No. 18-3710-cr

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

STEVEN AIELLO,

Defendant-Appellant.

EMERGENCY MOTION OF DEFENDANT-APPELLANT FOR STAY OF SURRENDER DATE AND BAIL PENDING APPEAL

Appeal from the United States District Court
for the Southern District of New York, No. 16 Cr. 776
Before the Honorable Valerie E. Caproni

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INTRODUCTION

Steven Aiello moves for an emergency stay of his March 1st surrender date and bail pending appeal. The district court (Caproni, J.) found that Aiello is neither a flight risk nor a danger, his appeal is not for purposes of delay, and "bail pending appeal is appropriate" for two of three counts of conviction. That leaves just one question: whether the appeal of the remaining count—alleging a conspiracy to commit "honest services fraud"—raises substantial questions of law likely to result in reversal or a new trial.

The district court undertook to show that it does not, but needed 54 pages and 55 footnotes—thereby demonstrating just how substantial the questions are. Specifically, Aiello's appeal presents substantial questions about whether private citizens can perform the "official acts" required for public-sector honest-services fraud and the scope of *McDonnell v. United States*, 136 S. Ct. 2355 (2016). The "private citizen" theory underlying this conviction is unprecedented and raises serious concerns about due process, fair notice, and the potential criminalization of constitutionally protected lobbying by former government officials. These issues of first impression provide the quintessential basis for bail pending appeal.

Aiello co-owned COR Development, a Syracuse real estate company. The indictment alleged that a COR consultant paid Joseph Percoco $35,000 when Percoco was a senior member of Governor Andrew Cuomo's administration in

exchange for Percoco's official acts, in violation of the honest-services fraud statute. But the proof at trial showed that COR's consultant paid Percoco *after* Percoco had resigned from the government. The district court instructed the jury that it could not convict Aiello of federal-program bribery unless Percoco was in government at the relevant time, but permitted conviction for honest-services fraud conspiracy based on a Percoco's mere relationships with public officials as a private citizen. Not surprisingly, the jury acquitted on bribery but convicted on the honest-services charge.

The instructions constructively amended the indictment, which charged a conspiracy involving only Percoco's honest services as a public official, not as a private citizen. And critically, this "private citizen" theory was foreclosed by *McDonnell*, which requires that public-sector bribery crimes—including honest-services fraud—involve "formal exercise[s] of governmental power" and "official position," thereby excluding private citizens. These errors were compounded by another jury instruction permitting conviction even if Percoco received payments untethered to *any* specific subject matter, action, or type of action. As this Court implicitly recognized last October when granting bail in *United States v. Silver*, there is at least a substantial question whether *McDonnell* forecloses that theory.

This Court should stay Aiello's surrender date and grant bail pending appeal.

BACKGROUND

Aiello co-founded COR with Joseph Gerardi. (Tr.644-45).[1] In 2010, COR expanded into public projects and retained Todd Howe, Cuomo's close friend, as its government relations consultant. (Tr.2120-21, 3865-66). The charges arose from Howe's work for COR and other companies. Aiello and Gerardi sought a severance from their co-defendants, but the district court instead forced them to stand trial twice. Howe cooperated and testified at the Percoco trial, in which the jury acquitted Aiello of bribery (18 U.S.C. §666) and false statements (18 U.S.C. §1001) (Counts 14 and 17) but convicted him of honest-services fraud conspiracy (18 U.S.C. §§1346, 1349) (Count 10). (Tr.6830-31).

The wire fraud charges concerned different conduct and were tried separately. After that trial, Aiello was convicted of wire fraud and conspiracy (Counts 1 and 2). On December 7, 2018, the district court sentenced him to 36 months' imprisonment and a $500,000 fine, and set a surrender date of March 1, 2019. Judgment was entered on December 11, 2018. Aiello filed a Notice of Appeal the following day.

At sentencing, Aiello orally moved for bail pending appeal. (12/7/18 Tr.37-42). Two months later, on February 8, 2019, the district court denied the motion.

[1] Cited transcript pages, exhibits, and other pertinent materials are attached to the accompanying Declaration of Alexandra A.E. Shapiro.

(Dkt.978).[2] As noted, the court found no flight risk or danger and confirmed that it had "already ruled that bail pending appeal is appropriate for all [wire fraud] convictions." (*Id.* at 4, 9-10).[3] Nevertheless, in a 54-page, 55-footnote opinion, the court endeavored to explain why the honest-services appeal is insubstantial.

