No.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents a clear and intractable conflict regarding an important statutory question under the Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.*

Under the Act, the government is required to file an information or indictment within thirty days of an individual's arrest. But the Act stops the clock for specified "periods of delay," including for certain continuances—"if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." The Act further specifies that "[n]o such period of delay * * * shall be excludable * * * 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 [were] served." 18 U.S.C. 3161(h)(7)(A).

In the proceedings below, a district judge granted multiple continuances without making any "ends of justice" findings. When petitioner moved under the Act to dismiss, a *different* judge denied the motion, supplying the requisite findings that the first judge failed to make. The First Circuit, like the Fifth Circuit, held that those post-hoc findings by a different judge satisfied the Act's "on-the-record" requirement. That holding is directly contrary to settled law in the Fourth and Ninth Circuits.

The question presented is:

1. Under the Speedy Trial Act, if one judge grants an "ends of justice" continuance but fails to explain why, whether a different judge can make the requisite findings to support the continuance.

The case also presents an independent question regarding the proper application of 28 U.S.C. 455 in district courts:

2. Whether, when confronted with specific allegations supporting judicial disclosure and disqualification, a district court exceeds its discretion by denying a disqualification motion without any explanation or disclosure necessary to facilitate meaningful appellate review.

RELATED PROCEEDINGS

United States District Court (S.D. Fla.):

United States of America v. *Martin Gottesfeld*, No. 1:16-MJ-02190 (Feb. 17, 2016) (transfer order)

United States District Court (D. Mass.):

United States of America v. *Martin Gottesfeld*, Nos. 1:16-CR-10305 and 1:16-MJ-04117 (Jan. 11, 2019) (judgment in criminal case)

United States of America v. *Martin Gottesfeld*, No. 1:16-MC-91064 (May 2, 2017) (closing miscellaneous docket)

United States Court of Appeals (1st Cir.):

Martin Gottesfeld v. *United States (In re Gottesfeld)*, No. 18-1668 (July 18, 2018)

Martin Gottesfeld v. *United States (In re Gottesfeld)*, No. 19-1011 (Jan. 9, 2019)

United States of America v. *Martin Gottesfeld*, No. 19-1108 (May 8, 2019)

United States of America v. *Martin Gottesfeld*, Nos. 18-1669, 19-1042, 19-1043, & 19-1107 (Nov. 5, 2021)

Martin Gottesfeld v. *United States (In re Gottesfeld)*, No. 21-1802 (Nov. 15, 2021)

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Martin Gottesfeld respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-28a) is reported at 18 F.4th 1. The opinion of the district court (App., *infra*, 32a-61a) is reported at 319 F. Supp. 3d 548. The electronic orders of the district court granting certain continuances (App., *infra*, 62a-65a) are reflected on the court's docket but otherwise unreported. The written order of the district court granting excludable delay for one continuance (App., *infra*, 66a-69a) is unreported. The orders of the district court denying disqualification (App., *infra*, 70a-72a) are unreported.

JURISDICTION

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

STATUTORY PROVISIONS INVOLVED

Section 3161 of Title 18 of the United States Code provides in relevant part:

> (b) Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges * * * .
>
> * * * * *
>
> (h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:
>
> * * * * *
>
> (7)(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. 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.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

(iii) Whether, in a case in which arrest precedes indictment, delay in the filing of the indictment is caused because the arrest occurs at a time such that it is unreasonable to expect return and filing of the indictment within the period specified in section 3161(b), or because the facts upon which the grand jury must base its determination are unusual or complex.

(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or

> would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.
>
> (C) No continuance under subparagraph (A) of this paragraph shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.
>
> * * * * *

Other relevant statutory provisions are reproduced in the appendix to this petition (App., *infra*, 74a-76a).

INTRODUCTION

This case presents an important and recurring question of federal criminal law that has squarely divided the lower courts. According to the First and Fifth Circuits, the Speedy Trial Act's "on-the-record" requirement—which directs courts to set forth the express basis for granting a continuance—need not be provided *by the actual judge who granted the continuance*. That holding implicates a direct 2-2 circuit conflict. Unlike those circuits, the Fourth and Ninth Circuits recognize that post-hoc findings are insufficient: the Act unambiguously requires the judge granting the continuance to provide "*his* findings" to exclude the time; 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 despite not saying a word about it.

