Nos. 19-1037 and 19-8000

In the Supreme Court of the United States

SOK BUN, PETITIONER

v.

UNITED STATES OF AMERICA

JAMES ROBERT PETERSON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners—who were serving state terms of imprisonment at the time they committed and were charged with federal crimes—were brought to trial within 120 non-tolled days of their arrival in federal custody, as required under Article IV of the Interstate Agreement on Detainers Act, 18 U.S.C. App. 2, § 2.

ADDITIONAL RELATED PROCEEDINGS

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

United States v. *Phon*, No. 16-cr-705 (Jan. 23, 2017)

United States Court of Appeals (4th Cir.):

United States v. *Peterson*, No. 17-4059 (Apr. 11, 2017)

United States v. *Davis*, No. 17-4074 (Apr. 11, 2017)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 945 F.3d 144.[1] The order of the district court (Pet. App. 26a-40a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 16, 2019. The petition for a writ of certiorari

[1] References to "Pet. App." are to the appendix to the petition for a writ of certiorari filed in No. 19-1037.

in No. 19-1037 was filed on February 19, 2020. The petition for a writ of certiorari in No. 19-8000 was filed on March 11, 2020. 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 District of South Carolina, petitioners were convicted of conspiring to possess with the intent to distribute more than 50 grams of methamphetamine, in violation of 21 U.S.C. 841(a)(1) (2012) and 21 U.S.C. 841(b)(1)(A); possessing with intent to distribute, and distributing, methamphetamine, in violation of 21 U.S.C. 841(a)(1) (2012) and 21 U.S.C. 841(b)(1)(A); and using a communication facility to aid a felony drug offense, in violation of 21 U.S.C. 843(b). Bun Judgment 1; Peterson Judgment 1. The district court sentenced petitioner Bun to 360 months of imprisonment, to be followed by five years of supervised release; and petitioner Peterson to 330 months of imprisonment, to be followed by five years of supervised release. Pet. App. 6a. The court of appeals affirmed. *Id.* at 1a-25a.

1. a. In 2014 and 2015, petitioners coordinated a methamphetamine-distribution ring while incarcerated in South Carolina state prison following murder convictions. Pet. App. 3a; Bun Presentence Investigation Report (PSR) ¶¶ 31, 108. Petitioners and their co-conspirators used contraband cellphones to direct the distribution in South Carolina of methamphetamine shipped primarily from California via the United States Postal Service. PSR ¶¶ 28, 40; C.A. App. 91. Customers paid for the methamphetamine in cash, through the use of interstate wires, and with prepaid debit cards, the

numbers for which were texted to petitioners by co-conspirators outside of prison who carried out the drug transactions. PSR ¶¶ 28, 35.

In September 2016, a grand jury in the District of South Carolina returned an indictment charging petitioners and several co-defendants with conspiracy to possess with intent to distribute more than 50 grams of methamphetamine, in violation of 21 U.S.C. 841(a)(1) (2012) and 21 U.S.C. 843(b) and 846; and related controlled-substances offenses. Pet. App. 27a; C.A. App. 249-251. On November 3, 2016, petitioners were transported from state custody for their initial appearance and arraignment in federal court. Pet. App. 27a. Petitioners were then returned to state custody and federal officials filed detainers against them.

b. A "detainer" is "a notification filed with the institution in which a prisoner is serving a sentence, advising that he is wanted to face pending criminal charges in another jurisdiction." *United States* v. *Mauro*, 436 U.S. 340, 359 (1978) (citation omitted); see *Alabama* v. *Bozeman*, 533 U.S. 146, 148 (2001). The Interstate Agreement on Detainers—which the United States joined through the Interstate Agreement on Detainers Act (IADA), 18 U.S.C. App. 2, § 2—sets out the procedures to be followed by the jurisdiction that wishes to try the prisoner and the jurisdiction in which the prisoner is currently incarcerated.

As relevant here, the IADA contains an "'anti-shuttling' provision," which provides that, once a detainer is filed, the indicting (or "receiving") jurisdiction must generally retain custody of a prisoner until disposing of all the charges against him. Pet. App. 4a; see 18 U.S.C. App. 2, § 2, Art. IV(e). The IADA further directs that the receiving jurisdiction bring the prisoner

to trial within 180 days of the prisoner's filing of a request for the disposition of the charges, and within 120 days of his arrival in the receiving jurisdiction. 18 U.S.C. App. 2, § 2, Arts. III(a), IV(c). A violation of the anti-shuttling provision or the timing restrictions requires dismissal of the charges, 18 U.S.C. App. 2, § 2, Arts. IV(e), V(c), although the dismissal in federal cases may be without prejudice, 18 U.S.C. App. 2, § 9(1).