A. The Alleged Public-Bribery Scheme And Trial

The indictment alleged that in 2014, "*while serving as Executive Deputy Secretary to the Governor*," Percoco conspired with Aiello and Gerardi to "take *official action* in exchange for bribes" and "deprive the public of its intangible right to PERCOCO's honest services *as a senior official in the Office of the Governor*." (Dkt.321 ¶¶58-59) (emphasis added).

For most of 2014, Percoco was not a public official. He resigned in April to manage Cuomo's re-election campaign, and then re-joined the Governor's office on December 8. (Tr.1016). The evidence at trial at most established that the conspiracy began during the campaign, not, as the indictment alleged, when Percoco was "serving as Executive Deputy Secretary to the Governor." (Tr.5952). The evidence depicted, at most, an arrangement for Percoco to advocate for COR

[2] In its opinion, the court also denied the bail motion Percoco had filed in October.

[3] The government did not appeal the rulings granting bail to the other wire-fraud defendants or challenge Aiello's bail motion on that basis below (*see* Dkt.958), so we assume it is undisputed that those convictions present substantial questions warranting bail.

while he was *not* a public official. Percoco asked Howe for consulting work *during the campaign* and even sought an ethics opinion about what work a *former government employee* may undertake. (Tr.1185-87, 2093-94). The opinion—which Howe forwarded to Aiello—advised that in his "post-State employment" Percoco could not be compensated for "any matter before," or "appear[] or practic[e] before," the Governor's office and state agencies, but that other work was permissible. (GX540A).

In mid-2014, a state agency claimed that COR needed a Labor Peace Agreement ("LPA") with a union to procure state funding for a project. Aiello asked Howe, "[I]s there any way Joe P can help us…*while he is off the 2nd floor working on the Campaign*…with regard to labor issues over the next few months." (GX550) (emphasis added).[4] *Before* he returned to government, Percoco called a friend in the Governor's office about the LPA. (Tr.1273-74). Even still, COR ultimately did not pursue the grant and never received any funding. (Tr.727).

There was no evidence that COR made any payments to Percoco when he was in office. The government only identified two COR checks to Howe in August and October 2014, from which Howe paid Percoco. (Tr.2479-80, 2483).[5]

[4] "2nd floor" refers to the Governor's Office. (Tr.438).

[5] There was substantial evidence that COR made the payments in connection with financing efforts unrelated to Percoco. (*E.g.*, Tr.3650-56, 3667-70).

The government also claimed these checks were bribes for certain calls and emails by Percoco in *September 2015*. But there was no evidence that anyone had contemplated those communications a full year earlier, when the conspiracy was supposedly hatched and the payments were made. Indeed, Howe testified that COR hired Percoco "to help on labor issues, in particular this…labor peace agreement," not the 2015 acts. (Tr.2476; *see* Tr.2469, 3854). And there was no evidence that Aiello had any inkling before December 8, 2014 that Percoco would join the Governor's office again. All Aiello knew at the time was that Percoco was "off the 2nd floor working on the Campaign" and, much like a lobbyist, could use his contacts and prior role to help with labor issues.

B. Pre-Trial Motions

The defendants moved to dismiss the indictment to the extent it relied on Percoco taking "official acts" when he was not a State employee, arguing that (1) Percoco did not "perform[] the alleged conduct while serving 'in the office of the Governor'"; and (2) the indictment failed to allege a *quid pro quo* for official acts on specific questions or matters, as *McDonnell* requires, and impermissibly alleged an open-ended promise to take acts "as the opportunity arose." (Dkt.187 at 17, 29-32; Dkt.230 at 43-61). The district court rejected both arguments. (Dkt.390).

C. Jury Instructions

The district court instructed the jury that Percoco "owed the public a duty of honest services" not only when employed by the State, but also when he was a private citizen if "he owed the public a fiduciary duty" at that time. (Tr.6445-46). To make that determination, it instructed:

> you must determine, first, whether he dominated and controlled any governmental business and, second, whether people working in the government actually relied on him because of a special relationship he had with the government….

(Tr.6446). Aiello objected to these instructions, in part because that theory was not charged in the indictment. (Tr.5845-47, 6475; *see* Tr.5765). The district court instructed the jury that a bribery count premised on the same conduct, unlike honest-services fraud, required proof that Percoco was "authorized to act on behalf of state government." (Tr.6451-53).

