No. 08A1063
(No. 08-876)

IN THE

Supreme Court of the United States

CONRAD M. BLACK, JOHN A. BOULTBEE, AND
MARK S. KIPNIS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

REPLY MEMORANDUM IN SUPPORT OF APPLICATION OF PETITIONER BLACK FOR BAIL PENDING APPEAL

MIGUEL A. ESTRADA
Counsel of Record
DAVID DEBOLD
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, D.C. 20036
(202) 955-8500

Counsel for Petitioner Black

INTRODUCTION

The government concedes that the three fraud counts on which Mr. Black was convicted "satisf[y] the standards in 18 U.S.C. 3143(b)(1)" for release on bail pending appeal. Bail Opp. 9 n.2. It could hardly do otherwise, because the government *consented* to minimal bail for co-petitioner Boultbee, who (for good measure) was permitted to return to his home in Canada where he now sits. The sole basis for the government's different posture on Mr. Black is that he was also convicted of a single count of obstruction of justice. The government devotes 27 convoluted pages to why it *hopes* the obstruction conviction not only will ultimately survive this Court's reversal of the fraud counts but also will result in a years-long sentence.

But the reality is quite simple: It is the government's burden to establish that the error in the fraud counts was harmless as to the obstruction conviction, and the government cannot carry that burden. The obstruction conviction rests on Mr. Black's removal of his personal effects from his Toronto office at the end of his tenancy, and a jury that knew that Mr. Black was *not* involved in a fraud, combined with the stipulation that he had already turned over to the government more than 100,000 pages of documents, would not vote to convict him of "corruptly" endeavoring to deprive the grand jury of evidence regarding his *innocent* conduct. Indeed, *even if* the obstruction conviction were to survive this Court's reversal of the fraud counts, it cannot reasonably be disputed that the sentence that was imposed on this count was based on the *fraud* counts, and that a Guidelines sentence for obstruction alone could be 15 months or lower—less than Mr. Black has *already* served. Contrary to the government's arguments, *none* of this requires this Court to engage in detailed Guidelines analyses more appropriate for district courts. Nor,

had a bail application been presented to it, would the district court be required to address these premature sentencing arguments either, though, as it happens, the government's sentencing contentions are also spectacularly wrong on their own merits. What is *currently* relevant about any future re-sentencing is also simple: prosecutors do not sentence defendants. Courts do. The government's wishful thinking about how it might leverage any possible future sentence does not control the bail analysis.

Unable to meet Mr. Black's application on the merits, the government's proffers a veritable Potemkin Village of supposed waiver rules that, the government asserts, require the conclusion that Mr. Black waived potential challenges to his obstruction conviction *and* sentence. In fact, the government now contends that even after *all* fraud convictions are reversed (and assuming incorrectly that the obstruction conviction could survive), the district judge would be *powerless* to re-calculate the offense level for the obstruction count—an offense level that was calculated *based on* those invalidated convictions. Mr. Black is stuck with that earlier calculation, so the government says, because at his sentencing hearing he did not ask the district court to predict what his obstruction sentence might be in the event the fraud counts were ultimately reversed. It would be too kind to call this argument frivolous. No court has *ever* intimated that a defendant must invite the sentencing judge to engage in a series of "what if," hypothetical calculations as to Guidelines that are, in any event, merely advisory, before the judge determines the appropriate punishment for the counts on which a sentence *will be* imposed. Were it not for the government's penchant for non-textual waiver rules, *see*, *e.g.*, Pet. i (presenting the question whether waiver follows from a decision not to acquiesce in the government's suggestion to use a prejudicial special verdict form), it would be remarkable that the government

even *suggests* such a burdensome and meaningless rule. The waiver rule that *does* exist, and that actually applies here because it is found in *this* Court's *written* rules, is Rule 15.2. This rule is acknowledged, almost in passing, only at the very end of the government's quite lengthy submission. It dooms the government's contentions. The government made several (meritless) arguments in its brief in opposition to certiorari to the effect that any error in the fraud counts had no injurious effect on the verdicts, but it elected *not* to take issue with petitioner's argument that such error would require reversal of the *obstruction* conviction. The government is stuck with its tactical choice.

