No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ARMANDO OROZCO-BARRON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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QUESTIONS PRESENTED FOR REVIEW

Under the Speedy Trial Act's "ends of justice" provision, a court may extend the statute's deadlines upon "finding 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). Between March 2020 and March 2022, the Southern District of California's Chief Judge invoked that provision to extend the Speedy Trial Act's deadlines in every case in the district, effectively nullifying those deadlines and precluding defendants from moving to dismiss (even without prejudice). Though the district suspended trials for only about eight-and-a-half months, these exclusions lasted for almost two years. A divided Ninth Circuit panel held that these exclusions were valid, even while trials were occurring and even for detained defendants at heightened risk of death from COVID-19.

The questions presented are:

(1) May a Chief Judge extend the STA's deadlines by general order, without individually evaluating defendants' interests in a speedy trial?

(2) When an exclusion is entered by general order, may a district court validate that exclusion by retroactively weighing the defendant's speedy trial interests at the motion-to-dismiss hearing?

PARTIES, RELATED PROCEEDINGS, AND RULE 29.6 STATEMENT

The parties to the proceeding below were Petitioner Armando Orozco-Barron and the United States. There are no nongovernmental corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

All proceedings directly related to the case, per Rule 14.1(b)(iii), are as follows:

- *United States v. Orozco-Barron*, No. 20-CR-2277-LAB, U.S. District Court for the Southern District of California, Judgment issued December 14, 2021.
- *United States v. Orozco-Barron*, No. 21-50298, U.S. Court of Appeals for the Ninth Circuit, Opinion issued May 22, 2023, Amended Opinion issued July 3, 2023.

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INTRODUCTION

The COVID-19 pandemic reached our shores in early 2020. The catastrophic results need little explication. Millions were infected. Hundreds of thousands died. Everyone sacrificed.

The courts were no exception. The courts' core functions—holding hearings, convening juries, taking witness testimony, ensuring defendants' attendance—all came with serious health risks. To meet these challenges, courts had to suspend or stagger trials, rely on technology, impose cleaning and distancing protocols, and implement safe transport procedures, all of which caused inconvenience and delay.

Few, however, suffered like detained persons awaiting trial. Their isolation took place in cells, not homes. Or they lived in dorm-style units, where there was no way to isolate. *See Wilson v. Williams*, 961 F.3d 829, 834 (6th Cir. 2020). No matter what, the churn of new arrivals, staff, and vendors introduced myriad opportunities

for outbreak. Camila Strassle & Benjamin E. Berkman, *Prisons and Pandemics*, 57 San Diego L. Rev. 1083, 1091–92 (2020). Detainees succumbed in droves. *See* Federal Bureau of Prisons, *Inmate COVID-19 Data*, https://www.bop.gov/about/statistics/statistics_inmate_covid19.jsp. Incarcerated people were over five times more likely to become infected and, adjusted for age and sex, three times more likely to die than people on the outside. Brendan Saloner, et al., *COVID-19 Cases and Deaths in Federal and State Prisons*, JAMA (July 8, 2020), https://jamanetwork.com/journals/jama/fullarticle/2768249. Even those who did not contract the virus lived with the deprivation that comes with extended lockdown and the fear that attends large-scale outbreaks. *See* Sharon Dolovich, *Mass Incarceration, Meet Covid-19*, 11/16/2020 U. Chi. L. Rev. Online 4, 10 (2020).

These competing considerations raised the question of how the Speedy Trial Act ("STA") applies in these conditions. The STA ordinarily mandates that trial occur within 70 days of indictment. 18 U.S.C. § 3161(c)(1). But the statute allows judges to extend that deadline after applying a case-specific balancing test. 18 U.S.C. § 3161(h)(7)(A). One side of the scale weighs interests supporting delay. *Id.* The other measures the "interest of the public and the defendant in a speedy trial." *Id*. Time is excludable only if the former outweighs the latter. *Id*.

This provision had obvious relevance during the pandemic. A straightforward application would simply require courts to weigh courts' and defendants' interests against one another when deciding whether to exclude time, as they do every day in federal courts across the nation. If the reasons for delay weighed heavier, then the

court would be obligated to grant the exclusion, despite the hardship to the defendant. But if the defendant had a weightier interest in avoiding pretrial delay, then the court would be bound by statute to deny the exclusion and—once the 70-day deadline expired—dismiss the case. 18 U.S.C. § 3162(a)(2). Such dismissals could be without prejudice, allowing the government to reindict when the danger abated. *Id*. Many courts followed this procedure during the pandemic, deciding on a case-by-case basis whether to grant ends-of-justice exclusions.

The Chief Judge in the Southern District of California took a different tack. In March 2020, he issued a general order purporting to exclude time in every case in the district, finding that the hardship to courts would always outweigh any defendant's interests in a speedy trial. Chief Judge Order ("CJO") 18 at 2.[1] He continued to issue these orders through the summer and into the fall, when the district's judges voted unanimously to resume trials. CJO 24, 27, 30, 33, 34, 36, 40.

It was around that time that the government indicted Mr. Orozco-Barron on an immigration offense. At that time, no vaccine had been released. And as a diabetic, Mr. Orozco-Barron faced heightened risks of hospitalization or death from COVID-19. That risk that was brought home vividly when a high-risk detainee died at the local jail. Yet Mr. Orozco-Barron was ordered detained. He would stay in detention for almost a year.

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[1] All CJOs are available on the Southern District of California's website at https://www.casd.uscourts.gov/rules/general-orders.aspx#tab2.

The Chief Judge did not know any of these facts about Mr. Orozco-Barron—or the individual circumstances of most of the district's thousands of defendants—when he entered the CJOs. And for the over 90 days after indictment, the district judge assigned to his case never entered an individual time exclusion on Mr. Orozco-Barron's docket. Over the life of the case, other, normally nonexcludable periods would add to this total, rounding out at 143 nonexcludable days. Yet, in denying Mr. Orozco-Barron's motion to dismiss, the court found that zero days has elapsed on the speedy trial clock because of the CJOs.

A divided panel of the Ninth Circuit affirmed. *See United States v. Orozco-Barron*, 72 F.4th 945 (9th Cir. 2023). The majority determined that the CJOs' exclusions were valid, relying both on the 2020 CJOs' generalized findings and on the district judge's post hoc evaluation at the 2021 motion-to-dismiss hearing. *Id.* at 954–59. At least two other circuits have adopted a similar view. *United States v. Pair*, 84 F.4th 577, 583–86 (4th Cir. 2023); *United States v. Roush*, No. 21-3820, 2021 WL 6689969, at *2 (6th Cir. Dec. 7, 2021) (unpublished). If these courts are right, then a single district judge can effectively suspend the deadlines in this federal statute, in an entire judicial district, across thousands of cases, for years at a time.