Both of the IADA time periods are subject to tolling provisions that allow a court to "grant any necessary or reasonable continuance" upon a showing of "good cause" made "in open court, the prisoner or his counsel being present." 18 U.S.C. App. 2, § 2, Arts. III(a), IV(c). The clock also stops "whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter." 18 U.S.C. App. 2, § 2, Art. VI(a).

c. After federal officials filed detainers against petitioners in this case, Peterson—but not Bun—next appeared in district court at a pretrial conference held on November 30, 2016. Pet. App. 27a-28a & n.2. At that hearing, Peterson joined in the government's previously filed motion to continue the case beyond the court's November 2016 term. *Id.* at 27a-28a. The court granted the motion and made the findings necessary to ensure that the continuance would appropriately toll the timelines set out in the Speedy Trial Act of 1974 (Speedy Trial Act), 18 U.S.C. 3161 *et seq.*—*i.e.*, it found "that the ends of justice served by [the continuance] outweigh the best interest of the public and the defendant in a speedy trial," 18 U.S.C. 3161(h)(7)(A). Pet. App. 29a-30a, 32a.

Following the November 30, 2016 hearing, Peterson was returned to state custody. Pet. App. 28a. The next

day, he filed a motion—which Bun later joined—to dismiss the indictment with prejudice, arguing that his return to state custody after the federal hearing violated the IADA's anti-shuttling provision. *Id.* at 28a & n.2. The government initially opposed the motion but subsequently moved for a dismissal without prejudice to eliminate any uncertainty as to application of the IADA. C.A. App. 332.

On January 23, 2017, petitioners were transferred to federal custody to attend the hearing on their motion to dismiss. Pet. App. 28a & n.2. At the hearing, the district court determined that only Peterson's rights under the IADA had been violated but that the indictment should be dismissed as to Bun and several other defendants as well "as a matter of grace, * * * to resolve any uncertainty regarding the application of the IADA and the defendants' status." *Id.* at 8a (citation and internal quotation marks omitted). A week later, the court issued a written order dismissing the indictment without prejudice. *Id.* at 28a.

2. a. On February 15, 2017, the grand jury returned a new indictment charging petitioners with the same offenses. C.A. App. 39-47. On February 24, 2017, petitioners were rearraigned in federal court, and federal officials filed new detainers against them. Pet. App. 28a.

In April 2017, the government and one of petitioners' co-defendants moved to continue the trial to the next term of the district court, which was scheduled for July 2017. Pet. App. 33a-34a & n.7; see Bun Pet. 8. The court granted the motions after a hearing at which it made ends-of-justice findings for purposes of the Speedy Trial Act. Pet. App. 33a-34a & n.6. In May 2017, Peterson filed (and Bun joined) a series of pretrial motions,

including motions to dismiss the February 2017 indictment, to sever their trial from their co-defendants, to change venue, to disclose trial exhibits and witnesses, and to preclude government evidence and argument under the Federal Rules of Evidence. C.A. App. 16 (docket entries 79-83).

In June 2017, while petitioners' motions were pending, the grand jury returned a superseding indictment that added two new co-defendants but did not alter the substantive charges against petitioners. Pet. App. 5a. Petitioners moved to dismiss the superseding indictment, arguing—among other things—that the government had exceeded the deadlines established by both the Speedy Trial Act and the IADA. *Ibid.* The government, in turn, moved for a continuance until the September 2017 term of the district court. *Id.* at 36a; C.A. App. 22 (docket entry 167).

On June 19, 2017, the district court held a hearing in which it resolved petitioners' outstanding pretrial motions, with the exception of their motions to dismiss the indictments under the Speedy Trial Act and the IADA. C.A. App. 22-23 (docket entry 180). The court also granted the government's motion for a continuance over petitioners' objection, finding "that the ends of justice served by granting the continuance outweigh the best interests of the public and the parties in a speedy trial." *Id.* at 784. The court later made explicit that its ruling also served to toll the 120-day period under the IADA. *Id.* at 25 (docket entry 218).

b. In July 2017, the district court denied petitioners' motion to dismiss under the Speedy Trial Act and the IADA. Pet. App. 26a-40a. With respect to the Speedy Trial Act, the court treated petitioners' initial November 3, 2016 arraignment as the starting point for the

statute's 70-day clock, and it assumed without deciding that the dismissal of the initial indictment did not restart that clock. *Id.* at 31a-32a & n.3. But the court determined that the 70-day period had not expired due to tolling from the ends-of-justice continuances and the periods of time otherwise excluded by statute, including the delays resulting from the filing of pretrial motions. *Id.* at 33a-34a; see 18 U.S.C. 3161(h)(1)(D).