This case easily satisfies the traditional criteria for granting review. The circuit split is obvious and entrenched; there is no prospect that both circuits on either

side will change their views. The question presented addresses an issue that arises all the time in criminal prosecutions, given the frequency in which different judges play a role at different stages of a criminal case. The matter also has exceptional practical importance, as a wrong decision threatens to implode completed criminal prosecutions—potentially requiring a full do-over (or permanent dismissal) of completed matters. And the rule below invites pointless disputes and wasted resources: the Act's "on-the-record" requirement is not onerous; it can be satisfied by simply dashing off a few explanatory sentences (orally or in writing) that addresses the Act's mandatory terms. Yet the failure to provide contemporaneous findings invites defendants, predictably, to protect their rights by filing motions—and thus inviting motions practice all so the judiciary can revisit the prior continuance and decide the same matter twice.

The question presented raises legal and practical issues of surpassing importance, and its correct disposition is essential to the Act's proper administration. Because this case presents an optimal vehicle for resolving this significant issue of federal law, the petition should be granted.

STATEMENT

A. Statutory Background

Under the Speedy Trial Act, "any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges." 18 U.S.C. 3161(b). In imposing this strict deadline, Congress still "recognized that criminal cases vary widely" and "there are valid reasons for greater delay in particular cases." *United States* v. *Zedner*, 547 U.S. 489, 497 (2006). Congress thus

added "necessary flexibility" to the Act, including "a long and detailed list of periods of delay that are excluded in computing" time. *Ibid.*

One central exception is at issue here: Section 3161(h)(7)(A)'s authorization of "ends-of-justice continuances," which provides "[m]uch of the Act's flexibility." *Zedner*, 547 U.S. at 498.[1] As this Court explained, "[t]his 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." *Id.* at 498-499. Section 3161(h)(7)(A) is thus "explicit" that any delay shall *not* be excluded "'unless the court sets forth * * * its reasons for [its] finding[s]." *Id.* at 507 (alternations in original). "[I]f 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." *Id.* at 508; see also *Bloate*, 559 U.S. at 203, 210 ("[s]ome of these delays are excludable only if the district court makes certain findings enumerated in the statute"; the judge must "record[] those findings").

The Act also contains "enforcement and sanctions provisions." *Zedner*, 547 U.S. at 499. If the government does not file an information or indictment "within the time limit required by section 3161(b) as extended by section 3161(h)," "such charge against that individual * * * shall be dismissed." 18 U.S.C. 3162(a)(1). Congress provided a series of factors for courts to consider in deciding whether that dismissal shall be "with or without prejudice." *Ibid.*

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[1] Congress revised the Act in 2008 to "renumber[] several provisions," which is why this provision often appears in decisions as 18 U.S.C. 3161(h)(8)(A); "[t]he amendments did not change the substance of any provision relevant here." *Bloate* v. *United States*, 559 U.S. 196, 199 n.2 (2010).

And Congress separately extended the limitations period for recharging individuals where an indictment is dismissed "after the period prescribed by the applicable statute of limitations has expired." 18 U.S.C. 3288.

B. Facts And Procedural History

1. In February 2016, the government filed a criminal complaint against petitioner charging him in connection with an alleged "Distributed Denial of Service" attack on Boston Children's Hospital and Wayside Youth and Family Support Network. App., *infra*, 1a. Petitioner allegedly targeted the hospital in protest and to correct its treatment of then-teenager Justina Pelletier. *Id.* at 1a-2a. Pelletier's parents and the hospital disagreed over Justina's medical treatment; the dispute lead to a contentious custody battle that garnered national attention, and ultimately prompted legislation designed to protect the rights of parents in such disputes. Before her parents managed to free Justina from the hospital, she had been committed to the State's custody, placed in a psychiatric ward, and allegedly faced serious mistreatment that some characterized as torture. C.A. J.A. 1569-1570.

Petitioner's alleged role in attempting to stop this treatment also garnered national attention. See, *e.g.*, David Kushner, *The Hacker Who Cared Too Much*, Rolling Stone (June 29, 2017) <https://tinyurl.com/RS-Gottesfeld>.

