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18-3710(CON), 18-3712(CON), 18-3715(CON), 18-3850(CON), 19-1272(CON)

To Be Argued By:
ALEXANDRA A.E. SHAPIRO

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—against—

PETER GALBRAITH KELLY, JR., MICHAEL LAIPPLE, KEVIN SCHULER,

Defendants,

JOSEPH PERCOCO, STEVEN AIELLO, JOSEPH GERARDI, LOUIS CIMINELLI, ALAIN KALOYEROS, AKA DR. K,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR DEFENDANT-APPELLANT STEVEN AIELLO

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INTRODUCTION

The government's opposition confirms that this prosecution is based on novel and overbroad fraud theories that would undermine principles of due process, fair notice, separation of powers, freedom of expression, democratic government, and federalism. Ever since its seminal decision in *McNally v. United States*, 483 U.S. 350 (1987), the Supreme Court has repeatedly held that criminal statutes, and particularly the fraud statutes charged in this case, must be interpreted narrowly (as "scalpels" rather than "meat axes") to avoid trampling these important constitutional principles. Yet the government asks this Court to do just the opposite—to stretch both honest-services fraud and "money or property" wire fraud beyond their breaking points. It even seeks license to imprison someone for conduct the grand jury never charged, based on a theory the district court *sua sponte* injected into the case at the end of the trial.

The government's brief defies the controlling law. It attempts to pass off the constructive amendment as merely an issue of notice, ignoring both the defendant's right to be tried solely on the charges brought by the grand jury and the very real notice problems created by the district court introducing the theory at the eleventh hour. The government also disregards constitutionally-based statutory construction principles that the Supreme Court has repeatedly directed lower courts to employ. It refuses to read *McDonnell v. United States*, 136 S. Ct. 2355 (2016),

in the context of those principles and effectively urges this Court to limit the import of Supreme Court decisions to the particular facts in those cases. The government's sweeping interpretations of the honest-services fraud statute—conscripting private citizens as public fiduciaries and equating nebulous "as opportunities arise" arrangements with *quid pro quo* official-act bribery—would criminalize a host of constitutionally-protected activities by former government officials, and those who retain them. The government's only answer is to trust prosecutorial discretion, even though the Supreme Court has repeatedly directed courts to do no such thing.

The wire-fraud charges, premised on this Court's "right to control" doctrine, are similarly unprecedented. That doctrine is in considerable tension with the text of the wire-fraud statute, which applies only to fraud schemes intended to "obtain" "money or property" in the hands of the victim, and with Supreme Court precedents interpreting that text. Yet this Court has always endeavored to reconcile the two by insisting on proof that the alleged scheme could cause genuine economic harm to the victim, and by rejecting the statute's application where the victim received the benefit of its bargain. The government jettisons those precedents and treats any theoretical failure to share "potentially valuable economic information" with the "victim" as wire fraud. Its attempts to rationalize the jury instructions and the district court's preclusion of key defense evidence are

premised on the same misreading of the controlling precedents, and similarly unavailing.

The government's brief also distorts the factual record in critical ways, mischaracterizing much evidence at both trials and falsely linking Aiello to proof that does not implicate him individually to try to cover up gaping holes in its case as to his scienter. The Court should look past the government's effort to muddy the waters and carefully scrutinize the government's record citations and, just as importantly, the record evidence demonstrating Aiello's good faith that the government omits from its brief.

Aiello's convictions should be reversed.

ARGUMENT

I. THE JURY INSTRUCTIONS CONSTRUCTIVELY AMENDED THE HONEST-SERVICES COUNT

The grand jury charged Aiello with participating in a conspiracy "to deprive the public of its intangible right to Percoco's honest services *as a senior official in the Office of the Governor*." (A305-06 (emphasis added)). Throughout the pretrial proceedings and most of the trial, the government never suggested that this conspiracy related to any duty Percoco owed to the public while he was *not* in public office. Quite the opposite: The government repeatedly reaffirmed that its theory was that Percoco accepted payments while not in government in exchange for taking "official action…*after* he returned to State service." (Dkt.264 at 75; *see*

Aiello.Br.12-13). And the government sought jury instructions focused on *public officials'* duties to the public, and asked the court to instruct the jury that "a private citizen…does *not* owe a duty of honest services to the public." (A348 (emphasis added); *see* Aiello.Br.13-14).

It was the district court—not the grand jury, not the prosecution—which first formulated and injected the "private citizen" *Margiotta*-style theory into the case late in the trial, just before the charge conference.[1] (Aiello.Br.14-15). The court's instruction invited the jury to convict for a conspiracy with an object different from the one the grand jury charged. That is a *per se* violation of the Grand Jury Clause requiring reversal. *See*, *e.g.*, *United States v. Hassan*, 578 F.3d 108, 133-34 (2d Cir. 2008) (constructive amendment where indictment charged conspiracies to import/distribute cathinone but jury instructions permitted conviction for any "controlled substance"); *see also* Aiello.Br.21-26.[2]

The government has absolutely no response to these undisputed, dispositive facts. It simply ignores them. Instead of answering Aiello's arguments, it changes

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[1] *United States v. Margiotta*, 688 F.2d 108 (2d Cir. 1982).

[2] The government mentions that the district court questioned whether the jury instruction challenge was preserved (G.Br.84 n.21), but does not argue waiver, and for good reason: Aiello specifically objected to the instruction on constructive amendment and variance grounds, the district court acknowledged his objection at the time, and he joined a later objection. (A646/5845-47, A658/6475; *see* A640/5765, A640/5779-80, A641/5824-25, A643-44/5833-36).

the subject. The government treats constructive amendment as purely a "notice" doctrine and assumes there is no Fifth Amendment right to be tried for the crime charged by the grand jury. (G.Br.100-02). But that view flatly contradicts the controlling authorities. "The substantial right implicated here is not [just] notice; it is the 'right to be tried only on charges presented in an indictment returned by a grand jury.'" *United States v. Roshko*, 969 F.2d 1, 6 (2d Cir. 1992) (quoting *Stirone v. United States*, 361 U.S. 212, 217 (1960)) (rejecting government argument "that no grand jury clause violation occurred because defense counsel were not 'surprised'").

As then-Judge Gorsuch has explained: "In addition to any Sixth Amendment notice guarantees, the Fifth Amendment right to have the grand jury make the charge on its own judgment is a substantial right which cannot be taken away"; thus, whether a defendant received notice or not, a constructive amendment "provides a sufficient basis, standing alone, to compel reversal without any further showing of prejudice." *United States v. Farr*, 536 F.3d 1174, 1184 (10th Cir. 2008). The government cites constructive amendment cases that mention "notice," but that language originates in *United States v. Heimann*'s discussion of non-prejudicial variances, not constructive amendments. *See* 705 F.2d 662, 666 (2d

Cir. 1983).[3] And the Supreme Court has unequivocally held: Deprivation of "the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury…is far too serious to be treated as nothing more than a variance and then dismissed as harmless error." *Stirone*, 361 U.S. at 217.[4]

In any event, Aiello could not possibly have anticipated that, just before the defense rested, the district court would on its own initiative introduce an alternative theory of criminality that the prosecution itself had disclaimed. "The premise of our adversarial system is that…courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.). The government maintains that notice was provided by the indictment's allegations that Percoco was Cuomo's campaign manager for most of 2014 and that the conspiracy began and the payments were made during that time. (*See* G.Br.100-01 (dismissing importance of "precise timing" of payments or

[3] Even the government's cases recognize that, because of the independent significance of the grand jury right, notice is "not dispositive." *United States v. D'Amelio*, 683 F.3d 412, 422 (2d Cir. 2012); *see Heimann*, 705 F.2d at 666 (discussing variance doctrine and notice only after concluding there was no grand jury violation).

[4] The government invites this Court to defy *Stirone* (G.Br.99 n.27), a Supreme Court decision that remains binding, which this Court has repeatedly followed. (Aiello.Br.23 (citing cases)).

official acts)). But that completely misses the point. The constructive amendment was not a change to the *timing* of the charged conspiracy; it was the addition of an uncharged *object* of the conspiracy, an essential element of the offense. *Roshko*, 969 F.2d at 5; *see* Aiello.Br.22-23. The grand jury charged Aiello with conspiring to violate the duty that all public officials clearly owe the public, whereas the petit jury convicted based on the breach of an altogether different duty—one that private citizens supposedly can owe the public even if they never hold (or seek) public office. Allegations that the conspiracy began before Percoco returned to office did not signal a departure from the public-official theory, because a conspiracy to deprive the public of an official's honest services can start during a campaign, with bribes for acts the recipient will perform once in office. *See United States v. Meyers*, 529 F.2d 1033, 1035-36 (7th Cir. 1976). Indeed, the government itself likened this case to *Meyers* in opposing dismissal of the honest-services count. (Dkt.264 at 75-76). But as it now concedes, that theory was not presented to the petit jury. (G.Br.102 n.28).