Turning to petitioners' IADA challenge, the district court treated November 30, 2016—the date Peterson first appeared in federal court after the filing of his initial detainer—as the starting point for the IADA's 120-day clock. Pet. App. 36a. It explained that, under circuit precedent, "[a] circumstance that would toll the 70-day Speedy Trial Act period also tolls the * * * 120-day IADA period[.]" *Id.* at 35a (citing *United States* v. *Hines*, 717 F.2d 1481, 1486 (4th Cir. 1983), cert. denied, 467 U.S. 1214, and 467 U.S. 1219 (1984); and *United States* v. *Odom*, 674 F.2d 228, 231 (4th Cir.), cert. denied, 457 U.S. 1125 (1982)). Reviewing the procedural history of the case, the court determined that, with the exception of a 42-day period following the return of the February 2017 indictment, the IADA's 120-day clock was stopped either because defendants had filed pretrial motions that required adjudication or because the court had granted a continuance based on ends-of-justice findings, which the court understood to establish "good cause" under Article IV(c) of the IADA. *Id.* at 35a-37a (citation omitted).

c. Jury selection for petitioners' trial took place on September 20, 2017. C.A. App. 29 (docket entry 274); see Bun Pet. 10. A four-day trial was held the following week, and petitioners were found guilty on all counts. Pet. App. 6a. The district court sentenced Bun to 360

months of imprisonment and Peterson to 330 months of imprisonment, both sentences to run consecutively to petitioners' state terms of imprisonment, and both sentences to be followed by five-year terms of supervised release. *Ibid.*

3. The court of appeals affirmed. Pet. App. 1a-25a. The court noted that "the government and [petitioners] disagree[d] about some of the particulars of the district court's tolling analysis," but found it "clear" that, "if both continuances granted under the [Speedy Trial Act] and time spent adjudicating a defendant's pretrial motions stop the IADA's 120-day clock, then [petitioners'] trial date complied with the statute." *Id.* at 17a. And the court determined that both events tolled the IADA clock. *Id.* at 14a-17a.

The court of appeals first agreed with every court of appeals "to reach the issue * * * that periods excludable under the [Speedy Trial Act] for 'ends of justice' continuances should also toll the 120-day clock under the IADA's substantially similar 'good cause' continuance provision." Pet. App. 16a (citing cases from the Second, Eighth, and Ninth Circuits). The court further determined that Article VI(a) of the IADA, which permits tolling "whenever and for as long as the prisoner is unable to stand trial," 18 U.S.C. App. 2, § 2, Art. VI(a), applies "when a district court is adjudicating pretrial motions raised by the defense." Pet. App. 16a. The court observed that "the clear majority of [its] sister circuits" had construed the tolling provision to encompass "'those periods of delays caused by the defendant's own actions,'" *ibid.* (quoting *United States* v. *Ellerbe*, 372 F.3d 462, 468 (D.C. Cir. 2004)), including "periods of delay occasioned by motions filed on behalf of a defendant." *Id.* at 17a (brackets, citation, and ellipsis

omitted). And the court explained that such a construction both serves to "harmonize the IADA with the [Speedy Trial Act]," and avoids incentivizing "defendants to saddle district courts with innumerable pretrial motions in hopes of manufacturing delays and waiting out the IADA's 120-day clock." *Ibid.*

ARGUMENT

Petitioners contend (Bun Pet. 2-4, 11-21; Peterson Pet. 6-16) that this Court's review is warranted to resolve a division among federal and state courts over whether, under Article VI(a) of the IADA, the period in which the district court is adjudicating the defendant's pretrial motions is a period in which the defendant is "unable to stand trial," such that it tolls the IADA's clock. The court of appeals correctly tolled the IADA during the pendency of the motions at issue here. And, although some dated disagreement exists among federal courts on the question presented, the division is neither entrenched nor significant enough to warrant certiorari review. Indeed, this Court previously denied a petition relying on the same decisions to allege a circuit conflict, see *Neal* v. *United States*, 558 U.S. 1093 (2009) (No. 09-5767), and the disagreement has grown even more stale since. In any event, this case would be an unsuitable vehicle for addressing whether the IADA clock is tolled while a court is adjudicating a defendant's pretrial motions because, even if petitioners' position is correct, it is not outcome determinative. Petitioners no longer contest that the IADA was properly tolled during the continuances granted in this case, and those continuances were alone sufficient to bring petitioners' trial within the permissible 120-day period. The petitions for writs of certiorari should be denied.

