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

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

The Speedy Trial Act, 18 U.S.C. § 3161 *et seq.*, requires that a criminal defendant be tried within 70 days of indictment or the defendant's first appearance in court, whichever is later. In calculating the 70-day period, 18 U.S.C. § 3161(h)(1) automatically excludes "delay resulting from other proceedings concerning the defendant, including but not limited to * * * (D) 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" (emphasis added). The question presented here is:

> Whether time granted to *prepare* pretrial motions is excludable under § 3161(h)(1).

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The decision of the Eighth Circuit (Pet. App. 1a–19a) is reported at 534 F.3d 893. The district court's decision (Pet. App. 20a–24a) is available at 2007 WL 551740.

JURISDICTION

The judgment of the court of appeals was entered on July 25, 2008. J.A. 11. Petitioner timely filed a petition for panel rehearing and rehearing *en banc*, which was denied on September 5, 2008. J.A. 11. On April 20, 2009, this Court granted the petition for a writ of certiorari; it has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 3161(c)(1) of Title 18 of the United States Code provides, in pertinent part:

> [T]he trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs.

Section 3161(h) of Title 18 of the United States Code provides, in pertinent part:[1]

> The following periods of delay shall be excluded in computing the time * * * within which the trial of any such offense must commence:
>
> (1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to * * * (D) 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.
>
> * * * *
>
> (7)(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that

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[1] On October 13, 2008, Congress amended portions of 18 U.S.C. § 3161(h) to repeal obsolete statutory cross-references. Judicial Administration and Technical Amendments Act of 2008, Pub. L. No. 110-406, § 13, 122 Stat. 4291, 4294 (2008). The amendments made no substantive changes to the statutory provisions at issue here, but several of the relevant subparagraphs were redesignated. As principally relevant here, § 3161(h)(1)**(F)** became § 3161(h)(1)**(D)**, and § 3161(h)**(8)** became § 3161(h)**(7)**. This brief uses the new designations. For clarity's sake, quotations and citations referring to the prior designations have been altered (as indicated with bracketed text) to reflect the new designations. Both versions of the statute are reproduced in the Petition Appendix. Pet. App. 27a–48a.

the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

* * * *

(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

* * * *

(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), 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.
>
> (C) No continuance under subparagraph (A) of this paragraph shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.
>
> * * * *.

STATEMENT

This case concerns whether time granted to prepare pretrial motions is automatically excluded from the time allotted to bring a criminal case to trial under the Speedy Trial Act, or whether such time is excludable only on a case-by-case basis. The automatic exclusion at issue here is 18 U.S.C. § 3161(h)(1), which excludes delays "resulting from other proceedings concerning the defendant, including but not limited to" certain categories of time enumerated in eight subparagraphs. Subparagraph (D) directly addresses pretrial motions and declares that the time "from the *filing* of the motion through the conclusion of the hearing on, or other prompt *disposition* of, such motion" is automatically excluded. 18 U.S.C. § 3161(h)(1)(D) (emphasis added). The Act separately provides in § 3161(h)(7) for the exclusion of time on a case-by-case basis where the district court finds (upon consideration of specified factors) that the "ends of justice * * * outweigh the best interest of the public

and the defendant in a speedy trial." *Id.* § 3161(h)(7)(A).

The decision below concluded that pretrial motion preparation time—*i.e.*, *before* "the filing of the motion"—is automatically excludable under § 3161(h)(1) notwithstanding the specific treatment of pretrial motions in subparagraph (D). That reading cannot be squared with the plain text of the Act. What is more, the Act's drafters specifically rejected a proposal to exclude pretrial motion preparation time under § 3161(h)(1). And all of that is fully consonant with the Act's structure and purpose, which effectuate defendants' and the public's interests in speedy trials while preserving trial courts' ability to make necessary accommodations on a case-by-case basis under § 3161(h)(7).

A. The Speedy Trial Act

The Speedy Trial Act requires a defendant to be tried within 70 days of indictment or the date on which the defendant first appears in court, whichever is later. 18 U.S.C. § 3161(c)(1). If a defendant is not tried within this 70-day period, the indictment must be dismissed upon his motion. See *id.* § 3162(a)(2).[2]

Not every day between indictment (or first appearance) and trial counts toward the 70-day total; the Act excludes eight categories of time from the

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[2] The Act leaves to the trial court's (guided) discretion whether to dismiss with or without prejudice. See 18 U.S.C. § 3162(a)(2) (factors include "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 [the Act] and on the administration of justice"); *United States* v. *Taylor*, 487 U.S. 326, 333 (1988).

speedy trial calculation. See § 3161(h). This case concerns the first such category, set out in § 3161(h)(1).[3]

Section 3161(h)(1) requires the automatic exclusion of "[a]ny period of delay resulting from other proceedings concerning the defendant, including but not limited to" eight enumerated subcategories of time. *Id.* §§ 3161(h)(1)(A)–(H).[4] One of those subcategories, § 3161(h)(1)(D), specifically addresses pretrial motions. It 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" (emphasis added). This case turns primarily on whether the specifically enumerated period of excludable delay in subparagraph (D) informs what is *not* excludable under § 3161(h)(1). Put another way, the question is whether—notwithstanding Congress's deliberate choice *not* to include pretrial motion preparation

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[3] The other general categories of time excluded under § 3161(h) are delays caused by: (2) deferral of prosecution for the purpose of allowing the defendant to demonstrate his good conduct; (3) the absence or unavailability of the defendant or an essential witness; (4) the fact that the defendant is mentally incompetent or physically unable to stand trial; (5) dismissal and refiling of the information or indictment, from the date the charge was dismissed to the date the time limitation would begin to run as to the subsequent charge had there been no previous charge; (6) the joinder of a defendant for trial with a codefendant as to whom the time for trial has not run; (7) a continuance granted by a judge on the basis of findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial; and (8) obtaining evidence in a foreign country. 18 U.S.C. §§ 3161(h)(2)–(8).

[4] The full text of the current Act is set forth in the Petition Appendix. Pet. App. 27a–37a.

time within subparagraph (D)—such time is nonetheless automatically excluded under § 3161(h)(1)'s general standard.

Time that is not subject to automatic exclusion under § 3161(h)(1) may nevertheless be excluded on a case-by-case basis under § 3161(h)(7), which provides "[m]uch of the Act's flexibility." *Zedner* v. *United States*, 547 U.S. 489, 498 (2006). Subsection (h)(7) permits trial judges to exclude delays resulting from continuances (granted *sua sponte* or at a party's request) if "the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." § 3161(h)(7)(A). Subsection (h)(7) gives district courts "discretion—within limits and subject to specific procedures—to accommodate limited delays for case-specific needs." *Zedner*, 547 U.S. at 499.

