No. 16-7725

IN THE

Supreme Court of the United States

GEORGE E. ROBEY,

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

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole

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[1] Pursuant to Rule 37.6, all parties received timely notice of *amicus's* intent to file this brief, and their consent letters have been lodged with the Clerk. Counsel for amicus curiae state that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The Speedy Trial Act (STA or Act) "sets forth a basic rule" that a defendant must be tried within seventy days of indictment or the date the defendant first appears in court, whichever is later, or dismissal occurs. *United States v. Tinklenberg*, 563 U.S. 647, 652 (2011). Some pretrial delays do not count toward the seventy-day limit because the Act also "excludes" several categories of time from the speedy trial calculation. *See* 18 U.S.C. § 3161(h). This case involves the ends-of-justice provision, which excludes delay from a continuance if the district court concludes that "the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." *Id*. § 3161(h)(7)(A).

But not every ends-of-justice continuance that a court grants counts as excludable time. Ends-of-justice continuances are excludable only when "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." *Id*.

This Court has noted that an ends-of-justice continuance is the Act's "most open-ended type of exclusion." *Zedner v. United States*, 547 U.S. 489, 508–09 (2006). Congress understood that ends-of-justice continuances could be used to "subvert the Act's detailed scheme" for speedy trials, if the continuance was not "rigidly structured." *Id*. So Congress "counteract[ed] substantive openendedness with procedural strictness," by requiring district courts to consider certain factors and provide "on-the-record findings" before an

ends-of-justice continuance counts as excludable time. *Id*. at 509.

The question presented here is whether there are any consequences when a district court grants multiple ends-of-justice continuances without making any findings whatsoever to justify its action. The district court in this case allowed 1,076 days to elapse between Robey's initial appearance and the commencement of his trial. *United States v. Robey*, 831 F.3d 857, 863 (7th Cir. 2016). The court of appeals upheld all eleven of the district court's ends-of-justice continuances, even though the district court never made individualized findings—never supplied the "reasons"—on the record for some of those continuances. Pet. App. 60a–61a. The court of appeals instead inferred the reasons from the district court's terse orders and the "relevant sequence of events." *Robey*, 831 F.3d at 863. Put differently, the court of appeals inferred findings from the reasons provided by the parties in their continuance motions. That type of lax STA enforcement, which is countenanced in several circuits, would not be allowed in several others. The conflict is important.

The Court's review is needed because both the district court and the court of appeals failed to enforce the "procedural strictness" that Congress built into the STA. The ends-of-justice provision is one of the most frequently used exclusions, and when used improperly it undermines the very purpose of the STA. The Court should resolve the conflict in the courts of appeals regarding appellate review of ends-of-justice continuances when a district court fails to put its reasons on the record. The courts that infer the reasons for the

district court—like the court below—seriously undermine the Act's detailed regime designed to protect the public interest in prompt trials.

ARGUMENT

I. THE QUESTION WHETHER A DISTRICT COURT MUST PROVIDE SPECIFIC AND INDIVIDUALIZED REASONS ON THE RECORD BEFORE AN ENDS-OF-JUSTICE CONTINUANCE COUNTS AS EXCLUDABLE TIME IS VITALLY IMPORTANT FOR ENSURING SPEEDY TRIALS

The question whether district courts must comply with the procedural strictness mandated by the STA for ends-of-justice continuances is worthy of this Court's review for several reasons.

A. The circuits are divided on how to review ends-of-justice continuances

The Speedy Trial Act requires a district court to include "in the record of the case" its reasons for finding that an end-of-justice continuance "outweigh the best interests of the public and the defendant in a speedy trial." 18 U.S.C. §3161(h)(7)(A). Despite the seemingly clear text, the courts of appeals disagree on whether the Act requires explicit findings or permits appellate courts to infer those findings.