The defendants also argued that the "as opportunities arise" theory violated *McDonnell* and requested an instruction that a *quid pro quo* requires an agreement on "a specific or identified question or matter." (Tr.5808-09). The court refused, and invited the jury to convict if COR made payments with "the expectation that, as a result of the payment, Mr. Percoco would, as opportunities arose, perform official acts" on COR's behalf. (Tr.6436-37, 6448).

ARGUMENT

Where, as here, the defendant is "not likely to flee" or "pose a danger" to public safety, a court "shall order" bail pending appeal if the appeal "raises a substantial question of law or fact likely to result in…reversal [or] an order for a new trial." 18 U.S.C. §3143(b). To be "substantial," a question need only be "one of more substance than would be necessary to a finding that it was not frivolous"—in other words, "a 'close' question or one that very well could be decided the other way," or one that is "fairly debatable" or "novel, which has not been decided by controlling precedent." *United States v. Randell*, 761 F.2d 122, 125 (2d Cir. 1985).[6] A defendant need not prove he is likely to prevail on the substantial question, but only that if he does, reversal or a new trial is likely. *Id*. at 124-25.

Aiello's appeal presents "important questions concerning the scope and meaning of [a] decision[] of the Supreme Court" (*i.e.*, *McDonnell*) and "unique facts not plainly covered by the controlling precedents." *United States v. Handy*, 761 F.2d 1279, 1281 (9th Cir. 1985) (cited approvingly by *Randell*, 761 F.2d at 124-25). And a reversal or new trial would likely result were he to prevail on any

[6] The district court rejected the "fairly debatable" and "novel" formulations of the standard. (Op.10 n.10; *see id.* at 53). But this Court embraced them and noted that none of the tests "differ[s] significantly from" from any other. *Randell*, 761 F.2d at 125.

of his appellate issues. Bail is therefore "mandatory." *United States v. Abuhamra*, 389 F.3d 309, 319 (2d Cir. 2004).

I. Whether The Jury Instructions Constructively Amended The Honest-Services Charge Is A Substantial Question

"[A]fter an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself." *Stirone v. United States*, 361 U.S. 212, 215-16 (1960). A constructive amendment occurs when a jury instruction "so alter[s] an essential element of the charge that, upon review, it is uncertain whether the defendant was convicted of conduct that was the subject of the grand jury's indictment." *United States v. Milstein*, 401 F.3d 53, 65 (2d Cir. 2005). This results in "a *per se* violation of the Grand Jury Clause of the Fifth Amendment that requires reversal even without a showing of prejudice to the defendant." *United States v. Wozniak*, 126 F.3d 105, 109 (2d Cir. 1997); *accord United States v. Hassan*, 578 F.3d 108, 133-34 (2d Cir. 2008) (reversing and remanding for new trial).

This Court has repeatedly "emphasized the need for particular vigilance" to ensure that a defendant is not "convicted of conspiracy based upon an agreement other than that specifically charged in the government's indictment." *United States v. Gallerani*, 68 F.3d 611, 618 (2d Cir. 1995); *see also United States v. Mollica*, 849 F.2d 723, 729 (2d Cir. 1988) (similar concern with fraud). A constructive amendment occurs when a jury is permitted to convict for a conspiracy with a

broader object than alleged in the indictment. *See United States v. Roshko*, 969 F.2d 1, 6 (2d Cir. 1992) (indictment alleged husband's green card was object but case tried on wife's green card also); *Hassan*, 578 F.3d at 133-34 (indictment charged cathinone conspiracy but jury instructions covered "some controlled substance").

The indictment charged a conspiracy to deprive the public only of Percoco's "honest services as a senior official in the Office of the Governor." (Dkt.321 ¶59). The grand jury made no finding that Percoco owed honest services when he was not in government—let alone that Aiello intended to deprive the public of those services. That theory should never have been presented to the petit jury.[7]

By giving the private-citizen instruction, the district court "created a basis for conviction which the grand jury did not intend to create." *Roshko*, 969 F.2d at 6; *see Stirone*, 361 U.S. at 217, 219 ("fatal error" when "it cannot be said with certainty that…[defendant] was convicted solely on the charge made in the indictment the grand jury returned"). Whereas the grand jury apparently focused on every period except the eight months that Percoco was campaign manager, the instruction permitted conviction based on that period alone. *Cf. Wozniak*, 126 F.3d

[7] In refusing to dismiss, the district court cited a passage in the indictment alleging that Percoco had an unofficial role in the governor's office while on the campaign. (Dkt.321 ¶4). But the actual charging language invoked his duty as a government official.

at 111 (no constructive amendment if "time, place, people, and object" remain unchanged). And the instruction deviated from the "core of criminality" alleged in the indictment. *Id.* Intentionally bribing a public official who indisputably owes the public fiduciary duties is fundamentally different from paying a lobbyist or civilian, who may or may not owe a fiduciary duty depending on the level of dominance and control he exercises.

