No. 12-546

In the Supreme Court of the United States

BRIAN K. WASSON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
KATHRYN KENEALLY
Assistant Attorney General
FRANK P. CIHLAR
GREGORY VICTOR DAVIS
MARK S. DETERMAN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the district court made sufficient findings to support its orders granting "ends of justice" continuances under 18 U.S.C. 3161(h)(7)(A).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes: Page

In the Supreme Court of the United States

No. 12-546

BRIAN K. WASSON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 679 F.3d 938. The relevant orders of the district court (26a-33a, 34a-45a) are unreported, but are available at 2009 WL 383447 and 2009 WL 4065044.

JURISDICTION

The judgment of the court of appeals was entered on May 21, 2012. A petition for rehearing was denied on July 3, 2012 (Pet. App. 75a-76a). On September 18, 2012, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including October 31, 2012, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Central District of Illinois, petitioner was convicted on one count of conspiracy to defraud the United States, in violation of 18 U.S.C. 371; and six counts of aiding in the preparation of a false tax return, in violation of 26 U.S.C. 7206(2). The district court sentenced petitioner to 180 months of imprisonment, to be followed by three years of supervised release. Pet. App. 1a-2a. The court of appeals affirmed. *Id.* at 1a-25a.

1. Petitioner's convictions stem from his involvement in an extensive tax-fraud conspiracy involving the now-defunct Aegis Company (Aegis). Beginning in approximately 1994, Aegis and its representatives devised, organized, promoted, and sold various financial instruments known as domestic and foreign "trusts" to federal taxpayers in exchange for substantial fees. The purpose of the trusts was to conceal a client's assets and income from the Internal Revenue Service (IRS), thereby reducing or eliminating the client's income tax liability. Pet. App. 2a; Gov't C.A. Br. 6-7. At an Aegis seminar in which petitioner participated, petitioner's co-defendant Joseph Starns compared the Aegis system to "taking [money] from one pocket and putting it in the other, * * * and then standing before your wife and saying, 'See I got no money.'" Gov't C.A. Br. 9 (quoting Gov't Ex. 1031).

In 1997, petitioner and Starns, who were Aegis representatives in central Illinois, established a business called Midwest Alternative Planning, which they used to market the Aegis trust scheme. Starns introduced the Aegis system to John Wolgamot, an attorney in Danville, Illinois, where Midwest Alternative Planning was based. Wolgamot assisted petitioner and Starns by

preparing the trust entities for clients of Midwest Alternative Planning. Pet. App. 2a; Gov't C.A. Br. 7.

Clients generally paid between $20,000 and $40,000 to set up trusts under the Aegis system, in addition to an annual management fee of between $3000 and $7000. For example, one Aegis client paid $20,000 to set up various trusts into which he transferred his business assets. The client was told to transfer the $3 to $4 million that he made annually in gross sales into one trust, then to a second trust, and finally to a third offshore trust, which he was told had no IRS reporting requirements. Using that method, the client went from paying between $20,000 and $25,000 in annual income taxes to paying no income tax. Pet. App. 3a. In all, petitioner, Starns, and Walgamot assisted at least 12 taxpayers using the Aegis system to conceal millions of dollars from the IRS. They received more than $350,000 in fees and commissions and caused a tax loss to the United States of approximately $6 million. *Ibid.*

2. On September 8, 2006, a federal grand jury in the Central District of Illinois charged petitioner with aiding the filing of a false tax return, in violation of 26 U.S.C. 7206(2). Between that date and May 2, 2007, the grand jury returned three superseding indictments that added Starns and Wolgamot as defendants; added additional counts under 26 U.S.C. 7206(2); and added a charge of conspiracy to defraud the United States, in violation of 18 U.S.C. 371. Pet. App. 4a; Gov't C.A. Br. 18-19.

a. On December 1, 2006, after the first superseding indictment was filed, the court held a hearing on petitioner's motion for a continuance of his December 11, 2006, trial date. See Pet. App. 79a-90a. During the hearing, petitioner's counsel conveyed his understand-

ing that "there's in excess of a million, maybe 1,400,000, maybe even 2 million pages of documents" relating to the case. *Id.* at 81a. The court granted petitioner's motion for a continuance and stated on the record that, pursuant to 18 U.S.C. 3161(h)(7)(A) (Supp. V 2011), the "ends of justice * * * outweigh[] the best interest of the public and the defendant in a speedy trial" and that the time between petitioner's motion and the next status conference would be excluded from the time limits set forth in the Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq*. Pet. App. 89a.

