No. 19-1037

IN THE
Supreme Court of the United States

SOK BUN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Fourth Circuit

REPLY ON PETITION FOR CERTIORARI

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The Government concedes that the question presented concerns an issue upon which there is a long-standing division of authority. Its attempts to diminish the significance of the conflict are unavailing. Contrary to the Government's claims, this case is an appropriate vehicle for the Court to resolve the question presented. Finally, although irrelevant to the decision of whether or not to grant the petition for certiorari, the Government's arguments in defense of the Fourth Circuit's decision are wrong.

The petition for a writ of certiorari should be granted.

I. AS THE GOVERNMENT CONCEDES, THERE IS A REAL AND ENTRENCHED CONFLICT ON THIS IMPORTANT ISSUE.

As the Government acknowledges, the courts of appeals are in disagreement on whether a defendant is unable to stand trial under the IAD while the trial court is adjudicating his pretrial motions. *See* BIO 14. In its decision below, the Fourth Circuit joined the position of the First, Second, Seventh, Ninth, and D.C. Circuits in a conflict that has existed for decades and has shown no sign of resolving itself. The fact that the Fifth and Sixth Circuits—which have taken the contrary view—first adopted their positions years ago does not weaken the extent of the conflict. Indeed, the decades of entrenched disagreement on this question make the Government's speculation that those courts might revisit the question particularly far-fetched.

Likewise, the Government attempts to undermine the significance of the Fifth and Sixth Circuit's decisions by observing that neither case concerned a federal prosecution that involved both the IAD *and* the application of the Speedy Trial Act. *Id.* at 14, 18. But that is a distinction without a difference. What is relevant here is that the decisions addressed the meaning of the phrase "unable to stand trial" under the IAD. They need not have arisen in the exact same context as other cases to nonetheless create binding law on the question presented. The Government suggests, in essence, that the Fifth and Sixth Circuit's decisions were not fully informed, because the cases did not foreground the potential relationship between the IAD and the Speedy Trial Act. But of course the Speedy Trial Act was on the books when the Fifth and Sixth Circuit reached their decisions. The fact that neither court referenced it suggests that they did not consider it relevant to the merits of their analysis—*not* that they somehow failed to squarely address the question presented.

The Government's assertion that this question is not sufficiently significant or recurring is also incorrect. *Id.* at 19-20. While the issue may not arise with great frequency (a fact which is difficult to determine in the absence of data), the issue does, obviously, arise. And when it does, it can be extremely significant for the Government and defendant alike. Specifically, the outcome of the question presented may mean the difference between a conviction and a dismissal with prejudice. And every defendant subject to the IAD would benefit from a clear understanding of the legal effect of filing pretrial motions on his ability to obtain a

prompt trial. As the Government notes, the issue will not necessarily be outcome determinative in every case in which it arises. But few issues are, and the hypothetical that other legal issues might predominate in any individual case has never been a reason for this Court to deny a petition for certiorari. And of course, the Government has no answer to the simple fact that currently there are different rules in different jurisdictions. There is no reason in law or logic for that to be the case. Indeed, there is significant unfairness.

II. THIS CASE IS AN APPROPRIATE VEHICLE FOR THE COURT TO RESOLVE THE QUESTION PRESENTED.

The Government claims that the question presented is not outcome determinative here. BIO 20-21. But that is no reason to deny the petition. Most important, the Fourth Circuit directly ruled on the question presented, holding "if both continuances granted under the [Speedy Trial Act] and time spent adjudicating a defendant's pretrial motions stop the [IAD's] 120-day clock," then Bun's trial was timely. Pet. App. 17a. This case thus squarely presents the question for this Court's resolution and is an appropriate vehicle for this Court to resolve a decades-old split. The Fourth Circuit can determine the effect of the Court's ruling in the first instance on remand.

III. THE FOURTH CIRCUIT'S DECISION IS INCORRECT.

Finally, and tellingly, the Government spends a significant portion of its argument claiming the decision below as correct. Even if the Government were right,

that would be no reason to deny the petition here. But the Government is incorrect in any event.

1. Acknowledging that the IAD does not define the phrase "unable to stand trial," the Government suggests that this phrase covers any time period where it is impossible or impractical for trial to proceed. BIO 10. That reading is unsupported by the plain text of the IAD. The IAD asks whether the defendant *is able to stand trial*, not whether the trial court *is ready to hold trial*. The focus is on the defendant's readiness and ability, not the court's. In other words, if the condition is external to the defendant, it does not render him unable to stand trial.

The Government resists this reading, insisting that any circumstance that makes it impossible or impractical to move forward with the trial is one that renders the defendant "unable to stand trial." *See id.* But that interpretation leads to unnatural results. Imagine a defendant who is ready to stand trial, but whose judge goes on a six-month vacation. On the Government's logic, the defendant is unable to stand trial during that time. But that would be a perverse result in light of the rest of the IAD's text and goals. Similarly, a defendant is not unable to stand trial while the prosecution has motions pending—even if those motions must be resolved before trial can begin. Not every circumstance that would prevent a trial from occurring at that very moment is one that renders the defendant unable to stand trial within the meaning of the IAD.

