No. 09-1498

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JASON LOUIS TINKLENBERG

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and rule: Page

Miscellaneous:

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As respondent concedes (Br. 13), for more than three decades, the courts of appeals had uniformly followed a clear, administrable rule: the exclusion in 18 U.S.C. 3161(h)(1)(D) from the deadline for commencing trial under the Speedy Trial Act of 1974 (STA or Act), 18 U.S.C. 3161 *et seq.*, applies automatically upon the filing of any pretrial motion, regardless of its effect on the trial schedule.[1] The court below incorrectly departed from that longstanding consensus, holding that a "motion must actually cause a delay, or the expectation of a delay, of trial in order to create excludable time." Pet. App. 16a. Like the court below, respondent contends that a motion creates excludable time only if it affects the trial schedule. Under respondent's test, however, the critical question is not whether the mo-

[1] All references to 18 U.S.C. 3161(h)(1)(D) are to Supplement III (2009) to the 2006 United States Code.

tion requires or threatens postponement of the *actual* trial date; instead, the question is whether the motion would require postponement of some *hypothetical* earliest "possible" trial date. Br. 16 & n.5. Respondent's standard conflicts with the STA's text, structure, and legislative history; departs from this Court's decisions; and is entirely unworkable. Although respondent advances two alternative grounds to defend the judgment, each lacks merit and does not warrant this Court's consideration. The Court should therefore reverse the decision below.

I. SECTION 3161(h)(1)(D) AUTOMATICALLY EXCLUDES THE TIME BETWEEN THE FILING OF ANY PRETRIAL MOTION AND ITS DISPOSITION

Respondent offers shifting formulations of when a motion creates excludable time. Sometimes he states that the motion must "require trial to begin later than would otherwise be possible." Br. 16. Other times, he states that it must either "postpone when trial could begin" or "hinder pretrial preparations." Br. 13. Occasionally, respondent appears to advocate a superficially bright-line rule that "[u]nopposed, mundane, administrative motions" are not excluded. Br. 17. But carving a category of motions out of the exclusion would be inconsistent with its text, which states that it applies to "any" pretrial motion. 18 U.S.C. 3161(h)(1)(D). And respondent provides only a circular definition of "mundane, administrative motions," describing them as motions that do not postpone when trial could begin because "they do not impede any party's preparation for trial or consume any judicial resources to resolve." Br. 17. Thus, at bottom, respondent's formulations all require that a motion have "postponed or hindered when trial could begin." Br. 22. And "when trial could begin" is not the scheduled trial date but instead a hypothetical earliest

"possible" trial date. Br. 16-17 & n.5 (stating test as whether motion "would have required trial to be postponed had it been scheduled earlier").

A. The Statutory Text Supports The Established Rule That Any Pretrial Motion Creates Excludable Delay

1. Respondent attempts to ground his standard in the statutory text, arguing that because Section 3161(h)(1)(D) excludes "delay resulting from" pretrial motions, and "delay" must refer to "[t]he period during which something is postponed or slowed," "[t]here is no conceivable way * * * to exclude the time during which a pretrial motion [i]s pending unless the motion postponed, or slowed preparation for, trial." Br. 14-15 (brackets in original; citations omitted). But Section 3161(h)(1)(D) does not identify the relevant "delay" as delay of the "trial." And respondent's definition of "delay" as the postponement or hindering of trial makes no sense in light of the full text of Section 3161(h)(1)(D).

The statute provides:

> (h) The following *periods of delay shall be excluded* in computing the time within which * * * trial * * * 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*.

18 U.S.C. 3161(h)(1)(D) (emphasis added). "Delay" should have the same meaning throughout those provisions. But respondent's interpretation makes that impossible.