But Judge Christen in dissent made a powerful case that the majority was wrong. *Orozco-Barron*, 72 F.4th at 559–65 (Christen, J., dissenting). This Court's decision in *Zedner v. United States* recognized that ends-of-justice exclusions operate on a "case-specific" basis. 547 U.S. 489, 499 (2006). The same case squarely

holds that judges may not perform retroactive ends-of-justice analyses. *See id.* at 506–09. In Judge Christen's view, the pandemic was no excuse for individual district judges to nullify these procedural safeguards, particularly when trials were moving forward in the district. *Id.* at 965.

Judge Christen was right. Even during an emergency, courts must not "willingly abandon the nicety of requiring laws to be adopted by our legislative representatives and accept rule by decree." *Arizona v. Mayorkas*, 143 S. Ct. 1312, 1316 (2023) (Gorsuch, J., statement). The majority's opinion below is egregiously wrong and directly at odds with this Court's precedent. And given the sheer scale and scope of these general orders—and the potential that they could be used in the future—this debate involves an issue of great importance. The Court should take up that issue now. If at-risk detainees must wait for the next emergency to challenge this practice, they may not get relief until it is too late.

OPINION BELOW

A divided Ninth Circuit panel affirmed Mr. Orozco-Barron's conviction in a published opinion. *See United States v. Orozco-Barron*, 67 F.4th 1203 (9th Cir. 2023). The panel then sua sponte amended the opinion. *United States v. Orozco-Barron*, 72 F.4th 945 (9th Cir. 2023) (attached here as Appendix A). Judge Christen dissented. *Id.* at 559–65. Mr. Orozco-Barron subsequently filed a petition for rehearing and rehearing en banc, which was denied.

JURISDICTION

The Ninth Circuit affirmed Mr. Orozco-Barron's conviction on May 22, 2023. *United States v. Orozco-Barron*, No. 21-50298, Docket No. 43. The court denied

Mr. Orozco-Barron's petition for rehearing or rehearing en banc on December 21, 2023. *United States v. Orozco-Barron*, No. 21-50298, Docket No. 58. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Copies of 18 U.S.C. §§ 3161–3162 are included in Appendix B.

STATEMENT OF THE CASE

By March 17, 2020, the United States' battle with COVID-19 had begun in earnest. San Diego, the seat of the Southern District of California's federal courts, was under a state of emergency. CJO 18 at 1. Convening juries or in-person hearings contravened public health guidance. *Id*. And persons detained awaiting criminal trials—under siege from the virus in their jails—risked spreading it every time they met with counsel or came to court. *Id*.

For these reasons, the Southern District of California's Chief Judge entered an order suspending jury trials. *Id*. The order also addressed the STA's 70-day deadline for convening trials. Due to the pandemic conditions described above, the Chief Judge found "that the period of suspension of criminal trials and other criminal proceedings implemented by this Order is excluded under the Speedy Trial Act." *Id*. at 2. Specifically, the order concluded that "under 18 U.S.C. § 3161(h)(7)(A), these continuances serve the ends of justice and outweigh the interests of the public, of the government, and of criminal defendants in a speedier trial." *Id*. The order provided that the exclusion would last from March 17, 2020 to April 16, 2020. *Id*.

By April 15, however, "[t]he circumstances giving rise to the judicial emergency ha[d] not materially changed or abated." CJO 24. The Chief Judge therefore extended the previous order for an additional 30 days, finding that "this extension serves the ends of justice under 18 U.S.C. § 3161(h)(7)(A)." *Id*.

On May 15, the Chief Judge issued another order. CJO 27. The order noted that conditions had improved to the point where, beginning in June, district judges could conduct certain in-person proceedings for out-of-custody criminal defendants. *Id*. at 1. For in-custody defendants, the same proceedings could take place using a mix of in-person proceedings and video teleconferencing ("VTC") technology. *Id*. at 2. Meanwhile, the U.S. Attorney's Office could start indicting new cases. *Id*.

But because of continued public health concerns, those newly indicted individuals, and anyone else awaiting a trial date, would not be able to go to trial. Thus, "[i]n consideration of the factors outlined in" the original CJO "and to protect the public safety and prevent the spread of COVID-19," the Chief Judge extended the original CJO for another 30 days, stating that the "extension serves the ends of justice under 18 U.S.C. § 3161(h)(7)(A)." *Id*. The Chief Judge entered materially identical exclusions, based on materially identical findings, in June, July, and August. CJO 30, 33, 34.

By August 24, however, conditions had improved to the point where trials were possible. CJO 36. A Chief Judge Order filed on that day put in place a series of safety protocols for conducting trials, which would commence on August 31. *Id*. at 2. The district's judges unanimously consented to the protocols. *Id*. at 1.

Trials resumed on schedule. In September, October, and November, however, the Chief Judge entered STA exclusions materially identical to those issued during the trial suspension. CJO 40, 47, 50.

Meanwhile, on July 17, 2020, Mr. Orozco-Barron was arrested on immigration charges. As a diabetic, Mr. Orozco-Barron fell in the "high risk" category for serious illness or death from COVID-19. Even before the pandemic, Mr. Orozco-Barron had struggled to control his diabetes. He had previously been hospitalized for complications from the disease. (His father had died from similar complications several years earlier.) Mr. Orozco-Barron's age, 55, and his hypertension further increased his risk.

Nevertheless, he was ordered detained pending trial. The Marshals Service assigned him to the Metropolitan Corrections Center ("MCC") in downtown San Diego, where hundreds had contracted the virus. A couple of months after he arrived, Victor Cruz—a 47-year-old with a high-risk comorbidity—died while in jail at MCC.

On August 13, federal prosecutors filed an information charging Mr. Orozco-Barron with attempted illegal reentry under 8 U.S.C. § 1326. A magistrate judge arraigned him the same day. A hearing to set a trial date was scheduled for September 30, 2020. About a week before the hearing, the district court entered a minute order vacating the hearing "on the Court's own motion." The hearing was reset for October 21, 2020. Neither the magistrate judge nor the district judge entered any orders excluding time.

