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 NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The National Association of Criminal Defense Lawyers ("NACDL") respectfully submits this brief as *amicus curiae* in support of petitioner.

INTERESTS OF *AMICUS CURIAE*[1]

NACDL is a nonprofit organization with a direct national membership of more than 12,500 attorneys, in addition to more than 35,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. NACDL recognizes that the

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[1] Pursuant to Rule 37.3(a), letters from the parties consenting to the filing of this brief are being filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

Speedy Trial Act's time limitations impose a burden on defense lawyers in the preparation of cases for their clients, but the Act ultimately benefits criminal defendants—to whom defense lawyers and the NACDL owe a duty of loyalty—and such time limitations also benefit society at large. Thus, NACDL respectfully submits this brief to urge the Court to reject proposed expansions of the automatic exclusions to the Act's limitations period that threaten achievement of the objectives that underlie the Act, such as the exclusion for pretrial motion preparation at issue here, even if the delay is requested by defense counsel and especially where the exclusion is inconsistent with congressional intent.

SUMMARY OF ARGUMENT

Congress enacted the Speedy Trial Act in 1974 "to assist in reducing crime and the danger of recidivism by requiring speedy trials." Pub. L. No. 93-619, 88 Stat. 2076 (1974).[2] As this Court has recognized, the Act's requirement that a criminal trial commence within a specified time frame, or that the indictment be dismissed, *benefits the public*, even in

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[2] The Act requires, among other things, that the trial of a criminal defendant commence within 70 days of his indictment or first court appearance, whichever is later. 18 U.S.C. § 3161(c)(1). If the defendant is not tried within the prescribed time period, the charges must be dismissed upon motion of the defendant. 18 U.S.C. § 3162(a)(2).

circumstances where both the prosecutor and the defense counsel might desire to delay the running of the Speedy Trial Act clock. *Zedner v. United States*, 547 U.S. 489, 501 (2006).

Rather than require dismissal of the indictment, the Eighth Circuit below interpreted the Act to permit an automatic exclusion from the Speedy Trial Act clock of the period of time that the parties spend preparing pretrial motions. Such an exclusion is not consistent with the specific language Congress used to carve out exceptions to its speedy trial limitations rule, nor does it further Congress's objectives in mandating speedy criminal trials.

A. The public benefits of providing speedy criminal trials are not only theoretical but are also supported by empirical data and other evidence regarding the administration of criminal justice. Data demonstrate that the Act has affected the processing speed of the slowest criminal cases, which decreases the adjudication times for all cases on average. Moreover, the Act and other speedy trial mandates have contributed to the development of a federal courthouse culture that values, and thus in turn facilitates, reductions of unwarranted trial delay.

Speeding up the process of criminal adjudications has several practical benefits for the public, as Congress intended. It advances the cause of justice because fresher, better evidence can be offered when defendants receive speedier trials. It saves money and time, because fewer jails are required when

defendants are not being detained for long periods pretrial and because mandating faster trials generates bargaining about guilty pleas. It also permits adherence to foundational principles regarding treatment of persons accused of crimes, while at the same time maintaining, if not improving, public safety.

In addition to these practical benefits, the Act serves other significant societal purposes, such as protecting innocent defendants from mistaken identification and wrongful conviction; promoting fundamental fairness, individual liberty, and other core criminal justice values; and facilitating effective enforcement of the Sixth Amendment's speedy trial guarantee.

B. Because Congress recognized that unwarranted delay in the accrual of the Act's limitations period thwarts the public benefits that the Act was designed to achieve, Congress was quite careful to delineate specifically the narrow circumstances under which the Act's limitations period can be tolled. *See* 18 U.S.C. § 3161(h). The exclusions enumerated in the statute reflect deliberate policy choices about the extent to which achievement of the public benefits must yield to due process and practicability concerns when the Act's limitations rule is applied.

This Court should not recalibrate Congress's careful balancing of these interests, even if the proposed expansion of the automatic exclusions is

requested by the defense. Delay in the commencement of trial does not always benefit the defendant. And this Court has already rejected the contention that the Act's exclusions are to be evaluated in light of the interests of the parties. *Zedner*, 547 U.S. at 501. Careful scrutiny of any proposed automatic exclusion is necessary to ensure that, regardless of the parties' desires, the requested additional delay is consistent with the will of Congress and does not substantially impede achievement of the important objectives of the Act.

C. An automatic exclusion for the time parties spend preparing pretrial motions—which defense counsel requested below and the lower court deemed permissible under section 3161(h)(1)—cannot withstand scrutiny. Section 3161(h)(1)(D)[3] clearly manifests Congress's determination that, as concerns motions practice, the benefits of speedy trials are subordinate to the administrative needs of the trial judge, not the litigants. This makes eminent sense because it is consistent with efficient criminal justice administration overall, given the judge's responsibility for managing the docket, the fact that motions can be case dispositive, and the likelihood that such expansion of the motions exclusion would

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[3] In accordance with the recent technical amendments to the statute, the automatic exclusion that tolls the Act's limitations period during the time from the "filing" to the "disposition" of pretrial motions (former section 3161(h)(1)(F)) is referred to in this brief as section 3161(h)(1)(D).

delay criminal case adjudication substantially. Focusing on the perceived inequities between the movants and respondents misses the bigger picture: Congress made a specific judgment call on this particular issue, which is reflected in the text of Section 3161(h)(1)(D). Courts need to honor that determination by refusing to expand the scope of the motions exclusion.

