IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff – Appellee,*	)	
v.	)	No. 17-10528
GREGORY CASORSO, *Defendant – Appellant.*	)	Dist. Ct. No. 4:14-CR-00580-PHJ

UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR RELEASE ON BAIL PENDING APPEAL

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INTRODUCTION

The United States opposes Gregory Casorso's motion for release pending appeal because it fails to raise a "substantial question of law or fact," 18 U.S.C. § 3143(b)(1). The question raised by Casorso has been decided against him by controlling Ninth Circuit precedent. That precedent has not been overruled or undermined by subsequent decisions. Rather, five other circuits have agreed with the Ninth Circuit's conclusion, and none have disagreed.

The question Casorso raises is premised on his incorrect argument that the well-established per se rule, which has long condemned certain types of agreements as unreasonable restraints of trade in violation of Section 1 of the Sherman Act without further inquiry into their effects or justifications, contravenes the constitutional requirement that the government prove all the elements of an offense to the jury. But his argument that unreasonableness is a necessary element of the offense and that the per se rule created an unconstitutional presumption of unreasonableness that precludes a jury from deciding for itself whether the charged conspiracy was unreasonable was squarely rejected by this Court in *United States v. Manufacturers' Association of the Relocatable Building Industry*, 462 F.2d 49 (9th Cir. 1972). *Manufacturers'* correctly held that the constitutional bar against presumptions in criminal cases, reflected in the Supreme Court's 1952 decision in *Morissette v. United States*, 342 U.S. 246, does not preclude application of the per

se rule in criminal antitrust prosecutions because that rule is not a presumption at all, but rather a substantive rule of antitrust law. Casorso's suggestion that more recent antitrust and constitutional decisions have undermined *Manufacturers'* is inaccurate.

Indeed, Casorso concedes (as he must) that this Court has already rejected his planned challenge to the per se rule, Mot. 8, and his claim that *Manufacturers'* has been effectively overruled or is likely to be overruled by this Court en banc, Mot. 17-18, is baseless. *Manufacturers'* is well-reasoned and correct; it remains binding precedent; and there is no basis for en banc review. Accordingly, Casorso's appeal does not present a substantial question and his motion for release pending appeal should be denied.

LEGAL STANDARD

As a convicted defendant, Casorso carries the burden of demonstrating that bail is appropriate. *United States v. Handy*, 761 F.2d 1279, 1283 (9th Cir. 1985). Casorso "shall" be detained pending appeal unless a judicial officer finds "by clear and convincing evidence that [he] is not likely to flee or pose a danger to the safety of any other person or the community if released" and "that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in—(i) reversal, (ii) an order for a new trial, (iii) a sentence that does not include a term of imprisonment, or (iv) a reduced sentence to a term of imprisonment less

than the total of the time already served plus the expected duration of the appeal process." 18 U.S.C. § 3143(b).

The government does not challenge Casorso's showing as to risk of flight, danger to community, or delay. The only issue here is whether the question raised is substantial. A "substantial question" is "one of more substance than would be necessary to a finding that it was not frivolous." *Handy*, 761 F.2d. at 1283.

In reviewing an order denying release pending appeal, this Court reviews the district court's "legal determinations de novo" and underlying factual determinations for "clear error." *United States v. Garcia*, 340 F.3d 1013, 1015 (9th Cir. 2003).

STATEMENT

On June 2, 2017, a jury found Casorso and two codefendants guilty of conspiring to rig bids—a form of price fixing—at public real estate foreclosure auctions in the Northern District of California in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. On November 29, 2017, the district court sentenced Casorso to 18 months of imprisonment to begin on January 19, 2018.

On December 13, 2017, Casorso's codefendant, Michael Marr, moved in the district court for bail pending appeal, contending that his appeal will raise a substantial question by arguing that the per se rule applicable to bid rigging constitutes a conclusive presumption that violates a criminal defendant's

constitutional right to have a jury find every element of the charged crime. Dkt.[1] 390. Casorso separately moved for bail, incorporated Marr's motion, and made no argument of his own. Dkt. 392. The defendants recognized that this Court rejected the same argument in *Manufacturers'*, but contended that intervening Supreme Court decisions have undermined *Manufacturers'* to the point where it is no longer binding. *Id.* at 5-10.

