IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff – Appellee,* v. JAVIER SANCHEZ, *Defendant – Appellant.*	))))))))	No. 17-10519 D. Ct. No. 4:14-CR-00580-PJH-2 (N.D. Cal., Oakland)
UNITED STATES OF AMERICA, *Plaintiff – Appellee,* v. GREGORY CASORSO, *Defendant – Appellant.*	))))))))	No. 17-10528 D. Ct. No. 4:14-CR-00580-PJH-3 (N.D. Cal., Oakland)
UNITED STATES OF AMERICA, *Plaintiff – Appellee,* v. MICHAEL MARR, *Defendant – Appellant.*	))))))))	No. 18-10113 D. Ct. No. 4:14-CR-00580-PJH-1 (N.D. Cal., Oakland)

OPPOSITION OF THE UNITED STATES TO APPELLANTS' MOTION FOR RELEASE PENDING FURTHER PROCEEDINGS ON THIS APPEAL

After the district court denied each of the defendants bail pending appeal, this Court likewise denied defendant Casorso bail pending appeal, finding that he

had “not shown that the appeal raises a ‘substantial question’ of law or fact” likely to result in reversal, a new trial, or a reduced sentence. Order Denying Bail, Feb. 14, 2018, ECF No. 11. Casorso’s co-defendants did not ask this Court for bail pending appeal at the time, but they join him now in asking this Court to reconsider its prior bail decision. Their motion does not identify any “points of law or fact which, in the opinion of the movant, the Court has overlooked or misunderstood.” 9th Cir. R. 27-10(a)(3). Nothing relevant in the law has changed since the prior motion for bail was denied, nor even in the half-century since this Court decided the precise question they raise on appeal. Instead, defendants’ motion is based solely on one inquiry during oral argument about appellate process, in which a member of the panel noted that “we’re bound by” circuit precedent that forecloses defendants’ argument. Oral Argument Video Recording at 17:59, *available at* https://www.youtube.com/watch?v=A08SxoE2U9w. Defendants’ motion does not raise a substantial question for purposes of bail pending appeal.

Under the Bail Reform Act of 1984, a criminal conviction is presumed correct, and “the burden is on the convicted defendant to overcome that presumption.” *United States v. Giancola*, 754 F.2d 898, 901 (11th Cir. 1985) (citing S. Rep. No. 98-225, at 26 (1983)). Thus, a defendant convicted and sentenced to a term of imprisonment “shall” be detained pending appeal unless a

judicial officer finds "by clear and convincing evidence that the person 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). A "substantial question" is "one of more substance than would be necessary to a finding that it was not frivolous." *United States v. Handy*, 761 F.2d 1279, 1283 (9th Cir. 1985) (quoting *Giancola*, 754 F.2d at 901). A question may be substantial because it is "novel," "has not been decided by controlling precedent," or is "fairly debatable." *Id.* at 1282 & n.2.

At oral argument, a member of the panel inquired about a "practical concern" that defendants could potentially be released from prison before the appeals process is complete.[1] Oral Argument Video Recording, *supra*, at 17:49-19:11. The panel member's query is no reason for this Court to reconsider its prior bail determination. The timing conditions of the normal appeals process are the same today as they were when this Court denied defendant Casorso's prior motion

[1] Defendants' expected release dates are June 27, 2019 (Casorso), September 22, 2019 (Sanchez), and August 7, 2020 (Marr).

for bail. Defendants did not ask to expedite this appeal, nor did they ask for initial en banc consideration in light of controlling circuit precedent—namely, *United States v. Manufacturers' Association of the Relocatable Building Industry*, 462 F.2d 49 (9th Cir. 1972). Moreover, even if the appeals process were to outlast their terms of incarceration, each defendant is subject to a 3-year term of supervised release that will keep their appeals from becoming moot. *See United States v. Verdin*, 243 F.3d 1174, 1177-79 (9th Cir. 2001).

In any event, a single query at oral argument cannot transform a foreclosed argument into a "substantial question." *Manufacturers* correctly holds that the per se rule is not an evidentiary presumption, but rather a distinct rule of substantive law in which "certain classes of conduct, such as price-fixing, are, without more, prohibited by the [Sherman] Act." 462 F.2d at 52. *Manufacturers* directly answers defendants' central question on appeal, and this Court is bound by it. Moreover, there is no basis for en banc or Supreme Court review because *Manufacturers* is consistent with every other circuit to have considered the question, *see* U.S. Br. 26 (citing five other circuits), and with Supreme Court precedent explaining the per se rule, *see* U.S. Br. 22-25 (citing *Ohio v. American Express*, 138 S. Ct. 2274 (2018), and *FTC v. SCTLA*, 493 U.S. 411 (1990)). *See generally* U.S. Br. 22-36. If a question is "substantial" even though this Court has already answered it—and answered it in accordance with every other circuit to

have addressed it—then it is hard to imagine an issue that would fail Section 3143(b)'s "substantial question" test. That is not the law, and defendants' renewed motion for bail pending appeal should be denied.

Respectfully submitted.

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January 18, 2019

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 proportionally spaced typeface because the word count for this opposition, excluding items listed at Federal Rules of Appellate Procedure 27(a)(2)(B) and 32(f), is 816, which divided by 280 is 2.9—*i.e.*, less than 20, which Ninth Circuit Rule 27-1(1)(d) designates as the page limit.

2. This opposition complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 27(d)(1)(E) because this opposition has been prepared in a proportionally spaced typeface using Microsoft Office Word 2013 with 14-point Times New Roman font.

January 18, 2019

/s/ *Adam D. Chandler*
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CERTIFICATE OF SERVICE

I, Adam D. Chandler, hereby certify that on January 18, 2019, I caused the foregoing Opposition of the United States of America to Appellants' Motion for Release Pending Further Proceedings on this Appeal to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system.

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

January 18, 2019

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