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

REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION

As the petition established, this case presents an important and recurring question under the Speedy Trial Act: if one judge grants an "ends of justice" continuance but fails to explain why, whether a *different* judge can enter the requisite findings to support the continuance. In response, the government effectively concedes key aspects of the certworthiness calculus. There is no dispute that that the issue is exceptionally important and implicates core interests under the Act. There is no dispute that it arises all the time, given the frequency in which different judges play a role at different stages of a criminal case. There is no dispute about the issue's practical magnitude—as the decision below invites an embedded defect in countless prosecutions. There is no dispute that the facts are uncontested, the issue was squarely raised and resolved below, the issue is outcome-determinative, and there is no conceivable obstacle to deciding it here. Nor, finally, is there any dispute that the issue is ripe for review: the government never explains how further percolation would sharpen the issues or produce any practical or theoretical benefit.

Instead, the government simply attempts to kick up dust. It says the first judge's findings were clear—in *electronic minute entries* that were facially silent with zero explanation. It says there is no genuine circuit conflict, but the split is obvious. Each circuit confronted a materially identical fact pattern: a first judge failed to satisfy the Act's "on-the-record" directive and a second judge supplied the Act's requisite findings. Two circuits say the second judge can *presume* what the first judge was thinking, and two circuits hold the opposite—refusing to let the second judge engage in post-hoc "speculat[ion]." The conflict is undeniable and entrenched. So the government is left

conjuring up judicial estoppel as a "vehicle" problem. But the government well knows this Court routinely grants review of predicate legal questions even when respondents believe they might prevail on alternative grounds on remand. The First Circuit did not decide estoppel below; this Court can do the same.

In the end, the government's opposition reads as a classic attempt to generate confusion, but the case for review remains exceptionally clear. This case easily satisfies the traditional criteria for review, and the petition should be granted.

A. There Is A Clear And Intolerable Conflict Over A Significant Question Under The Speedy Trial Act

1. As the petition established, the 2-2 circuit conflict is direct, obvious, and entrenched. Pet. 10-19. The government says the conflict is not real, but its position is mystifying. Two circuits (the First and Fifth) hold that the Act's "on-the-record" requirement can be satisfied by a different judge than the one *who actually granted the continuance*, whereas two other circuits (the Ninth and Fourth) hold exactly the opposite—and insist that the judge granting the continuance make the requisite showing. Compare Pet. 10-14 (describing *United States* v. *Ramirez-Cortez*, 213 F.3d 1149 (9th Cir. 2000), and *United States* v. *Keith*, 42 F.3d 234 (4th Cir. 1994)), with Pet. 9-10, 14-16 (describing the First Circuit's decision below and *United States* v. *Dignam*, 716 F.3d 915 (5th Cir. 2013)).

These conflicting holdings are hardly ambiguous. In the Ninth and Fourth Circuits, the initial judge's lack of findings creates an "insurmountable hurdle." *Ramirez-Cortez*, 213 F.3d at 1154-1155; *Keith*, 42 F.3d at 238. The unexplained continuance makes it impossible to tell "whether the 'delay was motivated by the proper considerations,'" and a second judge cannot "'infer[]'" why a first judge "'exclud[ed] time'"—even when the (probable)

"'only reason'" seems clear. *Ramirez-Cortez*, 213 F.3d at 1153, 1154-1155; *Keith*, 42 F.3d at 236, 238. Any other holding inevitably asks a different judge to "speculate" what the first judge was thinking—and to guess whether that judge faithfully applied the Act's strict procedural requirements. 213 F.3d at 1155; see also *Keith*, 42 F.3d at 238 ("it must be clear from the record that *the judge granting the continuance* conducted the mandatory balancing"; a second judge cannot "cure the deficiencies" of the first judge's prior order) (emphasis added).

Accordingly, "[t]he district court judge, a different judge than the Magistrate Judge who excluded the time, could not make th[e necessary] showing." *Ramirez-Cortez*, 213 F.3d at 1154.

The First and Fifth Circuits, by contrast, reach the opposite conclusion. Pet. App. 8a-9a & n.3; *Dignam*, 716 F.3d at 922. Unlike the Ninth and Fourth Circuits, these circuits expressly reject the contention "that a district judge's [later] findings * * * cannot suffice to explain a *different* judge's decision to grant the continuances." *Dignam*, 716 F.3d at 922 (emphasis in original); Pet. App. 8a (same). On the contrary, "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." Pet. App. 8.

