Nos. 22-402 and 22-419

In the Supreme Court of the United States

JAMES VORLEY, PETITIONER

v.

UNITED STATES OF AMERICA

CEDRIC CHANU, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
KENNETH A. POLITE, JR.
Assistant Attorney General
WILLIAM A. GLASER
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether petitioners' "spoofing" scheme, in which they manipulated prices on a commodities exchange by placing large orders for gold and silver futures that they did not intend to follow through to completion, violated the federal wire-fraud statute, 18 U.S.C. 1343.

2. Whether the district court made an adequate record of its finding that the ends of justice warranted excluding the period during which a motion to dismiss was pending for purposes of calculating the deadline for commencing trial under the Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and rule:

Statutes and rule—Continued: Page

Miscellaneous:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-38*) is reported at 40 F.4th 528. The district court's opinion and order denying petitioners' motion to dismiss the indictment for failure to state a claim (Pet. App. 188-237) is reported at 420 F. Supp. 3d 784. The district court's

* This brief refers to the petition appendix in No. 22-402 as "Pet. App.," the petition in No. 22-402 as "Vorley Pet.," and the petition in No. 22-419 as "Chanu Pet."

opinion and order denying petitioners' motion to dismiss the indictment on speedy-trial grounds (Pet. App. 49-150) is not published in the Federal Supplement but is available at 2021 WL 1057903.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 2022. A petition for rehearing was denied on August 4, 2022 (Pet. App. 39-40). The petitions for writs of certiorari were filed on October 27, 2022 (Vorley) and November 2, 2022 (Chanu). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner James Vorley was convicted on three counts of wire fraud, and petitioner Cedric Chanu was convicted on seven counts of wire fraud, all in violation of 18 U.S.C. 1343. Pet. App. 16. Each petitioner was sentenced to one year and one day of imprisonment. *Ibid.* The court of appeals affirmed. *Id.* at 1-38.

1. Petitioners worked for Deutsche Bank as traders in gold and silver futures. Pet. App. 2. Futures are contracts to buy or sell a given product at a given price on a given date in the future. *Ibid.* They are traded on exchanges regulated by the Commodity Futures Trading Commission. *Ibid.*

Between 2009 and 2013, petitioners engaged in a form of market manipulation known as "spoofing." Pet. App. 5. They placed large orders to buy or sell futures contracts, but with no intention of executing the orders, in order to create the impression of market interest and to drive the price of the contracts up or down. *Ibid.* Once the price shifted in the intended direction, they canceled their original orders and executed different

orders to take advantage of the movement in prices. *Ibid.* Petitioners' behavior violated the rules of the exchange on which they operated, which permitted canceling orders but forbade placing orders with the intent to cancel them. *Id.* at 4.

2. In July 2018, a grand jury in the Northern District of Illinois indicted each petitioner for wire fraud affecting a financial institution, in violation of 18 U.S.C. 1343 and 2, and conspiring to commit wire fraud affecting a financial institution, in violation of 18 U.S.C. 1343 and 1349. Pet. App. 303-315. In November 2018, petitioners moved to dismiss the indictment for failure to state an offense, arguing that they did not make false and misleading representations by placing orders that they intended to cancel. *Id.* at 10.

At a status conference on the day that motion was filed, Vorley's counsel stated to the district court that "discovery is quite voluminous" and that Vorley was "hopeful" that the court could "address further motions down the road if necessary." Pet. App. 153. Based on that request, the court deferred setting deadlines for further pretrial motions. *Ibid.* The court also entered an order stating that "time will be excluded" under the Speedy Trial Act of 1974 (Speedy Trial Act), 18 U.S.C. 3161 *et seq.*, "through briefing and ruling on [petitioners'] motion to dismiss pursuant to 18 U.S.C. § 3161(h)(1)(D)." Pet. App. 9-10 (brackets and citation omitted). The Speedy Trial Act generally requires a federal criminal trial to begin within 70 days after a defendant is charged or makes an initial appearance, but the cited provision automatically excludes from that 70-day period any "delay resulting from any pretrial motion, from the filing of the motion through the

conclusion of the hearing on, or other prompt disposition of, such motion." 18 U.S.C. 3161(h)(1)(D).

