No. 08-728

In the Supreme Court of the United States

TAYLOR JAMES BLOATE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

In our opening brief, we explained why delay caused by the preparation of pretrial motions is not automatically excluded from the speedy trial calculation under 18 U.S.C. § 3161(h)(1). Congress specifically crafted the enumerated exclusion in subparagraph (D) to exclude delay only from the *filing* of the motion through its disposition. Congress's decision not to exclude preparation time is also manifest in the structure of the Speedy Trial Act and fully consonant with its objectives. The government may not circumvent Congress's choice by seeking to exclude preparation time under the general standard in (h)(1).

In response, the government offers a standard for locating un-enumerated exclusions under (h)(1) that is nearly limitless and draws scant support from the statutory text. The government then proposes a specific rule for pretrial motion preparation time that appears custom-made to match the facts of this case. Pretrial motion preparation time must automatically be excluded, the government says, when it is requested by the defendant and "additional"—that is, not "routine." The government's exclusion, however, bears no resemblance to any of the enumerated exclusions that the government concedes must guide this inquiry.

To the government, this regime is necessary to compel symmetrical treatment of pretrial motion preparation and response time and to avoid judicial waste and windfall dismissals. But policy judgments like these are for Congress to make, not the

government. In any event, Congress's decision not to include pretrial motion preparation time within the automatic exclusion in subparagraph (D) was a sound one.

Finally, the government argues that Congress's express rejection of a proposal to exclude pretrial motion preparation time under § 3161(h)(1) "shed[s] no light on how it would have viewed" the government's proposed exclusion. But the legislative history confirms what the text and structure of the Act make plain: Pretrial motion preparation time should be excluded, if at all, on a case-by-case basis under § 3161(h)(7), not automatically under (h)(1).

I. The Government's Position Is Irreconcilable With The Plain Text Of The Statute

The government offers no credible explanation why Congress, having stated quite clearly in § 3161(h)(1)(D) that the automatic exclusion for pretrial motions begins with the *filing* of a motion, must actually have intended that the exclusion should start with *preparation* of the motion. Instead, the government devises a test for identifying unenumerated (h)(1) exclusions that is unmoored from the text of the Speedy Trial Act and virtually limitless in application. The government ultimately proposes an automatic exclusion—"[d]elay arising from a district court's grant of a *defendant's* request for *additional* time to prepare pretrial motions" (U.S. Br. at 18) (emphasis added)—that cannot be squared with the enumerated (h)(1) exclusions or, for that matter, derived from its own test for identifying unenumerated exclusions.

A. The Government's Proposed Test For Identifying Un-Enumerated Automatic Exclusions Conflicts With The Text Of Subsection (h)(1)

1. The government concedes, as it must, that the subparagraphs of § 3161(h)(1) "provide guidance" as to what delays fall under the general standard. U.S. Br. 15. But the government refuses to be guided by subparagraph (D), which specifically addresses pretrial motions and declares that the automatic exclusion begins with the filing of the motion. There is no escaping the fact that the government urges an interpretation of the general standard that is flatly at odds with Congress's specific statement that the automatic exclusion of "delay resulting from any pretrial motion" begins at "filing." That is where this case should end.

Instead, the government constructs a test for identifying un-enumerated automatic exclusions under § 3161(h)(1) by looking at just *some* of the enumerated exclusions, and even those at only the highest level of abstraction. According to the government, § 3161(h)(1) excludes delays arising from "individualized" "proceedings aimed at advancing the defendant's case towards trial or other resolution (or at resolving other charges against him)," "particularly procedures of which the defendant might legitimately take advantage to pursue his defense." U.S. Br. 15, 20 & n.6. But even that is not enough. Delays may also qualify if they result from any action that is the "functional equivalent" of, "'analogous' to," "similar to," or

"ancillary to" the proceedings in the enumerated (h)(1) exclusions. *Id.* at 16–17.

Leaving aside for the moment the obvious difficulties with applying such an amalgam, the government disregards the limitations imposed by the very subparagraphs on which it ostensibly relies. Most flagrantly, the government denies that the subparagraph most relevant to the dispute in this case—subparagraph (D)—exerts any influence at all on the general standard. By the government's reasoning, because (h)(1)'s list of automatic exclusions is prefaced by "including but not limited to," subparagraph (D) "does not address delay from the preparation of pretrial motions that occurs before pretrial motions are filed." U.S. Br. 22. But it is difficult to see how Congress "did not address" preparation time when it specifically identified a starting point for the automatic exclusion—"filing"—that necessarily comes *after* preparation.

The government's reasoning also runs headlong into subparagraph (H), which is preceded by the very same "including but not limited to" qualifier. Subparagraph (H) excludes "delay reasonably attributable to any period, *not to exceed thirty days*, during which any proceeding concerning the defendant is actually under advisement by the court." 18 U.S.C. § 3161(h)(1)(H) (emphasis added). By the government's logic, subparagraph (H) just "does not address" whether delays *longer* than thirty days are automatically excludable. Indeed, under the government's standard, subparagraph (H) would seem to *call* for the exclusion, because a 31-day delay

is "analogous" or "ancillary" to the 30-day delay excluded there.