In so holding, the First and Fifth Circuits authorize a later judge to simply *infer* an earlier judge's unstated motivation. *E.g.*, Pet. App. 7a (presuming the first judge "'necessarily adopted'" the parties' "grounds" despite not making any findings); *Dignam*, 716 F.3d at 922 (deeming the second judge's "statement of reasons 'can be fairly understood' to have 'actually motivated'" the first judge). That is precisely the kind of "speculat[ion]" that the Ninth

and Fourth Circuits emphatically reject. *Ramirez-Cortez*, 213 F.3d at 1154-1155; *Keith*, 42 F.3d at 238.[1]

2. Because the government cannot avoid the obvious conflict, it instead tries to reimagine the relevant decisions. Its efforts are transparent.

a. Initially, the government insists the first judge made the "requisite findings" below, and the second judge merely "set[] forth what it determined" were the first judge's "reasons." Opp. 14-15, 17. Thus, the government continues, this case does not present any legal issue at all, and petitioner merely "disagree[s]" with the lower courts' "factbound determinations." *Id.* at 15. This is baseless.

First and foremost, the second judge did not engage in a *factual* inquiry; he invoked a *legal presumption* ("under circuit law") dictating "that the granting of such motions 'necessarily adopt[s]' any grounds that '"are obvious and set forth in [the parties'] motion[s]."'" Opp. 15. That accordingly has nothing to do with any "factbound" determination; it is a *legal* conclusion. Pet. App. 6a-7a.

Which is unsurprising: The panel's analysis did not delve into the *actual* findings by the *actual* judge, nor could it. The continuance orders were silent—the second judge could not see into the mind of the different judge who actually granted the (unexplained) continuance. The second judge could only guess whether the first judge con-

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[1] *E.g.*, *United States* v. *Sampson*, No. 07-389, 2011 WL 1357526, at *5-*6 (M.D. Pa. Apr. 11, 2011) ("where a magistrate judge did not make any ends of justice findings," "the district court judge could not subsequently assume that the magistrate intended to make such findings," citing *Ramirez-Cortez*); *United States* v. *Low*, 452 F. Supp. 2d 1036, 1044 (D. Haw. 2006) ("where magistrate judge did not make any ends of justice findings," "district court judge could not subsequently infer that the magistrate judge intended to make an ends of justice finding," citing *Ramirez-Cortez*).

sidered or balanced the relevant factors; acted on the basis of permissible or impermissible grounds; or considered each relevant fact in the record—as opposed to simply making a mistake, granting continuances as a matter of course, or granting any motion that is unopposed. See, *e.g.*, *United States* v. *Bryant*, 523 F.3d 349, 360-361 (D.C. Cir. 2008). While it is assuredly *possible* that the court granted the continuance for a valid reason (and after considering the mandatory factors), it is just as possible that the court granted the continuance without any serious thought at all. *United States* v. *Doran*, 882 F.2d 1511, 1516 (10th Cir. 1989) ("[f]ailure to address these issues on the record creates the unnecessary risk of granting continuances for the wrong purposes").[2]

Under First and Fifth Circuit precedent, this legal presumption is nevertheless allowed. But the Fourth and Ninth Circuits apply the opposite rule. Under their contrary position, different judges are *not* permitted to "speculate" what a first judge was thinking—even when the grounds for the continuance were set forth by the parties. See *Ramirez-Cortez*, 213 F.3d at 1153-1154 (recounting second judge's attempt to "infer[]" the basis of the first judge's order); *Keith*, 42 F.3d at 236 (noting the parties "explained to Judge Payne [the second judge] what had occurred"). Had either case arisen in the First or Fifth Circuit, the second judges would have been permitted to "necessarily" *presume* the basis of the continuance, and each case would have come out the opposite way. But in these other circuits, the "fail[ure] to make any findings"

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[2] *E.g.*, *Low*, 452 F. Supp. 2d at 1044 (declaring it "disingenuous" to "suggest" the magistrate judge made "the requisite findings 'in her mind'" because of prevailing practice among some magistrates "to routinely grant thirty day continuances when requested by a defendant after issuance of a superseding indictment, without considering the facts set forth in Section 3161(h)(8)").

imposed "an insurmountable hurdle." *Ramirez-Cortez*, 213 F.3d at 1154-1155. The government's position thus only *confirms* the existence of a circuit conflict.