The transformation of the conspiracy's object fundamentally distinguishes this case from *United States v. D'Amelio*, 683 F.3d 412 (2d Cir. 2012). The indictment there charged attempted entrapment of a minor by using a facility of interstate commerce, "to wit…the internet," but the jury instructions allowed proof of telephone use, too. The Court found no constructive amendment because the

offense retained its "single, ultimate purpose" and the instruction related only to "the specific means" used. *Id.* at 421-22. The constructive amendment here, by contrast, transformed the supposed object of the offense rather than merely the means by which it was allegedly accomplished.

The government also tries to pass off the indictment as "generally framed" as related to "Percoco's honest services," whether he was in office or not. (G.Br.101-02). But that is simply untrue. The indictment alleged a conspiracy to defraud the public of a *specific* kind of honest services—"Percoco's honest services as a senior official in the Office of the Governor"—and the government repeatedly invoked that theory. Having "made the deliberate choice" to charge the conspiracy as it did, the prosecution rendered Percoco's honest services as a public official and Aiello's intent to deprive the public of those services "essential element[s] of the offense." *Hassan*, 578 F.3d at 133-34; *accord Farr*, 536 F.3d at 1181; *United States v. Willoughby*, 27 F.3d 263, 266-67 (7th Cir. 1994); *United States v. Leichtman*, 948 F.2d 370, 379 (7th Cir. 1991). The jury instruction impermissibly relieved the government of "the burden" it "assumed" to prove those essential elements, effecting a "*per se* violation" of the Fifth Amendment. *Hassan*, 578 F.3d at 133-34.

At a minimum, there was a prejudicial variance. (Aiello.Br.26-27). We have already disposed of most of the government's notice arguments above. The

government separately claims Aiello suffered no prejudice because it used the "same evidence" to prove Percoco was an "agent" for the §666 counts. (G.Br.103). But state agency requires "authori[ty] to act on behalf of state government"—essentially a state official. (A656/6451). The defense focused on disproving Percoco's actual state authority while he was on the campaign, which is why the jury acquitted all defendants of the §666 charge related to COR. By contrast, Aiello was blindsided by the district court's eleventh-hour injection of questions about whether Percoco's status while on the campaign satisfied the different, and more subjective, traits of dominance, control, and reliance, after any opportunity to cross-examine government witnesses with that test in mind had already passed.

II. THE PRIVATE-CITIZEN THEORY IS LEGALLY INVALID

For decades, the government has attempted to stretch the mail and wire fraud statutes as if they were limitless. And for decades, the Supreme Court has rebuffed these efforts. In doing so, the Court has emphasized that constitutional principles of due process, fair notice, and separation of powers require courts to construe criminal statutes *narrowly* in favor of lenity. The Court has placed particular emphasis on the need to cabin public corruption crimes to avoid treading on First Amendment rights, democracy, and federalism. In case after case, the Court's message could not be clearer: Congress must define criminal offenses precisely, to

proscribe no more than necessary, and courts must interpret them accordingly. *See*, *e.g.*, *McDonnell*, 136 S. Ct. at 2372-73; *Skilling v. United States*, 561 U.S. 358, 408-13 (2010); *Cleveland v. United States*, 531 U.S. 12, 24-25 (2000); *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 412 (1999); *McCormick v. United States*, 500 U.S. 257, 272-74 (1991); *McNally*, 483 U.S. at 359-60. Moreover, the Court has expressed particular concern with the honest-services fraud statute—a notoriously vague and elastic provision especially prone to prosecutorial misuse. In *McDonnell*, the Court narrowed "official act" to avoid concerns about "vagueness," democratic government, and federalism inherent in §1346 prosecutions. 136 S. Ct. at 2372-73, 2375. And in *Skilling*, the Court rejected the prosecution's broad construction and pared the statute to "core" offenses. 561 U.S. at 408-09. The Court has warned against assuming that prosecutors will use an impermissibly broad criminal law "responsibly," *McDonnell*, 136 S. Ct. at 2372-73, and has directed that when a public corruption statute "can linguistically be interpreted to be either a meat axe or a scalpel[, it] should reasonably be taken to be the latter," *id.* at 2373 (quoting *Sun-Diamond*, 526 U.S. at 412).[5]

[5] *Kelly v. United States*, No. 18-1059, the "Bridgegate" case now pending before the Supreme Court, will likely reinforce this narrow-construction directive. (The Petitioner there argues that the government cannot evade *Skilling*'s limitations on

The government plainly does not like these decisions and hopes the Circuit will ignore them. Consistent with that goal, the opposition brief fails to acknowledge the Supreme Court's teachings on how to interpret criminal statutes and particularly public corruption crimes such as §1346. It treats Supreme Court decisions as if they were confined to their specific facts and could not possibly invalidate a theory that has not been tested in decades and is a "relic from a 'bygone era of statutory construction.'" *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019).

For instance, the government says the district court's private-citizen theory is valid because the honest-services statute is broad and "does not, by its terms, apply only to 'public officials' or 'government employees.'" (G.Br.84). True, but the statute is not, "by its terms," limited to bribes and kickbacks either. Yet the Supreme Court confined it to that type of conduct because, if read literally, §1346 would be unconstitutionally vague and limitless, and due process *requires* a narrowing construction. *See Skilling*, 561 U.S. at 403-05. (Indeed, three Justices would have struck §1346 down altogether as unconstitutionally vague. *See id.* at 415-25.)

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honest-services fraud by cloaking an improper honest-services theory in "money or property" fraud garb.)

Critical here, the Court pared the statute to the "solid core" of pre-*McNally* caselaw: "paradigmatic cases of bribes and kickbacks" in which "[t]he existence of a fiduciary relationship…[i]s usually *beyond dispute*." *Id.* at 407 & n.41, 411 (emphasis added). This is plainly not such a case. Whether a private citizen working on a political campaign could *ever* have a fiduciary duty to the public is highly debatable, and certainly not "beyond dispute." That is true even under the dominance-control-reliance test the government now advocates. How, for example, can the public ever be said to rely on a private citizen who lacks formal governmental authority, and who's to say when influence morphs into dominance and control? The test and the theory are directly at odds with *Skilling*.

The same is true of *McDonnell*. The Court there rejected the government's "expansive interpretation of 'official act'" due to "significant constitutional concerns." 136 S. Ct. at 2372-73. The Court refused to construe a public corruption statute "in a manner that leaves its outer boundaries ambiguous" and, accordingly, cabined the "official act" requirement to a narrow class of public official actions that involve "governmental power," "authority of…office," and an "official position." *Id.* at 2369-70, 2372-73. The Court's holding and reasoning foreclose the "private-citizen" theory: A private citizen is legally incapable of performing an official act, as *McDonnell* defines it, and the dominance-control-reliance test is unconstitutionally nebulous. (Aiello.Br.29-31).

Yet the government doesn't even try to square *Margiotta* with *McDonnell* (or *Skilling* or *McNally*) and refuses to acknowledge that *Margiotta* is no longer binding if "intervening Supreme Court decision[s]…cast[] doubt on" it, even if the intervening decisions did "not address the precise issue." *Wojchowski v. Daines*, 498 F.3d 99, 106 (2d Cir. 2007); *see* Aiello.Br.37.[6] Its efforts to downplay, dismiss, and restrict *McDonnell* do not withstand scrutiny.

For example, the government suggests that the Court implicitly approved the private-citizen theory of public-sector fraud because Governor McDonnell's wife was also a defendant, and the Court didn't say there was anything wrong with charging her. (G.Br.89 n.24). But Mrs. McDonnell's charges were not before the Court. *See* 136 S. Ct. at 2367. More fundamentally, the prosecution theory was never that Mrs. McDonnell *herself* owed the public any duty of honest services; the government charged her for participating in acts to defraud Virginia citizens of *her husband's* honest services. *See United States v. McDonnell*, No. 3:14-CR-12, 2014 WL 6772483, at *2 (E.D. Va. Dec. 1, 2014).