As respondent acknowledges (Br. 14), the introductory language in Subsections (h) and (h)(1) makes clear that only "periods of delay" are excluded, and the language of Subsection (D) delineates the length of excluded pretrial motions "delay." Respondent defines "delay" as postponement or hindering of trial. Under that definition, the "period of delay" resulting from a motion logically must be the time during which trial is postponed or hindered by the motion. And Subsections (h) and (h)(1) would therefore dictate that only the time by which trial is postponed or hindered is excluded. Respondent concedes, however, that, when the exclusion applies, "the terms of Subsection (D) require a court to exclude the entire time 'from the filing of the motion through the [conclusion of] the hearing on, or other prompt disposition of, such motion.'" Br. 22 (quoting 18 U.S.C. 3161(h)(1)(D)). Respondent's interpretation of "delay" in Subsections (h) and (h)(1) thus contradicts the meaning of "delay" in Subsection (D).

This Court held in *Henderson* v. *United States*, 476 U.S. 321 (1986), and reaffirmed in *Bloate* v. *United States*, 130 S. Ct. 1345 (2010), that excluded pretrial motions delay covers exactly the period described in Subsection (D): the time between the filing of a motion and its disposition. But that period is often longer than the time by which a motion postpones or hinders when trial could begin. Thus, if respondent's definition of delay were correct, Subsection (D) would frequently require the exclusion of more time than Subsections (h) and (h)(1) would permit to be excluded.

For example, a defendant might file a motion 14 days before trial could have begun had the motion not been filed. If 15 days elapsed from the motion's filing to its disposition,

and trial began immediately thereafter, Subsection (D) would require that 15 days be excluded. Under respondent's definition of "delay," however, the "period of delay" resulting from the motion would be only one day, because that is how long trial was postponed or hindered. Subsections (h) and (h)(1) would therefore permit the exclusion of only one day. Respondent's definition of "delay" thus produces irreconcilable results under different portions of the same statute.

To avoid this contradiction, respondent repeatedly describes the statute as if it said: "[I]f a pretrial motion causes delay, * * * exclude the entire time [specified by Subsection (D)]." Br. 22; see also Br. 7, 16, 24. But the statute does not treat "delay" as a trigger for the exclusion, and then specify a separate period of time that is excluded. Instead, the statute equates the "delay" and the excluded period; it states that "periods of delay shall be excluded" and then defines the excluded "delay resulting from any pretrial motion" as the time "from the filing of the motion" through the "disposition of[] such motion." 18 U.S.C. 3161(h)(1)(D).

Even if it were possible to read the statute as respondent proposes, that reading would make little sense. Respondent cannot explain why Congress would have required courts to make the difficult calculation whether a motion postponed when trial could begin, but then commanded them to exclude the entire time the motion was pending, even if that period is much longer than the time by which trial was postponed.

2. Unlike respondent's approach, the established rule that Section 3161(h)(1)(D) automatically excludes the time from the filing of any motion through its disposition reads the statute as a harmonious whole. Under the established rule, the "period of delay" "resulting from any pretrial mo-

tion" is the interval of time "from the filing of the motion" through its "disposition," during which the STA's deadline is postponed because of the motion. 18 U.S.C. 3161(h)(1)(D).

That interpretation accords with a common meaning of the word "delay"—"[t]he interval of time between two events." Pet. Br. 17 (quoting *The American Heritage Dictionary of the English Language* 480 (4th ed. 2006)). Respondent asserts that "delay" can have that meaning only if "the second event begins later than was previously hoped or was possible." Br. 15. That is incorrect. For example, someone might say that there was a "delay" between when he sent an e-mail and when it was received, even though he neither hoped nor anticipated that the e-mail would be received more quickly. Or he might say that there was a "delay" between lightning and thunder, even though he did not hear the thunder any later than he hoped or thought possible.

Moreover, even assuming "delay" generally entails the postponement of some occurrence, that is consistent with the established rule. The occurrence that is postponed is the STA's deadline for commencing trial. And that postponement "result[s] from" the motion because it arises "as a consequence" of the motion's filing. *American Heritage Dictionary* 1487. Respondent erroneously contends that this reading of the statute is "circular" because it purportedly assumes that "the speedy trial clock is already stopped" before a motion is filed. Br. 18 (brackets and citation omitted). On the contrary, the established reading of the statute merely recognizes that the clock stops automatically when a motion is filed. Moreover, unlike respondent's interpretation, the established approach harmonizes all of

the language in Section 3161(h)(1)(D) and provides an administrable rule.[2]