Before excluding delay under subsection (h)(7), however, the district court must consider several factors set forth in § 3161(h)(7)(B). The court may exclude a continuance, for example, if a case is "so unusual or complex * * * that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section." 18 U.S.C. § 3161(h)(7)(B)(ii). Even if a case is not particularly unusual or complex, the court may exclude a continuance if denial of the continuance 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." *Id.* § 3161(h)(7)(B)(iv). The (h)(7) exclusion, however, is not available merely "because of general congestion

of the court's calendar, or lack of diligent preparation" by counsel. *Id.* § 3161(h)(7)(C).

B. The District Court's Decision

On August 2, 2006, petitioner Taylor James Bloate was arrested after a traffic stop led to the discovery of two small bags of cocaine in his car. Pet. App. 2a. As part of the ensuing investigation, petitioner's girlfriend, his passenger at the time of his arrest, permitted the police to search her apartment. Pet. App. 2a. There officers found drugs, a bulletproof vest, three firearms, ammunition, and evidence that petitioner lived in the apartment. Pet. App. 2a–3a. On August 24, 2006, petitioner was indicted for possession of a firearm and possession of cocaine with intent to distribute, starting the speedy trial clock. Pet. App. 3a; see 18 U.S.C. § 3161(c)(1).

On February 19, 2007—two weeks before his trial was set to begin—petitioner filed a motion to dismiss the indictment under the Speedy Trial Act. Pet. App. 4a. Although various periods of delay were relevant to that motion and the subsequent appeal, only one remains at issue here. That period began on September 7, 2006, when petitioner moved to extend the deadline for preparation and filing of pretrial motions. Pet. App. 3a. The district court granted the extension that day, moving the deadline to September 25. Pet. App. 3a, 21a. Petitioner later filed a waiver of his right to file pretrial motions, and on October 4, a magistrate judge granted leave for him to waive his right to file the motions. Pet. App. 3a, 21a.

The district court treated the entire 28-day period between September 7 and October 4 as "within the

extension of time granted to file pretrial motions," and excluded it from the speedy trial calculation. Pet. App. 21a. That conclusion brought the total excluded time to 134 days and the total non-excludable time to 58 days.[5] Pet. App. 6a–12a, 21a–24a. Had the district court not excluded the 28 days of pretrial motion preparation time, more than 70 non-excludable days would have elapsed between petitioner's indictment and the trial date, and the indictment would therefore have been dismissed under § 3162(a)(2). Instead, petitioner proceeded to trial, which began on March 5, 2007. He was convicted and sentenced to 360 months' imprisonment. Pet. App. 1a, 4a–5a.

C. The Court of Appeals' Decision

Petitioner appealed his conviction, arguing (among other things) that the district court had erred in excluding the 28 days of pretrial motion preparation time under § 3161(h)(1). The Eighth Circuit affirmed, "holding that pretrial motion preparation time may be excluded under § 3161(h)(1), if the court specifically grants time for that purpose." Pet. App. 8a. The court observed that § 3161(h)(1) offers merely "an illustrative rather than an exhaustive enumeration" of excludable

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[5] The district court excluded 40 days, from November 9, 2006, until December 18, 2006, because the defendant requested a continuance and because a plea agreement had been contemplated during that time, citing 18 U.S.C. § 3161(h)(1)([G]). Pet. App. 9a–11a, 22a–23a. The court excluded the 66 days from December 20, 2006, to February 23, 2007, under § 3161(h)([7]) due to a continuance granted at the request of the defendant to resolve "severe" differences with counsel. Pet. App. 11a–13a, 23a.

delays and concluded that pretrial motion preparation time was properly added to the list. Pet. App. 7a, 8a. It did so at least in part because, in its view, automatically excluding the time "eliminates a trap for trial judges, where accommodation of a defendant's request for additional time to prepare pretrial motions could cause dismissal of the case under the Speedy Trial Act." See Pet. App. 7a.

SUMMARY OF ARGUMENT

I.A. The plain text of the Speedy Trial Act directs that pretrial motion preparation time is not automatically excluded under § 3161(h)(1). The Act expressly addresses "delay resulting from any pretrial motion" and specifies that only the time "from the *filing* of the motion through the conclusion of the hearing on, or other prompt *disposition* of, such motion" is within the automatic exclusion. § 3161(h)(1)(D) (emphasis added). Elementary principles of statutory interpretation hold that the specific treatment of pretrial motion delays set forth in subparagraph (D) trumps the general standard of § 3161(h)(1).

Moreover, subparagraph (D) establishes exact limitations on the automatic exclusion of pretrial motion delays, identifying both a starting point and an endpoint. Several of the surrounding subparagraphs, however, offer comparatively open-ended illustrations of excluded time. If Congress had intended for courts to expand the pretrial motion exclusion under the general standard in § 3161(h)(1), it would not have defined the exclusion in subparagraph (D) with such precision.

Indeed, automatically excluding pretrial motion preparation time would render § 3161(h)(1)(D) superfluous. The whole point of subparagraph (D) is to specify that time from the filing of the motion to its disposition is excluded. Excluding preparation time—which, by definition, *precedes* the filing—renders that starting point meaningless. Respecting the plain terms of subparagraph (D), however, does not mean that pretrial motion preparation time can *never* be excluded from the speedy trial calculation. Subsection 3161(h)(7) allows for the exclusion of such time on a case-by-case basis when the ends of justice require it. That provision works in perfect harmony with the specific limitation in subparagraph (D).

Contrary to the Eighth Circuit's assertion, the automatic exclusion of pretrial motion preparation time is not necessary to avoid a "trap for trial judges" faced with a defendant's request for additional preparation time. The district court retains discretion to deny time that is not warranted, and subsection (h)(7) is available on a case-by-case basis to exclude (among other things) "reasonable time necessary for effective preparation." The notion that a defendant could somehow game the system is a red herring.

B. The structure of the Speedy Trial Act confirms that pretrial motion preparation time is not subject to automatic exclusion. If a delay is deemed to fall within § 3161(h)(1), then it is excluded from the speedy trial calculation in every case, without regard to circumstance. Subsection 3161(h)(7), by contrast, brings flexibility to the Act. It ensures that trial courts can accommodate the needs of an individual

case, subject to specific guiding factors set forth in the statute.