2. As relevant here, petitioner was indicted 246 days after his arrest, a number far exceeding the baseline limit in the Speedy Trial Act. App., *infra*, 3a. While the parties agree that 26 of those days "were not excludable," the remainder was "initially excluded by the district court as resulting from six ends-of-justice continuances." *Id.* at 3a, 43a, 45a. Those continuances, however, were not granted in the criminal docket or by the judge who ultimately pre-

sided over petitioner's case. Instead, the continuance requests (by local rule) were sent to the court's "miscellaneous business docket," where a different district judge reviewed and granted each motion. *Id.* at 4a, 45a-46a. Those motions were granted without any hearing and (in four of the six instances) were granted via electronic order on the docket sheet. See App., *infra*, 62a-64a. One of the continuances was accompanied by a written order, but that order merely referenced the docket number of the motion and checked a single box: "Continuance granted in the interest of justice." *Id.* at 69a.

The judge did not "set[] forth" any other reasons in the record, explain that any specific factors were considered, or otherwise provide any direct explanation for granting the extra time. App., *infra*, 62a-69a.

3. Petitioner moved to dismiss the indictment under the Speedy Trial Act. The district court denied the motion. App., *infra*, 43a-51a.

In so ruling, the court specifically rejected petitioner's contention that the prior judge "did not set forth [her] reasons for finding that the ends of justice would be served by the continuance." App., *infra*, 43a.[2] According to the district court, the continuance motions themselves set out a reason for granting the continuance, and "the district judge presiding over the miscellaneous business docket 'necessarily adopted' the grounds presented in the assented-to motions." *Id.* at 49a-50a. The court also separately found that the "ends-of-justice" continuances were

[2] Petitioner here specifically advances his challenges to the third, fourth, and fifth continuances—where the requests do not even conceivably implicate any grounds outside "ends of justice" as supporting the continuance. As noted above, because each separate continuance exceeds the four remaining days on the speedy-trial clock, the government loses unless it can justify all six continuances. App., *infra*, 3a, 43a, 45a.

justified: "Defendant here, through counsel, indicated that he was 'seriously considering' a plea agreement. The parties had reached an advanced stage of plea negotiations where an agreement was drafted and defendant was considering that agreement." *Id.* at 51a. "Under the circumstances," the court concluded, "the orders excluding time were appropriate under the ends-of-justice provision of the Speedy Trial Act." *Ibid.*[3]

4. The First Circuit affirmed. App., *infra*, 1a-28a.

In addressing petitioner's "procedural argument," the court declared itself "satisfied that the requisite findings were adequately 'set[] forth[] in the record of the case." App., *infra*, 7a. The court reasoned that the second district judge provided direct "expla[nations]" that "qualify as a statement of reasons set forth 'in the record of the case' under section 3161(h)(7)(A)." *Id.* at 7a-8a. It acknowledged petitioner's argument "that the trial judge's elaboration of reasons supporting the ends-of-justice continuances" were inadequate "because a different judge actually granted the continuances on the miscellaneous business docket." *Id.* at 8a. But the court concluded that made no difference: "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." *Ibid.* Indeed, on the contrary, the court reasoned that "the statute suggest the opposite by using different words to allocate responsibility for these distinct requirements." *Ibid.* (noting that the "judge" grants the continuance but the "court" sets forth the reasons in the record).

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[3] The court also cited the same basis as grounds to "judicially estop[]" petitioner from invoking the Speedy Trial Act. App., *infra*, 51a. The First Circuit declined to "address" that question. *Id.* at 11a n.4.

Consequently, the court "conclude[d]" that the second judge's order "denying [petitioner's] motion to dismiss" satisfied the Act's on-the-record requirement, and it thus declined to "address [petitioner's] separate argument that the judge who granted the challenged continuances on the miscellaneous business docket failed to adequately set forth such findings." App., *infra*, 8a-9a & n.3.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT REVIEW TO RESOLVE THE 2-2 CIRCUIT CONFLICT OVER AN IMPORTANT AND RECURRING QUESTION UNDER THE SPEEDY TRIAL ACT

A. The Decision Below Deepens A Direct, Intolerable Conflict Over A Significant Question Under The Speedy Trial Act

The decision below cements a square, indisputable conflict over an important 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 make the requisite findings to support the continuance. The circuits have now divided 2-2 on this recurring question, leaving the rights of criminal defendants subject to the location of their prosecution. While petitioner would have prevailed had his case arisen in California or Virginia, he instead lost because his case arose in Massachusetts—under a rationale that has been overwhelmingly rejected by courts nationwide.

The stark division on this key question of criminal law is untenable. The conflict is both undeniable and entrenched, and it should be resolved by this Court.