B. This Court's Precedent Supports The Established Rule

The established approach is also supported by *Henderson* and *Bloate*. *Henderson* held that the pretrial motions exclusion is "automatic," 476 U.S. at 327, and excludes "all time between the filing of a motion and the conclusion of the hearing on that motion, whether or not a delay in holding that hearing is 'reasonably necessary,'" *id.* at 330. *Bloate* reiterated that the exclusion is "automatic" and applies "regardless of the specifics of the case," 130 S. Ct. at 1349 n.1, but held that motions delay "is automatically excludable, *i.e.*, excludable without district court findings, *only* from the time a motion is filed through the hearing or disposition point specified," *id.* at 1353. *Henderson* and *Bloate* thus make clear that, when a motion is filed, Section 3161(h)(1)(D) automatically excludes, without the need for any additional findings, all of the time between the filing of the motion and its disposition.

Respondent's approach conflicts with *Henderson* and *Bloate* in several ways. First, it is inconsistent with the

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[2] Respondent mistakenly argues that the use of the word "any" in Section 3161(h)(1) indicates the "conditional nature" of the exclusion in Section 3161(h)(1)(D). Br. 19. That argument ignores that Subsection (h)(1) refers broadly to "[a]ny period of delay resulting from other proceedings concerning the defendant," which include various proceedings other than pretrial motions. Thus, even assuming the word "any" signals that the exclusion is conditional, its use merely reflects that those various proceedings will not necessarily occur in every criminal case. In all events, Congress likely used the term "any" not to stress the exclusion's conditional nature but instead to stress its expansiveness, *i.e.*, to indicate that *all* periods of delay are excluded regardless of their length or the type of "proceeding[] concerning the defendant" that triggers them. See *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997).

Court's repeated statements that Section 3161(h)(1)(D) applies automatically once a motion is filed. Under respondent's interpretation, the exclusion applies only if a court finds that the motion required trial to begin later than otherwise possible. Respondent incorrectly contends that *Henderson* and *Bloate* "presume[d] that [Section 3161(h)(1)(D)] excludes time during the pendency of pretrial motions only if the motions postponed when trial could begin." Br. 24-25. On the contrary, *Henderson* held that the time consumed in resolving the motions at issue was "automatically excludable" without considering whether they delayed the start of trial. 476 U.S. at 331-332. Similarly, in *Bloate*, both the Court and the dissent agreed that the request for additional motions preparation time resulted in "delay," 130 S. Ct. 1352-1353; *id.* at 1360 (dissenting opinion), even though nothing in the record indicated that it hindered the commencement of trial, see Pet. Br. 24.

Second, as respondent concedes, *Henderson* and *Bloate* held that, when the pretrial motions exclusion applies, a "court must exclude" the entire "time during which [the motion] was pending." Br. 24. But respondent's interpretation of Section 3161(h)(1)(D) cannot be reconciled with that holding. As discussed above, the textual and logical implication of respondent's definition of "delay" is that only the time by which trial was postponed or hindered should be excluded.

Third, *Henderson* expressly rejected "limiting [the] exclusion to time that is 'reasonably necessary' for the disposition of pretrial motions." 476 U.S. at 328. But respondent's interpretation requires courts to decide how much time is "reasonably necessary" to dispose of a motion before *any* time may be excluded. This case illustrates the point. The disposition of the government's motions took six days: the motion to depose a witness was filed on August 1 and

granted on August 3, and the motion for permission to bring respondent's firearms into the courtroom was filed on August 8 and granted on August 10. Under *Henderson*, a court need not ask if those periods of time were "reasonably necessary." Under respondent's approach, however, none of that time is excluded, because the motions purportedly "d[id] not impede any party's preparation for trial or consume any judicial resources to resolve," Br. 17—in other words, because no time spent resolving the motions was "reasonably necessary." Thus, respondent smuggles back into Section 3161(h)(1)(D) a variant of the "reasonably necessary" analysis that *Henderson* rejected.

