No. 21-1313

In the Supreme Court of the United States

MARTIN GOTTESFELD, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
KENNETH A. POLITE, JR.
Assistant Attorney General
JAVIER A. SINHA
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.*, requires petitioner's convictions following a jury trial to be vacated and the indictment to be dismissed because the reasons for the district judge's findings that the "ends of justice" were served by a series of assented-to continuances, 18 U.S.C. 3161(h)(7)(A), were entered into the record by a different district judge to whom the case had been reassigned.

2. Whether the district court abused its discretion in summarily denying petitioner's repeated motions for recusal or disqualification.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 18 F.4th 1. The order of the district court (Pet. App. 29a-31a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 5, 2021. A petition for rehearing was denied on December 30, 2021 (Pet. App. 73a). The petition for a writ of certiorari was filed on March 30, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted on one count of intentionally damaging a protected computer, in violation of 18 U.S.C. 1030(a)(5)(A) and (c)(4)(B), and one count of conspiring to intention-

ally damage a protected computer, in violation of 18 U.S.C. 371. Judgment 1. Petitioner was sentenced to 121 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-28a.

1. In the spring of 2014, petitioner, a computer-systems engineer, and an unidentified coconspirator launched cyberattacks against Wayside Youth and Family Support Network, a nonprofit organization that provides psychiatric care to children and families, and Boston Children's Hospital. See Presentence Investigation Report (PSR) ¶¶ 9, 23, 28-58. The attacks were Distributed Denial of Service (DDOS) attacks, which "flood computer servers with traffic in an attempt to overload the capacity of the server system." Pet. App. 33a. Such "attacks often force victims to shut down important parts of their websites or to refuse otherwise legitimate and productive traffic." *Id.* at 34a.

Petitioner's attacks on the nonprofit organization "impaired [its] ability to communicate with medical providers, staff, families, and [the relevant state agency] over e-mail"; impaired "the staff's ability to access [its] internal network, where it kept residents' records"; and impaired "the public's ability to obtain information from [its] public-facing Internet page." PSR ¶ 37. Petitioner's attack on the hospital was "one of the largest DDOS attacks ever conducted, in terms of traffic volume." PSR ¶ 51. As a result of petitioner's attack, "doctors, nurses, and staff had trouble accessing the Internet-based tools that they use to care for their patients," and "[a]ccess to critical applications was slow or intermittent." PSR ¶ 42. Petitioner's attack ultimately "knock[ed] the entire hospital off the Internet," such that "patient medical records could not be accessed

from outside the hospital," PSR ¶ 47, "[r]esearch data could not be sent or received," *ibid.*, and the hospital had "to resort to paper prescriptions and faxing documents," PSR ¶ 44. Petitioner also "launched DDOS attacks against other institutions" during the spring and summer of 2014, PSR ¶ 59; see PSR ¶ 65, including a utility company, the Massachusetts Medical Society, and various education-related nonprofits. See PSR ¶¶ 59-74. All told, petitioner's DDOS attacks caused more than $1 million in pecuniary harm. PSR ¶ 75.

In October 2014, federal agents investigating the DDOS attacks searched petitioner's residence for evidence of the crimes. PSR ¶ 76. At the time, petitioner "voluntarily spoke with [the] agents and falsely denied any involvement in the DDOS [attack on] Boston Children's Hospital." *Ibid.* Petitioner later admitted, however, that before the search, "he deleted substantial evidence of his involvement in the attack," thereby "interfer[ing] with the FBI's ability to obtain evidence about [his] involvement in the attack." PSR ¶ 78.

In April 2015, federal prosecutors and agents met with petitioner and his counsel and presented "some of the government's evidence against him." PSR ¶ 77; see 16-cr-10305 D. Ct. Doc. 167-1, at 2 (May 4, 2018). The parties subsequently began discussing "a possible pre-indictment resolution of the matter." D. Ct. Doc. 167-1, at 6. Petitioner's counsel informed the government that petitioner was "interested in a proffer, and taking a plea." *Id.* at 10. The parties met again in December 2015. PSR ¶ 77. But in January 2016, "while in the midst of final plea negotiations with the government," petitioner fled in a motorboat to Cuba, where he sought political asylum. PSR ¶ 79. After four weeks in Cuban custody, petitioner's asylum claim was rejected and he

was instructed to leave. *Ibid.* Petitioner returned to Florida, where he was arrested on February 17, 2016. *Ibid.*