Under the Speedy Trial Act, a defendant's trial must generally begin within 70 days of his indictment or appearance before a judicial officer, whichever occurs later. 18 U.S.C. 3161(c)(1). As relevant here, however, Section 3161(h)(7)(A) of the Speedy Trial Act excludes any period of delay resulting from a continuance granted by the district court "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," and if the court "sets forth, in the record of the case, either orally or in writing, its reasons for [that] finding."[1] In determining whether to grant an ends-of-justice continuance, a district court should consider several factors, including whether the defendant needs additional time to obtain counsel, whether counsel for the defendant or the government need additional time to effectively prepare for the case, and whether delay is

[1] Section 3161(h)(7)(A) was initially codified at 18 U.S.C. 3161(h)(8)(A) (2006) but was renumbered in 2008. See Judicial Administration and Technical Amendments Act of 2008, Pub. L. No. 110-406, § 13(3), 122 Stat. 4294. For clarity, this brief cites the current version of the statute, 18 U.S.C. 3161(h)(7)(A) (Supp. V 2011).

necessary to ensure continuity of counsel. 18 U.S.C. 3161(h)(7)(B)(iv) (Supp. V 2011).

b. On January 11, 2007, at petitioner's arraignment following a second superseding indictment, the district court discussed the nature of the charges, the complex nature of the case, the expectation that the indictment would be superseded again to add a third defendant, and the voluminous nature of the discovery materials. 1/11/07 Tr. 1-25. With the consent of counsel for both petitioner and Starns, the government requested that the district court "make a finding under the Speedy Trial Act that this is a complex case, entitling the court to make an appropriate ends-of-justice finding that would extend the pretrial period longer that in the usual case." *Id.* at 11-12. The district court granted that request. The court stated:

> The Court does believe it's quite clear—and, of course, the Court has the experience of having other tax cases before it—that these are complex cases. * * * [T]hese are paper-intensive cases. * * * Therefore, there's no [question] that there's lots of discovery in this case, especially in * * * what's now the third indictment and the number of tax years * * * *. It's undisputed this is a complex * * * income tax prosecution of two defendants now accused of a conspiracy and multiple taxpayers' returns [are] involved.

Id. at 19-20. The court set a status hearing for May 1, 2007, and stated that the time until then would be excluded from the Speedy Trial Act calculation because "the ends of justice served by taking this action * * * outweigh[] the best interests of the public and the defendants in a speedy trial." *Id.* at 25.

At the status hearing on May 1, 2007, Starns moved for appointment of counsel, and the government informed the court that the grand jury would return a third superseding indictment adding Wolgamot as a defendant the next day. 5/01/07 Tr. 11, 13-14. To allow Starns and Wolgamot's counsel to become familiar with the case, the court made another ends-of-justice finding and excluded the time until a scheduled hearing on July 17, 2007. *Id.* at 16-17, 19-20.

c. On June 8, 2007, following petitioner's arraignment on the third superseding indictment, petitioner, Starns, and Walgamot moved for a continuance.[2] Petitioner and Starns based their requests on the voluminous discovery materials and the need for effective trial preparation. 2:06-cr-20055 Docket entry Nos. (Docket entry No.) 36, 37 (C.D. Ill.). At a hearing on the motions, the government asked the court to reaffirm its finding of complexity, for purposes of the Speedy Trial Act. 6/28/07 Tr. 25. The court stated, "we all know from the record in this case stated by the counsel, discovery is voluminous with hundreds of thousands of pages of documents and that there are factual and legal matters that are complex. Obviously we have discussed that before; and that's why I've appointed * * * a team of panel attorneys to work on this case, so that it would be in the best interests of the defendants. *Id.* at 3. The court "reaffirm[ed] that the Court[] [has] found this to be a complex case" and stated that "based on the motions filed and the discussion, I don't think there's any