1. The First Circuit's decision conflicts with decisions of multiple circuits and lower courts.

a. The decision below squarely conflicts with established law in the Ninth Circuit. In *United States* v.

Ramirez-Cortez, 213 F.3d 1149 (9th Cir. 2000), the defendant initially appeared before a magistrate judge, who granted a series of continuances without "mak[ing] the requisite Speedy Trial Act findings." 213 F.3d at 1154. Unlike the First Circuit, however, the Ninth Circuit held that a later district judge could not supply the missing findings: "[t]he district court judge, a different judge than the Magistrate Judge who excluded the time, could not make th[e necessary] showing." *Ibid.*

The Ninth Circuit started by identifying the statutory requirements for an "ends of justice" continuance: time may only be excluded "'if the judge granted such continuance on the basis of *his findings* that the ends of justice" are satisfied; those "findings must be 'set[] forth, in the record of the case, either orally or in writing'"; and the court "'shall consider'" at least four specified "factors" in making those determinations. 213 F.3d at 1153 (quoting 18 U.S.C. 3161(h)(7)(A)) (emphasis added).

Applying those requirements, the Ninth Circuit found the magistrate judge "failed" to make the requisite showing. 213 F.3d at 1154. Although the magistrate judge "twice indicated—both times by checking off boxes on pre-printed forms—that the time would be excluded under section 3161(h)(8)(B)(i)," the judge never "ma[d]e findings as to the statutory factors underlying that conclusion." *Ibid.* The judge had a brief exchange with defense counsel (*id.* at 1152), but "made no inquiry into the need for the continuance," and the record did not "indicate any consideration of the 'ends of justice' factors" (*id.* at 1154). There was, in short, no "particularized inquiry as to the actual need and reasons for a continuance." *Ibid.*

Critically here, the Ninth Circuit then rejected the district court's attempt to cure "the lack of findings" by supplying its own conclusions or "'inferr[ing]' that the Magistrate Judge intended to make an 'ends of justice' finding."

213 F.3d at 1154.[4] The Ninth Circuit acknowledged that "'[s]imultaneous'" findings are "'unnecessary so long as the trial court later shows that the delay was motivated by proper considerations.'" *Ibid.* But it found the district court had no way to definitively guess what the first judge was thinking: "[b]ecause the Magistrate Judge who granted the two continuances 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.'" 213 F.3d at 1154-1155. On the contrary, the Ninth Circuit explained, "[t]he district court was in no better position that we to speculate as to the 'findings' that might support an 'ends of justice' continuance." 213 F.3d at 1155.

Accordingly, the court concluded, "the district court's post hoc evaluation of the considerations it believed should have motivated the Magistrate Judge does not cure the lack of simultaneous findings." 213 F.3d at 1155. And because "the extensions of time were not supported by adequate and simultaneous findings on the record," the Speedy Trial Act was violated. *Id.* at 1151. That holding directly contravenes the First Circuit's contrary holding below. Compare, *e.g.*, *id.* at 1154 ("[t]he district court judge, a different judge than the Magistrate Judge who excluded the time, could not make that showing"), with App., *infra*, 8a-9a & n.3 ("the statute does not require that the judge who grants the continuance must be the same

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[4] The Ninth Circuit quoted the district court's reasoning: "'Judge Stiven did make a finding of excludable time. He didn't specify, I agree, all of the reasons why he was excluding time. But I can draw the inference, and I find that the only reason that it would have been was that it served the best interests of justice. * * * [I]t was for the defense attorney to have time to be able to consider everything that the defense attorney needed to consider in order to be able to do his or her job in advising the client.'" 213 F.3d at 1153.

judge who sets forth in the record the reasons for the ultimate decision to exclude time").

b. The First Circuit's decision also squarely conflicts with settled law in the Fourth Circuit. In *United States* v. *Keith*, 42 F.3d 234 (4th Cir. 1994), the parties agreed to a continuance when the prosecutor "became ill" before trial. 42 F.3d at 236. The then-presiding judge (Judge MacKenzie) granted the continuance "'due to illness of counsel for the United States,'" but failed to make any express "ends of justice" findings. *Ibid.* When the case later proceeded before a different judge (Judge Payne), the defendant moved to dismiss "because Judge MacKenzie had not made a finding that the ends of justice were served by the continuance." *Ibid.* After the government "explained to Judge Payne what had occurred," Judge Payne made his own "finding that the continuance did serve the ends of justice" and denied the motion. *Ibid.*