The government also treats *McDonnell* as merely a technical reading of 18 U.S.C. §201 that doesn't apply to honest-services prosecutions. (G.Br.88-89). But

[6] The government claims that *Margiotta* lives on because other cases have employed its dominance-control-reliance test (G.Br.85-86), but not a single one involves a fiduciary duty to *the public* or discusses whether *Margiotta* survives *McDonnell*. (*See* Aiello.Br.37-38).

this Court has already rejected that very argument, and twice confirmed that *McDonnell* applies to honest-services fraud, not just §201. *See United States v. Boyland*, 862 F.3d 279, 290 (2d Cir. 2017); *United States v. Silver*, 864 F.3d 102, 118 (2d Cir. 2017); *see* Aiello.Br.28-29. The government's reliance on *United States v. Halloran*, 821 F.3d 321 (2d Cir. 2016), to distinguish between the definition of "official act" and the class of persons "who could perform an official act" (G.Br.89) is misplaced. *Halloran* did not involve a duty to the public and predated *McDonnell*. And as explained above and in the opening brief, the way *McDonnell* defined "official act" necessarily excludes private citizens from the category of individuals who can perform one. The government makes no attempt to reconcile its private-citizen theory with *McDonnell*'s insistence on a "public official," "formal…governmental power," and "official position."[7]

The government also gets cute with *McDonnell*'s language. It selectively quotes *McDonnell*'s statement that pressuring or advising "another official to perform an 'official act'" is itself an official act as if that proves the bribe recipient

[7] As previously explained (Aiello.Br.29 n.5), our argument is entirely consistent with *Dixson v. United States*, 465 U.S. 482 (1984) (cited G.Br.89), because the defendants there had been designated to administer federal block-grant funds and were formally invested with official power and "charged with abiding by federal guidelines." *Id.* at 484, 497. That presents a very different circumstance than the theory of conviction authorized by the private-citizen instruction here. The government ignores this critical distinction.

doesn't have to be a public official himself. (G.Br.88). But what the Court actually said was this: "A *public official* may also make a decision or take an action on a 'question, matter, cause, suit, proceeding or controversy' by *using his official position* to exert pressure on *another* official to perform an 'official act.'" 136 S. Ct. at 2370 (emphasis added). Under *McDonnell*, therefore, mere pressure or advice is not enough. The one doing the pressuring or advising must *himself* be a public official and must use his official position to do so. None of the cases the government cites as examples of defendants who were "personally incapable" of taking action (G.Br.88) supports its argument. Each involved a defendant who (unlike Percoco at the relevant time) *was* a public official and used that position to pressure another official. *See United States v. Fattah*, 914 F.3d 112, 127, 155-56 (3d Cir. 2019) (U.S. Congressman); *Boyland*, 862 F.3d at 282, 291-92 (State Assemblyman); *United States v. Middlemiss*, 217 F.3d 112, 115, 120 (2d Cir. 2000) (Port Authority officer).

At bottom, the government simply refuses to address *McDonnell*'s "significant constitutional concerns" head-on or offer any reason why its expansive private-citizen theory of public-sector honest-services fraud does not raise the exact same concerns. The government says there is no problem because *Margiotta* has been on the books for decades. (G.Br.91). But courts cannot "put[] faith in government representations of prosecutorial restraint" to green-light

unconstitutionally expansive statutory applications. *United States v. Stevens*, 559 U.S. 460, 480 (2010). If this Court were to hold that a former public official like Percoco owed the public a duty of honest services because state officials continued to respect him, it would open the door to whole new avenues of prosecution and criminalize a vast range of ordinary political interactions. A senior White House official who permanently leaves the administration could nonetheless be charged with defrauding the public if he later uses his influence to make a few phone calls for a client. And a career lobbyist who has spent decades back-slapping public officials and earning their ears could be prosecuted simply for being too good at her job. *McDonnell*, *Skilling*, and the Supreme Court's many other decisions in this area forbid that result.

Finally, the government's harmless error argument (G.Br.93-94) is toothless. It is unable to point to any evidence that Aiello knew Percoco would return to office when he sought Percoco's help in July 2014, or even when COR paid Howe in August and October 2014. (*See* Aiello.Br.39-41).[8] The government vaguely (and misleadingly) suggests that Aiello learned of Percoco's plans "*around* the time of the second payment" (G.Br.93), but the cited email was sent in November

[8] The government disingenuously asserts that "Aiello directed payments…through Percoco's wife." (G.Br.8-9). Not true. COR paid Howe in response to Howe's invoices; Howe testified that he—unilaterally and unbeknownst to Aiello—wrote checks to Percoco's wife. (A573-74/2476-80).

2014, weeks *after* that second and final payment. (SA-66). And Percoco's actions in 2015 (*see* G.Br.93-94) are irrelevant to Aiello's knowledge at the time of the payments in 2014.

Most significantly, the government completely ignores Aiello's July 2014 email asking for Percoco's assistance not if or when he returned to office, but only for a "few months" and only while Percoco was "off the 2nd floor working on the Campaign." (A680; *see* Aiello.Br.40). There is not a shred of evidence that Aiello ever intended COR to pay Percoco to do anything when he was in government or knowing that he planned to return to government.[9] And the jury deliberated for eight days, required two *Allen* charges, and acquitted Aiello of the other counts, including the bribery charge (Aiello.Br.44-45)—facts the government nowhere acknowledges in its "harmless error" discussion. *See United States v. Stewart*, 907 F.3d 677, 689 (2d Cir. 2018) (lengthy jury deliberations and necessity of *Allen* charge "cut[] strongly against" harmless error).

[9] The government repeatedly misleadingly characterizes Percoco's departure from government as "technical" (*see* G.Br.9, 13-14, 21, 83, 92 n.26, 101, 114). As several prosecution witnesses testified, however, when Percoco resigned he had no intention of returning, and only decided to do so months later after other top officials resigned, leaving the Governor without experienced senior staff. (A508/476-77, A509/574, A511/606-07, A525/1185-86).

III. *MCDONNELL* FORECLOSED THE "AS OPPORTUNITIES ARISE" INSTRUCTION

In defending the "as opportunities arise" instruction, the government again ignores the binding Supreme Court precedents, including *McDonnell*, mandating strict construction of public corruption crimes. Indeed, the government advocates reaffirming the doctrine precisely because it relieves prosecutors of any burden to prove a corrupt agreement with specificity (G.Br.75-76), even though that type of nebulous, overbroad "meat axe" is exactly what *McDonnell* and *Sun-Diamond* prohibit.

1. To ensure that the public corruption crimes fit within their constitutional limitations, *McDonnell* requires juries to make detailed findings of official action. They must (1) "identify a [matter] involving the formal exercise of governmental power"; (2) determine that the matter is "something specific and focused that is 'pending' or 'may by law be brought before any public official'"; and (3) find that the public official "made a decision or took an action—or agreed to do so—*on* the identified [matter]." 136 S. Ct. at 2374. These findings are incompatible with the "as opportunities arise" theory, which permits juries to convict based on an abstract and open-ended understanding that an official will take any type of action, on any matter. (Aiello.Br.46-48). The government's main argument is that since *McDonnell* didn't expressly overrule the "as opportunities arise" theory, it must have blessed it. (G.Br.69-70). But the issue was not directly

presented, the Court had no reason to address it, and the government offers no explanation for how to reconcile the inherent conflicts between its theory and the findings *McDonnell* requires.

The government also relies on cases that are inapposite, non-binding, or both. (G.Br.67-70, 72-74). Some were decided before *McDonnell* and didn't consider its application to the "as opportunities arise" theory[10]; others did not even involve any challenge to the theory.[11] The cases that actually have re-examined the theory after *McDonnell* (G.Br.73-74) are non-binding and address only whether *McDonnell* requires agreement as to specific official *acts*. (*See* Aiello.Br.48 n.8). But Aiello argues that there must be proof of an agreement for the official to act on a particular *matter* or *type of act*, even if the specific *act* need not be specified. The government acknowledges this (G.Br.71), but never explains why it does not have to prove that the agreement contemplated action on a particular matter or type of act. Instead, it inserts a page-long block quote from a district court case which opines that the specific *act* need not be "precisely identified," but does not discuss whether any specific *matter* or *type of act* must be contemplated. (G.Br.72-73).

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[10] *See United States v. Rosen*, 716 F.3d 691 (2d Cir. 2013); *United States v. Bruno*, 661 F.3d 733 (2d Cir. 2011); *United States v. Ganim*, 510 F.3d 134 (2d Cir. 2007).

[11] *See United States v. Skelos*, 707 F. App'x 733 (2d Cir. 2017); *United States v. Malkus*, 696 F. App'x 251 (9th Cir. 2017); *see* Aiello.Br.48 n.8 (discussing *Skelos*).

