No. 19-587

In the Supreme Court of the United States

JIMMIE EUGENE WHITE, II, PETITIONER,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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The government's opposition does not dispute that the magistrate judge made *no* independent ends-of-justice finding. Rather, the judge issued a summary order neither citing the Speedy Trial Act's ends-of-justice provision, nor including "explicit language of incorporation" referencing the parties' continuance stipulation. App.33a. Instead, using what the government concedes "is a different standard than in § 3161(h)(7)," Gov't C.A.Br.51, the magistrate concluded "*good cause exists* to extend the complaint and preliminary hearing" and excluded plea bargaining time. App.37a (emphasis added). According to the government—and the Sixth Circuit—judges *need never* trouble themselves to recite the Act's statutory ends-of-justice standard, or even reference the parties' recitation of that standard. Rather, Congress's "goal of * * * a system in which cases are disposed of with reasonable dispatch, whether or not prosecutors or defendants perceive speed as being in their interest," Federal Judicial Center, *Legislative History of Title I of the Speedy Trial Act of 1974*, at 34 (1980), is amply satisfied if someone staples the parties' stipulation to a summary order reciting the wrong standard.

There are two problems with that position. First, "the [Speedy Trial] Act requires *express findings*" by the district court, in which "*it* must set forth, in the record * * * , *its* reasons for finding that the ends of justice are served and they outweigh other interests." *Zedner* v. *United States*, 547 U.S. 489, 506 (2006) (emphases added). In twenty-two labored pages, the government identifies nothing the magistrate judge said "express[ly]" about *its* "reasons for finding that the ends of justice are served and they outweigh other interests." *Id.* The Sixth Circuit's toothless rule hardly constitutes "procedural strictness." *Id.* at 509.

Second, most courts of appeals squarely (and correctly) prohibit what the Sixth Circuit blessed. The government's efforts to reconcile facially contradictory decisions, Opp.17-21, cannot conceal that petitioner's claims would prevail in most courts. For example, the Tenth Circuit condemned as "particularly sparse" and legally insufficient a better record than here—a defense continuance motion reciting the statutory ends-of-justice standard together with an order citing the motion and reciting in conclusory fashion that the ends of justice served by delay outweighed interests in a speedy trial. *United States* v. *Toombs*, 574 F.3d 1262, 1269-70 (2008). The court emphasized a trial court must "make clear on the record its reasons for granting an ends-of-justice continuance" and "must * * * explain[]" its reasoning. *Id.* at 1273-74. The undeniable disparities in implementing the Speedy Trial Act undermine Congress's purpose of "introduc[ing] a measure of uniformity" to pretrial practices. 120 Cong. Rec. 41,781 (1974).

The government does not dispute that this issue arises constantly. It scarcely could. Although Congress thought the ends-of-justice exception would be "rarely used," Richard S. Frase, *The Speedy Trial Act of 1974*, 43 U. Chi. L. Rev. 667, 698 (1976) (quoting S. Rep. No. 1021, 93d Cong., 2d Sess. 39 (1974)), it has become "one of the most frequently used [Speedy Trial Act] provisions." Shon Hopwood, *The Not So Speedy Trial Act*, 89 Wash. L. Rev. 709, 744 (2014). Indeed, the exception is potentially at issue in every federal criminal prosecution. And this Court's regular review of Speedy Trial Act cases underscores the Act's central importance to the criminal justice system. See, *e.g.*, *United States* v. *Tinklenberg*, 563 U.S. 647 (2011); *Bloate* v. *United States*, 559 U.S. 196 (2010); *Zedner*, *supra*. This Court's review is urgently needed.

A. The Sixth Circuit's Decision Is Wrong

Zedner is as clear as the text of the Speedy Trial Act itself. Section 3161(h)(7) "requires express findings" made on the record by the trial court setting out "*its* reasons for finding that the ends of justice are served" and that the interests served by delay outweigh the public's and the defendant's interests in a speedy trial. *Zedner*, 547 U.S. at 506-507 (emphasis added). "Simply accept[ing]" the parties' stipulation and excluding the resulting delay violates the requirement for "independent findings." *United States* v. *Lloyd*, 125 F.3d 1263, 1268 (9th Cir. 1997).