1. a. The court of appeals correctly recognized that petitioners were "unable to stand trial" within the meaning of Article VI(a) of the IADA during the periods when the district court was adjudicating the defense's pretrial motions. Pet. App. 16a-17a (citation omitted). Although the IADA does not define the phrase "unable to stand trial," it is naturally understood to cover those periods when circumstances make it impossible or impractical to move forward with a defendant's trial. The district court's resolution of pretrial defense motions is one such circumstance. The principal categories of motions that a federal defendant must file before trial—*e.g.*, those alleging defects in instituting the prosecution or in the charging instrument, or those seeking to suppress evidence, to sever charges, or to obtain pretrial discovery, see Fed. R. Crim. P. 12(b)(3)—determine whether a prosecution (or individual counts in it) may lawfully go forward, the form in which it may proceed, and the scope of the evidence that will be admissible at trial. Thus, as the Federal Rules of Criminal Procedure recognize, a criminal trial generally cannot commence until the trial court has resolved most, if not all, of the defendants' pretrial motions. See Fed. R. Crim. P. 12(d) (providing that the trial "court *must* decide every pretrial motion before trial unless it finds good cause to defer a ruling") (emphasis added).

As the court of appeals explained, moreover, construing the defendant's filing of pretrial motions to toll the 120-day period under the IADA harmonizes that statute with the Speedy Trial Act, which excludes from its 70-day clock periods of "delay resulting from any pretrial motion," 18 U.S.C. 3161(h)(1)(D). Pet. App. 16a-17a. The two statutes—which were passed within five years of each other, see *United States* v. *Mauro*,

436 U.S. 340, 356 n.24 (1978)—address the same subject matter and share a common purpose. See *Reed* v. *Farley*, 512 U.S. 339, 346 & n.6, 352, 353 (1994) (referring repeatedly to the IADA's "speedy trial provisions," and "speedy trial claims" under those provisions). The court correctly observed that the "broadly harmonious aims" of the two statutes counsel in favor of treating their tolling provisions "*in pari materia*." Pet. App. 17a; accord *United States* v. *Collins*, 90 F.3d 1420, 1428 & n.4 (9th Cir. 1996); *United States* v. *Cephas*, 937 F.2d 816, 819 (2d Cir. 1991), cert. denied, 502 U.S. 1037 (1992); see also *Jett* v. *Dallas Indep. Sch. Dist.*, 491 U.S. 701, 738-739 (1989) (Scalia, J., concurring in part and concurring in the judgment) (relying on "the rudimentary principle[] of construction * * * that, where text permits, statutes dealing with similar subjects should be interpreted harmoniously").

b. Petitioners' contrary arguments lack merit. Petitioners suggest (Bun Pet. 18), for example, that a defendant is only "unable to stand trial" when he suffers from a "physical or mental" impairment, and they assert that "external" impediments to a defendant's ability to stand trial—such as pending pretrial motions—should not count. But the text of the tolling provision is not limited in that way, and the IADA elsewhere explicitly exempts the "mentally ill" from the reach of the statute as a whole. See *Collins*, 90 F.3d at 1427 (explaining that, "[h]ad the drafters of the IADA wanted to exclude only the physically incapacitated, in addition to the mentally ill, they would have done so explicitly"); see also 18 U.S.C. App. 2, § 2, Art. VI(b) ("No provision of this agreement, and no remedy made available by this agreement shall apply to any person who is adjudged to be mentally ill.").

Further, adopting petitioners' view that Article VI(a) is inapplicable to "conditions external to the defendant" (Bun Pet. 18) would preclude tolling in several situations where courts have uniformly deemed it appropriate. See, *e.g.*, *United States* v. *Neal*, 564 F.3d 1351, 1354 (8th Cir.) (per curiam) (finding that a defendant is unable to stand trial where the jurisdiction in which he is incarcerated requires his presence for pending criminal proceedings), cert. denied, 558 U.S. 1093 (2009); *Collins*, 90 F.3d at 1427; *United States* v. *Roy*, 830 F.2d 628, 635 (7th Cir. 1987) (same), cert. denied, 484 U.S. 1068 (1988); *State* v. *Pair*, 5 A.3d 1090, 1101 (Md. 2010) (same); see also, *e.g.*, *United States* v. *Winters*, 600 F.3d 963, 970-971 (8th Cir.) (allowing tolling where defendant is unable to stand trial because of a pending interlocutory appeal of a successful motion to suppress), cert. denied, 562 U.S. 908 (2010); *United States* v. *Roy*, 771 F.2d 54, 59 (2d Cir. 1985) (same), cert. denied, 475 U.S. 1110 (1986).