At a more fundamental level, the government is saying that any principle of limitation announced in the enumerated exclusions can be ignored because the statute leaves open the possibility that un-enumerated automatic exclusions exist. And that, in turn, is just another way of saying that the enumerated exclusions should not inform the meaning of the general standard except to *expand* it. But the canons that the government agrees must guide the interpretation of the general standard—*noscitur a sociis* and *ejusdem generis* (U.S. Br. 15)—are not one-way streets. See, *e.g.*, *Washington State Dep't of Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003) (applying the *noscitur a sociis* and *ejusdem generis* canons to interpret a general term "far more restrictively" than it would have been interpreted "in the abstract"). The enumerated exclusions cannot illustrate what *should* be automatically excluded under (h)(1)'s general language without also telling us something about what *should not.*[1]

For similar reasons, the government's claim that petitioner improperly invoked the *expressio unius*

[1] The government's misunderstanding of that point is what leads it to mischaracterize petitioner's position. Petitioner has never suggested "that 'Section 3161(h)(1)'s general language,' by its own terms, excludes delay resulting from the grant of a defendant's request for additional time to prepare pretrial motions." U.S. Br. 22. As we explained in our opening brief (at 20), the statute "reflects Congress's judgment that a 'proceeding' regarding pretrial motions does not begin until—as the text of § 3161(h)(1)(D) prescribes—the motion is actually filed."

canon (U.S. Br. 24) is baseless. Our position is that the Court must draw a compelling inference from the specific limitation imposed in subparagraph (D) (Pet. Br. 14–16); petitioner did not invoke (tacitly or otherwise) the *expressio unius* canon. The government's assertion that relying on subparagraph (D) to foreclose a flatly contrary interpretation of the general standard is the same thing as relying on the *expressio unius* canon is just a rehash of the government's unsupportable claim that the specific limitation of the pretrial motion exclusion "does not address" preparation time.

Likewise, the government wrongly disputes the applicability of the canon establishing that a specific statutory provision controls over one of more general application. The government claims that this principle does not apply to subparagraphs "intended to illustrate, but not to exhaust, the scope of the more general provision" because "there is no conflict" between an illustrative enumeration and the general standard. U.S. Br. 23. What the government is really saying is that there can *never* be a conflict between a general standard and a specific illustration where the series of illustrations is not exhaustive. None of the cases the government cites even remotely supports such a startling assertion. *National Cable & Telecomms. Ass'n* v. *Gulf Power Co.*, 534 U.S. 327 (2002), for example, establishes only the unremarkable proposition that the canon does not apply in the absence of actual conflict between the specific and general provisions. *Id.* at

335–336.[2] The government might have a point if subparagraph (D) did not contain a specific *limitation* on the pretrial motion exclusion, such that it would not necessarily be in conflict with the exclusion of additional time related to pretrial motions. But subparagraph (D) does impose clear limits by identifying both the beginning and the end of the exclusion. The government's argument is but another iteration of its misguided notion that a specific limitation merely "does not address" whether the general standard is likewise limited.

Finally, the government mistakenly asserts that its reading of the general standard would not render subparagraph (D) superfluous. According to the government, because Congress intended subparagraph (D) to expand the pretrial motion exclusion beyond what had been authorized in the 1974 version of the Act, subparagraph (D) is given effect so long as it is read to "'avoid[] an unduly restrictive interpretation of the exclusion.'" U.S. Br. 25 (quoting

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[2] In *National Cable*, the statute in question established two specific rate formulas for certain kinds of pole attachments, and some courts of appeals had concluded that Congress would not have left a residual category "for which the FCC would derive its own view of just and reasonable rates." 534 U.S. at 335. The Court disagreed, holding that "nothing about the text of [the two specific provisions], and nothing about the structure of the Act, suggest that these are the exclusive rates allowed." *Ibid.* There was, therefore, "no conflict" between the specific rate provisions and the general standard, which governed rates for pole attachments that did not fall into either of the two specific categories. See *id.* at 335–336. Here, by contrast, there is clear conflict between subparagraph (D)'s statement that the pretrial motion automatic exclusion begins at "filing" and the government's insistence that it should begin with preparation.

H.R. Rep. No. 96-390, at 11 (1979)). But that fails to give any significance to Congress's decision to prescribe a specific starting point for the exclusion—*i.e.*, to expand the exclusion only so far. And as we explain below (pp. 19–22, *infra*), that choice was quite deliberate.

2. In any event, the government's patchwork standard cannot be accepted. As noted above, the government proposes to include within the general standard in (h)(1) "individualized" "proceedings aimed at advancing the defendant's case towards trial or other resolution (or at resolving other charges against him)," "particularly procedures of which the defendant might legitimately take advantage to pursue his defense." U.S. Br. 15, 20 & n.6. In addition, the government says, (h)(1) reaches delays resulting from anything that is the "functional equivalent" of, "'analogous' to," "similar to," or "ancillary to" the enumerated (h)(1) exclusions. *Id.* at 16–17.

