No. 23-351

In the Supreme Court of the United States

RAMI A. AMER, PETITIONER

v.

NEW JERSEY

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONERS

This case presents two closely related questions concerning interlocking provisions of the Interstate Agreement on Detainers that govern whether a defendant has been brought to trial in a timely fashion. Nineteen federal and state courts have addressed the first question presented, which concerns whether a defendant is always "unable to stand trial" under Article VI(a) while a pretrial motion is pending. The result is an acknowledged and entrenched conflict. As to the second question presented, which concerns whether a defendant has been "brought to trial" within 180 days under Article III(a) when jury selection begins, the decision below transforms the Agree-

ment's generous 180-day clock into a virtually limitless period of time to try defendants. Both questions are enormously important, and this case is an ideal vehicle to resolve them.

Respondent concedes that there is a frequently acknowledged conflict over the tolling question. But respondent is wrong that this Court has "recently and repeatedly" denied review on that question; the most recent petition cleanly presenting it is from 1998. Nor is the conflict stale or insufficiently entrenched; in addition to the decision below, courts have adopted differing positions on the question as recently as 2008 and 2019.

On the merits, respondent's arguments founder on the settled historical meaning of the phrase "unable to stand trial." At the time of the Agreement's drafting and entry into force, that phrase referred to a defendant's physical or mental inability to stand trial. Respondent fails to cite a single historical source adopting a broader definition.

As to the second question presented, concerning the meaning of "brought to trial" in Article III(a), respondent again disregards a settled, common-law understanding. That phrase referred to the swearing in of a jury and the attachment of jeopardy. Respondent cites no case predating the Agreement that used that phrase to refer to the mere selection of a jury in the speedy-trial context. And it cites no post-adoption case treating the selection of a jury *over six weeks* before the swearing in of the jury as the moment when the defendant has been "brought to trial."

This case presents a suitable vehicle to resolve the longstanding conflict on the tolling question. The existence of a second question presented is not an obstacle to answering the first, and this Court routinely decides closely related questions even when one does not implicate a conflict among the lower courts. Respondent's fur-

ther suggestion that the trial court granted a continuance under Article III(a) was all but rejected by the New Jersey Supreme Court, and there are numerous reasons why that argument would fail on remand.

The questions presented are enormously important. Respondent seeks to circumvent not one, but two, separate provisions of the Agreement, which are designed to protect defendants against abuses by prosecutors and courts. This case illustrates the need for those protections. The trial court considered petitioner unable to stand trial not only for the 39 days it took orally to deny routine suppression motions, but also for an additional 14 days while the court wrote an opinion. The court then took what it thought was the bare minimum step to comply with the Agreement before recessing for more than six weeks, in part for a vacation. The petition for a writ of certiorari should be granted.

A. The Decision Below Perpetuates A Conflict Among The Lower Courts And Is Incorrect

1. The lower courts are in conflict on the question whether a pending motion always causes a defendant to be "unable to stand trial" under Article VI(a). See Pet. 12-19. Some nineteen federal courts of appeals and state courts of last resort have now addressed that question. Respondent tries to brush aside the conflict (at 25-28), but its efforts fall flat. On the merits, respondent urges this Court (at 28-30) to disregard the settled historical understanding of "unable to stand trial," but it fails to cite a single authority predating the Agreement in support of its interpretation. This Court's review is warranted.

a. As a preliminary matter, respondent is incorrect that the Court has "repeatedly and recently denied review" on this question. Br. in Opp. 25. In the most recent case it cites, the petitioners did not dispute that, in light

of unchallenged continuances, they were timely tried regardless of whether their pretrial motion tolled the limitations period. See Br. in Opp. at 20-22, *Bun* v. *United States*, Nos. 19-1037 & 19-8000 (cert. denied June 22, 2020). In another case respondent cites, the petition presented a different question: whether a defendant is "unable to stand trial * * * due to the pendency of court proceedings in another jurisdiction." Pet. at i, *Neal* v. *United States*, No. 09-5767 (cert. denied Dec. 14, 2009). Only in the third case, decided 26 years ago, did the Court deny certiorari on the same question presented in a potentially suitable vehicle. See *Montione* v. *Pennsylvania*, No. 98-1360 (cert. denied May 3, 1999). During the quarter-century since, the conflict has only deepened. See Pet. 12-17; Br. in Opp. 26-27.