---

[2] Petitioner states (Pet. 7) that his trial commenced "more than 900 days after the initial indictment." Throughout these proceedings, however, petitioner has never disputed that the speedy trial clock started to run from Wolgamot's arraignment on May 11, 2007, after the third superseding indictment was returned. Pet. App. 9a.

doubt from the defendants' perspective it's a complex case." *Id.* at 25-26. The court stated that the ends of justice would be served by excluding the time until the agreed-upon March 31, 2008, trial date.

Shortly after the June 28, 2007, hearing, Starns died of cancer. Pet. App. 5a.

d. On January 14, 2008, petitioner and Wolgamot moved to continue the trial. Petitioner's motion stated that he had recently received voluminous discovery, that "[r]eview of the electronic documents will take a considerable time," and that "[p]reparation for trial in this matter has been delayed by the addition of a new co-defendant and the death of another co-defendant." Docket entry No. 46, at 1-2. Petitioner's counsel stated that he "d[id] not feel [that] he [could] be adequately prepared for trial given the current state of exchange of discovery" and that petitioner "would be harmed by a premature trial." *Id.* at 2. During a hearing on the motion, the court stated, "I certainly understand the problems that defense counsel has in reviewing voluminous discovery, and so I believe that the motion needs no argument." Pet. App. 94a. The court further stated that "obviously, the interest of justice means that we do have to not have a premature trial, but we do have to have a reasonable trial setting." *Ibid.* After consulting with counsel, the court reset the trial date to September 22, 2008. *Id.* at 94a-95a. The court repeated its ends-of-justice finding pursuant to 18 U.S.C. 1361(h)(7)(A) (Supp. V 2011), and excluded the time until the September trial date. Pet. App. 5a, 95a.

e. On August 18, 2008, Wolgamot pleaded guilty to one count of aiding in the preparation of a false tax return. On August 22, 2008, the government moved to continue petitioner's trial based on Wolgamot's guilty

plea, which the government explained changed the landscape of the case such that more preparation time was necessary. Pet. App. 97a. The government also requested the continuance to ensure "continuity of government counsel," explaining that counsel had been asked to participate in a six-month detail in Washington, D.C., related to the Guantanamo Bay detainee litigation. *Id.* at 97a-98a. During the hearing, petitioner's counsel stated that he had been "talking [with the government] about the possibility of continuing the trial for a couple weeks, * * * ever since Mr. Wolgamot's plea became a real possibility." *Id.* at 101a. Petitioner's counsel further stated that "[i]t would be very difficult for us to go to trial in just a few weeks, given [Wolgamot's] plea" and the expected plea of another individual. *Id.* at 101a-102a. The district court specifically asked petitioner if he had any objection to a continuance, stating "I just wanted to make sure that you understood that the Court was willing to listen to your situation." *Id.* at 104a. Noting that the government's motion was unopposed, the court continued the trial until March 2, 2009. *Id.* at 5a-6a, 16a, 104a-105a. The court noted that the guilty plea would make the current trial date "extremely difficult for the defense" and that "if the defense made a motion for a continuance, the Court would be compelled to grant it * * * in light of the changing landscape." *Id.* at 104a. The court renewed its complexity finding and excluded the time until March 2, 2009. *Id.* at 105a.

f. Before the March 2, 2009, trial date, petitioner moved to dismiss the indictment for failure to comply with the Speedy Trial Act. The district court denied petitioner's motion. Pet. App. 26a-33a. The court explained that "each time a continuance was granted, specific reasons were given for the requested continu-

ance and this court made findings, citing 18 U.S.C. § 3161(h)([7])(A), that the ends of justice outweighed the best interest of the public and [petitioner] in a speedy trial." *Id.* at 31a. The court further noted that "there was agreement from the beginning that this is a complex case involving a huge number of exhibits which would require a lengthy period of time for trial preparation," that petitioner "either requested or did not object to each continuance," and that petitioner "conceded that every continuance in this case was accompanied by an ends of justice finding by this court." *Id.* at 31a-32a.