At a minimum, whether an unconstitutional constructive amendment occurred is a substantial question.

II. The Private-Citizen Theory Presents A Substantial Question

A. *McDonnell*'s Definition of "Official Act" Forecloses The Theory

In public-sector honest-services fraud cases, the government must prove "a *quid pro quo* agreement" in which an official receives something of value in exchange for his promise to perform "an official act." *United States v. Silver*, 864 F.3d 102, 111 & n.24 (2d Cir. 2017). But *McDonnell* significantly narrowed and defined "official act" in a manner that requires "governmental power," "authority of…office" and an "official position"—elements indicating that a private citizen is legally incapable of delivering the requisite *quo*. 136 S. Ct. at 2368-70.

The "official act" requirement has two components. First, the act's subject matter must be official: "the Government must identify a question, matter, cause, suit, proceeding or controversy that may at any time be pending or may by law be

brought before *a public official*." *Id*. at 2368 (emphasis added). This component is "relatively circumscribed"; the matter must involve the "*formal exercise of governmental power*" and be "within the specific duties of *an official's position*—the function conferred by the *authority of his office*." *Id.* at 2368-69 (emphasis added).

Second, the act itself must be official: "[H]osting an event, meeting with other officials, or speaking with interested parties is not, standing alone, a 'decision or action.'" *Id*. at 2370. "Instead,…the *public official* must make a decision or take an action on th[e] question or matter, or agree to do so." *Id.* (emphasis added). Alternatively, the Court held, "[a] *public official* may also make a decision or take an action on a [matter] by using *his official position* to exert pressure on *another official* to perform an 'official act.'" *Id.* (emphasis added).

A private citizen—no matter how much control he wields—lacks actual "governmental power," "authority of…office" and an "official position," and thus cannot perform official acts under *McDonnell*. This is true even where, as here, the government maintains that the individual pressured an official to act rather than acted himself, since under *McDonnell* that conduct only qualifies as an official act if the individual "us[es] his official position to exert pressure." *Id.* at 2370.

At a minimum, *McDonnell* raises a "close" question whether only public officials—not private citizens—can perform official acts. *Randell*, 761 F.2d at

125. Moreover, neither the Supreme Court nor this Court (nor, to our knowledge, any other Court of Appeals) has yet considered *McDonnell*'s ramifications for a private-citizen theory of public honest-services fraud, which arises in few reported decisions. The issue is plainly novel and an "important question[] concerning the scope and meaning of [a Supreme Court] decision[]." *Handy*, 761 F.2d at 1281. Accordingly, there is a substantial question whether the conviction was premised on an invalid legal theory.

B. The Private-Citizen Theory Raises Serious Constitutional Concerns

The private-citizen theory also raises the same "significant constitutional concerns" the Supreme Court identified in *McDonnell*. 136 S. Ct. at 2372-73.

The First Amendment protects the right to petition the government, including through well-connected lobbyists who are former government officials. *See generally Citizens United v. FEC*, 558 U.S. 310, 355 (2010). Extending honest-services fraud to civilians who "dominate" or "control" public officials could chill "citizens with legitimate concerns…from participating in democratic discourse." *McDonnell*, 136 S. Ct. at 2372; *see United States v. McClain*, 934 F.2d 822, 830-31 (7th Cir. 1991) (rejecting private-citizen theory for Hobbs Act extortion because a control standard "might simply prohibit being too successful a lobbyist"); *accord United States v. McFall*, 558 F.3d 951, 958 (9th Cir. 2009); *United States v. Tomblin*, 46 F.3d 1369, 1383 (5th Cir. 1995).

McDonnell's due process and fair notice concerns are also particularly acute here. *See* 136 S. Ct. at 2373; *Skilling v. United States*, 561 U.S. 358, 402-03 (2010). What is the line between a former-official lobbyist who merely remains chummy with former colleagues, and one who "dominates and controls" them, and how was Aiello supposed to have known the difference?