2. Petitioner was not immediately indicted after his arrest; instead, he and the government renewed their plea discussions. See 16-cr-10305 D. Ct. Doc. 167-1, at 24-45. Under the Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.*, an indictment generally must be filed within 30 days of the defendant's arrest. 18 U.S.C. 3161(b). But the Act excludes, among other periods, "[a]ny period of delay resulting from a continuance granted by any judge * * * if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." 18 U.S.C. 3161(h)(7)(A). A period of delay is not excludable under that "ends of justice" provision "unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial." *Ibid.* This Court has explained that the relevant "findings must be made, if only in the judge's mind, before granting the continuance," and that "at the very least * * * those findings must be put on the record by the time a district court rules on a defendant's motion to dismiss" on Speedy Trial Act grounds. *Zedner* v. *United States*, 547 U.S. 489, 506-507 (2006).

While the plea discussions in this case were ongoing, the government filed a series of six motions for continuances and to exclude time under the Act, each of which petitioner assented to through counsel. See Pet. App. 11a ("[Petitioner] specifically consented to each of the

challenged continuances at the time they were proposed and granted."). Each of those preindictment motions was filed on the district court's "miscellaneous business docket" and granted by District Judge Allison D. Burroughs, who had been assigned to petitioner's case on that docket. *Id.* at 62a-65a; see United States District Court, District of Massachusetts, *Plan for the Prompt Disposition of Criminal Cases* § 5(c)(1)(A) (Dec. 2008), www.mad.uscourts.gov/caseinfo/pdf/122008GenOrd08-5.pdf.

The first assented-to motion explained that a continuance until April 22, 2016 in which to file an indictment, and concomitant exclusion of time under the Act's ends-of-justice provision, were warranted because "the parties need additional time to discuss a possible plea agreement," and because a plea agreement "would be in the interest of both parties and the interest of justice." 16-mc-91064 D. Ct. Doc. 1, at 1-2 (Mar. 1, 2016). In between the closing signature block and the certificate of service, the motion provided a dedicated space for the district court to indicate the granting of the motion, with a sentence reading "The above motion is GRANTED, and the period from March 18, 2016 through April 22, 2016, is excluded from all Speedy Trial Act calculations," along with blank signature and date lines. *Id.* at 2. On March 1, 2016, Judge Burroughs granted the motion by signing, dating, and affixing a seal to a copy of the motion in the dedicated space. 16-mc-91064 D. Ct. Doc. 3, at 2.

The second assented-to motion, which sought a continuance and concomitant exclusion of time until May 27, 2016, similarly explained that "the parties need additional time to discuss a possible plea agreement," and that "resolution of this case through a plea agreement

and information would be in the interest of both parties and the interest of justice." 16-mc-91064 D. Ct. Doc. 4, at 2 (Apr. 11, 2016). Like the first motion, the second motion included a dedicated space between the signature block and the certificate of service for the district court to indicate the granting of the motion. *Ibid.* This time, however, Judge Burroughs granted the motion by entering an electronic minute order on the docket, rather than by signing, dating, and affixing a seal to a copy of the motion in the dedicated space. 16-mc-91064 Docket entry No. 5 (May 5, 2016); see Pet. App. 63a.

The third, fourth, and fifth assented-to motions sought continuances and concomitant exclusions of time until July 1, August 1, and September 9, 2016, respectively. See 16-mc-91064 D. Ct. Doc. 6, at 2 (May 20, 2016); 16-mc-91064 D. Ct. Doc. 8, at 2 (June 30, 2016); 16-mc-91064 D. Ct. Doc. 10, at 2 (July 22, 2016). All three motions observed that "the parties ha[d] not been able to conclude their discussions of a possible plea agreement" while awaiting a magistrate judge's decision on whether petitioner would be detained pending trial. *Ibid.* Each of the three motions included the dedicated space between the signature block and the certificate of service for the district court to indicate the granting of the motion. 16-mc-91064 D. Ct. Doc. 6, at 3; 16-mc-91064 D. Ct. Doc. 8, at 2; 16-mc-91064 D. Ct. Doc. 10, at 3. Judge Burroughs granted each of three motions by entering an electronic minute order on the docket. 16-mc-91064 Docket entry No. 7 (May 25, 2016); 16-mc-91064 Docket entry No. 9 (June 30, 2016); 16-mc-91064 Docket entry No. 11 (Aug. 2, 2016); see Pet. App. 63a-64a. As to the fifth motion, Judge Burroughs also issued an "Order of Excludable Delay" stating that a

continuance was "granted in the interest of justice." Pet. App. 66a, 69a (capitalization altered).