The Fourth Circuit rejected Judge Payne's ruling, holding that the second judge could not "cure the deficiencies" of the first judge's prior order. 42 F.3d at 238. As the Fourth Circuit explained, "it must be clear from the record that *the judge granting the continuance* conducted the mandatory balancing." *Ibid.* (emphasis added). Any other holding would undermine "'the twin purposes of the [Act's] record requirement'": "'[t]he trial court will not focus properly on the correct balancing at the time the continuance is granted, and the appellate court will have to settle for reviewing retroactive rationalizations instead of contemporaneous reasoning.'" *Id.* at 237-238 (quoting *United States* v. *Doran*, 882 F.2d 1511, 1516 (10th Cir. 1989)); see also *id.* at 237 (a "district court may not grant an ends of justice continuance *nunc pro tunc*").

Because "it [was] unclear whether Judge MacKenzie performed the necessary weighing as required by

§ 3161(h)(8)(A) at the time he granted the * * * continuance"—and because Judge Payne's post-hoc substitute findings could not "cure th[at] deficienc[y]"—the Fourth Circuit determined that "the procedural requirements of § 3161(h)(8)(A) were [not] met." 42 F.3d at 238. Under the First Circuit's conflicting approach, the Fourth Circuit would have reached the opposite conclusion. Compare App., *infra*, 7a-8a & n.3 (declaring it makes no difference whether the *first* judge—the one actually granting the continuance—"failed to adequately set forth such findings," because the *second* judge's post-hoc "statements qualify as a statement of reasons set forth 'in the record of the case'").

2. The Fifth Circuit, by contrast, sided with the First Circuit in *United States* v. *Dignam*, 716 F.3d 915 (5th Cir. 2013). Unlike the Ninth and Fourth Circuits, it held the requisite findings can be made by *any* judge, even one announcing those findings after the fact. 716 F.3d at 922.

In *Dignam*, the then-presiding judge (Chief Judge Tyson) granted two continuances to accommodate the defense counsel's hip-replacement surgery. 716 F.3d at 918. Each order stated simply that "'the ends of justice outweigh the best interest of the public and the defendant in a speedy trial.'" *Ibid.* After granting those continuances, Chief Judge Tyson died, and the case was reassigned to Judge Brady. *Id.* at 919. The defendant obtained new defense counsel, who moved to dismiss the indictment under the Speedy Trial Act. *Id.* at 920. In rejecting the motion, "Judge Brady found that although Chief Judge Tyson did not explain his reasons for granting the continuances, 'the record is clear' that he did so because of defense counsel's need for additional preparation time following his total hip replacement surgery." *Id.* at 920, 922.

The Fifth Circuit acknowledged that "the Act requires the district court to make findings on the record explaining why it granted the continuance," but it ultimately concluded that, "[i]n this case, Judge Brady made written findings in ruling on Dignam's § 3161(a)(2) motion to dismiss." 716 F.3d at 921-922. In so holding, the Fifth Circuit rejected the defendant's contention "that a district judge's findings at the motion to dismiss stage cannot suffice to explain a *different* judge's decision to grant the continuances." *Id.* at 922 (emphasis in original). On the contrary, the court found that Judge Brady's post-hoc findings were enough: "While allowing the district court to make findings after the fact may not guarantee that the court 'carefully consider[s] all relevant factors' at the time the continuances were granted," "[a] successor judge's articulation of reasons gives this court a sufficient record to evaluate the merits of the district court's decision on appeal." *Ibid.*

The Fifth Circuit accordingly authorized a later judge to presume an earlier judge's unstated motivation: "There is nothing to suggest that Chief Judge Tyson granted the continuance for any reason other than those articulated in the defense's unopposed motions," and thus "Judge Brady's statement of reasons 'can be fairly understood' to have 'actually motivated the court at the time it granted the continuance.'" 716 F.3d at 922.[5] That is precisely the

[5] The Fifth Circuit, of course, did not confront the fact that judges can make mistakes, continuances are at times granted for incorrect reasons, and common sense suggests that orders issued without explanation are those most likely to be issued without careful thought or deliberation (much less with the "necessary balancing as required by § 3161(h)(8)(A)," *Keith*, 42 F.3d at 238). 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

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.