Petitioners are also mistaken in their contention (Bun Pet. 18-19) that the IADA and the Speedy Trial Act cannot be construed together because the latter statute was enacted years after the IADA and is structured differently in some ways. "Statutes need not have been enacted simultaneously or refer to one another to be *in pari materia*." 2B Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* § 51:3, at 239-240 (7th ed. rev. Aug. 2012) (footnotes omitted). To the contrary, courts regularly consult subsequently enacted statutes addressing the same subject matter or with the same objective in construing an earlier provision. See, *e.g.*, *Branch* v. *Smith*, 538 U.S. 254, 281 (2003) (opinion of Scalia, J.) (courts "interpret statutes * * * in the context of the *corpus juris* of which

they are a part, including later-enacted statutes"). Here, the Speedy Trial Act's more detailed tolling provisions are a window into the sorts of events that are contemplated by the IADA's more succinct reference to circumstances in which a defendant is "unable to stand trial."

Nor are petitioners correct in suggesting (Bun Pet. 19-20) that the court of appeals' construction of the IADA runs contrary to this Court's statements in *New York* v. *Hill*, 528 U.S. 110 (2000) and *Mauro*, *supra*. The question in *Hill* was whether a defendant may waive his right to raise a violation of the IADA's time limits by agreeing to a trial date outside of those limits. 528 U.S. at 111, 114. In answering that question in the affirmative, the Court rejected as "inapt" a proposed analogy between the IADA and the Speedy Trial Act, and noted certain differences between the two statutes relevant in the waiver context. *Id.* at 117 n.2. But the Court's footnote ultimately "express[ed] no view" on "the question of waiver under the Speedy Trial Act," *ibid.*, and it did not suggest that the two statutes could not be construed in tandem where their provisions display an overlapping purpose.

The cited footnote in *Mauro* is similarly inapposite. The Court there was considering whether the Speedy Trial Act has anything to say about whether the United States may be both a "sending" and "receiving" state under the IADA; *Mauro* did not purport to preclude the Speedy Trial Act from ever informing a court's interpretation of the tolling provisions in the IADA. See 436 U.S. at 356 n.24. And petitioners would not succeed even if *Mauro* had so held, because the plain text of the IADA alone mandates that the 120-day period should be tolled "whenever" a "prisoner is unable to stand trial,"

18 U.S.C. App. 2, § 2, Art. VI(a), as he is when his pretrial motions are pending.

Finally, petitioners contend that the court of appeals' concern with incentivizing "defendants to saddle district courts with innumerable motions" is misplaced, because the IADA separately permits a court facing such pretrial motions to grant a reasonable continuance upon finding "good cause." Bun Pet. 11 (citation omitted); Peterson Pet. 11 (citation omitted); see 18 U.S.C. App. 2, § 2, Art. IV(c). But the potential to grant a continuance does not suggest that the time is not already excluded; continuances would equally be available for the types of temporary physical or mental incapacity that petitioners agree are automatically excluded. The text of Article VI(a) excuses district courts from taking an unnecessary additional step. And petitioners' argument ignores the possibility that—if their interpretation is accepted—some defendants will file time-consuming motions in the hopes that the district court will overlook the need to grant a continuance or make the requisite IADA finding.

2. Petitioners assert (Bun Pet. 12-16; Peterson Pet. 8-12) that review is warranted to resolve a conflict among federal and state courts over whether a defendant is "unable to stand trial" under Article VI(a) of the IADA during periods when the trial court is adjudicating defense pretrial motions. Although some disagreement exists, the only two courts of appeals to suggest that tolling is unavailable in that circumstance did so decades ago and have not considered the issue in the context of a federal prosecution that also involved application of the Speedy Trial Act. Nor is the question sufficiently significant or recurring in federal prosecutions to warrant this Court's review.