Many of the lower courts that have upheld the automatic exclusion of pretrial motion preparation time (including the Eighth Circuit below) have overlooked that essential distinction between (h)(1) and (h)(7), concluding that (h)(1) gives courts "discretion" to exclude such time, or that the exclusion is triggered only when the time is granted in a certain manner. The text of (h)(1) offers no basis for such gradations; rather, the Act contemplates that case-specific considerations should be evaluated under (h)(7)'s ends-of-justice exclusion. Were it otherwise, district courts could circumvent the specific factors and findings upon which the discretion granted in (h)(7) is conditioned.

It is no answer to say that the list of enumerated exclusions in (h)(1) is not exhaustive. That simply begs the question whether a particular delay is subject to automatic exclusion. What is more, Congress left little ground uncovered in § 3161(h). Against that backdrop, it is difficult to believe that that Congress intended to make pretrial motion preparation time—which arises in almost every case—subject to automatic exclusion but simply forgot to say so.

II.A. This is the second occasion on which the government has petitioned for the automatic exclusion of pretrial motion preparation time. When the Speedy Trial Act was amended in 1979 to include the provision at issue here, the Department of Justice submitted a proposal to make pretrial motion preparation time part of the enumerated exclusion that would eventually become subparagraph (D).

That request was specifically considered and explicitly rejected in favor of the current definition. Indeed, the Senate Judiciary Committee concluded that the government's proposal was "unreasonable," principally "because, in routine cases, preparation time should not be excluded where the questions of law are not novel and the issues of fact simple." S. Rep. No. 96-212, at 34 (1979). In the face of such unmistakable evidence of congressional intent, the government's renewed bid to make pretrial motion preparation time automatically excludable is as unreasonable today as it was 30 years ago.

And there is still more. At the same time it rejected the government's proposal, Congress clearly indicated that subsection (h)(7) would be the proper vehicle for considering the exclusion of pretrial motion preparation time on a case-by-case basis. In fact, Congress specifically directed that one of the considerations under (h)(7) is whether the delay is "necessary for effective *preparation*." 18 U.S.C. § 3161(h)(7)(B)(iv) (emphasis added).

B. The decision below is also inconsistent with Congress's larger goal to bring precision to the automatic exclusion of delays related to pretrial motions. Congress wanted to expand the scope of that exclusion in response to courts' unduly restrictive interpretations of the indeterminate standard for pretrial motion delays under the original Speedy Trial Act. But Congress was quite deliberate in specifying that it wanted to expand the exclusion only so far and that the limits it set are contained in the text of subparagraph (D).

III. The automatic exclusion of pretrial motion preparation time frustrates the carefully calibrated

legislative judgments Congress made in the Act. The Act serves both the public's and defendants' interests in the prompt adjudication of criminal cases. Of course, speed is not a virtue unto itself; it must be balanced with the practical realities of trial practice. Congress struck that balance by drawing any number of clear lines throughout the Act, while still leaving room for the exercise of (guided) discretion by the courts. The automatic exclusion of pretrial motion preparation time effectively extends the baseline allotment of time for bringing the vast majority of cases to trial, and thereby disrupts the Act's measured scheme.

The decision below and those like it illustrate the danger in giving courts license to relocate the lines that Congress drew. Several lower courts, for example, have suggested that it matters which party requested the pretrial motion preparation time, or that time granted by a routine scheduling order should be treated differently from time specifically granted to prepare pretrial motions. There is no basis in the Act for such hair-splitting. Moreover, this Court has rightly recognized the impracticability of rules that turn on divining who requested what in the fast-moving world of trial courts' dockets.

ARGUMENT

I. Under The Plain Text Of § 3161(h)(1), Pretrial Motion Preparation Time Is Not Automatically Excluded

Section 3161(h)(1)(D) directly addresses delays resulting from pretrial motions, identifying the precise moment at which the exclusion of such time begins and ends. Subparagraph (D) states that only

the time from the "filing" to "the conclusion of the hearing on, or other prompt *disposition*" of the motion should be excluded; time spent preparing the motion—which, by definition, *precedes* the filing—is not excluded. Congress thus spoke with specificity and precision in defining the scope of excludable delays relating to pretrial motions.

The decision below, however, rests on the premise that the careful limits set by subparagraph (D) can be bypassed by creating a new automatic exclusion under the general language of subsection (h)(1). That reading runs counter to basic principles of statutory interpretation; invalidates the deliberate choices Congress made in the Act; and upsets the coherency and consistency of the Speedy Trial Act's scheme.

A. The Only Pretrial Motion Delay Subject To Automatic Exclusion Under § 3161(h)(1) Is Described In § 3161(h)(1)(D)

1. Section 3161(h)(1)'s general language cannot be interpreted in isolation. See *Beecham* v. *United States*, 511 U.S. 368, 372 (1994) ("The plain meaning that we seek to discern is the plain meaning of the whole statute, not of isolated sentences."). In particular, it cannot be interpreted without consideration of the enumerated exclusions that follow it. It is clear from the carefully circumscribed treatment of delays associated with pretrial motions in § 3161(h)(1)(D) that pretrial motion preparation time is not subject to automatic exclusion from the speedy trial calculation.

Subparagraph (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." § 3161(h)(1)(D) (emphasis added). Congress thus pointedly omitted delays caused by the *preparation* of pretrial motions. As this Court previously has recognized, subparagraph (D) articulates precise starting and stopping points. See *Henderson* v. *United States*, 476 U.S. 321, 326, 327, 329 (1986) ("The plain terms of the statute appear to exclude all time between the filing of and the hearing on a motion * * * ."). As with other features of the Speedy Trial Act, "this omission was a considered one." *Zedner*, 547 U.S. at 500; see also *infra* Part II.

Congress's "specific provision" for the treatment of pretrial motion delays in subparagraph (D) controls over subsection (h)(1), a provision "of more general application." *Gozlon-Peretz* v. *United States*, 498 U.S. 395, 407 (1991) (citing *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987)). Under subparagraph (D), a delay caused by a pretrial motion results in an exclusion that begins at the time the motion is *filed*, not before. Having so carefully delineated the point at which delays caused by pretrial motions become excludable, Congress could not have intended for the general terms of (h)(1) to sweep in preparation time. "However inclusive may be the general language" of subsection (h)(1), it must "not be held to apply to a matter specifically dealt with in another part of the same enactment." *Fourco Glass Co.* v. *Transmirra Prods. Corp.*, 353 U.S. 222, 228 (1957) (internal quotation marks and citations omitted).