C. The Established Rule, Unlike Respondent's Test, Is Clear And Administrable

1. As the government's opening brief explains (at 34-36), the STA cannot operate efficiently and practicably unless the starting and stopping points of the speedy trial clock are clearly defined and easily discernible. If courts and parties cannot determine as each day passes whether it counts towards the deadline for commencing trial, they cannot take the necessary actions to prevent inadvertent violations of the Act.

Respondent's test for when a motion creates excludable time is neither clear nor administrable. To determine the hypothetical earliest date on which trial "would otherwise be possible" (Br. 16), a court would have to make difficult assessments about how multiple different factors affect when trial could begin. The court would have to decide, for example, how much time counsel need for factual investigation and legal analysis, how long discovery will take, and how much time the court itself needs to prepare. The court would also have to evaluate how other commitments of

counsel, the court, and witnesses might affect the trial schedule.

Moreover, numerous questions would arise about how to take those factors into account. Courts would have to decide whether to take potential obstacles to an earlier trial as given or instead to determine if the obstacles might be eliminated. For example, if another scheduled trial would prevent commencing the defendant's trial for two weeks, is the earliest possible trial date in two weeks, or does that depend on whether the other trial could be rescheduled? Courts also would have to decide when to calculate the earliest possible trial date. For example, if on the day a motion is filed, trial could occur in three days, but an unexpected conflict arises the next day and precludes trial for a week, is the earliest possible trial date three days after the motion was filed or a week after? And courts would have to decide how to account for other proceedings that might also generate excludable time. For example, if trial could otherwise begin in five days, and two motions are filed simultaneously, one that will require three days to resolve and another that will require four days, does neither motion create excludable time? Both? Only one? If so, which one?

Respondent's approach would still not be administrable even if it only required a court to consider the motion at issue in isolation and decide whether its resolution would "impede any party's preparation for trial or consume any judicial resources." Br. 17. Every motion consumes at least some time and resources. For example, opposing counsel must evaluate the motion and decide whether to respond, and the court must decide whether to grant or deny it. Thus, whether a motion creates excludable time would necessarily turn on an imprecise determination whether the amount of resources it is likely to consume is small enough that time ought not be excluded. Moreover,

courts would often be unable to make that determination when a motion is filed. It is frequently unclear until later how much time will be needed to resolve a motion or what effect granting it will have on a possible trial date. See Pet. Br. 36-37.

The motions in this case are illustrative. Contrary to respondent's contention, the motions consumed the time and resources of both the parties and the court. For example, after the government filed the motion to depose a witness, the court issued an order requesting a response. J.A. 141-142. In the response, respondent stated that he had been unable to respond until after he and counsel had met to discuss the matter and that he did not oppose the motion but did not want trial delayed. J.A. 143-144. The court issued an order granting the motion the following day, directing the parties to "schedule [the] deposition posthaste so as not to delay trial." J.A. 145. Thus, not only did the motion consume time that respondent, counsel, and the court might otherwise have used to prepare for trial, but when the motion was filed, it was unclear whether respondent would oppose it and thus how much time and resources it would consume. Moreover, even after the court granted the motion, neither the parties nor the court could be certain that events beyond their control (such as the witness's unavailability) would not delay the deposition and thereby delay when trial could begin.

The facts of this case thus undercut respondent's claim that "[d]etermining whether a motion will result in delay is typically simple at the time of its filing." Br. 28. Respondent's contention that trial courts can alleviate the problem by "noting on the record * * * whether the motion will result in delay" is likewise mistaken. Br. 29. Judges cannot make that notation if they are unable accurately to determine whether a motion will result in delay. Moreover, a

trial judge's finding that a motion will cause delay would not conclusively resolve whether it created excludable time. The defendant could challenge the finding in a subsequent motion to dismiss under the STA and on appeal. And, contrary to respondent's contention (*ibid.*), it is far from clear that the parties can eliminate uncertainty about whether a motion creates excludable time by "entering into stipulations" that time will be excluded. Cf. *Zedner* v. *United States*, 547 U.S. 489, 500 (2006) (holding that "a defendant may not prospectively waive the application of the Act"). In any event, in many cases, defendants may be unwilling to stipulate.[3]