In October 2019, about six months after briefing was completed, the district court denied petitioners' motion to dismiss. Pet. App. 188-237. The court rejected petitioners' contention that the wire-fraud statute applies only to "affirmative" misrepresentations, explaining that the statute also applies to "the omission or concealment of material information * * * if the omission was intended to induce a false belief and action to the advantage of the schemer and the disadvantage of the victim." *Id.* at 196 (citation omitted). The court observed that "that is precisely what the indictment alleges here: that [petitioners] did not disclose, at the time they placed their Spoofing Orders, their intent to cancel the orders before they could be executed, inducing by the placement of those orders a false belief about the supply or demand for a commodity." *Id.* at 196-197.

3. In November 2019, a grand jury returned a superseding indictment charging petitioners with a longer-term conspiracy and additional counts of wire fraud. Pet. App. 171-187. Petitioners moved to dismiss the superseding indictment with prejudice under the Speedy Trial Act. *Id.* at 12. They argued that several months had elapsed while their motion to dismiss the original indictment had been pending, but that no more than 30 days could be automatically excluded from the speedy-trial clock under Section 3161(h)(1)(H). *Id.* at 12-13.

The district court denied the motion to dismiss. Pet. App. 151-170. The court reasoned that the time at issue was excludable under a different provision of the Speedy Trial Act, 18 U.S.C. 3161(h)(7)(A), which authorizes continuances that serve the "ends of justice."

See Pet. App. 156. The court explained that, although "courts must make ends-of-justice findings to exclude time under § 3161(h)(7), those findings do not have to be entered on the record at the time the continuance is granted." *Ibid.* The court stated that it had "concluded at the status hearing" in November 2018 "that an ends-of-justice exclusion of time was appropriate" based on petitioners' request to "defer further pretrial motion practice" until resolution of the motion to dismiss the original indictment. *Id.* at 157-158. The court noted that the continuance served the parties' and the court's interest in "conserving resources" until it was "clear that the government could go forward with the prosecution." *Id.* at 160.

The district court acknowledged that, "[u]nfortunately, [it] did not articulate the ends-of-justice provision as the basis for excluding time," but instead "relied on the automatic exclusions of time for the briefing and consideration of pretrial motions." Pet. App. 160. The court stated that it had "erroneously construe[d] the automatic exclusions * * * to extend to the disposition of the motion, whereas § 3161(h)(1)(H) limits the automatic exclusion for consideration of a pretrial motion to 30 days." *Id.* at 161. The court made clear, however, that "in [its] view—then and now—the exclusion of time while the motion to dismiss was pending was appropriate under the ends-of-justice exclusion provided by § 3161(h)(7)(A)." *Id.* at 160. The court added that, if it or the parties had brought the issue to its attention sooner, it "unquestionably would have remedied the error by including [its] determination that [petitioners'] request to defer other pretrial motions warranted an ends-of-justice exclusion under § 3161(h)(7)." *Id.* at 161.

The jury found Vorley guilty on three counts of wire fraud and Chanu guilty on seven counts of wire fraud, but found both petitioners not guilty on the conspiracy count. Pet. App. 16. The district court sentenced each petitioner to one year and one day of imprisonment. *Ibid.*

3. The court of appeals affirmed. Pet. App. 1-38.

The court of appeals rejected petitioners' challenge to the denial of their motion to dismiss the indictment for failure to state an offense. Pet. App. 16-24. The court observed that a defendant can commit fraud not only through "affirmative misrepresentations," but also through "material omission[s]" and "[f]ailure[s] to give the whole story." *Id.* at 22 (emphasis omitted). And it found that petitioners had committed fraud here by placing spoofing orders that created "the public perception of an intent to trade," while "obscuring their intent to cancel" those orders. *Id.* at 23. The court also found that the misrepresentations were material, finding that "[t]he record clearly establishe[d] that traders employing * * * spoofing do so with the aim (and effect) of influencing other actors in the trading space." *Id.* at 23-24.