2. The specificity with which subparagraph (D) defines the exclusion of pretrial motion delays was

not inadvertent. When Congress wished to leave the boundaries of an enumerated exclusion less clearly defined, it did so. Subparagraph (A), for example, excludes "delay resulting from any proceeding, *including* any examinations, to determine the mental competency or physical capacity of the defendant." § 3161(h)(1)(A) (emphasis added). With the word "including," Congress indicated that examinations may not be the only kind of competency proceedings that fall within the automatic exclusion of (h)(1)(A).

Similarly, subparagraph (C) excludes "delay resulting from any interlocutory appeal," but contains no further limitation. § 3161(h)(1)(C). The delays contemplated by subparagraph (C) thus have been read to include delay resulting from the filing of petitions for writs of habeas corpus and mandamus that function as interlocutory appeals. See, *e.g.*, *United States* v. *Davenport*, 935 F.2d 1223, 1233 (11th Cir. 1991) ("We hold that the delay resulting [from a petition for writ of habeas corpus filed before trial in the circuit court] is excluded from the petitioner's speedy trial clock under 18 U.S.C. § 3161(h)(1)([C])."); *United States* v. *Tyler*, 878 F.2d 753, 759 (3d Cir. 1989) ("[W]e hold that the 140 days that elapsed between the filing of the mandamus petition and the notification to the district court of the disposition of that petition was 'a period of delay resulting from other proceedings concerning the defendant' within the meaning of 18 U.S.C. § 3161(h)(1)([C]).").

That is not to say that all the other exclusions listed in § 3161(h)(1) are boundless. They are not. Subparagraph (H), for example, limits the excludable period during which courts may keep "any pro-

ceeding concerning the defendant" under advisement to 30 days. See § 3161(h)(1)(H). Under the reasoning adopted below, however, a court could simply decide that day 31 is excludable under § 3161(h)(1) as a "period of delay resulting from other proceedings concerning the defendant." That makes no sense. Nor does it make sense to read subparagraph (D)'s treatment of delays attributable to pretrial motions as inconsequential.

It is therefore clear that, if Congress had wanted pretrial motion preparation time to be excluded automatically, it would have drafted subparagraph (D) differently. See, *e.g.*, *United States* v. *Rojas-Contreras*, 474 U.S. 231, 235 (1985) ("Congress knew how to provide for the computation of time periods under the Act relative to the date of an indictment. Had Congress intended that the 30-day trial preparation period * * * commence or recommence on such a date, it would have so provided."). Congress knew how to write broad exclusions; it listed several of them in § 3161(h)(1). Likewise, "Congress clearly knew how to limit an exclusion." *Henderson*, 476 U.S. at 327. Congress chose to limit the automatic exclusion of pretrial motion delay with § 3161(h)(1)(D), and courts may not "override that choice." *Whitfield* v. *United States*, 543 U.S. 209, 217 (2005).

3. As this Court has reaffirmed time and again, "[i]t is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan* v. *Walker*, 533 U.S. 167, 174

(2001)); see *Inhabitants of Montclair Twp.* v. *Ramsdell*, 107 U.S. 147, 152 (1883). The decision below violates that canon.

Subparagraph (D) restricts the exclusion of pretrial motion delays to those between the *filing* of a motion and its *disposition*. § 3161(h)(1)(D). If preparation time were automatically excluded under the general language of subsection (h)(1), the starting point announced by subparagraph (D) would be meaningless. It would be as if the words "from the filing of the motion" were stricken from the statute. And why stop there? If *pre*-filing delays can fall within § 3161(h)(1)'s general standard, why not *post*-disposition delays? Carried to its logical conclusion, the reasoning adopted below reads subparagraph (D) out of the Act entirely.

To say that preparation time is not *automatically* excluded from the speedy trial calculation is not to say that it may *never* be excluded. Rather, preparation time may be excluded under § 3161(h)(7) at the discretion of the district court when the court determines that the ends of justice served by the excluded delay outweigh the interests of the defendant and society in a speedy trial. See § 3161(h)(7)(A). Most relevant here, "[t]he Act [ ] places broad discretion in the District Court to grant a continuance when necessary to allow further preparation." *Rojas-Contreras*, 474 U.S. at 236; see § 3161(h)(7)(B)(iv). The ability of the district court to exclude pretrial motion preparation time when the circumstances of a particular case demand works in harmony with—rather than negates—the default rule imposed by § 3161(h)(1)(D), under which preparation time is not automatically excluded.

Conversely, the limits on the automatic exclusion imposed by § 3161(h)(1)(D) give effect to significant portions of § 3161(h)(7). If pretrial motion preparation time is a delay that must be excluded under § 3161(h)(1), then, by the Eighth Circuit's logic, so is time granted to prepare for any number of pretrial tasks. If all such pretrial preparation time is automatically excluded under § 3161(h)(1), then § 3161(h)(7)(B)(iv)—which provides for the exclusion of "reasonable time necessary for effective *preparation*" (emphasis added)—is superfluous.

All of that 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. That understanding is entirely natural in this context. See *Webster's Dictionary of the English Language Unabridged Encyclopedic Edition* 1434 (1979) (defining a legal "proceeding" to mean the "*taking* of legal action") (emphasis added).[6]

4. It is no answer to suggest, as have some courts, that the automatic exclusion of preparation time "eliminates a trap for trial judges, where accommodation of a defendant's request for additional time to prepare pretrial motions could cause dismissal of the case under the Speedy Trial Act." Pet. App. 7a; accord *United States* v. *Wilson*, 835 F.2d 1440, 1444 (D.C. Cir. 1987). There is no trap. If a trial judge is concerned that a defendant has asked

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[6] It is true, of course, that time used by one party to prepare a *response* to a pretrial motion is excluded under § 3161(h)(1)(D) because it falls between the filing of a motion and the motion's disposition, but by that point the "proceeding" has already begun.

for preparation time in an effort to manipulate the speedy trial calculation, the judge can simply deny the request. If such time is genuinely "necessary for effective preparation," the district court can exclude it under § 3161(h)(7) if the appropriate findings are made, § 3161(h)(7)(B)(iv), or such time might qualify for exclusion under one of the other prongs of (h)(7) or another subsection of the Act. As a practical matter, all this Court need do is announce the clear rule that pretrial motion preparation time is not automatically excluded under § 3161(h)(1). District courts and prosecutors will then know that such time presumptively counts against the speedy trial clock and will adjust their behavior accordingly.

In any event, the Act's remedial scheme is flexible. Although the district court is required to dismiss an indictment where the Act has been violated, it may do so with or without prejudice upon consideration of, among other factors, "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 [the Act] and on the administration of justice." § 3162(a)(2). Statutes of limitations are seldom an obstacle when an indictment is dismissed on Speedy Trial Act grounds. See 18 U.S.C. §§ 3288, 3289.

