No. 09-1498

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

JASON LOUIS TINKLENBERG,

Respondent.

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

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

Respondent Jason Louis Tinklenberg respectfully requests that this Court affirm the judgment of the court of appeals.

STATUTORY PROVISIONS INVOLVED

In addition to the provisions of the Speedy Trial Act set forth in the appendix to the Government's brief, this case involves Federal Rule of Criminal Procedure 45 and the portion of the Insanity Defense Reform Act found at 18 U.S.C. § 4247(b). Those provisions are set forth in the appendix to this brief.

STATEMENT OF THE CASE

Subject to various excludable periods of delay, the Speedy Trial Act of 1974 requires the federal government to commence a criminal trial within 70 days of charging or of the defendant's first appearance. There is no dispute that at least 64 "nonexcludable" days elapsed before respondent Jason Tinklenberg's trial began. The question in this case is whether six more nonexcludable days elapsed before trial, thus violating the Act. The Sixth Circuit correctly held that nine additional nonexcludable days elapsed during the two weeks before trial, while three motions were pending that did not delay the commencement of trial. But the Sixth Circuit erroneously rejected respondent's alternative arguments that more than six additional days also elapsed in relation to transporting him to competency examinations and conducting those examinations.

1. In January 2005, police officers in Kalamazoo, Michigan stopped respondent for driving with an

open rear door and an expired registration tag. Upon searching respondent's vehicle, the officers discovered a pistol, as well as Sudafed tablets and other materials used to manufacture methamphetamine. Respondent subequently consented to a search of his residence, where the officers found a shotgun and additional materials used for manufacturing methamphetamine.

2. A grand jury in the Western District of Michigan later indicted respondent for possession of firearms after having been convicted of a felony and for possession of materials used to manufacture methamphetamine. Respondent's initial appearance before a magistrate judge took place on October 31, 2005.

Two days later, the magistrate granted respondent's request for a mental competency examination, ordering – consistent with 18 U.S.C. § 4247(b) of the Insanity Defense Reform Act – that the examination be completed within a period "not to exceed 30 days." JA 105. On November 10, 2005, respondent was designated to the Metropolitan Correctional Center in Chicago for a competency evaluation. He arrived there 20 days later. He then had to wait another four months before the competency examination was actually conducted. Although the Government initially asserted the respondent was not cooperating with the effort to evaluate him, JA 108, it never offered any justification for the bulk of this delay, other than asserting without elaboration in a second motion for an extension of time that the facility needed additional time to do its job, JA 114. The facility's examining physician eventually found respondent

competent to stand trial, and the magistrate agreed. JA 117.

Shortly thereafter, respondent requested a second, independent competency evaluation. The magistrate granted this request, and the evaluation again took over 30 days (this time, over two extra weeks to complete. Pet. App. 4a. After the examination, the magistrate once again found respondent competent to stand trial. Pet. App. 4a. After six more weeks passed, the district court set a trial date of August 14, 2006. Pet. App. 4a.

In early August, the Government filed two "mundane" administrative motions, which the court noted, and the parties agreed, "would not affect the trial schedule." Pet. App. 20a. On August 1, the Government moved to conduct a video deposition of a witness, the public safety officer found the firearm and ammunition in respondent's vehicle, who could not attend trial. JA 139. On August 3, the district court granted this motion and directed the parties to "schedule the deposition posthaste so as not to delay trial," which the parties did. JA 145. Then, on August 8, the Government moved for formal permission to bring respondent's seized firearms into the courtroom as evidence during trial. JA 28, 147-48; Pet. App. 5a.[1] On August 10, the district court granted this motion as well. JA 149; Pet. App. 4a-5a. Respondent did not oppose either motion. As the

[1] Although the Government's motion is dated August 7, JA 147-48, the district court's docket sheet makes clear that it was not actually filed until August 8. JA 28; *see also* U.S. Br. 7 (using August 8 date).

parties had anticipated at the outset of the motions' filings (and as the district court had directed), neither motion caused any postponement of the trial, or ever threatened to do so.

On Friday, August 11, 2006, the last business day before trial, respondent moved to have the indictment dismissed on the ground that the 70-day period for commencing trial under the Speedy Trial Act had expired. There is no dispute that from respondent's initial appearance through July 31, 2006, 60 nonexcludable days elapsed. Pet. App. 15a; U.S. Br. 8. There also is no dispute that four more nonexcludable days elapsed between August 4 and August 7, 2006, when no pretrial motions were pending. Pet. App. 31a. Thus, at least 64 nonexcludable days had elapsed at the time respondent filed his motion to dismiss.

Respondent's motion suggested three independent reasons – each stemming from different subsections of Section 3161(h)(1) of the Act – why at least six more nonexcludable days had elapsed, thus violating the Act. First, Subsection (D) excludes "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." While two Government motions were pending for six days in August, no "delay result[ed] from" either of them in the sense that neither motion hindered pretrial preparations nor postponed when trial could begin. Second, Subsection (F) provides that "any time consumed in excess of ten days" in transporting a defendant to a place of examination "shall be presumed to be unreasonable" and thus nonexcludable. Yet it took 20 days, ten more than

this allotted amount, to transport respondent to his first competency examination. Third, while Subsection (A) excludes time resulting from conducting competency evaluations, 18 U.S.C. § 4247(b) of the Insanity Defense Reform Act requires such evaluations (save exceptions not relevant here) to be conducted within 30 days. Yet it took several months to conduct respondent's competency evaluations.

The district court rejected each of these three possibilities and denied respondent's motion to dismiss. Pet. App. 29a-36a. Trial began, as scheduled, on August 14. The jury found respondent guilty of all three charges. He was sentenced to 33 months in prison, to be followed by three years of supervised release.

3. The Sixth Circuit reversed, concluding that the time in which pretrial motions were pending in early August was nonexcludable under the Act. The court of appeals explained that the plain language of Subsection (D) – specifically the prefatory words "delay resulting from" – excludes the time in which pretrial motions are pending only where such motions cause, or are expected to cause, actual delay. Pet. App. 16a-17a, 20a. Given the "obvious understanding of the parties and the court [here] that the motions . . . would not affect the trial schedule," the court of appeals held that the time during the pendency of those motions was nonexcludable. Pet. App. 20a.

The court of appeals also held that neither of respondent's two arguments relating to the time it took to arrange and to conduct his competency evaluations warranted adding six or more

nonexcludable days. First, while agreeing with respondent that time beyond Subsection (F)'s ten-day allotment for transportation was unreasonable (indeed, the Government did not argue otherwise), the court of appeals determined that only two of the ten extra days it took to transport him were actually nonexcludable. Pet. App. 14a. Under Sixth Circuit precedent as of the time of the relevant proceedings here, Subsection (F)'s ten-day allotment did not count weekends and holidays, and the remaining eight of the ten extra days during which respondent awaited transportation were weekends and holidays (Veterans Day and Thanksgiving). Pet. App. 14a (citing *United States v. Bond*, 956 F.2d 628, 632 (6th Cir. 1992)).

Second, the Sixth Circuit held, again following circuit precedent, that the 30-day limit for conducting competency examinations under 18 U.S.C. § 4247(b) "does not limit the time period for a competency examination with respect to calculations under the Speedy Trial Act." Pet. App. 12a (quoting *United States v. Murphy*, 241 F.3d 447, 456 (6th Cir. 2001)). Accordingly, the court of appeals refused to render nonexcludable any of the days beyond 30 days during which the Government detained respondent awaiting his competency examinations, based on nothing more than an assertion that it needed more time.

4. The Government filed a petition seeking rehearing en banc, which the court of appeals denied without any judge requesting a vote on it. Pet. App. 37a.

5. This Court granted certiorari. 131 S. Ct. 62 (2010).

SUMMARY OF ARGUMENT

There are three independent reasons why at least six days, in addition to the 64 days that are not disputed here, elapsed from the speedy trial clock in this case, thus violating the Speedy Trial Act.

I. The Sixth Circuit correctly held that the speedy trial clock did not stop during the six days while the Government's two unopposed, administrative motions to bring evidence to court and to conduct a deposition were pending.

A. Subsection 3161(h)(1)(D) provides that the days during which pretrial motions are pending are excluded from the speedy trial count only if "delay result[s] from" the motions. The ordinary meaning of "delay" is a postponement or hinderance to progress. Consequently, motions (such as the ones at issue here) that the parties and the court know from the moment they are filed will not take up anyone's time do not stop the speedy trial clock. The structure of the Act reinforces this conclusion. The subsections of Section 3161(h)(1) list types of "proceedings" that toll the speedy trial clock *if the proceeding causes delay.* The purpose of these subsections, therefore, is to list types of proceedings covered by the Act, not to announce that any type of proceeding automatically constitutes delay.

B. There is no reason to depart from the plain meaning of Subsection (D). Prior precedent does not dictate any outcome here; in *Henderson v. United States*, 476 U.S. 321 (1986), this Court took it as a given that the pretrial motions at issue postponed when trial could begin, and *Bloate v. United States*, 130 S. Ct. 1345 (2010), did not even involve the

pendency of a pretrial motion. The legislative history of the Speedy Trial Act does not directly address the issue either, and the isolated snippets the Government quotes seem to assume the pretrial motions toll the clock only when they consume time and resources.