On December 22, 2017, the district court denied Casorso bail for lack of a substantial question on appeal. Mot. Ex. B. (Dkt. 402). The court found that the issue raised "was squarely decided by the Ninth Circuit in *Manufacturers',*" which "applied well-settled authority recognizing that price fixing has long been held to be 'a per se violation of the Sherman Act without consideration of the rule of reasonableness." *Id.* at 2-3. The district court also rejected the argument that *Manufacturers'* "has been undermined by intervening cases deciding antitrust and due process issues." Id. at 2-5. The district court noted that *Manufacturers'* was subject to unanimous agreement among "the circuit courts that have been presented with this issue" and reasoned that the Supreme Court's post-*Manufacturers'* due process decisions do not undermine *Manufacturers'* because "the due process principle that the jury must decide every element of the crime is not a novel issue

[1] References to filings in the district court are denoted by "Dkt." followed by the number of the district court docket entry.

that has arisen since *Manufacturers' Ass'n* was decided." *Id.* at 4-5 (citing *Morissette*, 342 U.S. at 276). Rather, the "due process principles that defendants contend contravene the per se rule were considered by the court in *Manufacturers' Ass'n*, which cited *Morissette* as authority on the right to have every element of the crime submitted to the jury." *Id.* at 4-5.

On January 16, 2018, Casorso filed a motion asking this Court for release pending appeal on the same basis raised below.

ARGUMENT

The motion for bail pending appeal should be denied because the asserted issue fails to meet Section 3143(b)'s "substantiality" requirement. As the district court correctly held, the appeal does not present a substantial question because this Court has already decided the issue against Casorso, that decision binds the merits panel, and there is no basis to believe the decision has been overruled by intervening decisions or will be overruled on a petition for rehearing en banc. *See* Mot. Ex. B. (district court's order denying bail pending appeal).

Casorso makes the same argument that this Court rejected in *Manufacturers'*—that "the *per se* rule constitutes an unconstitutional presumption" of unreasonableness and thus violates a criminal defendant's "right to have each element of the crime charged submitted to the jury." 462 F.2d at 50. Since *Manufacturers'* was decided, the Second, Third, Fifth, Seventh, and Eleventh

Circuits have also opined that the per se rule is not an evidentiary presumption.[2]

Contrary to Casorso's claims, *Manufacturers'* has not been undermined by subsequent decisions of the Supreme Court and is not a realistic candidate for en banc review. Because Casorso's appeal fails under binding precedent that remains in effect and is not likely to be revisited by this Court en banc, his appeal does not present a substantial question meriting his release pending appeal.

I. *Manufacturers'* Is Correct and Controlling

In *Manufacturers'*, this Court correctly rejected the contention that "the *per se* rule constitutes an unconstitutional conclusive presumption" as "misunderstand[ing] the Sherman Act." 462 F.2d at 50. The Court recognized that "since the accused is presumed innocent, he has the right to have each element of the crime charged submitted to the jury" and that "[c]onclusive presumptions may not operate to deny this right." *Id.* (citing *Morissette*, 342 U.S. 246). The per se

[2] *United States v. Giordano,* 261 F.3d 1134, 1143-44 (11th Cir. 2001) (rejecting due process challenge to the per se rule as an unconstitutional presumption because "the per se rule does not establish a presumption" (quoting *Manufacturers'*, 462 F.2d at 52)); *United States v. Fischbach & Moore, Inc.*, 750 F.2d 1183, 1196 (3d Cir. 1984) (agreeing that the per se rule does not create an "irrebutable presumption" (citing *Manufacturers'*, 462 F.2d at 52)); *United States v. Cargo Serv. Stations, Inc.*, 657 F.2d 676, 683 (5th Cir. 1981) (rejecting challenge to the per se rule as an unconstitutional presumption); *United States v. Koppers Co.*, 652 F.2d 290, 293 (2d Cir. 1981) (rejecting the argument that a jury instruction on the per se rule "improperly withdrew the question of reasonableness from the jury by the use of a conclusive presumption"); *United States v. Brighton Bldg. & Maint. Co.*, 598 F.2d 1101, 1106 (7th Cir. 1979) (holding that "per se rules . . . are substantive rules of law, not evidentiary presumptions.").