After the magistrate judge entered a decision ordering petitioner to be detained until trial, see 16-cr-10305 D. Ct. Doc. 25 (July 27, 2016), the government filed a sixth assented-to motion seeking a "further, likely final" continuance and concomitant exclusion of time until October 10, 2016. 16-mc-91064 D. Ct. Doc. 13, at 2 (Aug. 26, 2016). The motion explained that the magistrate judge's decision had "resulted in renewed discussions between the parties regarding a possible plea agreement," and that the "parties believe the additional time sought by this assented-to motion will allow the parties to either reach an agreement or determine that there will be no plea agreement and the case will proceed via indictment." *Ibid.* Like the previous motions, this one included a dedicated space for the district judge to indicate a grant. See *id.* at 3. Judge Burroughs granted the motion by entering an electronic minute order on the docket. 16-mc-91064 Docket entry No. 14 (Aug. 29, 2016).

On September 23, 2016, the parties filed a joint notice alerting the district court that an additional ten days were excludable under the Speedy Trial Act to account for petitioner's transfer from the Southern District of Florida, where he had been arrested, to the District of Massachusetts, where he would be charged. 16-mc-91064 D. Ct. Doc. 15, at 1 (Sept. 23, 2016) (citing 18 U.S.C. 3161(h)(1)(F)). The joint notice explained that, with that exclusion, "the government presently has until October 20, 2016 to file an information or indictment in this matter." *Id.* at 2 (emphasis omitted). Petitioner ultimately rejected the government's plea offer. On October 19, 2016—245 days after his arrest—petitioner

was indicted on one count of intentionally damaging a protected computer, in violation of 18 U.S.C. 1030(a)(5)(A) and (c)(4)(B), and one count of conspiring to commit that offense, in violation of 18 U.S.C. 371, with respect to the DDOS attacks on the hospital and the nonprofit. Indictment 7-11.

3. The case was ultimately reassigned to District Judge Nathaniel M. Gorton. See 16-cr-10305 Docket entry No. 41 (Nov. 14, 2016). The district court denied petitioner's pretrial motion to dismiss the indictment under the Speedy Trial Act. Pet. App. 29a-61a. The court also summarily denied three posttrial motions for recusal or disqualification. *Id.* at 70a-72a.

a. In the pretrial motion to dismiss, petitioner had contended, among other things, that more than 30 non-excludable days had elapsed between his arrest and his indictment because (1) Judge Burroughs's orders granting the continuances and excluding time under the Act "were not made in the record of this case but rather in a sealed civil docket"; and (2) "the Court did not set forth its reasons for finding that the ends of justice would be served by the continuance[s]." Pet. App. 43a. The district court rejected both contentions. *Id.* at 45a-51a.

First, the district court explained that under the court's "plan for the disposition of criminal cases consistent with the time standards of the Speedy Trial Act," implemented in accordance with 18 U.S.C. 3165, "pre-indictment motions for a continuance are properly filed with the judge assigned to 'the miscellaneous business docket.'" Pet. App. 45a-46a (citation omitted). Second, the court observed that the "First Circuit has made clear that a court need not 'articulate the basic facts when they are obvious and set forth in a motion for

a continuance,'" and that "it is clear here that the district judge presiding over the miscellaneous business docket 'necessarily adopted' the grounds presented in the assented-to motions." *Id.* at 50a (citations omitted); see *id.* at 31a (explaining that "the electronic orders excluding time in this case 'necessarily adopted' the grounds submitted in the motions") (citation omitted).