The court of appeals likewise rejected petitioners' claim that the district court had violated the Speedy Trial Act. Pet. App. 31-38. It quoted this Court's statement that, although the findings supporting an ends-of-justice continuance "must be made, if only in the judge's mind, before granting the continuance," the Speedy Trial Act "is ambiguous on precisely when those findings must be set forth, in the record of the case." *Id.* at 35 (quoting *Zedner* v. *United States*, 547 U.S. 489, 506-507 (2006)) (brackets and internal quotation marks omitted). The court of appeals emphasized that the

"best practice * * * is for a district court to put its findings on the record at or near the time when it grants the continuance," and that the findings must at the latest be put on the record "by the time a district court rules on a defendant's motion to dismiss." *Id.* at 35-36 (quoting *Zedner*, 547 U.S. at 507 & n.7). And the court of appeals observed that, although the district court in this case had failed to follow the "'best practice,'" it "ultimately made on-the-record ends-of-justice findings by the time it ruled on [petitioners'] to dismiss," and found "no legal error" in the district court's exclusion of time under the ends-of-justice provision. *Id.* at 38.

ARGUMENT

Petitioners renew their contentions (Vorley Pet. 15-36; Chanu Pet. 21-33) that their market manipulation was not wire fraud and that the district court violated the Speedy Trial Act by placing its previously unexpressed ends-of-justice findings on the record when denying petitioners' motion to dismiss. The court of appeals correctly rejected those contentions, and its decision does not conflict with any decision of this Court or another court of appeals. The petitions for writs of certiorari should be denied.

1. Petitioners' contention that their conduct did not constitute wire fraud does not warrant review.

a. The wire-fraud statute prohibits the use of a wire communication in interstate commerce to execute "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. 1343. The term "defraud" refers to "wronging one in his property rights by dishonest methods or schemes." *McNally* v. *United States*, 483 U.S. 350, 358 (1987) (citation omitted).

The "gist" of fraud is "producing a false impression upon the mind of the other party" for one's own benefit. *Stewart* v. *Wyoming Cattle Ranche Co.*, 128 U.S. 383, 388 (1888). "[I]f this result is accomplished, it is unimportant whether the means of accomplishing it are words or acts of the defendant, or his concealment or suppression of material facts." *Ibid.* In particular, "half-truths"—that is, "representations that state the truth only so far as it goes, while omitting critical qualifying information"—can be actionable. *Universal Health Services, Inc.* v. *United States ex rel. Escobar*, 579 U.S. 176, 188 (2016). For example, "an applicant for an adjunct position at a local college makes an actionable misrepresentation when his resume lists prior jobs and then retirement, but fails to disclose that his 'retirement' was a prison stint for perpetrating a $12 million bank fraud." *Id.* at 189 (citing 3 Dan B. Dobbs et al., *Law of Torts* § 682, at 702-703 & n.14 (2d. ed. 2011)).

That rule "recurs throughout the common law," *Escobar*, 579 U.S. at 188 n.3, and petitioners' scheme here consisted of just those sorts of "actionable misrepresentations," *id.* at 188. Petitioners deliberately engaged in acts that "produc[ed] a false impression upon the mind" of other traders. *Stewart*, 128 U.S. at 388. They placed large orders to buy or sell gold and silver futures, creating a "public perception of an intent to trade," even though they in fact "inten[ded] to cancel in the hopes of financial gain." Pet. App. 23. "By obscuring their intent to cancel," petitioners "advanced a quintessential 'half-truth'" in order to manipulate the futures markets. *Ibid.* And by "omitting critical qualifying information" of the expected non-consummation of the trades that they were purporting to propose, they were making

actionable misrepresentations. See *Escobar*, 579 U.S. at 188.

b. Petitioners' contrary arguments lack merit.