Finally, the purpose and functionality of the Act are best served by declining to exclude from the speedy trial count time during the pendency of unopposed, administrative motions. Parties will almost always know, as they did here, as soon as a motion is filed whether the motion will hinder pretrial preparations. In the rare instance in which the Government is forced to guess and guesses wrong, the Act accounts for this possibility by providing that the indictment will typically be dismissed without prejudice, allowing the Government promptly to re-indict the defendant. On the other hand, if the Government were correct that *every* pretrial motion *automatically* tolled the speedy trial clock during its pendency, then Subsection (D) would thwart the Act's objective of guaranteeing speedy justice by stopping the clock for no good reason. Worse yet, the Government's categorical rule would lead to arbitrary results depending on whether motions are decided promptly or tabled and would allow the Government to manipulate the clock by filing motions regarding issues that could easily be handled orally at trial.

II. Eight nonexcludable days beyond those counted by the court of appeals elapsed while respondent was awaiting transportation to the facility where his competency evaluation took place. Subsection 3161(h)(1)(F) presumes that time beyond

"ten days" for transportation is unreasonable. Contrary to the Sixth Circuit's holding that this provision, at the time of this case's pretrial proceedings, excluded weekends and holidays (and thus that only two of the ten extra days it took to transport respondent were excludable), this provision has always counted calendar days. This Court has treated other provisions of the Speedy Trial Act as counting calendar days, and the common law rule is that statutory time periods beyond one week count calendar days unless they explicitly provide otherwise. Furthermore, some ten-day time periods in the U.S. Code expressly exclude weekends and holidays, whereas some do not. This makes it clear that when Congress wishes to exclude weekends and holidays, it does so expressly.

Nothing about Fed. R. Crim. P. 45(a) alters this analysis. Although that provision formerly excluded weekends and holidays from time periods less than 11 days (it no longer does so), it did not apply by its terms to statutory time periods. The Rule's amendment history and a comparison to other federal rules of procedure confirm that this omission was intentional and must be given meaning.

III. Several nonexcludable months beyond those counted by the court of appeals elapsed while respondent was at the designated facility awaiting his competency evaluations. Subsection 3161(h)(1)(A) excludes time relating to such evaluations, but 18 U.S.C. § 4247(b) of the Insanity Defense Reform Act requires such evaluations to be conducted within 30 days. Because these two provisions of Title 18 of the U.S. Code share a common objective – ensuring speedy competency

evaluations – they should be read to complement each other.

At the very least, the Sixth Circuit's refusal to incorporate Section 4247(b) into the Speedy Trial Act cannot be reconciled with its decision simultaneously to incorporate Criminal Rule 45(a). If the Speedy Trial Act does not incorporate the counting rule Section 4247(b), then there is basis whatsoever for incorporating the counting rule in former Criminal Rule 45(a) – a legal provision of inferior authority that the Act did not even reference and that by its own express terms did not apply to statutes. That insight alone is enough to compel affirmance.

ARGUMENT

The "manifest purpose" of the Speedy Trial Act, as its name indicates, is to "ensur[e] speedy trials." *Bloate v. United States*, 130 S. Ct. 1345, 1355 (2010). In other words, the Act is designed to "quantify and make effective" a vital "Sixth Amendment right." *Henderson v. United States*, 476 U.S. 321, 333 (1986) (White, J., dissenting). Speedy trials are vital in order to "(i) to prevent oppressive pretrial incarceration, (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Barker v. Wingo*, 407 U.S. 514, 532 (1972); *accord Smith v. Hooey*, 393 U.S. 374, 377-78 (1969); *United States v. Ewell*, 383 U.S. 116, 120 (1966). The "disadvantages for the accused who cannot obtain his release are even more serious." *Barker*, 407 U.S. at 532. "The time spent in jail awaiting trial . . . often means loss of a job; it disrupts family life; and it enforces idleness," all while "living

under a cloud of anxiety, suspicion, and often hostility." *Id.* at 532-33.

"[T]he Act serves not only to protect defendants, but also to vindicate the public interest in the swift administration of justice." *Bloate*, 130 S. Ct. at 1356; *accord Zedner v. United States*, 547 U.S. 489, 501 (2006). A court's failure to provide a speedy trial can create "a large backlog of cases," encouraging plea bargaining in cases that should be tried. *Barker*, 407 U.S. at 519. In addition, when defendants are detained awaiting trial for such lengthy periods, society must foot the bill for the detention while it "lose[s] wages which might have been earned, and it must often support families of incarcerated breadwinners." *Id.* at 521. Jails also become increasingly "overcrowd[ed]." *Id.* at 520.

With these various realities "firmly in mind," *Zedner*, 547 U.S. at 501, the Act provides that trial "shall commence within seventy days" from the defendant's indictment or first appearance, whichever is later. 18 U.S.C. § 3161(c)(1). At the same time, the Act recognizes that "there are valid reasons for greater delay in particular cases." *Zedner*, 547 U.S. at 497. The Act therefore excludes specified "periods of delay" from the Act's 70-day limit, among them "[a]ny period of delay resulting from other proceedings concerning the defendant." 18 U.S.C. § 3161(h)(1).

Respondent was kept in federal custody for 285 days from his first appearance until the start of his trial. There is no dispute that at least 64 of these 285 days are not excluded from the speedy trial clock (60 days from respondent's first appearance through July 31, 2006, U.S. Br. 8; Pet. App. 15a, and four days

from August 4th through August 7th when no pretrial motion was pending and no other reason for tolling existed, U.S. Br. 7-8; Pet. App. 15a). This case turns, therefore, on whether six of the 221 remaining days that elapsed before trial began were nonexcludable.

There are three reasons why six or more such days were nonexcludable. First, the court of appeals correctly held that six nonexcludable days elapsed during which two mundane, unopposed pretrial motions that the Government filed in the days leading up to trial were pending. Second, the court of appeals erroneously excluded eight days (in excess of the ten calendar days that the Act presumptively allows) during which respondent was being transported for a competency evaluation. Third, the court of appeals erroneously excluded several weeks of time during which respondent was awaiting competency evaluations, all of which exceeded the 30-day limit in Insanity Defense Reform Act.[2]

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[2] The Government's petition for certiorari raised only the first of these three issues. But in order to reverse, this Court would need to reach the second and third issues because the court of appeals reached them; they supply alternate grounds for affirmance; and respondent preserved them in his brief in opposition pursuant to Rule 15.2. *See, e.g.*, *Zedner*, 547 U.S. at 503 (considering "the Government's alternative grounds in support of the judgment below" in Speedy Trial Act case).

I. The Speedy Trial Act Does Not Exclude The Time During Which The Government's Two Unopposed, Administrative Pretrial Motions Were Pending.

Even though the two unopposed, administrative pretrial motions the Government filed in the days leading up to trial did not hinder pretrial preparations or postpone when trial could begin, the Government argues that Subsection 3161(h)(D) of the Act requires exclusion of the six days during which the motions were pending because "the filing of *any* pretrial motion *automatically* stops the speedy trial clock." U.S. Br. 16 (emphasis added).[3] In so arguing, the Government takes pains to note that "the courts of appeals had uniformly" adopted such an automatic rule of exclusion until the Sixth Circuit's decision here. U.S. Br. 16; *accord id.* 9, 11. As past decisions from this Court demonstrate, however, such a prior consensus matters only insofar as the reasoning in the prior opinions is persuasive. *Compare, e.g.*, *United States v. Gaudin*, 28 F.3d 943, 955 (9th Cir. 1994) (en banc) (Kozinski, J., dissenting) (noting that Ninth Circuit decision created a conflict with "every circuit except the Federal," which did not have jurisdiction over the issue), *with* 515 U.S. 506 (1995)

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[3] The court of appeals also considered whether the time during the pendency of a third motion, respondent's motion to dismiss for a violation of the Speedy Trial Act, should be excluded. Pet. App. 20a. But because including the time during the pendency of the Government's two administrative pretrial motions would be sufficient to violate the Act, there is no need for this Court to consider whether the time during which respondent's Speedy Trial motion was pending was excludable.

(affirming decision by 9-0 vote based on plain text of the statute). Here, the reasoning in the prior opinions is not persuasive.

The text of the Speedy Trial Act could not be clearer: it excludes from the speedy trial clock only periods of "delay." Subsection 3161(h)(1)(D) thus does not exclude periods of time during which mundane administrative pretrial motions are pending. Furthermore, neither this Court's precedent, nor the Act's legislative history, nor alleged administrability concerns warrant departing from Subsection (D)'s plain meaning.

A. The Text And Structure Of Subsection 3161(h)(1)(D) Demonstrate That It Does Not Exclude Periods During The Pendency Of Unopposed, Administrative Petrial Motions.