Respondent also incorrectly contends (Br. 30) that the existence of a few STA exclusions requiring reasonableness determinations shows that courts and parties have no need to know as each day passes whether it counts towards the STA deadline. As *Henderson* explained, very few exclusions require such determinations. 476 U.S. at 327. And they involve much more manageable analyses than respondent's proposed test for pretrial motions delay, which would

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[3] Amicus NACDL (Br. 5-12) makes the same flawed arguments in arguing that the ruling below will not disrupt the STA's administration. NACDL also argues (Br. 3-5) that courts and litigants in the Sixth Circuit have successfully adjusted to the ruling. But NACDL admits that "many" defense attorneys are still "unaware" of the ruling, which has been in effect only a short time. Br. 3. It is therefore too early to make an accurate empirical judgment about how much disruption it will cause. In any event, many prosecutors inform us that courts have been entering ends-of-justice continuances under 18 U.S.C. 3161(h)(7) (Supp. III 2009) to exclude pretrial motions delay in order to avoid STA violations under the ruling. See also Pet. Br. 26-27 (citing cases). The ruling is thus frustrating Section 3161(h)(1)(D)'s purpose—to provide an automatic exclusion that avoids spending time and resources on case-specific analyses of whether the benefits of delay from each particular motion outweigh the costs.

require courts to assess how countless factors would affect a hypothetical earliest possible trial date. For example, 18 U.S.C. 3161(h)(1)(F), on which respondent principally relies, excludes ten days of time spent transporting a defendant to and from places of examination or hospitalization, plus additional time if "[]reasonable." Courts and parties can avoid violating that provision simply by assuming that only ten days will be excludable. Moreover, if it becomes necessary to determine whether additional transportation time was reasonable, the universe of considerations will be far smaller than the innumerable factors courts would have to consider to divine hypothetical earliest possible trial dates.[4]

Respondent also mistakenly relies (Br. 30-32) on the STA's provisions for dismissing indictments as a sanction for violations. Contrary to respondent's contention, the fact that most dismissals are without prejudice, and that courts sometimes rely on the inadvertent nature of a violation in selecting that form of dismissal, does not show that courts and parties generally do not know in advance whether time is excludable. Whether dismissal is with or without prejudice turns on a number of factors, not simply whether the violation was inadvertent. 18 U.S.C. 3162(a)(1). Moreover, inadvertent violations can occur even if the rules governing the exclusion of time are intended to be precise and prospectively applicable. For example, violations may occur because of arithmetic errors or misun-

[4] Contrary to respondent's contention (Br. 30), 18 U.S.C. 3161(h)(1)(H) does not require a reasonableness determination. Consistent with *Henderson*'s discussion of the provision, 476 U.S. at 328-329, the courts of appeals have read it as automatically excluding 30 days while a proceeding concerning the defendant is under advisement. *E.g.*, *United* v. *Chalkias*, 971 F.2d 1206, 1211 (6th Cir.), cert. denied, 506 U.S. 926 (1992).

derstandings about the meaning of statutory provisions. In any event, the rarity of dismissals with prejudice provides no reason to interpret the pretrial motions exclusion in a manner that increases complexity and decreases clarity.

2. In contrast to respondent's proposal, the established rule that Section 3161(h)(1)(D) applies automatically upon the filing of any pretrial motion is clear and easily administrable. By "put[ting] [the court and] counsel on notice from the outset as to what is excludable," *United States* v. *Vo*, 413 F.3d 1010, 1015-1016 (9th Cir.), cert. denied, 546 U.S. 1053 (2005), the rule facilitates compliance with the STA while advancing its goal of providing speedy trials without sacrificing the time needed to resolve important pretrial proceedings.