g. Following a 12-day bench trial that began on March 2, 2009, petitioner filed a *pro se* motion to dismiss the indictment for failure to comply with the Speedy Trial Act. The district court denied petitioner's motion, Pet. App. 34a-45a, concluding that petitioner "ha[d] not shown that th[e] court's prior ruling denying his counsel's Motion to Dismiss was incorrect." *Id.* at 44a. The court convicted petitioner on all counts of the third superseding indictment and sentenced him to 180 months of imprisonment, to be followed by three years of supervised release. *Id.* at 1a-2a, 46a-74a.

3. The court of appeals affirmed. Pet. App. 1a-25a. On appeal, petitioner challenged the final two continuances granted by the district court under the Speedy Trial Act on the grounds that "the district court failed to make explicit contemporaneous findings on the record justifying the continuances." *Id.* at 10a-11a. The court of appeals rejected that argument.

The court of appeals explained that "although the [Speedy Trial] Act specifies the need to make findings 'in the record,' it does not spell out precisely *how* the court must effectuate this." Pet. App. 12a. The court explained that "a court's ends-of-justice findings need

not be articulated contemporaneously on the record," so long as those reasons "have been articulated by the time [the court] rules on a defendant's motion to dismiss and that those reasons satisfy § 3161(h)(7)." *Id.* at 13a. The court concluded that the hearings in question, "coupled with the district court's written denial of [petitioner']s motions to dismiss certainly satisfy th[at] standard." *Id.* at 14a.

The court of appeals explained that the continuance granted on February 7, 2008 (excluding time until September 22, 2008), was requested by petitioner and joined by Wolgamot and the government. Pet. App. 14a-15a. The motion "spelled out for the district court precisely why the ends of justice supported a continuance": (1) the complexity of the case; (2) the extensive discovery; and (3) the death of Starns and the addition of Wolgamot as a defendant. *Id.* at 15a. Petitioner's counsel represented to the court that "given the state of discovery he could not be prepared to adequately represent [petitioner] without a continuance." *Ibid.* The court concluded that "[f]aced with this motion and the parties' unanimous position that more time was needed to prepare for trial," the district court's granting of the motion with an "unadorned conclusion" that the ends of justice were satisfied indicated to the court of appeals that the court considered the Section 3161(h)(7)(A) factors. *Ibid.*

The court of appeals further explained that the hearing on the August 22, 2008, continuance (excluding time until March 2, 2009), "provides ample evidence that the court considered and balanced the ends of justice against the competing interest in a speedy trial." Pet. App. 15a-16a. The court explained that the district court learned during the hearing that Wolgamot's guilty

plea "would likely lead to additional discovery in terms of a proffer statement" and that "it would be very difficult for [petitioner] to go to trial in just a few weeks," given Wolgamot's plea. *Id.* at 16a. The court concluded that the district court appropriately considered that the case remained complex, that petitioner had an interest in adequately preparing for trial, that the government had an interest in continuity of counsel, and that the court had balanced the interest of the public "when it assured itself that this would be the final continuance in the already long-delayed case." *Id.* at 17a. The court stated that "[w]ith this background, the court's finding on the docket sheet that the ends of justice supported the continuance suffices, particularly when taken together with its later written explanation when ruling on [petitioner's] motion to dismiss." *Ibid.*

The court declined to address the government's alternative argument that petitioner was estopped from challenging the ends-of-justice continuances on appeal because he either requested or agreed to each continuance. Pet. App. 17a-19a. The court explained, however, that unlike the defendant in *Zedner* v. *United States*, 547 U.S. 489 (2006), petitioner had persuaded the district court that the factual predicate for an ends-of-justice continuance existed. Pet. App. 18a-19a. The court stated that "although we reserve judgment on the question of when estoppel prevents a plaintiff from challenging continuances under the Act, we note that [petitioner's] support for the continuances certainly does little to enhance his position on appeal." *Id.* at 19a.