The district court also determined that petitioner was "judicially estopped" from seeking dismissal under the Speedy Trial Act because his position was "clearly inconsistent with his earlier assent to the motions for exclusion of time." Pet. App. 50a. The court observed that petitioner had "indicated that he was 'seriously considering' a plea agreement," and that the "parties had reached an advanced stage of plea negotiations where an agreement was drafted and [petitioner] was considering that agreement." *Id.* at 51a. And the court explained that the "plea negotiations here that served to justify the interest of justice exclusions of time inured to [petitioner's] potential benefit." *Id.* at 50a. The court accordingly found that "[u]nder the circumstances," petitioner was "judicially estopped from advancing a position contrary to his earlier assent." *Id.* at 51a.

b. Petitioner proceeded to trial and the jury found him guilty on both counts in the indictment. See Judgment 1. Following trial, petitioner filed three pro se motions seeking the recusal or disqualification of Judge Gorton. See 16-cr-10305 D. Ct. Docs. 344, 345, 347 (Dec. 31, 2018). All three motions relied on a handwritten 82-page affidavit from petitioner alleging (among other things) that Judge Gorton (1) had a financial interest in the hospital based on his and his family's donations to other nonprofits; (2) had presided over another case in-

volving an unrelated DDOS attack in which the defendant had committed suicide, and (3) had ruled against petitioner on a number of occasions in this case. See 16-cr-10305 D. Ct. Doc. 346, at 1-82 (Dec. 31, 2018). The district court summarily denied all three motions. Pet. App. 70a-72a.

4. The court of appeals affirmed. Pet. App. 1a-28a.

a. The court of appeals rejected petitioner's contention that his convictions should be vacated and the indictment dismissed under the Speedy Trial Act. Pet. App. 2a-11a. The court first considered petitioner's assertion that Judge Burroughs "did not make 'findings that the ends of justice served by taking such action outweighed the best interest of the public and the defendant in a speedy trial.'" *Id.* at 5a (brackets and citation omitted). The court acknowledged that "[d]elay resulting from a continuance is excluded only if the judge before granting the continuance finds (even if only in his or her mind) that the ends of justice served by the continuance outweigh the best interests of the defendant and the public in speed." *Id.* at 6a (citing *Zedner*, 547 U.S. at 506). But the court explained that "'it is not necessary for the [judge] to articulate the basic facts' underlying [her] decision to grant an ends-of-justice continuance 'when they are obvious and set forth in' the motion to continue." *Ibid.* (citation omitted).

The court of appeals observed that here, "the relevant motions asserted that the ends of justice supported the continuances * * * because the parties were awaiting a detention decision by the magistrate judge and could not 'conclude their discussions of a possible plea agreement and information' without it." Pet. App. 7a. The court thus determined that "[b]y granting each motion, [Judge Burroughs] 'necessarily adopted' these

grounds, which supports the conclusion that she was 'persuaded that the factual predicate for a statutorily authorized exclusion of delay could be established.'" *Ibid.* (brackets, citations, and ellipsis omitted).

The court of appeals then considered petitioner's assertion that dismissal under the Speedy Trial Act was required on the theory that "the court's reasons for making [the ends-of-justice] findings were never 'set forth in the record of the case'" by Judge Burroughs herself. Pet. App. 5a (brackets omitted). The court observed that while Judge Burroughs "actually granted the continuances," the "statute does not require that the judge who grants the continuance must be the same judge who sets forth in the record the reasons for the ultimate decision to exclude time." *Id.* at 8a. The court noted that "the statute suggests the opposite by using different words to allocate responsibility for these distinct requirements," noting that the Act "requires the '*judge*' who grants an ends-of-justice continuance to do so only 'on the basis of' the requisite findings," but "permits the 'reasons' supporting such findings to be 'set forth in the record of the case' by the '*court*.'" *Ibid.* (brackets and citation omitted). It thus found Judge Groton's express "elaboration of reasons supporting the ends-of-justice continuances" in denying the motion to dismiss "qualif[ied] as a statement of reasons set forth 'in the record of the case' under section 3161(h)(7)(A)." *Id.* at 7a-8a.

b. The court of appeals additionally rejected petitioner's contention that "the trial judge improperly denied three recusal motions he made pro se after the verdict but before sentencing." Pet. App. 26a; see *id.* at 26a-28a. The court explained that after "[h]aving reviewed [petitioner's] allegations concerning" the three

grounds for recusal that petitioner had raised in those motions, it saw "nothing to suggest that the trial judge had any bias, prejudice, personal interest, or financial interest that would have required his disqualification from this case." *Id.* at 27a. The court explained that the allegations involving Judge Groton's asserted financial interest in the hospital and an emotional reaction to another case involving similar charges were "far too remote," "indirect," and "speculative" to require disqualification or recusal. *Id.* at 27a-28a. And the court observed that the "third basis for recusal * * * boils down to a bare disagreement with the judge's rulings" and thus "runs afoul of the" rule that "any claim of bias or prejudice * * * must 'stem from an extrajudicial source.'" *Id.* at 28a (citation omitted).