Respondent mistakenly contends that the established rule "makes no sense" because it excludes the time when motions are pending even if their resolution requires only limited resources. Br. 33. Congress reasonably concluded that the cost of excluding that time (which typically is short because the motions can be quickly resolved) is outweighed by the benefits of an administrable exclusion.[5]

Respondent also incorrectly asserts that prosecutors will abuse the automatic exclusion by "fil[ing] pretrial motions as pretexts to toll the speedy trial clock." Br. 35. The automatic exclusion has been the law in virtually every cir-

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[5] Contrary to respondent's contention (Br. 33-34), the automatic exclusion is not inconsistent with the conclusion of some circuits that once a pretrial motion has been tabled until after trial, time is no longer excluded under Section 3161(h)(1)(D). *E.g.*, *United States* v. *Clymer*, 25 F.3d 824 (9th Cir. 1994). As the Ninth Circuit has explained, that conclusion is consistent with the automatic exclusion because, in tabling the motion, "the district court" has, for all practical purposes, "denied the motion without prejudice to the filing of a renewed submission after the conclusion of the trial." *Id.* at 829-830; see *Vo*, 413 F.3d at 1015.

cuit for more than three decades. Yet respondent points to no evidence that prosecutors have engaged in any abuse. Neither case cited by respondent (Br. 36) supports that suggestion. *United States* v. *Hood*, 469 F.3d 7 (1st Cir. 2006), involved a motion filed by defense counsel, not the government, and the court held that the pretrial motions exclusion applies equally to "significant or complex 'pretrial motions' and simple or routine motions." *Id.* at 10 (citation omitted). *United States* v. *Brown*, 285 F.3d 959, 961 (11th Cir. 2002), merely held that "a reminder to the court to set a timely trial date" was not a "pretrial motion" within the meaning of Section 3161(h)(1)(D). Moreover, in the unlikely event that a prosecutor filed a motion solely to extend the STA deadline and avoid proceeding to trial, that conduct would be sanctionable. See 18 U.S.C. 3162(b)(4) (providing for sanctions when an attorney "otherwise willfully fails to proceed to trial without justification").

D. The STA's Stucture And Legislative History Support The Established Rule

Respondent's reading of Section 3161(h)(1)(D) also conflicts with the STA's structure and legislative history. Respondent concedes that the statutory structure indicates that "a district court applying [Section 3161(h)(1)(D)] should not conduct any reasonableness analysis or otherwise make findings concerning the ends of justice." Br. 21. Respondent erroneously asserts, however, that his interpretation would not require such findings. As described above, by restricting pretrial motions "delay" to motions that postpone or hinder when trial could possibly begin, respondent would effectively require courts to conduct a reasonableness analysis before excluding time. See pp. 8-9, *supra*. Respondent's approach also would likely lead district courts to make ends-of-justice findings under Section

3161(h)(7) as a backstop when they exclude time under Section 3161(h)(1)(D). Indeed, district courts have already been doing that to avoid possible dismissals under the Sixth Circuit's rule. See note 3, *supra*.

Moreover, many other automatic exclusions in Section 3161(h) also use the phrase "delay resulting from" on which respondent relies. Adopting respondent's interpretation of that phrase would therefore upset the established understanding that those other exclusions apply regardless of whether trial is postponed and exclude the entire time during which the triggering proceeding is pending. See Pet. Br. 27-29.

As for the legislative history, respondent does not dispute that numerous statements in the committee reports equate the phrase "delay resulting from" a motion or other proceeding with the time that the proceeding is pending, rather than any time by which trial is postponed. Nonetheless, respondent asserts that those statements "presuppose a finding" that the motion or other proceeding "impeded pretrial preparations or postponed when trial could begin." Br. 26. Contrary to that assertion, several of the statements make clear that Section 3161(h)(1)(D) "provides exclusion of time from the filing to the conclusion of hearings on or 'other prompt disposition' of *any* motion." S. Rep. No. 212, 96th Cong., 1st Sess. 34 (1979) (emphasis added); see, *e.g.*, *id.* at 33 (stating, without qualification, that Section 3161(h)(1)(D) excludes "the entire period of time from the date of filing to the conclusion of hearings on, or other prompt disposition of, pretrial motions"). Although respondent strains to draw contrary inferences from a couple of isolated statements in the committee reports (Br. 26-27), he fails to identify even a single passage stating that the "delay resulting from" a motion is the time during which trial

is postponed or that the pretrial motions exclusion applies only when trial is postponed.

