No. 12-546

In the Supreme Court of the United States

BRIAN K. WASSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The brief in opposition seeks to remake this case from head to toe. It remakes the question presented, suggesting that this case is simply about "[w]hether the district court made sufficient findings" under 18 U.S.C. § 3161(h)(7)(A) (Opp. I), rather than the Seventh Circuit's holding that a district court's "unadorned conclusion" is acceptable so long as a party "laid out" possible reasons that the court could have adopted (Pet. App. 15a). It remakes the court of appeals' opinion, ignoring how that court understood the district court record and – more important still – never once defending that court's statutory analysis. And it ultimately seeks to remake the district court record itself, assuming that information "presented" or "stated" to the district court is necessarily what the district court relied upon in excluding huge swaths of time from the Speedy Trial Act clock. In short, the brief in opposition does exactly what the Act forbids: It replaces the express statutory requirement that the district court "set forth" on the record its *actual* reasons for excluding time under the Speedy Trial Act with what the government believes the district court *could have* said. Whether such supposition is permissible is exactly the question on which the Circuits are split (as the government has elsewhere acknowledged) and why this Court's review is needed.

1. When the government at last turns (Opp. 15) to address the conflict, it has very little to say. It does not dispute that three courts of appeals (the Ninth, Tenth, and D.C. Circuits) enforce the requirements of § 3161(h)(7)(A) according to their terms. But the government would not read those courts' cases to require district courts to articulate reasons under-

lying an ends-of-justice exclusion; rather, it claims that those decisions relate simply to "specific factual scenarios." *Id.* at 16. At the same time, the government ignores the express holdings of the First, Seventh, and Eighth Circuits that it is permissible to infer a district court's reasons from a sequence of events or facts presented *to* it. As the government would have it, none of these courts really mean what they say. The government is wrong.

A. As explained in the petition (at 13-15), the First, Seventh, and Eighth Circuits all permit a reviewing court to infer ends-of-justice reasons from the record when the district court has not articulated those reasons. Pet. App. 15a-17a; *United States* v. *Pakala*, 568 F.3d 47 (1st Cir. 2009); *United States* v. *Gamboa*, 439 F.3d 796 (8th Cir. 2006). The government never seriously confronts these holdings or explains how they can be reconciled with the contrary decisions by the Ninth, Tenth, and D.C. Circuits described in the petition (at 15-19).

In the decision below, for example, the Seventh Circuit held that a district court's reasons for excluding an ends-of-justice continuance could be inferred from the "sequence of events," and acknowledged that the district court excluded time based on an "unadorned conclusion" that the ends-of-justice criteria were satisfied. Pet. App. 14a-15a. The government says nothing about these clear holdings and makes no attempt to square them with the Act's express requirement that a district court actually "sets forth" its reasons "in the record." 18 U.S.C. § 3161(h)(7)(A). Likewise, the First Circuit has explicitly affirmed a district court's unexplained exclusion of time under subsection (h)(7)(A), even

conceding that "the far better course for the district court would have been to articulate its reasons for granting the 'ends of justice' continuances." *Pakala*, 568 F.3d at 60. Again, the government says nothing. And the Eighth Circuit has held that the absence of reasons explicitly stated by the district court can be overcome when "it is clear from the record of the [continuance] hearing that the district court very seriously and properly considered this speedy trial issue." *Gamboa*, 439 F.3d at 803. Once again, the government is silent.[1]

B. In sharp contrast, the Ninth, Tenth, and D.C. Circuits have held that a district court must articulate reasons explicitly, even if possible reasons might later be inferred from context. The government contends that these cases merely illustrate "specific factual scenarios" where the record was found to be insufficient. Opp. 16. Not so.