ARGUMENT

Petitioner contends (Pet. 19-27) that the district court did not make sufficient findings in support of the final two ends-of-justice continuances that it granted

pursuant to 18 U.S.C. 3161(h)(7)(A) (Supp. V 2011). The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or another court of appeals. Further review is unwarranted.

1. a. The Speedy Trial Act requires a criminal defendant's trial to commence within 70 days of his indictment or initial appearance, whichever occurs later, 18 U.S.C. 3161(c)(1), and entitles the defendant to dismissal of the charges if that deadline is not met, 18 U.S.C. 3162(a)(2). As relevant here, the Act excludes from the 70-day period "[a]ny period of delay resulting from a continuance granted by any judge * * * , 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," and if the court "sets forth, in the record of the case, either orally or in writing, its reasons for [that] finding." 18 U.S.C. 3161(h)(7)(A) (Supp. V 2011). In determining whether to grant an ends-of-justice continuance, a district court should consider several factors, including whether the defendant needs additional time to obtain counsel, whether counsel for the defendant or the government need additional time to effectively prepare for the case, and whether delay is necessary to ensure continuity of counsel. 18 U.S.C. 3161(h)(7)(B)(iv) (Supp. V 2011).

In *Zedner* v. *United States*, 547 U.S. 489 (2006), this Court held that a defendant cannot prospectively waive the application of the Speedy Trial Act, including the requirement that a district court make findings to support an ends-of-justice continuance under Section 3161(h)(7)(A). *Id.* at 500-503. The court further held that the findings requirement of the Act means that "the

findings must be made, if only in the judge's mind, before granting the continuance" and that those findings must be placed on the record "by the time a district court rules on a defendant's motion to dismiss" under Section 3162(a)(2). *Id.* at 506-507. The findings requirement is not satisfied by a "passing reference to the case's complexity" in the district court's ruling on the motion to dismiss. *Ibid.*

The courts of appeals have held that the findings requirement of Section 3161(h)(7)(A) does not require a district court to articulate basic facts when those facts are obvious and set forth in the motion for continuance. *United States* v. *Larson*, 627 F.3d 1198, 1204 (10th Cir. 2010); *United States* v. *Pakala*, 568 F.3d 47, 60 (1st Cir. 2009), cert. denied, 130 S. Ct. 1105 (2010); *United States* v. *Gamboa*, 439 F.3d 796, 803 (8th Cir.), cert. denied, 549 U.S. 1042 (2006); *United States* v. *Jean*, 25 F.3d 588, 594 (7th Cir. 1994). Moreover, a district court does not have to recite the statutory factors in Section 3161(h)(7)(B) or make findings as to each of them on the record. *United States* v. *Adams*, 625 F.3d 371, 380 (7th Cir. 2010). A judge's findings may be sufficient where the motion for continuance sets forth the reasons for an ends-of-justice continuance, the court grants the motion based on those representations, and the court later confirms its rationale in ruling on the motion to dismiss. See, *e.g.*, *United States* v. *Napadow*, 596 F.3d 398, 405 (7th Cir. 2010).

b. Here, the district court made sufficient findings to support the final two ends-of-justice continuances that it granted under Section 3161(h)(7)(A).

i. With respect to the continuance granted on February 7, 2008, petitioner requested the continuance and represented to the court that review of the voluminous

discovery materials was going slowly, that preparation "ha[d] been delayed by the addition of a new co-defendant and the death of another co-defendant," that counsel "d[id] not feel [that] he [could] be adequately prepared for trial given the current state of exchange of discovery," and that petitioner "would be harmed by a premature trial." Docket entry No. 46, at 2. The district court stated on the record that it "underst[oo]d the problems that defense counsel has in reviewing voluminous discovery" and that "obviously, the interest of justice means that we do not have to have a premature trial," but that the interest of justice does require the parties "to have a reasonable trial setting." Pet. App. 94a. After consulting with counsel about their schedules, the court reset the trial date to September 22, 2008. *Id.* at 94a-95a.