There is no valid reason to deprive Mr. Black of his freedom pending appeal. He will have served, with credit for his good behavior, 32 months of his sentence by the end of the October 2009 Term. He has served 18 months of that sentence already. If the obstruction count survives (indeed, even if all counts survive), Mr. Black still must (and will) serve the full sentence that results from these proceedings. Mr. Black therefore is the only party who bears the risk of a "wrong" decision on his bail application—the only party in this case who stands to suffer *irreparable* harm. And the risk of such harm is significant: more likely than not a denial of bail pending appeal will subject him to substantial unjust imprisonment. Like co-petitioner Boultbee, Mr. Black should be given his liberty while their appeals are pending. Accordingly, this Court should order that Mr. Black be released on bail subject to conditions to be prescribed by the district court in keeping with those to which the government already agreed for co-petitioner Boultbee.

ARGUMENT

The Government Has Failed To Advance A Legitimate Reason For This Court To Deny Mr. Black The Same Relief As Co-Petitioner Boultbee

1. An uninformed reader of the government's opposition to Mr. Black's bail application would be forgiven for missing the fact that this Court has *already* granted certiorari. Such a reader also might not realize that, in consenting to bail for Mr. Boultbee, the government conceded that this joint appeal raises substantial questions likely to result in at least a new trial on all three fraud counts of conviction. The reason a reader might be confused is that a number of arguments and assertions of "fact" essential to the government's opposition to bail for Mr. Black could *only* be credited if certiorari had *not* already been granted *and* if the government had *not* already conceded that Mr. Boultbee meets the same statutory requirements for bail on appeal. Not the least of these inconsistencies between the government's proposed view of things and the grant of bail to Mr. Boultbee is the government's repeated incantation that the jury must have concluded that Mr. Boultbee, Mr. Black and the others schemed to defraud Hollinger of its money (not just of a right to petitioners' honest services). Bail Opp. 3-4, 5-7, 17, 23 & n.6. The government offered this up as one of its main reasons to deny certiorari. But there being no way—and no *effort*—to explain away cooperating witness David Radler's unambiguous testimony that the non-competition-agreement payments had already been approved as part of a much larger management fee, the government's opposition to certiorari failed.

With the vitality of the fraud convictions off the table, the government's bail opposition boils down to two propositions, each of which it must establish: (1) that the obstruction conviction will remain intact even if the jury was misled into believing that the conduct being investigated and prosecuted was a federal crime; and (2) that on a re-

sentencing the term of imprisonment for obstruction alone would substantially exceed the time that Mr. Black has already served. Both propositions are wrong for several independent reasons, and it is neither necessary nor appropriate to require Mr. Black to start back in the district court yet again with his arguments for why bail is warranted.

2. Only as an afterthought does the government deny it waived its new argument—that the instructional error is harmless as to the obstruction conviction. Bail Opp. 24-25. In its brief in opposition to certiorari, the government argued at great length that the error was harmless as to three of the counts and therefore did not warrant review. But for a fourth count of conviction—one that the government insists was just as serious as the other three combined (Bail Opp. 18)—it made no such claim. The petition clearly contended that if this Court rejects the Seventh Circuit's rulings on the questions presented, the judgment must be vacated as to every count, not just the fraud counts. Pet. 11 n.7. Therefore, the factual statements in the petition regarding the obstruction conviction, and the legal statements as to the prejudicial effect of the erroneous honest services instruction on that conviction, are "statement[s] of fact and law in the petition" that "bear[] on what issues properly would be before the Court if certiorari were granted." Sup. Ct. R. 15.2; *see also* Bail Opp. 25 (conceding that rule applies to statements that bear on the "scope of the questions presented"). As a result, the government had "an obligation to the Court to point out in the brief in opposition, *and not later*, any perceived misstatement" of such law or fact "in the petition." Sup. Ct. R. 15.2 (emphasis added). The government having failed to do so, its objection should be "deemed waived." *Id.*

The government insists Rule 15.2 does not apply. It contends that, unlike the issues in the Rule 15.2 cases cited in the bail application, an issue as to the scope of the

counts that would be vacated as a result of a favorable ruling on Mr. Black's questions presented does not "directly address[] the scope or resolution of the issues on which the Court granted certiorari." Bail Opp. 26. That is incorrect. Earlier this Term, the Court applied Rule 15.2 to the same types of issues. In *Carcieri v. Salazar*, 129 S. Ct. 1058 (2009), the factual assertion in the petition (whether a particular tribe was under federal jurisdiction in 1934) could have been resolved by the Court or left to the lower courts on remand in the event petitioners prevailed on the merits. And the question presented (whether the Secretary of the Interior could take land into trust for tribes that were not under federal jurisdiction in 1934) could have been decided without the Court ruling on that factual assertion. This Court nonetheless determined, under Rule 15.2, that because the government did not challenge the statement found in the petition the statement should be accepted as true for purposes of the case. *Id.* at 1068. Likewise, the effect on the obstruction count of a favorable ruling on the questions presented addresses the scope of those questions, even though this Court could decide them before addressing that effect. Bail should be granted based on the government's waiver alone.