The traditional tools of statutory construction thus support the longstanding rule, followed by every circuit except the court below, that the filing of any pretrial motion automatically stops the speedy trial clock, without any need to inquire whether it would or could affect the trial schedule. Accordingly, this Court should reverse the decision below.

II. RESPONDENT'S ALTERNATIVE GROUNDS FOR AFFIRMANCE LACK MERIT AND DO NOT WARRANT THIS COURT'S REVIEW

Respondent advances (Br. 36-50) two alternative grounds to defend the judgment. Contrary to respondent's contention (Br. 12 n.2), this Court can and should reverse the decision below without addressing those arguments, which the court of appeals correctly rejected. This Court may, in its discretion, "decline to entertain" alternative grounds offered to defend a judgment "[i]n the absence of * * * an indication that the issues are of sufficient general importance to justify the grant of certiorari." *United States* v. *Nobles*, 422 U.S. 225, 242 n.16 (1975); see Eugene Gressman et al., *Supreme Court Practice* 490 (9th ed. 2007). Respondent's alternative arguments lack sufficient importance to warrant this Court's review, and they are without merit in any event.

A. No Additional Non-Excludable Time Elapsed During Respondent's Transportation To His Competency Examinations

Respondent contends (Br. 36-47) that ten days of non-excludable time elapsed during his transportation to a mental competency examination, because Section 3161(h)(1)(F) permitted exclusion of only "ten days" and the transportation took 20 calendar days. The court below, relying on

United States v. *Bond*, 956 F.2d 628 (6th Cir. 1992), held that only two non-excludable days elapsed because weekends and holidays did not count towards the ten-day limit. *Bond* held that Section 3161(h)(1)(D) should be construed in accordance with Federal Rule of Criminal Procedure 45(a), which, at the time, excluded weekends and holidays for time limits of less than 11 days. 956 F.2d at 632. Respondent argues that the court below erred in construing Section 3161(h)(1)(F) in accordance with Rule 45(a).

This Court should not address respondent's argument because, as respondent conceded in his brief in opposition (at 15 n.9), the issue has no continuing importance. Rule 45(a) was amended after the decision below and now expressly applies to statutes like Section 3161(h)(1)(F) that do not specify a method of computing time. Moreover, the Rule now provides that intermediate weekends and holidays count towards any time limit stated in days. Fed. R. Crim. P. 45(a).

In any event, the court below correctly relied on Rule 45(a) in construing Section 3161(h)(1)(F). The statute does not specify whether the "ten days" of excludable time are calendar or business days. It is therefore reasonable to infer that Congress expected courts to interpret that phrase in light of the counting rules applicable in similar criminal contexts. See *United States* v. *Skanes*, 17 F.3d 1352, 1354 (11th Cir. 1994) (citing decisions relying on Rule 45(a) in construing other STA time limits). Accordingly, the court below appropriately looked to Rule 45(a), the Federal Rule of Criminal Procedure governing the computation of time limits, to determine whether weekends and holidays counted towards the ten-day limit.

Every circuit that has addressed the issue has reached the same conclusion. See *United States* v. *McGhee*, 532 F.3d 733, 738 (8th Cir. 2008); *United States* v. *Garrett*,

45 F.3d 1135, 1140 n.6 (7th Cir.) cert. denied, 514 U.S. 1134 (1995). The circuit court decisions cited by respondent (Br. 38) did not address the issue but simply included weekends and holidays when calculating the ten-day period. See *United States* v. *Collins*, 90 F.3d 1420, 1427 (9th Cir. 1996); *United States* v. *Noone*, 913 F.2d 20, 25-26 (1st Cir. 1990), cert. denied, 500 U.S. 906 (1991); *United States* v. *Castle*, 906 F.2d 134, 137 (5th Cir. 1990). And *United States* v. *Williamson*, 409 F. Supp. 2d 1105, 1107 n.1 (N.D. Iowa 2006), was abrogated by the Eighth Circuit's decision in *McGhee*.