By the October 21 hearing, the district had been holding trials for close to two months. Mr. Orozco-Barron appeared at the hearing via VTC. The court did not reference the STA or time exclusions. The 70-day deadline to try Mr. Orozco-Barron expired the next day.

In December 2020, infection numbers started surging. The Chief Judge entered an order suspending trials and excluding time under the STA. CJO 52-A at 2. But by March 8, 2021, conditions had improved enough to resume criminal trials, VTC hearings, and some in-person proceedings. CJO 63 at 3. Still, the CJO lifting the trial suspension continued to exclude time under the STA. CJO 63 at 3–4.

Criminal trials were never suspended again. Yet, the Chief Judge continued entering district-wide orders excluding time for the remainder of 2021 and into the first months of 2022. CJOs 63-A to -H. Taken together, the Chief Judge Orders suspended criminal trials for about eight-and-a-half months. *See* CJOs 18–36; CJOs 52–60. But they purported to exclude time from the STA's trial clock in every case in the district for nearly 2 years. *See* CJOs 18–63-G.

On June 21, Mr. Orozco-Barron filed a motion to dismiss under the STA, explaining that 143 non-excludable days had elapsed since indictment. In response, the prosecutor conceded that 68 non-excludable days had elapsed, though she contested the other periods. But at the motion to dismiss hearing, the district court[2]

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[2] By happenstance, the assigned district judge was the Chief Judge who issued the CJOs. But he did not even meet Mr. Orozco-Barron for the first time until after

disagreed with the prosecutor's concession. "Why do you say its non-excludable?" the court asked. "Up until around the 1st of July, we were still under a Chief Judge order that limited the number of jury trials to three per week, only one of which would be an in custody case. . . . All of that time was excluded under the order." He added, "This was obviously an emergency circumstance that suspended the ordinary operation, including the Speedy Trial Act."

Defense counsel objected that "even though there was a Chief Judge Order, there still had to be specific exclusions of time specific to Mr. Orozco's case." ER-22.

The court rejected her argument. "The motion to dismiss on the Speedy Trial Act is denied. The court relies on the pendency of Chief Judge orders," the court said. The court then recounted the challenges described in the CJOs, including public health concerns, intermittent trial suspensions, and limits on the number of trials that could move forward. "So, the bottom line was that it was impossible . . . for the court to convene Mr. Orozco's jury trial any time before tomorrow. The motion is denied." The case then went to trial on July 13, 2021. The trial took less than one day.

Mr. Orozco-Barron appealed to the Ninth Circuit, arguing that the CJOs did not satisfy the STA's strict procedural requirements for entering ends-of-justice exclusions. On appeal, the government reversed its position. The government no longer contested that, absent the CJOs, more than 70 days would have elapsed on

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entering over 70 days' worth of CJOs applicable to Mr. Orozco-Barron's case. *See* CJO 33, 34, 40, 47.

the speedy trial clock. But the government defended the validity of the CJOs' exclusions.

A divided panel of the Ninth Circuit affirmed. *Orozco-Barron*, 67 F.4th at 495. The panel majority reasoned that in "an emergency or disaster that has the same widespread effects on courts and parties alike," ends-of-justice findings "need not be particularized to an individual defendant." *Id*. at 958. The majority also relied on the district court's comments at the 2021 motion-to-dismiss hearing. *Id*. at 955. In particular, though the district court stated explicitly that it was relying on the CJOs, the panel found that the court had also implicitly considered Mr. Orozco-Barron's status as a high-risk detainee. *Id*. at 956. Per the majority, the district court "was well aware of Orozco-Barron's detention status, because it had previously denied Orozco-Barron's request for release after holding a hearing"; the court had "subsequently recognized that it had been 'tough on [Orozco-Barron] in custody,'" and "there [was] no indication that the district court failed to consider Orozco-Barron's interest in being free from prolonged detention." *Id*. at 956.

Judge Christen dissented. She pointed out that the ends-of-justice provision "necessitates consideration of case-specific information," particularly when trials are occurring. *Id*. at 964 (Christen, J., dissenting). She also noted that the district court's post hoc evaluation of the ends-of-justice balance could not validate the exclusion. *Id*. at 964. Ends-of-justice exclusions must be justified based on the actual reasons for excluding time, which—in the case of district-wide CJOs—had nothing to do with Mr. Orozco-Barron's individual case. *Id*. Finally, she opined that

the "district court's ruling does not reflect consideration of Orozco-Barron's detained status during the pre-trial period." *Id.*

This petition follows.

SUMMARY OF THE ARGUMENT

This Court should grant certiorari because the court below—along with two and arguably three other circuits—directly and egregiously violated this Court's precedents on an issue of great importance.

First, the decision below validated pandemic ends-of-justice exclusions that violated the Court's precedents. The Court has interpreted the ends-of-justice exclusion to mandate a "case-specific" analysis, *Zedner*, 547 U.S. at 499, and every circuit to consider the question (including the Ninth Circuit) has agreed. Likewise, this Court has held that courts must perform this case-specific analysis "before granting the [ends-of-justice] continuance," *id.* at 506–07, and circuit courts (including the Ninth Circuit) have resoundingly agreed. Finally, the Court has held that "the Act requires express findings" to support an ends-of-justice exclusion, *id.* at 506, as the statute says in so many words, 18 U.S.C. § 3161(h)(7)(A) ("No such period of delay . . . shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for [granting the exclusion]."). When courts do not follow these procedures in entering ends-of-justice exclusions, the exclusion is invalid, and reviewing courts must disregard it without conducting harmless error review. *Zedner*, 547 U.S. at 506-08.

General orders excluding time, including the CJOs, do not fulfill the STA's requisites. The judges entering those orders cannot assess thousands of defendants'

individualized speedy trial interests before excluding time. And any later, case-specific evaluation will necessarily occur in retrospect, after the general order's ends-of-justice continuances have been granted.

Yet, over a dissent by Judge Christen, the majority below validated CJO exclusions that violated all three procedural protections laid out above. The majority held that in "an emergency or disaster that has the same widespread effects on courts and parties alike," ends-of-justice findings "need not be particularized to an individual defendant." *Orozco-Barron*, 72 F.4th at 958. The majority also relied on the district court's remarks at the 2021 motion-to-dismiss hearing—months after the 2020 CJO exclusions—to find that the court "considered the relevant statutory and non-statutory factors when deciding to grant a continuance." *Id*. at 955. Finally, the majority held that the 2021 remarks incorporated factors beyond those stated in the record, reasoning that the court "was well aware of" those factors and had "recognized" those factors in other hearings not involving the STA, and "there [was] no indication that the district court failed to consider" those factors. *Id.* at 956.