Subsection (D) excludes from the Act's 70-day rule "[a]ny period of delay resulting from other proceedings concerning the defendant, including . . . delay resulting from pretrial motions, from the time of filing through the conclusion of the hearing on, or other prompt disposition of, such motion." 18 U.S.C. § 3161(h)(1)(D). This provision's text and structure dictate that it does not categorically exclude the time between the filing of every pretrial motion and its disposition.

1. Text

a. *"Delay."* The key word in the provisions at issue is "delay." The introductory text of Section 3161(h) excludes "periods of *delay*," 18 U.S.C. § 3161(h) (emphasis added). The word "delay" is repeated in Section 3161(h)(1) and in Subsection

3161(h)(1)(D). The ordinary meaning of "delay" is "to postpone until a later time;" or "to cause to be later or slower than expected or desired." The American Heritage Dictionary 480 (4th ed. 2000); *see also* Shorter Oxford English Dictionary 635 (6th ed. 2007) (a delay is a "[h]indrance to progress"). The legal meaning of the term likewise is "[t]he period during which something is postponed or slowed." Black's Law Dictionary 491 (9th ed. 2009). Accordingly, as the court of appeals noted (Pet. App. 17a), "[t]here is no conceivable way" to read the language in Subsection (D) as allowing a court to exclude the time during which a pretrial motion was pending unless the motion postponed, or slowed preparation for, trial.

The Government contends, however, that another "common meaning" of the word "delay" is simply "'[t]he interval of time between two events.'" U.S. Br. 17 (quoting the fourth of the four definitions in The American Heritage Dictionary 480 (4th ed. 2006)). The most sensible reading of this definition, consistent with those listed above, is that it implicitly assumes that the second event begins later than was previously hoped or was possible. But even if the American Heritage Dictionary – unlike any other leading dictionary – actually advances a definition of "delay" that lacks any connotation of a postponement or hindrance, it would not matter.[4] As this Court

[4] The closest any dictionary besides the American Heritage comes to the Government's desired meaning of "delay" is defining the term as "the time during which something is delayed." Webster's Third New International Dictionary of the English Language 595 (1971); *accord* The Random House

repeatedly has held, "[w]hen terms in a statute are undefined, we give them their ordinary meaning." *Hamilton v. Lanning*, 130 S. Ct. 2464, 2471 (2010) (quoting *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995)); *see also Gross v. FBL Financial Servs.*, 129 S. Ct. 2343, 2350 (2009) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.") (quotation and citation omitted). The ordinary meaning of "delay" plainly denotes something more than a mere interval of time; it indicates a postponement or hindrance concerning when an event can begin. If Congress had wished to exclude all time during the pendency of pretrial motions, it would have excluded "time" during the pendency of such motions, not "delay" resulting from them.

Implementing the ordinary definition of "delay" in the context of the Act, Subsection (D) excludes periods of time during which pretrial motions are pending only when those motions require trial to begin later than would otherwise be possible.[5]

Dictionary of the English Language 526 (2d ed. 1987). But as the Random House example of usage makes clear, this (circular) definition of "delay," like other more straightforward ones, assumes a postponement. *See* The Random House Dictionary at 526 ("The ballet performance began after a half-hour delay.").

[5] Asking whether the motion causes "delay" in the sense that it requires trial to begin later than would otherwise be *possible* captures both (i) whether the motion actually "delay[s] trial" and (ii) whether it has "the potential to cause any such delay" – that is, whether it would have required trial to be

Unopposed, mundane, administrative motions do not satisfy this test, for they do not impede any party's preparation for trial or consume any judicial resources to resolve.

b. *Surrounding language.* Two other pieces of language that frame Subsection (D) confirm this analysis.

i. Section 3161(h)(1) excludes delay "resulting from" other proceedings, and Subsection (D) excludes time "resulting from" pretrial motions. The phrase "resulting from" underscores that Subsection (D) excludes periods of delay that occur *as a consequence of* pretrial motions, not merely the time during which such motions are pending. As this Court has explained, "[o]n its face, subsection [(D)] excludes '[a]ny period of delay' *caused by* 'any pretrial motion.'" *Henderson v. United States*, 476 U.S. 321, 326 (1986) (emphasis added); *see also Bloate* 130 S. Ct. at 1352 n.9 (accepting that the phrase "resulting from" means "as a consequence of"); *id.* at 1361 (Alito, J., dissenting) ("The phrase 'resulting from' means 'proceed[ing], spring[ing], or aris[ing] as a consequence, effect, or conclusion.'" (quoting Webster's Third New International Dictionary 1937 (1971)).

The Government's reading of Subsection (D), by contrast, is unable to give any intelligible meaning to the phrase "resulting from." According to the

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postponed had it been scheduled earlier. Pet. App. 16a. It thus avoids the formalism of asking merely "whether the district court formally moves the trial date." U.S. Br. 38.

Government, "'delay resulting from' a pretrial motion is the period of time between the filing of the motion and its disposition, *during which the speedy trial clock [is] stopped*." U.S. Br. 18 (emphasis added) (citation omitted). In this formulation, the Government actually concedes that "delay" requires postponement, but contends that what must be postponed is the *statutory deadline* for starting trial rather than the ability to start trial itself. This is completely circular. The whole point of applying Subsection (D) – like the other subsections of Section 3161(h)(1) – is to determine whether to exclude a period of time from the Act's 70-day time period. 18 U.S.C. § 3161(h). One therefore cannot assume in applying that Subsection that the "the speedy trial clock [is already] stopped." U.S. Br. 18.

In much the same way, the Government errs in claiming that Subsection (D) "defines" a motion's filing and disposition as "the starting and ending points" of an excluded period of time, irrespective of whether the pretrial motion results in any actual postponement. U.S. Br. 17. As this Court made clear last Term in *Bloate*, the filing and disposition of a motion simply demarcate *limits* on the delays that are excluded pursuant to Subsection (D). Delay that takes place between a motion's filing and its disposition is excluded pursuant to Subsection 3161(h)(1)(D), *Bloate*, 130 S. Ct. at 1353, while delay that occurs before a motion's filing or after its disposition may be excluded only pursuant to Section 3161(h)(7) on findings that the "ends of justice" would be served, *Bloate*, 130 S. Ct. at 1357-58. In either instance, however, the statute excludes only periods of "delay."

ii. Section 3161(h)(1) leads into Subsection (D) by providing that the Act excludes "any" period of delay resulting from other proceedings concerning the defendant. Congress' use of the introductory word "any," instead of the definite article "the," underscores the conditional nature of the exclusion in Subsection (D). It will not always be the case that other proceedings will result in a postponement of when trial could begin; only when they do is there be a reason for excluding time from the speedy trial clock.

This distinction between the import of the words "any" and "the" is reinforced by other provisions of the U.S. Code. The Code uses the phrase "*the* period of delay resulting from" in contexts where delay would necessarily occur: for example, when an intervening period of notice and comment would invariably postpone the subsequent public release of information.[6] In contrast, the Code uses the phrase

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[6] *See, e.g.*, 15 U.S.C. § 2217(4) (postponing the release of information pending a period of notice and comment "if the delay resulting from such notice and opportunity for comment would not be detrimental to health and safety"); 33 U.S.C. § 1513(b)(4) (postponing the release of information pending a period of notice and comment "if the delay resulting from such notice and opportunity for comment would not be detrimental to the public health and safety"); 42 U.S.C. § 9122(b)(1)(B) (postponing the release of information pending a waiting period after notice to the parties "unless the delay resulting from such notice would be detrimental to the public health or safety or the environment"); 49 U.S.C. § 1114(b)(1)(D) (postponing the release of information pending a period of notice and comment "if the delay resulting from notice and opportunity for comment would not be detrimental to health and safety").

"*any* delay resulting from" or "*a* period of delay resulting from" in contexts where it is uncertain whether postponement will result.[7] The only way to give meaning to these differing qualifiers before the word "delay" is to recognize that delay automatically results from the event described only when Congress used the phrase "the delay."

2. Structure

The structure of Section 3161(h)(1) confirms that Subsection (D) does not automatically exclude time from the speedy trial clock during the pendency of every pretrial motion.

Section 3161(h)(1) excludes "[a]ny period of delay resulting from *other proceedings* concerning the defendant, including but not limited to" the periods of delay listed in Subsections (A) through (H). 18 U.S.C. § 3161(h)(1) (emphasis added). Subsections (A) through (H) illustrate the types of "other proceedings" referenced in Section 3161(h)(1). Accordingly, as this Court explained last Term, Subsection (D) "governs the automatic excludability of delays 'resulting' from *a specific category of 'proceedings concerning the defendant*,' namely,

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[7] *See, e.g.*, 15 U.S.C. § 78o-5(b)(2)(C)(iii)(II) (requiring inter-agency consultation "unless the appropriate regulatory agency determines that any delay resulting from such consultation would be inconsistent with ensuring the financial and operational condition of the government securities broker"); 49 U.S.C. § 21102(a)(4) (exempting from a limit on the monthly hours worked by a rail worker "a delay resulting from a cause unknown and unforeseeable to a railroad carrier or its officer or agent in charge of the employee when the employee left a terminal").

proceedings involving pretrial motions." *Bloate*, 130 S. Ct. at 1352-53 (emphasis added) (footnote omitted); *see also* S. Rep. No. 1021, 93d Cong., 2d Sess. at 36 (1974) ("*1974 Senate Report*") ("[T]he committee has enumerated in the text of the bill examples of what is meant by 'proceedings concerning the defendant.' The list is not meant to be exhaustive. It is representative of procedures of which a defendant might legitimately seek to take advantage for the purpose of pursuing his defense.")