Respondent also argues that the split among the courts is "minor" and "stale." Br. in Opp. 3; see *id.* at 26-27. But this Court routinely grants certiorari on "longstanding" conflicts. See, *e.g.*, *Salinas* v. *United States Railroad Retirement Board*, 592 U.S. 188, 193 (2021). And as respondent concedes (at 25-26), the conflict involves a large number of lower courts, with courts adopting differing positions on the question as recently as 2008 and 2019. Compare *United States* v. *Peterson*, 945 F.3d 144, 154 (4th Cir. 2019), cert. denied, 141 S. Ct. 132 (2020), with *State* v. *Brown*, 953 A.2d 1174, 1181 (N.H. 2008). Such a conflict cannot be said to be either "minor" or "stale."

Respondent's related argument (at 25-27) that the conflict is not "entrenched" completely ignores several cases. Although the Fifth and Sixth Circuits have not "had occasion to reconsider the question in the wake of" contrary decisions, Br. in Opp. 27, three courts have disagreed with the interpretation adopted by the decision below. As petitioner has explained (Pet. 15-17), the First

Circuit, the Florida Supreme Court, and the New Hampshire Supreme Court have all adopted the intermediate position that a defendant is "unable to stand trial" only if the trial date is delayed because of a reason attributable to him. See *Brown*, 953 A.2d at 1181-1182; *United States* v. *Neal*, 36 F.3d 1190, 1210 (1st Cir. 1994), cert. denied, 519 U.S. 1012 (1996); *Vining* v. *State*, 637 So. 2d 921, 925 (Fla.), cert. denied, 513 U.S. 1022 (1994). Petitioner would prevail even under that test, because his trial date was delayed only to accommodate the trial judge's docket and vacation schedule.

b. On the merits of the tolling question, respondent does not cite a single case predating the drafting and entry into force of the Agreement that adopts its broad interpretation of "unable to stand trial." The New Jersey Supreme Court erred by disregarding the settled, common-law understanding of that phrase. See Pet. 18-19.

Respondent argues (at 26-27) that the decisions of the Fifth and Sixth Circuits are unpersuasive because they do not discuss the Speedy Trial Act. But those courts were surely aware of that important federal statute when they interpreted the Agreement, with the Fifth Circuit even noting that the defendant "[c]it[ed] the [f]ederal and Texas Speedy Trial Acts." *Birdwell* v. *Skeen*, 983 F.2d 1332, 1338 (1993). At any rate, there is no reason why the Speedy Trial Act must be interpreted *in pari materia* with the Agreement. The Agreement sets a generous deadline (180 days), but tolls it only when the defendant is "unable to stand trial," N.J. Stat. Ann. § 2A:159A-6(a), or a court grants a "necessary or reasonable" continuance for "good cause," N.J. Stat. Ann. § 2A:159A-3(a). By contrast, the Speedy Trial Act sets a less generous limitations period (70 days), but tolls that deadline for 16 enumerated reasons, including the pendency of pretrial motions and

the defendant's being "mentally incompetent or physically unable to stand trial." 18 U.S.C. 3161(h).

Respondent further suggests (at 29) that the Fifth and Sixth Circuits' interpretation of Article VI(a) renders it redundant to Article VI(b)'s prohibition on applying the Agreement to "any person who is adjudged to be mentally ill." N.J. Stat. Ann. § 2A:159A-6(b). But Article VI(b) serves the additional function of precluding the transfer of a mentally ill defendant from one State to another. See Pet. 19.

Respondent's remaining reasons for ignoring the settled historical understanding of "unable to stand trial" are also unpersuasive. *First*, the absence of "limiting language" in Article VI(a), Br. in Opp. 28 (citation omitted), is irrelevant in light of the settled historical meaning. *Second*, respondent is incorrect (at 29-30) that statutes and precedents cannot establish a phrase's meaning without secondary sources or legislative history. See, *e.g.*, *Merck & Co.* v. *Reynolds*, 559 U.S. 633, 648 (2010); see also Pet. 17-18. *Third*, although respondent speculates (at 29) that the interpretation adopted by the Fifth and Sixth Circuits might incentivize defendants to file motions to manufacture delays, respondent can neither identify a single case where that has happened nor explain why a frivolous defense motion would not constitute "good cause" for a continuance under the Agreement. See *Birdwell*, 983 F.2d at 1341 n.23.