Second, these holdings were egregiously wrong. The Court has repeatedly instructed that judges must follow the law even during the pandemic. That is doubly true here because, at least by the fall of 2020, there was no emergent needs for these orders. At that time, courts were already managing their own calendars and holding hearings in their individual cases. It therefore would have been easy for courts to evaluate time exclusions on an individual basis, as they do in ordinary

times. And if it were true, as the CJOs claim, that the ends of justice would always favor a time exclusion, then a time exclusion would inevitably be granted. Thus, the CJOs' only practical effect was to ensure that defendants could not even make the argument that their particular speedy trial interests weighed heavier, no matter the risks to their health and life that pandemic pretrial detention posed.

Third, this issue is extremely important, because these illegal exclusions covered hundreds of cases in entire judicial districts for months or years. The Southern District of California, for instance, processes thousands of cases each year, and the purported exclusions were in effect for about two years until March 2022. Court of appeals decisions green-lighting these orders will encourage district courts to claim similar, unauthorized "emergency" powers next time the courts face a comparable threat. And this Court should reach this issue now, before the next disaster strikes, as these illegal orders slow down the review process. Furthermore, in straining to validate these exclusions, the majority also employed long-disapproved procedures and created intra- and inter-circuits splits. Reviewing this case now will allow the Court to iron out those inconsistencies.

Fourth, this case is the right vehicle to resolve this issue. Mr. Orozco-Barron fully preserved this issue at every stage in the case. The answer to the question presented is dispositive here. And this may be one of the last pandemic cases presenting this issue, as these general orders have now been lifted.

For all these reasons, this Court should grant certiorari and reverse.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit panel majority held that the pandemic justified allowing district courts to extend the STA's deadlines without following the procedures laid out in statute and the Court's longstanding precedent.

"[T]he Speedy Trial Act generally requires a trial to begin within 70 days of the filing of an information or indictment or the defendant's initial appearance, but the Act recognizes that criminal cases vary widely and that there are valid reasons for greater delay in particular cases." *Zedner*, 547 U.S. at 497. "To provide the necessary flexibility, the Act includes a long and detailed list of periods of delay that are excluded in computing the time within which trial must start." *Id*. Most of these exclusions are triggered automatically by certain objective events, like motions practice, competency proceedings, or interlocutory appeals. 18 U.S.C. § 3161(h)(1)–(6).

But one exclusion—the so-called "ends of justice" exclusion—is administered by courts at their discretion. *Zedner*, 547 U.S. at 498. That provision lies at the center of the questions presented here.

A. The Court and the courts of appeals all agree that ends-of-justice findings must be case specific and must be made, at least in the judge's mind, before granting the exclusion.

The ends-of-justice provision "permits a district court to grant a continuance and to exclude the resulting delay if the court, after considering certain factors, makes on-the-record findings that the ends of justice served by granting the continuance outweigh the public's and defendant's interests in a speedy trial." *Zedner*, 547 U.S. at 498–99. "[I]n allowing district courts to grant such

continuances, Congress clearly meant to give district judges a measure of flexibility in accommodating unusual, complex, and difficult cases." *Id*. at 508. "But it is equally clear that Congress, knowing that the many sound grounds for granting ends-of-justice continuances could not be rigidly structured, saw a danger that such continuances could get out of hand and subvert the Act's detailed scheme." *Id*. at 508–09. "The strategy of [this exclusion], then, is to counteract substantive openendedness with procedural strictness"; it "gives the district court discretion," but only "within limits and subject to specific procedures." *Id*. at 498, 509.

Three of the STA's strict procedures are relevant here. First, courts must assess exclusions on an individual basis. The ends-of-justice provision sets forth four, non-exhaustive, case-specific factors that courts "shall consider," and it nullifies any exclusion granted without on-the-record reasons why the ends of justice outweigh the public's and defendant's speedy trial interests. 18 U.S.C. § 3161(h)(7)(A)–(B). Courts have readily inferred from this structure that Congress intended the exclusion "to accommodate limited delays for *case-specific* needs." *Zedner*, 547 U.S. at 499 (emphasis added). In keeping with the Court's case-specific orientation toward the exclusion, every circuit to address this issue—including the Ninth Circuit—has held that an ends-of-justice continuance may be granted only for case-specific reasons. *See, e.g.*, *United States v. Ramirez-Cortez*, 213 F.3d 1149, 1155 (9th Cir. 2000) ("[T]he Speedy Trial Act requires case-by-case findings."); *United States v. Huete-Sandoval*, 668 F.3d 1, 5 (1st Cir. 2011) (holding that time could not be excluded under this provision where the trial court "omitted the necessary case-

specific cost-benefit analysis"); *United States v. White*, 679 F. App'x 426, 430 (6th Cir. 2017) ("A delay under § 3161(h)(7) is excludable if the district court makes case-specific findings."), *vacated on other grounds*, 138 S. Ct. 641 (2018); *United States v. Dignam*, 716 F.3d 915, 921 (5th Cir. 2013) (same); *United States v. Henry*, 538 F.3d 300, 303 (4th Cir. 2008) (same).

Second, the ends-of-justice provision requires judges to balance competing interests and make the appropriate findings before they exclude time; they may not perform the weighing and make the findings after the fact. The statute states that exclusions can only be "granted on the basis of [the court's] findings" that the interests supporting delay outweigh the defendant's and public's speedy trial interests. 18 U.S.C. § 3161(h)(7)(A). Thus, "the Act is clear that the findings must be made, if only in the judge's mind, *before* granting the continuance." *Zedner*, 547 U.S. at 506–07 (emphasis added). Courts can formally put those reasons on the record later on, even at the motion to dismiss hearing. *See id.* But they may not invent new reasons or weigh the ends-of-justice factors retroactively. Even if, in hindsight, "the ends-of-justice balance in fact supported" an exclusion, the court's failure to perform a contemporaneous weighing is fatal. *Id.* at 506. Again, these principles are uncontroversial across circuits, including in the Ninth Circuit. *See, e.g.*, *United States v. Crawford*, 982 F.2d 199, 204 (6th Cir. 1993) (holding that though a court may "state the reasoning [for an exclusion] in an order denying a motion to dismiss charges, . . . the reasons stated must be the actual reasons that motivated the court at the time the continuance was granted"); *United States v. Engstrom*, 7 F.3d 1423,

1426 (9th Cir. 1993) (adopting the *Crawford* rule and employing it to invalidate an exclusion); *United States v. Johnson*, 120 F.3d 1107, 1111 (10th Cir. 1997) ("Although findings may be *entered on the record* after the fact, they may not be *made* after the fact. The balancing must occur contemporaneously with the granting of the continuance.") (citation omitted); *United States v. Elkins*, 795 F.2d 919, 924 (11th Cir. 1986) (similar); *United States v. Ramirez*, 788 F.3d 732, 736 (7th Cir. 2015) (similar); *United States v. Tunnessen*, 763 F.2d 74, 77 (2d Cir. 1985) (similar); *United States v. Brooks*, 697 F.2d 517, 522 (3d Cir. 1982) (similar).