3. This same division is reflected in the lower courts. Some courts have reached the same conclusion as the Ninth and Fourth Circuits, refusing to let a second judge supply post-hoc findings where the first judge failed to "set[] forth * * * its reasons" (18 U.S.C. 3161(h)(7)(A)) for an ends-of-justice continuance. See, *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 pursuant to the Act, the district court judge could not subsequently assume that the magistrate intended to make such findings," citing *Ramirez-Cortez*, *supra*); *United States* v. *Low*, 452 F. Supp. 2d 1036, 1043-1044 (D. Haw. 2006) (same); *United States* v. *Wollschlager*, 588 F. Supp. 1579, 1582 (N.D. Ill. 1984) (prohibiting "a judge to enter * * * a *post hoc* finding concerning a continuance granted by another judge or magistrate": "this court has no means of determining whether the Magistrate weighed the considerations required by § 3161(h)(8)(B) or intended to make a finding of excludable time"; "[o]nly the Magistrate was in a position to make such a finding").

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court granted the continuance without any serious thought at all (or because it grants continuances as a matter of course). See, *e.g.*, *Doran*, 882 F.2d at 1515 ("[f]ailure to address these issues on the record creates the unnecessary risk of granting continuances for the wrong purposes"). This is why Congress required courts to "set[] forth[] in the record" their *actual* "reasons" for granting the continuance. 18 U.S.C. 3161(h)(7)(A); see also *Zedner*, 547 U.S. at 509 (the provision "counteract[s] substantive open-endedness with procedural strictness"; it "demands on-the-record findings and specifies in some detail certain factors that a judge must consider in making those findings"; "[e]xcusing the failure to make these findings * * * would be inconsistent with the strategy embodied in § 3161(h)").

Other courts, by contrast, agree with the First and Fifth Circuits, permitting a second judge to justify a continuance where the first judge did not explain its rationale. See, *e.g.*, *United States* v. *Tomkins*, No. 07-227, 2011 WL 4840949, at *13 (N.D. Ill. Oct. 12, 2011) ("the Court notes the obvious difficulty in a second judge deciphering the circumstances—including the mind set of the previously assigned judge—at a time that a prior continuance was granted," but authorizing the exclusion because "it seems clear from the record in this case that the time previously excluded for pre-trial motions easily could have been excluded under the ends of justice exception").

4. In addition to the direct conflict, the First and Fifth Circuit's position is incompatible with settled principles for construing the Speedy Trial Act.

As courts have overwhelmingly recognized, the operative question under Section 3161(h)(7)(A) is what motivated the judge *at the time the continuance was granted*. *E.g.*, *United States* v. *Henry*, 538 F.3d 300, 304-306 (4th Cir. 2008); *United States* v. *Crawford*, 982 F.2d 199, 204 (6th Cir. 1993); *United States* v. *Brooks*, 697 F.2d 517, 522 (3d Cir. 1982). The statute imposes a backward-looking inquiry: the delay is excused only "if the judge *granted* such continuance on the basis of *his findings* that the ends of justice [were] served." 18 U.S.C. 3161(h)(7)(A) (emphasis added). That language is framed in the past tense and asks for the judge's *actual* reasoning ("*his* findings")—it does not ask whether a continuance was *hypothetically* justified. *E.g.*, *United States* v. *Saltzman*, 984 F.2d 1087, 1091-1092 (10th Cir. 1993); *Crawford*, 982 F.2d at 204 ("the reasons stated must be the actual reasons that motivated the court at the time the continuance was granted"). Thus the *actual* findings that motivated the *actual* continuance must have been made "before granting

the continuance." *Zedner*, 547 U.S. at 506. Post-hoc rationalizations are inadequate. *E.g.*, *United States* v. *Reese*, 917 F.3d 177, 184 (3d Cir. 2019); *United States* v. *Williams*, 511 F.3d 1044, 1058-1059 (10th Cir. 2007); *United States* v. *Cianciola*, 920 F.2d 1295, 1299 (6th Cir. 1990).