The most obvious problem with the government's test is that it is virtually limitless. What sort of delays *wouldn't* be caught in a net so large? Indeed, as the government candidly acknowledges, "almost everything counsel does in advance of trial can be viewed as general trial preparation." U.S. Br. 29 n.8. Surely general trial preparation is "aimed at advancing the defendant's case toward trial or other resolution" (*id.* at 15), so under the government's theory all of that would be automatically excluded. And if a pretrial event somehow does not "advance a defendant's case toward trial or other resolution," surely it could be deemed "analogous," "similar," or

"ancillary" to one or more of the enumerated exclusions.

B. The Government's Bid To Exclude "Additional" Pretrial Motion Preparation Time "Granted At A Defendant's Request" Has No Basis In The Text Of § 3161(h)(1) And No Place In This Statutory Scheme

Despite the nearly limitless principles it claims define the general standard in subsection (h)(1), the government concedes that "[a]n across-the-board exclusion for pretrial motion preparation" would leave each district court "free to amend the Speedy Trial Act by local rule." U.S. Br. 29, 30 (quoting *United States* v. *Hoslett*, 998 F.2d 648, 656 (9th Cir. 1993), and *United States* v. *Williams*, 197 F.3d 1091, 1095 n.6 (11th Cir. 1999)). Accordingly, the government announces that only "additional" time to prepare pretrial motions "granted at a defendant's specific request" ought to be excluded automatically under subsection (h)(1). *Id.* at 30. But this proposed exclusion has no basis in the text of the statute; indeed, it does not even follow from the government's own test for identifying an exclusion under subsection (h)(1)'s general standard.

1. The government rightly observes that any unenumerated (h)(1) exclusion should be "similar in nature" to the enumerated exclusions (U.S. Br. 15), but the one it ultimately proposes looks nothing like those listed in subsection (h)(1).

For starters, the statutory text makes no mention of treating time granted at the defendant's request differently from time granted under other circumstances. By its terms, the general standard

articulated in § 3161(h)(1) applies to "delay resulting from other proceedings concerning the defendant," not delay *caused by* the defendant. The subparagraphs that follow say nothing of treating defense requests differently. Subparagraph (A), for example, addresses delay caused by competency proceedings, without regard to which side requested them. Likewise, subparagraph (C) automatically excludes "delay resulting from *any* interlocutory appeal," no matter which side takes the appeal. 18 U.S.C. § 3161(h)(1)(C) (emphasis added). And, of course, subparagraph (D) specifically addresses delay resulting from pretrial motions and treats time for the defense just the same as time for the government.

If the government's attempt to create a special rule for defense requests sounds familiar, that is because the government pressed it (unsuccessfully) just three years ago. In *Zedner* v. *United States*, 547 U.S. 489 (2006), the government's leading argument was that "a defendant cannot challenge delay that he sought and the Speedy Trial Act authorizes." See Brief for the United States at 14, No. 05-5992 (Mar. 2006). Because the defendant sought the continuance, the government asserted, the defendant "cannot both reap the benefit of the continuance and challenge its validity under the [Speedy Trial Act]." *Ibid.* This Court squarely rejected that argument, holding that the delay at issue could not be excluded even though the defendant had requested it. See 547 U.S. at 503–506. This Court should reject the government's argument yet again.

Moreover, none of the enumerated exclusions distinguishes between "additional" delay and "routine" delay. Subparagraph (B), for example, automatically excludes "delay resulting from trial with respect to other charges against the defendant," but it does not purport to treat trials that proceed according to a standard scheduling order any differently from those that occasion additional delays at the request of a party. And again, subparagraph (D)'s treatment of pretrial motions makes no such distinction.

Thus, while professing to back an exclusion similar in kind to those enumerated by Congress, the government has instead proposed one that is contingent upon conditions that are not present in any enumerated exclusion. The government cannot simply tailor an exclusion to its convenience.

2. The government is wrong to assert that a "defense request" for "additional" time is of a piece with other un-enumerated exclusions under § 3161(h)(1).

The government suggests that courts routinely hold that delays caused by the "functional equivalent" of an enumerated exclusion are covered by the general standard in (h)(1). U.S. Br. 16 (citing *United States* v. *Hohn*, 8 F.3d 1301, 1304 (8th Cir. 1993); *United States* v. *Noone*, 913 F.2d 20, 27 n.12 (1st Cir. 1990); *United States* v. *Jorge*, 865 F.2d 6, 11–12 (1st Cir. 1989)). But these "functional equivalent" cases do not purport to discover *un*-enumerated exclusions under the general standard; rather, they explicitly hold that the delay falls within an *enumerated* exclusion. *Hohn*, 8 F.3d at 1304