As a corollary to this rule, ends-of-justice findings cannot be made on appeal. "A straightforward reading of [the ends-of-justice] provision[] leads to the conclusion that 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, and if as a result the trial does not begin on time, the indictment or information must be dismissed." *Zedner*, 547 U.S. at 507–09. In light of this "unequivocal" statutory command, Federal Rule of Criminal Procedure 52(a)'s harmless error rule does not apply to errors in entering (or not entering) ends-of-justice findings. *Id*. at 507.

Third, "the Act requires express findings" to support an ends-of-justice exclusion. *Id*. at 506. The STA states this requirement in so many words: "No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection 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." 18 U.S.C. § 3161(h)(7)(A).

Each of these principles makes sense. The case-specific-reasons requirement is compelled by the statute's language and structure. A judge cannot apply the four mandatory factors or weigh in the balance the "defendant's interests in a speedy trial" if she knows nothing about the defendant in question. 18 U.S.C. § 3161(h)(7)(A).

Likewise, the contemporaneous-findings requirement is key to protecting the statute's purpose, namely, to ensure swift justice without unduly compromising other values. *See Zedner*, 547 U.S. at 501. The statute charges courts with carefully considering up front whether each delay is justified. If the court waits until later to perform that evaluation, then it will be too late to avert unjustified delay. Worse yet, courts evaluating their own delays may be tempted to come up with reasons to support past decisions. *See United States v. Clymer*, 25 F.3d 824, 829 (9th Cir. 1994).

Finally, the express-findings requirement ensures that reviewing courts rely only on the district court's contemporaneous reasoning when evaluating ends-of-justice continuances. Without express findings, reviewing courts would have no way to know how or why a district court excluded time, and thus, no way to enforce the requisite to properly balance interests before granting a continuance.

Each of these procedures is therefore critical to ensuring that the ends-of-justice exception will not swallow the STA's rules.

B. Though many courts obeyed these rules during the pandemic, the Chief Judge Orders necessarily violated them, thereby eliminating individual detainees' speedy trial interests from the ends-of-justice calculus.

The COVID-19 emergency had clear implications for the interests on both sides of the ends-of-justice balance. On the one hand, "the ends of justice served by the granting of . . . continuance[s]" were obvious: Courts had powerful interests in delaying trials to protect public health. 18 U.S.C. § 3161(h)(7)(A). On the other hand, "the best interest . . . the defendant in a speedy trial" was in many cases equally stark: Detained defendants had powerful interests in avoiding indefinite pretrial delay, as they were subject to vastly increased risks of serious illness or death from COVID-19. *Id.*; *see supra*, Introduction.

Faced with the emergent needs on both sides, courts took divergent paths. Some courts simply performed the ends-of-justice balancing per the normal rules, like they had before the pandemic. *See, e.g.*, *United States v. Allen*, 86 F.4th 295, 307 (6th Cir. 2023); *United States v. Walker*, 68 F.4th 1227, 1235–38 (9th Cir. 2023); *United States v. Keith*, 61 F.4th 839, 851 (10th Cir. 2023). This approach was particularly feasible after the pandemic's first few months, when the CARES Act and other adjustments made virtual court commonplace. *See, e.g.*, CJO 27. These judges believed that the STA's procedures applied even during the pandemic. As one such judge put it, "[b]ecause § 3161(h)(7)(A) requires this balancing to be case-specific, the Court cannot, and does not, find that considerations surrounding COVID-19's impact on public safety and the Court's operations will, in every case,

outweigh the best interest of the defendant and the public in a speedy trial." *In re Smith*, 854 F. App'x 158, 161 (9th Cir. 2021).

The Ninth Circuit approved and refined this approach in the circuit's first pandemic-era case, *United States v. Olsen*, 21 F.4th 1036, 1041 (9th Cir.), *cert. denied*, 142 S. Ct. 2716 (2022). There, the Ninth Circuit reversed a district court's order dismissing an indictment with prejudice under the STA, finding that the court had wrongly placed dispositive emphasis on whether it was literally impossible to bring the defendant to trial. *Id.* at 1044–46. In a per curiam opinion joined by Judge Christen, the Ninth Circuit held that courts should instead balance all salient factors before deciding whether to exclude time. *Id.* at 1046. The panel laid out seven pandemic-specific factors that courts should weigh when deciding whether to grant an exclusion:

> (1) whether a defendant is detained pending trial; (2) how long a defendant has been detained; (3) whether a defendant has invoked speedy trial rights since the case's inception; (4) whether a defendant, if detained, belongs to a population that is particularly susceptible to complications if infected with the virus; (5) the seriousness of the charges a defendant faces, and in particular whether the defendant is accused of violent crimes; (6) whether there is a reason to suspect recidivism if the charges against the defendant are dismissed; and (7) whether the district court has the ability to safely conduct a trial.

Id. at 1046.

Meanwhile, before and after *Olsen*, another group of courts concluded that the pandemic justified a different orientation toward ends-of-justice exclusions. *See, e.g.*, *United States v. Dunn*, 83 F.4th 1305, 1315–18 (11th Cir. 2023) (describing general orders in Southern District of Florida); *United States v. Murta*, No. 23-

20276, 2024 WL 64764, at *1 (5th Cir. Jan. 5, 2024) (unpublished) (same, in Southern District of Texas). These courts excluded time by general order, finding that the ends of justice favoring a continuance would always outweigh the defendant's speedy trial interest in every case. That is the approach adopted in the CJOs.