The government's discussion of *United States* v. *Bryant*, 523 F.3d 349 (D.C. Cir. 2008), is critically incomplete. The government fails to mention *Bryant*'s stated holding "that 'implicit' findings are insufficient to invoke the [ends-of-justice] exclusion" and that to satisfy the statute "the judge had to make 'express findings' about why the ends of justice were served by a continuance." *Id.* at 360. *Bryant* requires a district court to provide "*express*" reasons even if a reviewing court could later infer reasons that may have been "implicit." *Ibid.* (emphasis added). This

[1] In a recent unpublished decision, the Second Circuit has joined the First, Seventh, and Eighth Circuits. *United States* v. *Levis*, 488 F. App'x 481, 485 (2d Cir. 2012), *petition for cert. filed*, 2012 WL 588488 (U.S. Nov. 19, 2012) (No. 12-635).

holding directly conflicts with the approach adopted by the First, Seventh, and Eighth Circuits described above.

The government's treatment of *United States* v. *Lloyd*, 125 F.3d 1263 (9th Cir. 1997), similarly misses the mark. Opp. 16-17. *Lloyd* held that the district court alone – not the parties – is responsible for articulating its reasons for excluding time under the ends-of-justice provision. See 125 F.3d at 1269. *Lloyd* makes clear that "the district court may not simply credit the vague statements by one party's lawyer"; rather, the district court must make its own "*independent* findings." *Ibid.* (emphasis added); see also *United States* v. *Clymer*, 25 F.3d 824, 828-829 (9th Cir. 1994). The First, Seventh, and Eighth Circuits, by contrast, permit reviewing courts to infer that the district court adopted reasons set forth by the parties.

The government likewise mischaracterizes the Tenth Circuit's holdings (and ignores one of its decisions altogether). The government notes *Larson*'s statement that facts that "are obvious and set forth in the motion for continuance itself" need not be rearticulated by the district court. Opp. 13 (citing *United States* v. *Larson*, 627 F.3d 1198, 1204 (10th Cir. 2010)). But the government does not mention the court's conclusion that "it is far from 'obvious,' * * * what factors the district court relied upon in making its determination." *Larson*, 627 F.3d at 1206 (internal citations omitted). The government also fails to acknowledge *Larson*'s holding that a record "consisting of only short, conclusory statements lacking in detail is insufficient." *Id.* at 1204 (internal citations omitted). And – most important for present

purposes – *Larson* squarely held that the record below must explain "*why* the mere occurrence of the event identified by the party" requires an excluded continuance. *Ibid.* (emphasis added). None of that can be reconciled with the decision below.

The Government similarly mischaracterizes *United States* v. *Williams*, 511 F.3d 1044 (10th Cir. 2007), as a mere factual dispute. Opp. 17. The court there reaffirmed that the Speedy Trial Act requires "explicit findings regarding *why* granting the continuance will strike a proper balance between the ends of justice and the best interest of the public and the defendant in a speedy trial." *Williams*, 511 F.3d at 1057 (quoting *United States* v. *Doran*, 882 F.2d 1511, 1515 (10th Cir. 1989)) (emphasis added). The defendant asked for a continuance so that his new attorney could become familiar with the case. *Ibid.* The district court even "not[ed] the presence of [defendant's] new counsel" in the record. *Ibid.* However, the Tenth Circuit refused to transmute those statements into actual reasons. *Id.* at 1058. That is, while the Tenth Circuit *could have* inferred the reasons for this exclusion, it did not.[2]

The government fails even to mention *United States* v. *Toombs*, 574 F.3d 1262 (10th Cir. 2009). But see Pet. 17-18 (discussing same). That omission is significant, because the government has elsewhere

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[2] In *United States* v. *Hernandez-Mejia*, 406 F. App'x 330 (10th Cir. 2011), the court itself noted that it "has interpreted strictly the requirements of § 3161(h)(7)(A) and (B)," and held that the continuances in that case were improper when evaluated against "these *demanding* standards." *Id.* at 336-337 (emphasis added).

acknowledged that *Toombs* and the Seventh Circuit's standard cannot be reconciled. In *United States* v. *Hills*, 618 F.3d 619 (7th Cir. 2010), the government responded to the defendants' argument that the Seventh Circuit "should adopt the standard of review employed by the Tenth Circuit in *United States* v. *Toombs*." *Hills* Consolidated U.S. Br. at 16. "In essence," the government asserted, the defendants' reliance on *Toombs* "ask[s] this court to excuse them from showing they were prejudiced as a result of this exclusion of time." *Id.* at 17. The government did not, as it does here, claim that there was no difference between the Seventh and Tenth Circuits' standards. Rather, the government argued: "[Defendants] fail to show why the standard this Court uses is wrong or why this Court should adopt the standard employed in *Toombs*. This Court should decline defendants' invitation to up-end long settled precedent." *Ibid.* The government's candor in *Hills* contradicts the government's denial of a conflict here.