a. A "clear majority" of the federal courts of appeals have held that the IADA clock is tolled under Article VI(a) "when a district court is adjudicating pretrial motions raised by the defense." Pet. App. 16a; see *United States* v. *Ellerbe*, 372 F.3d 462, 468-469 (D.C. Cir. 2004); *United States* v. *Johnson*, 953 F.2d 1167, 1171-1172 (9th Cir.), cert. denied, 506 U.S. 879 (1992); *United States* v. *Sawyers*, 963 F.2d 157, 162 (8th Cir.), cert. denied, 506 U.S. 1006 (1992); *Cephas*, 937 F.2d at 821 (2d Cir.); *United States* v. *Dawn*, 900 F.2d 1132, 1136 (7th Cir.) cert. denied, 498 U.S. 949 (1990); Bun Pet. 14-16; Peterson Pet. 10-12; see also *United States* v. *Walker*, 924 F.2d 1, 5-6 (1st Cir. 1991).[2]

For their part, the state courts of last resort to consider the question have agreed with the majority view of the federal courts. See *Cobb* v. *State*, 260 S.E.2d 60, 64 (Ga. 1979); *State* v. *Batungbacal*, 913 P.2d 49, 56 (Haw. 1996); *Diaz* v. *State*, 50 P.3d 166, 167-168 (Nev. 2002); *State* v. *Brown*, 953 A.2d 1174, 1181-1182 (N.H. 2008); *Commonwealth* v. *Montione*, 720 A.2d 738, 741 (Pa. 1998), cert. denied, 526 U.S. 1098 (1999); 720 A.2d at 744 (Nigro, J., concurring); *Dillon* v. *State*, 844 S.W.2d 139, 142 (Tenn. 1992), cert. denied, 507 U.S. 988 (1993); *Jones* v. *State*, 813 P.2d 629, 632 (Wyo. 1991).

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[2] In adopting the majority interpretation of Article VI(a), the First Circuit has "held out the possibility * * * that where a defendant timely advises the court that he or she is claiming protections under the IAD *and* the court takes more time than is necessary to resolve the defendant's pretrial motions, then the delay may not be fully excluded from the 120–day clock." *United States* v. *Neal*, 36 F.3d 1190, 1210 (1994), cert. denied, 519 U.S. 1012 (1996). But that court has yet to encounter a case in which the criteria for that potential exception are satisfied. See *ibid.*; *United States* v. *Whiting*, 28 F.3d 1296, 1307 (1st Cir.), cert. denied, 513 U.S. 956, 513 U.S. 994, and 513 U.S. 1009 (1994); *Walker*, 924 F.2d at 6 n.1.

Contrary to petitioners' contention (Peterson Pet. 10), the Florida Supreme Court did not break from the state courts' consensus in *Vining* v. *State*, 637 So. 2d 921 (per curiam), cert. denied, 513 U.S. 1022 (1994). The court in *Vining* adopted the Second Circuit's longstanding rule that all "periods of delay occasioned by the defendant" are excluded from the IADA clock, *id.* at 925 (quoting *United States* v. *Scheer*, 729 F.2d 164, 168 (2d Cir. 1984)), and simply concluded that tolling was inappropriate on the facts of that case because "the original trial date was never changed," despite the filing of defense motions. *Ibid.*; see also *Fuente* v. *State*, 549 So. 2d 652, 656 (Fla. 1989) ("It is generally accepted that a defendant may be unable to stand trial for reasons other than physical or mental disability.").

Peterson's remaining citations (Pet. 9-10) are to decisions of intermediate appellate courts, which do not establish a conflict warranting review. See Sup. Ct. R. 10(b). Furthermore, a subsequent decision in at least one of those jurisdictions (Missouri) suggests that courts in that State remain open to the majority view. See *State ex rel. Taylor* v. *McFarland*, 675 S.W.2d 868, 873, 874 (Mo. Ct. App. 1984) (agreeing "that a defendant may be 'unable to stand trial' for reasons other than a physical or mental disability," and that the IADA clock tolls to account for "pretrial motions filed by [a] defendant").

b. To the extent that the Fifth Circuit's decision in *Birdwell* v. *Skeen*, 983 F.2d 1332 (1993), or the Sixth Circuit's decision in *Stroble* v. *Anderson*, 587 F.2d 830 (1978), cert. denied, 440 U.S. 940 (1979), reflects disagreement with the overwhelming majority approach, such disagreement does not warrant the Court's review.