B. The Structure Of The Speedy Trial Act Confirms That Pretrial Motion Preparation Time Is Not Automatically Excluded Under § 3161(h)(1)

Automatic exclusion of pretrial motion preparation time would disrupt the Act's "coherent and consistent" statutory scheme—namely, the

calibrated interplay between § 3161(h)(1) and § 3161(h)(7). See *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 340 (1997) (quoting *United States* v. *Ron Pair Enterprises*, 489 U.S. 235, 240 (1989)). Preparation time *can* be excluded from the speedy trial calculation, but it should be excluded under § 3161(h)(7) on a case-by-case basis as the ends of justice require, not automatically under § 3161(h)(1).

1. If subsection (h)(7) imparts a standard, (h)(1) imparts a rule. As this Court explained in *Zedner*, 547 U.S. at 507–508, the operative language in (h)(1) is imperative and unequivocal: The periods of delay encompassed by (h)(1) "*shall* be excluded" from the speedy trial calculation in every case. § 3161(h) (emphasis added); see *Henderson*, 476 U.S. at 329–330, 331.

Section 3161(h)(7), by contrast, is the primary source of the Act's flexibility. See *Zedner*, 547 U.S. at 498–499. That provision, which the Act's drafters called "the heart of the speedy trial scheme," S. Rep. No. 96-212, at 10, 19, permits a district court to exclude periods of time—including "reasonable time necessary for effective preparation," § 3161(h)(7)(B)(iv)—if it makes certain findings in the record before deciding a motion to dismiss for violation of Act, see § 3161(h)(7); *Zedner*, 547 U.S. at 507 ("[W]ithout on-the-record findings, there can be no exclusion under § 3161(h)([7]).").

To be sure, both § 3161(h)(7) and the "including but not limited to" clause of § 3161(h)(1) contemplate the possibility that Congress had not specifically anticipated every delay that would merit exclusion from the speedy trial calculation. But those provisions work in opposite ways. Delays excluded

under subsection (h)(7) are case- and circumstance-specific. Delays that qualify for exclusion under subsection (h)(1) must be excluded in every case in which they arise. See *Henderson*, 476 U.S. at 329–330, 331.

Courts that follow the rule adopted below tend to elide that important distinction. In *United States* v. *Wilson*, 835 F.2d 1440 (D.C. Cir. 1987), for example, the defendants requested and received extra time to prepare pretrial motions. The D.C. Circuit upheld the exclusion of that delay, holding that "the trial court may exclude motion preparation time [under § 3161(h)(1)] *in its sound discretion*," especially when the defendant requests the extra time. 835 F.2d at 1444 (emphasis added and citation omitted). Several other courts, including the Eighth Circuit below, have embraced variations on that theme. See *United States* v. *Oberoi*, 547 F.3d 436, 451 (2d Cir. 2008) ("[T]ime for pretrial motions * * * *can* be excluded pursuant to subsection (h)(1), so long as the judge expressly stops the speedy trial clock for that purpose.") (emphasis added); Pet. App. 8a ("[P]retrial motion preparation time *may* be excluded under § 3161(h)(1), if the court specifically grants time for that purpose.") (emphasis added); *United States* v. *Mejia*, 82 F.3d 1032, 1036 (11th Cir. 1996) ("[*U*]*nder the circumstances*, an order granting an extension of time for the preparing and the filing of pre-trial motions causes [an excludable] delay for the purpose of the Speedy Trial Act.") (emphasis added).

But relying on § 3161(h)(1) to accommodate particular circumstances gets the statutory scheme exactly backwards. Subsection (h)(7)—not (h)(1)—is the source of trial courts' discretion. See *Zedner*, 547

U.S. at 498–499. And subsection (h)(7) carries with it carefully prescribed limits on the exercise of that discretion. Indeed, the Act specifically provides that (h)(7) exclusions may not be granted simply "because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government." § 3161(h)(7)(C). As this Court has recognized, Congress determined that the "substantive openendedness" of subsection (h)(7) should be paired with "procedural strictness" in its application. *Zedner*, 547 U.S. at 508–509. The rule adopted below, however, claims the former but circumvents the latter.

2. If courts should act with deliberation when granting exclusions one case at a time, see *Zedner*, 547 U.S. 508–509, they must be especially wary before granting them a *class* at a time. That is chiefly because delays excluded under subsection (h)(1) can affect a large number of cases in a single a stroke. It is also because evidence suggests that exclusions under (h)(1)'s general standard are quite rare.

In subsection (h)(1), Congress left open the possibility that it had overlooked a class of delay that ought to be automatically excluded, but the wide-ranging list of enumerated exclusions in subparagraphs (A)–(H)—not to mention the remainder of § 3161(h)—leaves little reason to believe that Congress expected significant additions would be necessary. Rather, "the 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, or as a recognition that the need for such an exclusion will not arise under the statutory scheme." *Rojas-Contreras*, 474 U.S. at 239–240 (Blackmun, J., concurring in the judgment).

Nearly three decades of experience with the Act show that the need has not arisen often. Although there have been cases in which courts have identified further examples of delays that fit within an enumerated subparagraph of (h)(1), the courts of appeals appear to have added almost no new *classes* of exclusions to the (h)(1) list. It would be passing strange if Congress, which was so thorough in its enumeration of exclusions, completely overlooked pretrial motion preparation time, a class of delay likely to occur in almost every criminal case that passes through the courts.

II. Section 3161(h)(1)'s Drafters Specifically Rejected The Automatic Exclusion Of Pretrial Motion Preparation Time

This is not the first time the government has asked to put pretrial motion preparation time within the automatic exclusion in § 3161(h)(1). Its first request was to Congress, which rejected it; its plea to this Court must meet the same fate.

A. Congress Specifically Considered And Rejected The Automatic Exclusion Of Pretrial Motion Preparation Time

Congress added the current language of § 3161(h)(1)(D) to the Speedy Trial Act in 1979. See Speedy Trial Act Amendments Act of 1979, Pub. L. No. 96-43, sec. 4, § 3161(h)(1), 93 Stat. 327, 328 (1979). The original Act, enacted five years before,

had excluded "delay resulting from hearings on pretrial motions." Speedy Trial Act of 1974, Pub. L. No. 93-619, sec. 101, § 3161(h)(1)(E), 88 Stat. 2076, 2077 (1975). That phraseology needed "legislative clarification," S. Rep. No. 96-212, at 20, Congress determined, because it (along with other features of the original statute) had caused "practical problems in interpreting and implementing the act" in the years since its passage, 125 Cong. Rec. 15,454 (1979) (statement of Sen. Biden). Congress set about to remedy that problem in the 1979 amendments.

