

No. 07-1311

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IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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UNITED STATES OF AMERICA,  
APPELLEE

v.

JOSEPH P. NACCHIO,  
APPELLANT

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

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OPPOSITION OF THE UNITED STATES TO NACCHIO'S RENEWED EMERGENCY APPLICATION  
FOR RELEASE PENDING SUPREME COURT RESOLUTION OF A PETITION FOR CERTIORARI

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DAVID M. GAOUILLE  
Acting United States Attorney  
District of Colorado

JAMES O. HEARTY  
KEVIN T. TRASKOS  
Assistant United States Attorneys  
District of Colorado

STEPHAN E. OESTREICHER, JR.  
Attorney  
Appellate Section, Criminal Division  
U.S. Department of Justice  
P.O. Box 899, Ben Franklin Station  
Washington, DC 20044-0899  
(202) 305-1081  
Stephan.Oestreicher@usdoj.gov

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Appellant Joseph P. Nacchio again asks this Court to grant him release pending resolution of his petition for a writ of certiorari even though the en banc Court already revoked his prior grant of release, which was based on essentially the same issues that he now cites in support of bail. Mot. 1-17.<sup>1</sup> Though the panel could have denied the request the first time Nacchio presented it, the panel permitted him to file his application in the district court for consideration in the first instance. Nacchio did so, but he raised no substantial new issues. The district court has now denied his request for continued release and has ordered him to report to prison on Tuesday, April 14, 2009. The panel should likewise deny his application because, as both the district court (explicitly) and the en banc Court (implicitly) have concluded, none of the claims raised in his recently-filed certiorari petition presents a “substantial question” “likely to result in \* \* \* reversal” under the stringent standards applicable at this stage of proceedings. 18 U.S.C. § 3143(b).

#### STATEMENT

In April 2007, Nacchio was convicted on 19 counts of insider trading. Pet. App. 2a, 13a, 109a. In July 2007, the district court sentenced him to 72 months of imprisonment and ordered that he be detained pending appeal. App. 1332, 1361. In August 2007, Nacchio filed in this Court an

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<sup>1</sup> Hereinafter, “Mot.” refers to Nacchio’s instant “Renewed Emergency Application for Release Pending Supreme Court Resolution of a Petition for Certiorari and Motion for a Stay of the District Court’s Order to Surrender.” “Ex.” refers to an exhibit attached to the renewed application. “Pet.” refers to Nacchio’s petition for a writ of certiorari, which was filed in the Supreme Court on March 20, 2009. The petition can be found in electronic form on the district court’s docket sheet (“Dkt.”) at Dkt. 556, and it is also attached as Ex. H to Nacchio’s renewed application for release. “Pet. App.” refers to the petition’s appendix, which contains this Court’s panel and en banc opinions, along with miscellaneous excerpts of transcripts, pleadings, and statutory and other provisions. “App.” refers to the 16-volume appendix that Nacchio filed with his panel briefs in this Court. Finally, “Order” refers to the district court’s April 7, 2009, opinion and order (Dkt. 562) denying the emergency motion for continued release (Dkt. 538) that Nacchio filed in the district court on March 11, 2009. The district court’s Order is attached as Ex. J to Nacchio’s renewed application.

application for bail pending appeal, arguing that the sufficiency of the evidence, the district court's jury instructions, and the exclusion of proposed opinion testimony from defense witness Daniel Fischel presented "substantial question[s]" under 18 U.S.C. § 3143(b). The panel granted the application and ordered expedited briefing and argument. In March 2008, the panel unanimously rejected Nacchio's sufficiency and jury-instruction claims (Pet. App. 128a-155a, 157a) but held, over a dissent, that the district court had abused its discretion in excluding Fischel's proposed opinions (Pet. App. 110a-127a). In July 2008, the Court granted rehearing en banc on issues relating solely to that exclusion, and it ordered extensive supplemental briefing. Pet. App. 169a-170a.

In February 2009, the en banc Court affirmed Nacchio's convictions. Pet. App. 1a-51a. The Court vacated the portions of the panel opinion relating to exclusion of Fischel's testimony (Pet. App. 3a-4a, 50a), but it also made clear that "[t]he remainder of the panel's decision"—including those portions rejecting Nacchio's sufficiency and jury-instruction claims—"remains in effect" (Pet. App. 4a, 50a). Finally, and significantly, the en banc Court revoked the panel's earlier grant of release pending appeal and lifted the stay of Nacchio's sentence. Pet. App. 50a-51a.

Despite the en banc Court's revocation of release, Nacchio sought continued release from the panel. On March 10, 2009, the panel denied his request "without prejudice to renewal subject to initial submission of [his] application" in the district court. 3/10/09 Order. Thus, on March 11, Nacchio filed an emergency motion for continued release in the district court, but he raised no issues that the en banc court did not already have before it when revoking the panel's earlier grant of release.<sup>2</sup> As in his August 2007 application, Nacchio's emergency motion argued that the sufficiency

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<sup>2</sup> In a separate motion, Nacchio cited medical concerns as a basis for a short stay of his surrender date. Dkt. 536 at 1-2. But he did not suggest that such concerns warranted release until the Supreme Court rules on his certiorari petition. In any event, because his medical concerns turned

of the evidence, the district court’s jury instructions, and the exclusion of proposed opinion testimony present “substantial question[s]” under 18 U.S.C. § 3143(b). Mot. Ex. C.