Vorley argues (Vorley Pet. 21-22) that, although a defendant can commit fraud through a "false statement or the omission of material information that makes an express statement misleading," he cannot do so through an "'implied misrepresentation.'" But "[a]n implied misrepresentation is simply an omission [of that sort] by another name." Pet. App. 23. Again, "representations that state the truth only so far as it goes, while omitting critical qualifying information * * * can be actionable misrepresentations." *Escobar*, 579 U.S. at 188. In this case, viewing petitioners' orders as tacit representations that petitioners did not intend to cancel those orders is equivalent to viewing them as express representations "of an intent to trade" coupled with omissions of "a private intent to cancel in the hopes of financial gain." Pet. App. 23. Either way, the orders were fraudulent.

Contrary to Vorley's contention (Vorley Pet. 22), the government's theory of fraud in this case does not conflict with this Court's decision in *Williams* v. *United States*, 458 U.S. 279 (1982). In *Williams*, the Court held that a person does not make a "false statement" to a federally insured bank, in violation of 18 U.S.C. 1014, by presenting a check knowing that the underlying account has insufficient funds. 458 U.S. at 284-289. The court observed that a check does not "make any representation as to the state of [the check-writer's] bank balance"; instead, it "serve[s] only to direct the drawee banks to pay the face amounts to the bearer, while committing [the check-writer] to make good the obligations if the banks dishonor[] the draft[]." *Id.* at 284-285. The

absence of any "false statement" in a check does not suggest that petitioners here failed to engage in a "scheme or artifice to defraud," 18 U.S.C. 1343, under traditional common-law rules, see *Escobar*, 579 U.S. at 188 n.3.

Vorley likewise errs in contending (Vorley Pet. 22-23) that the government's theory of fraud conflicts with *Neder* v. *United States*, 527 U.S. 1 (1999), and *Pasquantino* v. *United States*, 544 U.S. 349 (2005), under which an omission is fraudulent only if it concerns a material fact. As the court of appeals correctly found, the deceptions here were material. Pet. App. 23-24. "The record clearly establishes that traders employing * * * spoofing do so with the aim (and effect) of influencing other actors in the trading space." *Id.* at 24; see Trial Tr. 644 (witness's testimony that he could "see the market react" to petitioners' spoofing because "prices" would move); Trial Tr. 1400-1401 (government expert's testimony about effect of spoofing orders on market prices).

Chanu is wrong to suggest (Chanu Pet. 21) that the deception here was "collateral" to the transaction. The object of petitioners' scheme was to manipulate the price of gold or silver futures by overrepresenting supply or demand, so that petitioners' victims would pay or accept prices that they otherwise would not have paid or accepted. Chanu's suggestion (Chanu Pet. 30 n.14) that deception about "supply and demand" differs from deception about price ignores the reality that, in the commodities futures market, the former cannot be separated from the latter. Cf. Oral Argument Tr. at 40-41, *Chadbourne & Parke LLP* v. *Troice*, 571 U.S. 377 (2014) (No. 12-79) ("JUSTICE BREYER: * * * [S]uppose * * * [a robber baron] gets into his horse and carriage, drives up and down Wall Street, and says, 'I'm going to buy Union Pacific, I'm going to buy Union Pacific,'

knowing that people will, in fact, all run out and buy it quickly, and what he really intends to do is, * * * he's going to sell outright. Anyway, typical fraud. Now, that is certainly covered.").

In any event, Chanu errs in arguing (Chanu Pet. 25) that the wire-fraud statute does not reach cases "where the transaction was induced by a collateral deception," but where the "terms of the transaction were transparent." The common law has long recognized that misrepresentations can be fraudulent even if they do not concern the "terms of [a] transaction." See, *e.g.*, *Hedden* v. *Griffin*, 136 Mass. 229, 229-231 (1884) (finding fraud where a person was induced to buy an insurance policy based on false claims that other respectable people had done so); 1 Joseph Story, *Commentaries on Equity Jurisprudence* § 203e, at 207 (10th ed. 1870) (explaining that a broker commits fraud by inducing a buyer to purchase property while concealing that the broker owned the property himself and was not acting for another).

c. Contrary to petitioners' contention (Vorley Pet. 15-20; Chanu Pet. 24-30), the decision below does not conflict with the decisions of other circuits.