Put another way, the function of Subsection (D) is not – as the Government would have it (U.S. Br. 25) – to specify a type of *time period* that the Act categorically excludes. Rather, the point of the Subsection is to identify a particular type of "other proceeding[]," – namely, a pretrial motion – that gives rise to excludable time *when it causes delay*.

The Government tries to avoid this straightforward structural analysis in two ways, but neither works. First, the Government argues that whereas Section 3161(h)(7) excludes delay "only if the district court makes certain findings" concerning the ends of justice, Subsection (D) "is automatic and applies 'without district court findings.'" U.S. Br. 24-25 (quoting *Bloate*, 130 S. Ct. at 1351). It is true that a district court applying Subsection (D) should not conduct any reasonableness analysis or otherwise make findings concerning the ends of justice. But it does not follow – and this Court never suggested in *Bloate* – that a court applying Subsection (D) need not even determine whether a pretrial motion caused any actual delay.

Second, the Government contends that Subsection (D) cannot require actual delay because

"[i]n calculating the excludable time attributable to other proceedings concerning the defendant, . . . courts generally calculate the excludable time based on the duration of the proceeding itself." U.S. Br. 28. But nothing in the Sixth Circuit's holding is inconsistent with this method of calculating how much time to exclude when another proceeding concerning the defendant results in delay. That holding simply requires the Government to demonstrate that a pretrial motion postponed or hindered when trial could begin. This Court need not address how much time to exclude if a motion hinders pretrial preparations, because the parties agree that the mundane motions in this case did not postpone when trial could begin.

At any rate, there is good reason to believe that, if a pretrial motion causes delay, the terms of Subsection (D) require a court to exclude the entire time "from the filing of the motion through the hearing on, or other prompt disposition of, such motion." 18 U.S.C. § 3161(h)(1)(D). In other words, just as with other proceedings concerning the defendant, the threshold question in implementing Subsection (D) is whether the pendency of a pretrial motion resulted in any delay. If it did, then the duration of the whole proceeding (that is, the entire time the motion was pending) is excluded.

B. There Is No Reason To Depart From The Plain Meaning Of Subsection (D) In Light Of This Court's Precedent, The Act's Legislative History, Or Alleged Administrability Concerns.

The Government's brief quickly moves past statutory text to argue that precedent, the Act's legislative history, and policy considerations require this Court to adopt its rule automatically excluding time during which all pretrial motions are pending, even if those motions cause no delay at all. *Compare* U.S. Br. 16-20 *with* 20-39. But when the text of a statute is unambiguous, "judicial inquiry is complete." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)); *see also Caminetti v. United States*, 242 U.S. 470, 490 (1917) ("If the words are plain, they give meaning to the act, and it is neither the duty nor the privilege of the courts to enter speculative fields in search of a different meaning."). And here, the text of Subsection (D) simply does not automatically exclude time during the pendency of every pretrial motion. But even if Subsection (D) were at all ambiguous, none of the Government's arguments warrants deviating from what the court of appeals properly perceived is the far better reading of the Subsection.

1. Precedent

The Government contends that this Court's decisions in *Henderson v. United States*, 476 U.S. 321 (1986), and *Bloate v. United States*, 130 S. Ct. 1345 (2010), establish that "the [Subsection (D)] exclusion applies *automatically* upon the filing of any

pretrial motion, without the need for a finding that the motion affected or could have affected the trial schedule." U.S. Br. 20 (emphasis added). These cases, however, do not so hold.

In *Henderson*, this Court ruled that Subsection (D) excludes periods of delay resulting from pretrial motions even if the delay they caused was not "reasonably necessary." 476 U.S. at 330. But, contrary to the Government's contention, nothing in *Henderson* suggests that Subsection (D) excludes time during the pendency of motions even if the motions do not hinder pretrial preparation or postpone when trial could begin. Rather, this Court took it as a given that the motions at issue there *had caused such delay*, for the motions had caused the trial court to grant a continuance and to push back trial several months. *Henderson*, 476 U.S. at 324-25.

This Court confirmed the limited reach of *Henderson*'s holding last Term in *Bloate v. United States*, 130 S. Ct. 1345 (2010). In the course of holding that delay associated with preparing pretrial motions is not excludable under Subsection (D), this Court explained that the excludability of delay arising from the pendency of pretrial motions is "automatic" simply "in the sense that a district court must exclude such delay from a Speedy Trial Act calculation without any further analysis as to whether the benefit of the delay outweighs its cost." *Id.* at 1349 n.1. In other words, "[t]he word 'automatic'" is merely "a useful shorthand" to denote that once a pretrial motion has caused delay, a court must exclude the time during which it was pending. *Id.* Just as in *Henderson*, this explanation presumes that Subsection (D) excludes time during the

pendency of pretrial motions only if the motions postponed when trial could begin.

2. Legislative History

Just last Term, the Government reminded this Court that "the [Speedy Trial] Act's legislative history, although comprehensive, is often contradictory and unhelpful." Brief for United States at 33 n.9, *Bloate v. United States* (No. 08-728). Indeed, this Court has previously recognized that the Act's legislative history is a poor guide to the statute's meaning. *See Henderson*, 476 U.S. at 330 (rejecting a portion of legislative history as "at odds with the plain language of the statute" and "contrary to other passages contained in both the House and Senate Reports"); *United States v. Taylor*, 487 U.S. 326, 335 n.8 (1988) (finding portions of the Act's legislative history "largely unhelpful"); *see also Rojas-Contreras*, 474 U.S. 231, 237 (1985) (Blackmun, J., concurring in the judgment) (same). The Government nonetheless contends here that the Act's legislative history "indicates that Congress used the phrase 'delay resulting from' to refer to the time consumed by a proceeding or an event that triggers an exclusion, not the time during which trial might be postponed." U.S. Br. 29. The legislative history does not support that conclusion.

The Government's argument hinges primarily on its assertion that the 1974 Senate Report concerning the Act "equated the statutory phrase 'delay resulting from' with the time *consumed* by the proceedings themselves, rather than any time during which trial might be postponed." U.S. Br. 30 (emphasis added). But a proceeding concerning the defendant

"consumes" time only by occupying the time of the parties or by drawing on judicial resources, thereby postponing when trial can begin. Thus, to the extent that isolated snippets of the legislative history may appear to "equate" the phrase "delay resulting from" with the period of time during which the proceeding was taking place, the snippets simply presuppose a finding that the periods of time during which proceedings were taking place impeded pretrial preparations or postponed when trial could begin.

Insofar as the legislative history provides any guidance, it suggests that Section 3161(h)(1) excludes periods of time during which other proceedings are taking place only if those proceedings hinder pretrial preparation or postpone when the subsequent trial can begin. The 1974 Senate Report explained that Section 3161(h)(1) excludes "[d]elays *caused by* proceedings relating to the defendant such as hearings on competency to stand trial, hearings on pretrial motions, trials on other charges, and interlocutory appeals." *1974 Senate Report* at 35 (emphasis added). This causation language indicates that the Act treats the concept of "delay" as a meaningful prerequisite to excluding time from the speedy trial clock.

Nothing in the legislative history of the 1979 amendments to the Speedy Trial Act suggests that Congress meant to disturb this understanding of "delay." Rather, that legislative history reinforces that Congress envisioned automatically excluding "the entire period of time" (U.S. Br. 32) during which

pretrial motions were pending only when those motions "consumed" time. S. Rep. No. 212, 96th Cong., 1st Sess., at 9 (1979) ("*1979 Senate Report*").[8] As the 1979 Senate Report explained, "it would indeed be anomalous to permit the defendant to benefit from delay proper[l]y undertaken to protect his interests in a fair adjudication of the charges against him by allowing dismissal without exclusion of that time." *Id.* A defendant could "benefit" from such "delay" only if pretrial motions pushed the date on which trial could begin past the original expiration date of the speedy trial clock.

3. Administrability

Finally, the Government asserts that "the STA cannot operate efficiently and practicably" under a rule excluding only actual delays because "[t]he government, the criminal defendant, and the district court must be able to know, as each day passes, whether that day counts toward the 70-day deadline for commencing trial," and an "actual delay" requirement would make that impossible. U.S. Br.

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[8] Congress enlarged Subsection (D)'s exclusion to "include, as excludable time, the entire period of time from the date of the filing to the conclusion of hearings on, or other prompt disposition of, pretrial motions," *1979 Senate Report* at 33, to address a very specific problem: that some courts had given the Subsection "an unduly restrictive interpretation . . . as extending only to the actual time consumed in a pretrial hearing" itself, H. Rep. No. 390, 96th Cong., 1st Sess., at 11 (1979). The amendments made clear that when a pretrial motion causes delay, a court may excludes time beyond the duration of the hearing itself.