The Ninth, Tenth and D.C. Circuits have interpreted the Act and this Court's decision in *Zedner* to require the district courts to state its reasons for granting ends-of-justice continuances based on specific findings on the record. *United States v. Toombs*, 574 F.3d 1262, 1271 (10th Cir. 2009); *United States v. Bryant*, 523 F.3d 349, 360 (D.C. Cir. 2008); *United States v. Lloyd*, 125 F.3d 1263, 1269–70 (9th Cir. 1997). The

Ninth Circuit, for example, held that when a district court grants an ends-of-justice continuance, it must make specific findings rather than merely adopting a party's affidavit to speak for itself. *Lloyd*, 125 F.3d at 1269.

The Seventh Circuit, by contrast, will infer a district court's reasons from the parties' continuances motions and the "sequence of events," even if the district court failed to provide its reasons on the record. *United States v. Wasson*, 679 F.3d 938, 946–47 (7th Cir. 2012); *see also United States v. Napadow*, 596 F.3d 398, 405 (7th Cir. 2010) ("When facts have been presented to the court and the court has acted on them, it is not necessary to articulate those same facts in a continuance order."). Other circuits have interpreted the Act similarly. These circuits will also infer from the record an acceptable reason for granting an ends-of-justice continuance. *See, e.g.*, *United States v. Whitfield*, 590 F.3d 325, 357–58 (5th Cir. 2009); *United States v. Pakala*, 568 F.3d 47, 60 (1st Cir. 2009); *United States v. Bazuaye*, 311 F. App'x 382, 384 (2d Cir. 2008); *United States v. Thomas*, 272 F. App'x 479, 482–84 (6th Cir. 2008); *United States v. Gamboa*, 439 F.3d 796, 803 (8th Cir. 2006).

B. The circuit conflict is important because district courts frequently use the ends-of-justice provision to grant continuances

Although Congress thought the ends-of-justice continuance would be "rarely used," Richard S. Frase, *The Speedy Trial Act of 1974*, 43 U. CHI. L. REV. 667, 698 (1976) (quoting S. REP. NO. 1021, 93d. Cong., 2d Sess. 39 (1974)), district courts have frequently used the ends-of-justice provision to delay trials in all sorts

of criminal cases. *See, e.g., Robey*, 831 F.3d at 860 (granting eleven ends-of-justice continuances in case involving trafficking in vehicles with altered Vehicle Identification Numbers); *Pakala*, 568 F.3d at 51 (granting continuances in case involving possession of a firearm by a felon); *Bazuaye*, 311 F. App'x at 383 (bank fraud and access device fraud); *Thomas*, 272 F. App'x at 480 (submitting false claims to the Internal Revenue Service); *Toombs*, 574 F.3d at 1265 (illegal firearm and drug possession); *Gamboa*, 439 F.3d at 800 (same). Consequently, the ends-of-justice exclusion has become "indispensable to the practical judicial administration of complex federal cases." Greg Osfeld, *Speedy Justice and Timeless Delays: The Validity of Open-ended "Ends-of-justice" Continuances Under the Speedy Trial Act*, 64 U. CHI. L. REV. 1037, 1038 (1997). *See also* Shon Hopwood, *The Not So Speedy Trial Act*, 89 WASH. L. REV. 709, 744 (2014) (noting that the "ends-of-justice provision is one of the most frequently used STA provisions").

When a statutory provision frequently applies to the daily administration of the federal criminal justice system, questions regarding how that provision applies warrant this Court's review. *See* SHAPIRO, ET AL., SUPREME COURT PRACTICE 268 (10th ed. 2013) ("Among the variety of factors that may lend importance to a decision involving statutory construction or application is the significance of the issue in the administration of the statute * * * *"). The Supreme Court has previously granted certiorari in cases involving the judicial administration of the Speedy Trial Act. *See, e.g.*, *Tinklenberg*, 563 U.S. 647; *Bloate v. United States*, 559 U.S. 196 (2010); *Zedner*, 547 U.S. 489. Because the ends-of-justice continuances is important to the administration of the STA, which itself

applies at the start of most federal criminal cases, the circuit conflict is worthy of review.