Respondent observes (Br. 37) that, in *Henderson*, 476 U.S. at 323, and *United States* v. *Rojas-Contreras*, 474 U.S. 231, 236 (1985), this Court counted calendar days when determining compliance with the time limits in Section 3161(c)(1) and (2). That was entirely consistent with Rule 45(a), however, because those time limits far exceed ten days. Citing an article in American Jurisprudence 2d, respondent also argues that Section 3161(h)(1)(F) should be interpreted to incorporate a purported "common-law rule" that weekends and holidays are excluded only for statutory time periods of seven days or less. Br. 37. The vast majority of the cases cited in the article, however, did not construe statutory or other time limits to incorporate any "common-law rule." Instead, like the decision below, they construed the time limits in accordance with related rules of civil or criminal procedure. See 74 Am. Jur. 2d Time § 22 n.1 (2001).

Respondent also argues (Br. 40-41) that because certain other statutes expressly exclude weekends and holidays, and Section 3161(h)(1)(F) does not, Congress must have intended Section 3161(h)(1)(F) to include them. But none of the other statutes was enacted by the same Congress as, or even near in time to, Section 3161(h)(1)(F). The negative

implication that respondent seeks to draw therefore has little, if any, force. See *Johnson* v. *United States*, 130 S. Ct. 1265, 1272-1273 (2010). Finally, respondent offers various arguments (Br. 41-47) why former Rule 45(a) did not apply of its own force to statutes. The relevant question, however, is not whether former Rule 45(a) applied of its own force but instead whether Congress intended the phrase "ten days" in Section 3161(h)(1)(D) to be construed consistently with the Rule. The court below correctly concluded that it did, and that ruling does not warrant this Court's review.

B. No Additional Non-Excludable Time Occurred During The Competency Examinations

Respondent also contends (Br. 47-50) that the court of appeals should have counted as non-excludable time several weeks during which his competency evaluations were pending. He argues that 18 U.S.C. 4247(b), which generally limits to 30 days the time during which a defendant may be committed for a competency evaluation under 18 U.S.C. 4241, should also limit the STA's exclusion for delay resulting from competency evaluations. The court below correctly rejected that argument, and this Court should not revisit the issue.

Respondent's argument is contrary to the plain language of the STA, which excludes "[a]ny period of delay" resulting from competency examinations, 18 U.S.C. 3161(h)(1)(A). Respondent attempts to avoid that clear text by arguing (Br. 48-49) that Section 3161(h)(1)(A) and Section 4247(b) should be read *in pari materia*. That principle has limited force, however, when statutes were not enacted "by the same legislative body at the same time," *Erlenbaugh* v. *United States*, 409 U.S. 239, 244 (1972), and Section 4247(b) was enacted by the Insanity Defense Reform

Act of 1984, Pub. L. No. 98-473, § 403(a), 98 Stat. 2065, many years after the STA's enactment in 1974. Moreover, the two statutes should not be read *in pari materia* because they do not "serve the same function." *Erlenbaugh*, 409 U.S. at 245. Section 4247(b) protects defendants' liberty interests by restricting the time during which they may be involuntarily committed for mental examinations. Section 3161(h)(1)(A), in contrast, ensures that the STA's deadline for commencing trial accommodates the time spent in competency evaluations without sacrificing the goal of promoting speedy trials. The court below therefore correctly rejected respondent's argument, and no court of appeals has held to the contrary. See *United States* v. *Taylor*, 353 F.3d 868, 869-870 (10th Cir. 2003) (holding the same as the court below), cert. denied, 541 U.S. 1018 (2004); *United States* v. *Fuller*, 86 F.3d 105, 106-107 (7th Cir. 1996) (same); *United States* v. *Miranda*, 986 F.2d 1283, 1285 (9th Cir.) (same), cert. denied, 508 U.S. 929 (1993); but cf. *United States* v. *Huguenin*, 950 F.2d 23, 27-28 n.4 (1st Cir. 1991) (expressing the contrary view in dicta).

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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Acting Solicitor General

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