ARGUMENT

Petitioner contends (Pet. 10-22) that his convictions should be vacated and the indictment dismissed, asserting that the reasons why the period of delay resulting from the third, fourth, and fifth assented-to continuances were excludable under the Speedy Trial Act were not properly set forth in the record. Petitioner also briefly contends (Pet. 23-24) that the district court abused its discretion in denying his motions for disqualification or recusal without a written opinion. The court of appeals correctly rejected those contentions, and its decision does not conflict with any decision of this Court or another court of appeals. Further review is unwarranted.

1. a. Under the Speedy Trial Act, an indictment generally must be filed within 30 days of the defendant's arrest. 18 U.S.C. 3161(b). When "computing the time within which an information or an indictment must be filed," however, the Act excludes certain periods. 18

U.S.C. 3161(h). Among other things, it excludes "[a]ny period of delay resulting from a continuance granted by any judge * * * if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." 18 U.S.C. 3161(h)(7)(A). Such time is excluded as long as "the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial." *Ibid.* In *Zedner* v. *United States*, 547 U.S. 489 (2006), this Court noted that while "the Act is clear that the findings must be made, if only in the judge's mind, before granting the continuance * * * , the Act is ambiguous on precisely when those findings must be 'set forth, in the record of the case.'" *Id.* at 506-507 (brackets and citation omitted). The Court observed, however, that "at the very least the Act implies that those findings must be put on the record by the time a district court rules on a defendant's motion to dismiss" on Speedy Trial Act grounds. *Id.* at 507.

Since *Zedner*, the courts of appeals have determined that the Speedy Trial Act's on-the-record requirement to support an ends-of-justice continuance and concomitant exclusion of time does not require a district court to recite basic facts and circumstances when those facts and circumstances are obvious and set forth in the motion for a continuance. *E.g.*, *United States* v. *Pakala*, 568 F.3d 47, 60 (1st Cir. 2009), cert. denied, 558 U.S. 1132 (2010) (No. 09-7805); *United States* v. *Jean*, 25 F.3d 588, 594 (7th Cir. 1994); *United States* v. *Gamboa*, 439 F.3d 796, 803 (8th Cir.), cert. denied, 549 U.S. 1042 (2006) (No. 06-7134); *United States* v. *Larson*, 627 F.3d

1198, 1204 (10th Cir. 2010). Instead, a district judge's findings generally will satisfy the Act's on-the-record requirement where the motion sets forth the reasons for an ends-of-justice continuance, the district court grants the motion based on those representations, and the court later confirms its rationale in ruling on the motion to dismiss. See, *e.g.*, *United States* v. *Napadow*, 596 F.3d 398, 405 (7th Cir. 2010).

b. Consistent with those decisions, the court of appeals in this case correctly determined that the periods of delay resulting from the third, fourth, and fifth assented-to continuances were excludable under the Speedy Trial Act. The petition for a writ of certiorari does not raise any substantive challenge to the exclusions of time; for instance, it does not dispute that the ends of justice were served by the continuances, which enabled further plea negotiations while awaiting the magistrate judge's decision on detention. Cf. Pet. App. 7a n.2, 9a-11a. Instead, the petition raises only a procedural challenge, asserting that the periods of delay were not excludable because Judge Gorton, and not Judge Burroughs, entered the reasons for the ends-of-justice findings into the record. That assertion lacks merit.