And the lack of bright-line standards raises federalism concerns. *McDonnell*, 136 S. Ct. at 2373. Given the potentially limitless scope of §1346, courts should not "construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials." *McNally v. United States*, 483 U.S. 350, 360 (1987).

These constitutional considerations provide additional reasons why the legal question here is at least "fairly debatable" and "very well could be decided the other way." *Randell*, 761 F.2d at 125.

C. *McDonnell* Supersedes *Margiotta*

The district court patterned its instruction on language in *United States v. Margiotta*, 688 F.2d 108 (2d Cir. 1982).[8] But *Margiotta* pre-dated *McDonnell*—

[8] The district court suggested that Aiello waived this challenge by requesting a *Margiotta* instruction. (Op.19-20). He did no such thing. On the transcript page the court cited, Aiello's counsel merely provided the page number of a citation the court had inquired about. (Tr.5843). Shortly thereafter, Aiello specifically objected to *any* private-citizen instruction on variance and constructive amendment

and *Skilling* and *McNally*, which also substantially reined in honest-services doctrine—and thus did not consider *McDonnell*'s implications for the private-citizen theory of public-sector honest-services fraud.

In its bail opinion, the district court attempted to bolster its reliance on *Margiotta* by citing other cases that employed the "reliance, *de facto* control and dominance" test for fiduciary status. (Op.20-23). But not a single one involved a fiduciary duty owed *to the public*, let alone addressed whether *McDonnell* forecloses liability under *Margiotta*'s test in the specific context of public-sector honest-services fraud.[9] Moreover, in public-sector cases it is hard to fathom how the "reliance" element could be satisfied when an individual is not an actual public official. The public does not rely on, or put their trust in, individuals who are neither known to them nor on the public payroll. And other Circuits have rejected *Margiotta* on vagueness grounds. *See United States v. Murphy*, 323 F.3d 102, 104 117-18 (3d Cir. 2003) (rejecting *Margiotta*'s case-by-case approach and instead

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grounds; the court acknowledged, "OK. You got your objection." (Tr.5845-47). Aiello also later joined an objection that the instructions failed to require that Percoco was an official at the time of the alleged agreement. (Tr.6475; *see* Tr.5765). And his Rule 29 motion (Tr.5104-33) was more than sufficient to preserve his argument that the government failed to prove an agreement for Percoco to take official action. *See*, *e.g.*, *United States v. Hoy*, 137 F.3d 726, 729 (2d Cir. 1998).

[9] *United States v. Halloran*, for example, involved fiduciary duties owed by Republican Party officials to their party members—not to the public at-large. *See* 821 F.3d 321, 339-40 (2d Cir. 2016).

requiring a "clearly established fiduciary relationship or legal duty"); *United States v. Brumley*, 116 F.3d 728, 734-35 (5th Cir. 1997) (§1346 limited to obligations "under state law").

D. The District Court's Reasoning Fails

The district court labored to minimize *McDonnell*'s relevance and effectively re-write the Supreme Court's opinion to avoid finding a substantial question. But its efforts are unavailing.

First, the district court deemed *McDonnell* irrelevant because the definition of "official act" is different from the "class of persons" subject to the honest-services statute. (Op.29-33). But that is an artificial distinction. As discussed *supra* at 12, under *McDonnell*'s definition, only a public official can perform an official act. *McDonnell* thus necessarily limited the class of persons who can commit public-sector honest-services fraud.

Second, the district court acknowledged *McDonnell*'s holding that official action includes "[a] *public official* ... using *his official position* to exert pressure on *another official* to perform an 'official act'" and conceded that it "can arguably be read" to mean that a private citizen's pressuring an official is not official action. (Op.37 n.41). But the court refused to read that language as written. It held that when *McDonnell* is applied to honest-services fraud, "the term 'public official' must be replaced by the term[] 'person who owes a duty of honest services'" and

"[t]he term 'official position' must similarly be translated…[as] 'position of *de facto* control.'" (*Id.*). But *McDonnell* says what it says, and this Court has repeatedly held that its definition, though based on language in 18 U.S.C. §201, applies to honest-services fraud. *See United States v. Skelos*, 707 F. App'x 733, 735-37 (2d Cir. 2017) (honest-services fraud instruction erroneous under *McDonnell*); *accord Silver*, 864 F.3d at 118; *United States v. Boyland*, 862 F.3d 279, 290 (2d Cir. 2017). The district court's resort to linguistic gymnastics to reformulate and broaden *McDonnell*'s holding demonstrates that, at a minimum, it is a "close" question whether *McDonnell* forecloses the private-citizen theory. *See Handy*, 761 F.2d at 1281.