2. As to the second question presented, respondent offers no evidence that a defendant has been "brought to trial" for purposes of Article III(a) when jury selection begins. Statutes and cases from before the Agreement's drafting and entry into force evinced the understanding that a defendant has been "brought to trial" for speedy-trial purposes only when a jury has been sworn and jeopardy has attached. See Pet. 20-21. Respondent's various

arguments (at 20-22) cannot overcome that settled understanding.

Respondent first cobbles together dictionary definitions of "brought to trial" and "commence." See Br. in Opp. 20-21. But those definitions indicate only that a defendant is "brought to trial" when the "first act" of the trial occurs; they do not say what the "first act" is.

Respondent next cites cases referring to jury selection as the beginning of trial, see Br. in Opp. 21-22, but those cases are inapposite. One of them addressed the right to consistent verdicts, and its assertion that "trials generally begin with *voir dire*" is dictum. *United States* v. *Powell*, 469 U.S. 57, 66 (1984). Two other cases addressed the right to be present, which, in the interest of protecting defendants, extends even before a jury is sworn. See *Gomez* v. *United States*, 490 U.S. 858, 873 (1989); *Lewis* v. *United States*, 146 U.S. 370, 375-376 (1892); see also Fed. R. Crim. P. 43(a)(2) (protecting a defendant's right to be present from "impanelment" until "verdict"). And while *State* v. *Bjorkman*, 199 A.3d 263 (N.H. 2018), held that a defendant had been "brought to trial" at the time of jury selection even though two weeks elapsed before the jury was sworn (due in part to a defense motion), the decision expressly excluded "any improper delay in trial proceedings." *Id.* at 269; see *United States* v. *Brown*, 819 F.3d 800, 806, 822 (6th Cir. 2016) (holding that a delay between selection and swearing was included time for purposes of the Speedy Trial Act); *United States* v. *Stayton*, 791 F.2d 17, 20 (2d Cir. 1986) (same).

As with the first question presented, see p. 6, *supra*, evidence of common-law usage is sufficient to demonstrate the settled meaning of a phrase. See Br. in Opp. 21-22. The established usage of "brought to trial," like the established usage of "unable to stand trial," is dispositive. The New Jersey Supreme Court's holding on the second

question presented, like its holding on the first, was erroneous.

B. The Questions Presented Are Exceptionally Important And Warrant The Court's Review In This Case

This case is a suitable vehicle to resolve the conflict among the lower courts on the first question presented, and both questions are important. See Pet. 21-23.

1. Although respondent is correct (at 23-24) that it need only prevail on one of the two questions presented, the second question does not pose an obstacle to resolving the first. There is no rule against granting certiorari in such circumstances. See, *e.g.*, *Thompson* v. *North American Stainless, LP*, 562 U.S. 170, 173 (2011). And here, there is no logical reason why the Court must address the second question presented before resolving the conflict on the first. Even if the Court were to answer one of the questions in respondent's favor, it would be deciding this case and thus would not be issuing an advisory opinion. See Br. in Opp. 23.

What is more, respondent is incorrect that the two questions are not closely related. See Br. in Opp. 18. They involve interlocking provisions of the same interstate compact and ultimately concern whether petitioner was tried in a timely fashion. Indeed, when the Court "grant[s] certiorari on a question" involving a conflict among the lower courts, it "often also grant[s] certiorari on attendant questions that are not independently 'cert-worthy,' but that are sufficiently connected to the ultimate disposition of the case that the efficient administration of justice supports their consideration." *City and County of San Francisco* v. *Sheehan*, 575 U.S. 600, 619-620 (2015) (Scalia, J., concurring in part); see, *e.g.*, *Collins* v. *Yellen*, 141 S. Ct. 1761 (2021).