In *Birdwell*, the defendant was delivered from federal custody to Texas authorities for trial. 983 F.2d at 1334. The defendant filed several pretrial motions, including a motion to dismiss, the resolution of which delayed the start of trial. *Ibid.* On habeas review, the Fifth Circuit concluded that the delays associated with those motions did not toll the IADA. The court first found that the continuance granted by the trial court while considering the motion to dismiss did not comply with the IADA's procedural requirements that a continuance be "for good cause shown in open court, the prisoner or his counsel being present." *Id.* at 1339; see 18 U.S.C. App. 2, § 2, Art. IV(c). Relevant here, the court also took the view that Article VI(a)'s tolling provision did not apply. The court stated that, before the enactment of the IADA, the phrase "'unable to stand trial'" referred only to a defendant's physical or mental ability to stand trial, and it declined to expand the phrase "to encompass legal inability due to the filing of motions or requests." *Birdwell*, 983 F.2d at 1340-1341.

The principal question in *Stroble* was whether a state trial court's decision to grant a motion for a continuance without the defendant's knowledge or consent satisfied the Article IV(c) requirement that a continuance be granted "in open court." 587 F.2d at 839. The Sixth Circuit concluded that it did not. *Id.* at 838-840. In a preliminary portion of its analysis, the court also stated that the record failed to disclose any determination by the state courts that the defendant was "unable" to stand trial, observing that defendant was in the jurisdiction of the trial court and that no showing had been made that he was physically or mentally disabled. *Id.* at 838.

The decisions in *Birdwell* and *Stroble* do not represent a division of authority sufficiently clear, entrenched, or important to require this Court's review. After *Birdwell* and *Stroble* were decided, this Court held that violations of the IADA's 120-day limit do not support federal habeas corpus relief without, *inter alia*, a showing of prejudice. See *Reed*, 512 U.S. at 342, 353; *id.* at 356-358 (Scalia, J., concurring in part and concurring in the judgment). As a result, federal courts of appeals are now most likely to address the IADA in federal prosecutions of prisoners incarcerated in other jurisdictions and transferred to federal custody for trial. And neither *Birdwell* nor *Stroble* arose in that context.

While the Fifth Circuit in *Birdwell* addressed Article VI(a)'s application to periods when a court adjudicates defense pretrial motions, it did so on federal habeas review of state trial proceedings. 983 F.2d at 1334-1345, 1341. *Birdwell* accordingly had no occasion to analyze the relationship between the IADA and the Speedy Trial Act, a consideration that several courts of appeals have found significant in interpreting the IADA's tolling provisions. Indeed, the Fifth Circuit did not acknowledge the then-recent decisions of the First, Second, and Ninth Circuits construing the timing provisions of the two statutes together in the context of federal prosecutions. See *Johnson*, 953 F.2d at 1172; *Cephas*, 937 F.2d at 819; *Walker*, 924 F.2d at 5-6. Given that the Fifth Circuit has never applied its decision in *Birdwell* to a federal prosecution and that every federal court of appeals and state court of last resort to consider *Birdwell*'s reading of Article VI(a) of the IADA has rejected it, see *Collins*, 90 F.3d at 1426-1427; *Pair*, 5 A.3d at 1100, the Fifth Circuit may well be open to distinguishing *Birdwell* in a future federal prosecution

or to revising its prior articulation of the appropriate standard in light of the decisions of other appellate courts.

Similarly, *Stroble* does not suggest that the Sixth Circuit is firmly committed to the position petitioners advance. *Stroble* itself did not directly present the question whether a defendant's pretrial motions toll the clock under Article VI(a) of the IADA. Nor have petitioners identified any subsequent decision of or within the Sixth Circuit, in the more than 40 years since *Stroble* was decided, applying that case's passing discussion of Article VI(a), much less a decision applying that discussion to tolling based on the filing of pretrial motions in a federal prosecution.

c. In the absence of a conflict among the state courts of last resort, and in light of the strict limits on federal habeas relief on a state prisoner's IADA claim, *Reed*, 512 U.S. at 342, 353; *id.* at 356-358 (Scalia, J., concurring in part and concurring in the judgment), petitioners fail to show any meaningful conflict in the application of the IADA to state prosecutions. And even assuming the division among the courts of appeals is as entrenched as petitioners suggest, the question they seek to present would not warrant this Court's review because petitioners have not shown that the question presented arises frequently or that it is regularly outcome determinative in federal prosecutions.

Before the decision below, for example, the Fourth Circuit had last issued published decisions relating to the question presented in 1982 and 1983. See Pet. App. 15a. In applying those earlier decisions to periods when a district court adjudicates a defendant's pretrial motions, the court of appeals aligned itself with decisions

from the First, Second, Seventh, and Ninth Circuits issued between 1988 and 1996. *Id.* at 16a-17a; see *Collins*, 90 F.3d at 1426-1427; *Cephas*, 937 F.2d at 819-821; *Walker*, 924 F.2d at 5-6. The Fifth and Sixth Circuit decisions on which petitioners rely to assert a conflict date from 1993 and 1978. Bun Pet. 12-13. And neither of those courts has had occasion to apply the analysis that petitioners cite in a reported decision in the decades since issuing those decisions.