At a more basic level, the government ignores the obvious. In recent years, the Tenth Circuit has reversed at least eight exclusions of time under § 3161(h)(7)(A). *Hernandez-Mejia*, 406 F. App'x at 337; *Larson*, 627 F.3d at 1206-1207; *Toombs*, 574 F.3d at 1272; *Williams*, 511 F.3d at 1056; *United States* v. *Allen*, 235 F.3d 482, 491 (10th Cir. 2000); *United States* v. *Gonzales*, 137 F.3d 1431, 1434-1435 (10th Cir. 1998); *United States* v. *Johnson*, 120 F.3d 1107, 1111-1112 (10th Cir. 1997); *Doran*, 882 F.2d at 1518. By contrast, the government does not cite a single instance (and we are aware of none) in which the Seventh Circuit has done so. That is because there are fundamentally different legal standards in

place and because the Seventh Circuit's standard is exceedingly permissive, not because "specific factual scenarios" arise in one court but not the other. Opp. 16.

2. The government devotes the bulk of its brief in opposition to making it appear as if the district court did, in fact, set forth reasons rather than "unadorned conclusion[s]" that the ends-of-justice requirements were satisfied. Pet. App. 15a. These efforts must fail.

First and foremost, there is no reason even to engage the government's revisionist account of the district court proceedings. That is because this Court is asked to review the Seventh Circuit's *holding* that "[a]lthough it may have been better for the district court to spell out its" reasons when granting a continuance motion, the Speedy Trial Act is satisfied if the "motion laid out the reasons supporting the continuance and the court subsequently granted the motion." Pet. App. 15a. This Court need look no further than the court of appeals' willingness to accept "unelaborated" and "unadorned" conclusions – indeed, that is what future litigants and district courts reading the decision below will understand the law to be. *Id*. at 10a, 15a.

In any event, the government's retelling does not square with reality. The government fails to acknowledge, for example, that the district court continued Wasson's trial for 161 days in light of the lead prosecuting attorney's upcoming "detail" to Washington, D.C., regarding the Guantanamo Bay detainee litigation, Pet. App. 5a, and the "weather being what it is in Illinois in January and February," *id*. at 100a. The government does not attempt to suggest – nor

could it – that these *actual* concerns stated by the district court are acceptable reasons under the Act.

More fundamentally, the government repeatedly elides the crucial difference between reasons for a continuance offered by a party and reasons to exclude such time placed on the record by the district court. Only the latter satisfy the court's duty under the Speedy Trial Act. Stripped of *the parties'* statements, then, the government hangs its hat on only three assertions by the district court itself:

(1) The court took notice of "the problems that defense counsel ha[d] in reviewing voluminous discovery," Pet. App. 94a;

(2) The court further stated that "obviously, the interest of justice means that we do [not have to have] a premature trial," but that the interest of justice requires "a reasonable trial setting," *ibid.*; and finally,

(3) The court acknowledged that the guilty plea of Wasson's codefendant would make the schedule "extremely difficult for the defense," *id.* at 104a.

From these three snippets, the government asserts that the district court justified 336 days of excluded time as sufficiently in the "ends of justice" to "outweigh the best interests of the public and the defendant in a speedy trial." 18 U.S.C. § 3161(h)(7)(A).

That is wrong. The court's observation of problems caused by extensive discovery is no more than an acknowledgment of petitioner's argument for a continuance. Even if the court's statement is something more, it is at most a "passing reference" to the case's complexity. *Zedner* v. *United States*, 547 U.S. 489, 507 (2006). The court's bare nod does not

explain how such lengthy further delay would serve the ends of justice, let alone that it would be in the interest of the public or even the defendant. Likewise, recognizing a codefendant's change in plea does not weigh the relevant interests.