As a threshold matter, as the lower courts explained, Judge Burroughs contemporaneously adopted the ends-of-justice rationale set forth in each of the six assented-to motions for continuances that she granted. See Pet. App. 7a (explaining that "[b]y granting each motion, [Judge Burroughs] 'necessarily adopted' the[] grounds" set forth in those motions) (citation omitted); *id.* at 50a (explaining that "it is clear here that [Judge Burroughs] 'necessarily adopted' the grounds presented in the assented-to motions") (citation omitted). That is particularly clear with respect to the first mo-

tion, which Judge Burroughs granted by signing, dating, and affixing a seal to a copy of the motion itself, see 16-mc-91064 D. Ct. Doc. 3, at 2, but is also clear for the motions that she granted by entering electronic minute orders on the docket rather than by signing, especially given that she was operating under circuit law making clear that the granting of such motions "necessarily adopt[s]" any grounds that "'are obvious and set forth in [the] motion[s],'" *Pakala*, 568 F.3d at 60. And petitioner does not dispute that the assented-to motions—which were in writing and are in the district-court record—"themselves made obvious the reasons for granting them" (namely, the need for more time in which to conduct plea negotiations, including because the parties were awaiting the magistrate judge's detention). Pet. App. 8a.

The district court then provided whatever additional record the Speedy Trial Act may require by setting forth in writing the reasons for the ends-of-justice findings into the record in its order and opinion denying petitioner's motion to dismiss. See Pet. App. 31a, 49a-51a. Contrary to petitioner's suggestion (Pet. 18), the court in doing so was not "unavoidably *making* findings" after the fact. Rather, the court—over which Judge Gorton was at that point presiding—was clear that it was setting forth what it determined were the reasons for the findings of "the district judge presiding over the miscellaneous business docket" who granted the continuances (Judge Burroughs). Pet. App. 51a. The court of appeals accordingly recognized that the reasons supporting the findings highlighted at that time based on the preexisting record were those of Judge Burroughs, not Judge Gorton. See *id.* at 7a-8a. Petitioner's disagreement with those factbound determinations does not merit this

Court's review. Cf. *United States* v. *Doe*, 465 U.S. 605, 613-614 (1984) ("The District Court's finding essentially rests on its determination of factual issues. Therefore, we will not overturn that finding unless it has no support in the record. Traditionally, we also have been reluctant to disturb findings of fact in which two courts below have concurred.") (citations omitted).

To the extent petitioner proposes (Pet. 18) a categorical rule that a delay resulting from an ends-of-justice continuance granted by one judge is *never* excludable under the Speedy Trial Act if a second judge enters the reasons for the requisite findings into the record, that proposal is unsound. As the court of appeals observed (Pet. App. 8a), the statutory text draws a clear distinction between, on the one hand, the "judge" who grants the continuance and makes the requisite findings, and, on the other hand, the "court" that must set forth in the record the reasons for those findings. 18 U.S.C. 3161(h)(7)(A) (excluding the "period of delay resulting from a continuance granted by any judge * * * if the judge granted such continuance on the basis of his findings" regarding the ends of justice, but clarifying that such delay is not excludable "unless *the court* sets forth, in the record of the case, either orally or in writing, its reasons for [those] finding[s]") (emphasis added); see *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (brackets and citation omitted). At a minimum, therefore, the period of delay resulting from an ends-of-justice continuance is not rendered non-excludable when the then-current judge, in denying a

Speedy Trial Act motion to dismiss, has explicitly laid out the already-evidence reasons for a predecessor judge's findings supporting the continuance.

c. Petitioner errs in contending (Pet. 10) that this Court's review is warranted to resolve a circuit conflict about whether, "if one judge grants an 'ends of justice' continuance but fails to explain why, * * * a *different* judge can make the requisite findings to support the continuance."

No court of appeals has adopted a rule under which a second judge "can *make* the requisite findings to support the continuance." Pet. 10 (emphasis added). Instead, lower courts have understood, consistent with this Court's decision in *Zedner*, that only the judge who grants the continuance may make the requisite findings, and that he or she must do so contemporaneously with the granting of the continuance. The court of appeals expressly recognized as much in this case, explaining that delay resulting from a continuance is excludable "only if the judge before granting the continuance finds (even if only in his or her mind) that the ends of justice served by the continuance outweigh the best interests of the defendant and the public in speed." Pet. App. 6a (citing *Zedner*, 547 U.S. at 506).