ARGUMENT

THE SPEEDY TRIAL ACT ADVANCES THE PUBLIC'S INTEREST IN AN EFFICIENT AND FAIR CRIMINAL JUSTICE SYSTEM, AS CONGRESS INTENDED, AND THIS COURT SHOULD REJECT ANY EXPANSION OF THE ACT'S AUTOMATIC EXCLUSIONS THAT THREATENS ACHIEVEMENT OF THE IMPORTANT PURPOSES AND SIGNIFICANT BENEFITS OF THE ACT

The Speedy Trial Act mandates that a criminal defendant's trial "shall commence within seventy days" of the defendant's indictment or "the date the defendant first appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs." 18 U.S.C. § 3161(c)(1). The Act provides that "[i]f a defendant is not brought to trial within the time limit required by [the statute], the information or indictment shall be dismissed on motion of the defendant." *Id.* § 3162(a)(2).

The Act also expressly excludes eight categories of time from the calculation of the 70-day period in which a trial must commence. *Id.* § 3161(h). As

petitioner establishes in his brief on the merits, the court of appeal's ruling below—which held that the time spent *preparing* pretrial motions can be automatically excluded under section 3161(h)(1)—cannot be reconciled with the plain language of the Act. This is so because the Act not only automatically excludes certain "delay resulting from any pretrial motion," *id.* § 3161(h)(1)(D), but also 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" fits within that automatic exclusion. *Ibid.* (emphasis added). Had Congress intended *any* and *all* time related to pretrial motions to be excluded, it would have said so.

Moreover, as argued below, the listed automatic exclusions reflect specific policy judgments that Congress made in light of the importance of the Act's objectives and the significance of the public's interest in providing speedy trials. Expansion of these exclusions to delay further the start of criminal trials recalibrates Congress's careful balancing of interests and threatens achievement of the significant public benefits that the Act provides.

A. The Act's Limitations Period Furthers Several Important Public Objectives

The Speedy Trial Act was enacted as an antidote to lengthy trial delays that, as of the early 1970s, had created an enormous backlog in federal criminal justice processes, which, in turn, gave rise to a host

of serious societal ills. Congress viewed the many "ramifications" of delayed criminal trials as a significant problem that was "highly prejudicial to the public interest" because it decreased accountability, increased danger of recidivism, undermined the deterrent value of swift punishment, and eroded public "confidence in the fairness and administration of criminal justice." S. Rep. No. 96-212, at 6 (1979). Empirical evidence demonstrates that the Act has been successful in creating incentives for the efficient movement of cases through the federal criminal justice system and in reinforcing many of our most important legal norms, including the Sixth Amendment's speedy trial guarantee. The ruling below, which expands the automatic exclusions to the Act's limitations rule, threatens continued achievement of these important objectives.

1. The Act motivates action in the adjudication of criminal cases, which yields many practical benefits for society

a. Prior to the enactment of the Speedy Trial Act in 1974, the mean case processing time for federal criminal cases was at least four months. *See* Joel H. Garner, *Delay Reduction in the Federal Courts: Rule 50(b) and the Federal Speedy Trial Act of 1974*, 3 J. Quantitative Crim. 229, 239 (1987). The Act and its dismissal sanction reduced that time from four months to three between 1975 and 1982. *Ibid.* This reduction was driven in part by a 20 percent decrease

in the time required to resolve the slowest overall cases. *Ibid.*[4]

Studies of state-level speedy trial legislation have found similar effects. For example, researchers analyzing the effect of speedy trial statutes in several Midwestern states found that the laws caused cases to be adjudicated more quickly, partly because of the incentives created by dismissal (and similar sanctions) in those laws. *See, e.g.*, Roy B. Flemming, Peter F. Nardulli & James Eisenstein, *The Timing of Justice in Felony Trial Courts*, 9 L. & Pol'y 179, 198 (1987); Charles W. Grau & Arlene Sheskin, *Ruling Out Delay: The Impact of Ohio's Rules of Superintendence*, 66 Judicature 108, 116-117 (1982).

By mandating the commencement of trials within a set period of time, at the risk of dismissal of the indictment, the Act also refocused participants in the criminal justice process (*i.e.*, prosecutors, defense counsel, and trial judges). These participants quickly came to understand that the complacency that had given rise to a need for the legislation was unacceptable. *See, e.g.*, S. Rep. No. 96-212, at 8

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[4] Researchers observed a similar pattern on a geographic basis in the 1970s and early 1980s, with case processing time reductions in the slowest judicial circuits bringing those circuits substantially closer to overall mean disposition times. *See* Nancy L. Ames, Theodore M. Hammett & Lindsey D. Stellwagen, Office of Legal Policy, Dep't of Justice, THE IMPACT OF THE SPEEDY TRIAL ACT ON INVESTIGATION AND PROSECUTION OF FEDERAL CRIMINAL CASES 82 (1985).

("None of us interested in the administration of criminal justice, * * * whether inside or outside of the Government, whether within or without the bench and bar, can fail to be struck by the stark fact of intolerable delays in our system of administering criminal justice." (quoting Statement of then-Assistant Att'y Gen. William H. Rehnquist)). And that new shared understanding gave rise to broad-ranging reforms, such as revised organizational structures and active management policies within U.S. Attorneys' offices, and new case tracking systems within courts. *See, e.g.,* Ames, *supra*, at 82-83; Statement of U.S. Attorney Whitney North Seymour, Jr., delivered August 15, 1972, *reprinted in* 118 Cong. Rec. 30404, 30405 (Sept. 13, 1972) [hereinafter "Seymour Statement"]; *see also* John C. Godbold, *Speedy Trial—Major Surgery for a National Ill*, 24 Ala. L. Rev. 265, 266 (1972) ("The realization has taken root that the expedition of criminal trials is a responsibility shared by many who participate in the administration of criminal justice, rather than, as often viewed, an annoying tactical maneuver used by the informed and persistent defendant.").

b. Even minor increases in efficiency in regard to the processing of criminal cases have substantial practical benefits for the public.