Third, the district court said that cases where defendants were convicted of pressuring or advising public officials to perform an official act demonstrate that an alleged bribe recipient need not himself have the capacity to perform official acts. (Op.34-38). But those cases all involved defendants who were themselves public officials and used their official positions to pressure others. *See Boyland*, 862 F.3d at 282-83 (State Assemblyman); *United States v. Fattah*, No. 16-4397, --- F.3d---, 2019 WL 209109, at *10-11 (3d Cir. Jan. 16, 2019) (U.S. Congressman); *United States v. Middlemiss*, 217 F.3d 112, 120 (2d Cir. 2000) (Port Authority officer); *United States v. Kerik*, 615 F. Supp. 2d 256, 261 (S.D.N.Y. 2009) (Police/Corrections Commissioner). The court's inability to point to a single post-

McDonnell public-sector honest-services fraud case in which a private citizen supposedly was the bribe recipient demonstrates that this is a case of first impression warranting bail. *Randell*, 761 F.2d at 125.

E. The Error Was Not Harmless

Under *McDonnell*, Aiello was not guilty unless he intended to buy Percoco's acts as a public official. *See Ocasio v. United States*, 136 S. Ct. 1423, 1432 (2016) (conspirators must have agreed that the object crime "be committed by a member of the conspiracy who was capable of committing it"). But there was no evidence that at the time of the alleged agreement Aiello had any idea Percoco would ever return to public office, let alone that he wanted to secure Percoco's assistance if and when that ever occurred. Instead, the evidence showed that after receiving an ethics opinion concerning Percoco's "post-State employment activities," Aiello asked if Percoco could assist COR "while he is off the 2nd floor working on the Campaign." (GX540A; GX550).[10]

And the case was very close: the jury deliberated for 8 days, received two *Allen* charges, and acquitted Aiello on two of three counts, including the one that depended on Percoco's being a state agent. *See United States v. Stewart*, 907 F.3d 677, 689 (2d Cir. 2018) (length of deliberations and modified *Allen* charge "cut[]

[10] The district court ignored this evidence, focused its sufficiency analysis solely on Percoco (Op.23-27) and avoided the pivotal question of Aiello's state of mind.

strongly against" harmlessness). A jury properly instructed to focus solely on the time Percoco was a public official might well have acquitted Aiello of honest-services fraud conspiracy. *See McDonnell*, 136 S. Ct. at 2375 (vacating because it was "possible" that erroneous jury instruction led to conviction "for conduct that is not unlawful"); *Silver*, 864 F.3d at 123-24.

III. Whether *McDonnell* Foreclosed The "As Opportunities Arise" Theory Is A Substantial Question

To sustain a conviction for honest-services fraud, the government must prove that the public official "agreed to perform an 'official act' at the time of the alleged *quid pro quo*." *McDonnell*, 136 S. Ct. at 2371; *accord Silver*, 864 F.3d at 111. Prior to *McDonnell*, this Court allowed the government to avoid proving an agreement for a specific official act—or any type of act or even acts on a particular subject matter—as long as the official agreed to "exercise particular kinds of influence…as specific opportunities arise." *United States v. Ganim*, 510 F.3d 134, 145 (2d Cir. 2007). At that time, however, any "act taken under color of official authority" was an "official act" in this Circuit, *id.* at 142 n.4, so the "as opportunities arise" theory presented no issue.

There is a substantial question whether *McDonnell* forecloses that theory now. As discussed above, *McDonnell* strictly cabined the "official act" requirement so that many things officials do no longer qualify. 136 S. Ct. at 2371-72. The Court acknowledged that its rule left certain "distasteful" and "tawdry"

conduct outside the federal criminal bribery laws, but reasoned that its narrow, prophylactic definition was necessary to curb "the broader legal implications of the Government's boundless interpretation." *Id.* at 2375; *see id.* at 2372-73 (discussing "significant constitutional concerns" with "standardless sweep" of government's position). To enforce the Court's limitations, *McDonnell* mandates that juries make findings as to *each* component of the official act requirement. The jury 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 official] made a decision or took an action—or agreed to do so—*on* the identified [matter]." *Id.* at 2374.