In any event, the government's attempt to read *anything* into the first judge's ministerial orders is absurd. There is no basis in the record for determining what the first judge was thinking. All six motions were granted without any hearing, and four of the six (including each challenged order here) was granted via electronic minute entry on the docket sheet. Pet. App. 62a-64a. The judge did not "set[] forth" any reasons in the record, explain that any specific factors were considered, or otherwise provide any direct explanation for granting extra time. Pet. App. 62a-69a. Indeed, there is no definitive showing that the judge even *read* the full motions. Compare *Low*, 452 F. Supp. 2d at 1044 (noting "the apparent practice of at least some of the magistrate judges" to "routinely grant thirty day continuances").[3]

The Act's on-the-record requirement is not demanding; it can be satisfied by simply dashing off a few explanatory sentences ("orally or in writing") that addresses the Act's mandatory terms. Any judge thinking about the Act

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[3] The government cannot even explain why the judge directly "sign[ed], dat[ed], and affix[ed] a seal" to the first continuance motion but not the others. Opp. 14-15. If those rote acts had any significance, it presumably means the judge intended to treat the subsequent motions (granted via electronic minute entry) differently. See *id.* at 6-7 (acknowledging unexplained difference in treatment). Anyway, the judge's decision to sign the first order indicates nothing. The parties' prepared text simply read "[t]he above motion is GRANTED." C.A. J.A. 180. The "dedicated space" and pre-printed text (Opp. 5) did not say *why* the motion was granted—indeed, it did not even say "granted *for the reasons stated in this motion*." As the government's own authority confirms, "minute entries, by themselves, are clearly unsatisfactory explanations of the district court's ends-of-justice determinations." *United States* v. *Napadow*, 596 F.3d 398, 406 (7th Cir. 2010).

and its requirements is likely to meet that simple directive; common sense suggests that orders issued without explanation are those most likely to be issued without careful deliberation, much less with the "necessary balancing as required by § 3161(h)(8)(A)," *Keith*, 42 F.3d at 238. Yet in the First and Fifth Circuit, these failures can be excused by any grounds set forth by the parties, whereas the Ninth and Fourth Circuits demand the textual showing explicitly required by the Act (read: findings *by the court*). Those conflicting positions warrant immediate review.[4]

b. The government next tries to sidestep the split by refashioning what the circuit-level decisions actually say. Opp. 17-18. According to the government, the Ninth and Fourth Circuits held "only" that a second judge could not make up his or her "own findings" instead of divining the first judge's "record-discernable reasons." *Id.* at 18.[5]

This is nonsense. Both the Ninth and Fourth Circuits made two key points: (i) the first judge, not the second,

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[4] In passing, the government maintains that the Act's "on-the-record requirement" "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." Opp. 13 (citing decisions). Yet in each decision the granting judge *did* enter findings on the record; none suggested the (remarkable) proposition that courts can simply ignore the Act's "strict[]" procedural rules whenever a court feels its findings would be "obvious." Contra *United States* v. *Zedner*, 547 U.S. 489, 509 (2006) ("[t]his provision demands on-the-record findings"). Anyway, even on the government's reading, these cases would further cement the circuit conflict.

[5] The government weakly describes these cases as "[t]he pre-*Zedner* Fourth and Ninth Circuit decisions." Opp. 18. The government never identifies a single conceivable reason that *Zedner* would alter the analysis of either case; and, indeed, *Zedner* directly reinforces the Ninth and Fourth Circuit analysis while casting substantial doubt on the decision below.

had to make the requisite findings; and (ii) where the first judge failed to make *express* findings, the second judge was impermissibly left to "speculate" what the first judge was thinking. See Pet. 10-14. The government simply plucks isolated snippets from the circuits' opinions while ignoring each court's operative rationale: "[t]he district court was in no better position than we to speculate as to the 'findings' that might support an 'ends of justice' continuance," and "[b]ecause the Magistrate Judge * * * failed to make any findings, the district court faced an insurmountable hurdle in her effort to determine whether the 'delay was motivated by the proper considerations.'" *Ramirez-Cortez*, 213 F.3d at 1154-1155.