First, the provision of speedy trials promotes just outcomes in criminal cases. A 1980 study of pre-Act data regarding the speed with which criminal cases were adjudicated discovered a clear correlation between the speed of adjudication and the rate of

conviction—a connection that the researchers hypothesized was attributable to speed's effect on evidence preservation. *See* Victoria L. Swigert & Ronald A. Farrell, *Speedy Trial and the Legal Process*, 4 L. & Hum. Behav. 135, 140 (1980).[5] The search for truth in our adversarial criminal justice system clearly requires *reliable* evidence, and such evidence becomes increasingly difficult to produce with the passage of time, regardless of whether it is offered by the prosecution or the defense. *See Doggett v. United States*, 505 U.S. 647, 654-656 (1992); *see also* 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). Thus, speedy adjudication of criminal charges advances the cause of justice.

Efficient criminal process also preserves public resources—both time and money. The public gains from speedy resolution of criminal cases because getting cases to trial faster reduces the costs related

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[5] After speedy trial guidelines were adopted by the Second Circuit on its own initiative in 1971, the United States Attorney for the Southern District of New York similarly observed that conviction rates had increased as a result. *See* Seymour Statement, *supra*, at 30405. A report by the Administrative Office of the U.S. Courts ("AOUSC") and analyzed in the early 1980s also supports this conclusion. The Administrative Office found that overall conviction rates for federal defendants tried by court or jury increased from 77.6% in 1976 to 80.5% in 1980. *See* AOUSC *Sixth Report on the Implementation of Title I of the Speedy Trial Act of 1974*, at 35 (Feb. 1980) [hereinafter "AOUSC Sixth Report"].

to prolonged incarceration of individuals who have not yet been convicted of committing crimes. *See* Amanda Petteruti & Nastassia Walsh, Justice Policy Inst., *Jailing Communities: The Impact of Jail Expansions and Effective Public Safety Strategies* 18 (April 2008) (the average daily cost to a local county of incarcerating one pretrial detainee is $58.64, for a minimum of $21,403 if pretrial detention lasts a year); *cf.* Tim Craig, "Non-Violent Offenders Could Get Out Early," THE WASHINGTON POST, Feb. 3, 2009, at B1 (each of Virginia's 41 correctional facilities costs $25 million annually to operate). The public also benefits when the cost of a trial is entirely avoided—a result that occurs most frequently when plea-bargains are struck, which tends to happen more in the wake of speedy trial legislation. *See* Seymour Statement, *supra*, at 30405 (the rate of disposition of criminal cases jumped 20% in S.D.N.Y. the first full quarter after the Second Circuit's speedy trial rules went into effect, all due to increased guilty pleas); Barry Mahoney et al., CHANGING TIMES IN TRIAL COURTS 81 (1988) ("[N]othing is more likely to produce a settlement in a case then the imminent and unavoidable prospect of actually going to trial.").

As a final practical matter, speedy trial legislation is capable of achieving a feat that few other policy initiatives can match: it can maintain public safety while at the same containing costs and also upholding basic values about the restraint of individuals in a free society. *See* Susan N. Herman, THE RIGHT TO A SPEEDY AND PUBLIC TRIAL 205 (2006).

This is so because of the assessments that judges are likely to make in a world in which trials are *not* predictably forthcoming.

In the absence of a speedy trial mandate (or the existence of one with so many unenumerated categorical exceptions that the limitations period is rendered illusory), some judges who might be tempted to release non-dangerous alleged offenders would choose, instead, to deny bond and to keep such individuals incarcerated (on the public's tab) to avoid the risk that they would commit crimes while on release during the uncertain and potentially lengthy period of pretrial delay. Other judges, who might worry about breaching the public trust by keeping people who have not been convicted of crimes locked up for uncertain and potentially lengthy periods of time, would authorize bond liberally, releasing many alleged offenders, and thereby put the public at the mercy of some dangerous individuals who might commit new crimes while roaming the streets during the period of pretrial delay. The provision of speedy trials solves *both* problems: the non-dangerous offenders get released, and the dangerous offenders remain in jail, both at a reduced net cost to society. *See* Richard S. Frase, *The Speedy Trial Act of 1974*, 43 U. Chi. L. Rev. 667, 668-669 (1976); *see also* Herman, *supra*, at 205 (the Act "responded to public concerns about preventing crime and controlling dangerous offenders" while at the same time providing "an alternative to preventive

detention as a means of addressing the public's concerns").

These outcomes are not speculative. Statistics from the late 1970s gathered by the Administrative Office of the United States Courts suggests that the Speedy Trial Act has this effect. *See* AOUSC Sixth Report, at 27 (percent of defendants detained in custody prior to trial decreased from 39.4% to 31% from 1976 until 1980). And this effect was precisely what Congress intended when it enacted the Speedy Trial Act to "ensure[ ] that defendants are brought to trial quickly enough that the pretrial controls only need to be used for a minimum time." Herman, *supra*, at 205 (quoting statement of then-Representative Abner Mikva).

2. The Act serves as a bulwark against the prosecution and conviction of innocent defendants

Another significant public benefit that results from legislation mandating speedy trials is the protection that it affords to *innocent* people who are mistakenly accused of criminal wrongdoing by the government. Just in the past decade, there have been many reports about persons wrongly accused, and in some cases convicted, of very serious crimes. *See, e.g.*, Ralph Blumenthal, "15th Dallas County Inmate Since '01 is Freed by DNA," N.Y. Times, Jan. 4, 2008, at A11; Solomon Moore, "DNA Exoneration Leads to Change In Legal System," N.Y. Times, Oct. 1, 2007, at

A22; *see also* Samuel R. Gross, et al., *Exonerations in the United States 1989 Through 2003*, 95 Crim. L. & Criminology 523 (2005).[6] Many more of these sad situations likely would occur in the absence of legislation requiring speedy trials.