Nacchio was initially due to report to prison on March 23. The district court stayed that surrender date indefinitely so that it could fully consider Nacchio’s emergency motion in light of the issues raised in his March 20 certiorari petition. Mot. Ex. G. On April 7, in a 34-page order, the court denied the request for continued release, concluding (*inter alia*) that none of the issues presented in the petition qualifies as a “substantial question of law or fact” that “would likely result in reversal of his conviction[s]” or “a new trial.” Order 34 (citing 18 U.S.C. § 3143(b)). In a separate order (Dkt. 563), the court ordered Nacchio to report to prison on Tuesday, April 14.

Nacchio now renews his request for an order from this Court continuing his release. Mot. 1, 18. He also asks the Court “to stay the district court’s order requiring him to surrender by April 14 in order to permit this Court and, if necessary, the Supreme Court sufficient time to consider” his application for release. Mot. 2, 16-17. Finally, he says that, even if this Court denies his application for release, it should “grant a stay of [his] surrender date until noon one week after any denial of bail by the Supreme Court.” Mot. 2.

#### ARGUMENT

The Court should deny Nacchio’s renewed application for release, for two reasons. *First*, the en banc Court has already determined that Nacchio is not entitled to bail pending further review. The en banc Court’s revocation of the prior grant of release indicates that it saw nothing in the initial motion for release, in its own opinion, or in the reinstated portions of the panel opinion that would

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out to be not as grave as originally feared (*see* Order 6), the district court denied that motion (Dkt. 555), and Nacchio has not pursued the issue here.

satisfy the applicable standards. Nothing has changed since the en banc Court made that determination, and comity considerations strongly counsel deference to it. *See infra* Point I.

*Second*, even apart from comity considerations, the en banc Court’s bail determination was clearly correct on the merits. Nacchio has not shown, as he is required to do, that the Supreme Court would “likely” grant review and then decide the case in a way that would result in acquittal or a new trial. *See infra* Point II.

Because Nacchio has not shown his entitlement to relief under Section 3143(b), the panel should likewise deny his request (Mot. 2, 16-18) for a stay in his surrender date. Assuming the panel denies continued release, the district court, panel, and en banc court will all have agreed—after extensive review of a lengthy record—that Nacchio has failed to present a substantial question warranting bail pending resolution of his certiorari petition. Under those circumstances, Nacchio would have no realistic chance of securing release from the Supreme Court itself, and there would be no legal justification for allowing him to remain free. Finally, under no circumstances could there be any justification to stay his surrender date beyond the date on which the Supreme Court *denies* bail (Mot. 2, 17). *See infra* Point III.

**I. Respect For The En Banc Court’s Revocation Of Bail Should Foreclose Relief On Nacchio’s Current Application, Which Raises No New Ground For Release**

In revoking the panel’s earlier grant of release pending appeal (Pet. App. 50a), the en banc Court necessarily concluded that none of the issues Nacchio had presented on appeal—whether related to evidentiary sufficiency, the jury instructions, or the exclusion of Fischel’s proposed opinion testimony—was “substantial” enough to warrant continued release while Nacchio seeks Supreme Court review of those issues. Nacchio’s emergency motion in the district court, his instant

application in this Court, and his petition for certiorari do not raise any issue that the en banc Court, by implication, did not already have before it. This Court’s rules provide that “[t]he [C]ourt will not reconsider \* \* \* an en banc disposition.” 10th Cir. R. 35.1(C). But Nacchio’s application asks the Court to do just that. Taken together with Rule 35.1, comity and law-of-the-case principles foreclose, or at least counsel strongly against, upsetting the en banc Court’s bail disposition.

Traditional law-of-the-case doctrine “limits relitigation of an issue once it has been decided \* \* \* in the same case.” *McIlravy v. Kerr-McGee Coal Corp.*, 204 F.3d 1031, 1034 & n.1 (10th Cir. 2000) (quotations omitted). The doctrine serves a number of “compelling” purposes: it ensures “quick resolution of disputes by preventing continued re-argument of issues already decided”; it “avoid[s] \* \* \* wasteful expenditure of resources by courts and litigating parties”; it promotes “public confidence in the judiciary”; and it “discourag[es] panel shopping at the court of appeals level.” *Id.* at 1035 (quotations omitted); see *United States v. Alvarez*, 142 F.3d 1243, 1247 (10th Cir. 1998). The doctrine reflects courts’ “understandabl[e] reluctan[ce] to reopen a ruling once made,” and it is “augmented by comity concerns when one judge or court is asked to reconsider the ruling of a different judge or court.” 18B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE: JURISDICTION AND RELATED MATTERS § 4478, at 637 (2d ed. 2002).

These concerns apply with full force here, where the en banc Court revoked Nacchio’s bail after full consideration—by the en banc Court itself (as to exclusion of Fischel’s opinions) and by the panel (as to sufficiency and jury instructions)—of the issues Nacchio now presents, again, in support of release. To be sure, Rule 9.4 of this Court’s rules provides that “a decision of a motion for release” does not strictly “constitute[] law of the case.” 10th Cir. R. 9.4(A). But that rule does not give license to file successive applications. Instead, it recognizes that a preliminary legal

determination by a motions panel, on issues that a bail applicant claims are “substantial,” does not bind the merits panel when later deciding those issues. In any event, the rule certainly does not address a situation where, as here, the en banc Court has revoked a grant of release.<sup>3</sup> And there is good reason to doubt the rule’s applicability where Nacchio is asking a panel to reconsider the disposition of the full Court. 10th Cir. R. 35.1; *cf. Stewart v. Donges*, 20 F.3d 380, 381 (10th Cir. 1994) (where party presented to the panel “the same due process argument” he had already raised in a petition for rehearing or rehearing en banc that was denied, the panel held that it could not “overrule” the denial of the petition).