34-35.[9] But once the ordinary meaning of a statute is clear, this Court lacks the authority to rewrite the statute to avoid "practical problems" it perceives with its implementation. *Lewis v. City of Chicago*, 130 S. Ct. 2191, 2200 (2010). If it turns out the statute's language imposes "unintended" administrative burdens, that reality "is a problem for Congress, not one that federal courts can fix." *Id.*

In any event, Subsection (D)'s "actual delay" prerequisite is eminently sensible and fully workable. Indeed, it is the Government's proposed "automatic exclusion" rule that would frustrate the Act's purposes and complicate its functioning.

a. Excluding only actual delays will not "greatly complicate" (U.S. Br. 36) trial courts' administration of the Act. Determining whether a motion will result in delay is typically simple at the time of its filing. Some pretrial motions (for example, unopposed

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[9] The Government advances two other administrability arguments, but each is based on a misapprehension of the Sixth Circuit's holding and that are not implicated by respondent's position here. First, the Government argues that defining "delay" strictly according to whether a district court changes a previously set trial date would be overly formalistic. U.S. Br. 36. Respondent does not advocate such a definition. Second, the Government contends that "[r]equiring individualized determinations whether a particular motion actually caused or threatened postponement of the trial would also 'force courts to resolve intractable causation issues'" because it would require courts to decide how much of a given delay was attributable to the pendency of a motion, as opposed to other proceedings. U.S. Br. 37 (citation omitted). As explained above, however, respondent's interpretation of Subsection (D) does not require such analysis. *See supra* at 21-22.

motions for the separation of witnesses or joint motions to set a pretrial conference date), are so administrative in nature and so clearly will not consume anyone's time that it will be obvious to all that pretrial preparations can continue uninterrupted. Other motions (for example, motions to suppress or other motions requiring evidentiary hearings) will plainly consume the parties' and trial court's time, and thus it will be apparent from the time they are filed that they will result in delay.

A trial court can further assist the parties in tracking the speedy trial clock by noting on the record, as was done in the case, whether the motion will result in delay. JA 145 (telling parties that the motion would "not . . . delay trial"). Indeed, since the Sixth Circuit decided this case, district courts have shown themselves perfectly willing and able to make such prospective determinations. *See, e.g.*, *United States v. Gump*, No. 3:10-CR-94, 2010 WL 3655981, at *2 (E.D. Tenn. Sept. 14, 2010) (finding "that the Defendants' motion is of such a nature that the time required to determine the issues creates excludable time" because "[t]he Court will need time to hear and rule upon the motion"); *United States v. Sutton*, No. 3:09-CR-139, 2009 WL 5196592, at *1 (E.D. Tenn. Dec. 22, 2009) (same); *United States v. Jerdine*, No. 1:08-CR-481, 2009 WL 4906564, at *5 (N.D. Ohio Dec. 18, 2009) (same); *United States v. Mayes*, No. 3:09-CR-129, 2009 WL 4784000, at *1 (E.D. Tenn. Dec. 8, 2009) (same). Parties likewise can eliminate any doubts regarding the speedy trial clock by entering into stipulations regarding whether the time during which a motion is pending will be excluded.

In any event, the Government is simply wrong that parties and the court "*must* be able to know, as each day passes, whether that day counts toward the 70-day deadline for commencing trial." U.S. Br. 34-35 (emphasis added). District and appellate courts already routinely make retrospective determinations concerning the speedy trial clock, and properly so. Subsection 3161(h)(1)(F), for instance, excludes time beyond ten days for transportation relating to competency hearings only if such delay is "[]reasonable." This reasonableness standard obviously requires post hoc determinations. *See, e.g.*, *United States v. Dehart*, No. 3:10-250, 2010 WL 4363012, at *2-3 (M.D. Tenn. Oct. 27, 2010). Subsection 3161(h)(1)(H) also requires retrospective determinations. It excludes delay relating to proceedings being taken under advisement only when the delay was "reasonably attributable" to such proceedings. The same type of inquiry is possible here. When necessary, trial courts can determine retrospectively whether the pretrial motions resulted in delay. *See, e.g.*, *United States v. Johnson*, 09-20264, 2010 WL 779284, at *6 (E.D. Mich. Mar. 8, 2010) (finding that defense counsel's motion to withdraw had resulted in delay because "the defendant had asked [defense counsel] not to do anything on the case because the defendant wanted a new lawyer").

The dismissal provision of the Act removes any remaining doubt that Congress anticipated – and accounted for – the fact that parties would sometimes harbor uncertainty regarding the Act's clock at any given moment and that courts would sometimes be required to make retrospective determinations

concerning whether certain periods of time were excluded. Under the Act's dismissal provision, courts may dismiss indictments for violations of the Act "with or without prejudice." 18 U.S.C. § 3162(a)(1). In making such determinations, district courts must weigh "the seriousness of the offense; *the facts and circumstances of the case which led to the dismissal*; and the impact of a reprosecution on the administration of this chapter and on the administration of justice." *Id.* (emphasis added). This weighing process overwhelmingly yields dismissals without prejudice.[10]

Of particular import here, courts typically hold that dismissal without prejudice is appropriate when the Government reasonably believed that the Act's 70-day time period had not expired. *See, e.g.*, *United States v. Cano-Silva*, 402 F.3d 1031, 1036 (10th Cir. 2005) (dismissal without prejudice proper when violation is "inadverten[t]"). And "[w]hen an indictment is dismissed without prejudice, the prosecutor may of course seek – and in the great majority of cases will be able to obtain – a new indictment, for even if 'the period prescribed by the applicable statute of limitations has expired, a new indictment may be returned . . . within six calendar

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[10] For example, from July 1, 1991, to September 30, 1998, 144 of the 177 Speedy Trial Act dismissals in federal courts for violations of the 70-day limit were without prejudice, a rate of 81%. See Judicial Business of the United States Courts, Report of the Director, Administrative Offices of the United States, Table 10 (1992-93) and Table S-13 (1994-98). The Report no longer compiles Speedy Trial dismissals, so more current data is unavailable.

months of the date of the dismissal.'" *Zedner*, 547 U.S. at 499 (quoting 18 U.S.C. § 3288).

This state of affairs cannot be squared with the Government's description of the Act. If the Government were correct that parties must always know, as each day passes, whether that day counts toward the Act's 70-day deadline for commencing trial, prosecutors would almost always know ahead of time whether they were violating the Act. As a result, practically all violations would be willful, and it would be hard to see why many, if any, cases should be dismissed without prejudice. *See Cano-Silva*, 402 F.3d at 1036 (dismissal with prejudice appropriate when violation is "intentional"); *United States v. Moss*, 217 F.3d 426, 435 (6th Cir. 2000) (Gilman, J., concurring in the judgment) (dismissal with prejudice was appropriate because of a "truly egregious and inexplicable violation of the Act"). Yet the relative rarity of such dismissals underscores that the Government usually is not aware of the speedy trial clock's expiration and that the Act's overall regime expressly accounts for this reality.

b. Far from being necessary for the orderly implementation of the Act, the Government's categorical rule would frustrate the Act. It is important to remember that the purpose of the Act is not, as the Government's brief suggests, to provide a counting mechanism untethered to any ultimate goal. Rather, the Act's purpose is to provide a statutory deadline in order to "vindicate the public interest in the swift administration of justice" by "ensuring speedy trials." *Bloate*, 130 S. Ct. at 1355-56; *see also supra* at 10-11. The exclusion of time during which pretrial motions are pending that everyone knows

will not postpone preparations for trial would frustrate the Act's true purpose. Worse yet, it would invite the Government to manipulate the speedy trial clock.

i. As this case illustrates, excluding the time during which mundane pretrial motions are pending would frustrate the Act's goal of speedy trials. Here, there is no question that if no pretrial motions had been filed in the days leading up to respondent's trial, the Act's clock would have expired before trial commenced. The Government's argument, therefore, depends on the proposition that by filing two unopposed, administrative motions that did not in any way impede the parties' preparation for trial or consume any judicial resources, Pet. App. 20a, it tolled the speedy trial clock. This makes no sense. The purpose of the Act's exclusions is to toll the clock when proceedings occur that postpone the time at which a trial could start. If, as here, there is "an obvious understanding of the parties and the court" that the proceedings (here, the Government's two motions) clearly fail to do that, Pet. App. 20a, the Act should not exclude any time relating to them.