The government's remaining arguments are similarly unpersuasive. It dismisses *Sun-Diamond* as irrelevant because it concerned gratuities rather than bribery (G.Br.74-75), but bribery is the more serious offense and should be more difficult, not easier, to prove.[12] And *Sun-Diamond* holds that where the statute proscribes receiving a benefit "for or because of any official act," the government "must prove a link between a thing of value conferred upon a public official and a specific 'official act.'" 526 U.S. at 414. If that is true as to gratuities, surely an agreement about a specific matter or type of act is required for bribery.

And the government's complaint that it will be hard to prosecute politicians who "commonly accept bribes to be on retainer" without the "as opportunities arise" theory is misconceived. (G.Br.75). The point is not that "retainer" arrangements are permissible, but that *McDonnell* requires juries to make the requisite findings about the matter(s) and act(s) that are the subject of those arrangements. For example, an implicit agreement for a governor to veto any gun-control legislation that might arise would likely satisfy *McDonnell*, because gun-control legislation involves a "formal exercise of governmental power" and is "something specific and focused" that can be brought before a public official, and a veto is a "decision or action" on that matter. But when a jury is permitted to find

[12] *Compare* 18 U.S.C. §201(b) (15-year maximum and disqualification from office for bribery), *with id.* §201(c) (2-year maximum for gratuities).

an open-ended, nebulous commitment to take action "as opportunities arise"—untethered to any matter, type of matter, act, or type of act—a court lacks the requisite "assurance that the jury reached its verdict after finding" each of the three official-act elements *McDonnell* mandates. *See* 136 S. Ct. at 2374. If that leaves certain "corrupt" arrangements beyond §1346's reach, it is for Congress, not this Court, to address.

Finally, the error was not somehow cured because the instruction defining "official act" comported with *McDonnell*. (*See* G.Br.71). One has nothing to do with the other. A correct definition of "official act" does not solve the problem created by telling the jury it could convict based on an agreement for Percoco to take official acts "as opportunities arose," without having to identify a specific "matter" or find Percoco's agreement to make a "decision" or take an "action" on that matter. *See McDonnell*, 136 S. Ct. at 2374.

2. The erroneous instruction plainly prejudiced Aiello. When COR engaged Percoco and the payments were made in 2014, no one contemplated any acts in 2015 related to the "matters" of Aiello's son's salary or outstanding COR invoices. The government does not argue otherwise. Instead it contends that the instructional error was harmless because there was evidence that the payments were made so that Percoco would "take specific official action" on the LPA when he was not in office. (G.Br.81-82). But the burden is on the government to show

beyond a reasonable doubt that the jury would have convicted even without the "as opportunities arise" theory. *E.g.*, *Silver*, 864 F.3d at 119. The government repeatedly invited the jury to rely on that theory (Aiello.Br.51), and the jury therefore may well have convicted solely based on Percoco's later acts, not the LPA. Under these circumstances, the government cannot credibly dispute that it is "possible" that there would have been an acquittal without it. *McDonnell*, 136 S. Ct. at 2375. On the contrary, the most likely explanation for the jury's divergent verdicts (convicting Aiello but acquitting his co-defendant and fellow COR principal, Gerardi, on this count) is that the jury relied on the "as opportunities arise" theory and focused on the 2015 act related to Aiello's son's salary.[13]

IV. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE HONEST-SERVICES CONVICTION[14]

Nothing in the government's brief can fill the void in its honest-services conspiracy case against Aiello. The government presented no evidence of *his*

[13] The government erroneously suggests (without record support) that Aiello knew more about the payments than Gerardi. (G.Br.83). The record shows that Gerardi had the same information about COR's retention of Percoco, but was far more involved in the LPA issue than Aiello. (*See* A688-91, A698-712).

[14] The government suggests in passing that the sufficiency challenge is subject to "plain error or manifest injustice" review because Aiello did not renew his Rule 29 motion after the defense rested. (G.Br.106). That is incorrect. The district court reserved decision on Aiello's motion (A628/5141) and did not decide it until *after* the jury's verdict (A802). There was no need for Aiello "to take any additional procedural steps to preserve the issue for appellate review." *United States v. Wahl*, 290 F.3d 370, 374 (D.C. Cir. 2002); *see* Laurie L. Levenson, *Rule 29. Motion for*

intent to participate in any such conspiracy, under either a private-citizen or public-official theory. Its brief focuses on extraneous facts that shed no light on Aiello's state of mind and cannot save the conviction.

1. As to the *Margiotta* theory, the government purports to marshal evidence that Percoco continued to have "the same responsibilities" when he was on the campaign as before. (G.Br.113-16). But even if true, there was no evidence that Aiello knew anything about that, and the government cites no evidence suggesting that he did. *See*, *e.g.*, *United States v. Torres*, 604 F.3d 58, 67-72 (2d Cir. 2010) (reversing conviction because defendant was unaware of facts that made conspiracy criminal, citing multiple similar cases). The government argues that Aiello retained Percoco to "use his position of control" (G.Br.116) but cites no proof supporting that claim. What the evidence actually demonstrates is that Aiello expected Percoco to be merely "an advocate with regard to labor issues" while he was "off the 2nd floor." (A680 (July 2014 Aiello email to Howe)). Aiello's email is the only direct evidence of his state of mind and shows that he

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Judgment of Acquittal, FED. CRIM. RULES HANDBOOK (2018) ("[I]f the court reserves decision on a Rule 29(b) motion until the end of trial, there is nothing more the defendant must do to renew its original Rule 29 motion…."); *compare United States v. Finley*, 245 F.3d 199, 202 (2d Cir. 2001) (cited G.Br.106) (motion *denied* at close of government's case and not renewed at close of evidence).

intended for Percoco to advocate COR's position and believed this was permissible *because* Percoco had left his official post.

COR engaged Percoco through Howe and paid Howe's entity (G.Br.116), but that does not support any reasonable inference that Aiello believed that Percoco owed the public a duty at the time and intended to deprive the public of Percoco's honest services. The government's suggestion that Aiello must have known of Percoco's supposed continuing role in state government is pure "impermissible speculation" insufficient to sustain the conviction as a matter of law. *See United States v. Pauling*, 924 F.3d 649, 656-57, 662 (2d Cir. 2019) (reversing conviction because even inference that was "likely" or "probable" did not satisfy government's burden of proof beyond a reasonable doubt); *United States v. Coplan*, 703 F.3d 46, 76 (2d Cir. 2012) (reversing conviction based upon "speculation and surmise").

The government's case was insufficient not only on the essential element of Aiello's intent to defraud, but also on whether Percoco exercised *Margiotta*-like "control over State government." What the government cites (G.Br.13, 90, 115) merely shows that Percoco had access to and influence with government officials. (*See*, *e.g.*, A552/2098 (Percoco could "pick up the phone and get things done"), A567-69/2410-17 (Percoco convinced senior staff members not to quit), A697 (Percoco felt he still had "a bit of clout"), SA-269-76/1249-56 (Percoco helped

plan an event, participated in phone calls, and went to a meeting), SA-385-86/2203-04 (Percoco asked staffers "questions about campaign issues" and "g[ave] them direction")). But "mere influence or minimum participation in the processes of government" does not establish a fiduciary relationship with the public. *Margiotta*, 688 F.2d at 122. And the government does not even try to establish that the public in any way "relied" on Percoco once he left office—the lynchpin of fiduciary duty. (*See* Aiello.Br.38-39).

2. The government only half-heartedly defends the sufficiency of the evidence under a public-official theory, in a single sentence stating that Aiello "went to" Percoco even after Percoco returned to state employment. (G.Br.116-17). But Aiello and Gerardi did not make any payments at that time and reached out to *Howe*, who remained close friends with Percoco. (A713-15, A719-23, SA-479-80/2537-38). Simply asking one's retained consultant to ask a friend for a favor is not an honest-services fraud conspiracy. For Aiello to be guilty under a public-official theory he must have authorized COR's payments in mid-2014 intending to buy Percoco's future acts if and when he returned to office. It is undisputed that there was zero evidence of that (*see* Aiello.Br.39-41), and the government even concedes that that was not its theory (G.Br.102 n.28).