Even assuming a panel has discretion to reopen the en banc Court’s bail disposition, Nacchio has offered no good reason to do so. Ordinarily, the Court will “depart” from law-of-the-case principles only in the “narrow circumstances” where: (1) “the evidence in [the] subsequent [proceeding] is substantially different”; (2) “controlling authority has subsequently made a contrary decision of the law applicable to [the relevant] issue[]”; or (3) “the decision was clearly erroneous and would work a manifest injustice.” *Alvarez*, 142 F.3d at 1247 (quotation omitted). Nacchio has

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<sup>3</sup> It does not matter that the en banc Court did not *explicitly* conclude that each argument likely to be presented in any subsequent certiorari petition would fail the “substantial question” test. *See Rishell v. Jane Phillips Episcopal Mem’l Med. Ctr.*, 94 F.3d 1407, 1410 (10th Cir. 1996) (“[L]aw of the case applies to issues that are resolved implicitly as well as to those decided explicitly.”); *see also McIlravy*, 204 F.3d at 1036 (law-of-the-case doctrine applies to an issue “so closely related to the earlier [decision] [that] its resolution involves no additional consideration and so might have been resolved but unstated” (quotation omitted)). And it seems fair to say that the en banc Court in revoking bail implicitly rejected not only (a) any argument that Nacchio’s sufficiency, jury-instruction, and expert-testimony challenges are substantial (Pet. 17-32), but also (b) any argument that the en banc and panel opinions made miscellaneous record-bound errors warranting bail pending review for “summary reversal” (Pet. 32-35). In any case, even assuming the en banc Court’s disposition did not even implicitly address that latter category of purported errors, the prospect of summary reversal is beyond remote—because there were no such errors and because the Supreme Court does not sit to correct such errors even if there were—such that bail is unwarranted on the merits. *See infra* Point II.B.3.

not suggested, either in the district court or in his instant application, that (1) new evidence or (2) new law calls the en banc Court's bail disposition into question. And for the reasons set forth below, that disposition was correct, not (3) "clearly erroneous" or "manifest[ly] [u]njust[.]" *Ibid.*

## **II. Even Apart From Comity Considerations, Nacchio Cannot Show That The Supreme Court Would "Likely" Grant Certiorari And Reverse**

The standards Nacchio must meet in order to show that he is entitled to bail pending resolution of his certiorari petition are more stringent than he acknowledges (*infra* Part II.A), and the questions presented in the petition fall well short (*infra* Part II.B).

### **A. The Bail Reform Act requires Nacchio to show that the Supreme Court would "likely" grant certiorari and decide the case in a way that would result in acquittal or a new trial.**

Under Section 3143(b), Nacchio's convictions are presumed correct, so he carries the burden of demonstrating that his certiorari petition 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)(1)(B). Nacchio concedes (Mot. 8) that "[t]he inquiry at the certiorari stage is, of course, influenced by the discretionary nature of the Supreme Court's certiorari jurisdiction." That is a significant concession, because the Supreme Court receives up to 9,000 certiorari petitions per year and grants review in less than one percent of those cases. *See* <http://www.abanet.org/jd/ajc/calnewsletters/200708/article6.pdf>.

Citing *United States v. Affleck*, 765 F.2d 944 (10th Cir. 1985) (en banc), however, Nacchio suggests (Mot. 8) that his certiorari petition need only present a "close" question, not one over which the Supreme Court is "likel[y]" to grant review or on which it is "likel[y]" to base reversal. He is mistaken. *Affleck* did not address what constitutes a "substantial question" in the context of certiorari review, which differs greatly from the ordinary appeal context. ROBERT L. STERN ET AL.,

SUPREME COURT PRACTICE § 17.5, at 664 (7th ed. 1993) (“What may be substantial and likely to result in reversal in terms of invoking the mandatory appellate jurisdiction of a court of appeals may well be insubstantial and unlikely to warrant the Supreme Court’s plenary review when one seeks to invoke the discretionary jurisdiction of the Court.”).

The in-chambers Supreme Court opinions Nacchio cites (Mot. 8-9) only underscore the stringency of the standard in the certiorari context. In *Morison v. United States*, 486 U.S. 1306 (1988) (Rehnquist, C.J., in chambers), the Chief Justice made clear, in a passage Nacchio omits, that bail pending action on a certiorari petition is warranted only where the petition presents an issue “likely to result in reversal [or] an order for a new trial.” *Id.* at 1306 (quotation omitted). Of course, the only way one would be “likely” to obtain reversal from the Supreme Court is if one were “likely” to obtain review in the first place.