Vorley and Chanu both cite (Vorley Pet. 19; Chanu Pet. 28) *United States* v. *Takhalov*, 827 F.3d 1307 (2016), a case in which the Eleventh Circuit reversed the conviction of bar owners who had hired women to pose as tourists in order to lure customers into their bars and nightclubs. *Id.* at 1310. The Eleventh Circuit took the view that the term "'scheme to defraud' * * * refers only to those schemes in which a defendant lies about the nature of the bargain itself," such as the "price" or the "characteristics of the good." *Id.* at 1314.

A judge on the Eleventh Circuit has since pointed out that *Takhalov*'s view of that phrase "is difficult to ground in the common law of fraud." *United States* v. *Feldman*, 931 F.3d 1245, 1269 (2019) (Pryor, J., concurring), cert. denied, 140 S. Ct. 2658 (2020). But even if that view were correct, the deception in this case did go to the "nature of the bargain itself"; as discussed above, it manipulated the "price" of gold and silver futures by falsely representing a key "characteristic" of that commodity—namely, the market for it—to create the illusion of a greater supply or demand than actually existed. The decision below thus does not conflict with *Takhalov*. See Pet. App. 104-105 & n.16 (district court's explanation that the charges in this case were consistent with *Takhalov*).

Vorley also invokes (Vorley Pet. 17-18) *United States* v. *Connolly*, 24 F.4th 821 (2022), in which the Second Circuit rejected the argument that certain submissions by a bank were "misleading half-truths," where the bank had not disclosed that its traders had influenced the submissions. *Id.* at 832. The Second Circuit explained that the rules governing the relevant submissions "said nothing to bar [the bank's] submitters from receiving or considering input from the bank's * * * traders," and that, as a result, "a bank's submission * * * did not implicitly represent that there had been no consideration" of the traders' input. *Id.* at 842. The Second Circuit did not question the general rule that a defendant can commit fraud through a half-truth; rather, it simply concluded that the statements at issue there were not half-truths. That fact-specific decision does not conflict with the decision below, which examined a different type of misleading statement in the distinct context of futures contracts.

In the remaining three cases cited by Vorley (Vorley Pet. 19-20), the Sixth Circuit rejected civil fraud claims where the plaintiff either failed to allege or failed to prove that the defendants made material misstatements or omissions. See *Walters* v. *First Tenn. Bank, N.A. Memphis*, 855 F.2d 267, 273 (1988) (finding "an absence of proof of * * * misrepresentations or omissions" where defendant used the term "'prime rate'" validly), cert. denied, 489 U.S. 1067 (1989); *Blount Fin. Servs., Inc.* v. *Walter E. Heller & Co.*, 819 F.2d 151, 153 (1987) (finding allegation of prime-rate deception insufficiently specific and that, in any event, an "ordinary and prudent business person * * * would have verified the rate independently"); *Bender* v. *Southland Corp.*, 749 F.2d 1205, 1216 (1984) ("[T]he plaintiffs' complaint does not allege what misrepresentations (or omissions) of material fact [the defendant] made to the plaintiffs."). None sets forth a rule of law that would classify petitioners' spoofing of the commodities market as non-fraudulent.

Finally, Chanu cites (Chanu Pet. 26-28) two cases that involved the application of the federal fraud statutes to buyers who deceived sellers about the use to which the goods being bought at full price would be put—a matter that, in the context of those cases, was not considered an essential term of the bargain. See *United States* v. *Sadler*, 750 F.3d 585, 590-591 (6th Cir. 2014) (false assurances that purchased opiates would be used for poor patients); *United States* v. *Bruchhausen*, 977 F.2d 464, 466-468 (9th Cir. 1992) (false assurances that purchased equipment would not be sent to certain foreign countries). The deception in this case, however, was not simply about what a purchaser might do after a fair-market-value purchase was made; it was designed

to manipulate the market value itself, by painting a misleading picture of the supply and demand for futures contracts.