("The period of time * * * was properly excluded pursuant to § 3161(h)(1)([D]) * * * as a pretrial motion."); *Noone*, 913 F.2d at 27 ("The entire 28 day interval between Noone's oral request * * * for reconsideration * * * and its denial * * * was excludable as 'delay resulting from any pretrial motion.' 18 U.S.C. § 3161(h)(1)([D])."); *Jorge*, 865 F.2d at 12 (1st Cir. 1989) ("Because we believe it is appropriate to treat the document as at least equivalent to a pretrial motion, we hold that it falls within subsection [D] of § 3161(h)(1)."). Indeed, the government seemed to recognize as much when opposing the petition for a writ of certiorari in this case, claiming that petitioner's waiver of his right to file pretrial motions was the "functional equivalent" of "a motion for leave to waive the right to file pretrial motions." Br. in Opp. 11–12 (citing *Hohn* and *Jorge*). The government argued that "[t]he STA clock thus stopped again under 18 U.S.C. 3161(h)(1)([***D***]) until the matter was heard by the court." *Id.* at 12 (double emphasis added). The government cannot now claim that the "functional equivalent" cases in fact are examples of courts finding un-enumerated exclusions.

The government's list of cases purportedly finding a host of un-enumerated exclusions that are "analogous," "similar," or "ancillary" to an enumerated proceeding (U.S. Br. 16–17) fares little better. Many of those cases do not create general (h)(1) exclusions at all; rather, they exclude delays under specific subparagraphs. See *United States* v. *Pete*, 525 F.3d 844, 849 (9th Cir. 2008) ("We now hold that such time is excludable under § 3161(h)(1)([C]) of the STA."); *United States* v. *Davenport*, 935 F.2d 1223,

1233 (11th Cir. 1991) ("We hold that the delay resulting therefrom is excluded from the petitioner's speedy trial clock under 18 U.S.C.A. § 3161(h)(1)([C])."); *United States* v. *Tyler*, 878 F.2d 753, 759 (3d Cir. 1989) ("[W]e hold that the [delay] was 'a period of delay resulting from other proceedings concerning the defendant' within the meaning of 18 U.S.C. § 3161(h)(1)([C])."); *United States* v. *Montoya*, 827 F.2d 143, 150 (7th Cir. 1987) ("Negotiating a plea bargain reasonably falls within the meaning of 'trial' under section 3161(h)(1)([B])."). Others confine their discussion to *dicta* or statements in the alternative. See *United States* v. *Salgado*, 250 F.3d 438, 454 n.2 (6th Cir. 2001); *United States* v. *Van Someren*, 118 F.3d 1214, 1218–1219 (8th Cir. 1997); see also *Noone*, 913 F.2d at 27 n.12; *Montoya*, 827 F.2d at 150.[3] The government's assertion that—despite what appears on the face of these opinions—these courts really meant to locate these exclusions under the general standard (U.S. Br. 17 n.4) is scant comfort.

To be sure, § 3161(h)(1) expressly contemplates the possibility of un-enumerated exclusions, and there are instances in which courts have relied on the general standard. But the government's strained

[3] Some others draw their support from cases that exclude delay under specific subparagraphs or in *dicta*, see *United States* v. *Dunbar*, 357 F.3d 582, 593 (6th Cir. 2004); *United States* v. *Leftenant*, 341 F.3d 338, 344–345 (4th Cir. 2003); *United States* v. *Bowers*, 834 F.2d 607, 610 (6th Cir. 1987), or offer no reasoning or supporting authority at all, see *United States* v. *Goodwin*, 612 F.2d 1103, 1105 (8th Cir. 1980). All of this suggests that the purported (h)(1) exclusions are not "essential in enabling courts to comply with the STA's time limit" (U.S. Br. 18 n.5), but merely convenient.

reading of these cases vastly overstates their frequency. And what examples do exist hardly support the atextual reading of the statute the government urges here. The government offers no reason why Congress would have relegated something so common as pretrial motion preparation time to the general standard under (h)(1). And as we have explained (Pet. Br. 25, 27–29) and discuss further below (pp. 28–30, *infra*), it is abundantly clear that Congress did not just forget to consider preparation time. The point here is simply that it would be odd if Congress intended a delay that could potentially arise in every case that is headed to trial—and likely does arise in the vast majority of them—to be automatically excluded (in the face of subparagraph (D), no less) under the general standard.

3. There is yet another problem with the government's proposal to exclude only defendant-requested, additional time: It cannot be squared with the government's standard for identifying un-enumerated (h)(1) exclusions.

According to the government, "[p]retrial motions * * * advance the case towards resolution because they shape the content or structure of the trial and may even eliminate the need for trial altogether." U.S. Br. 21. "The same is true," the government continues, "of additional time granted *at a defendant's request* to research, prepare, and file pretrial motions" because "[m]otions cannot be resolved fairly and accurately if a *defendant* has insufficient time to prepare them." *Ibid.* (emphasis added). Note the sleight of hand: Motions filed by either side "shape

the content or structure of the trial," but only *defense-requested* preparation time is excluded. By the government's own logic, preparation time used by *either* side should advance the case toward resolution, and both types of delay should therefore be excluded automatically. But no such acknowledgement appears in the government's brief; indeed, there is *no discussion at all* of prosecution-requested extensions. That is because there is no principled way to distinguish them from defendant-requested extensions under the government's proposed standard.