Relatedly, *Julian v. United States*, 463 U.S. 1308 (1983) (Rehnquist, J., in chambers), does not stand for the proposition that, “at most,” Nacchio must demonstrate only a “reasonable probability” that the Court would grant review (Mot. 9). *Julian* holds that, “at a minimum, a bail applicant must demonstrate a reasonable probability that four Justices are *likely* to vote to grant certiorari.” 463 U.S. at 1309 (emphases added). Also, as Nacchio points out (Mot. 9), *Julian* was decided before the Bail Reform Act was passed in 1984. Nacchio seems to think that the standards are now easier after the Act’s passage (*see* Mot. Ex. B at 7), but he has things backwards. *Affleck*, 765 F.2d at 950-951 (Section 3143(b), enacted as part of the Bail Reform Act, introduced “new restrictive rules” meant to be “more onerous than those under the former law” (quotation omitted)); *see* EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE § 17.15, at 886 (9th ed. 2007) (because the Act “made it considerably more difficult to secure bail,” pre-1984 “in-chambers decisions of

Circuit Justices dealing with such matters \* \* \* must be carefully reevaluated and applied in light of the 1984 changes”). In short, at the very *least* (*see Julian*, 463 U.S. at 1309), Nacchio must show that the Supreme Court is “likely” to grant review over one of the issues presented in his petition (*ibid.*), and that it is “likely” to decide the case on the merits in a way that would “result in reversal [or] an order for a new trial” (*Morison*, 486 U.S. at 1306 (quotation omitted)).

**B. Nacchio has not shown that the Supreme Court would “likely” grant certiorari and reverse on any of the questions presented in his petition.**

**1. The Supreme Court would not likely grant review and reverse on the question of whether this Court’s “materiality” and “instructional” analyses were correct.**

The first question presented in Nacchio’s certiorari petition (Pet. i) is actually a hybrid one involving two distinct issues: (a) whether the government’s materiality evidence was sufficient; and (b) whether the panel “erred by upholding” the district court’s materiality instruction.<sup>4</sup> Neither issue is likely to lead to a grant of certiorari, let alone serve as a basis for reversal.

a. The petition contends, as part of the first question presented, that “The Tenth Circuit’s Materiality Analysis Merits Review.” Pet. 17. The petition then challenges (*id.* at 17-26) the standard by which the panel assessed the sufficiency of the government’s materiality evidence, arguing that: “internal predictions and interim operating results are immaterial as a matter of law unless they establish a very strong likelihood that the company’s eventual reported performance will be substantially below what the market is expecting”; the First Circuit has held as much; this Court erred by failing to adhere to that heightened test of materiality; and the Supreme Court should grant review to resolve the alleged “conflict[.]” There are several problems with this chain of reasoning.

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<sup>4</sup> Nacchio faults the district court for “conflat[ing] the materiality question with the jury instructions question.” Mot. 13. But Nacchio’s own petition (Pet. i) presents the two issues as one.

*First*, it is well settled under *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), that materiality ultimately “depends on the significance the reasonable investor would place on the withheld \* \* \* information.” *Id.* at 240; see *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1090-1091 (1991) (applying the same standard to statements of opinion by corporate directors and commenting that the notion “[t]hat such statements may be materially significant raises no serious question”). As the panel recognized (Pet. App. 131a), the reasonable-investor inquiry is “fact-specific” (*Basic*, 485 U.S. at 240). Indeed, the Supreme Court has cautioned that the inquiry “requires delicate assessments of the inferences a ‘reasonable shareholder’ would draw from a given set of facts and the significance of those inferences to him.” *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976). “[T]hese assessments,” the Court has admonished, “are peculiarly ones for the trier of fact.” *Ibid.* For that reason alone, Nacchio will have a difficult time persuading the Supreme Court that the materiality issue *must* be taken from the jury unless his new proposed “stringent” test (Mot. 13)—a convoluted one requiring a “very strong likelihood” of performance being “substantially below” (or an “extreme departure” from) market expectations—has been met.

*Second*, the fact-bound nature of the materiality inquiry also undermines Nacchio’s claim of a circuit conflict. Contrary to Nacchio’s contentions (Pet. 17-19; Mot. 11-13), neither the First Circuit nor any other has abandoned the general materiality definition that the panel applied here. Instead, to the extent that the cases Nacchio cites actually address materiality,<sup>5</sup> the courts have applied *Basic*’s fact-specific test to the circumstances before them—unsurprisingly, with varying results and using different language turning on the particulars at hand—and have emphasized that

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<sup>5</sup> *But see, e.g., Wielgos v. Commonwealth Edison Co.*, 892 F.2d 509, 517 (7th Cir. 1989) (“Our case may be decided \* \* \* without regard to materiality.”).

any “bright-line rules” would be “contrary to *Basic*.” *E.g.*, *Shaw v. Digital Equip. Corp.*, 82 F.3d 1194, 1210 (1st Cir. 1996); *see Glassman v. Computervision Corp.*, 90 F.3d 617, 632 (1st Cir. 1996) (reaffirming *Shaw*’s “reject[ion]” of “any bright-line rule”); *Wielgos*, 892 F.2d at 517 (“*Basic* \* \* \* emphasizes that materiality is a ‘fact-specific’ inquiry.”); *Vaughn v. Teledyne, Inc.*, 628 F.2d 1214, 1221 (9th Cir. 1980) (“The test for materiality is whether there is a substantial likelihood that a reasonable investor would consider the fact important in making an investment decision.”).