Further, even when the question arises, its resolution does not necessarily determine the outcome of a criminal proceeding. Rather, it will be outcome determinative only when a defendant is brought to trial beyond the relevant time period in Article III or IV of the IADA (180 or 120 days, respectively); the defendant has not waived the benefit of the time limits by agreeing to a trial date outside of them, see *Hill*, 528 U.S. at 115; and the time period was not otherwise tolled under the IADA—whether by the grant of a continuance or during a period when the defendant had escaped from custody, see 18 U.S.C. App. 2, § 2, Art. III(f), IV(c). Petitioners provide no evidence that such situations arise with any frequency.

3. The question presented is not even outcome determinative in this case. Thus, at all events, this case would be an unsuitable vehicle for addressing the issue.

The court of appeals determined that petitioners' 120-day IADA clock was tolled both by the periods in which the district court was adjudicating defense motions *and* by the ends-of-justice continuances the district court granted under the Speedy Trial Act. Pet. App. 14a-17a. Petitioners do not challenge the latter determination, which accords with the unanimous recognition by the federal courts of appeals that, so long

as the IADA's procedural requirements are met, ends-of-justice continuances granted under the Speedy Trial Act also stop the 120-day clock in Article IV(a) of the IADA. See Pet. App. 15a-16a. And, in this case, the district court's ends-of-justices continuances alone excluded sufficient time from the 120-day clock to establish that petitioners were brought to trial in compliance with the IADA.

The district court determined that petitioners' IADA clock began to run on November 30, 2016, the date on which Peterson (but not Bun) attended a November 30, 2016 pretrial conference. Pet. App. 36a. The court granted a continuance on the same date, stopping the 120-day clock for the entire period until the January 2017 pretrial conference, which was originally scheduled for January 19 but was rescheduled for January 23. See Bun Pet. 8; 16-cr-705 D. Ct. Doc. 214 (July 26, 2017) (scheduling order). Assuming *arguendo* (in petitioner's favor) that neither the dismissal of the indictment nor the grand jury's return of a new indictment stopped the clock, see Gov't C.A. Br. 35 n.8, the IADA clock would have then run from January 24 until April 11, 2017, a period of 79 days. On April 11, 2017, the district court entered an order granting an ends-of-justice continuance until its July 2017 term of court. Pet. App. 33a-34a & n.6; see Bun Pet. 9 (asserting that the next term of court "was scheduled to begin on July 10, 2017"). On June 19, 2017, while the previous continuance was still in effect, the district court entered an additional ends-of-justice continuance postponing trial until the next term of court in September 2017. Pet. App. 34a; see Bun Pet. 9 (June continuance "push[ed] the trial back until at least September 13."). Once that term started, the clock then ran for seven more days until September 20,

2017, the day when the jury was empaneled and trial began for purposes of the IADA.[3] See *State* v. *Bjorkman*, 199 A.3d 263, 268 (N.H. 2018) (holding "that 'for purposes of the IAD[A], a trial commences when the jury selection begins'") (quoting *Bowie* v. *State*, 816 P.2d 1143, 1147 (Okla. Crim. App. 1991)); see also *United States* v. *Rodriguez*, 63 F.3d 1159, 1164 (1st Cir.) (applying the same rule under the Speedy Trial Act), cert. denied, 516 U.S. 1032 (1995).

In total, then, ends-of-justice continuances that also stopped the IADA clock accounted for all but 86 days of the time between the earliest possible start of the IADA's 120-day period and the start of trial. As a result, petitioners would not be entitled to relief under the IADA even if the period when the district court was adjudicating defendants' pretrial motions did not separately toll the clock under Article VI(a) of the IADA. This case would therefore be an unsuitable vehicle for addressing any question concerning the construction of Article VI(a), even if that question otherwise warranted review.

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[3] The precise calculations would be different, but the bottom line the same, even if the continuances were instead understood to exclude time from the date of each order through the next scheduled pretrial conference. In that scenario, the June 19 continuance period would end on August 30, 2017, the day a pretrial conference was held and a trial date was set. With the 22 days between the pretrial conference and jury selection, a total of 101 days would have counted under the IADA, still well within Article IV(c)'s 120-day limit.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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