3. For similar reasons, a rational jury could not find beyond a reasonable doubt that Aiello entered into an open-ended agreement to pay Percoco for his acts

"as opportunities arise," assuming the theory survives *McDonnell*. The only evidence of any agreement confined it to a discrete time, subject matter, and act: Percoco's "advocat[ing]" for COR on the LPA and other labor issues for a "few months" while a private citizen "off the 2nd floor." (A680; *see* Aiello.Br.11-12, 39-40). Even Howe—the government's star cooperating witness—conceded that was the full extent of any arrangement. (*See* A567/2409, A572/2469, A573/2476, A604/3854).

The honest-services conviction should be reversed or, at a minimum, vacated for a new trial.

V. AIELLO IS ENTITLED TO ACQUITTAL ON THE WIRE-FRAUD CHARGES

The government's arguments on money-and-property wire fraud are as misguided as its arguments on honest-services fraud. It advocates an expansive interpretation of the wire-fraud statute that cannot be reconciled with the controlling precedents or the Supreme Court's constitutionally-based teachings dictating narrow construction of fraud crimes. The prosecution also grossly mischaracterizes the record. The Court should reject its arguments and reverse the convictions.

A. This Was Not A Bid-Rigging Case

Throughout its brief, the government asserts that the defendants misled FSMC into believing that COR won a competitive RFP process, when in fact the

Syracuse RFP was "rigged." This "rigging" allegation underlies most of its wire-fraud arguments, but it is baseless. The evidence did not prove bid-rigging. The jury charge did not mention bid-rigging. And the jury's verdict was not a finding of bid-rigging.

The evidence—much of it testimony from FSMC witnesses—established that the Syracuse RFP was vetted by FSMC personnel; that its terms were objectively reasonable and competitive; that COR won the RFP on the merits; that winning did not guarantee COR any contract; and that after it won, COR negotiated contracts at arms-length with experienced FSMC procurement staff. (Aiello.Br.53, 57-60).[15]

The government barely attempts to address this evidence, and its version of the facts distorts and mischaracterizes the record. Among other things, it is ludicrous to suggest that the defendants prevented price competition over the Syracuse projects; that FSMC personnel were somehow "tricked" into believing the RFP provisions were reasonable; or that the negotiations between COR and FSMC over the Syracuse projects were a "sham." As explained below, the record does not support any of these assertions. And consequently, the government's position that bid-rigging is wire fraud does nothing to justify the convictions.

[15] Even during and after these proceedings, FSMC continued to work with COR on these projects, did not demand renegotiation of the contracts, paid COR what it was due, and even increased the price paid. (Aiello.Br.60).

B. The Government's View Of Wire Fraud Is Not The Law

The government distorts the law as much as it distorts the record. It stretches this Court's right-to-control doctrine past its breaking point, reading the "money or property" requirement out of the wire-fraud statute and replacing it with a watered-down version of the "potentially valuable economic information" mentioned in some of this Court's cases.

The "right to control one's assets" is infringed only where the purported scheme "misrepresent[s]…an essential element of the bargain." *United States v. Binday*, 804 F.3d 558, 570 (2d Cir. 2015); *accord United States v. Johnson*, No. 18-1503-CR, --- F.3d ---, 2019 WL 4308625, at *4 (2d Cir. Sept. 12, 2019) (citing *Binday*). Consequently, there is no fraud "where the purported victim received the full economic benefit of its bargain." *Binday*, 804 F.3d at 570 & n.10 (citing *Starr*, *Novak*, *Mittelstaedt*, and *Shellef*); *accord United States v. Schwartz*, 924 F.2d 410, 420 (2d Cir. 1991) ("harm must be found to reside in the bargain sought to be struck"); *United States v. Regent Office Supply Co.*, 421 F.2d 1174, 1179-80 (2d Cir. 1970) (same).

Although the government claims the purported victim is defrauded "when it is denied information that would allow it to make its own assessment of an economic decision" (G.Br.138), this Court has never actually adopted such an amorphous standard. Plainly, bulk-mailing customers would want to know that

their vendor is underpaying the Post Office; contractors would want to know that their union payments are funding kickbacks; officials would want to know that their land deals involve bribery and self-dealing; chemical companies would want to know how their customers plan to use the chemicals; and stationery buyers would want to know whether they are purchasing excess inventory or estate-sale goods (presumably at a discount). Yet in cases presenting those facts, the Court has reversed or vacated fraud convictions. *See Binday*, 804 F.3d at 570 n.10 (summarizing *Starr*, *Novak*, *Mittelstaedt*, and *Shellef*); *Regent*, 421 F.2d at 1176.

The cases the government cites do not advance its argument. In several, the defendant misrepresented facts essential to calculating the payment it received from the victim, clearly depriving the victim of the benefit of its bargain. *See United States v. Rossomando*, 144 F.3d 197, 198 (2d Cir. 1998) (defendant received pension overpayment by understating outside income); *United States v. Rodolitz*, 786 F.2d 77, 78-80 (2d Cir. 1986) (defendant schemed to "inflate" insurance claim and "recover more…than he was lawfully due" under insurance policy).

In others, the defendant gave the victim goods or services different from those promised, again depriving the victim of the benefit of its bargain. *See Johnson*, 2019 WL 4308625, at *4-5 (per Court's description of facts, defendant supposedly executed foreign-exchange transaction differently than promised

resulting in a price higher than promised); *Binday*, 804 F.3d at 574-76 (victims received STOLI policies that "differ[ed] economically" from non-STOLI policies promised); *United States v. Carlo*, 507 F.3d 799, 801-02 (2d Cir. 2007) (defendant misrepresented financing services he provided to real-estate developers); *United States v. Frank*, 156 F.3d 332, 335-36 (2d Cir. 1998) (defendant "fraudulently …bill[ed] a customer for services that ha[d] not been provided"); *United States v. Wallach*, 935 F.2d 445, 461 (2d Cir. 1991) ("corporation and its shareholders did not receive the services that they believed were being provided"); *Schwartz*, 924 F.2d at 420-21 (defendants "misled [their supplier] as to *explicit* promises" made to obtain sales); *United States v. Tagliaferri*, 648 F. App'x 99, 103 (2d Cir. 2016) (defendant misrepresented his transactions using clients' money); *United States v. Viloski*, 557 F. App'x 28, 31 (2d Cir. 2014) (defendant accepted sham consulting fees for work he did not perform).

And in *United States v. Finazzo*, the defendant "used his control over Aéropostale's vendor selection and pricing to steer [its] business" to his vendor, "which provided inferior products and charged higher prices than other vendors." 850 F.3d 94, 113 (2d Cir. 2017). He also "actively discouraged—and rejected—use of other vendors," meaning that "Aéropostale did not freely bargain." *Id.* at 114-15; *accord* Br. of U.S., *Finazzo*, No. 14-3213 (2d Cir.), Dkt.84 at 40, 61 (Finazzo "controlled the price and all the negotiations" and "crushed dissent and

competition"). This explains why it was no defense that the vendor had honored its contracts.[16]

To avoid the benefit-of-the-bargain defense, the government argues that it is fraud to misrepresent "potentially valuable economic information" related to "economic risk." (G.Br.119). But the "economic risk" caselaw generally involves "loan or insurance application[s] or claim[s]," *Binday*, 804 F.3d at 571, because "the value of credit or insurance transactions inherently depends on the ability of banks and insurance companies to make…judgments on the basis of full information," *Rossomando*, 144 F.3d at 201 & n.5. *See*, *e.g.*, *United States v. Lebedev*, 932 F.3d 40, 48-49 (2d Cir. 2019) (banks misled into processing illegal transactions with higher risk of fraud); *United States v. Chandler*, 98 F.3d 711, 716 (2d Cir. 1996) (defendant obtained bank loan by applying under false identity). These "financial instrument" cases are "inapposite" in other contexts, *United States v. Davis*, No. 13-CR-923 (LAP), 2017 WL 3328240, at *17 (S.D.N.Y. Aug. 3, 2017), as the government has recognized elsewhere. *See* Br. of U.S., *Lebedev*, No. 17-3691 (2d Cir.), Dkt.254 at 21-22 & n.3 (distinguishing "credit transactions"

[16] Even if he "withh[eld]…information regarding [his] kickbacks" (G.Br.138), and that was important to Aéropostale, Finazzo could not have been convicted merely for having his vendor negotiate with Aéropostale. This Court has *reversed* a fraud conviction because the victims "received all they bargained for," despite the defendant's undisclosed "kickback scheme." *United States v. Novak*, 443 F.3d 150, 156-59 (2d Cir. 2006); *see United States v. Mittelstaedt*, 31 F.3d 1208, 1220 (2d Cir. 1994) ("bribery is not [mail fraud] *per se*").

from "commercial transactions"); Br. of U.S., *Johnson*, No. 18-1503 (2d Cir.), Dkt.87 at 24 ("[w]here the alleged fraud relates to a contract," there is no fraud if the "victim received exactly what he expected and at the price he expected to pay").