The CJOs' exclusions departed from the procedural rules surrounding ends of justice exclusions in two respects. First, the CJOs were not—and could not be—case-specific. The Southern District of California is a high-volume district, which processes thousands of cases a year. *See* U.S. Sentencing Commission, *Statistical Information Packet* (2020), https://tinyurl.com/4u8smm9s (noting that the Southern District reported 3,499 cases to the Sentencing Commission in fiscal year 2020). The CJOs purported to exclude time in every case in the district over a multiyear period. It is not plausible that the Chief Judge reviewed each case, distilled the strength of each defendant's speedy trial interests, and balanced them against competing considerations. Indeed, the CJOs do not purport to do so. Instead, each order recites the hardships to courts stemming from the pandemic, then concludes that excluding time "serves the ends of justice under 18 U.S.C. § 3161(h)(7)(A)." *See, e.g.*, CJO 30, 33, 34, 40, 47, 50.

Second and correlatively, any individualized consideration both would occur retroactively and would not reflect the Chief Judge's actual reasons for excluding time. As just explained, "the actual reasons that motivated the court at the time the continuance was granted" were inherently nonindividualized. *Crawford*, 982 F.2d at

204. Thus, any later individualized weighing would serve only as "post hoc explanations" for the time exclusion. *Ramirez*, 788 F.3d at 735.

Accordingly, under the ordinary rules applicable to ends-of-justice exclusions, these CJOs' exclusions would be invalid, regardless of whether a later judge agreed in hindsight with the exclusion of time.

C. The panel majority held that the pandemic obviated the need to make an individualized assessment, in addition to relying on the district court's post hoc evaluation.

This appeal therefore presented the question whether exclusion by general order properly excluded time under 18 U.S.C. § 3161(h)(7)(A). A divided Ninth Circuit panel held that it did. *Orozco-Barron*, 72 F.4th at 951. The competing opinions addressed the procedural requisites described above.

First, each opinion grappled with the STA's individualization mandate. For its part, the panel majority acknowledged that the STA ordinarily requires that time exclusions be entered on an individualized basis. *Id.* at 957–58. But the majority reasoned that the pandemic obviated the need for individualization. In "an emergency or disaster that has the same widespread effects on courts and parties alike," the majority reasoned, ends-of-justice findings "need not be particularized to an individual defendant." *Id.* at 958.

Judge Christen disagreed. She pointed out that "[t]he STA's ends-of-justice provision requires '*balancing* . . . whether the ends of justice served by granting a continuance outweigh the best interest of the public and the defendant in convening a speedy trial.'" *Id.* at 964 (Christen, J., dissenting) (emphasis original). True, on one side of the scale, the reasons for granting a continuance might remain constant

across cases, as the pandemic would affect all cases equally. But the interest on the other side would necessarily vary according to the particularities of the defendant's case, "necessitat[ing] consideration of case-specific information." *Id.* Nor could judges simply assume that defendants' interests would always lose out. "As *Olsen* recognized, if the pandemic continued long enough, the need to honor speedy trial rights could require dismissal of at least some cases." *Id.* at 964–65; *see also id.* at 965 & n.6 (noting that dismissal could be without prejudice).

Second, each opinion considered the effect of the district court's backward-looking remarks at the motion-to-dismiss hearing. That hearing occurred in July 2021, several months after the contested ends-of-justice exclusions from 2020. Relying on the district court's remarks at the 2021 hearing, the majority concluded that "the district court . . . considered the relevant statutory and non-statutory factors when deciding to grant a continuance." *Id.* at 955 (majority opinion). The majority made no mention of the STA's contemporaneous-findings requirement or its prohibition on retroactive ends-of-justice analyses, though each of these principles was extensively briefed.

The dissent highlighted that omission. "[O]ur precedent requires that a reviewing court assess the validity of an STA exclusion based on the actual reasons offered for a district court's ends-of-justice conclusion, not post hoc reasons that could have justified the exclusion," Judge Christen explained. *Orozco-Barron*, 72 F.4th at 963 (Christen, J., dissenting). Because "[t]he district court's order denying Orozco-Barron's motion to dismiss solely relied on the CJO orders suspending jury

trials, without considering the specific circumstances of Orozco-Barron's case," a backward-looking analysis could not fill in the gaps. *Id.* at 963.

Third, each opinion considered whether the district court's backward-looking remarks incorporated individualized information about Mr. Orozco-Barron's case. The majority concluded that they did. It reasoned that the district court was "was well aware of Orozco-Barron's detention status, because it had previously denied Orozco-Barron's request for release after holding a hearing"; that the court had "subsequently recognized that it had been 'tough on [Orozco-Barron] in custody"; and that "there [was] no indication that the district court failed to consider Orozco-Barron's interest in being free from prolonged detention." *Id.* at 956 (majority opinion).

The dissent disagreed. Judge Christen noted that the district court had explicitly relied on the CJOs and had not said anything about Mr. Orozco-Barron's individual interests. *Id.* at 965 (Christen, J., dissenting); *see also* 18 U.S.C. § 3161(h)(7)(A) (providing that the court must "set[] forth, in the record of the case, either orally or in writing, its reasons for finding" that an exclusion should be granted).

At least two, and arguably three, circuits have also held that general orders can exclude time under 18 U.S.C. § 3161(h)(7)(A). *See Pair*, 84 F.4th at 583–86;[3]

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[3] *Pair* differed procedurally from Mr. Orozco-Barron's case. In *Pair*, the district court did enter contemporaneous ends-of-justice exclusions in the defendant's individual case, but it simply cited the CJOs without considering the defendant's individualized circumstances. 84 F.4th at 580–81, 584. *Pair* therefore

Roush, 2021 WL 6689969, at *2; *see also United States v. Leveke*, 38 F.4th 662, 670 (8th Cir. 2022).[4] Of these, only the Fourth Circuit explicitly addressed the individualization issue. That court agreed with the *Orozco-Barron* majority that courts need not make individualized findings during the pandemic, opining that any such findings would be "duplicative" of the findings in the general orders. *Pair*, 84 F.4th at 583–86. None discussed the statute's contemporaneous-findings requirement.

II. Pandemic decisions approving exclusion by general order are egregiously wrong.

As this discussion shows, this Court's precedent yields an obvious answer to whether general orders—alone or in tandem with post-hoc ends-of-justice assessments—can exclude time. They plainly cannot. The principles supporting that conclusion flow not only from *Zedner*, but also from an overwhelming consensus among the courts of appeals. *See supra*, Section I.A–B.

