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VIA ECF

Catherine O'Hagan Wolfe
Clerk of Court
United States Court of Appeals for the Second Circuit
40 Foley Square
New York, NY 10007

Re: *United States v. Aiello*, No. 18-2990(L), 18-3710(CON)

Dear Ms. Wolfe:

Pursuant to FRAP 28(j), Appellant respectfully submits that *United States v. Silver*, No. 18-2380 (2d Cir. Jan. 21, 2020), ratifies and further supports the arguments in Point III of Aiello's briefs. (Br.45-51; Reply.Br.18-22).

Silver confirms that an official's "open-ended promise" to perform "official action to the benefit of the payor…as specific opportunities arose" is legally insufficient for honest-services fraud. Op.38-39. Premising liability on such "vague" and "meaningless" notions, the Court held, would contravene *McDonnell* and this Court's own precedent. Op.27-36, 53-60. Instead, "a particular question or matter" to be acted upon "must be identified at the time the official makes a promise or accepts a payment," and district courts must instruct juries accordingly. Op.35, 60-62. As in *Silver*, the instructions here failed to communicate that critical finding; they invited the jury to convict if Aiello paid Percoco merely "for official action as the opportunities arose," without identifying a specific "question or matter" at that time. (A656/6449). That is reversible error.

Nor can the government prove the error harmless beyond a reasonable doubt. There was no evidence of any as-opportunities-arise (or "retainer," Op.24 n.7) scheme. Rather, the evidence, including the government-cooperator's unequivocal testimony, at best showed COR retained Percoco in mid-2014 for the sole purpose of assisting with the LPA *while he was not in office*. (Br.39-41; *see* G.Br.82). But the jury acquitted Aiello's business partner, Gerardi, while convicting Aiello, which suggests it likely relied on the as-opportunities-arise instruction to base its verdict on Percoco's communications about a pay raise for Aiello's son a year after COR's payments, rather than any agreement about the LPA. It is undisputed that the son's salary was not on anyone's radar, let alone specifically identified, at the time of the supposed *quid pro quo*, but the erroneous instruction nonetheless invited the jury to convict based on *any* later act. *Silver* presented a similar scenario, and the Court rejected the harmless-error argument. Op.65-66. Because it is at least "possible" the jury convicted Aiello for conduct that *Silver* confirms is not

unlawful, the instructional error requires vacating Aiello's honest-services conviction. *See McDonnell*, 136 S. Ct. at 2375.

Respectfully submitted,

/s/ Alexandra A.E. Shapiro

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Attachment

cc: All Counsel (via ECF)