Those findings were sufficient under the statute. The court made the above statements "orally" on the record in the hearing on petitioner's motion. See 18 U.S.C. 3161(h)(7)(A) (Supp. V 2011). Consideration of whether failure to grant a continuance "would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation" is a valid ends-of-justice consideration that is specifically authorized by the statute. 18 U.S.C. 3161(h)(7)(B)(iv) (Supp. V 2011). The court further considered the interest of the public in a speedy trial when it noted that although it "underst[oo]d the problems that defense counsel has in reviewing voluminous discovery" and that "the interest of justice means that we do not have to have a premature trial," "we do have to have a reasonable trial setting," warranting a continuance of several months. Pet. App. 94a. Those findings are sufficient to

support an ends-of-justice continuance under Section 3161(h)(7)(A).

ii. With respect to the continuance granted on August 22, 2008, the government requested the continuance based on the effect that Wolgamot's guilty plea had on the government's presentation of the case and the fact that counsel had been asked to participate in a six-month Department of Justice detail. Both "continuity of counsel" and the need for further time to effectively prepare for trial are valid considerations supporting an ends-of-justice continuance. 18 U.S.C. 3161(h)(7)(B)(iv) (Supp. V 2011). Petitioner's counsel did not oppose the motion, stating at the hearing that "[i]t would be very difficult for us to go to trial in just a few weeks, given [Wolgamot's] plea" and the expected plea of another individual. Pet. App. 101a-102a.

The district court explained on the record that the Wolgamot's guilty plea would make the current trial date "extremely difficult for the defense" and that "if the defense made a motion for a continuance, the Court would be compelled to grant it * * * in light of the changing landscape." Pet. App. 104a. And as the court of appeals noted, the district court "balanced the interest of the public when it assured itself that this would be the final continuance in the already long-delayed case." *Id.* at 15a. Those findings are sufficient to support an ends-of-justice continuance under Section 3161(h)(7)(A). The court of appeals' fact-bound conclusion on that issue does not warrant this Court's review. See *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts.").

2. Petitioner contends (Pet. 13-19) that the courts of appeals are "sharply divided" on the question of whether

a reviewing court may infer the district court's reason for granting an ends-of-justice continuance "from context or the course of proceedings." (citing cases) According to petitioner (Pet. 15), the Ninth, Tenth, and D.C. Circuits "have refused to infer ends-of-justice reasons." This case would not implicate any such conflict because the district court conducted a hearing on each continuance motion and made adequate findings in support of each ends-of-justice continuance that it granted. In any event, the cases petitioner cites do not demonstrate that the circuits are in conflict. Rather, those cases present specific factual scenarios where a court of appeals did not find sufficient evidence in the record to justify a district court's ends-of-justice continuance.

In *United States* v. *Lloyd*, 125 F.3d 1263 (9th Cir. 1997), the district court granted a 112-day continuance based on counsel's unavailability on the specific date on which trial was scheduled to begin. *Id.* at 1269. Without conducting a hearing, the court explained in an order that it was granting a continuance because defense counsel had a conflict on that date and counsel for another defendant and the government "have scheduling conflicts with 'later dates.'" *Ibid.* The Ninth Circuit concluded that the district court's order was insufficient to support a 112-day ends-of-justice continuance. The court explained that a district court "may not simply credit the vague statements by one party's lawyer about the possible scheduling conflicts or general desires for a continuance of the other parties or their attorneys." *Ibid.* "[I]nstead, [the court] must conduct an appropriate inquiry to determine whether the various parties actually want and need a continuance, how long a delay is actually required, what adjustments can be made with respect to the trial calendars or other plans of counsel,

and whether granting the requested continuance would 'outweigh the best interest of the public and the defendant[s] in a speedy trial.'" *Ibid.* (quoting 18 U.S.C. 3161(h)(7)(A) (Supp. V 2011)) (brackets in original). In petitioner's case, the district court conducted a full hearing on each continuance request, inquired into the reasons for the request, considered whether a continuance would be justified to allow the parties adequate time to review voluminous discovery in a complex tax-fraud case, and consulted the relevant schedules to determine when a trial could realistically take place.