That is not to say the government must prove "monetary injury-in-fact": the harm "contemplated" by the scheme need not "materialize" into "actual" harm because "success of the fraud is not an element." (G.Br.119, 121-25, 146). But there must be proof that the victim "would have suffered some economic loss if the scheme had been successful." *United States v. Mittelstaedt*, 31 F.3d 1208, 1217 (2d Cir. 1994); *accord Binday*, 804 F.3d at 581-82 ("the loss of the right to control money or property…[suffices] only when the scheme, if it were to succeed, would result in economic harm to the victim"); *see* Aiello.Br.64-65.

Thus, while this Court has analyzed whether the victim was deprived of "potentially valuable economic information," *Binday*, 804 F.3d at 570, that phrase does not supplant the precedent discussed above, nor does it have the virtually limitless meaning that the government ascribes to it. *Compare*, *e.g.*, *id.* (asking whether "the deceit *affected* the victim's economic calculus"), *with* G.Br.120 (mischaracterizing *Binday* as asking whether the information "*could* affect 'the victim's economic calculus'") (emphases added). As the government fails to dispute (G.Br.163 n.40), this Circuit's right-to-control doctrine is in considerable

tension with the text of the mail and wire fraud statutes and Supreme Court precedent (Aiello.Br.70-72). Without the limits described above—which foreclose prosecution where the purported victim gets what it paid for, and which require much more than a hypothetical risk of harm—there would be no hope of reconciling that doctrine with the statutory requirements that the defendant's scheme implicate "money or property" and seek to "obtain[]" the *victim*'s property. 18 U.S.C. §1343; *see*, *e.g.*, *Skilling*, 561 U.S. at 400.[17]

C. The Government Failed To Prove The Required Harm To FSMC

Under a proper understanding of the law and the facts, the conclusion that Aiello did not participate in a scheme to defraud FSMC is inexorable.

1. FSMC Received The Benefit Of Its Bargain.

Aiello is entitled to acquittal because there was no proof that COR deprived FSMC of the "benefit of its bargain." *Binday*, 804 F.3d at 570. Any deception in the RFP process was irrelevant, since the RFP gave COR no rights and merely brought it to the negotiating table with FSMC. Only then did COR and FSMC negotiate their bargain, which was defined by contract, and there is no allegation of

[17] In the "Bridgegate" case, public officials convicted of "right to control" wire fraud have argued that although they misrepresented their "subjective motives" for political decision-making, this did not implicate an "essential element of the[ir] bargain" with their employers. Br. for Pet'r, *Kelly v. United States*, No. 18-1059, at 14, 50-52 (citing, *e.g.*, *Shellef* and *Regent*). As noted above, the case presents another opportunity for the Supreme Court to narrow the wire-fraud statute's scope.

fraud in that bargain. Indeed, it is undisputed that COR gave FSMC what it paid for. (Aiello.Br.62-63).

Attempting to avoid this conclusion, the government asserts that once COR won the RFP, there "were no…free negotiations" over the contracts it obtained from FSMC. (G.Br.135). But its brief offers no legitimate support for this claim. The government asserts that Kaloyeros oversaw the negotiations; points to an instance where it contends Kaloyeros intervened on behalf of LPCiminelli (not COR); and observes that some of the pushback that COR faced during its negotiations came from state government rather than FSMC. (G.Br.135-37). But none of this remotely suggests that the negotiations were a "sham" (*id.*), particularly in the face of undisputed testimony from FSMC personnel that FSMC's "experienced" procurement staff negotiated with COR "at arm's length" to "get the best deal they could get" (A1096-97/491-94, A1097/496; *see also* A1422/2215-17) and that FSMC was not obligated to award contracts to COR and was free to select other developers (A1044/221, A1065-66/340-46, A1069/355, A1082/435, A1096/492). Inexplicably, the government ignores this testimony, which proves that FSMC freely bargained with COR.

The government also attempts to reframe the "bargain," arguing that (1) "a legitimate and competitive RFP process was an 'essential element' of any bargain," and (2) FSMC was deprived of that element, since COR supposedly was

not "selected on the merits based on a legitimate, competitive RFP." (G.Br.134, 139). However, this "essential element" theory was not advanced below (*see* A849-52) and cannot supply the basis for affirmance. *See McCormick*, 500 U.S. at 270 n.8; *Chiarella v. United States*, 445 U.S. 222, 236-37 (1980); *Mittelstaedt*, 31 F.3d at 1220.[18] Regardless, neither proposition is true.

For starters, no "competitive RFP" requirement was "written into" the contracts between FSMC and COR. (G.Br.134). In those contracts, the references to FSMC's "competitive" process appear in factual recitals and "whereas" clauses—background material that is entirely distinct from the "terms and conditions" or "mutual promises" that bind COR and FSMC. (*Compare* A1809, *with* A1810; *compare* SA-766, SA-788, *with* SA-767, SA-789). They are not representations or warranties, and they "cannot create any right beyond those arising from the operative terms of the [contract]." *United States v. Hamdi*, 432 F.3d 115, 123 (2d Cir. 2005); *Aramony v. United Way of Am.*, 254 F.3d 403, 413 (2d Cir. 2001); *Abraham Zion Corp. v. Lebow*, 761 F.2d 93, 103-04 (2d Cir. 1985). Thus, only the terms and conditions in the contracts constituted the bargain

[18] This is not the only instance in which the government shifts theories on appeal. As explained below, the government advances a theory of reputational harm that it never argued to the jury. (G.Br.120-21, 134). And while it insisted below that "[t]he facts at issue here [we]re much the same as in *Finazzo*" because they involved an "insider with an interest in a vendor" (A849-50), it now claims that *Finazzo* is "unlike" this case because there, "the defendant lied about his financial interest in an outside vendor" (G.Br.126).

between COR and FSMC; the government cannot repackage that bargain to include an RFP which preceded any negotiation.

Regardless, COR *was* selected on the merits based on a competitive RFP. (Aiello.Br.53, 57-60). While not essential to reversing Aiello's convictions, this issue is sufficiently important, and the government's factual distortions sufficiently serious, to warrant extended discussion:

2. COR Was Selected On The Merits After A Competitive RFP.

As noted above, this was not a bid-rigging case. The government did not present any evidence that the defendants steered contracts to COR. Nor was there any evidence that the Syracuse RFP was anti-competitive in any relevant sense. The government's contrary arguments are meritless.

Its most egregious distortion is the false claim that Kaloyeros used "preferred-developer" RFPs to avoid price competition. (G.Br.33, 128-29). Price competition was *impossible* when the Syracuse RFP was issued because FSMC did not contemplate any specific project in Syracuse. (A1050/242-43, A1145/868, A1149/896). The government concedes this, arguing only that the *Buffalo* defendants had advance knowledge of a Buffalo project. (G.Br.33 n.6). It also concedes that FSMC's board—which Kaloyeros did not control (G.Br.31)—"had the authority to authorize RFPs and to approve the award of contracts" (G.Br.32), and therefore could have solicited price bids for each Syracuse project if it so

desired (A1089/464, A1090/466). Indeed, FSMC's board knew how to design RFPs for price competition (G.Br.32, 120), and fully understood that the Syracuse RFP was different (A1050/242-43, A1145/868). FSMC was not misled; it *chose* to prioritize developer quality over price, which is understandable given that the projects were not "off the rack." (A1134/824-25).

The government also argues that provisions of the Syracuse RFP were tailored to prevent competition, such as the requirement of 15 years' experience and the supposed "requirement that the preferred developer use a particular type of software" used by COR. (G.Br.38-39). But in fact, the RFP did *not* require COR's specific software. (A1063-64/333-35, A1154/918-19, 1165/981). And in any event, FSMC witnesses consistently testified that these provisions (and the RFP as a whole) were fair, reasonable, and not slanted in favor of any developer, and that FSMC personnel were involved in crafting the RFP and could have rejected any improper provision. (Aiello.Br.58-59).[19]

The government's only response is that the defendants "trick[ed] these people into believing that the process was fair" (G.Br.144), but this misses the point

[19] The government conspicuously omits this testimony from its statement of facts, burying it in pages discussing Gerardi's intent. (G.Br.143-44). Similarly, while it claims that we argue only "in passing" that the RFP was reasonable (G.Br.143 n.34), we made that argument several times in detail (Aiello.Br.57-59, 67, 69). Evidently, the government has no substantive response.

entirely. Both during the RFP-drafting process and at trial, FSMC personnel endorsed the RFP's provisions based on the content and expected effect of those provisions. The subjective motivations for proposing or inserting certain provisions do not affect whether those provisions were reasonable and competitive as an objective matter. *Cf. Regent*, 421 F.2d at 1182 (reversing mail-fraud convictions because defendants "gave a false reason for [their] offer" without misrepresenting "the bargain they were offering"). Indeed, the government concedes that Gerardi proposed edits to the draft RFP that made, or would have made, it even less restrictive and therefore more competitive. (G.Br.38-39 & n.9; Aiello.Br.57-58). As we previously observed, "[t]here was no evidence FSMC would have drafted [the RFP] differently to attract more competition or select the best developer." (Aiello.Br.67). The government has no answer, and proposes no alternative.