The relatively stringent time constraints set forth in speedy trial legislation compel the prosecutor to assemble, review, and thoroughly evaluate her case *before* the charges are brought. *See* Linda M. Ariola et al., *The Speedy Trial Act: An Empirical Study*, 47 Fordham L. Rev. 713, 741-742 (1979). Statistical reports confirm that, as a result of the speedy-trial time constraints, some federal prosecutors withhold arrests until after indictment and sometimes downgrade charges. *See* AOUSC Sixth Report, at 42. The Act's time limitations thus contribute to the "increased quality of indictments," Seymour Statement, *supra*, at 30405, which benefits innocent defendants, as well as the public, because weak cases are identified early and screened out, leaving more

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[6] Such mistaken identifications have occurred nationwide and have not been limited to local prosecutions. Mistakes have been made even in regard to alleged federal crimes in high-profile cases. *See, e.g.*, Mark Larabee & Ashbel S. Green, "One Mistaken Clue Sets a Spy Saga in Motion," THE OREGONIAN, Mar. 26, 2006, at A1 (describing the two-week long detention of a Portland-area lawyer on a material witness warrant that was issued based on the federal government's erroneous allegation of a connection between his fingerprint and the 2003 Madrid terrorist bombings).

resources for the most meritorious matters. *See* Ames, *supra*, at 29-31, 112-127.[7]

The Act also helps the innocent criminal defendant cope with the unfortunate circumstance of being charged with a federal crime. *Cf.* Frase, *supra*, at 667 (the speedy trial right "minimize[s] the anxiety, public scorn and suspicion, and potential 'chilling effect' of unresolved charges"). It both ensures that such person can exonerate himself in a timely manner and also limits the government's leverage to extract a guilty plea.[8] Prior experience amply demonstrates that in the absence of speedy trial legislation, "[i]nnocent persons unable to make

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[7] As the United States Attorney for the Southern District of New York noted in candid remarks made in 1972:

> When a younger Assistant U.S. Attorney must face the fact that he will have to present his evidence to a trial jury in approximately sixty days, he is much more likely to take a jaundiced look at the evidence presented to him by the investigative agency, and to ask more hard questions at the threshold of the prosecution, rather than waiting until some far-off day of preparation for trial. He knows that he is preparing for trial from the start and that there will be no future opportunities to fill in the gaps in the proof if they exist.

Seymour Statement, *supra*, at 30405.

[8] When faced with a prosecutor's offer to recommend a sentence of "time-served"—a frequently-used prosecutorial strategy in relatively minor cases—an innocent defendant may feel enormous pressure to cut his losses and to plead guilty in exchange for immediate freedom, especially if there is no discernable end to the potential period of pretrial incarceration.

bail suffer the brutalizing atmosphere of pretrial detention centers or, in desperation, plead guilty to unfounded charges in order to escape." Note, *Speedy Trial: A Constitutional Right in Search of Definition*, 61 Geo. L.J. 657, 658 (1973). Among its many virtues, then, the Act addresses this significant problem.

3. The Act promotes the perception that American criminal justice processes are fundamentally fair

a. Speedy trial principles have been inextricably linked to notions of fundamental fairness in criminal procedure for *centuries*. No less an authority on English common law than Sir Edward Coke maintained that "doing 'justice and right, according to the rule of law and custome of England' * * * included the quality of speed." Herman, *supra*, at 162-163 (quoting Sir Edward Coke, I INSTITUTES OF THE LAWS OF ENGLAND 56 (LONDON: E. & R. BROOKE (1797)).[9] The Habeas Corpus Act of 1679 provided prisoners with a remedy for "prolonged incarceration without trial." Herman, *supra*, at 164. And the Framers followed suit, expressly guaranteeing that

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[9] Coke traced the principle that avoidance of undue delay is an essential ingredient of fair criminal process in a free society all the way back to the Magna Carta. *See* Herman, *supra*, at 163 (quoting Coke as stating that "the law of England is a law of mercie * * * for three causes: First, that the innocent shall not be worn and wasted by long imprisonment, but (as hereby, and by the statute of Magna Charta appeareth) speedily come to trial").

speedy trials would be provided to criminal defendants under our Constitution as a matter of right. *See* U.S. Const. amend. VI.

By the time the Speedy Trial Act was enacted in 1974, our society's agreement with the view that any system for adjudicating criminal cases must "give[ ] the prisoner full and speedy justice, * * * without detaining him long in prison," Coke, *supra*, at 43, was beyond question. But the Act also reinforces specific bedrock tenets of criminal procedure, including the right to trial by jury and the principle that a person accused of a crime is deemed innocent, unless and until *the government* satisfies its burden of establishing guilt beyond a reasonable doubt. Long gone are the repudiated practices of previous eras in which an individual could be arrested summarily and held in prison "no matter how long that may be, until he can prove by inquest that he is innocent." Henry de Bracton, II ON THE LAWS AND CUSTOMS OF ENGLAND: 1240-1260, 347 (HARV. UNIV. PRESS, 1968). Under the American system of criminal justice, accused individuals may stand silent, and the burden of bringing forth evidence that establishes each element of the alleged crime beyond a reasonable doubt must be shouldered by the government. *Cf. In re Winship*, 397 U.S. 358, 363 (1970) ("There is always in litigation a margin of error * * * which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant has liberty—this margin of error is reduced as to him by the process of placing on the

other party the burden of * * * persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt." (quoting *Speiser v. Randall*, 357 U.S. 513, 525-526 (1958)); *see also Dickey v. Florida*, 398 U.S. 30, 37 (1970) ("State claims have never been favored by the law, and far less so in criminal cases.").