3. Even if the government *had* preserved its argument that the obstruction count survives independent of reversals on the fraud counts, the argument is implausible. To convict Mr. Black of obstructing justice, the jury needed to find that he acted with a "corrupt" intent when he helped safeguard his personal papers and other documents on the eve of being evicted from his office—that is, the jury had to find that he acted with the improper purpose of subverting or undermining the fact-finding functions of those investigating conduct at Hollinger. Pet. App. 242a-43a. But as the district court noted in finding that Mr. Black is not a flight risk, it was clear throughout the trial that Mr. Black

never shied away from defending the propriety of his conduct. Bail Appl., Ex. F at 46. Had the jury known that Mr. Black's protestations of innocence were not false bravado—that he had, in fact, committed *no* fraud—the prospects for conviction would have been, at the very least, highly doubtful.[1] The government, having conceded the likelihood of reversal on the fraud counts, cannot seriously contend it would be any easier for it to establish that the error was harmless as to the obstruction count.

In its effort to confront this form of prejudice as well as the prejudicial spillover from the voluminous evidence the government paraded before the jury as supposed proof of fraud, the government contends that the *same* evidence of fraud would have been admissible to prove a corrupt intent on the obstruction count. Bail Opp. 22-23. It posits that the outcome of a trial based on such proofs would have been the same, because the district court and court of appeals each reasoned that there was ample evidence of fraud by theft of money—a theory the government and the court of appeals believed so central to the verdicts that both confidently proclaimed that the jury would have acquitted had it found no fraud by theft. *Id.* at 23. The fatal flaw in these arguments is that the govern-

---

[1] As noted earlier, the obstruction count was based entirely on Mr. Black's decision to move 13 boxes containing personal effects and documents from his Toronto office to his nearby home, in advance of the end of his tenancy. The government suggests that he moved the boxes—on May 20, 2005—in response to the fact that "on approximately May 19, 2005, the SEC sought additional documents from [him]." Bail Opp. 4. But the evidence at trial established that Mr. Black learned of the SEC's interest in additional documents only *after* he had moved them. His lawyers testified that *they* learned of the request in a call from the SEC on May 19 but *did not* communicate the request to Mr. Black until the week of May 23. C.A. Supp. App. 424-28. This was the SEC's *sixth* request for documents (*id.* at 150-51 (stipulation of parties)), and there was no dispute that Mr. Black had *fully* complied with all previous SEC requests—producing over 112,000 pages of documents (*id.*). In complying with those request, Mr. Black gave several lawyers the full run of the same Toronto office—for a week at a time—*and* his residence. *Id.* at 485-96. It was, at the very least, a close question whether Mr. Black harbored a corrupt intent in moving his property from office to home.

ment *already* pressed them as reasons to deny certiorari; petitioners replied that, to the contrary, the only plausible explanation for the guilty verdicts is that the jury rejected the theft theory and credited the honest services theory now under review; this Court then *granted* review; and the government has now agreed with Mr. Boultbee that the fraud counts *will* likely be reversed if petitioners prevail on the questions presented (in other words, the government concedes that any error was, in all likelihood, *not* harmless). Because the government has already lost this battle (and for very good reason), it cannot resurrect its "surely the jury must have found fraud by theft" refrain as reason to deny bail to Mr. Black and Mr. Black alone.[2]

---

[2] The government notes differences between the sets of charges on which the jury convicted and those on which it acquitted. Bail Opp. 23 n.6. That is—and always has been—precisely petitioners' point. *See, e.g.*, Pet. C.A. Reply Br. 4 (found at Exh. G to Bail Opp.). The jury acquitted on all counts where non-compete agreements were entered into contemporaneously with the sale of newspapers. The government had argued that even if Hollinger knew of the existence of these non-compete agreements, the agreements really were unnecessary and worthless because the buyers of the newspapers did not care whether non-compete agreements were included in the deals. Once the jury concluded that the agreements were *not* shams, the instructions led it to reject *both* the theft *and* honest services theories for those counts. But the fraud counts on which the jury did convict were different. On counts 1 and 6, for example, even though the testimony from the government's own star witness established no intent to steal from Hollinger (because the payments had already been approved in the form of management fees), the honest services theory allowed the jury to convict if it concluded that—in contrast with the transactions for the acquitted counts—petitioners were not "entirely fair" with Hollinger in how they went about recharacterizing and describing the payments. Pet. App. 236a-237a.