In *United States* v. *Williams*, 511 F.3d 1044 (2007), the Tenth Circuit considered several ends-of-justice continuances granted by a district court and concluded that they were not adequately supported. *Id.* at 1057-1058. The court concluded that several of the district court's orders, which contained no findings, summarily rescheduled a jury trial, and stated that the interim period was excluded, were insufficient to support an ends-of-justice continuance. *Id.* at 1057. The court further noted that simply noting in an order that the defendant has new counsel, without addressing any of the associated grounds for a continuance (*i.e.*, counsel's need to familiarize himself with the case, or any reference to the ends-of-justice provision) was insufficient to demonstrate that the district court had weighed the proper factors under the Speedy Trial Act. *Id.* at 1058. In petitioner's case, in contrast, the district court repeatedly addressed counsels' asserted need to familiarize themselves with voluminous discovery materials and to reassess litigation strategy after major events in the case, and the court reiterated at every hearing that the interests the parties had identified outweighed the public and the defendants' interest in a speedy trial.

Finally, in *United States* v. *Bryant*, 523 F.3d 349 (D.C. Cir. 2008), the district court continued a trial from October 28, 2005, to late February 2006, but the court "made no express findings supporting [an ends-of-justice] continuance" at that time. *Id.* at 361. When the defendant moved to dismiss the indictment for a Speedy Trial Act violation, the court stated that it "thought [it] had probably made a finding that the time period * * * was waived in the interest of justice to coordinate the schedules of the prosecutor, the two defense lawyers, and the Court." *Id.* at 360 (internal quotation marks and brackets omitted). The D.C. Circuit stated that "[a]lthough *Zedner* permits trial judges to put their findings on record at the time they rule on a [Speedy Trial Act] motion, rather than at the time when they grant the continuance, the passing reference to the 'interest of justice' made by the trial judge at the [Speedy Trial Act] hearing does not indicate that the judge seriously considered" the Section 3161(h)(7)(A) factors. *Id.* at 361. Again, in petitioner's case, the district court made a specific finding at each continuance hearing that because of the complexity of the case and the unfairness of forcing petitioner to proceed before counsel could adequately review the discovery materials, the ends of justice warranted a continuance.

In each of the cases petitioner cites, the court of appeals looked to the trial court record and found the record wanting. Those cases do not represent a categorically different method of reviewing a district court's ends-of-justice findings, and they do not forbid a court of appeals from looking to the trial court record to understand the context surrounding a district court's ends-of-justice ruling. No conflict among the courts of ap-

peals exists in this context that warrants this Court's review.

3. Finally, this would be an inappropriate vehicle for review because petitioner's request for or agreement to each continuance provides an alternative basis for affirming the judgment. See *Schiro* v. *Farley*, 510 U.S. 222, 228-229 (1994) (respondent may "rely on any legal argument in support of the judgment below"); accord *Bennett* v. *Spear*, 520 U.S. 154, 166-167 (1997); *Washington* v. *Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979). Although the court of appeals did not reach this issue, it cited authority making clear that petitioner is judicially estopped from challenging the continuances. See Pet. App. 18a-19a (citing *Pakala*, 568 F.3d at 60).

Under the principle of judicial estoppel, "[w]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *Zedner*, 547 U.S. at 504 (quoting *Davis* v. *Wakelee*, 156 U.S. 680, 689 (1985)). Petitioner either requested or agreed to each continuance granted by the district court, and he is now taking a "clearly inconsistent" position in asking that such time be counted under the Speedy Trial Act. See *id.* at 504-505 (rejecting judicial estoppel argument in the context of a defendant's prospective Speedy Trial Act waiver suggested by the district court, but noting that it "would be a different case if petitioner had succeeded in persuading the District Court * * * that the factual predicate for a statutorily authorized exclusion of delay could be established"). Accordingly, petitioner is estopped

from challenging the continuances on appeal. Because petitioner could not benefit from the legal rule he espouses, and is not an appropriate party to raise the issue, further review of the question presented is not warranted in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
KATHRYN KENEALLY
Assistant Attorney General
FRANK P. CIHLAR
GREGORY VICTOR DAVIS
MARK S. DETERMAN
Attorneys

FEBRUARY 2013