Thus, by prescribing a specific time frame within which indictment and trial must commence as a matter of federal law, the Act reflects our core values regarding individual liberty and the relationship between the government and its citizens. Indeed, the very fact that there *is* a Speedy Trial Act makes it abundantly clear that when the United States seeks to invoke its awesome power to accuse an individual of criminal behavior and to deprive him of his liberty on that basis, government officials may not merely rest on their laurels, but out of respect for the sobering task of restricting freedom, must move forward deliberately and expeditiously in the effort to prove the case.

b. Notwithstanding these clear benefits to defendants, some have argued that the Act *undermines* fairness for defendants in practice, because it effectively restricts the amount of time for preparation of the defense. *See, e.g.,* Ames, *supra*, at 95-96; Ariola, *supra*, at 739-743; Robert L. Doyel, *The Federal Speedy Trial Act: Stampede into Ambush*, 16 John Marshall L. Rev. 27 (1982). Speedy trial laws work to a defendant's distinct disadvantage, the argument goes, because his counsel must investigate the crime

and respond to the accusations within the relatively short timeframe set forth in the statute, while the prosecutor has unlimited time (and substantial resources) to gather evidence and to develop arguments prior to seeking an indictment.

Unfairness to the defendant is not inevitable, however. *See* Ariola, et al., *supra*, at 746-753. As explained in Part B(1), *infra*, defense counsel has a ready remedy under the Act, to mitigate concerns about unfairness to the defendant due to insufficient time to prepare an adequate defense, *see* 18 U.S.C. § 3161(h)(7), and courts often utilize this "ends of justice" authorization when evaluating the equities in the context of a particular case. *See, e.g., United States v. Harris*, No. 08-1192, 2009 WL 1515425, at *3 (7th Cir. June 2, 2009); *United States v. Rollins*, 544 F.3d 820 (7th Cir. 2008); AOUSC Sixth Report, at 26 (nearly a quarter of the total incidence of excludable delay in 1980 was due to ends-of-justice continuances).

4. The Act permits effective enforcement of the Sixth Amendment's speedy trial guarantee

The Framers did not define "speedy" when they guaranteed the right to a speedy trial, and for constitutional purposes, this Court has also declined to provide any definition, *Barker v. Wingo*, 407 U.S. 514, 523 (1972), much to Congress's dismay, *see* S. Rep. No. 96-212, at 6 (lamenting the "[f]ederal courts' professed inability to gauge the constitutional implications of competing speedy trial interests other

than on a case-by-case basis"). Before the Act, lower federal courts "vari[ed] widely in their findings of violations of the speedy trial right." Note, *Speedy Trial*, *supra*, at 660. But with the Act's pronouncement that a trial should ordinarily commence within 70 days from the date of an indictment or first appearance, courts now have general parameters for an analysis of the scope of a speedy trial violation. *See, e.g., United States v. Bieganowski*, 313 F.3d 264 (5th Cir. 2002) ("It will be the unusual case * * * where the time limits under the Speedy Trial Act have been satisfied but the right to a speedy trial under the Sixth Amendment has been violated."); *cf.* Frase, *supra*, at 706 ("There is some similarity between the standards for dismissal under the Act and under the [S]ixth [A]mendment * * * .").[10]

From the standpoint of judicial economy, the Act thus provides needed clarity, which advances the cause of efficient administration of criminal justice overall because weak Sixth Amendment cases are weeded out. Indeed, as a probable result of the Act's clear boundaries, there has been no flood of cases brought in federal courts seeking to make a constitutional case out of a relatively minor delay;

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[10] To be sure, a defendant's statutory and constitutional rights are not entirely coterminous. *See* Herman, *supra*, at 205. But the Act provides something of a benchmark for constitutional cases, and such yardsticks can often be useful measures in the evaluation of unmeritorious claims.

rather, the flow of such actions has only amounted to a trickle. *See* Herman, *supra*, at 206 (the Act may have had the effect of reducing the volume of Supreme Court cases related to constitutional speedy trial analysis).

B. The Act's Automatic Exclusions Should Be Interpreted In The Context In Which They Were Devised And Without Regard To Any Perceived Benefit That The Defense Might Derive From The Delay

1. The statutory listing of automatic exclusions is clear and comprehensive, and the listed exclusions were deliberately designed to permit flexibility without undermining the Act's objectives

The court of appeals below read 18 U.S.C. § 3161(h)(1) to authorize an automatic exclusion from the Speedy Trial Act's 70-day limitations period for the time that the parties spend *preparing* pretrial motions, Pet. App. 8a, even though the Act expressly provides at subdivision (D) that only the time from "filing" through "disposition" of such motions is automatically excluded. The court found persuasive other circuits' view that motion preparation delay was automatically excludable by virtue of the "including but not limited to" language of section 3161(h)(1). *Id.* at 7a. But it is clear from the text of the statute that Congress did not intend this language to authorize courts to *ignore* the listed automatic exclusions by expanding the listed categories.

As petitioner's brief on the merits makes clear, Congress refused to leave it up to the courts to delineate the circumstances that warrant automatic suspension of the Speedy Trial Act clock. Instead, Congress expressly and intentionally used its reasoned judgment to set forth the specific time periods that are to be excluded automatically from the running of the Act's limitations period.