d. Contrary to petitioners' contention (Vorley Pet. 25; Chanu Pet. 21), this Court need not hold the petitions here pending its decision in *Ciminelli* v. *United States*, No. 21-1170 (argued Nov. 28, 2022). *Ciminelli* presents the question "[w]hether the Second Circuit's 'right to control' theory of fraud—which treats the deprivation of complete and accurate information bearing on a person's economic decision as a species of property fraud—states a valid basis for liability under the federal wire fraud statute, 18 U.S.C. § 1343." Pet. at i, *Ciminelli*, *supra* (No. 21-1170). Petitioners here were not convicted under a right-to-control theory, and for the reasons explained above, petitioners' scheme here would constitute fraud even under the *Ciminelli* petitioner's definition, see, *e.g.*, Pet. Br. at 46, *Ciminelli*, *supra* (No. 21-1170) (recognizing that "deception about price, quality, or performance" is "traditional property fraud"). The Court's resolution of *Ciminelli* accordingly would not affect the outcome of these cases.

2. Petitioners' contention that their trial violated the Speedy Trial Act also does not warrant review.

a. The Speedy Trial Act generally requires a federal criminal trial to begin within 70 days after the defendant is charged or makes an initial appearance. 18 U.S.C. 3161(c)(1). But the statute includes "a long and detailed list of periods of delay that are excluded in computing the time within which trial must start." *Zedner* v. *United States*, 547 U.S. 489, 497 (2006).

The provision at issue here excludes "[a]ny period of delay resulting from a continuance * * * 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." 18 U.S.C. 3161(h)(7)(A). "No 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 served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial." *Ibid.*

The statutory text "is clear that the findings must be made, if only in the judge's mind, before granting the continuance." *Zedner*, 547 U.S. at 506. The text does not, however, specify "precisely when those findings must be 'set forth, in the record of the case.'" *Id.* at 507 (brackets and citation omitted). "[A]t the very least the Act implies that those findings must be put on the record by the time a district court rules on a defendant's motion to dismiss." *Ibid.* And the "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 507 n.7.

In this case, the record shows that the district court made the necessary findings, "if only in the judge's mind," before granting the continuance. *Zedner*, 547 U.S. at 506. In ruling on petitioners' Speedy Trial Act motion, the court explained that it had "concluded *at the status hearing on November 15* that an ends-of-justice exclusion of time was appropriate." Pet. App. 157 (emphasis added). It added that, "in [its] view—*then and now*—the exclusion of time * * * was appropriate under the ends-of-justice exclusion." *Id.* at 160 (emphasis added). And it stated that, "*[a]t the time*" it granted the continuance, it "*had* * * * *concluded*" that "the ends of justice served by excluding the time * * * outweighed

the best interest of the public and the defendant in a speedy trial." *Id.* at 163 (emphases added). Although the court did not follow the "best practice" of putting its findings on the record at or near the time it granted the continuance, it did at least do so "by the time [it] rule[d] on [petitioners'] motion to dismiss." *Zedner*, 547 U.S. at 507 & n.7.

Petitioners' arguments rest on a misunderstanding of the district court's disposition of their motion to dismiss on speedy-trial ground. Vorley suggests (Vorley Pet. 32-33) that the decision below allows a district court to make an ends-of-justice finding "when ruling on the defendant's motion, even if the district court failed to make the finding at the time the district court granted the continuance." Chanu similarly suggests (Chanu Pet. 31) that the district court here granted a "retroactive" continuance based on "*post hoc* 'ends-of-justice' findings." As emphasized above, however, the district court here did not make its ends-of-justice findings for the first time when it ruled on the motion to dismiss. Rather, the court explained that it had already made those findings at the time it granted the continuance, and that, in ruling on the motion to dismiss, it was simply "supplement[ing] the record" by setting forth the findings it had already made. Pet. App. 163. Petitioners provide no sound reason to discredit the court's statements that it had in fact considered the relevant factors and made the relevant findings when it had granted the continuance. Petitioners accordingly err in suggesting that it was granting an ends-of-justice continuance retroactively.

b. Contrary to petitioners' contentions (Vorley Pet. 26-31; Chanu Pet. 31-33), the decision below does not conflict with decisions from the Second, Fifth, Sixth,