Centering the inquiry on the defendant's readiness and ability, as the text of the IAD requires, explains why a defendant is able to stand trial even while he has

motions pending before the court. The court may—indeed, likely does—have more to do before trial can begin. *See id.* (citing Fed. R. Crim. P. 12(d)). But the defendant is ready and able to proceed. (Even assuming a defendant is "unable to stand trial" while a motion is pending that the court must resolve before trial, the Government's reading would create too sweeping of a rule. Some motions need not be resolved before trial—it is in no way accurate to say that a defendant is unable to stand trial while such a motion is pending.)

The Government points to two lines of cases where, in its view, conditions external to the defendant have rendered him "unable to stand trial" within the meaning of the IAD. *See id.* at 12. But those cases do not undermine petitioners' reading of the statute. In the first line of cases, two courts of appeals and one state high court have held that a defendant is unable to stand trial in one jurisdiction while he is required to be present in another for pending criminal proceedings. *See id.* (citing *United States v. Neal*, 564 F.3d 1351, 1354 (8th Cir. 2009) (per curiam), *cert. denied*, 558 U.S. 1093 (2009); *United States v. Collins*, 90 F.3d 1420, 1427 (9th Cir. 1996); *United States v. Roy*, 830 F.2d 628, 635 (7th Cir. 1987), *cert. denied*, 484 U.S. 1068 (1988); *State v. Pair*, 5 A.3d 1090, 1101 (Md. 2010)). That is wholly unsurprising. In that situation, a defendant is unable, within the plain meaning of the word, to stand trial in the first jurisdiction because he is physically elsewhere. In the second line of cases, one court of appeals has held (and one has stated in dicta) that a defendant is unable to stand trial during an interlocutory appeal. *See id.* (citing *United States v. Winters*, 600 F.3d 963, 970-71 (8th Cir. 2010), *cert. denied*, 562 U.S. 908 (2010); *United States v.*

Roy, 771 F.2d 54, 59 (2d Cir. 1985), *cert. denied*, 475 U.S. 1110 (1986)). That too is reasonable. Assuming both lines of cases are correct, what they suggest is that a defendant is "unable to stand trial" while he is litigating in a different jurisdiction. In both scenarios, the defendant is effectively unavailable while he litigates elsewhere—hardly an "external" condition.

Of course, the quintessential examples of "internal" conditions that would prevent a defendant from standing trial are physical or mental impairments. As the Government points out, the IAD as a whole does not apply to "any person who is adjudged to be mentally ill." 18 U.S.C. App. 2, § 2, art. VI(b); *see* BIO 11. But that does not mean that the provision at issue covers only physical incapacitation. More likely, it reaches a host of situations that relate to the defendant's readiness to stand trial, including physical health, mental impairment that has not risen to the level of being "adjudged," and—as described above—the obligation to be present at criminal proceedings in other jurisdictions. The fact that that the IAD excludes a subset of mentally ill defendants does not render petitioners' reading unreasonable.

2. The Government also argues that the Fourth Circuit's decision satisfies the general principle that statutes that share the same subject matter and a common purpose should be harmonized when possible. BIO 10-11. This too is unpersuasive. To the extent that the IAD and Speedy Trial Act do share a subject matter and common purpose—which they do only at a relatively high level of generality—they still can only be harmonized "where the text permits." *See* BIO 11 (quoting *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701,

738-39 (1989) (Scalia, J., concurring in part and concurring in judgment)). As described above, however, a defendant is not "unable to stand trial" while his motions are pending. (It is also worth noting that the Government's interpretation does not fully harmonize the IAD and the Speedy Trial Act, as the Speedy Trial Act excludes "delay resulting from any pretrial motion," 18 U.S.C. § 3161(h)(1)(D), not just defense motions.)

Of course, a subsequently enacted statute can be useful in understanding an earlier one. But the relationship between these two statutes is not as straightforward as the Government suggests. In the Government's view, "the Speedy Trial Act's more detailed tolling provisions are a window into the sorts of events that are contemplated by the IADA's more succinct reference to circumstances in which a defendant is 'unable to stand trial.'" BIO 13. But the differences between the Speedy Trial Act and the IAD's tolling provisions suggest two different regimes. As the Second Circuit has pointed out, "[t]he two acts contain differing time limits, use differing language, and have differing events to trigger the relevant clocks." *United States v. Cephas*, 937 F.2d 816, 818 (2d Cir. 1991), *cert. denied*, 502 U.S. 1037 (1992). There is no reason to assume that Congress nevertheless wanted the scope of the tolling provision to be the same.

Nor is the Government correct to suggest that the Court's decisions in *United States v. Mauro*, 436 U.S. 340 (1978), and *New York v. Hill*, 528 U.S. 110 (2000), are irrelevant here. BIO 13-14. Of course, those cases do not answer the question presented. But they do illuminate two key points: First, it is wrong to assume

that, because the IAD and Speedy Trial Act both address how quickly a trial must occur, their provisions are always in alignment. *See Hill*, 528 U.S. at 117 n.2. And second, the plain text of the IAD must govern. *See Mauro*, 436 U.S. at 356 n.24.

The Government fears that, if the minority rule prevails, defendants might abuse the system, filing frivolous and time-consuming motions with the trial court in the hopes of pushing their trial past the statutory time limit. *See* BIO 14. But the Government does not address the risk that, under the majority rule, prosecutors and trial courts could just as well delay responding to or ruling on motions. Both risks are theoretically possible. The key difference is that, if a defendant does act in bad faith, the trial court has the tools to control the situation, by—for example—granting a continuance. If the court or prosecutor acts in bad faith, however, the defendant has no recourse.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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