Prosecutors, of course, routinely file pretrial motions, including motions to suppress evidence, which must be filed before trial, see Fed. R. Crim. P. 12(b)(3)(C), and not uncommonly are raised to prevent the defendant from admitting hearsay that is against the declarant's interest but lacks "corroborating circumstances clearly indicat[ing] the trustworthiness of the statement," Fed. R. Evid. 804(b)(3). The government is also required to file any motion to compel discovery from the defendant before trial. Fed. R. Crim. P. 12(b)(3)(E). Reciprocal discovery from the defendant is common in modern federal criminal practice. See Fed. R. Crim. P. 16(b). The government frequently files other pretrial motions *in limine*, pretrial motions to revoke bail or modify the conditions of release, and motions addressing a variety of other matters. The government's failure to address how its rule would apply to—or could be upheld in light of—such everyday occurrences is telling.

Neither does the government's reading of (h)(1) justify the restriction of its proposed exclusion to "additional" preparation time. Surely "routine" preparation time "advances a case toward trial" just the same as "additional" preparation time. The government apparently believes otherwise, asserting in a footnote that that delay-causing proceedings must be "individualized," and that "[t]ime granted by a local rule or a routine order entered at the outset of every case" does not result from an "individualized" proceeding. U.S. Br. 20 n.6. But the government does not attempt to explain what that means or where this qualifier came from. Certainly it did not come from the text; as explained above (pp. 9–10, *supra*), none of the enumerated exclusions makes any mention of whether the delay is granted as a matter of course or in response to a specific request.

4. The final flaw in the government's proposed exclusion is the host of practical problems that would follow its adoption. Making the automatic exclusion of delay turn on who requested it may sound simple to the government's ears, but the reality is much more complicated. As we explained in our opening brief, this Court has recently noted the difficulty inherent in a rule that depends on whether a party makes a specific request. See Pet. Br. 38 (citing *Montejo* v. *Louisiana*, 129 S. Ct. 2079, 2084 (2009) (holding that a standard that turns on whether the defendant affirmatively invoked or requested counsel would be "mysterious" in application); 129 S. Ct. at 2094 (Stevens, J., dissenting) (agreeing that standard would be "unworkable")).

The government offers no response. Rather, it leaves unanswered any number of questions that follow from a rule triggered by a "defense" request: What is a court to do when the prosecution and the defense jointly propose a scheduling order? What about a joint motion specifically requesting an extension of time to file pretrial motions? Does it make a difference if the government simply lodges no objection to a defense request? Local rules requiring the parties to attempt to reach an agreement on such matters are the norm. See, *e.g.*, D. Mass. L.R. 7.1(a)(2) ("No motion shall be filed unless counsel certify that they have conferred and have attempted in good faith to resolve or narrow the issue."). The government's proposal, however, would encourage the government to withhold consent in order to take advantage of the automatic exclusion.

There are still further problems with automatically excluding only "additional" preparation time, beginning with the uneven impact it would have across jurisdictions. Many districts have local rules or standing orders that anticipate the filing of pretrial motions, but those rules are not uniform, and some districts have no standing orders regarding motion scheduling. See, *e.g.*, D.D.C. L.Cr.R. 45.1(B)(6) (pretrial motions due within 11 days of arraignment, with five days for response); N.D. Ill. L.Cr.R. 12.1(a) (pretrial motions "shall be filed within the time set by the court" or, if no time is set, within 21 days of arraignment); N.D. Cal. Crim. L.R. 12-1 (pretrial motions deadline set by assigned judge). If only "additional" time were to be excluded, those discrepancies would have consequences under the Speedy Trial Act.

The local rule in force in this case illustrates the difficulty of implementing the government's proposed exclusion. Eastern District of Missouri Local Rule 3.05 states that "[d]eadlines for filing any pretrial motions[] shall be governed by an order of Court entered at or after a defendant's arraignment." E.D. Mo. L.R. 3.05. On the day of petitioner's arraignment, the presiding magistrate judge issued an "Order Concerning Pretrial Motions" setting the trial date and the deadlines for motions and responses. See Dkt. Nos. 16, 17. Was the order "individualized" or simply "routine"? Does the answer depend on whether the magistrate discussed the deadlines with the parties before setting them or issued the order as they walked into the courtroom? If the dates that appear in the order were set after consultation with both parties, were they at the request of one party or the other? The government's proposed exclusion raises many more questions than it answers.

II. The Government Cannot Circumvent The Clear And Reasonable Legislative Choices Embodied In The Act

Much of the government's brief is devoted to arguing that the Speedy Trial Act *ought* to exclude pretrial motion time automatically. But the government's preferences are no substitute for Congress's clear decision to the contrary. In any event, Congress's choice not to make pretrial motion preparation time automatically excludable was eminently sensible.