The petition for certiorari quotes passing language in *Shaw* and *Glassman*, out of context, for the proposition that the First Circuit has adopted Nacchio’s proposed “extreme departure” standard. But *Shaw* observed merely that “the plaintiffs’ *allegation*” was that the company there had information “indicating some substantial likelihood that the quarter would turn out to be an extreme departure from publicly known trends and uncertainties,” and it found that that allegation sufficed to defeat judgment as a matter of law. 82 F.3d at 1211 (emphasis added). Thus, especially given its express “reject[ion]” of “any bright-line rule[s]” (*id.* at 1210), *Shaw* stands at most for the proposition that an “extreme departure” is *sufficient* to show materiality, not that the First Circuit was adopting a heightened materiality standard. Similarly, the court in *Glassman*, while quoting from *Shaw*, examined the evidence not under any new standard but under the basic language of materiality, assessing whether the company there had information that “would have predicted a *material* departure” in results. 90 F.3d at 632 (emphasis added).

Since *Shaw* and *Glassman* were decided, no circuit court (the First Circuit included) has made any reference to the “extreme departure” language that Nacchio touts, much less adopted it as a new, heightened materiality standard. Moreover, the SEC bulletin on which the certiorari petition itself relies (Pet. 21)—and which the panel incorporated into its “materiality analysis” at Nacchio’s

urging (Pet. App. 140a; Nacchio Panel Reply Br. 8)—postdates *Shaw* and *Glassman* and makes clear that the SEC has not approved any version of the heightened test that Nacchio proposes. SEC Staff Accounting Bulletin No. 99, 64 Fed. Reg. 45150, 45151 (Aug. 19, 1999) (under *Basic* and *TSC*, “an assessment of materiality requires that one views the facts in the context of the ‘surrounding circumstances’ \* \* \* or the ‘total mix’ of information”); see Pet. App. 140a (the panel took its “cue” from the SEC bulletin, which it cited for the proposition that numerical benchmarks and other “rule[s] of thumb” “do[] not end the inquiry”). Indeed, in *Basic* itself, the Supreme Court emphasized that “[c]ourts would do well to heed [the] advice” of the SEC’s “Advisory Committee on Corporate Disclosure,” which has “cautioned \* \* \* against administratively confining materiality to a rigid formula.” 485 U.S. at 236.

*Third*, Nacchio has failed to show that he “would be acquitted” (Mot. 13; see Pet. 19-20) under the standard he proposes. As the panel observed (Pet. App. 139a), “things *had* gone wrong” at Qwest by April 2001—*i.e.*, there *was* “a very strong likelihood” of performance being “substantially below” market expectations—inasmuch as Qwest had already failed to “crank up recurring growth” as planned (Gov’t Panel Br. 27); it was already “draining the pond” of one-time business, which ultimately could not close Qwest’s gaps (*ibid.*); and Nacchio well knew that if he disclosed that information to the market, the company’s stock price would fall dramatically (Pet. App. 143a).

b. The petition also contends, as part of the first question presented, that “The Tenth Circuit’s Instructional Analysis Conflicts With Other Circuits.” Pet. 26. It then claims (*id.* at 26-27) that the panel, unlike other courts, held that a district court’s instructions cannot provide the basis for reversal “unless [they] affirmatively ‘misstate[] the law.’” As the district court correctly

recognized (Order 19-20),<sup>6</sup> the panel made no such sweeping statement. To the contrary, the panel “review[ed] the instructions as a whole *de novo* to determine whether they accurately informed the jury of the governing law.” Pet. App. 132a. That is the same standard that other circuits apply.<sup>7</sup> It cannot even be thought that the panel applied that standard in a more obliging manner than other circuits do, because it went out of its way to emphasize (Pet. App. 132a) the “importan[ce] [of] giv[ing] a jury enough guidance to sort out material information from noise.” Nor did the panel hold that Nacchio’s failure to tender correct jury instructions “immunize[d] from scrutiny” the district court’s purported “failure to instruct the jury adequately” on materiality. Pet. 27. Rather, the panel closely reviewed the materiality instruction and concluded that it was correct and adequate. Pet. App. 134a (“The Supreme Court has said that the ‘significance the reasonable investor would place on the withheld \* \* \* information’ is the test for materiality, *Basic Inc.*, 485 U.S. at 240, \* \* \* and that is what the jury was instructed.”).

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<sup>6</sup> Nacchio dismisses the district court’s views out of hand, claiming that they are “not entitled to any weight.” Mot. 1. It is true that this Court’s “review of detention or release orders is plenary as to mixed questions of law and fact.” *United States v. Meyers*, 95 F.3d 1475, 1488-1489 (10th Cir. 1996). That does not mean, however, that the district court’s views should be categorically swept aside. If the panel had no use for those views, it presumably would not have denied Nacchio’s initial application “without prejudice to renewal subject to initial submission of [his] application” in the district court. 3/10/09 Order; see *Affleck*, 765 F.2d at 954 (noting that Fed. R. App. P. 9(b) “contemplates that the district court is in a better position to evaluate, in the first instance, the propriety of granting bail” and “aids our appellate function by requiring the district court to make written findings and conclusions”). And it is instructive that the district court—which is constrained to apply this Court’s precedents—found no sweeping new law in the panel and en banc opinions.