These principles are irreconcilable with the decision below. While courts can *enter* findings after the fact, courts cannot *make* findings after the fact (*e.g.*, *United States* v. *Larson*, 627 F.3d 1198, 1204 (10th Cir. 2010); *Doran*, 882 F.2d at 1516)—and a second judge is unavoidably *making* findings. That second judge cannot see into the mind of the judge who actually granted the (unexplained) continuance; the later court is inevitably speculating, post hoc, about the first judge's motivation. The court can only guess whether the first judge considered or balanced the relevant factors; acted on the basis of permissible or impermissible grounds; and considered each relevant fact in the record—as opposed to simply making a mistake. See, *e.g.*, *United States* v. *Bryant*, 523 F.3d 349, 360-361 (D.C. Cir. 2008); *Doran*, 882 F.2d at 1516 ("Our review of the legitimacy of the continuance is hampered by the lack of more specific findings."). And "the ultimate decision" (App., *infra*, 8a) is necessarily not reached "before granting the continuance" (*Zedner*, 547 U.S. at 506), but after—as the second judge does not even show up until after the continuance has been granted.

Neither the First Circuit nor the Fifth Circuit made any genuine attempt to square their decisions with these accepted principles. While two circuits (the Ninth and Fourth) correctly applied the general principles to this common situation, the other two (the First and Fourth) abandoned these settled understandings of the Act's plain text. Where a continuance order is silent and fails to "set[] forth" the judge's "reasons for finding that the ends of jus-

tice [were] served," it is not possible to satisfy the statutory standard. The decision below departs from this general body of federal law.

* * *

The conflict over this important question of federal criminal law is obvious and entrenched. The 2-2 split is undeniable: two circuits authorize a second judge to enter findings to support a first judge's continuance, whereas two other circuits reach the opposite conclusion—and insist that the judge granting the continuance make the necessary findings. The lines of debate are clear, with each adopting a fundamentally different understanding of the Act's text and operation. There is no realistic prospect that this conflict will resolve itself: one side is right and the other is wrong, and neither side has hinted it will back down.

Until this Court intervenes, important rights under the Speedy Trial Act will turn on the happenstance of where a prosecution is located. Because the nation's criminal laws should not be dictated by geography, this Court's immediate review is warranted.

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

1. The question presented is of exceptional legal and practical importance. It implicates a fundamental aspect of the Speedy Trial Act's proper operation involving one of the Act's most common exceptions. And the fact-pattern arises all the time. Courts often grant continuances in orders with minimal (or no) explanation, and continuances are often granted by different judges than the ones resolving a subsequent motion to dismiss. *E.g.*, *Ramirez-Cortez*, 213 F.3d at 1154. Indeed, different judges can handle arraignments, initial proceedings, and other pre-indictment and pre-trial issues. Magistrate and district judges often divide up certain tasks. *E.g.*, *United States* v.

White, 920 F.3d 1109, 1116 (6th Cir. 2019). Cases can be reassigned for a multitude of reasons. Certain local rules (like the one applying across the board in Massachusetts) channel continuance requests to designated judges on a miscellaneous docket—who are often not assigned the remainder of the case.[6] There is no shortage of opportunities for this situation to arise, and all participants in the system (judges, government prosecutors, and criminal defendants) urgently need guidance about the findings necessary to avoid triggering the Act's dismissal requirements.

The rule embraced by the First and Fifth Circuits also invites pointless disputes. There is no excuse for not entering contemporaneous findings, especially when a case may be transferred to another judge. Courts can satisfy the Act's "on-the-record" requirement without even a written order ("either orally or in writing"), and no elaborate explanation is necessary—often a few quick sentences will do. See, *e.g.*, *Bloate* v. *United States*, 559 U.S. 196, 214 (2010). And the failure to perform this simple task often generates wasted time and resources: defendants who see continuances granted without the requisite findings predictably file motions to dismiss; the issue then has to be fully briefed all so the judge can make the same findings he or she *should* have made in the first instance. And under the holding below, a new judge has to revisit and study the situation the first judge *already* considered (at least in theory) in order for the judiciary to decide the

[6] See United States District Court for the District of Massachusetts, *Plan for Prompt Disposition of Criminal Cases* § 5(c)(1)(A) (Dec. 2008) ("If the United States Attorney anticipates that an indictment or information will not be filed within the time limit set forth in section 3, he may file a written motion for a continuance with the judge assigned to the miscellaneous business docket.").

identical question twice. A rule instead directing the initial judge to make the simple findings the Act expressly requires would cut off pointless dismissal motions and duplicative proceedings in federal courts that already have more than enough to do. See, *e.g.*, *United States* v. *Tunnessen*, 763 F.2d 74, 78 (2d Cir. 1985).