A. The Enumerated Exclusion In Subparagraph (D) Reflects Specific And Reasonable Congressional Choices

1. Congress expressly excluded all time "from the filing of [a pretrial] motion through the conclusion of the hearing on, or other prompt disposition of, such motion." § 3161(h)(1)(D). Observing that the time spent responding to a pretrial motion falls within that automatic exclusion, the government argues that it makes "scant sense" not to have a matching exclusion for time spent preparing the initial motion and that the general standard should therefore be read to establish one. U.S. Br. 19 (citing *United States* v. *Oberoi*, 547 F.3d 436, 451 (2d Cir. 2008)). The government is wrong.

First and foremost, *Congress* thought it made sense to treat them differently. The enumerated exclusion in subparagraph (D) expressly begins with "filing." Even the government does not dispute that time spent preparing the initial motion does not fall within that exclusion, but the government fails to acknowledge that this reflects a considered judgment by Congress. Whatever the wisdom of that decision as a policy matter, there can be no doubt that Congress understood that commencing the automatic exclusion in subparagraph (D) at "filing" would leave preparation of the initial motion outside the exclusion.

Contary to the government's suggestion, *Henderson* v. *United States*, 476 U.S. 321 (1986), does not permit this Court to second-guess such choices. The question in *Henderson* was whether certain time was within the enumerated exclusion in

what is now subparagraph (D). That is made crystal clear in the very first paragraph of the Court's opinion. 476 U.S. at 322 ("This case requires us to decide the narrow questions whether that exclusion [in subparagraph (D)] is limited to reasonably necessary delays, and whether it applies to delays occasioned by the filing of posthearing briefs on motions."). The Court held that subparagraph (D) was not limited to a "reasonable" period under which the motion is under advisement and that it necessarily excluded time during which "the court remains unable to rule." *Id.* at 331. The Court did *not* purport to interpret the general standard under (h)(1), much less to hold that the general standard could be interpreted to evade a specific limitation in the enumerated exclusion if a court later decides that it would "make * * * sense" (U.S. Br. 19) to do so.

Even if symmetrical treatment of motion preparation and response preparation were the paramount objective, the government's rule does not achieve it. Under the government's proposed exclusion, "routine" *motion* preparation time would not be excluded, but "routine" *response* preparation time would. The government's bid for symmetry thus proves too much.

2. In any event, treating pretrial motion preparation differently from response time does make sense. Preparing initial motions is a significantly different exercise than preparing responses. The former can involve considerable uncertainty about which motions to file, how to frame the arguments, and what relief to seek. Response papers, by contrast, typically require a

more limited exposition of why the requested relief should be denied. This Court's rules, for example, recognize the difference between preparing an opening submission and responding to it. Compare S. Ct. R. 13.1 (providing 90 days within which to file a petition for a writ of certiorari) with S. Ct. R. 15.3 (providing 30 days within which to file a brief in opposition); compare S. Ct. R. 25.1 (providing 45 days within which to file an opening merits brief) with S. Ct. R. 25.2 (providing 30 days within which to file a responsive merits brief). Congress sensibly determined that the narrowed field of play when preparing a response warranted automatic exclusion, but that the uncertainty and variety of delays associated with preparing the initial motion did not. Congress contemplated that delays resulting from preparation of the initial motion would be addressed on a case-by-case basis under (h)(7). See S. Rep. No. 96-212 (1979), at 33–34; pp. 28–30, *infra*.

3. The government also objects to dismissals under the Speedy Trial Act that it claims are based on "technicalities." See U.S. Br. 27, 28, 32–33. To the government, literal enforcement of the Act "would frustrate, rather than advance, the public's interest in speedy trials." *Id.* at 27. The government, however, fundamentally misapprehends the character of the Speedy Trial Act, which rests almost entirely on a series of discrete lines drawn by Congress. For example, the Act provides 70 nonexcludable days within which to bring a defendant to trial, not 71, see § 3161(c)(1); likewise, § 3161(h)(1)(H) excludes up to 30 days, not 31, during which a pretrial motion is under advisement. Thus, in contrast to a defendant's relatively

"amorphous" Sixth Amendment right to a speedy trial, *Vermont* v. *Brillon*, 129 S. Ct. 1283, 1290 (2009) (internal quotation marks omitted), the Act expressly contemplates the enforcement of what the government disparages as "technical" requirements to ensure compliance with its objectives.

Moreover, the use of dismissal as a sanction—even the relatively mild sanction of dismissal without prejudice—reflects an entirely reasonable congressional judgment that making certain prosecutions more cumbersome (or even impossible) in response to a violation of the Act will result in speedier trials overall. See *Zedner*, 547 U.S. at 499. Dismissals without prejudice "promote compliance with the Act without needlessly subverting important criminal prosecutions." *Ibid.* Congress could have included a harmless error exception for "technical violations," but it did not, and this Court should reject the government's implicit invitation to create one.

B. The Government's Parade Of Horribles Will Not Materialize

The government predicts that all manner of maladies will result if pretrial motion preparation time is not automatically excluded: Making explicit ends-of-justice findings will waste judicial resources; or judges will forget to make them; or defendants will "game the system" and benefit from windfall dismissals; or judges might "inappropriately" deny requested preparation time. U.S. Br. 27–28. All wrong.