This Court has already acknowledged that Congress's enumerated list of automatic exceptions is "comprehensive[]." *Zedner*, 547 U.S. at 500. With a notable amount of detail, Congress has identified the specific circumstances that, in its view, require a compromise in speed in order to assure fair trials and "to make compliance with [fixed time limits] a realistic goal." S. Rep. No. 96-212, at 9. Furthermore, Congress has inserted a stop-gap measure designed to guarantee case-by-case consideration of due process concerns: it permits individual judges to assess whether the "ends of justice" require a continuance in the context of a particular case because the need for delay "outweigh[s] the best interest of the public and the defendant in a speedy trial." 18 U.S.C. § 3161(h)(7)(A). The enumerated exclusions thus "afford the flexibility to handle both the unusual case [and] other practical problems certain to arise during the * * * implementation of [the] primary policies" of the Act. *See* S. Rep. No. 96-212, at 7. And there can be no serious dispute that Congress has covered every imaginable situation in

which it would be reasonable to stop the Speedy Trial Act clock.

Congress's deliberate policy judgments about the amount of delay that can be permitted without undermining the objectives of the Act should be respected, not recalibrated. Congress expended "considerable effort * * * to aggressively promote speedy trial goals without thwarting the ability of the * * * justice system to serve the needs of justice on a case-by-case basis," *id.* at 11, and the result of its work represents a reasonable accommodation of the competing objectives of swiftness and fairness in the federal criminal justice process. Moreover, it is well within Congress's purview to set time limitations that mandate speedy trials and then carve out exclusions to that limitations rule. *See Barker*, 407 U.S. at 522-523 (declining to establish constitutional time limitations because doing so "would require this Court to engage in legislative or rulemaking activity"); *see also* Order Adopting Amendments to the Federal Rules of Civil Procedure, 406 U.S. 981, 982 (1972) (Douglas, J., dissenting) (arguing that "[t]his Court is not able to make discerning judgments between various policy choices" as regards the provision of speedy trials). The care that Congress exhibited in expressly and specifically setting forth automatically excludable time periods counsels against expansive interpretations of the Act's listed exclusions.

2. The fact that an automatic exclusion is requested by the defense, or that the defendant purportedly benefits from the delay, should have no bearing on this Court's evaluation of whether such exclusion is consistent with the purposes of the Act

The government has repeatedly emphasized that the party who requested the automatic exclusion from the Speedy Trial Act's limitations period in this case was *the defendant*. *See* Br. in Opp. (I) (framing the question presented as whether "time granted at the request of the defendant to prepare pretrial motions qualifies as 'delay resulting from other proceedings concerning the defendant'" for the purpose of 18 U.S.C. § 3161(h)(1)); *see also id.* at 11 n.3 (asserting that an exclusion granted pursuant to a court's routine scheduling order "presents a different question" from whether "a period of delay specifically requested by a defendant" should be deemed excludable).

The government's observation conjures up a contention that frequently appears in cases and commentary regarding the Speedy Trial Act: that the defendant should not be heard to complain about a trial delay that he brings upon himself. *See* Pet. App. 7a (opinion in *United States v. Bloate*, 534 F.3d 893, 897-898 (8th Cir. 2008)); *United States v. Mobile Materials, Inc.*, 871 F.2d 902, 913-914 (10th Cir.), *opinion supplemented on reh'g*, 881 F.2d 866 (10th Cir. 1989); *see also United States v. Jarrell*,

147 F.3d 315, 318 (4th Cir. 1998) (noting that such reasoning has "intuitive appeal"). More broadly, the government's assertion implies that a requested delay in the commencement of trial necessarily redounds to the benefit of the defendant, so defendants should not be heard to complain about exclusions to the Speedy Trial Act's limitations period at all. *Cf.* Ames, *supra*, at 83 ("The defense has a built-in interest in delay * * * ." (citation omitted)); Robert L. Misner, SPEEDY TRIAL: FEDERAL AND STATE PRACTICE 212 n.5 (1983) ("The defendant, of course, is in no hurry for trial because he wishes to delay his day of reckoning as long as possible."); Seymour Statement, *supra*, at 30404 ("Except in the rarest case, the last thing in the world a guilty defendant wants is a speedy trial."). These types of allegations do not relate in any meaningful way to Congress' intent in permitting automatic exclusions in light of the purposes of the Act; thus, they should not influence the Court's determination in this case.

a. To be sure, in section 3161(h)(1), Congress expressly excluded "[a]ny period of delay resulting from other proceedings concerning the defendant." But, contrary to the government's suggestion, this exclusion reflected Congress's concerns about the *fairness* of criminal trials in the context of the new limitations period, not defense manipulation.

The Senate committee report for the original Speedy Trial Act bill makes this clear. The report notes that section 3161(h)(1) "allows the court to exempt from the time limits[ ] time consumed by

'proceedings concerning the defendant.'" S. Rep. No. 93-1021, at 35 (1974). The report also indicates that the exemption should be "considered [in conjunction] with all the enumerated exclusions from the time limits contained in 3161(h)," *ibid.*, and, viewed from that vantage point, the exclusion merely reflects a balancing of interests that "assures that the time limits do not fall too harshly upon either the defendant or the Government." *Ibid.*

If collateral proceedings related to defendants that consume time, such as mental competency proceedings or examinations, are *not* excluded from the Act's limitation's period, then a clock-conscious trial judge would be less inclined to permit such proceedings, and speed might trump due process in regard to that defendant. Alternatively, a trial judge who is primarily concerned with such proceedings, no matter how long they take, could easily dwell on collateral concerns, to the detriment of the public's interest in speedy trials and perhaps even at the risk of public safety because the indictment would be dismissed. An automatic exclusion for "proceedings concerning the defendant" thus creates the appropriate incentives for the institutional actors to pursue important collateral proceedings that promote fair trial procedures without scuttling the case or substantially impairing the intended objectives of the Act.