And contrary to petitioner's contention (Pet. 14-16), that is also what the Fifth Circuit recognized in its decision in *United States* v. *Dignam*, 716 F.3d 915, cert. denied, 571 U.S. 1034 (2013) (No. 13-6921), which cited *Zedner* for that proposition, see *id.* at 921-922. The Fifth Circuit accordingly found no Speedy Trial Act violation where the district judge who denied the motion to dismiss had "made written findings" only in the sense of "articulat[ing]" the "predecessor judge's reasoning," as to which "the record [was] clear." *Id.* at 922. As the

Fifth Circuit emphasized, a "successor judge's later articulation of a predecessor judge's reasoning" is not equivalent to "allowing the district court to make findings after the fact." *Ibid.*

Conversely, petitioner does not identify any court of appeals that has adopted the categorical rule he proposes. The pre-*Zedner* Fourth and Ninth Circuit decisions on which petitioner relies (Pet. 10-14) found only that the successor judges in those cases entered into the record not the reasons for the predecessor judges' findings, but instead their own findings that the ends of justice would be served by a continuance. In *United States* v. *Ramirez-Cortez*, 213 F.3d 1149 (2000), for example, the Ninth Circuit concluded only that a "district court's post hoc evaluation of the considerations it believed should have motivated the Magistrate Judge d[id] not cure the lack of simultaneous findings," where the record did not make clear that the magistrate judge had made such findings. *Id.* at 1155; see *id.* at 1154-1155. And in *United States* v. *Keith*, 42 F.3d 234, 238 (1994), the Fourth Circuit similarly found insufficient indications in the record that the judge who had granted the continuance had made contemporaneous ends-of-justice findings, thereby logically precluding a successor judge from more explicitly recording the reasons for those (nonexistent) findings. *Id.* at 237-238.

Neither decision compels dismissal where a second judge highlights the record-discernable reasons supporting the ends-of-justice findings of a predecessor judge who contemporaneously made those findings. Indeed, *Ramirez-Cortez* took that proposition as a given in explaining its alternative holding that exclusion of time in that case was improper on substantive grounds. See 213 F.3d at 1155 ("Even if we were to conclude that

the district court somehow gleaned from the record proper considerations relied upon by the Magistrate Judge, our Speedy Trial Act jurisprudence would compel us to find a violation.").

d. In any event, this case would be a poor vehicle in which to review the question presented because, as the district court found and as the government urged on appeal, petitioner is judicially estopped from challenging the exclusion of time in this case. See Pet. App. 50a-51a; cf. *id.* at 11a n.4 (court of appeals' opinion finding it unnecessary to reach the issue); *Schiro* v. *Farley*, 510 U.S. 222, 228-229 (1994) (respondent may "rely on any legal argument in support of the judgment below").

As this Court recognized in *Zedner*, "[w]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." 547 U.S. at 504 (brackets and citation omitted). This Court has explained that although judicial estoppel "is equitable and thus cannot be reduced to a precise formula or test," among the "'factors'" to be considered are whether "'a party's later position [is] clearly inconsistent with its earlier position'"; "'whether the party has succeeded in persuading a court to accept that party's earlier position'"; and "'whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.'" *Ibid.* (citation omitted).

Here, petitioner "specifically consented to each of the challenged continuances at the time they were proposed and granted," Pet. App. 11a, and each of those

assented-to motions made clear that the pending detention decision and petitioner's ongoing plea discussions with the government were suitable grounds for an ends-of-justice continuance, see 16-mc-91064 D. Ct. Doc. 6, at 2; 16-mc-91064 D. Ct. Doc. 8, at 2; 16-mc-91064 D. Ct. Doc. 10, at 2. Moreover, Judge Burroughs had granted the second motion by entering an electronic minute order on the docket, yet rather than suggest any procedural impropriety with that approach, petitioner assented to a third motion for a continuance and exclusion of time under the Speedy Trial Act, and subsequently assented to the fourth, fifth, and sixth motions despite Judge Burroughs's having granted each preceding motion in the same manner.

Petitioner thus "assume[d] a certain position," namely, that each ends-of-justice continuance and concomitant exclusion of time was substantively warranted and procedurally proper; "succeed[ed] in maintaining that position" given that Judge Burroughs granted each of the motions; and has now "assume[d] a contrary position" "simply because his interests have changed." *Zedner*, 547 U.S. at 504 (citation omitted). Or, phrased in terms of the "factors" set forth in *Zedner*, petitioner's current position that exclusion was unwarranted is "clearly inconsistent" with his earlier one agreeing that the factual predicates for exclusion had been established and that Judge Burroughs had properly granted the motions, *ibid.* (citation omitted); petitioner (and the government) "succeeded in persuading" Judge Burroughs to accept his earlier position, *ibid.* (citation omitted); and petitioner would derive "an unfair advantage [and] impose an unfair detriment on the" government if the convictions were vacated and the indictment were dismissed, *ibid.* (citation omitted), given that "the '"ero-

sion of memory" and "dispersion of witnesses" that occur with the passage of time' prejudice the government and diminish the chances of a reliable criminal adjudication," *McCleskey* v. *Zant*, 499 U.S. 467, 491 (1991) (citations omitted).