<sup>7</sup> See, e.g., *United States v. Keene*, 341 F.3d 78, 83 (1st Cir. 2003); *United States v. Tropeano*, 252 F.3d 653, 657-658 (2d Cir. 2001); *United States v. Johnstone*, 107 F.3d 200, 204 (3d Cir. 1997); *United States v. Rahman*, 83 F.3d 89, 92 (4th Cir. 1996); *United States v. Harrod*, 168 F.3d 887, 892 (6th Cir. 1999); *United States v. Thornton*, 539 F.3d 741, 745 (7th Cir. 2008); *United States v. Johnson*, 956 F.2d 197, 199 (9th Cir. 1992).

In any event, while Nacchio faults the district court for providing “inadequate guidance on materiality” (Pet. 27), he does not cite any case holding that a court must (1) give instructions that, like Nacchio’s, are affirmatively incorrect; or (2) give instructions that the defendant, like Nacchio, affirmatively opposes.

*First*, a “reasonable basis” instruction—the main “guidance” Nacchio faults the district court for failing to include (Pet. 19, 27; *see* Nacchio Panel Br. 32-38; Nacchio Reply Panel Br. 17-22)—would have been flat-out wrong. Reasonable-basis principles are rooted in SEC regulations (17 C.F.R. §§ 230.175 and 240.3b-6) that do not protect inside traders like Nacchio. The regulations provide a safe harbor for *companies*, not individual insiders. 17 C.F.R. §§ 230.175 and 240.3b-6 (both regulations are entitled: “Liability for certain statements by *issuers*” (emphasis added)). They protect *statements* filed with the SEC, not trading. *Ibid.* And they do not even address materiality. *Ibid.* The panel correctly recognized as much (Pet. App. 134a-137a), and Nacchio cites no case that holds to the contrary. Anyway, no reasonable-basis instruction could have aided Nacchio, because the regulations apply only to statements made “in good faith.” 17 C.F.R. §§ 230.175(a) and 240.3b-6(a). Here, the jury was instructed on good faith and necessarily found that Nacchio acted in bad faith. Accordingly, an instruction about a safe harbor that applies only in cases of good faith would have made no difference.

*Second*, though the relevant pages of the certiorari petition do not precisely identify what other “guidance” the jury should have been given (Pet. 26-28), Nacchio has suggested that, “at a minimum,” the district court “was required to instruct the jury on \* \* \* ‘probability/magnitude’ principles.” Nacchio Panel Br. 35; *see* Mot. 14 (the instructions “gave insufficient guidance” about “uncertain and predictive \* \* \* information”); *cf.* Pet. 18-21, 33-34. But he is ill-positioned to

complain about omission of those principles, given that he *opposed* their inclusion. Dkt. 424, Exhibit 6 at 4 (arguing that inclusion of instructions about “the probability [of] future events” and “the anticipated magnitude of the events” would “provide no assistance in the context of this case”).

**2. The Supreme Court would not likely grant review and reverse on the question of whether the district court abused its discretion in excluding Fischel’s opinion testimony under Rule 702.**

This Court has received hundreds of pages of briefing about exclusion of Fischel’s various opinions. The government thus limits its discussion here to the following two observations:

a. Nacchio claims to “accept[]” the en banc Court’s “characterization of the record.” Mot. 15. That being so, the question is whether the legal standards the en banc Court applied to the facts here actually differed from the standards endorsed by the Supreme Court or applied in other circuits. It was not. The certiorari petition points to cases in other circuits holding that a district court must have an adequate record to rule on reliability. Pet. 30-31. But the en banc Court did not hold that a court may rule on an inadequate record. It concluded instead that, on the *adequate* record of *this* case, Nacchio “failed to carry his evidentiary burden” in proving Fischel’s reliability. Pet. App. 37a n.17; *see id.* at 33a (“[I]t would be an abuse of discretion for the district court to unreasonably limit the evidence upon which it based its *Daubert* decision, [but] that did not happen here.” (citing *Dodge v. Cotter Corp.*, 328 F.3d 1212, 1228 (10th Cir. 2003))); *see id.* at 33a n.16 (“[T]he record \* \* \* was fully adequate for the court to examine the reliability issue[.]”). Similarly, the petition cites cases from the Third Circuit finding an abuse of discretion where the proponent was denied an opportunity to present reliability evidence. Pet. 30 & n.9. The en banc Court did not hold, however, that courts need not afford such an opportunity. It concluded instead that, under the circumstances of *this* case, “Nacchio had an adequate opportunity”(Pet. App. 30a) but failed to avail

himself of it (*id.* at 33a). If there were any doubt about whether the en banc Court thought it was establishing a standard at odds with that in other circuits, one need only review the Court’s fact-by-fact distinction of the cited cases. *Id.* at 43a-45a; *see id.* at 40a n.18 (“Other circuits are in accord with the Tenth Circuit view.”). In sum, Nacchio’s assertion that “other circuits \* \* \* would have come out differently” (Mot. 16)—which is the same as saying the decision misapplied agreed-upon standards to the facts here—is just not good enough. Sup. Ct. R. 10 (the writ “is rarely granted when the asserted error consists of \* \* \* the misapplication of a properly stated rule of law”).