C. Congress created the STA with the public interest firmly in mind and only strict compliance with the Act's on-the-record requirement will protect the public interest

This Court held in *Zedner* that the Speedy Trial Act is meant to "serve the public interest." 547 U.S. at 501. Congress worried that a "court delay" had a "debilitating effect" on the deterrent value of criminal punishment. 547 U.S. at 501, *citing* S. REP. NO. 93-1021, at 6–8 (1974). Among other problems, delays erode the public's confidence in the criminal justice system. *Zedner*, 547 U.S. at 501; *see also* Hopwood, 89 WASH. L. REV. at 713 (detailing the various problems associated with pretrial delay). That is why the end-of-justice provision requires district courts to consider the "best interest of the public," not just the interest of the litigants. *See* 18 U.S.C. § 3161.

Litigants' self-interest does not adequately protect the public interest at the heart of the Speedy Trial Act. Congress knew that litigants did not have sufficient incentive to enforce the Act and protect the public interest. *Zedner*, 547 U.S. at 501–02. The primary architect of the Act, Senator Ervin, explained that "while it is in the public interest to have speedy trials, the parties involved in the criminal process do not feel any pressure to go to trial." 120 CONGO REC. 41618 (1974), *reprinted in* ANTHONY PARTRIDGE, LEGISLATIVE HISTORY OF TITLE I OF THE SPEEDY TRIAL ACT OF 1974, 16 (Fed. Judicial Center 1980). The defendant "wishes to delay his day of reckoning for as long as possible." *Id*. And prosecutors may happily accept delay because of

heavy caseloads. *Id*. In other cases, delay may come not from the interest of the parties, but merely from the lawyers' own interests. *See* Robert Misner, *Delay, Documentation and the Speedy Trial Act*, 70 J. CRIM. L. & CRIMINOLOGY 214, 219–23 (1979). The parties simply cannot protect the public interest underlying the Speedy Trial Act.

The public interest instead requires careful district court review of ends-of-justice continuance requests. District courts should not defer to parties whose interest in delay often conflicts with the public's interest in speedy trials. The requirement of on-the-record findings and meaningful appellate review ensures that courts seriously consider the public interest and balance *all* interests at stake, rather than simply rubberstamping requests from the parties. Congress envisioned a "rarely used" ends-of-justice continuance where district courts would strike a "proper balance" on a "case-by-case basis." S. REP. NO. 93-1021, at 39–41 (1974), *reprinted in* PARTRIDGE at 163. When district courts instead summarily grant continuance requests and courts of appeals approve them, the ends-of-justice provision works against the Act and the public interest.

Circuit courts of appeals have acknowledged, even while approving continuances unaccompanied by on-the-record findings, that district courts *should* provide express reasons. In *Pakala*, the First Circuit approved an ends-of-justice continuance when the district court granted it by a "stock electronic order" that "did not even hint" at reasons. 568 F.3d at 58, 60. But the court also noted that "the far better course" would be for the district court to "articulate its reasons." *Id*. at 60. The court further noted that "administrative ease" should

not override "*Zedner*'s clear holding" requiring express, on-the-record findings. *Id*. Despite *Zedner*, district courts often grant ends-of-justice continuances by parroting the language of the STA in minute orders without providing real reasons. *See* Hopwood, 89 WASH. L. REV. at 720 n.84. Some courts of appeals have begrudgingly approved these grants-by-minute-order. *See Wasson*, 679 F.3d at 947 (approving continuance while acknowledging it may have "been better" for the district court to make on-the-record findings); *Napadow*, 596 F.3d at 405 (approving continuance while acknowledging the record "would have been more clear" if the district court made on-the-record findings); *Pakala*, 568 F.3d at 60; *Bazuaye*, 311 F. App'x at 384 (approving continuance while acknowledging it would be "preferable, in light of *Zedner*" for the district court to make explicit findings). These courts of appeals are right: it would be better for district courts to make on-the-record findings when granting continuances. But it is hardly an optional exercise; it is instead a Congressionally *mandated* practice, which these courts' holdings fail to honor.