rule does not contravene this right, the Court reasoned, because the per se rule is a substantive rule of law and therefore does "not establish a presumption. It is not even a rule of evidence." *Id.* at 52. As the Court recounted, while Section 1 of the Sherman Act states that "[e]very . . . conspiracy in restraint of trade or commerce . . . is declared to be illegal," 15 U.S.C. § 1, the Supreme Court has long construed Section 1 to proscribe "only unreasonable acts in restraint of trade and commerce." *Manufacturers'*, 462 F.2d at 50. And the Supreme Court "enunciated two distinct rules of substantive law" governing when a restraint on trade is unreasonable. *Id.* at 50-52. Under one rule, the per se rule, "certain classes of conduct, such as price-fixing, are, without more, prohibited by the Act," and under the other, the rule of reason, "restraints upon trade or commerce which do not fit into any of these classes are prohibited only when unreasonable." *Id.* at 52.[3]

The Court acknowledged that courts sometimes have referred to the first class as the product of a "conclusive presumption that certain types of conduct are unreasonable," and explained that such nomenclature "however, is no more than a

[3] For restraints governed by the rule of reason, the fact finder considers "the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable" along with the "history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained" and then determines whether the particular restraint is one that suppresses competition or promotes it. *Bd. of Trade of City of Chi. v. United States*, 246 U.S. 231, 238 (1918).

pedagogic instrument." *Id.* Correctly understood, the "first rule [the per se rule], in light of the second [the rule of reason], *defines* certain classes of pernicious conduct as unreasonable." *Id.* Thus, the per se rule does not operate as any sort of evidentiary presumption because "the substantive rules of antitrust are no more rules of evidence than the substantive rules of any legal area." *Id.*

The claim that the per se rule removed consideration of reasonableness from the jury was thus mistaken. "'Reasonableness' must be viewed as a legal term, and not in its ordinary sense." *Id.* When "the Court describes conduct as *per se* unreasonable," it is does "no more than circumscribe the definition of 'reasonableness.'" *Id.* The Court concluded, appellants' "ingenious and novel attempt to trap the Court in its own rhetoric . . . must be, and is, rejected." *Id.*

Manufacturers' correctly understood and applied longstanding substantive rules of antitrust law when rejecting the due process challenge. The Sherman Act is "a common-law statute." *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007); *see also Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 59-60 (1911). "Congress . . . expected the courts to give shape to the statute's broad mandate by drawing on common law tradition." *Nat'l Soc'y of Prof. Eng'rs v. United States*, 435 U.S. 679, 688 (1978). Thus, the Supreme Court's "enforcement of the Sherman Act has required the Court to provide much of its substantive content." *Arizona v. Maricopa Cnty. Med. Soc'y*, 457 U.S. 332,

354 (1982).

The substantive rules of law articulated by the Supreme Court that govern Section 1 of the Sherman Act "have the same force and effect as any other statutory commands." *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 433 (1990). The Supreme Court has read the Act "to prohibit only unreasonable restraints of trade," *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988), and then defined unreasonableness by providing "two complementary categories of antitrust analysis"—the rule of reason and the per se rule—that may be used to assess challenged restraints. *Prof. Eng'rs*, 435 U.S. at 692. Reasonableness under the Sherman Act was never the same as reasonableness in a colloquial sense: The Supreme Court has never "open[ed] the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason." *Prof. Eng'rs*, 435 U.S. at 688. And not every restraint must be assessed through the inquiry prescribed by the rule of reason, *see supra* n.3. To the contrary, the Supreme Court has unequivocally stated that the "rule of reason does not govern all restraints." *Leegin*, 551 U.S. at 886. Certain "types of restraints" are categorically unreasonable—that is, they are "unlawful *per se*." *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997). The inquiry under the per se rule focuses on whether the challenged agreement falls within a class of agreements deemed unreasonable per se and eschews any individualized inquiry into the agreement's

effect on competition. *See Arizona v. Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 351-54 (1982). Thus, the government must prove beyond a reasonable doubt to the jury that an agreement subject to the per se rule existed (here, the charged bid-rigging conspiracy) and that the defendant knowingly joined it.

An agreement among competitors "to fix prices is the archetypal example of" a per se unlawful agreement.[4] *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 646-47 (1980). Over ninety years ago the Supreme Court rejected as a matter of law a challenge to a criminal price-fixing conviction based on an objection to a jury instruction embodying the per se rule. *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927). The Court explained that price fixing is always unreasonable because it contravenes the basic policy of the Sherman Act:

> Our view of what is a reasonable restraint of commerce is controlled by the recognized purpose of the Sherman Law itself. Whether this type of restraint is reasonable or not must be judged in part at least in the light of its effect on competition, for whatever difference of opinion there may be among economists as to the social and economic desirability of an unrestrained competitive system, it cannot be doubted that the Sherman Law and the judicial decisions interpreting it are based upon the assumption that the public interest is best protected from the evils of monopoly and price control by the maintenance of competition.