Unable to contest that bedrock point, the government changes the subject. It first argues the Act "does not require a judge to articulate basic facts when those facts are * * * set forth in a motion for continuance." Opp.13. But that conflates facts underlying a continuance request with ends-of-justice *findings*. Although a district court need not repeat every fact a motion recites, it must *explain* "why the mere occurrence of the event identified by the party * * * results in the need for additional time." *United States* v. *Larson*, 627 F.3d 1198, 1204 (10th Cir. 2010). "The ends-of-justice determination is * * * entrusted to the court, not the parties, and the parties cannot stipulate to its satisfaction." *Parisi* v. *United States*, 529 F.3d 134, 140 (2d Cir. 2008). The ends-of-justice provision requires "procedural strictness," *Zedner*, 547 U.S. at 509, for a reason: Requiring a court to explicitly analyze each continuance request on the record imposes discipline and accountability, preventing parties from using § 3161(h)(7) as a self-help mechanism to obtain delays. Congress was concerned "[t]he court, defendant, his attorney, and the prosecutor may have different reasons not to push for trial," 120 Cong. Rec. 41,618 (1974) (statement of Sen. Ervin), and

without the discipline of explicit, on-the-record findings, "the public interest to have speedy trials" would cede to the wishes of "parties involved in the criminal process." *Ibid.*

The government next argues there is no Speedy Trial Act violation where the trial court "grants [a] [continuance] motion based on [the parties'] representations, and the district court later confirms that rationale in ruling on the motion to dismiss." Opp.14. That argument is misplaced here. The district court did not, and could not, cure the magistrate judge's failure to make contemporaneous findings. The district court made clear it made no independent findings because it wrongly believed "[t]he Magistrate Judge made a finding and I can rely on that." App.53a. More fundamentally, "[t]he district court judge, a different judge than the Magistrate Judge who excluded the time," could not supply after-the-fact findings. *United States* v. *Ramirez-Cortez*, 213 F.3d 1149, 1154-55 (9th Cir. 2000). "Because the Magistrate Judge who granted the * * * continuance[] failed to make any findings," "[t]he district court was in no better position than [the Sixth Circuit] to speculate as to the 'findings' that might support an 'ends of justice' continuance." *Id.* at 1155. Findings "may be entered on the record after the fact, but they may not be *made* after the fact." *Larson*, 627 F.3d at 1204.

Finally, the government argues petitioner presents a "factbound issue" involving "disagreement" over the proper interpretation of the magistrate judge's order. Opp.16. But that disagreement underscores why the Sixth Circuit's rule is wrong as a matter of law. Because the Act required the magistrate judge to clearly say on the record what he meant, there should be no disagreement. The on-the-record findings requirement "ensures * * * [appellate courts have] "an adequate record to re-

view." *Toombs*, 574 F.3d at 1269. The magistrate judge's failure to make *any* balancing findings, or even to include "explicit language * * * incorporat[ing]" the stipulation, App.33a, required the reviewing court to speculate about what he did. Indeed, the panel below could not even agree whether the parties' stipulation was actually incorporated. Compare App.15a, 23a, with 32a. The Sixth Circuit majority's reasoning lays bare the speculation its rule embraces. One of the principal factors in its analysis was that the stipulation was attached to the order when entered on the electronic docket—a ministerial act that could have been performed by the clerk—which "bolsters the conclusion" that "the parties' proposed justifications" "found their way into the magistrate judge's determination." App.15a. Such speculation is impossible to square with *Zedner*, which emphasized the need for explicit findings and rejected the idea of inferring reasoning from context. See 547 U.S. at 507 (refusing to give weight to judge's "passing reference to the case's complexity in its ruling on [defendant's] motion to dismiss").

B. The Circuit Split Is Real

The government's struggle to characterize fundamentally different legal rules as factbound distinctions, Opp.17-21, does not survive even momentary scrutiny. The Second, Ninth, Tenth, Eleventh, and D.C. Circuits have categorically held that (1) a district court must make its own independent findings even where parties agree excluding time is warranted, and (2) courts of appeals cannot cure a district court's failure to make required findings by inferring findings from context. The Fourth, Sixth, and Seventh Circuits disagree.

Toombs is impossible to square with the decision below. There, the parties agreed to a continuance and, as

here, the motion included a conclusory statement that "the ends of justice served by the granting of such continuance outweigh the best interest of the public and the defendant in a speedy trial." 574 F.3d at 1270. Though the district court's order referenced the motion's "premises" and recited in conclusory fashion that the ends of justice served by delay outweighed interests in a speedy trial, the Tenth Circuit held the "particularly sparse" record was nowhere near sufficient. *Id.* at 1269-70. The court emphasized that a trial court must "make clear on the record its reasons" and "must [provide] an explanation" of its reasoning. *Id.* at 1273-74.