The problem is that the jury was not *further* required to find, under the honest-services instructions urged by the government, that petitioners contemplated *any* economic or other property harm to Hollinger when they recharacterized the nature of the fee to pursue a lawful tax benefit in Canada. Whether the jury needed to find that petitioners contemplated such harm to those to whom they owed any duty of honest services—an issue on which the circuits are deeply split—is, of course, the primary question on which this Court has granted review.

4. Even indulging the government in its erroneous view that the obstruction conviction could survive reversal of all three mail fraud convictions, Mr. Black still meets the second independent ground for bail pending appeal: *i.e.*, it is likely his sentence for an obstruction conviction alone would be shorter than the sentence he has *already* served. Despite its novel sentencing waiver argument, the government concedes that upon reversal of the fraud convictions, Mr. Black will be entitled to resentencing on his obstruction conviction, "because his sentence on that count was based in part on grouping with the fraud counts under the Sentencing Guidelines." Bail Opp. 11. The district court's previous calculation of the offense level for the obstruction count (a level of 24) had *no* effect on the sentence, because under the grouping rules the higher offense level for the fraud counts alone determined the Guidelines range. Bail Opp. 12; Bail Appl. 12-13. The government also agrees that Mr. Black would be entitled to a redetermination of that range at a hypothesized resentencing for the obstruction count alone—and indeed it agrees that Mr. Black would need to be sentenced under a *lower* advisory Guidelines range for obstruction if the fraud counts are vacated. Bail Opp. 12-13. The government contends nonetheless that the district court would be *barred* at such a resentencing from revising its earlier offense level calculation for the obstruction count—a calculation that was completely controlled by the offense level calculation for the three fraud convictions that, under this hypothetical exercise, are assumed to have been *vacated*. The government has not a whit of support for such a bizarre result.

The government's position rests principally on a heretofore unheard of waiver rule, one that would require a sentencing judge to decide whether the advisory Guideline range might change (and, if so, how) under *each* of multiple permutations that flow from

the possible affirmance and reversal of separate counts of conviction following an appeal that the defendant, as of the time of sentencing, may or may not have decided to pursue, based on issues that he may or may not have already identified. The government insists that because Mr. Black did not ask the district court to engage in this mindless exercise, any resentencing for obstruction that is occasioned by a decision to vacate the fraud counts must proceed as if the fraud counts had not been vacated after all. Its *sole* citation for this proposition is a case that *undermines* it.

In *United States v. Parker*, 25 F.3d 442 (7th Cir. 1994), the court of appeals reversed and remanded for limited relief—imposition of sentence without an enhancement for obstruction of justice. *Id.* at 449 (agreeing with the defendant that his false statements at the plea hearing were immaterial). On remand, the district court redetermined the range by subtracting the enhancement, but it declined to consider other sentencing issues that were unaffected by that change and could have been raised at the original sentencing. On a second appeal, the court of appeals held that the defendant was properly barred from raising his stale issues on remand. *United States v. Parker*, 101 F.3d 527, 528 (7th Cir. 1996) (Posner, J.). Assuming the waiver rule articulated in *Parker* still applies now that the Guidelines are merely advisory, it would permit Mr. Black to raise any issue at a resentencing that "aris[es] out of the correction" of errors on appeal. *Id.* As explained in the bail application, and as described further below, a recalculation of the obstruction offense level after the fraud counts are vacated would "arise out of" the reversal of those counts, because the original obstruction offense level was based on the calculation for the vacated counts.

As for having adequately raised the issue on appeal, Mr. Black clearly alerted the court of appeals that a reversal of the fraud counts would require a recalculation of the obstruction sentence. The government quotes a snippet of Mr. Black's appeal brief. The passage, read in full, shows that the court of appeals had all it needed to fashion the appropriate relief on remand.

> The sentences in this case were interlinked in such a fashion that a reversal on any count or counts would require resentencing on the remaining count(s). For example, if the APC count is reversed, that would change the loss calculation dramatically for all defendants and might also alter some of the enhancements applied by the district court in calculating the guideline recommendation, including Black's obstruction conviction. And if Black's obstruction conviction is reversed, it would alter the guidelines calculation for the fraud offenses. Therefore, in the event of a partial affirmance and partial reversal, defendants request that the case be remanded for resentencing.