1. The government's first complaint is that requiring judges to exclude preparation time under

the ends-of-justice provision in subsection (h)(7) would waste courts' time by requiring them to make explicit findings that are (the government claims) already "inherent in the grant of additional time to prepare motions." U.S. Br. 26–27. The government does not explain why it is especially difficult to put ends-of-justice findings on the record, and common experience is to the contrary. The Act specifically permits judges to set forth the findings "orally or in writing," § 3161(h)(7)(A), so making the findings explicit will hardly consume significant resources in cases where exclusion is warranted.

Moreover, it is not necessarily the case that by granting such a request the district court has concluded that the ends of justice "outweigh the best interests of the public and the defendant in a speedy trial." § 3161(h)(7)(A). Were it otherwise, the corollary would also be true: District courts would lack the *authority* to grant a defense-requested continuance unless doing so met the (h)(7) criteria. The government stops short of such an assertion, and for good reason. Surely a district court has the power to grant a defense request for additional time where the asserted justification is mere convenience or even a lack of due diligence, even if the ends of justice would not outweigh the public's and the defendant's speedy trial interests.

Implicit in the government's "inherent finding" argument is the idea that the ends-of-justice test prescribed by subsection (h)(7) imposes no hurdle to the granting of an exclusion. But while the provision is no doubt frequently invoked, it expressly requires

an assessment of statutorily prescribed criteria at odds with the government's characterization.

More particularly, subparagraph (h)(7)(B) lays out four factors a district court must consider before excluding a continuance under (h)(7), three of which are relevant here and in the vast majority of cases.[4] The court must ask whether failure to grant an (h)(7) continuance would "be likely to make a continuation of such proceeding *impossible*, or result in a *miscarriage of justice*," § 3161(h)(7)(B)(i) (emphasis added); whether the case is "so *unusual or so complex* * * * that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established," § 3161(h)(7)(B)(ii) (emphasis added); and whether, in non-complex cases, failure to grant an excluded continuance "would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, *taking into account the exercise of due diligence*," § 3161(h)(7)(B)(iv) (emphasis added). It is difficult to square these criteria with the government's apparent belief that the (h)(7) findings are a mere formality *whenever* the defense receives additional time to prepare pretrial motions.

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[4] The fourth criterion applies to cases in which arrest precedes indictment and requires courts to consider whether the timing of the arrest or the complexity of the case makes timely return of the indictment unreasonable. 18 U.S.C. § 3161(h)(7)(B)(iii).

Even if the (h)(7) test were almost always satisfied when a defense request is granted, this Court has recognized that the process of making the (h)(7) findings is essential to the Act's scheme. That is the very holding of *Zedner*, which declared that the defendant cannot prospectively waive the Act's application, 547 U.S. at 503, and that the (h)(7) findings cannot be supplied retrospectively, *id.* at 506 ("In the first place, the Act requires express findings, and in the second place, it does not permit those findings to be made on remand as the Government proposes."). See also *id.* at 509 ("The strategy of § 3161(h)([7]), then, is to counteract substantive open-endedness with procedural strictness.").

Nor is it the case that the district court's granting of a defense continuance "shows that the public interest is * * * served by delaying trial." U.S. Br. 21. If the exclusion is automatic, the district court is never even asked to consider the public's interest. Likewise, it is not true that "the opportunity for an adversary presentation" (*ibid.*)—by which the government presumably means government opposition to a requested continuance—protects the public's interest. The government's principal concern in any particular case is not to safeguard the public's speedy trial interest; indeed, as noted above (p. 17, *supra*), counsel are frequently required by rule to agree to requested continuances whenever possible.

2. The government also fears that busy district court judges will forget to make ends-of-justice findings altogether, resulting in "windfall" dismissals for opportunistic defendants who "game the system."

U.S. Br. 27–28. Given the omnipresence of the Speedy Trial Act, however, forgetting to make findings seems unlikely (especially with the prosecution there to remind judges of the obligation). And, of course, the district court need not make any such findings until the defendant moves to dismiss on Speedy Trial Act grounds. *Zedner*, 547 U.S. at 507. It is difficult to see how judges will be caught unaware.

But even supposing such failures do occur, the defendant is unlikely to receive a "windfall." District courts retain (guided) discretion to dismiss the indictment without prejudice, allowing the prosecution to bring the case again. See 18 U.S.C. § 3162(a) (listing "the facts and circumstances of the case which led to the dismissal" as a factor to consider when deciding whether to dismiss a case without prejudice). The opportunity to be re-indicted and re-tried is hardly a bonanza for defendants.

Nor is there any real likelihood that defendants could successfully "game the system" (U.S. Br. 28). As explained in our opening brief (at 20–21), district courts and prosecutors will adjust to a clear rule that pretrial motion preparation time is not automatically excluded. The government does not seriously dispute that fact. There is no realistic possibility that a defendant could outfox the district court and the prosecution.