Id. at 397. *Manufacturers'* was correct to conclude that the per se rule is

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[4] Bid rigging "is a form of price-fixing." *Ramsay v. Vogel*, 970 F.2d 471, 474 (8th Cir. 1992); *accord, e.g.*, *United States v. Guthrie*, 814 F. Supp. 942, 950 (E.D. Wash. 1993), *aff'd*, 17 F.3d 397, 1994 WL 41106 (9th Cir. 1994) (unpublished table decision). As such, it "is *per se* illegal." *United States v. Green*, 592 F.3d 1057, 1068 (9th Cir. 2010) (collecting cases).

substantive law based upon *Trenton Potteries* and other Supreme Court decisions.

Casorso neglects to consider these foundational cases, making the false claim that the Supreme Court first adopted per se rules "in a line of mid-twentieth century . . . (mostly civil) cases." Mot. 10-11. The Supreme Court has traced the per se rule back as far as 1897, explaining in 1940 that "for over forty years this Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful per se under the Sherman Act." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 212-18 (1940) (discussing *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897); *United States v. Joint-Traffic Ass'n*, 171 U.S. 505 (1898)). And in two cases from the first half of the twentieth century, the Supreme Court affirmed criminal convictions for price fixing under the per se rule. *Socony-Vacuum*, 310 U.S. at 165, 254 (reversing court of appeals and reinstating criminal convictions); *Trenton Pottery*, 273 U.S. at 393-94, 407 (reversing court of appeals and reinstating criminal convictions).

Casorso is also wrong that the per se rule was adopted purely as a "matter of judicial economy" to decrease the costs of Sherman Act litigation by permitting courts to "presume that certain categories of conduct are unreasonable without further analysis." Mot. 11-12. As the Supreme Court has explained, it is error to assume "the *per se* rule . . . is only a rule of administrative convenience and efficiency." *Superior Court Trial Lawyers Ass'n*, 493 U.S. at 432 (internal

quotation omitted). While per se rules are "indeed justified in part by 'administrative convenience,' . . . *per se* rules also reflect a longstanding judgment that the prohibited practices by their nature have a substantial potential for impact on competition." *Id.* at 433 (internal quotation omitted). And the "*per se* rules . . . have the same force and effect as any other statutory commands." *Id.* at 432. Thus, "*per se* rules in antitrust law serve purposes analogous to *per se* restrictions upon, for example, stunt flying in congested areas or speeding." *Id.* at 433. While "[p]erhaps most violations of such rules actually cause no harm," the rules are "justified by the State's interest in protecting human life and property." *Id.* The rules are "supported . . . by the observation that every speeder and every stunt pilot poses some threat to the community" and that a "bad driver going slowly may be more dangerous than a good driver going quickly, but a good driver who obeys the law is safer still." *Id.* at 434.

"So it is with . . . price-fixing. Every such horizontal agreement among competitors poses some threat to the free market." *Id.* As the Supreme Court long ago explained in *Trenton Potteries*, the per se rule against price fixing was adopted because the "aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition." 273 U.S. at 397; *see Catalano*, 446 U.S. at 649 ("[T]he fact that a practice may turn out to be harmless in a particular set of circumstances will not prevent its being declared unlawful per se.").

Manufacturers' correctly articulated the place of per se rules in antitrust. Per se rules are substantive rules of law. They are categorical prohibitions on certain classes of conduct that eliminate some measure of competition and which longstanding experience has demonstrated should be categorically banned due to the "actual or potential threat to the central nervous system of the economy" that such practices pose. *Socony-Vacuum*, 310 U.S. at 224 n.59. Per se rules are not rules of evidence despite the fact some courts have used the phrase "conclusive presumption" as a "pedagogic instrument." *Manufacturers'*, 462 F.2d at 52.

II. No Decision Has Overruled or Undermined *Manufacturers'*

Casorso concedes that the issue he raises is controlled by this Court's "apparent ruling to the contrary in *Manufacturers' Association*." Mot. 8. His arguments that the Court should nonetheless disregard that decision are meritless. *Manufacturers'* has not been undermined by subsequent decisions of the Supreme Court and therefore remains binding on the merits panel. The Supreme Court has not abandoned the distinction between the per se rule and the rule of reason. Nor has it altered its due process jurisprudence in any relevant way since *Manufacturers'* was decided.