Circuit courts understandably hesitate in effectuating the on-the-record requirement. Dismissal is strong medicine. But dismissal is the remedy Congress chose. *See* 18 U.S.C. § 3162(a) (stating that if the seventy-day limit is exceeded, the district court must dismiss the case with or without prejudice). Until appellate courts uphold the procedural strictness that Congress created, district courts will continue to create delay by granting ends-of-justice continuances without properly weighing the public's interest against the parties and without placing reasons on the record. And the lax enforcement of this requirement will inevitably lead to more delay.

D. Judicial enforcement of the STA is particularly important in circuits like the Seventh, that are relatively slow in disposing of criminal cases

A simple comparison of data from the Seventh and Tenth Circuits, where courts are on opposite sides of this circuit split, is instructive. Felony criminal case litigation takes much longer before the average district court in the Seventh Circuit than it does in the Tenth. *See* Figure 1. It takes 10.89 months from filing to disposition of felony cases in the Seventh Circuit, compared to 6.45 months in the Tenth Circuit. Criminal cases move slower than civil cases in the Seventh Circuit, whereas criminal cases move faster than civil ones in the Tenth. Caseloads do not explain this discrepancy: the average district court in the Seventh Circuit has 78 criminal felony cases per judgeship, whereas the average is 152 in the Tenth Circuit. *Id*. Despite having nearly twice as many felony cases per judgeship, district courts in the Tenth Circuit take four and a half months less to dispose of the cases than their counterparts in the Seventh.

	Seventh Circuit	Tenth Circuit
Felony Cases: Filing to Disposition	10.89 months	6.45 months
Civil Cases: Filing to Disposition	10.44 months	9.57 months
Felony Cases per Judgeship	78 cases	152 cases

Figure 1. Data compiled from UNITED STATES COURTS, UNITED STATES DISTRICT COURTS — NATIONAL JUDICIAL CASELOAD PROFILE (2016), http://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables. Data covers period from September 30, 2010 to September 30, 2016.

To be sure, this data does not pinpoint the cause of delays in the Seventh Circuit. Perhaps the Seventh Circuit's failure to enforce the Act's "procedural strictness" when reviewing ends-of-justice continuances is partly to blame. Or maybe a host of other unrelated factors cause the delays. Either way, the Seventh Circuit can ill afford to dilute the STA's prophylactic procedures given the delays that already exist in the circuit. The data, at the very least, demonstrates that STA enforcement ensures the courts are doing their part in controlling delay.

By upholding ends-of-justice continuances where a district court has not weighed the factors, nor put its reasons on the records, the Seventh Circuit has approved extraordinary delays. George Robey waited 1,076 days for his trial because the Seventh Circuit approved eleven end-of-justice continuances spanning 488 days. This length of delay is egregious, but not uncommon. *See, e.g.*, *United States v. Parker*, 716 F.3d 999, 1003–05 (7th Cir. 2013) (551 total days delayed; at least thirteen approved ends-of-justice continuances totaling at least 364 days); *Wasson*, 679 F.3d at 944–45 (661 total days delayed; two approved ends-of-justice continuances covering 389 days); *United States v. O'Connor*, 656 F.3d 630, 638–43 (7th Cir. 2011) (1,229

total days delayed; at least six approved ends-of-justice continuances spanning at least 651 days). The wheels of justice turn slowly when courts grant ends-of-justice continuances as a matter of course and without the "procedural strictness" Congress requires. And, even if the Court disagrees, the STA should be enforced consistently throughout the circuits and that is decidedly not the case now.

CONCLUSION

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

Respectfully submitted,

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