Pet. C.A. Br. 100. Nothing more was required. *Cf.* Bail Opp. 26 (complaining that litigants should not "be forced to clutter" their filings with objections "that have little or no bearing on the issues that the Court has been asked to address").

As the government acknowledges, the offense level that the probation department calculated for the obstruction count was governed by a cross-reference to the Accessory After the Fact Guideline, USSG § 2X3.1, because the cross-reference produced an offense level higher than the one otherwise applicable under the obstruction Guideline. Bail Opp. 15. The Accessory After the Fact Guideline calls for a base offense level six levels lower than the offense level "for the criminal offense" whose investigation or prosecution the defendant obstructed. USSG § 2J1.2(c)(1) & cmt. (backg'd.) (explaining that the cross-reference is designed to deal with, *inter alia,* those situations where the obstructive conduct is "part of an effort to avoid punishment for an offense that the defendant has committed"); USSG § 2X3.1(a)(1). Thus, the probation department recom-

mended, and the district court found, that the offense level based on the obstruction conviction should simply be six levels lower than the calculation for the fraud counts of which Mr. Black was *convicted*—or level 22.

The government argues that the cross-reference would still apply even if Mr. Black no longer stood convicted of the criminal offense whose investigation and prosecution he purportedly obstructed. Bail Opp. 14-16. This Court need not pre-judge whether the district court could (or would) still apply the cross-reference once it is determined that Mr. Black was convicted of non-criminal conduct. Even assuming the cross-reference *can* apply to the obstruction of investigations and prosecutions where the conduct in question turns out to be innocent, the cross-reference is nonetheless calibrated to the "serious[ness]" of the offense being investigated or prosecuted. USSG § 2J1.2(c)(1), cmt. (backg'd). Thus, any sentence calculation under the cross-reference to accessory after the fact to a fraud scheme would include enhancements for aggravating circumstances, if any, that actually *were present* in connection with the fraud and that the defendant *knew of*, not for aggravating circumstances that the government imagined or merely suspected.[3] *See also* USSG § 2X3.1, cmt. (n.1) (directing the court, in calculating the Guideline for

---

[3] For this reason, the fact that Mr. Radler received a 29-month sentence is beside the point. Mr. Radler's sentence was based on his plea of guilty to defrauding Hollinger of more than $32 million, and his sentence calculation was premised on a loss of that size. Plea Agreement (DE 21), at 23, *United States v. Radler*, No. 05cr727 (N.D. Ill. Sept. 20, 2005) (containing stipulation that Radler's loss amount was greater than $20,000,000). The question here is the sentence Mr. Black will likely receive based on no fraud conviction at all. In any event, Mr. Radler, whom the government agreed to let serve his sentence in Canada, was released from prison after serving only 10 months. (The Canadian Parole Board decision granting Mr. Radler his release is available at www.straight.com/files/pdf/DavidRadler_parole.pdf.)

the underlying offense, to apply any specific offense characteristics "that were known, or reasonably should have been known, by the defendant").

The district court applied precisely this limitation to the cross-reference calculation after the jury acquitted Mr. Black of nine counts of fraud. It based the offense level for the obstruction count on a loss figure of $6.1 million rather than the more than $60 million in loss that would have applied under convictions on all fraud counts. Bail Opp., Exh. E at 19 & 41. If the remaining fraud counts are vacated, the 14-level enhancement for $6.1 million in loss would no longer apply, and the cross reference would not produce an offense level greater than the base offense level under the obstruction Guideline.[4]

5. The government's final position is that Mr. Black should be forced to delay his release by returning to the district court to argue that this Court's grant of certiorari warrants bail pending appeal. Even the government concedes, however, that there is no reason for such a disposition if—as we establish above—the obstruction conviction is likely to be reversed along with the fraud convictions. That is a legal issues; the Court is better positioned to apply its own waiver rule; and, as noted earlier, the lower courts' reasons for denying bail are inconsistent with this Court's decision to grant certiorari.