1. For over a century, the legality of an agreement challenged under Section 1 of the Sherman Act has been assessed under one of two substantive rules of law—the rule of reason or the per se rule. *See Supra* Part I. Carorso wrongly

contends that after *Manufacturers'* the Supreme Court abandoned these two rules of law and now "recognizes that there are some in-between cases, which came to be referred to as 'quick look' cases." Mot. 15.

Contrary to Casorso's assertion, the "quick look test" is not a third substantive rule of antitrust law but a specific form of "analysis under the rule of reason." *Cal. Dental Assoc. v. FTC*, 526 U.S. 756, 770 (1999). The quick look test arises from Supreme Court decisions recognizing that for some challenged practices, the "practice is not categorically unlawful in all or most of its manifestations" (and therefore not unreasonable per se), but a particular application of the practice may nonetheless be so obviously anticompetitive that "the rule of reason can . . . be applied in the twinkling of an eye." *NCAA v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 109 n.39 (1984). Thus, when a challenged agreement is facially anticompetitive and the defendant advances no credible countervailing procompetitive benefit, a "truncated rule of reason" analysis—a quick look—may become appropriate. *California ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118, 1134 (9th Cir. 2011); *see also Prof. Eng'rs*, 435 U.S. at 692-93 (condemning an agreement not to solicit or submit price information to prospective clients summarily under the rule of reason because "no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement"); *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 459 (1986) (condemning an

agreement not to submit dental x-rays to insurers in conjunction with claims forms summarily under the rule of reason because "[a]pplication of the Rule of Reason to these facts is not a matter of any great difficulty").

Casorso is equally mistaken when he claims that *California Dental* replaced the distinction between the per se rule and the rule of reason with a rule that requires antitrust cases to be "viewed on a spectrum," Mot. 15. To the contrary, *California Dental* itself "cautioned against the risk of misleading even in speaking of a 'spectrum' of adequate reasonableness analysis for passing upon antitrust claims." 526 U.S. at 780. Casorso's reliance on the Court's observation that the "'truth is that our categories of analysis of anticompetitive effect are less fixed than terms like "*per se*," "quick look," and "rule of reason" tend to make them appear,'" Mot. 15 (quoting *Cal. Dental*, 526 U.S. at 779), is unavailing. That observation reflects the variability among the amount of analysis required to condemn a restraint under each approach, but does not blur the substantive rules of antitrust law, let alone silently overrule the many Supreme Court holdings that the per se rule applies to certain types of restraints. Indeed, since *California Dental*, the Supreme Court's decisions demonstrate the continuing vitality of the per se rule as a substantive rule separate from the rule of reason. *See, e.g.*, *Leegin*, 551 U.S. at 885-86 ("Restraints that are per se unlawful include horizontal agreements among competitors to fix prices . . . ."); *Texaco v. Dagher*, 547 U.S. 1, 6 (2006).

2. Casorso's claim that *Manufacturers'* has been undermined by subsequent Supreme Court decisions establishing that "a defendant is entitled to a jury determination of every fact necessary for the imposition of punishment," Mot. 16, is also baseless. A criminal defendant's due process rights, as relevant to this case, were well-established at the time of, and were considered by the Court in, *Manufacturers'*.

Both Casorso and the defendants in *Manufacturers'* challenged the per se rule as an unconstitutional evidentiary presumption, *compare* Mot. 14-16 *with Manufacturers'*, 462 F.2d at 50, and by the time *Manufacturers'* was decided, the law on the constitutionality of presumptions had been set for at least twenty years. The Court's modern jurisprudence on the constitutionality of presumptions can be traced back at least to its 1952 *Morrisette* decision. 342 U.S. 246. There, a scrap iron collector claimed lack of criminal intent as a defense to his taking spent bomb casings that he believed were "abandoned" from a United States Air Force practice range. *Id.* at 247-48. But the district court refused to submit to the jury the question whether the defendant acted with the requisite criminal intent, holding instead that "felonious intent . . . is presumed by [the collector's] act" of taking the casings. *Id.* at 249. The Supreme Court reversed, holding that the use of a conclusive presumption on intent was unconstitutional because it "conflict[s] with the overriding presumption of innocence with which the law endows the accused

and which extends to every element of the crime." *Id.* at 275. From *Morissette* to the present, the Supreme Court has analyzed the constitutionality of presumptions the same way, asking whether the presumption relieves the government of the burden of proving every element of the charged offense. *See, e.g.*, *Carella v. California*, 491 U.S. 263, 266 (1989) (per curiam); *Sandstrom v. Montana*, 442 U.S. 510, 520-24 (1979) (applying *Morrisette*).