Thus, FSMC was not misled as to whether the RFP was "competitive." (*E.g.*, A1135/828 ("competitive" means that "whatever bid package [COR] submitted was evaluated against other bid packages submitted")). At most, FSMC was misled as to whether Kaloyeros and Howe intended, and made efforts, to help COR. But the government points to no evidence that *this* alleged misrepresentation undermined an essential element of COR's bargain with FSMC. While one FSMC board member testified that it was important to FSMC's

"credibility" to avoid the perception that FSMC was "preconceiving an award to someone" (G.Br.120, 134), COR's victory was in no way preconceived. Nothing prevented a competitor from submitting an RFP response, and nothing prevented FSMC's evaluation committee or FSMC's board from deciding that this response was superior to COR's.[20] In any event, the fact that FSMC cared about avoiding threats to its credibility, standing alone, does not make that concern an essential part of FSMC's bargain with COR. *See*, *e.g.*, *United States v. Novak*, 443 F.3d 150, 159 (2d Cir. 2006) (reversing convictions because "the contractors received all they bargained for," even if they "would not have paid" had they known about the defendant's kickbacks).[21]

Accordingly, even if COR's bargain with FSMC included a competitive RFP process, Aiello's wire-fraud convictions must be reversed.

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[20] In fact, FSMC *chose* to exclude one potential Syracuse bidder as untimely even though Kaloyeros had encouraged FSMC to consider late inquiries. (A1148-49/895-96, A1157-62/951-69).

[21] The government's reliance on this testimony is unavailing for additional reasons. *First*, at trial, the government relied exclusively on a theory that FSMC potentially lost a better deal; it cannot now argue the theory that FSMC risked reputational harm. *See McCormick*, 500 U.S. at 270 n.8; *Chiarella*, 445 U.S. at 236-37; *Mittelstaedt*, 31 F.3d at 1220. *Second*, every breach of fiduciary duty damages an institution's "credibility." This Court cannot "adopt a rule that would effectively convert every breach of a fiduciary duty that is not openly confessed into a deprivation of §1341 'property.'" *Mittelstaedt*, 31 F.3d at 1218.

3. FSMC Did Not Lose Any Better Deal.

The government argues that because a "competitive" RFP helps "f[i]nd the lowest-priced or best-qualified vendor," the alleged scheme created a risk that FSMC failed to consider "better offers" than COR's. (G.Br.120, 128). However, because FSMC "freely bargained" with COR and got what it paid for, there was no fraud even if FSMC "could have negotiated a better deal absent [the purported] scheme." *Finazzo*, 850 F.3d at 115; *accord Binday*, 804 F.3d at 570.

Regardless, the hypothetical loss the government alleges is not enough to prove that the scheme contemplated harm to FSMC. (*See* Point V.B *supra*; Aiello.Br.64-65). There was no proof that the Syracuse RFP excluded any developer or deprived FSMC of a better deal. Nor was there even proof that the RFP made a better deal any less likely. Indeed, the government does not dispute that *any* change to *any* RFP could conceivably change the responses and results, without necessarily increasing the risk of harm. (Aiello.Br.66-68).

The government's only effort to suggest that FSMC lost a better deal is its claim that the Buffalo RFP discouraged a potential Buffalo applicant that might have charged less for Buffalo projects. (G.Br.128-29). But as we already explained, this evidence was irrelevant to Syracuse. (Aiello.Br.66). Moreover, as the government recognizes elsewhere in its brief (G.Br.184), the evidence was *not* admitted to show that the fees could have been lower for any of the projects at

issue. The district court made clear that the witnesses did not "ha[ve] any idea what the development fee ought to have been in this case" (A1291/1485), and found their testimony relevant *solely* for the limited purpose of showing that "there is a range" of development fees rather than one "fixed fee," so "various contractors [can] differ" (A1291/1485-87). The government conceded that it would not be able to argue that "there was a developer out there that was willing to do this [project] for [less]." (A1292/1491; *accord* A1472-73/2517-18, A2625/7-8). And at sentencing, the district court recognized that because of the "many variables that affect what fee a construction company will charge," the testimony could not establish that FSMC was deprived of a lower price (let alone that it was deprived of a better deal overall). (A2627/15-16). It certainly was not "exactly the kind of evidence" presented in *Finazzo* (G.Br.129), because there, the government proved that the defendant "provided inferior products and charged higher prices than other vendors," costing Aéropostale millions of dollars. 850 F.3d at 113-14 & n.21.[22]

The government did not even attempt such a showing here. Its claim of economic risk is pure speculation that cannot support a jury verdict, and the wire-fraud convictions must be reversed. (Aiello.Br.67-68).

[22] This is yet another instance where the government tells the Court, in one breath, that *Finazzo* is "exactly" like this case, and in another, that *Finazzo* is "unlike" this case (because the goods at issue were "easily comparable commodities"). (G.Br.126, 129).

D. The Government Failed To Prove Intent To Defraud

Separately, the convictions should be reversed because Aiello lacked fraudulent intent. Throughout its brief, the government emphasizes facts that have nothing to do with Aiello. Aiello was not privy to most of the communications between Howe and Kaloyeros, especially those about "vitals" and "unique" qualifications. Aiello had no reason to know FSMC's procurement policies. No cooperator testified about what Aiello said. Considering the proof specific to Aiello, no reasonable juror could find intent to defraud beyond a reasonable doubt. (Aiello.Br.54-56, 68-70).

The government's aggressive characterization of the evidence against Aiello does not survive inspection. It is patently false that any fraud scheme was disclosed to Aiello "explicitly over email," and the supposedly "illicit communications" cited by the government are nothing of the sort. (G.Br.142-43; A1961-64). The initial contacts between Aiello and Kaloyeros were innocuous. (G.Br.142; Aiello.Br.54-55). And while Howe forwarded an LPCiminelli email to Aiello, it did *not* contain any "ideas for rigging the RFP." (G.Br.142). That email included bland suggestions for an RFP, like evaluating "[e]xperience delivering projects in W[est] N[ew] Y[ork]" and "[e]xperience of the individual team members who will be on this project." (A1644). Nothing would have suggested to Aiello that this was an invitation to participate in a scheme to defraud FSMC.

Similarly, if Aiello read Gerardi's emails to Howe, he would have discerned nothing criminal in describing COR's qualifications to Howe, or in marking up a proposed RFP to make it *less restrictive*. (G.Br.142; A1650-65, A1700-02). Nor would receiving a copy of the RFP a mere week before its intended publication have suggested to Aiello that the RFP was not competitive. (G.Br.142-43; A1685). The terms of that RFP were eminently reasonable, and COR's competitors were free to apply. Indeed, Aiello's email to Howe that a potential competitor could cause "trouble" (G.Br.143) shows Aiello's understanding that FSMC could easily select a developer *other* than COR as the RFP winner.[23]

As for the lobbyist disclosure form (G.Br.141), there was, again, no proof that Aiello saw it.[24] "[I]t is not enough that the [contrary] inference[] in the government's favor [is] permissible," as it is not "sufficiently supported" to treat as established fact. *United States v. Valle*, 807 F.3d 508, 522 (2d Cir. 2015); *see also*

[23] While the government asserts that this email and Aiello's praise of Kaloyeros violated the "blackout period," it plainly did not enhance COR's "competitive advantages." (G.Br.42-43).

[24] The relevant email was part of a chain in which Gerardi, Howe, and a state employee were discussing an entirely *separate* project at Loguen Crossing in Syracuse. (A1704-10). Aiello was copied but did not respond, and to notice any arguable misstatement he would have had to open the attachment. He would not necessarily have understood that Howe, a non-lobbyist, should be disclosed on a "Disclosure of *Lobbyist* Form." (A1711 (emphasis added)). And while he signed the cover letter for COR's RFP response (A1721), it was Gerardi, COR's lawyer, who prepared and signed all disclosure forms, including this one (A1800-03).