Congress had been warned that the wording of the 1974 version was too indeterminate to be workable. In a 1971 Senate hearing on the original legislation, Professor Daniel Freed explained that

> [t]he term delay "resulting from hearings on pretrial motions" is ambiguous. It fails to describe the beginning and ending of the excluded period. Does it mean from the date of filing the motion to the date on which the court issues its decisions? That seems excessive. Does it mean "court days actually consumed in hearing a motion"? If so, the language should say that.

Speedy Trial: Hearings on S. 895 Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 92d Cong., 1st Sess. 147–148 (1971) (Appendix A to Prepared Statement of Daniel J. Freed), as reprinted in Anthony Partridge, *Legislative History of Title I of the Speedy Trial Act of 1974*, 99 (Fed. Jud. Center 1980).[7] The

[7] All bills leading to the passage of the 1974 Act contained the "hearings on pretrial motions" language that was ultimately

Judiciary Committee, however, dismissed a suggestion to clarify the exclusion. Compare Speedy Trial Act of 1973, S. 754, 93d Cong. sec. 101, § 3161(c)(1)(B) (as referred to S. Comm. on the Judiciary, Feb. 5, 1973), with Speedy Trial Act of 1974, S. 754, 93d Cong. sec. 101, § 3161(h)(1)(v) (as referred to H. Comm. on the Judiciary, July 29, 1974). As a result, the precise boundaries of the pretrial motion exclusion remained largely undefined in the final 1974 Act. See sec. 101, § 3161(h)(1), 88 Stat. at 2077–2078.

In 1979, Congress set out to change that. One proposed amendment, sent to Congress by the Department of Justice, called for the exclusion of all "delay resulting from the *preparation* and service of pretrial motions and responses and from hearings thereon." Speedy Trial Act Amendments Act of 1979, H.R. 3630, 96th Cong. sec. 5(c), § 3161(h)(1)(E) (1979) (emphasis added); see 125 Cong. Rec. 7,951 (1979) (statement of Sen. Kennedy introducing the Department of Justice amendment); 125 Cong. Rec. 8,080 (1979) (statement of Rep. Rodino introducing

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enacted. See Pretrial Crime Reduction Act of 1971, H.R. 7107, 92d Cong. § 3161(b)(1) (1971); Speedy Trial Act of 1971, S. 895, 92d Cong. sec. 101, § 3161(c)(1) (1971); Speedy Trial Act of 1973, S. 754, 93d Cong. sec. 101, § 3161(c)(1)(A)(v) (as referred to S. Comm. on the Judiciary, Feb. 5, 1973); Speedy Trial Act of 1974, S. 754, 93d Cong. sec. 101, § 3161(h)(1)(v) (as referred to H. Comm. on the Judiciary, July 29, 1974); Speedy Trial Act of 1974, H.R. 17409, 93d Cong. sec. 101, § 3161(h)(1)(E) (1974); see also Anthony Partridge, *Legislative History of Title I of the Speedy Trial Act of 1974*, 26 (Fed. Jud. Center 1980) ("The list of examples of 'other proceedings' changed somewhat from one version of the bill to another, although 'hearings on pretrial motions' appeared as an example in all bills through the 1974 act.").

the Department of Justice amendment).[8] That amendment would have required the automatic exclusion of pretrial motion preparation time under § 3161(h)(1)—the very result reached below.

The Senate Judiciary Committee specifically rejected that proposed amendment, instead adopting the current version of § 3161(h)(1)(D). See Speedy Trial Act Amendments Act of 1979, S. 961, 96th Cong. sec. 4, § 3161(h)(1)(F) (as reported June 13, 1979); see also 125 Cong. Rec. 15,452 (1979). The Committee explained that decision in its report:

> Although some witnesses contended that all time consumed by motions practice, from *preparation* through their disposition, should be excluded, *the Committee finds that approach unreasonable*. This is primarily because, in routine cases, preparation time should not be excluded where the questions of law are not novel and the issues of fact simple. However, the Committee would permit through its amendments to subsection

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[8] One of the witnesses who appeared before the Senate Judiciary Committee was Assistant Attorney General Philip Heymann. He explained that the Department of Justice's bill would "provide for the exclusion of all time reasonably necessary for and routinely required to *make*, respond to, contest and decide pretrial motions, thus avoiding unnecessary resort to and litigation under and about the exercise of authority under section 3161(h)(3) [sic]." *The Speedy Trial Act Amendments of 1979: Hearings on S. 961 and S. 1028 Before the Senate Committee on the Judiciary*, 96th Cong., 1st Sess. 55 (1979) (Prepared Statement of Assistant Attorney General Philip B. Heymann), as reprinted in Partridge, *Legislative History of Title I of the Speedy Trial Act of 1974*, at 110 (noting that the reference to § 3161(h) (3) was likely a misprint that should have referred to § "3161(h)([7])").

> (h)([7])(B) reasonable preparation time for pretrial motions in cases presenting novel questions of law or complex facts.

S. Rep. No. 96-212, at 33–34 (emphasis added). The House approved the Senate's change, and the bill was enacted into law. See sec. 4, § 3161(h)(1), 93 Stat. at 327–328; see also H.R. Rep. No. 96-390, at 10, as reprinted in 1979 U.S.C.C.A.N. 805, 814 (1979) ("The Committee approves the expansion of this exclusion to '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' * * * .").

As noted above, even as it rejected the automatic exclusion of preparation time, Congress authorized district courts to exclude preparation time on a case-by-case basis when the ends of justice require. With the same amendments that modified § 3161(h)(1)(D), Congress enacted what is now § 3161(h)(7)(B)(iv), which permits courts to exclude a continuance when denial of the continuance "would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective *preparation*." Sec. 5(c), § 3161(h)(8)(B)(iv), 93 Stat. at 328 (emphasis added).

It would be "improper * * * to give a reading to the Act that Congress considered and rejected," *Pacific Gas and Elec. Co.* v. *State Energy Res. Conservation and Dev. Comm'n*, 461 U.S. 190, 220 (1983), but that is precisely what affirming the decision below would do. As this Court has explained, "[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact

statutory language that it has earlier discarded in favor of other language." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 442–443 (1987) (quoting *Nachman Corp* v. *Pension Benefit Gaur. Corp.*, 446 U.S. 359, 392–393 (1980) (Stewart, J., dissenting)); accord *Doe* v. *Chao*, 540 U.S. 614, 622–623 & n.5 (2004) (relying on the deletion of language from a draft bill when interpreting the enacted language).