Appreciating this point is necessary to faithfully implement the Act not only under the circumstances here, but also in the similar situation when the trial court tables a pretrial motion for resolution, if necessary, during trial. In the tabling scenario, the federal courts of appeals have held that the speedy trial clock continues to run while the motions are pending. *See United States v. Gambino*, 59 F.3d 353, 359 (2d Cir. 1995); *United States v. Clymer*, 25 F.3d 824, 830 (9th Cir. 1994). As the Second Circuit has explained, "Congress envisioned that the speedy trial

clock be tolled when the expenditure of judicial resources to decide the motion would interfere with the case expeditiously proceeding to trial, and not tolled when" the motion "does not [a]ffect a trial court's ability to proceed." *Gambino*, 59 F.3d at 359. Thus, when a pretrial motion does not "consume the court's time and attention" prior to trial, it does not give rise to excludable time. *Id.*; *see also Clymer*, 25 F.3d at 830 (time while motion is pending excluded "only when [delay] in some way results from the pendency of the motion"). Yet if the Government were correct that Subsection (D) categorically excludes "the 'period of time' between the filing of the motion and its disposition" (U.S. Br. 18), then every time a court tabled a motion, Subsection (D) would exclude the entire period of time from the filing of that motion to the beginning of trial. This would thwart the Act's speedy-trial goal by excluding time even though the proceeding "does not [a]ffect a trial court's ability to proceed." *Gambino*, 59 F.3d at 359.[11]

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[11] In its reply brief in support of certiorari, the Government tried to distinguish the tabling scenario from this case by arguing that when a district court tables a pretrial motion until trial, the court "[i]n effect . . . denie[s] the motion without prejudice," resubmitting it at trial. U.S. Reply Br. 4 (quotation and citation omitted). This assertion finds no support in reality. When a motion is tabled, it is *not* denied; it is taken under advisement for resolution at a later date. Thus, if a court grants a previously tabled motion, it simply grants the motion; it does not grant a motion for reconsideration of a denial of the original motion. At any rate, the Government's previous argument contravenes the argument it now makes that Subsection (D) "precisely defines the starting and ending points" of the time

ii. Worse yet, excluding all time during which a pretrial motion is pending, regardless of whether that motion results in delay, would enable busy federal prosecutors to file pretrial motions as pretexts to toll the speedy trial clock. Criminal litigation raises a multitude of evidentiary and other issues that are amenable to written pretrial motion practice, but that also can be fully dealt with, as necessary, through oral motions as the issues arise at trial. Under the Government's rule, every time the Government decides to file a written pretrial motion regarding an issue that could have been handled orally at trial, the filing, no matter how needless, would stop the speedy trial clock. This categorical rule would provide the Government with a ready means of stopping the speedy trial clock whenever it felt itself falling behind in its duty to push the case to trial.[12]

Recognizing this problem, some courts have refused to exclude time during the pendency of filings that are "part of a Government attempt to frustrate

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that must be excluded relating to pretrial motions as "the filing of the motion and its disposition." U.S. Br. 17-18.

[12] The Act provides for sanctions for government lawyers who file certain motions "solely for the purpose of delay." 18 U.S.C. § 3162(b)(2). But the Act does so only when a motion is "without merit." *Id.* The problem with filing a pretrial motion regarding a matter that should be handled orally at trial is not that the motion lacks merit; it is that the motion is so simple and so obviously *has* merit that it is unnecessary to file in advance of trial. Thus, the only possible way to deal with the problem that the Government's position raises is by properly construing Subsection (D) itself.

the operation of the Speedy Trial Act." *United States v. Hood*, 469 F.3d 7, 10 (1st Cir. 2006); *see also United States v. Brown*, 285 F.3d 959, 962 (11th Cir. 2002) ("If the government could extend the seventy-day period merely by filing a request to set a trial date," there would be "no teeth in the Speedy Trial Act."). But even assuming such a subjective backstop is susceptible of consistent application, it is incompatible with the Government's categorical rule that the filing of any motion automatically tolls the speedy trial clock. Even more to the point, such a judicially created doctrine is unnecessary to address the problem of filing pro forma motions in order to stop the speedy trial clock. The plain text of Subsection (D) already avoids this problem by refusing to exclude time during the pendency of pretrial motions that do not consume any time or require postponement of trial.

II. The Act Does Not Exclude Time Beyond Ten Calendar Days During Which Respondent Was Transported For His Competency Examinations.

While the Speedy Trial Act excludes "delay resulting from transportation of any defendant . . . to and from places of examination," "any time consumed in excess of *ten days* from the date [of] an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable." 18 U.S.C. § 3161(h)(1)(F) (emphasis added). The Sixth Circuit held (Pet. App. 13a), and the Government did not dispute in its petition or reply brief in support of certiorari, that this ten-day limitation applies to

examinations to assess the defendant's competency. Yet here 20 days passed from the order designating respondent for his first competency examination to his arrival at the facility. Pet. App. 14a. Further, the government has never argued that the extra time it took to perform this task was reasonable.

As a general rule, the various time periods specified in the Speedy Trial Act count *calendar* days. *See, e.g.*, *Henderson*, 476 U.S. at 323 (counting 70 calendar days from arraignment to trial under 18 U.S.C. § 3161(c)(1)); *United States v. Rojas-Contreras*, 474 U.S. 231, 236 (1985) (counting 30 calendar days under 18 U.S.C. § 3161(c)(2)). And the common-law rule with respect to computing statutory time periods in excess of seven days is that "Saturdays, Sundays, or holidays . . . will not be excluded, in the absence of an express proviso for their exclusion." 74 Am. Jur. 2d *Time* § 22 (2001) (collecting authorities).[13] Accordingly, several courts have interpreted or applied Subsection (F) as providing that more than ten *calendar* days relating to transportation is presumptively unreasonable and thus would have held that the 20-day delay in transporting respondent for his competency

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[13] The reasoning behind this rule is that where a statutory time period is more than one week, "the time stipulated must necessarily include one or more Saturdays, Sundays, or holidays," so it is assumed in that case that the drafters envisioned counting weekends and holidays. 74 Am. Jur. 2d Time § 22. By contrast, where a time period is less than a week, it may or may not capture weekends or holidays, so those days are excluded to ensure that actors have a sufficient number of working days to complete the task.

evaluation resulted in ten nonexcludable days accruing. *See United States v. Collins*, 90 F.3d 1420, 1427 (9th Cir. 1996); *United States v. Noone*, 913 F.2d 20, 25 (1st Cir. 1990); *United States v. Castle*, 906 F.2d 134, 137 (5th Cir. 1990); *United States v. Williamson*, 409 F. Supp. 2d 1105, 1108 (N.D. Iowa 2006).

The Sixth Circuit, however, held that Subsection (F) incorporates the methods for counting days set forth in Federal Rule of Criminal Procedure 45(a). *See* Pet. App. 14a. Although that Rule currently provides that all time periods are counted in calendar days (and thus, even if it applies, would simply reinforce the calendar-day counting method here), Rule 45(a), at the time of the pretrial proceedings here, excluded weekend days and holidays in computing any period of time specified in "th[e] rules [of criminal procedure], any local rule, or any court order" that was less than 11 days. In the Sixth Circuit's view, former Rule 45(a) temporarily "enlarged" the ten-day limitation in Subsection (F), *United States v. Bond*, 956 F.2d 628, 632 (6th Cir. 1992), *cited in* Pet. App. 14a, such that only the two days in excess of the first eighteen days (ten weekdays, six weekend days, and two holidays) it took to transport respondent for his first competency evaluation were nonexcludable under the Act. Pet. App. 14a.[14]

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[14] Other courts have issued similar holdings. *See United States v. McGhee*, 532 F.3d 733, 738 (8th Cir. 2008); *United States v. Garrett*, 45 F.3d 1135, 1140 n.6 (7th Cir. 1995).

The Sixth Circuit's holding is incorrect. The text and structure of Subsection (F), as well as former Rule 45(a), make clear that Subsection (F) has always counted ten *calendar* days. And all other sources of statutory insight buttress this conclusion.

A. The Text And Structure Of Subsection 3161(h)(1)(F) And Federal Rule Of Criminal Procedure 45(a) Dictate That Subsection (F) Counts Calendar Days, Not Merely Business Days.

1. Subsection (F) provides that all time "in excess of ten days" relating to transportation for competency hearings is presumptively nonexcludable. This text, especially against the background of the common law and the calendar-day counting norm in the Act, is plain on its face: all transportation time in excess of ten calendar days is nonexcludable when, as here, the the extra time that the government took to conduct the transportation was unreasonable.

Indeed, this Court has emphasized that the subsections in Section 3161(h)(1) provide "detailed"

Some courts also have cited Rule 45(a) in holding that when the 70th day of the speedy trial clock falls on a weekend day or holiday, the last day of the clock does not fall until the next weekday. *See, e.g.*, *United States v. Vickerage*, 921 F.2d 143, 147 (8th Cir. 1990). It is unnecessary, however, to resort to Rule 45(a) to reach this conclusion. The default rule under the common law is that "when an act is to be performed within a certain number of days, and the last day falls on Sunday, the person charged with the performance of the act has the following day to comply with his obligation." *Monroe Cattle Co. v. Becker*, 147 U.S. 47, 56 (1893). Nothing in the Speedy Trial Act deviates from this rule.

rules that "comprehensively regulate[] the time within which a trial must begin." *Zedner*, 547 U.S. at 497, 500. Consequently, when a provision of the Act does not expressly exclude certain days, the proper inference is that this omission was deliberate and that the days count toward the Act's 70-day limit. *See id.* at 500 (drawing this inference); *Bloate*, 130 S. Ct. at 1353 (same); *Rojas-Contreras*, 474 U.S. at 239-40 (Blackmun, J., concurring in the judgment) ("[T]he Act's comprehensive list of express exclusions counsels one to read Congress' failure to exclude certain periods of time as a considered judgment that those periods are to be included in the speedy-trial calculation . . . ."). Here, nothing in Subsection (F)'s ten-day limitation restricts itself to "working days" or "business days." Nor does it exclude "weekends" or "holidays" or include any reference to Rule 45(a). The Sixth Circuit, therefore, had no basis for holding that former Rule 45(a) somehow temporarily "enlarged" Subsection (F)'s ten-day limitation to exclude weekends and holidays.