The majority below did not deny this. Instead, they concluded—explicitly, in the case of the individualization requirement, and implicitly, when it came to the

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does not implicate the contemporaneous-findings problem, but it does implicate the individualization problem.

[4] The Eighth Circuit in *Leveke* noted that even "[a]side from general administrative orders, the court also made findings relating to Leveke's individual case." 38 F.4th at 670. It is unclear when the district court made the individualized findings, contemporaneously or retroactively. And the Eighth Circuit did not say whether the general orders by themselves would have been sufficient to exclude time. Thus, it is unclear whether the Eighth Circuit's decision implicated the individualization or the contemporaneous-findings problem. The Eighth Circuit did not explicitly grapple with either issue.

contemporaneous-findings and express-findings requirement—that the pandemic justified casting those principles aside. That conclusion not only flies in the face of this Court's pandemic-era precedents, which upheld the law despite the crisis. It also raises serious practical questions about the need for statute-defying emergency action. These points are taken in turn.

A. Judges must obey the law even in times of crisis.

The rule of law is never more important than in times of crisis, when government officials are most likely to exceed their authority. The recent pandemic has been a good example. No one can doubt that the government should do all it lawfully can to mitigate the effects of a pandemic. Yet we have repeatedly seen government officials try to do more than they lawfully can to curb the pandemic. For example, the federal government exceeded its statutory authority to regulate workplace safety. *National Fed'n of Indep. Bus. v. Dep't of Labor*, 142 S. Ct. 661 (2022). The Centers for Disease Control and Prevention unlawfully prohibited evictions. *Alabama Ass'n of Realtors v. Dep't of Health & Human Servs.,* 141 S. Ct. 2485 (2021). So did New York. *Chrysafis v. Marks*, 141 S. Ct. 2482 (2021). And California and New York repeatedly infringed the freedom of worship. *Tandon v. Newsom*, 141 S. Ct. 1294 (2021); *Gateway City Church v. Newsom*, 141 S. Ct. 1460 (2021); *Gish v. Newsom,* 141 S. Ct. 1290 (2021); *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021); *Harvest Rock Church, Inc. v. Newsom*, 141 S. Ct. 889 (2020); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020). The present case is one more example.

A chorus of judges have explained why good intentions cannot replace the rule of law: "However wise one person may be, that is no substitute for the wisdom of the whole of the American people that can be tapped in the legislative process." *Mayorkas*, 143 S. Ct. at 1316 (Gorsuch, J., statement). Courts' "duty is always to safeguard the people's rights no matter the challenges facing our communities." *Doe v. San Diego Unified Sch. Dist.*, 22 F.4th 1099, 1101 (9th Cir. 2022) (Bumatay, J., dissenting from denial of rehearing en banc). Indeed, "the need to protect those rights is especially acute during those times." *McDougall v. Cnty. of Ventura*, 23 F.4th 1095, 1109, *reh'g en banc granted, opinion vacated*, 26 F.4th 1016 (9th Cir. 2022). An "emergency" therefore must not "*displace*[] normal [legal] standards," no matter how tempting such displacement may be. *S. Bay United Pentecostal Church v. Newsom*, 959 F.3d 938, 942 (9th Cir. 2020) (Collins, J., dissenting).

This duty was even more important during the period relevant here. "[I]n the pandemic's early stages," more flexibility may have seemed necessary "based on the newness of the emergency." *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 70 (2020) (Gorsuch, J., concurring). Thus, one might forgive the Chief Judge's blanket exclusions early on, when the district suspended trials, grand juries, and most court appearances. *E.g.*, CJO-18.

But even assuming that "courts [should] tolerate very blunt rules" "at the outset of an emergency," government actors do not have "*carte blanche* to disregard the [law] for as long as the medical problem persists." *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2604–05 (2020) (Alito, J., dissenting from denial of

injunction). And by fall 2020, any justification for wholesale exclusions had "expired." *Roman Cath. Diocese*, 141 S. Ct. at 70 (Gorsuch, J., concurring). "[M]ost of [Mr.] Orozco-Barron's pre-trial detention occurred after the Southern District of California had resumed conducting jury trials on a limited basis," not to mention virtual court hearings, grand juries, and other procedures attendant to the normal criminal process. *Orozco-Barron*, 72 F.4th at 959 (Christen, J., dissenting). "As such, the STA and Supreme Court precedent interpreting it required," even more clearly than in earlier months, that "the district court . . . make case-specific findings before excluding time on the STA clock." *Id.*

B. The CJOs had minimal practical benefit for courts, but they deprived defendants of the chance to seek dismissal without prejudice until after the danger abated.

The shift from a total court shutdown to a partial court reopening raises a perplexing question about the Fall 2020 CJOs: What "emergent" need was there to violate the STA? The district's judges were already individually managing their assigned cases, holding hearings, setting briefing schedules, scheduling court dates, and performing other housekeeping duties. It would have been easy to accompany continuances with an individualized ends-of-justice balancing, as is done in non-emergent times.

Not only were the CJOs procedurally unnecessary. If the Chief Judge was right that the interests in delay would always prevail, then excluding time via CJO would also make no substantive difference. Complying with the statute would produce the same outcome as illegal, blanket exclusions. Courts would simply weigh

particularized interests, find that the interests supporting delay outweighed the defendant's interest in a speedy trial, and inevitably deem exclusions warranted.

Thus, practically speaking, the CJOs could only really have an effect in cases where the Chief Judge was wrong: where an individualized weighing of factors would favor a defendant's right to a speedy trial. And there was a serious risk that such cases existed, particularly in light of the Southern District's high pretrial detention rates—over 70% in 2020, U.S. Courts, *Pretrial Services Release and Detention* (2020), https://tinyurl.com/dujxdftr—and the devastating effects of pandemic incarceration. *See supra*, Introduction. These threats to health and life may well have outweighed interests supporting delay in individual cases. Thus, it is no stretch to say that if assessed on an individualized basis, "the need to honor speedy trial rights could require dismissal of at least some cases." *Orozco-Barron*, 72 F.4th at 964–65. Yet defendants did not even have a chance to be heard on their interests before their rights were extinguished.

Thus, by Fall 2020, the CJOs had little practical impact other than to violate the STA, infringe defendants' rights, and erase their suffering. No court should accept pandemic excuses for illegal exclusions—particularly when the excuse is as thin as the Southern District's.