Moreover, none of this explains the *length* of the particular continuances granted. The Act requires the district court to provide reasons for granting "*such* continuance," 18 U.S.C. § 3161(h)(7)(A) (emphasis added), and the government does not dispute that that means the district court was required to explain why exclusion of such particularly long continuances – 175 and 161 days, respectively – was necessary. The district court never said anything to justify such extreme delays.

Also unavailing are the court's "obvious[]" and tautological conclusions that "the interest of justice means that we do [not have to have] a premature trial," and "we do have to have a reasonable trial setting." Pet. App. 94a. Labeling these statements "findings" is word play; they contain no reasoning related to Wasson's trial, or any facts at all, for that matter. If they are sufficient under the statute, then anything is.

Without sufficient reasons "in the record," 18 U.S.C. § 3161(h)(7)(A), the government accordingly shares the Seventh Circuit's fundamental error: "reading between the lines" of the record, pronouncing the Speedy Trial Act's procedural requirements satisfied by contextual clues. As the government explains, against the "background" of the case's complexity and "taken together" with the later denial of Wasson's motion to dismiss (Opp. 11 (citing *Wasson*, Pet. App. 17a)), the Seventh Circuit was

satisfied that that the district court had made the appropriate ends-of-justice findings. This wholesale inference, however, is not an adequate substitute for reasoning "set forth" *by the district court* "in the record."

Reasoning that *might* have been in the judge's mind does not satisfy the Act's plain text. Factual assumptions about the district court's reasoning are the very *antithesis* of reasons on the record. The government may not remedy this procedural defect by relying on inferences from mere chronology. The Seventh Circuit itself acknowledged that the district court failed "to spell out its agreement with" the reasons advanced by the parties. Pet. App. 15a. This should have been fatal.

This misguided chronological inference relies in part on the illogical and atextual proposition that a litigant's legitimate desire for a continuance is sufficient to justify the district court's decision to toll the Speedy Trial clock. They are not the same. A court's decision to exclude a continuance must rest on a finding that delay is not only in the defendant's interest, but also in the interest of *the public*. As a result, the mere fact that a continuance is granted following a movant's request could address only a portion of the relevant findings.[3]

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[3] The government briefly contends that the district court satisfied the Speedy Trial Act by "confirm[ing] its rationale in ruling on the motion to dismiss." Opp. 13. A district court may indeed satisfy the Act by referencing earlier reasons for granting an ends-of-justice continuance – *so long as those reasons explicitly appear somewhere on the record.* "Confirming" earlier reasons simply begs the question whether the district court put

3. Finally, the government claims that this case is an "inappropriate vehicle for review because petitioner's request for or agreement to each continuance provides an alternative basis for affirming the judgment." Opp. 19. But that ignores both the requirements of judicial estoppel and the interests the Speedy Trial Act safeguards.

First, it is undisputed that the district court must comply with the Speedy Trial Act for *each* continuance. Pet. 24. But *the government* made the August 2008 motion for a continuance. Pet. App. 98a. Petitioner's only contribution was stating that he had no objection to the government's request. *Id.* at 104a. Wasson thus never "persuade[d]" the district court of the necessity of the continuance. *Zedner*, 547 U.S. at 505. That is the end of the government's estoppel argument, even if the dicta in *Zedner* were given the effect the government suggests.

Second, and in any event, the government's argument would be further reason to grant review here. As explained in the petition (at 17 n.3), there is conflict among the circuits as to whether it should matter that the defendant requested a continuance that is excluded under § 3161(h)(7)(A). And the government's position is exceedingly difficult to square with the Act itself, which "was designed with the public interest firmly in mind," *Zedner*, 547 U.S. at 501, and therefore makes no textual distinction based on the identity of the party requesting the

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its findings on the record in the first place. Merely asserting, as here, that "this court made findings" does not satisfy the statute. Pet. App. 31a.

continuance. 18 U.S.C. § 3161(h)(7)(A). The same societal interest underlying *Zedner*'s refusal to allow prospective waivers of the Speedy Trial Act's requirements – even if requested by the defendant – holds true here. *Zedner*, 547 U.S. at 501. If the government thinks otherwise, this case is a perfectly adequate vehicle to address and reject that proposition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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