That principle has already made its appearance in a case interpreting the Speedy Trial Act. See *Taylor*, 487 U.S. at 339–340 & n.11. In that case, the court of appeals had held (and the government did not dispute) that the defendant's failure to appear for trial did "not restart the full 70-day speedy trial clock." *Id.* at 339–340. The Court noted that a "Department of Justice proposal to restart the 70-day period following recapture of a defendant who has fled prior to trial was rejected by Congress in favor of merely excluding '[a]ny period of delay resulting from the absence or unavailability of the defendant.'" *Id.* at 340 n.11 (alteration in original) (internal citation omitted). This Court should again reject the government's attempt to win from the courts what Congress expressly denied it.

This Court is no stranger to consulting the legislative history of the Speedy Trial Act. See, *e.g.*, *Zedner*, 547 U.S. at 501; *Henderson*, 476 U.S. at 327–328; *Rojas-Contreras*, 474 U.S. at 235–236; *Taylor*, 487 U.S. at 334. And here, that evidence could not be clearer: Congress deliberately elected *not* to include pretrial motion preparation time within the automatic exclusion set forth in § 3161(h)(1). The rule adopted below flouts that decision.

B. Congress Carefully Circumscribed The Pretrial Motion Exclusion, Leaving Preparation-Related Considerations To § 3161(h)(7)

Reading § 3161(h)(1) to exclude pretrial motion preparation time also ignores the fact that Congress wished to bring calibrated precision to the pretrial motion exclusion. One of Congress's chief complaints leading up to the 1979 amendments was that courts had interpreted the Act's exclusions too narrowly. See, *e.g.*, S. Rep. No. 96-212, at 18, 26; H.R. Rep. No. 96-390, at 10. To combat that problem, Congress revised subsection (h)(1)—subparagraph (D) included—with the general goal of expanding the scope of the automatic exclusions listed there. See, *e.g.*, *Henderson*, 476 U.S. at 327–328; S. Rep. No. 96-212, at 33 ("The 'hearings on pretrial motions' provision would be *enlarged* to include, as excludable time, the entire period of time from the date of filing to the conclusion of hearings on, or other prompt disposition of, pretrial motions.") (emphasis added).

Even with the general purpose of expanding § 3161(h)(1)(D), however, Congress was at pains to delineate the provision's limits with precision, identifying both a starting point and an endpoint to pretrial motion delay that would be automatically excluded. See, *e.g.*, S. Rep. No. 96-212, at 34 ("[T]he section provides exclusion of time from filing to the conclusion of hearings on or 'other prompt disposition' of any motion. This later language is intended to provide a point at which time will cease to be excluded * * * ."). The reason for that care is documented in both the House and Senate Judiciary Committee reports: Congress worried that this

exclusion could be abused or, through undisciplined application, expand and undermine the Act's carefully balanced objectives. See *id.* at 33–34; H.R. Rep. No. 96-390, at 10, 11.

It bears repeating that Congress was clear that § 3161(h)(7)—not § 3161(h)(1)—would supply the necessary flexibility to exclude pretrial motion preparation time in appropriate cases. The Senate Judiciary Committee explained that "the language of subparagraph ([D]) of subsection (h)(1), the automatically excludable delay provisions, must be read together with the proposed change in clause (ii) of subsection (h)([7])(B) involving 'preparation' for 'pretrial proceedings." S. Rep. No. 96-212, at 33. Although clause (ii) deals only with unusual or complex cases, the House Judiciary Committee noted that, as part of the 1979 amendments, Congress was also enacting § 3161(h)(7)(B)(iv), which would permit an exclusion "when reasonably necessary to permit either party reasonable time for effective preparation of the case." H.R. Rep. No. 96-390, at 12 (discussing amendments to § 3161(h)(7) designed, in part, to allow for excludable continuances for pretrial preparation, "including, for example, in the preparation of complex pretrial motions").

Accordingly, the limits Congress set on pretrial motion exclusions were not incidental. Rather, they were put into place after specific consideration of both *how much* to expand the existing pretrial motion exclusion and *where else* in the statute to give district courts flexibility. The exclusion of pretrial motion preparation time only under § 3161(h)(7) thus comports with the deliberate judgment of Congress.

III. The Automatic Exclusion Of Pretrial Motion Preparation Time Would Disrupt The Act's Carefully Balanced Scheme

The Speedy Trial Act was expressly intended to serve the interests of both criminal defendants and the public. To effectuate those goals, Congress was forced to make any number of choices. It chose, for instance, to give the government precisely 70 days—not 69 or 71 (or, as the Department of Justice wanted, 120)—to take a case from indictment to trial.[9] See § 3161(c)(1). It chose to give district courts the discretion to exclude particular delays when the ends of justice require. See § 3161(h)(7). And most importantly for this case, it chose automatically to exclude some of the delays occasioned by pretrial motions, but not others. See § 3161(h)(1)(D). By automatically excluding pretrial motion preparation time, the Eighth Circuit replaced

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[9] The 1974 Act required arraignment to follow within ten days of indictment, and trial to commence within 60 days of arraignment. See sec. 101, § 3161(c), 88 Stat. at 2077. In 1979, the Department of Justice, the Judicial Conference of the United States, and the American Bar Association all supported "enlargement of the fixed arraignment to trial period," in part because they felt that the prescribed period was "arbitrary." S. Rep. No. 96-212, at 24. The Senate Judiciary Committee disagreed, concluding that "[t]here is a rational basis for concluding that sixty days is a desirable benchmark for the time by which most criminal cases should proceed to trial." *Ibid.* To eliminate certain "interpretive as well as practical problems," however, the committee consolidated the two, separate periods in the original Act into one, 70-day period. *Ibid.* The Department of Justice and Judicial Conference also favored consolidation, but they supported a 120-day period, not the 70-day period Congress preferred. See Partridge, *Legislative History of Title I of the Speedy Trial Act of 1974*, at 21 & n.61.

Congress's choice with its own, disrupting the careful balance of interests Congress struck in the 1979 Act.