III. This issue is an important one because it impacted thousands of defendants in numerous judicial districts for years, and district judges will be emboldened to claim the same "emergency" powers in the future.

The questions presented here are important enough to warrant the Court's review. This follows, first, from the orders' sheer temporal and geographical scope.

Thousands of people across numerous judicial districts fell under these general orders. And in the Southern District, these orders dragged on for years. A policy with such wide ranging effects calls for scrutiny. That is not to say that everyone affected by the orders would have their case dismissed. Far from it. STA claims are categorically waived both if a defendant does not raise them before trial and if they plead guilty. 18 U.S.C. § 3162(a)(2). These statutory mechanisms ensure that the Court can review district judges' broad assertion of emergency powers, without compromising an equally broad swath of final convictions.

Second, and related, these questions will affect countless defendants whenever we experience another crisis of comparable magnitude. The next time the courts temporarily close due to natural disaster, or war, or terrorist attack, or another pandemic, the decision below—in tandem with the Fourth, Sixth, and Eighth Circuits' complementary decisions—will encourage district judges to resort again to illegal general orders.

There is good reason to end this practice now, before the next disaster strikes, because these circuit court opinions ensure that defendants will not receive prompt appellate review the next time around. District courts will have the power to issue general orders suspending trials and excluding time, thereby precluding any meaningful attempt on the part of defendants to assert their interests under the STA. Defendants will not be able to challenge those orders on direct appeal until their trials take place, perhaps months or years later. And by the time the issue again comes before this Court, the disaster may well have abated. In that case, it

will be too late for the affected detainees, who will have spent the entire disaster behind bars with no avenue for asserting their speedy trial interests. In short, the same cycle that characterized this disaster will repeat itself. The only way to interrupt that cycle is to decide the issue in advance, before the next emergency.

Third, the questions presented implicate this Court's "significant interest in supervising the administration of the judicial system" to ensure "compliance with proper rules of judicial administration." *Hollingsworth v. Perry*, 558 U.S. 183, 196 (2010) (per curiam). That interest is especially acute "when those rules relate to the integrity of judicial processes." *Id.* at 196 (per curiam); *see, e.g., id.* at 184-85 (addressing whether the district court improperly changed its rules regarding the broadcasting of trials shortly before trial was to begin); *Nguyen v. United States*, 539 U.S. 69, 73-74 (2003) (addressing whether the judgment of the court of appeals was invalid because of the presence of a non-Article III judge on the panel). It is hard to think of a question that more directly implicates the integrity of judicial processes than whether a district judge can put in place a years-long suspension of STA deadlines that usurps other judges' responsibility to decide whether to exclude time in their assigned cases.

Fourth, the decision below created intra- and inter-circuit splits, which will persist even in non-emergent times. In straining to validate these across-the-board exclusions, the majority ignored the statute's strict prohibition on retroactive ends-of-justice analyses, *Orozco-Barron*, 72 F.4th at 955–56—a practice that, until the pandemic, was universally understood to be contrary to statute, *see supra*, Section

I.A. Even worse, the majority also inferred findings that were never placed in the record, *Orozco-Barron*, 72 F.4th at 956, a practice that could not be more at odds with the statute's express commands, *see* 18 U.S.C. § 3161(h)(7)(A); *Zedner*, 547 U.S. at 506. These egregiously wrong holdings were not confined to the pandemic context, and they will reverberate through future STA decisions.

IV. This case is the right vehicle to resolve this issue.

Finally, this case is the right vehicle for resolving whether general orders, with or without retroactive ends-of-justice findings, can effectuate district-wide time exclusions under 18 U.S.C. § 3161(h)(7).

First and foremost, this may be the Court's last opportunity to get ahead of these issues before the next emergency. The federal courts have now ceased most pandemic-era precautions, including their exclusion-by-general-order practices. The Southern District's last CJO exclusion, for instance, ended in March 2022. *See* CJO 63-G. And only a limited set of pandemic cases will implicate the question presented, given that a defendant can avoid the statute's waiver provision only by both raising the claim pretrial and actually proceeding to trial. 18 U.S.C. § 3162(a)(2). The direct appeals for many of these cases are likely to be in their final stages. Thus, this may be among the last pandemic-era petitions for certiorari raising this issue, and the next opportunity to answer these questions may not arise until the next emergency.

Second, Mr. Orozco-Barron's STA claim rises or falls on the answers to the questions presented. Below, Mr. Orozco-Barron argued without contradiction that,

absent the CJOs, 143 days would have elapsed on the speedy trial clock. Thus, the questions presented are dispositive of his STA claim.

Third, Mr. Orozco-Barron's case illustrates the problem with relying on general orders to exclude time. As Judge Christen explained, "the district court in Orozco-Barron's case relied entirely on the CJOs, even though Orozco-Barron was accused of a nonviolent offense, he was jailed the entire time he awaited trial, and jury trials had resumed on a limited basis in the Southern District for most of the pre-trial period at issue," among other salient factors. *Orozco-Barron*, 72 F.4th at 963 (Christen, J., dissenting). These case-specific factors "sharply illustrate why case-specific considerations are necessary for the balancing required by the STA." *Id*. That is not to say that a district judge faced with this combination of circumstances would be required to withhold a time exclusion. The statute entrusts judges with great "discretion" to decide whether or not to exclude time. *Zedner*, 547 U.S. at 498. But under the statute, they are at least required to ask the question. After all, "if the word 'discretion' means anything in a statutory or administrative grant of power, it means that the recipient must exercise his authority according to his own understanding and conscience." *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266–67 (1954). That did not happen here.

Fourth, Mr. Orozco-Barron fully preserved his STA claim by litigating it at every stage in his case, thereby avoiding the statute's strict forfeiture provisions. 18 U.S.C. § 3162(a)(2).

Fifth, this issue has sufficiently percolated in the courts of appeals and is unlikely to receive much further scrutiny. As just noted, only a limited number of cases arising out of the pandemic years will implicate the questions presented. The courts of appeals therefore will not continue to issue decisions on these matters into the indefinite future; the decisions cited above may be the only circuit court opinions on these matters to come out of the pandemic. Furthermore, the opinions issued thus far, though limited in number, provide a sufficiently robust exploration of the issue for this Court to now weigh in. In particular, Mr. Orozco-Barron's appeal yielded both a published opinion and a dissent, staking out the main arguments in favor of each side.

Thus, this is the ideal opportunity for the Court to grant certiorari.

CONCLUSION

For these reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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s/ Katie Hurrelbrink

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