Eighth, Ninth, and Tenth Circuits. Those decisions are consistent with the principle that district courts may enter interest-of-justice findings on the record after granting the continuance, so long as they make the findings before granting the continuance. See *United States* v. *Tunnessen*, 763 F.2d 74, 77 (2d Cir. 1985) ("Congress intended that the decision to grant an ends-of-justice continuance be prospective, not retroactive; an order granting a continuance on that ground must be made at the outset of the excludable period. Nevertheless, it is reasonably well settled that the required findings need not be placed on the record at the same time that the continuance is granted."); *United States* v. *Jones*, 56 F.3d 581, 585 n.9 (5th Cir. 1995) ("[V]irtually every Circuit has held that the *entry* of findings in the record after granting the continuance is not reversible error so long as the findings were not actually *made* after the fact."); *United States* v. *Moran*, 998 F.2d 1368, 1372 (6th Cir. 1993) ("[T]he appropriate finding [must be] made * * * prior to the beginning of the period of delay. In the instant case, however, no such finding was made."); *United States* v. *Suarez-Perez*, 484 F.3d 537, 542 (8th Cir. 2007) (concluding that a district court erred by granting an ends-of-justice continuance "after the period sought to be excluded beg[an] to run"); *United States* v. *Spanier*, 637 Fed. Appx. 998, 999-1000 (9th Cir. 2016) ("[I]t is permissible for a court to grant ends of justice continuances * * * and subsequently set forth sufficient facts to support its finding. * * * However, it is impermissible for a district court to * * * subsequently perform the requisite balancing test for the first time."); *United States* v. *Williams*, 511 F.3d 1044, 1055 (10th Cir. 2007) ("[A]lthough the ends-of-justice findings mandated by the Act 'may be entered on the

record after the fact, they may not be made after the fact.'") (citation omitted).

In an attempt to identify a circuit conflict, petitioners emphasize (Vorley Pet. 33, Chanu Pet. 33) the Seventh Circuit's statement in *United States* v. *Rollins*, 544 F.3d 820 (2008), cert. denied, 560 U.S. 933 (2010), that "the district court is not required to make the ends of justice findings contemporaneously with its continuance order." *Id.* at 830. But the underlying district court order in *Rollins* made clear that that the district court had in fact made, though not memorialized in writing, the necessary findings before granting the continuance. See Doc. 230 at 2, *United States* v. *Pittman*, No. 05-cr-30133 (S.D. Ill. Sept. 6, 2006) ("Although this finding was made 'in the judge's mind before granting the continuance' the Court now endeavors to memorialize its finding in this subsequent order.") (citation and ellipsis omitted). Insofar as the court of appeals did not make clear that only the written findings need not be made contemporaneously, its statement is imprecise. But that imprecision did not affect the outcome of the case, and subsequent Seventh Circuit decisions—including the decision below—have clarified that "the findings must be made, if only in the judge's mind, before granting the continuance." Pet. App. 35 (quoting *Zedner*, 547 U.S. at 506); see *United States* v. *Wasson*, 679 F.3d 938, 946 (2012) (stating that a court "must balance the factors at the time it grants the continuance." Indeed, in the decision below, the court of appeals acknowledged that "the findings must be made, if only in the judge's mind, before granting the continuance"), cert. denied, 568 U.S. 1228 (2013).

The court below, other courts of appeals, the government, and petitioners thus all appear not to disagree on

the applicable legal rule: "A district court * * * must * * * make the required ends-of-justice finding at the time the court grants the continuance," but need not "put its findings on the record at th[at] time." Vorley Pet. 33-34. The only disagreement involves "what happened here." *Id.* at 34. According to the district court, it had made the requisite findings at the time it granted the continuance, see pp. 15-16, *supra*; according to petitioners (Vorley Pet. 34; Chanu Pet. 31), it did not. That case-specific dispute does not warrant this Court's review. See *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."); Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of * * * the misapplication of a properly stated rule of law.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
KENNETH A. POLITE, JR.
Assistant Attorney General
WILLIAM A. GLASER
Attorney

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