Comparing Subsection (F)'s ten-day limitation with similar provisions in other federal statutes confirms this conclusion. The Bail Reform Act, for instance, allows a court, under certain circumstances, to temporarily detain a defendant for "a period of not more than ten days." 18 U.S.C. § 3142(d)(2). Yet, unlike Subsection (F) of the Speedy Trial Act or any other provision of that Act, this time limitation in the Bail Reform Act expressly provides immediately following the number of days specified that the period "exclud[es] Saturdays, Sundays, and holidays." 18 U.S.C. § 3142(d)(2); *see also id.* § 3142(f) (providing that another five-day period in Bail Reform Act does "not includ[e] any intermediate Saturday, Sunday, or

legal holiday"). Numerous other statutes outside of the realm of criminal procedure likewise expressly exclude weekends and holidays from time periods of ten days or longer. *See, e.g.*, 3 U.S.C. § 425(c)(3)(A) (fifteen-day time period in which to seek review of administrative decision in OSHA case); 5 U.S.C. § 552a(d)(2)(A) (ten-day period to request records under Administrative Procedures Act); 5 U.S.C. § 1221(c)(2) (ten-day period to grant stay in administrative proceedings before federal Merit Systems Protection Board); 8 U.S.C. § 1231(c)(3)(A)(i)(III) (fifteen-day period for detaining and maintaining an alien on a vessel or aircraft).

By contrast, numerous other statutes (both inside and outside of the realm of criminal procedure) set forth ten-day time periods without excluding weekends or holidays. *See, e.g.*, 18 U.S.C. § 2518(9) (ten-day period before trial for disclosing applications and court orders authorizing wiretaps); 18 U.S.C. § 4114(a) (ten-day period for notifying foreign country of rejection of prisoner transfer); 18 U.S.C. § 4244(a) (ten-day period after conviction for filing motion requesting treatment of mental disease or defect in a suitable facility); 8 U.S.C. § 1324b(b)(1) (ten-day period for service of charges of unfair immigration practices).

The lesson is clear: when Congress wants to exclude weekends and holidays from ten-day time periods governing administrative or trial procedure, it knows how to do so and does so explicitly. When, by contrast, Congress simply specifies a period of ten days, the statute requires courts to count a certain number of calendar days.

2. Even if it were appropriate to look beyond the U.S. Code in construing and applying Subsection (F),

the text of former Rule 45(a) provided no basis for temporarily foisting its method of counting upon that Subsection. Former Rule 45(a) instructed that its counting method applied "in computing any period of time specified in these rules, any local rule, or any court order." Fed. R. Crim. P. 45(a) (2008). Conspicuously absent from this list was any indication that Rule 45(a) applied to statutes. This omission must be deemed dispositive. Under the venerable canon of *expressio unius est exclusio alterius*, the omission of a thing or idea from a legal provision dictates its exclusion "when in the natural association of ideas in the mind of the reader that which is expressed is so set over by way of strong contrast to that which is omitted that the contrast enforces the affirmative inference." *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 81 (2002) (quoting *State ex rel. Curtis v. De Corps*, 16 N.E.2d 459, 462 (1938)); *see also*, *e.g.*, *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993) (employing this canon to a federal rule of procedure).

Such is the case here. Any draftsperson stating that a provision applied to rules or court orders would no doubt have considered whether the provision should also apply to statutes. *See, e.g.*, *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001) (emphasizing the difference between a regulation and statute as a source of law). The fact that Rule 45(a) left "statutes" off of its list of specified sources of law indicates that it was not meant to apply to statutes. *See Williamson*, 409 F. Supp. 2d at 1107 n.1 (drawing this conclusion).

If the drafters of former Rule 45(a) had intended it to apply to any statutes, the Federal Rules Civil, Appellate, and Bankruptcy Procedure 6(a) confirm that they would have said so expressly. Those rules set forth the methods of "computing any time period specified in these rules, in any local rule or court order, *or in any statute* that does not specify a method of computing time." Fed. R. Civ. P. 6(a) (emphasis added); *see also* Fed. R. App. P. 26(a) (same); *see also* Fed. R. Bank. P. 9006(a) (same). "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Kucana v. Holder*, 130 S. Ct. 827, 838 (2010) (quoting *Nken v. Holder*, 129 S. Ct. 1749, 1759 (2009)); *see also Russello v. United States*, 464 U.S. 16, 23 (1983) (This Court should "refrain from concluding . . . that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship."); *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982) (same). The same holds true with respect to the federal rules of procedure. The Sixth Circuit thus erred in interpreting Criminal Rule 45(a) as though it read like Civil Rule 6(a), Appellate Rule 26(a), and Bankruptcy Rule 9006(a).

B. Other Sources Of Statutory Insight Reinforce That Subsection (F) Counts Calendar Days.

The amendment history of Rule 45(a), the Speedy Trial Act's purpose, and the Rules Enabling Act's prohibition against rules of procedure changing the

meaning of federal statutes all buttress the conclusion that former Rule 45(a) did not temporarily enlarge Subsection (F)'s ten-day limitation beyond ten calendar days.

1. Legislative History

Rule 45's subsequent amendment history demonstrates that former Rule 45(a) did not apply to statutes, such as Subsection 3161(h)(1)(F) of the Speedy Trial Act.

In 2007, the Time Computation Subcommittee of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States proposed amending the various rules of federal procedure to cease excluding weekends or holidays from any time periods governed by those rules. In doing so, the Subcommittee also explicitly noted that unlike its counterparts in the Civil, Appellate, and Bankruptcy Rules, "Criminal Rule 45(a) does not currently encompass statutory time periods." Memorandum from Time Computation Subcommittee to Committee on Rules of Practice and Procedure 3 (June 29, 2007); *see also id.* at 7 (noting that Rule 45(a) did not "apply to statutory periods").[15] The Subcommittee recommended amending Criminal Rule 45 to apply to such periods. *Id.*

In 2009, the Subcommittee's recommendations were carried out, adopting a pure calendar-days approach for all of the federal rules and amending

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[15] The memo is available at: http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/proposed0807/07_7_5_time_comp.pdf.

Criminal Rule 45 to apply to periods of time in any "statute that does not specify a method of computing time." In the Advisory Committee Notes that accompany this amendment, the Committee explained that the purpose of the latter change was to "mak[e] [Criminal Rule 45's] time computation rules applicable to statutory time periods." Fed. R. Crim. P. 45 advisory committee's note. This change having been made, the Committee explained, Criminal Rule 45(a) "is consistent with Civil Rule 6(a)." *Id.*

Congress followed these changes by reinforcing that it had always intended Subsection 3161(h)(1)(F) to count calendar days. In the Statutory Time-Periods Technical Amendments Act of 2009, Pub. L. No. 111-16, Congress amended twenty-eight (mostly civil) statutory time periods across the U.S. Code to explicitly exclude weekends or holidays or to lengthen short time periods. The Act, however, did not touch Subsection 3161(h)(1)(F). Had Congress previously understood Subsection (F) to exclude weekends and holidays, it surely would have amended it to continue doing so. That Congress left that provision alone, while amending others, shows that it has always counted calendar days.

2. Purpose

The inapplicability of former Rule 45(a)'s counting method to the Speedy Trial Act makes good sense. Time is simply of the essence in criminal cases in ways that it is not in civil cases. When people who are presumed innocent are detained against their will and their future liberty is at stake, proceedings must progress as expeditiously as possible. Any

statutes that purport to relieve the Government or courts of this obligation must be construed strictly. Accordingly, it was perfectly understandable that former Criminal Rule 45(a) did not apply to statutory time periods, whereas Civil Rule 6(a) did.[16] Indeed, it is telling that Rule 45(a) ceased excluding weekends or holidays only when the Rule was also amended to apply to certain statutory time periods.

3. The Rules Enabling Act

This Court should resolve any uncertainty over whether Subsection (F)'s ten-day rule incorporated former Rule 45(a) against such incorporation because it would violate the Rules Enabling Act.