In *Ramirez-Cortez*, the magistrate judge granted a continuance to allow time for plea negotiations. 213 F.3d at 1152. Lacking explicit findings, the district court "inferred" the magistrate judge had "ma[d]e an 'ends of justice' finding." *Id.* at 1154. The Ninth Circuit reversed, holding that the magistrate's "fail[ure] to make any findings" explicitly was error because reviewing courts could not "determine whether the delay was motivated by the proper considerations." *Id.* at 1154-55. The Sixth Circuit majority did *precisely* what the Ninth Circuit held was prohibited.

United States v. *Bryant*, 523 F.3d 349, 360 (D.C. Cir. 2008), held that "'implicit' findings" drawn from context, like those the Sixth Circuit embraced, "are insufficient" under *Zedner*. The judge's "passing reference to the 'interest of justice'" at a hearing was insufficient; "*Zedner* makes clear that trial judges are obligated to seriously weigh the benefits of granting the continuance against" strong interests in speedy trials. *Id.* at 361. And in *United States* v. *Ammar*, 842 F.3d 1203, 1211-1212 (2016), the Eleventh Circuit articulated a bright-line rule that a "continuance * * * based solely on the parties' agreement" violates the Speedy Trial Act.

There, as here, the district court made no independent ends-of-justice findings. While the Eleventh Circuit found a Speedy Trial Act violation, the Sixth Circuit did not.

The government breezily dismisses as "dicta," Opp.17, the Second Circuit's carefully reasoned conclusion that "[t]he ends-of-justice determination is * * * entrusted to the courts, * * * and the parties cannot stipulate to its satisfaction as a substitute for the district court's own finding to that effect." *Parisi*, 529 F.3d at 140. But the government disregards the Second Circuit's direction that "dictum * * * must be given considerable weight." *United States* v. *Bell*, 524 F.2d 202, 206 (2d Cir. 1975); *United States* v. *Coye*, 02-CR-732(FB), 2004 WL 1743945, *3 (E.D.N.Y. Aug. 4, 2004) (same).

Though the government repeatedly emphasizes that some cases on the other side of the split involved longer continuances, that played no part in the courts' decisionmaking. The government cites no authority for the novel proposition that the Act's required findings depend on a continuance's length, or that the Act incorporates an unstated *de minimis* exception. That position is "hard to square with the Act's categorical terms," which make clear that "if a judge fails to make the required findings * * *, the delay resulting from the continuance must be counted, and if as a result the [defendant is not indicted] on time, the indictment * * * must be dismissed." *Zedner*, 547 U.S. at 508.

C. No Vehicle Problem Would Prevent Resolution Of This Issue

The government asserts "this case would be a poor vehicle" because the judgment could be affirmed on another basis—because petitioner's first lawyer agreed to the continuance and based on successor counsel's representations in district court. Opp.21. But this Court rou-

tinely reviews cases where alternative bases exist to deny relief after a legal error is corrected. *E.g.*, *Rosemond* v. *United States*, 134 S. Ct. 1240, 1252 (2014); *Zivotofsky* v. *Clinton*, 566 U.S. 189, 200-02 (2012). Even if the petitioner later loses on some alternative ground, that in no way diminishes the benefit of resolving circuit conflict. Indeed, the government has *repeatedly* won review by explaining "the existence of a potential alternative ground * * * not addressed by the court of appeals, is not a barrier to [this Court's] review." Cert. Reply Br.3, *United States* v. *Bean* (01-704) (collecting examples); Cert. Reply Br.9, *Comm'r v. Estate of Jelke* (07-1582) (same).

In any event, the government's arguments are meritless. To begin with, the government forfeited the estoppel argument by not raising it below. Moreover, *Zedner* itself refused to estop a defendant from arguing a "continuance was not permissible under the [Act]" simply because he had consented to the continuance. 547 U.S. at 505-06. Numerous courts of appeals have granted relief because of inadequate ends-of-justice findings even when the defendant moved for or agreed to the continuance. "[T]he district court * * * [is] no less responsible under the Speedy Trial Act merely because it is a defendant who requests a continuance." *Toombs*, 574 F.3d at 1273; accord, *e.g.*, *Ramirez-Cortez*, 213 F.3d at 1152 (defendant requested continuance); *United States* v. *Mathurin*, 690 F.3d 1236, 1243 (11th Cir. 2012) ("highly doubtful that a finding of estoppel is proper" "even where a defendant asks * * * to delay the trial"). The government cites no case to the contrary.[1] Applying es-

[1] *Zedner* contemplated that estoppel might apply if a defendant "had succeeded in persuading the District Court * * * that the factual predicate for a statutorily authorized exclusion could be established-for example * * * by falsely representing that [counsel] was

toppel to such claims conflicts with the judiciary's obligation to ensure delay is in the defendant's *and the public's* interest. Estoppel is also inapplicable because it applies only to inconsistent "arguments," not to unopposed motions or stipulations with little argument. *United States* v. *Turner*, 602 F.3d 778, 783-84 (6th Cir. 2010).