3. The government even goes so far as to suggest that, in the absence of automatic exclusion, "judges might inappropriately deny the requested time." U.S. Br. 27. That assertion rests on a subtle but important fallacy—namely, that granting additional

time to prepare pretrial motions necessarily delays trial or prejudices the government. Not so. A district court can extend the deadline for filing pretrial motions without moving the trial date, which avoids any consequence under the Act. Even if granting additional motion preparation time does delay the trial, the government (and the district court) need only pay careful attention to the number of unexcluded days remaining to avoid a violation.[5] Because pretrial motions are typically filed soon after the speedy trial clock starts to run, moreover, there will almost always be ample time remaining within which the government can bring the defendant to trial. What is more, there is some evidence that, in response to the passage of the Speedy Trial Act, prosecutors began conducting a substantial portion of their case before indictment, leaving less to accomplish during the allotted 70 days. See Linda M. Ariola et al., *The Speedy Trial Act: An Empirical Study*, 47 Fordham L. Rev. 713, 741–742 (1979). And the government points to no evidence suggesting that district courts in jurisdictions that have rejected the rule adopted below in fact "inappropriately" deny defense requests for additional time.

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[5] Some courts even require one or both of the parties to share their tally of excluded and unexcluded days at various points during the pretrial proceedings. See, *e.g.*, N.D. Cal. Crim. L.R. 47-2(c) (requiring the government to address the "Speedy Trial Act Implications" of any paper it files "concerning any matter to which an exclusion * * * may apply," and requiring the defendant to respond); D. Mass. L.R. 116.5(A)(5), 116.5(C)(8) (requiring the parties to address Speedy Trial Act exclusions in the initial status conference and file a joint memorandum again addressing exclusions before the final status conference).

III. The Government's Attempt To Evade The Act's Legislative History Is Unavailing

The government briefly contends that the legislative history of the Speedy Trial Act supports the automatic exclusion of pretrial motion preparation time. The government is wrong.

1. The government first argues that the express rejection of a proposal to include pretrial motion preparation time within the automatic exclusion in subparagraph (D) says nothing about the question presented here. See U.S. Br. 33–35. Of course, that assertion assumes the very conclusion that the government hopes to prove—*i.e.*, that additional time requested by the defense should be treated differently. Moreover, it could hardly have been unknown to Congress when it rejected an exclusion for *all* preparation time that it was also rejecting an exclusion for defendant-requested, additional preparation time.

The government next claims that the Senate Judiciary Committee Report "expressed opposition to the automatic exclusion of *all* time *routinely allotted* for motions preparation"—it said nothing about "additional" time. See U.S. Br. 34–35. In fact, the Committee Report rejected an automatic exclusion for preparation time "*in routine cases*," S. Rep. No. 96-212, at 34 (emphasis added), not preparation time that is "*routinely allotted*." In other words, the Senate Committee determined that, in most cases, the parties should be able to prepare pretrial motions within the Speedy Trial Act's limits. In non-routine cases, exclusion remains an option under subsection (h)(7). There is no room in this framework for an

automatic exclusion of pretrial motion preparation time.

2. The government suggests that its proposed exclusion is in accord with the legislative history because "[t]he legislative history is silent on which provision of the [Speedy Trial Act] most appropriately accommodates grants of additional motions preparation time in non-complex cases." U.S. Br. 37.[6] But as the government admits (see *id.* at 35–36), the legislative history *does* say quite clearly that Congress amended the portion of (h)(7) that deals with complex cases in order "to address, in part, the preparation time problem regarding *pretrial motions*," S. Rep. 96-212, at 34 (emphasis added) (discussing what is now § 3161(h)(7)(B)(ii)). Why would Congress need to do that if it intended for that time to be excluded automatically under subsection (h)(1)? The government has no answer.

3. Despite its eagerness to retreat from the Act's legislative history, the government invokes it to argue that Congress "forcefully disapproved of narrow and inflexible interpretations of the automatic exclusion provisions akin to the interpretation that petitioner proposes here." U.S. Br. 37. As explained in our opening brief (at 31–32), Congress was concerned in 1979 that the original Speedy Trial Act exclusions had been interpreted too narrowly, see, *e.g.*, S. Rep. No. 96-212, at 18, 26; H.R. Rep. No. 96-390 (1979), at 10. For that reason, it expanded them—subparagraph (D) included—so that

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[6] Note that the government's proposed exclusion has again been narrowed, this time to only non-complex cases. Compare with pp. 3–4, *supra*.

even when interpreted "strictly," they would have the desired scope. See, *e.g.*, *Henderson*, 476 U.S. at 327–328; S. Rep. No. 96-212, at 33. The government points to no evidence suggesting that Congress believed its revisions of the enumerated exclusions were insufficient to address its concerns and would therefore favor an interpretation of the general standard that swallows the limitations set forth in subparagraph (D).

The fact remains that the Act's drafters were specifically asked—by the government, no less—to make pretrial motion preparation time subject to automatic exclusion. The drafters rejected that request as "unreasonable" and concluded that preparation time should be addressed on a case-by-case basis under (h)(7). S. Rep. No. 96-212, at 33–34. The government's bid to circumvent that clear choice should meet a similar fate.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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