NO. 22-7761

IN THE

SUPREME COURT OF THE UNITED STATES

AARON KEITH, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR THE PETITIONER

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1. **The government has not refuted the conclusion that certiorari review is warranted because, for criminal defendants seeking to litigate a Speedy Trial Act challenge to a lengthy continuance that has already been granted, the decision below incentivizes either duplicative and inefficient motions practice or eve-of-trial litigation that prevents trial courts from solving the problem by advancing the trial date instead of dismissing the case.**

The government argues that the text of the Speedy Trial Act "does not contemplate anticipatory motions or anticipatory dismissals based on delays that have not yet occurred." (Brief in Opp. at 6-7.) But the only thing the Speedy Trial Act says about the timing of filing a motion to dismiss for violation of its provisions is that the motion must be filed before trial. 18 U.S.C. § 3162(a) ("Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section.").

The specter of so-called "anticipatory dismissals" raised by the government overlooks petitioner's arguments. The entire point of the rule petitioner urges is that when a trial court is presented with a persuasive motion argument that a continuance the court has already granted leads to a future trial date that violates the Speedy Trial Act, it will be possible for the trial court to remedy the violation, not with dismissal, but by reconsidering the continuance and advancing the trial date. By contrast, the waiver rule the government urges would deny a trial court the opportunity to implement such a remedy short of dismissal, because it dictates that the defendant can challenge the delay resulting from the continuance only by filing a motion after the delay has passed, i.e., on the eve of trial. By that juncture, of course, if persuaded that a violation has occurred, the trial court's only option is dismissal.

Noting that the Speedy Trial sets forth multiple grounds for excluding time from the speedy-trial clock, the government asserts that "[t]he parties and the court cannot be certain in advance that a future period of delay will fall outside all those exclusions." (Brief in Opp. at 7, citing 18 U.S.C. § 3161(h).) This argument puts the cart before the horse. If the hypothetical alternative ground for exclusion had already existed or occurred when the trial court granted the challenged continuance, it can be addressed during the adjudication of a motion to dismiss filed immediately following the order granting the continuance. And if the hypothetical alternative ground for exclusion arises *after* the motion to dismiss is adjudicated, then of course the trial court has the authority to grant another, appropriate-length continuance based on the new ground.

Moreover, to the extent the hypothetical alternative ground falls within the category of an ends-of-justice exclusion pursuant to section 3161(h)(7)(A), it is clear from the statutory text and this Court's precedent that a trial court's findings for such exclusions must occur when the continuance is granted, not later. 18 U.S.C. 3161(h)(7)(A) (period of delay resulting from a continuance will be excluded "if the judge granted such continuance on the basis of his [*sic*] 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"); *Zedner v. United States*, 547 U.S. 489, 506-07 (2006) (noting that "the Act is clear that the findings must be made, if only in the judge's mind, before granting the continuance").

The petition argues that the decision below incentivizes defendants to wait until the eve of trial to file their speedy-trial motions to dismiss because that is the only way they can now challenge the full period of delay in bringing their cases to trial. (Pet. at 13-14.) In response, the government asserts that defendants are not *required* to wait that long because they can move to dismiss the day after the statutory 70-day period has expired. (Brief in Opp. at 7-8, citing *United States v. Sherer*, 770 F.3d 407, 411 (6th Cir. 2014), *cert. denied*, 574 U.S. 1097 (2015).) They *can* do so, but why would they? Under the decision below, filing when the government suggests would waive any challenge to the subsequent period of delay. This leaves a defendant with two viable options: File multiple, serial motions to dismiss for alleged violations of the Speedy Trial Act, or file one speedy-trial motion to dismiss on the eve of trial. Both of these courses of action are detrimental to the administration of justice. Either unnecessarily duplicative litigation ensues, or defendants are forced to identify the speedy-trial problem for the trial courts only *after* it is too late for any remedy other than dismissal.

Furthermore, *Sherer* involved a defendant who filed a speedy-trial motion to dismiss 57 days after indictment. 770 F.3d at 411. The government does not explain whether, in its view, the 71st day occurs literally on the 71st day after the indictment or first appearance of the defendant, *see* section 3161(c)(1), or rather on the 71st day plus any periods of time validly excluded from the speedy-trial clock under section 3161(h). Presumably, the government takes the latter view. As a practical matter, many federal criminal cases involve multiple continuances and exclusions granted

under the Speedy Trial Act. Here, for example, the trial date was continued six times. The government's position thus assumes that a criminal defendant will be able to discern in advance which of those continuances will ultimately be deemed valid and which will be deemed invalid. In making litigation decisions at the time of pretrial proceedings, however, defendants have no such crystal ball. They make decisions based on the need to preserve as many legal and factual claims of error as possible.

The government asserts that the waiver rule in the Tenth Circuit's decision below is consistent with case law from the First, Sixth, and Ninth Circuits. (Brief in Opp. at 8-9, citing *United States v. Connor*, 926 F.2d 81, 84 (1st Cir. 1991); *Sherer*, 770 F.3d at 411; and *United States v. Wirsing*, 867 F.2d 1227, 1230 (9th Cir. 1989).) While these cases are indeed distinguishable from petitioner's on their facts, it is true that each of these circuits has used broad waiver language akin to the challenged holding by the court below. This widespread adoption of an overbroad waiver doctrine demonstrates the scope of the problem and the need for this Court's intervention.[1]

2. Petitioner's appeal provides an excellent vehicle for deciding this important question of federal law, because when the trial court granted the final, lengthy trial continuance at issue, it relied on a ground expressly prohibited by the Speedy Trial Act and acknowledged that the case could be tried sooner.

The petition explains that one of the reasons the trial court articulated for the final, lengthy continuance (court congestion) was statutorily prohibited and that the court recognized the case could be tried earlier than the trial date selected—

[1] The government notes that this Court denied certiorari review of a similar decision from the Tenth Circuit. (Brief in Opp. at 5.) *See United States v. Nevarez*, 55 F.4th 1261, *cert. denied*, 143 S.Ct. 1790 (2023). But of course there are many reasons independent of an issue's merits why certiorari may be denied.

arguments the court of appeals did not address because of its waiver analysis. (Pet. at 5-9, citing Vol. 1 at 455.) The government does not dispute that when granting the final continuance, the trial court relied on court congestion in violation of 18 U.S.C. § 3161(h)(7)(C). Instead, the government simply points to other bases for the continuance to assert that petitioner's speedy-trial claim would fail on the merits. (Brief in Opp. at 10-11.) But the government overlooks the fact that *none* of those grounds justified the *length* of the continuance granted. And the government does not dispute that, as the trial court expressly acknowledged, this case could have been brought to trial sooner than the trial date selected. (Pet. at 5-6, citing Vol. 1 at 455.) Petitioner's statutory speedy-trial claim deserves to be adjudicated on its merits.

CONCLUSION

For all these reasons and those stated in the petition for writ of certiorari, this Court should grant certiorari and review whether petitioner's motion to dismiss adequately preserved his speedy-trial objection to the entire final trial continuance.

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Respectfully submitted,

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