This Court correctly stated and applied the law on presumptions in *Manufacturers'*. *Manufacturers'* expressly recognized that the "use of presumptions in criminal law is limited by considerations of due process." 462 F.2d at 50. It explained that "since the accused is presumed innocent, he has the right to have each element of the crime charged submitted to the jury. Conclusive presumptions may not operate to deny this right." *Id.* The Court correctly held that the per se rule was consistent with these principles because the per se rule was a "substantive rule[] of antitrust" law and not a presumption or "even a rule of evidence." *Id.* at 52. Nowhere did the Court ground its decision on a mistaken belief that a conclusive presumption would not violate due process under the circumstances of the case.

The "*Apprendi* line of cases" did not change "the law of constitutional criminal procedure" as it relates to presumptions, despite Casorso's contrary claims, Mot. 15-16. *Apprendi v. New Jersey* did not "raise any question

concerning the State's power to manipulate the prosecutor's burden of proof by . . . relying on a presumption rather than evidence to establish an element of an offense." 530 U.S. 466, 475 (2000). Instead, *Apprendi* held that defendants have a right to have a jury decide beyond a reasonable doubt any fact that increases the penalty for a crime beyond the prescribed statutory maximum. *Id.* at 490; *see also Blakely v. Washington*, 542 U.S. 296, 301 (2004) (reaffirming that any fact that increases the penalty for a crime beyond the statutory maximum must be found by a jury). Nor did *United States v. Gaudin* alter the law on the constitutionality of presumptions; it held that a jury must find each element of a crime beyond a reasonable doubt even if that element involves a mixed question of law and fact. 515 U.S. 506, 512-13 (1995).

III. Casorso's Asserted Question Is Not Substantial Because It Has Been Decided by Controlling Precedent That This Court Is Exceedingly Unlikely to Overturn

It is doubtful that a substantial question could ever be raised where binding circuit precedent provides an answer adverse to the defendant making relief dependent on discretionary review by the en banc court. But even assuming in some extraordinary case that a question could be substantial despite controlling precedent, this case does not present such a question. Review en banc to overrule *Manufacturers'* is exceedingly unlikely because the decision is correct, *see supra* Part I, and does not conflict with any decision of the Supreme Court, this Court, or

any other court of appeals. Casorso's statement that "this case would make an exceptional candidate for *en banc* review," Mot. 18, is unpersuasive.

Ordinarily, the Court grants rehearing en banc only if it "is necessary to secure or maintain uniformity of the court's decisions" or "the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a). Neither reason applies here. The government is aware of no decision of this Court that conflicts with *Manufacturers'* and Casorso has identified none. *Manufacturers'* also does not conflict with any decisions of the Supreme Court. *See supra* Part II.

Nor does this case present a question of substantial importance. A case may present a question of substantial importance if "it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue." Fed. R. App. P. 35(b)(1)(B). The question presented here is the exact opposite. The Second, Third, Fifth, Seventh, and Eleventh Circuits are in accord with the Ninth Circuit that the per se rule does not create an unconstitutional presumption. *See supra* n.2. Casorso has therefore failed to make a showing "that the chance for reversal is substantial." *Handy*, 761 F.2d at 1280-81 (citation omitted).

CONCLUSION

The motion for bail pending appeal should be denied.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

1. This opposition complies with the page limitation in Ninth Circuit Rule 27-1(1)(d) because it does not exceed 20 pages (excluding items listed at Federal Rules of Appellate Procedure 27(a)(2)(B) and 32(f)). The opposition also complies with the word limitation based on the conversion in Ninth Circuit Rule 32-3(2) for briefs using propositionally spaced font because the word count for this brief excluding items listed at Federal Rules of Appellate Procedure 27(a)(2)(B) and 32(f) (4852) divided by 280 equals 17.33, which is less than the 20 page limit contained in Ninth Circuit Rule 27-1(1)(d).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2013 with 14-point Times New Roman font.

January 26, 2018

s/ Jonathan Lasken

Attorney for the
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CERTIFICATE OF SERVICE

I, Jonathan Lasken, hereby certify that on January 26, 2018, I electronically filed the foregoing Opening Brief for the United States of America with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the CM/ECF System.

I certify that all participants in these cases are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

January 26, 2018

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