1. The Speedy Trial Act "was designed with the public interest firmly in mind." *Zedner*, 547 U.S. at 500–501 (citing § 3161(h)([7])(A)); accord 125 Cong. Rec. 21,599 (1979) (statement of Rep. Gudger) ("[T]he act is designed to protect society as much as to protect the rights of the accused.").[10] Bringing defendants quickly to trial reduces the number of crimes committed during periods of pretrial release and prevents extended pretrial delay from undermining the deterrent effect of the criminal law. See *Zedner*, 547 U.S. at 501 (citing S. Rep. No. 93-1021, at 6–8 and H.R. Rep. No. 93-1508, at 8). Speedy trials also tend to be more accurate: "As the time between the commission of the crime and trial lengthens, witnesses may become unavailable or their memories may fade." *Barker* v. *Wingo*, 407 U.S. 514, 521 (1972). Other evidence may also decay with the passage of time. Automatically extending the speedy trial clock for the preparation of pretrial motions—which occurs in countless cases—presents a serious risk to the public's interest in speedy trials.

At a more basic level, automatically excluding pretrial motion preparation time subordinates the public's interests to the desires of parties or the trial court. As this Court observed in *Zedner*, "there are

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[10] This is not surprising considering that the constitutional right to a speedy trial also takes the public interest into account. That right, this Court has said, is "generically different from any of the other rights enshrined in the Constitution for the protection of the accused" because there is also "a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused." *Barker* v. *Wingo*, 407 U.S. 514, 519 (1972).

many cases * * * in which the prosecution, the defense, and the court would all be happy to opt out of the Act, to the detriment of the public interest." 547 U.S. at 502. Because such opting out would "seriously undermine the Act," *Zedner* concluded that "a defendant may not prospectively waive the application of the Act." *Id.* at 502–503. The automatic exclusion of pretrial motion preparation time would likewise allow the court and the parties effectively to opt out of the Act. The trial court would need only designate a delay—whatever its duration, and whatever the reason for it—as "preparation time," and it would be exempt from the strictures of the Act. No less than prospective waivers, such a loophole in the Act's otherwise comprehensive scheme would significantly undermine the Act's pursuit of the public interest. See *id.* at 500.

When pretrial motion preparation time is not excluded automatically, such time must be evaluated on a case-by-case basis and its exclusion justified in on-the-record findings. See § 3161(h)(7)(A). Those findings guide district courts' discretion and allow reviewing courts to determine whether the district court properly took into account the best interest of the public before excluding the delay. See *ibid.* Indeed, there is little indication that Eighth Circuit (or the other courts that share its view) took the public interest seriously into account when deciding that pretrial motion preparation time must automatically be excluded under subsection (h)(1). See, *e.g.*, Pet. App. 7a–8a (focusing on petitioner's request for preparation time without mentioning the public interest); *Wilson*, 835 F.2d at 1444 (same). Excluding pretrial motion preparation time only

under the specific procedures and findings mandated by subsection (h)(7) ensures that the priorities set by Congress are protected.

Defendants' interests in speedy trials are no small matter, of course. The degradation of testimony and evidence frequently impairs defendants' ability to mount an effective defense. See *Barker*, 407 U.S. at 532; Jennifer L. Overbeck, *Beyond Admissibility: A Practical Look at the Use of Eyewitness Expert Testimony in the Federal Courts*, 80 N.Y.U. L. Rev. 1895, 1898–1899 (2005). The Act also combats the harsh effects of excessive pretrial incarceration, which lies at the "core" of the right to a speedy trial. Brian P. Brooks, *A New Speedy Trial Standard for* Barker *v.* Wingo*: Reviving a Constitutional Remedy in an Age of Statutes*, 61 U. Chi. L. Rev. 587, 596–597 (1994). Even if an accused is not confined before trial, "he is still disadvantaged by restraints on his liberty and by living under a cloud of anxiety, suspicion, and often hostility." *Barker,* 407 U.S. at 533. Legislators also recognized that some prosecutors will "rely upon delay as a tactic in the trial of criminal cases," H.R. Rep. No. 93-1508, at 7 (1974), as reprinted in 1974 U.S.C.C.A.N. 7401, 7408, and the Act seeks to counter such abuses.

2. Under the Sixth Amendment, a defendant's speedy-trial right is "amorphous, slippery, and necessarily relative." *Vermont* v. *Brillon*, 129 S. Ct. 1283, 1290 (2009) (internal quotation marks omitted). Courts evaluating whether delay is of constitutional dimension therefore apply a balancing test that considers the length of the delay, the reason

for it, and the prejudice to the defendant, among other factors. See *ibid.*

Although that sort of "reasonableness review" is appropriate for constitutional speedy trial cases—and, in certain specified ways, for review of exclusions made under § 3161(h)(7)—it is not appropriate where (as here) the task is to determine whether Congress chose automatically to exclude a particular class of delay under § 3161(h)(1). Just two years after this Court articulated the constitutional balancing test in *Barker* v. *Wingo*, Congress passed the Speedy Trial Act, establishing an entirely distinct framework in which to analyze speedy-trial cases—a framework of Congress's choosing, not the courts'. See 125 Cong. Rec. 21,599 (1979) (statement of Rep. Gudger, stating that Congress enacted the Speedy Trial Act "in part in response" to this Court's "refus[al] to read any specific time limits into the sixth amendment"). Accordingly, the Speedy Trial Act's automatic exclusions are not an invitation for courts to substitute their own judgments about what is a reasonable timetable for those of Congress.

What is more, granting courts broad license to expand the Act's automatic exclusions based on judgments about what is reasonable can be a complicated business. In the Seventh Circuit, at least, all preparation time is excluded as long as the trial court specifically grants time for that purpose. See *United States* v. *Montoya*, 827 F.2d 143, 153 (7th Cir. 1987); *cf.* Pet. App. 8a; *Wilson*, 835 F.2d at 1445. Other circuits distinguish between preparation time granted at a defendant's request (excludable) and routine time granted *sua sponte* by the court (non-excludable). See, *e.g.*, *United States* v. *Williams*, 197

F.3d 1091, 1093–1095 (11th Cir. 1999); *United States* v. *Hoslett*, 998 F.2d 648 (9th Cir. 1993). And if those courts were asked to decide whether preparation time would automatically be excluded when the *prosecution* requests it, there may well be differing judgments about what is reasonable in that circumstance, too. As this Court recently observed, determining who requested what in the whirl of daily trial practice is no small feat. See *Montejo* v. *Louisiana*, 129 S. Ct. 2079, 2084 (2009) (holding that standard turning on whether 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 Speedy Trial Act is, by design, an amalgam of bright-line rules and discretionary judgments. But Congress was quite clear in identifying which circumstances warranted the former and which required the latter. To say that Congress could or should have done something differently is beside the point; Congress made those decisions, and they are not subject to judicial second-guessing.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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