The Rules Enabling Act (REA) provides that this Court has "the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals," provided that "[s]uch rules *shall not abridge, enlarge or modify any substantive right*." 28 U.S.C. § 2072(a)-(b) (emphasis added). As this Court has summarized this proviso, a given application of a rule of procedure violates the REA and thus cannot be enforced "if it alters the rules of decision by which [the] court will adjudicate [a litigant's] rights." *Shady Grove Orthopedic Assocs.,*

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[16] Implicitly recognizing the limited applicability of former Rule 45(a), this Court applied it exclusively to other rules and never to any statutory time period. *See, e.g.*, *Berman v. United States*, 378 U.S. 530 (1964) (applying Rule 45(a) to a filing deadline in a district court).

P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1442 (2010) (plurality opinion) (first alteration in original) (quoting *Miss. Publ'g Corp. v. Murphree*, 326 U.S. 438, 446 (1946) (internal quotation marks omitted)).

Incorporating former Rule 45(a) into the Act here would violate the REA because the Act does not reference the Rule and – in the Sixth Circuit's own words, *see Bond*, 956 F.2d at 632 – the Rule would "enlarge[]" the time within which a defendant must be tried. In other words, the Act gives defendants a right to be tried within 70 days of indictment and specifies that, absent circumstances not alleged here, that deadline may not be tolled by more than ten days for transportation to a competency examination. This 70-day deadline cannot be understood as anything other than a substantive right; it is the very heart of the Act. Accordingly, it would violate the REA to incorporate former Rule 45(a) into the Speedy Trial Act in order to give the Government and courts more time than they otherwise had to bring a defendant to trial.[17]

III. The Act Does Not Exclude The Time Beyond Thirty Days That It Took To Conduct Respondent's Competency Examinations.

Subsection 3161(h)(1)(A) of the Act provides that "delay resulting from . . . examinations, to determine the mental competency . . . of the defendant" should

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[17] Recall that current Rule 45 no longer excludes holidays and weekends from any time periods, so even if the Rule now applies to the Speedy Trial Act, it would not violate the Rules Enabling Act.

be excluded from the speedy trial clock. Another federal statute, 18 U.S.C. § 4247(b), limits the period in which these evaluations may be completed to 30 days, subject only to an extension of time for "good cause." Yet it took over four months to conduct respondent's first competency evaluation and nearly two months to conduct his second one. Although the Government initially asserted the respondent was not cooperating with the effort to evaluate him, JA 108, it never provided any justification for the bulk of the delay, other than asserting without elaboration in a second motion for an extension of time that the facility needed additional time to do its job, JA 114. The Sixth Circuit nevertheless excluded all of the time while respondent was waiting to be evaluated, holding that Section 4247(b) "does not limit the time period for a competency examination with respect to calculations under the Speedy Trial Act." Pet. App. 11a-12a (quoting *United States v. Murphy*, 241 F.3d 447, 456 (6th Cir. 2001)).

This holding is not only incorrect but is incompatible with the Sixth Circuit's other holding that the Speedy Trial Act did incorporate the counting rule in former Fed. R. Crim. P. 45(a).

1. It is a fundamental principle of statutory construction that different statutes which relate to the same subject matter – that is, statutes *in pari materia* – should be construed together, "as if they were one law." *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972) (quoting *United States v. Freeman*, 44 U.S. (3 How.) 556, 564 (1845)). This is especially so where a subsequent statute falls "within the reason of [the] former statute" – that is, where

both statutes are designed to effectuate the same goal. *Freeman*, 44 U.S. at 564.

Both Section 4247(b) and Subsection (A) relate to the same subject matter – namely, the timing of competency examinations. Furthermore, the two provisions share the same objective: to make pretrial proceedings involving such examinations as expeditious as possible. Indeed, Section 4247(b) underscores that objective by requiring that competency examinations be conducted not only within 30 days but also that they be conducted "in the suitable facility closest to the court." Accordingly, the 30-day requirement set out in Section 4247(b) limits the period of "delay" that the Speedy Trial Act contemplates competency evaluations will cause. Congress could hardly have intended to exclude days used for the illegal detention of defendants for competency proceedings.

2. At the very least, the Sixth Circuit's decision to incorporate former Fed. R. Crim. P. 45(a) into Subsection 3161(h)(1)(F)'s transportation rule, while at the same time refusing to incorporate Section 4247(b) into Subsection 3161(h)(1)(A)'s competency evaluation rule, cannot be correct.

It is logically possible that neither of these two provisions outside of the Speedy Trial Act should be read into the Act. But if the Act incorporates only one of the two provisions, it must be Section 4247(b). Rule 45(a) is not a federal statute; it is a mere court rule. Moreover, the text of former Rule 45(a) shows that it did not apply to the Speedy Trial Act or any other statute. By contrast, Section 4247(b) is a federal statute dealing with the same subject matter, and sharing the same goal, as its counterpart in the

Speedy Trial Act. And nothing in Section 4247(b) suggests that its counting rule should not be incorporated into the Act.

In short, if the Speedy Trial Act does not incorporate the counting rule Section 4247(b), then there the Sixth Circuit had no basis whatsoever for incorporating the counting rule in former Criminal Rule 45(a). That reality is enough to affirm the decision below.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX A

INSANITY DEFENSE REFORM ACT – RELEVANT PROVISION

18 U.S.C. § 4247(b) provides in pertinent part:

"(b) Psychiatric or psychological examination. A psychiatric or psychological examination ordered pursuant to this chapter shall be conducted by a licensed or certified psychiatrist or psychologist, or, if the court finds it appropriate, by more than one such examiner. Each examiner shall be designated by the court, except that if the examination is ordered under section 4245, 4246, or 4248 [18 USCS § 4245, 4246, or 4248], upon the request of the defendant an additional examiner may be selected by the defendant. For the purposes of an examination pursuant to an order under section 4241, 4244, or 4245 [18 USCS § 4241, 4244, or 4245], the court may commit the person to be examined for a reasonable period, but not to exceed thirty days, and under section 4242, 4243, 4246, or 4248 [18 USCS § 4242, 4243, 4246, or 4248], for a reasonable period, but not to exceed forty-five days, to the custody of the Attorney General for placement in a suitable facility. Unless impracticable, the psychiatric or psychological examination shall be conducted in the suitable facility closest to the court. The director of the facility may apply for a reasonable extension, but not to exceed fifteen days under section 4241, 4244, or 4245 [18 USCS § 4241, 4244, or 4245], and not to exceed thirty days under section 4242, 4243, 4246, or 4248 [18 USCS § 4242, 4243, 4246, or 4248], upon a showing of good cause that the additional time is necessary to observe and evaluate the defendant."

APPENDIX B

FEDERAL RULE OF CRIMINAL PROCEDURE 45(a)

CURRENT VERSION EFFECTIVE DECEMBER 1, 2009

(a) Computing Time.

The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time.

(1) Period Stated in Days or a Longer Unit.
When the period is stated in days or a longer unit of time:

(A) exclude the day of the event that triggers the period;
(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and
(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

(2) Period Stated in Hours.
When the period is stated in hours:

(A) begin counting immediately on the occurrence of the event that triggers the period;
(B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

(C) if the period would end on a Saturday, Sunday, or legal holiday, the period continues to run until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

(3) Inaccessibility of the Clerk's Office.
Unless the court orders otherwise, if the clerk's office is inaccessible:

(A) on the last day for filing under Rule 45(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday; or

(B) during the last hour for filing under Rule 45(a)(2), then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday.

(4) "Last Day" Defined.
Unless a different time is set by a statute, local rule, or court order, the last day ends:

(A) for electronic filing, at midnight in the court's time zone; and

(B) for filing by other means, when the clerk's office is scheduled to close.

(5) "Next Day" Defined.
The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(6) "Legal Holiday" Defined.
"Legal holiday" means:

(A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial

Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day;

(B) any day declared a holiday by the President or Congress; and

(C) for periods that are measured after an event, any other day declared a holiday by the state where the district court is located.

FEDERAL RULE OF CRIMINAL PROCEDURE 45(a)

PRIOR VERSION EFFECTIVE THROUGH NOVEMBER 30, 2009

(a) Computing Time.
The following rules apply in computing any period of time specified in these rules, any local rule, or any court order:

(1) **Day of the Event Excluded.** Exclude the day of the act, event, or default that begins the period.

(2) **Exclusion from Brief Periods.** Exclude intermediate Saturdays, Sundays and legal holidays when the period is less than 11 days.

(3) **Last Day.** Include the last day of the period unless it is a Saturday, Sunday, legal holiday, or day on which weather or other conditions make the clerk's office inaccessible. When the last day is excluded, the period runs until the end of the next day that is not a Saturday, Sunday, legal holiday, or day when the clerk's office is inaccessible.

(4) **"Legal Holiday" defined.** As used in this rule, "legal holiday" means:

(A) the day set aside by statute observing:

(i) New Year's Day;
(ii) Martin Luther King, Jr.'s Birthday;
(iii) Washington's Birthday;
(iv) Memorial Day;
(v) Independence Day;
(vi) Labor Day;

(vii) Columbus Day;
(viii) Veterans' Day;
(ix) Thanksgiving Day;
(x) Christmas Day; and

(B) any other day declared a holiday by the President, the Congress, or the state where the district court is held.