An "as opportunities arise" instruction like the one here is incompatible with this mandate. It relieves the jury of the critical task of making those three required findings and allows them to convict based on an abstract and open-ended promise to act. This is not to say that honest-services fraud requires agreement as to the *specific act* that the public official will take. But the *quid pro quo* must be sufficiently concrete with respect to the *matter(s)* to be acted on, and the *type(s)* of acts to be taken, to give a reviewing court "assurance that the jury reached its verdict after finding" each of the required elements of an official act. *Id.* at 2374.

Moreover, in construing the federal-officer gratuity statute, the Supreme Court held that 18 U.S.C. §201's "insistence upon an 'official act,' carefully defined, seems pregnant with the requirement that some particular official act be identified and proved." *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 406 (1999). This Court had to distinguish *Sun-Diamond* in order to endorse an "as opportunities arise" theory, and it did so on the basis that the honest-services statute does not "contain the same express statutory requirement." *Ganim*, 510 F.3d at 146. But the Court has since recognized that §201's official act requirement—and *McDonnell*—apply equally to honest-services fraud. *See supra* at 17. That development provides further reason to revisit the viability of the "as opportunities arise" theory in light of *McDonnell*.

The district court dismissed this question because *McDonnell* did not expressly address the "as opportunities arise" theory. (Op.15). But the court failed to acknowledge the considerable tension between that theory and the above-quoted language and made no attempt to reconcile the two. *See United States v. Harris*, 838 F.3d 98, 107 (2d Cir. 2016) ("[E]ven if the statement is fairly characterized as *dictum*, we are obligated to accord great deference to Supreme Court *dicta*, absent a change in the legal landscape."). The district court also leaned heavily on other courts' conclusions that the "as opportunities arise" theory survives *McDonnell*. (Op.16). But most of those courts focused only on whether *McDonnell* requires

that *specific acts* be identified at the time of the *quid pro quo*—a standard Aiello is not advocating. *See*, *e.g.*, *Woodward v. United States*, 905 F.3d 40, 48 (1st Cir. 2018). In any event, that several courts have ruled one way does not mean that the question cannot "very well…be decided the other way." *Randell*, 761 F.2d at 125. Prior to *McNally*, for example, *every* Court of Appeals had held that the mail fraud statute "embraced the honest-services theory of fraud," yet the Supreme Court concluded otherwise. *Skilling*, 561 U.S. at 401.

Indeed, this Court apparently recognizes that this issue presents a substantial question. In *United States v. Silver*, No. 18-2380, the continued viability of the "as opportunities arise" theory after *McDonnell* was one of two issues raised. At oral argument, Judge Cabranes called it an "important question," the government agreed, and the panel granted bail after a short recess. (Shapiro Decl. Ex. 9 at 42-45). *See Handy*, 761 F.2d at 1281 (question is "substantial" if it "involve[s] important questions concerning the scope and meaning of decisions of the Supreme Court").

Finally, if Aiello prevails on this issue, his conviction will likely be reversed because the error was not harmless. The only specific matter or act at the time of the alleged *quid pro quo* was the LPA issue and Percoco's call while he was *not* a public official. There was no logical nexus between Percoco's 2015 acts and the

2014 payments, which is undoubtedly why the government pressed "as opportunities arose" in its summations. (Tr.5953, 6384).

CONCLUSION

If bail is denied, and Aiello prevails on appeal, he will likely serve most of his prison sentence (effectively 24 months, in light of the First Step Act). This Court should stay the surrender date and grant bail pending appeal.

Dated: New York, New York
February 12, 2019

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CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION

I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 5,186 words.

2. This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font.

Date: February 12, 2019

/s/ Alexandra A.E. Shapiro
Alexandra A.E. Shapiro

CERTIFICATE OF SERVICE

I hereby certify that, on February 12, 2019, an electronic copy of this Emergency Motion of Defendant-Appellant for Stay of Surrender Date and Bail Pending Appeal, together with the accompanying Declaration of Alexandra A.E. Shapiro and exhibits attached thereto, was filed with the Clerk of Court using the ECF system and thereby served upon the following counsel:

Robert Boone
Sarah K. Eddy
Matthew D. Podolsky
David Zhou

/s/ Alexandra A.E. Shapiro
Alexandra A.E. Shapiro