Although *Zedner* declined to find estoppel where a continuance had been granted based on an invalid blanket waiver of Speedy Trial Act rights, the Court made clear that "a different case," in which a defendant "succeeded in persuading" the judge ruling on a continuance "that the factual predicate for a statutorily authorized exclusion of delay could be established," might warrant the application of judicial estoppel. 547 U.S. at 505. That is what happened here. Unlike in *Zedner*, petitioner's consent to each motion established a "factual predicate" for statutory exclusion under Section 3161(h)(7)(A), and each of the challenged motions expressly "focus[ed] on" and cited the Act. *Zedner*, 547 U.S. at 505-506; see Pet. App. 50a-51a.

2. Petitioner briefly contends (Pet. 23-24) that the district court abused its discretion by denying his motions for recusal or disqualification without explaining those denials. Petitioner does not identify any legal authority for the proposition that a district court (or any court) is required to issue a written opinion in those circumstances. Cf. *Jennings* v. *Stephens*, 574 U.S. 271, 277 (2015) (explaining that a "federal appellate court[] does not review lower courts' opinions, but their *judgments*"); *Taylor* v. *McKeithen*, 407 U.S. 191, 194 n.4 (1972) (per curiam) (explaining that "courts of appeals should have wide latitude in their decisions of whether or how to write opinions"). Nor does petitioner contend that the judgment below conflicts with any decision of

this Court or another court of appeals. Those alone are sufficient reasons to deny further review.

Moreover, while petitioner contended in the court of appeals that the district court's summary denials effectively prevented "meaningful appellate review," Pet. 23, the court of appeals' opinion shows that it was able to conduct such review. The court of appeals specifically identified the three alleged bases for disqualification that petitioner had asserted in his 82-page handwritten affidavit; explained that it had "reviewed [petitioner's] allegations concerning the trial judge's financial disclosures, prior judicial service, and legal rulings in this case"; and determined that it saw "nothing to suggest that the trial judge had any bias, prejudice, personal interest, or financial interest that would have required his disqualification from this case." Pet. App. 27a. The court likewise explained why petitioner's three asserted bases for recusal "do not raise any doubt about the trial judge's impartiality" and that "each of the district court's orders denying [petitioner's] recusal motions was 'a rational conclusion supported by a reasonable reading of the record.'" *Id.* at 28a (citation omitted).

Finally, petitioner failed to timely raise his recusal claim in the district court. Petitioner did not seek recusal or disqualification until more than two years after Judge Gorton was assigned to his case and more than a month after trial concluded. And other than challenges to the various rulings in his case, his motions relied on alleged events of which petitioner was aware long before trial. See 16-cr-10305 D. Ct. Doc. 346, at 1-82. Many circuits, including the First Circuit, have declined to consider similarly dilatory claims. See *In re United States*, 441 F.3d 44, 65 (1st Cir.) ("[A] party must raise the recusal issue 'at the earliest moment af-

ter acquiring knowledge of the relevant facts.'") (brackets and citation omitted), cert. denied, 549 U.S. 888 (2006) (No. 06-166); see also *United States* v. *Mathison*, 157 F.3d 541, 545 (8th Cir. 1998) (explaining that a defendant "waive[s] his right to seek recusal from the trial court" if the recusal request is not "timely made"), cert. denied, 525 U.S. 1089 (1999) (No. 98-7038); cf. *United States* v. *Ruzzano*, 247 F.3d 688, 694 (7th Cir. 2001); *United States* v. *Barrett*, 111 F.3d 947, 952-953 (D.C. Cir.), cert. denied, 522 U.S. 867 (1997) (No. 97-193).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
KENNETH A. POLITE, JR.
Assistant Attorney General
JAVIER A. SINHA
Attorney

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