In effect, then, by enacting section 3161(h)(1), Congress avoided being in the "anomalous" position of either requiring swift justice with compromised due

process because of insufficient time to address valid collateral concerns, or forcing dismissal of an indictment when the necessary delay results from proceedings "proper[l]y undertaken to protect [a defendant's] interests in a fair adjudication of the charges against [the defendant]." S. Rep. No. 96-212, at 9. The alternative characterization of Congress's motivation—*i.e.*, that Congress undertook to exclude the time related to "proceedings concerning the defendant" because a manipulative defendant might ask for such proceedings as a means of running out the clock—finds no support.[11]

b. It is also misguided to conceive of the exclusions from the Speedy Trial Act's limitations mandate as benefiting only the criminal defendant. Delay in the commencement of trial proceedings certainly might benefit defense *counsel*, who has the responsibility of investigating the alleged criminal activity and of preparing a constitutionally effective response to the government's allegations under the time constraints set forth in the Act. *See* Misner, *supra*, at 212 n.5 ("[O]ver-worked * * * defense attorneys depend on delay in order to cope with their

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[11] The view that a defendant should not be permitted to seek redress for violation of a Speedy Trial Act claim if defense counsel sought a delay is also manifestly inconsistent with this Court's no-waiver holding in *Zedner*, 547 U.S. at 503-506. As the Fourth Circuit notes, the argument "denigrates the interest of the public by effectively allowing a defendant to relinquish his otherwise unwaivable right to a speedy trial." *Jarrell*, 147 F.3d at 318.

heavy caseloads."). But the speedy trial clock stops *both* for the defense lawyer *and* for the prosecutor, so any litigation benefit that defense counsel receives as a result of gaining additional time to prepare for trial is offset by the gain to the prosecutor as well.

More important, a defense counsel's purported desire for delay is not always shared by the defendant. Indeed, this is one area of the law in which a defense lawyer's interests and that of his client may not be aligned.

While it may well suit a defense lawyer to dawdle in trial preparation, he does so to the detriment of his client, who, meanwhile, might be languishing in jail. *Barker*, 407 U.S. at 532-533; *see also* H. Rep. No. 93-1508, *reprinted in* 120 Cong. Rec. 7401, 7408 (1974) ("A defendant who is required to wait long periods to be tried suffers from a magnitude of disabilities which in no way contribute to his well being."); Godbold, *supra*, at 265-266 (even a guilty untried defendant "may prefer the chance of acquittal to indefinite pretrial confinement"). Even when a defendant remains free on bond pending trial, delay of his trial is not necessarily a bonus. "[H]e 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—circumstances that continue unless and until such defendant is provided with an opportunity to clear his good name. Not surprisingly, some defendants who are released before trial "wish to get on with the hearing * * * and the minimization of the

impediments to normal life which attend public accusation." Godbold, *supra*, at 265.[12]

On the flip side, studies have shown that delaying trial can provide concrete benefits to *the prosecution* in some cases. "[A]n arrest or indictment in one case may provide leads to other[s]" that "could be compromised if the defendant in the first case [is] brought to trial speedily." Mahoney, *supra*, at 79. Also, a case might be weak in the prosecutor's view, making her "not anxious to bring [the case] to trial or other resolution." *Ibid.* Because "there will almost inevitably be some situations in which a prosecutor's office will not want to see an individual case proceed rapidly," *ibid.*, it cannot be said as a general matter that it is the defense, rather than the government, that benefits most from an automatic exclusion that causes a delay.

Thus, this Court should reject the government's subtle suggestion that defendants' complaints about exclusions from the Speedy Trial Act clock should be substantially discounted. In the final analysis, whether or not defendants as a whole are helped or hurt by such exclusions cannot be conclusively determined. What *is* known, however, is that

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[12] And, of course, the further back the trial date is pushed, the greater the chance that key witnesses and critical evidence will not be available to rebut the government's case. *See, e.g., Dickey*, 398 U.S. at 38 (while defendant pressed for the commencement of trial, two witnesses died, another became unavailable, and police records were lost).

Congress intended the Act as a whole to be evaluated with *the public's* interest "firmly in mind." *Zedner*, 547 U.S. at 501; *see also* Godbold, *supra*, at 266 ("Whatever the calculus of injury and advantage resulting from delay, in criminal cases * * * public safety, life, and liberty may be affected."). There is no need to speculate about winners and losers *as between the parties* in interpreting the Act and its exclusions, because it is abundantly clear that Congress viewed *all* of the institutional actors as having an interest in prolonging the trial process such that *none* could be trusted to do what was needed to further the public's interest in regard to the provision of speedy trials. *See* Misner, *supra*, at 212 n.5 ("[W]hile it is in the public interest to have speedy trials, the parties involved in the criminal process do not feel any pressure to go to trial."). Consequently, "the Speedy Trial [Act] contemplates that each participant in that system [will] become an important factor in increasing the efficiency of the Federal courts in order to achieve the speedy disposition of criminal cases." H. Rep. No. 93-1508, *supra*, at 7404.