The government repeatedly quotes out-of-context statements by petitioner's former counsel to suggest he conceded the magistrate judge made proper findings. Opp. 7, 15, 22. Although those statements were hardly a model of clarity, they cannot reasonably be interpreted as concessions the magistrate judge made appropriate findings. Pages after the comments the government cites, counsel unequivocally stated that "it doesn't appear as though the Magistrate had a sufficient factual basis other than the stipulation itself" and "there was no determination made at all" about the ends of justice providing "a strong enough record" for exclusion. App.52a. Tellingly, the Sixth Circuit gave no weight to counsel's statements, although the government raised the same arguments below. See Gov't C.A.Supp.Br.10. Nor did this Court give them weight when this case was last before it. See Opp.5, 12, 20, *White* v. *United States* (17-720).

Finally, the government suggests petitioner failed to preserve this argument, or that he is unfairly seeking to capitalize by switching positions. Opp.5-8, 22. But petitioner raised this argument pro se at his earliest opportunity when counsel would not. Gov't C.A.Br.8 (acknowledging pro se motion invoked "the statute's 30-day complaint-to-indictment clock"). The Sixth Circuit rejected the government's arguments that petitioner failed to preserve issues. App.18a-20a, 25a-29a. Granting re-

in the midst of working with an expert." 547 U.S. at 505. That concern is not implicated here.

view of this petition would underscore a bedrock principle Congress embodied in the Speedy Trial Act: Courts must *independently* assess whether continuances are in the *public* interest, even if defense counsel believes them to be in the defendant's interest.

D. Immediate Review Is Warranted

The government's claim that "[t]his Court has repeatedly denied certiorari petitions seeking review on the question of what findings are sufficient to justify an ends-of-justice continuance," Opp.12, downplays critical differences between those cases and this one. Most involved unpublished dispositions from jurisdictions that have *already adopted* the standard petitioner seeks.[2] All involved factbound error claims and far more explicit ends-of-justice findings. *E.g.*, Opp.3-8, 15-16, *Qadri* (express findings for each continuance; petitioner argued judge should have separately analyzed each factor); Opp. 5-8, 13-15, *Wasson* v. *United States* (12-546) (express findings; petitioner sought fuller explanation); Opp. 14, 27, *Robey* v. *United States* (16-7725) (explicit justifications so appellate court "did not" have to "infer the district court's rationale").

The government's *Levis* opposition confirms the Speedy Trial Act violation here. There, the district court granted a continuance using a handwritten notation on a letter from defense counsel. Opp.5-6 (12-685). When the defendant moved to dismiss for failure to make requisite findings, the court denied the motion without explanation. *Id.* at 7. "[M]indful that the Act expressly requires the Court to set forth in the record its reasons for find-

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[2] *E.g.*, *Qadri* v. *United States*, 574 U.S. 974 (2014) (14-79) (unpublished Ninth Circuit disposition); *Ioane* v. *United States*, 571 U.S. 1134 (2014) (13-6849) (same); *Levis* v. *United States*, 569 U.S. 957 (2013) (12-635) (unpublished Second Circuit order).

ing that the ends of justice warrant the granting of a continuance," *the government* "ask[ed] the Court to confirm [its] findings" explicitly, which it did. *Id.* at 7-8. In opposing review, the government critically relied on that confirmatory action, suggesting an unexplained action would have been invalid. *Id.* at 18. As in *Levis*, the magistrate judge here excluded time by rubber-stamping the parties' request. Although "the government bears a large part of the responsibility" for "ensuring adherence to the [Speedy Trial Act's] requirements," *Toombs*, 574 F.3d at 1273, prosecutors here did not ask the magistrate judge to make findings.

The Sixth Circuit's published opinion invites district courts to take a similarly slapdash approach, deepening an existing split on a recurring issue of critical importance. Immediate review is necessary.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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