The district court also is no better positioned than this Court to decide whether Mr. Black qualifies for bail on the independent ground that a sentence for obstruction

---

[4] It is notable, given the government's newly proposed doctrine of sentencing-related waiver, that the government did not challenge the district court's decision to tie the obstruction count offense level to the amount of loss from only those fraud counts on which the jury convicted, and not from all counts that were part of the government's investigation and prosecution. *See* Government's Consolidated Objections to Presentence Investigation Reports (DE 950), No. 05cr727 (N.D. Ill Nov. 27, 2007) (identifying only objections to the Guideline calculation under Section 2B1.1 for the fraud offenses, and not mentioning the obstruction count calculation); Bail Opp., Exh. E at 41-42 (no objection tendered to court's obstruction count offense level determination).

alone would likely be no greater than the sentence Mr. Black has already served. The arguments on this point are also grounded in legal principles—straightforward applications of the Guidelines based on how this Court would likely resolve the questions presented.[5] An appellate court determining whether to grant release pending appeal need not force the sentencing judge to engage in a full dress rehearsal of a potential resentencing. In addition, if the sentencing judge were presented with the bail application after a grant of certiorari, she would need to speculate on the determinations that were implicit in this Court's decision to grant review. That is a particularly knotty task when the grant of certiorari involves a repudiation of an earlier decision by the lower court. The district judge would need to conclude, without the benefit of guidance from this Court, that its previous views on the harmlessness of the instructional error were wrong in some significant respect, and then try to guess how that should affect the sentence for obstruction.

Now that this Court has granted review, Mr. Black's bail arguments are properly presented and decided here. The government's proposed approach would threaten to prolong his detention unduly by sending the matter back to the district court yet again with

---

[5] Moreover, Mr. Black's calculation of the sentence for an obstruction conviction is overly conservative. The base offense level of 14 is derived from the Guidelines currently in effect. At sentencing for *each* of the defendants in this case the district judge uniformly, in a determination the government did not appeal, applied the version of the Guidelines in effect at the time of the conduct at issue in the fraud counts, expressly concluding that the earlier version produces sentences sufficient, but not greater than necessary, to achieve the purposes of punishment. Bail Opp., Exh. E at 10-16. The version of the Guidelines Manual that she applied calls for a base offense level of 12 for obstruction (corresponding to a range of *10 – 16 months*). Given the statutory directive to avoid unwarranted sentence disparity, *see* 18 U.S.C. § 3553(a)(6), the district judge would have good reason to apply the same version at a resentencing. After all, she concluded, in applying the earlier version before, that "it is only appropriate that the same version of the Guidelines should apply to Mr. Black as it does to Mr. Radler." Bail Opp, Exh. E at 15.

possible appeals by the government to the court of appeals and back to this Court a second time. Such an outcome is neither useful nor fair.

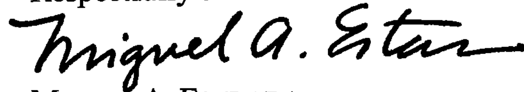
* * *

Contrary to the government's position, there is nothing extraordinary about granting bail under these circumstances. *See* Bail Opp. 10. Indeed, not a single case cited by the government deals with an application for bond *after* certiorari was granted. In each of the cases it cites, the Court denied bail *because* it concluded that a grant of certiorari was too unlikely. *See, e.g., Julian v. United States*, 463 U.S. 1308, 1309 (1983) (Rehnquist, Circuit Justice) (denying bail because the applicant did not demonstrate "a reasonable probability that four Justices [were] likely to vote to grant certiorari"); *McGee v. Alaska*, 463 U.S. 1339, 1340 (1983) (Rehnquist, Circuit Justice) (denying bail because "the probability of this Court's granting certiorari to review the judgment of the Court of Appeals approaches, if it does not actually reach, zero"); *Beame v. Friends of the Earth*, 434 U.S. 1310, 1315 (1977) (Marshall, Circuit Justice) (denying a stay request because the balance of irreparable harm was not in applicants' favor, nor was there a likelihood that four Justices would vote to grant certiorari). What *is* unusual, if not extraordinary, is the government's opposition to bail after it has conceded the appropriateness of release for the co-petitioner, and where its arguments have been waived or are inconsistent with the fact that certiorari was granted.

CONCLUSION

For the reasons stated above and in the bail application, the Court should enter an order granting bail pending appeal and refer the matter to the district court for the sole purpose of setting, within 7 days of this Court's order, the appropriate amount of security for Mr. Black's bond, in light of the government's agreement as to co-petitioner Boultbee.

Respectfully submitted.



MIGUEL A. ESTRADA
Counsel of Record
DAVID DEBOLD
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, D.C. 20036
(202) 955-8500

Counsel for Petitioner Black

June 9, 2009