Immediate review is also warranted in light of the consequences of getting this wrong. If petitioner's view is correct, courts proceeding under the First and Fifth Circuits' approach will be needlessly jeopardizing convictions, inviting potential retrials before new juries, or dismissing cases permanently—all based on a mistake that is exceptionally easy to avoid. See *Zedner*, 547 U.S. at 503 (highlighting the importance of sensible procedures that avoid "moot[ing]" "expensive and time-consuming trial[s]"). A dismissal under the Act is mandatory; the only question is whether the dismissal is with or without prejudice. See 18 U.S.C. 3162(a)(1). An urgent answer to this important legal issue could avoid an embedded defect in countless prosecutions. There is simply no reason to accept the cost of further percolation, especially when the mature 2-2 split leaves the issue fully ventilated and ripe for this Court's disposition.

Finally, the decision below undermines Congress's clear directive and ignores this Court's unmistakable guidance. As this Court has already explained, Section 3161(h)(7)(A) "counteract[s] substantive open-endedness with procedural strictness." *Zedner*, 547 U.S. at 509. Congress "demand[ed]" express findings based on contemporaneous consideration of mandatory factors. *Id.* at 508-509. Post-hoc decisions are a poor (and impermissible) substitute for that straightforward and efficient process—which is why this Court stressed that "[t]he best practice, of course, is for a district court to put its findings

on the record at or near the time when it grants the continuance." *Id.* at 506-507 & n.7. The lower courts (including the First Circuit below) simply did not get the message. Review is necessary to correct that error and realign national practice with the Act's unambiguous statutory mandate.

2. This case is an ideal vehicle for resolving this significant question. The dispute turns on a pure question of law: whether a second judge can supply the Act's requisite findings when a first judge fails to satisfy the Act's "on-the-record" directive. It has no factual or procedural impediments. The question was squarely presented and resolved at each stage below (App., *infra*, 8a, 43a), and it was the exclusive grounds of the First Circuit's decision—indeed, the court specifically noted that it was *not* deciding whether the initial judge's (minimalist) orders could satisfy the Act's procedural requirement. App., *infra*, 8a-9a & n.3.[7] And with all sides agreeing that 26 days elapsed—and with each continuance covering more than 4 additional days—there is no doubt that the issue is outcome-determinative: if the later court's findings could not cure the earlier deficiencies, the Act's clock has run. *E.g.*, App., *infra*, 45a. There is no conceivable obstacle to deciding this important statutory question.

[7] Nor is there any real question that the initial orders were inadequate: the electronic orders had no express findings at all, and the single "checklist" order failed to reflect any consideration of the mandatory factors—or even begin to explain why the "ends of justice" were served by the continuance.

II. THE COURT SHOULD SEPARATELY GRANT REVIEW TO DECIDE AN IMPORTANT PROCEDURAL QUESTION REGARDING DISTRICT-COURT RECUSAL

This case separately implicates an important procedural question regarding the district court's obligation to make fact findings and judicial disclosures in response to petitioner's pro-se motions under 28 U.S.C. 455.

In three motions filed after the verdict and before sentencing, petitioner asserted a series of factual allegations showing that the district judge had a possible interest in the subject-matter of the case, including as a result of the judge's role in a for-profit family business. See App., *infra*, 26a-28a; C.A. Supp. Reh'g Pet. 1-2, 4. Despite petitioner's detailed and vigorous filings, the district court denied petitioner's motions without explanation or disclosure. Instead, the district court issued three "endorsed orders" with a single, handwritten directive: "Motion denied." App., *infra*, 70a-72a.

On appeal, petitioner argued that the district court exceeded his discretion by denying his motions without any recorded findings or judicial disclosure that would facilitate meaningful appellate review. App., *infra*, 28a. The First Circuit rejected that contention, holding that its "conclusion that Gottesfeld's allegations do not raise any doubt about the trial judge's impartiality" eliminated the need to make any findings. *Ibid.*

Petitioner submits that this is incorrect. The district court's failure to provide any substantive response to the disqualification motions blocked any record of the truth or validity of petitioner's allegations—and the district court's failure to respond with relevant disclosures eliminated the possibility of disclosing other facts related to the core allegations (and of which petitioner might not have been aware). Cf. 28 U.S.C. 455(e); *American Textile*

Mfgs. Inst., Inc. v. *The Ltd., Inc.*, 190 F.3d 729, 742 (6th Cir. 1999). This important procedural question warrants further review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 2022