Moreover, the en banc decision is a modest one. It does not “transform[] \* \* \* expert practice.” Pet. 31. As the district court observed (Order 31), the decision does not “endorse the procedure used by the trial court to the exclusion of other methods of making Rule 702 determinations.” It merely holds—consistent with the “considerable leeway” the Supreme Court affords district judges on matters of expert procedure (*Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999))—that the trial judge did not abuse his discretion on these particular facts.

b. Moreover, even if Nacchio were to obtain review, and even if the Supreme Court were to reverse the en banc Court’s decision about reliability, Nacchio would not necessarily be entitled to a new trial. As reflected in the en banc court’s grant of rehearing (Pet. App. 3a n.1), a limited remand on reliability might be required, which could again lead to exclusion on reliability grounds. Also, the trial judge excluded Fischel’s opinions on several grounds independent of Rule 702(2)’s reliability requirement. *See* Gov’t En Banc Br. 17-18, 43-51. The en banc Court vacated the panel’s opinion as to those other grounds (Pet. App. 3a-4a, 18a-19a n.9, 50a), and so even a Supreme Court victory for Nacchio on the reliability issue would require consideration of them. If Nacchio were unsuccessful as to any of those grounds, his convictions would stand. His convictions

would likewise stand if exclusion (even assuming it was improper on *all* of the grounds the trial judge proffered) were found to be harmless.<sup>8</sup> These procedural hurdles do not only make the reliability issue an unattractive candidate for certiorari. *See* GRESSMAN, *supra*, § 4.4(f), at 248 (certiorari is rarely granted where “resolution of [an alleged] conflict [will] not change the result reached below”). They also make a new trial “[un]likely” under Section 3143(b) and therefore preclude bail on the Rule 702 issue.

**3. The Supreme Court would not likely grant review and summarily reverse based on Nacchio’s miscellaneous claims of record-bound error.**

The petition (Pet. 32-35) raises various fact-bound claims of error that Nacchio believes warrant the extraordinary remedy of summary reversal. He says (a) the en banc Court erroneously failed to consider whether the district court’s exercise of discretion under Rule 702 was “infected by its erroneous belief” that Nacchio violated Fed. R. Crim. P. 16 (Pet. 32-33); (b) the en banc Court misapplied *Sprint/United Management Co. v. Mendelsohn*, 128 S. Ct. 1140 (2008) (Pet. 33); (c) the panel ignored his argument that the difficulties Qwest faced in 2001 were too uncertain to be material (Pet. 33-34; *see* Mot. 10-11 n.4); and (d) the en banc Court so misconstrued the record that “basic fairness” dictates reversal (Pet. 34-35). Each of these claims is factually and legally unfounded, and none warrants the Supreme Court’s discretionary review. *See United States v. Johnston*, 268 U.S. 220, 227 (1925) (“We do not grant \* \* \* certiorari to review evidence and discuss specific facts.”).

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<sup>8</sup> Nacchio says that “this Court has already rejected the government’s additional arguments” for exclusion. Mot. 11. He also chides the district court for purportedly failing to “recall” that “this Court already conducted a harmless error analysis.” *Id.* at 16. But he is referring to vacated portions of the panel opinion that no longer have any legal effect. Pet. App. 18a n.9 (“the panel’s holdings regarding admissibility of Professor Fischel’s expert testimony” “have no decisional force”).

a. The en banc Court made clear its belief that the trial judge’s exclusion of Fischel’s opinions under Rule 702 was independent of the judge’s Rule 16 ruling. *See, e.g.*, Pet. App. 16a (“when read in context,” the judge’s references to “disclosures” “do not indicate that the exclusion was based upon allegedly incorrect Rule 16 grounds”). Under the en banc Court’s view, then, the decision to exclude Fischel’s opinions under Rule 702 was necessarily *not* “infected” (Pet. 32) by the judge’s Rule 16 ruling — even assuming *arguendo* the Rule 16 ruling were incorrect, which is an issue the en banc Court explicitly and properly declined to decide. Pet. App. 46a (“[A]cting with prudent judicial restraint, we simply have elected not to opine on the Rule 16 issue.”).

b. The en banc Court’s citation of *Sprint* does not make this case a candidate for review. Contrary to Nacchio’s assertion (Pet. 33), the Court’s decision did not rest on an alleged “presum[ption]” under *Sprint*. Rather, the en banc Court found that the “natural” reading of the trial judge’s decision “indicates that the basis for the ruling” was Rule 702. Pet. App. 20a.

c. The panel did not ignore Nacchio’s contention that the difficulties Qwest faced in 2001 were too uncertain to be material. To the contrary, the panel stated that it did “not disregard th[is] other component of the materiality analysis [concerning] the probability that [an] event will occur.” Pet. App. 144a n.10. The panel’s accompanying analysis confirms that it understood, addressed, and rejected Nacchio’s claim that Qwest’s problems were insufficiently concrete risks. Pet. App. 139a (addressing the theory that by April 2001, “Nacchio had learned that \* \* \* things *had* gone wrong or at least were much more likely to” (emphasis in original)); *id.* at 141a-144a (analyzing the materiality of the “risk” in Qwest’s targets).

d. Nacchio’s certiorari petition suggests (Pet. 34) that the Supreme Court should summarily reverse based in whole or in part on the “zeal[ous]” “[un]fairness” of the en banc Court.

Hardly. As the district court recognized in denying Nacchio's request for continued release (Order 29-32), the en banc Court, after careful review of a lengthy record, did nothing more than make a fact-dependent, narrow determination that Nacchio was given ample opportunity, and failed, to show the reliability of certain opinion testimony. That determination finds plenty of support in the record. It is not the stuff of certiorari review (*see supra* Point II.B.2), let alone summary reversal.