C. Section 3161(h)(1)(D) Strikes A Careful Balance Between The Interests Of The Public And The Administrative Needs Of Criminal Justice Participants, And Expanding The Motions Exclusion To Include Preparation Time Threatens That Balance

The text of 3161(h)(1)(D), which specifically excludes only that time between the "filing" and the

"disposition" of pretrial motions from the Speedy Trial Act clock, manifests a policy judgment that Congress made after taking into account both due process and speedy trial objectives. *See supra* Part B(1). In the context of a regime that values swift justice, Congress apparently considered due process in motions practice best served by providing additional time to *judges* to consider and rule on filed pretrial motions, but not gifting the litigants with excludable time for the preparation of such motions.[13] This conclusion is entirely consistent with the overall goal of increasing efficiency in case management, because the judge bears ultimate responsibility for the movement of cases through the system, and also because, given appropriate time to consider a dispositive motion, the judge might order the case dismissed.

As petitioner explains in his brief on the merits, it could not be more obvious that Congress's policy choice in regard to the scope of the motions exclusion

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[13] The American Bar Association and the National Conference of Commissioners on Uniform State Laws have made a similar judgment call. In model speedy trial proposals, each would ensure adequate time for judges, and limit the parties, by excluding the time required for adjudication of pretrial motions, but not for their preparation. *See* Am. Bar Ass'n, ABA STANDARDS FOR CRIMINAL JUSTICE: SPEEDY TRIAL AND TIMELY RESOLUTION OF CRIMINAL CASES, Standard 12-2.3(b), at 49 (3d ed. 2006) (excluding "[t]ime required for the consideration and disposition of pretrial motions"); Nat'l Conference of Comm'rs on Uniform State Laws, UNIF. RULES OF CRIM. PROCEDURE, Rule 722(f)(2), at 251 (1987) (excluding delays resulting from motions on complex issues, "including the time needed to prepare *for a hearing* on the motion" (emphasis supplied)).

was deliberate. *See* S. Rep. No. 96-212, at 33-34, (Congress specifically rejected as "unreasonable" a proposal that "all time consumed by motions practice, from preparation through their disposition, should be excluded").[14] Those courts of appeals that have nonetheless concluded that an exclusion for motion preparation is consistent with the language of the Act have relied, in part, on the purported inequity of excluding preparation time for the party that prepares and files a *response* to a motion, but not excluding preparation time for the party that files the motion itself. *See United States v. Oberoi*, 547 F.3d 436, 450-451 (2d Cir. 2008) ("We see no reason Congress would accommodate the needs of one party but not the other."), *petition for cert. filed*, 77 U.S.L.W. 3596 (U.S. Apr. 14, 2009) (No. 08-1264). As noted above, however, in regard to motions practice in an age of speedy trials, Congress was balancing the needs of judges, on the one hand, and the public, on the other, and it specifically chose *not* to provide the parties with automatically excludable time in regard to the preparation of pretrial motions, without regard to whether one party was advantaged as a result.

In any event, there is no substantial inequity involved in the application of section 3161(h)(1)(D),

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[14] Congress also fully explained its reasoning: in those cases "where the issues of law are not novel and the issues of fact simple," litigants needed no extra time for preparation, while, in more complex circumstances, the remedy, granted sparingly, should be an "ends of justice" continuance. *Id.* at 34.

given the relatively short and generally fixed time periods that local court rules provide for preparing responsive pleadings. *See, e.g.*, E.D. Mo. R. 4.01(b) (requiring the party opposing a motion to file a response within five days of service). And compared to the response, preparation of an initial motion can occur over a much broader and more variable period, and at the whim of the moving party, which would (1) leave courts hard-pressed to "determine a point at which preparation actually begins," S. Rep. No. 96-212, at 34, and (2) make it difficult for legislators to foresee the amount of additional delay that will result from excluding time related to the preparation of such motions.

The delays that would result from recognizing an automatic exclusion of motion-preparation time are also likely to be substantial. *Cf.* S. Rep. No. 96-212, at 34 cautioning that (the motions exclusion "could become a loophole which could undermine the whole Act"). In the two years following the amendments to the Act that expanded section 3161(h)(1)(D) to include the period from "filing" to "disposition," the incidence of periods of motion-related excludable delay increased *by more than 100 percent*. Those delays tended to be significantly longer in length, as well: in 1979, 90 percent of motions delays lasted 10 days or less, and only three percent lasted 43 days or more, while in 1981, 32 percent of motions delays were 10 days or less, and 25 percent were 43 days or more. *See* AOUSC Fifth Report on the Implementation of

Title I of the Speedy Trial Act of 1974, at 26 (Sept. 1980); Ames, *supra*, at 87.

Given that motions-related exclusions alone made up more than one-third of the total incidence of excludable delay under section 3161(h) in both 1979 and 1980, and forty percent in 1981, *see* AOUSC Sixth Report, at A-2; AOUSC Fifth Report, *supra*, at 22; Ames, *supra*, at 87. Congress's deliberate decision in 1979 to amend section 3161(h)(1)(D) to broaden the motion-related exclusion, *see* Pet. Br. at 25-32, had a material effect on the overall speed of federal criminal case adjudication at that time. But, of course, any such increase followed from a specific congressional determination that automatically excluding the period of time from the filing of a motion until the disposition of the motion is necessary for due process and/or feasibility in criminal cases. Congress has made no similar determination in regard to the likely increases in case disposition times that would result from an automatic exclusion for the preparation of motions. And, indeed, when Congress considered precisely this question previously, it pointedly declined to expand the scope of the exclusion. *See* Pet. Br. at 28.

Rather than countenance an additional delay in the running of the Speedy Trial Act clock that Congress has already rejected, this Court should conclude that Congress meant what it said when it struck the balance between speed and justice that resulted in the exclusion at section 3161(h)(1)(D).

CONCLUSION

For the reasons set forth above and in the petitioner's brief, this Court should reverse the judgment of the court below.

Respectfully submitted,

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