Pauling, 924 F.3d at 660-61 (even "reasonable speculation…is an insufficient basis on which to rest a guilty verdict"). Regardless, despite the government's speculation (G.Br.141 n.33), there was no proof that the disclosure form was material or should have disqualified COR. The government had multiple opportunities to ask FSMC's directors about the supposed importance of this form, but it elected not to elicit any testimony on the subject. Finally, COR's response to the disclosure form was not proof of fraudulent intent, since it in no way excluded other developers or hindered FSMC from selecting the most qualified developer.

In sum, when Aiello signed contracts with FSMC (G.Br.143), he had no reason to believe that the RFP process was rigged, and he had never shown any intent to rig it. It was not enough for the government to point to "[some] evidence that arguably could support a verdict." *Valle*, 807 F.3d at 515. "[T]he government had to prove more than likelihood or probability" of guilt; it had to prove Aiello's intent "beyond a reasonable doubt," *Pauling*, 924 F.3d at 662, and it failed. *See*, *e.g.*, *Valle*, 807 F.3d at 515, 522 (where the evidence "gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence, then a reasonable jury must necessarily entertain a reasonable doubt").

VI. THE WIRE-FRAUD INSTRUCTIONS WERE ERRONEOUS, INCOMPLETE, AND CONFUSING

A. The Instructions Improperly Permitted Conviction Even If FSMC Was Not Deprived Of The Benefit Of Its Bargain Or A Better Deal

1. Aiello's wire-fraud convictions should be vacated because the jury was not instructed to acquit if FSMC received the benefit of its bargain. (Aiello.Br.74-75). The government claims this was unnecessary because the instructions already required proof of an "economic discrepancy" between what FSMC "anticipated" and what it "received." (G.Br.161). But that language was confusing (Aiello.Br.76-77), and it plainly did not convey the defense theory that acquittal was required if COR delivered what it promised to FSMC (*see* Point V.C.1 *supra*). Having argued that this theory is erroneous (*e.g.*, G.Br.137-39), the government cannot credibly maintain that the instructions endorsed it.

2. Moreover, the instructions did not prevent the jury from improperly convicting based on a hypothetical possibility of harm to FSMC. (Aiello.Br.75-76). The rejected defense instructions did not require proof that any harm "materialized." (G.Br.162). They properly required proof that harm *would* materialize "if [the scheme] were to succeed," or at least proof that FSMC risked more than a "mere possibility" of harm. (Aiello.Br.75; *see* Point V.B *supra*). These instructions were not "unnecessary" (G.Br.162), since the government urged the jury to convict based on speculative harm (Aiello.Br.75-76). *See Silver*, 864

F.3d at 118 (government could not claim that instructions given were narrower than the interpretation it urged upon the jury).

B. The Instructions Were Confusing And Misleading

Separately, the right-to-control instructions were unbalanced and confusing. (Aiello.Br.76-80). The government contends that portions of the instructions came from the opinions in *Finazzo* and *Binday* (G.Br.157) or the instructions reviewed in those cases (*e.g.*, G.Br.159), but that does not mean that the resulting charge was fair to both sides or clear to a jury. "[S]tatements of law quoted from the opinions of appellate courts" are often "unintelligible to the average juror." *United States v. Christmann*, 298 F.2d 651, 653 (2d Cir. 1962); *see also* Aiello.Br.74, 79. A lawyer would have trouble applying the district court's amalgam of abstract principles (Aiello.Br.73); a lay juror would find it impossible without the language requested by the defense, which clarified the nature of "economic harm" (Aiello.Br.78). "The district court must tailor its instructions to the facts of the case before it," *United States v. Regan*, 937 F.2d 823, 828 (2d Cir. 1991), but here it failed to "ma[k]e clear…the critical inquiry" under its view of the law, *United States v. Kopstein*, 759 F.3d 168, 181 (2d Cir. 2014)—namely, whether there was any risk that FSMC was deprived of a better deal (Aiello.Br.78).

Moreover, it is unavailing for the government to argue that certain language was "upheld in *Binday*" (G.Br.159), since in *Binday*, the defendants had "waived"

any argument "that the instruction failed to clearly explain what would constitute economic harm." 804 F.3d at 582. We did not waive that argument (Aiello.Br.78), and it is precisely the argument we are making now (Aiello.Br.76-80). *Binday* does not prevent the Court from deciding that the instructions "did not convey [the economic harm] requirement with sufficient clarity." 804 F.3d at 583.

The government does not claim that any of these instructional errors were harmless, so the convictions must be vacated.

VII. AIELLO WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE TO THE WIRE-FRAUD CHARGES

A. The Evidence Was Admissible To Show Lack Of Harm

The district court improperly precluded evidence that COR gave FSMC what it paid for and charged a reasonable price, depriving Aiello of his right to present a complete defense. (Aiello.Br.80-83). The government argues that "it is not a defense" that FSMC received a "'good' product" if FSMC was deprived of information concerning "whether a *better* product could be available." (G.Br.181). But the government mischaracterizes both the evidence and our argument. First, the evidence would have shown that FSMC received what was promised (Aiello.Br.80-81), which *is* a defense to wire fraud even if FSMC might have foregone a better deal elsewhere. (*See* Point V.B *supra*; Aiello.Br.62-63). Second, the evidence would have shown that COR charged a fair price for good work (Aiello.Br.80-81), suggesting that FSMC was *not* deprived of a better deal. Even if

it would not have definitively proved that FSMC got the best deal possible, "evidence need not be dispositive of an issue to be relevant." *United States v. Diaz*, 878 F.2d 608, 615 (2d Cir. 1989). Rather, "[r]elevance under the FRE is a low threshold, easily satisfied." *United States v. Gramins*, No. 18-2007-CR, --- F.3d ---, 2019 WL 4554521, at *15 (2d Cir. Sept. 20, 2019).

The government claims the evidence was properly excluded under Rule 403, but again, it presupposes that the evidence was worthless and misleading rather than relevant. (G.Br.182). Since the evidence was relevant to valid defenses, its exclusion was fundamentally unfair and could not be harmless. (Aiello.Br.82-83).

B. The Evidence Was Admissible To Rebut Scienter

The government does not meaningfully dispute that the excluded evidence was relevant to whether Aiello acted in good faith. (Aiello.Br.83-85). Like the district court, it mischaracterizes the question as whether the "defendants *could not* have intended to harm [FSMC]" if they were qualified and did good work at a reasonable price. (G.Br.181 (emphasis added); *see also* A1130/809-10). But that was never our contention. Again, evidence can be relevant without being dispositive, *Diaz*, 878 F.2d at 615, and the low standard for relevance is particularly lenient when the evidence concerns the defendant's intent (Aiello.Br.84 (collecting cases)).

COR's qualifications and its work for FSMC plainly shed light on Aiello's intent. If, as the government contended, Kaloyeros rigged the RFP so that COR would win and receive a stream of contracts, one could have expected COR to exploit its alliance with Kaloyeros and monopoly position by shortchanging FSMC. (Aiello.Br.83). That it did *not* is circumstantial evidence of Aiello's intent. And the government's proof of Aiello's intent to defraud was so frail that the erroneous exclusion could not possibly be harmless. (*See* Point V.D *supra*).

* * *

In addition, pursuant to Federal Rule of Appellate Procedure 28(i), Aiello joins the arguments of co-Appellants Percoco (Points I-II and III.B), Gerardi (Points I- III), Kaloyeros, and Ciminelli (Points I-II).

CONCLUSION

Aiello's convictions should be reversed with instructions to enter a judgment of acquittal, or at least vacated and remanded for a new trial. The Court should extend the stay of his surrender date through a decision on the merits.

Dated: New York, New York
October 4, 2019

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENT, AND TYPE STYLE REQUIREMENT

1. On October 1, 2019, Defendant-Appellant Steven Aiello filed an unopposed motion for leave to exceed the word limit for his reply brief, seeking permission to file a reply brief of up to 11,500 words. (Dkt.264). That motion remains pending as of the filing deadline. Consequently, the undersigned counsel of record for Aiello certifies pursuant to Federal Rules of Appellate Procedure 32(g) that the foregoing brief contains 11,474 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), according to the Word Count feature of Microsoft Word 2016.

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 Word 2016 in 14-point font of Times New Roman.

Dated: October 4, 2019

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