Respondent's further contention (at 24) that the trial court granted a continuance is a smokescreen. The Agreement permits only a "necessary or reasonable" continuance "for good cause shown in open court" with "the prisoner or his counsel being present." N.J. Stat. Ann. § 2A:159A-3(a). Here, respondent argues that the trial court granted a continuance (1) retroactively, (2) *sua sponte*, (3) not in open court, (4) without petitioner or his counsel present, and (5) without an explanation of good cause, necessity, or reasonableness on the facts of this case. See Pet. App. 73a, 77a-78a. The New Jersey Supreme Court did not address the propriety of any continuance, but it did pointedly "remind trial courts" of the statutory prerequisites. Pet. App. 26a n.8; see *Stroble* v. *Anderson*, 587 F.2d 830, 839 (6th Cir. 1978), cert. denied, 440 U.S. 940 (1979). Respondent could raise the continuance issue on remand if this Court were to vacate the judgment below; in any event, it poses no impediment to the Court's review of the questions presented.

2. Respondent also argues (at 16) that the questions presented are neither important nor recurring, but those arguments lack merit.

a. Respondent contends (at 27-28) that the first question presented is not important because the trial court *could* have granted a continuance while petitioner's motions were pending. That objection proves petitioner's point. The Agreement provides only one avenue, complete with detailed procedural protections, for tolling the 180-day deadline while motions are adjudicated: a "necessary or reasonable continuance" based on "good cause shown in open court" with "the prisoner or his counsel being present." N.J. Stat. Ann. § 2A:159A-3(a). The Agreement should not be read to allow for tolling without those procedural protections. See *Birdwell*, 983 F.2d at 1341

n.23; *State* v. *Shaw*, 651 P.2d 115, 120 (N.M. Ct. App. 1982).

Respondent also speculates that there is no "reason to fear that the ruling below will open the door for abuse or excessive delay," because there are "restrictive timelines" on motions practice under state law. Br. in Opp. 28 n.3. But even if procedural deadlines imposed by New Jersey law were relevant to the meaning of "unable to stand trial" under the Agreement, automatic tolling would still incentivize courts and prosecutors to delay within the bounds of those deadlines. See *Birdwell*, 983 F.2d at 1341 n.23. Indeed, in petitioner's case, the trial court deemed petitioner "unable to stand trial" not only until it orally denied petitioner's motions, but also until it issued a written decision—all apparently consistent with New Jersey procedures. See Pet. App. 7a, 34a.

b. As to the second question presented, respondent argues (at 18-20) that it is not recurring and has no practical importance because courts will almost always swear in the jury shortly after selection. But respondent provides no support for that assumption. In this case, more than six weeks passed between the selection and swearing in of the jury. See Pet. 7-8. Cases decided in the Speedy Trial Act context show a similar potential for delay. See, *e.g.*, *Brown*, 819 F.3d at 810. And the frequency of delay is likely to increase if the lengthy delay in this case is allowed to stand. Such delays can be devastating for defendants who need witnesses and evidence to be available at the time of trial. See, *e.g.*, *Stayton*, 791 F.2d at 21.

The promise of the New Jersey Supreme Court to police future delays, on which respondent relies (at 20), is illusory. If a six-week delay is not a sufficiently "prolonged recess[]" to violate the Agreement, Pet. App. 25a, then that judge-made protection does very little work.

And the promise that courts will impose extratextual limits on prosecutors is no substitute for the protections adopted by Congress and state legislatures in the Agreement itself.

Finally, the possibility that the trial court could have granted a continuance (see Br. in Opp. 20) does not deprive the second question presented of its importance, either. As the Second Circuit has recognized, the Agreement places a "responsibility [on] the trial judge to reassign cases to assure defendants their right to a speedy trial" if the court's "calendar [is] already full," the court is "in the middle of another trial," or a conflict arises due to "a program undertaken by the court to dispose of [other] cases." *United States* v. *Ford*, 550 F.2d 732, 743 (2d Cir. 1977), aff'd on other grounds, 436 U.S. 340 (1978). And in the absence of a properly granted continuance, the Agreement's 180-day period continues to run. Further review is warranted to provide clarity concerning the operation of that period, which protects the right of an incarcerated defendant to the timely disposition of pending charges.

* * * * *

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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