**III. Because Nacchio Has Not Shown That He Is Entitled To Relief Under 18 U.S.C. § 3143(b), He Is Not Entitled To A Stay In His Surrender Date**

Assuming this Court denies Nacchio's request for continued release, there is no sound reason to stay his surrender date. Nacchio has not made the showing required by Section 3143(b). That means, quite simply, that he should be incarcerated without delay, because his "conviction is presumed correct." *United States v. Valera-Elizondo*, 761 F.2d 1020, 1023 (5th Cir. 1985); *see* S. Rep. 98-225, 1984 U.S.C.C.A.N. 3182, 3209 (under Bail Reform Act of 1984, "[o]nce guilt of a crime has been established in a court of law, there is no reason to favor release pending imposition of sentence or appeal"). In any event, where a district court and court of appeals panel (not to mention a court sitting en banc) have refused bail, the odds of obtaining release from the Supreme Court are minimal or nil, and properly so. *See* GRESSMAN, *supra*, § 17.15, at 884-885 & n.64 ("[T]here is not a single published in-chambers opinion under the Bail Reform Act of 1984 granting bail. Nor does there appear to be any significant practice of Circuit Justices granting bail under that Act without opinion. \* \* \* Indeed, it is not clear that a Circuit Justice has *ever* granted an application for bail since the Bail Reform Act of 1984." (emphasis in original)); *see also Julian*, 463 U.S. at 1309 (even before Bail Reform Act, bail applications to the Supreme Court would be "granted only in extraordinary circumstances, especially where \* \* \* the lower court[s] refused" bail (quotation

omitted)); *DiCandia v. United States*, 78 S. Ct. 361, 362 (1958) (Harlan, J., in chambers) (even before Bail Reform Act, “decisions of the courts below disallowing bail after conviction [were] entitled to the highest respect by a circuit justice”).

Finally, under no circumstance would it be proper to stay Nacchio’s surrender date “until noon one week after any *denial* of bail by the Supreme Court.” Mot. 2 (emphasis added). Nacchio has not even begun to explain why he should get a windfall week of freedom after (A) he has already received what amounts to a 21-month stay; and (B) courts at every level have made a final determination that he should be detained.

#### CONCLUSION

Nacchio’s renewed application for release pending resolution of his certiorari petition should be denied. His request for a stay of his surrender date of April 14, 2009, should likewise be denied.

Respectfully submitted,

**DAVID M. GAUETTE**  
**Acting United States Attorney**  
**District of Colorado**

**JAMES O. HEARTY**  
**KEVIN T. TRASKOS**  
**Assistant United States Attorneys**  
**District of Colorado**

**s/ Stephan E. Oestreicher, Jr.**  
**STEPHAN E. OESTREICHER, JR.**  
**Attorney**  
**Appellate Section, Criminal Division**  
**U.S. Department of Justice**  
**P.O. Box 899, Ben Franklin Station**  
**Washington, DC 20044-0899**  
**(202) 305-1081**  
**Stephan.Oestreicher@usdoj.gov**

**CERTIFICATE OF SERVICE**

In accordance with Fed. R. App. P. 25(d), the undersigned counsel certifies that the foregoing Opposition of the United States to Nacchio's Renewed Emergency Application for Release Pending Supreme Court Resolution of a Petition for Certiorari was this day delivered by overnight mail and electronic mail to the Court and to counsel for appellant Joseph P. Nacchio at the following addresses:

Maureen E. Mahoney  
Everett C. Johnson, Jr.  
J. Scott Ballenger  
Nathan H. Seltzer  
LATHAM & WATKINS LLP  
555 11th Street, N.W.  
Suite 1000  
Washington, DC 20004  
(202) 637-2200  
Maureen.Mahoney@lw.com  
Everett.Johnson@lw.com  
Scott.Ballenger@lw.com  
Nathan.Seltzer@lw.com

Sean M. Berkowitz  
LATHAM & WATKINS LLP  
Sears Tower  
Suite 5800  
Chicago, IL 60606  
(312) 876-7700  
Sean.Berkowitz@lw.com

**DATED:           APRIL 10, 2009**

**s/ Stephan E. Oestreicher, Jr.**  
**STEPHAN E. OESTREICHER, JR.**  
**Appellate Section, Criminal Division**  
**U.S. Department of Justice**  
**P.O. Box 899, Ben Franklin Station**  
**Washington, DC 20044-0899**  
**(202) 305-1081**  
**Stephan.Oestreicher@usdoj.gov**

**CERTIFICATE OF DIGITAL SUBMISSION**

The undersigned counsel certifies that:

(1) there were no privacy redactions to be made in the foregoing Opposition of the United States to Nacchio's Renewed Emergency Application for Release Pending Supreme Court Resolution of a Petition for Certiorari, and the Digital Form version e-mailed to the Court on this day is an exact copy of the written document that was sent to the Clerk; and

(2) the Digital Form version of the Opposition e-mailed to the Court on this day has been scanned for viruses with McAfee Virus Scan, version 8.7.0.570, which is continuously updated, and according to that program is free of viruses.

**s/ Stephan E. Oestreicher, Jr.**  
**STEPHAN E. OESTREICHER, JR.**  
**Appellate Section, Criminal Division**  
**U.S. Department of Justice**  
**P.O. Box 899, Ben Franklin Station**  
**Washington, DC 20044-0899**  
**(202) 305-1081**  
**Stephan.Oestreicher@usdoj.gov**