As noted above, each case, just like the one below, involved "record-discernable reasons" (contra Opp. 18); the problem was not the absence of any factors that might *theoretically* justify a continuance; the problem was the lack of express "findings on the record." *Ramirez-Cortez*, 213 F.3d at 1151; see also *United States* v. *Zedner*, 547 U.S. 489, 508 (2006) ("if a judge fails to make the requisite findings regarding the need for an ends-of-justice continuance, the delay resulting from the continuance must be counted"); *Bloate* v. *United States*, 559 U.S. 196, 203, 210 (2010) ("[s]ome of the delays are excludable only if the district court makes certain findings enumerated in the statute"; the judge must "record[] those findings").

Two circuits let a different judge supply those findings when the first judge fails to comply with the Act, and two circuits hold the opposite. The legal question is binary: one side is right and the other is wrong, and the stark division on this key question of criminal law is untenable. The government has an obvious incentive to paper over the split, but the conflict is undeniable, and it should be resolved by this Court.

B. The Question Presented Is Important And Warrants Review In This Case

As previously established (Pet. 22), this case is an optimal vehicle for resolving this important question. The issue is a pure question of law; it was squarely raised and resolved in both courts below; and it was outcome-determinative at each stage. There are no conceivable obstacles to resolving it here. Indeed, in response, the government does not even contest any of those critical considerations while effectively conceding the issue's obvious importance.

The government nevertheless argues this case is a "poor vehicle" because it might ultimately prevail under judicial estoppel. Opp. 19. Yet the First Circuit rejected petitioner's challenge solely under its view that a *different* judge could satisfy the Act's "on-the-record" requirement; it declined to "address" the government's estoppel argument. Pet. 9 (so explaining); Pet. App. 11a n.4. And this Court "routinely grants certiorari to resolve important questions that controlled the lower court's decision notwithstanding a respondent's assertion that, on remand, it may prevail for a different reason." Reply Br., *Kisor* v. *Wilkie*, No. 18-15, at 2 (filed Nov. 19, 2018). The government may prefer to litigate that unrelated issue now, but there will be every opportunity to argue the point on remand should this Court grant and reverse.

The government's estoppel argument, anyhow, is wrong. Suffice it to say that it ignores key aspects of this Court's reasoning in *Zedner* (see 547 U.S. at 500-502); it flouts the accepted principle that the Act protects the public's interest as much as the defendant's (*id.* at 501); and petitioner's so-called "representations" said nothing about whether the Act's "on-the-record" requirements were met, but only whether a continuance was warranted—it was the first judge's error in failing to follow

the Act's "procedural strictness" (*id.* at 509) and the government's failure in not insisting upon proper findings. There was no inconsistency between petitioner's factual contentions and the later assertion of his rights under the Act.

In any event, the government overlooks that its judicial-estoppel theory only invites an *additional* circuit conflict. *E.g.*, *Ramirez-Cortez*, 213 F.3d at 1156 (rejecting a parallel contention as inconsistent with the Act's text, circuit precedent, and the fundamental precept that "'the right to a speedy trial belongs not only to the defendant, but to society as well'"). If anything, the government has thus identified another reason to *grant* review, not deny it.

* * *

This case easily checks off every traditional box for review. The conflict over this important question of federal criminal law is obvious and entrenched. It implicates a fundamental aspect of the Speedy Trial Act's proper operation involving one of the Act's most common exceptions. The fact-pattern arises constantly in courts nationwide: courts often grant continuances in minimalist orders with virtually no explanation, and continuances are often granted by different judges than the ones ultimately resolving a subsequent motion to dismiss—in pointless disputes that could have been avoided had the first judge simply followed this Court's instructions and the Act's clear directive.

Until this Court intervenes, deep uncertainty will remain over the findings necessary to avoid triggering the Act's dismissal requirements—while embedded defects (requiring a potential do-over) are introduced in countless prosecutions. Review is urgently warranted.

Respectfully submitted.

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JULY 2022