No.

In the Supreme Court of the United States

JIMMIE EUGENE WHITE, II, PETITIONER

v.

UNITED STATES OF AMERICA

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Speedy Trial Act, 18 U.S.C. § 3161 *et seq.*, requires that any criminal information or indictment be filed within 30 days of a defendant's arrest. The Act automatically excludes from this limitation "[a]ny period of delay resulting from other proceedings concerning the defendant, including but not limited to" eight enumerated subcategories involving specific formal proceedings. See 18 U.S.C. § 3161(h)(1)(A)-(H). Delays attributable to other circumstances may be excluded only if a judge makes specific, on-the-record findings that a continuance would serve the ends of justice. *Id.* § 3161(h)(7).

The question presented is:

Whether (as four circuits hold) time engaged in plea negotiation that does not result in a finalized plea agreement is automatically excludable as "other proceedings concerning the defendant" under § 3161(h)(1), or whether (as four other circuits hold) such time is excludable only if the district court makes case-specific "ends of justice" findings under § 3161(h)(7).

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OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, 1a-17a, is unreported, but available at 2017 WL 633386. The district court's order denying petitioner's motion to dismiss, App., *infra*, 19a-29a, is unreported. The magistrate judge's order accepting the stipulation by petitioner's former counsel and the government to exclude plea bargaining time, App., *infra*, 32a-33a, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 16, 2017, and a timely pro se petition for rehearing was denied on March 20, 2017. On June 7, 2017, Justice Kagan extended the time in which to file a petition for writ of certiorari to and including August 17, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 3161(b) of Title 18 of the United States Code provides in part:

> Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges.

Section 3161(h) of Title 18 of the United States Code provides in part:

> The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

> (1) Any period of delay resulting from other proceedings concerning the defendant * * * .

Further statutory provisions are reproduced in the Appendix to this petition. App., *infra*, 34a-40a.

INTRODUCTION

The Speedy Trial Act requires a criminal information or indictment to be filed within 30 days of a defendant's arrest. 18 U.S.C. § 3161(b)[1] If the defendant is not indicted within the 30-day period, the charges must be dismissed. See *id.* § 3162(a)(1).

Section 3161(h) enumerates eight specific categories of formal judicial proceedings for which delay is excluded in "computing the time within which an information or indictment must be filed." As relevant here, § 3161(h)(1) requires the automatic exclusion of "[a]ny period of delay resulting from other proceedings concerning the defendant, including but not limited to * * * delay resulting from consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the Government." See § 3161(h)(1)(G). This case presents the important and recurring question whether plea negotiations that do *not* result in submission to the court of a proposed plea agreement are "other proceedings concerning the defendant," subject to automatic exclusion under § 3161(h)(1).

The courts of appeals are sharply "divided as to whether plea negotiations are automatically excludable from the Speedy Trial Act calculation as 'other proceedings.'" *United States* v. *Huete-Sandoval*, 668

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[1] References to § 3161, § 3162, and their respective subsections are to Title 18 of the United States Code.

F.3d 1, 7 n.8 (1st Cir. 2011). The Sixth Circuit, together with the Fourth, Seventh, and Eighth Circuits, holds that time spent in plea negotiations is automatically excluded under § 3161(h)(1). App., *infra*, 8a. The Second, Fifth, Ninth, and Eleventh Circuits, by contrast, hold that plea negotiations that fail to yield a finalized agreement are *not* automatically excluded under § 3161(h)(1). See pp. 14-18, *infra*. In those circuits, if such time is to be excluded from the Speedy Trial Act clock, a judge must first make exacting, on-the-record findings that a continuance would serve the ends of justice. See § 3161(h)(7). Courts have struggled deciding which test to apply, recognizing the substantial practical difference between the two tests. This division of authority is particularly intolerable because Congress enacted the Speedy Trial Act for the very purpose of "introduc[ing] a measure of uniformity" to federal practices regarding pretrial delay. See 120 Cong. Rec. 41,781 (1974).

The Sixth Circuit's decision cannot stand. The Speedy Trial Act's text, structure, legislative history, and purpose all make clear that the "other proceedings" § 3161(h)(1) contemplates are limited to the kinds of formal judicial proceedings enumerated in that section's express exceptions, and should not be expanded to include informal discussions between counsel. A contrary approach ignores this Court's directive that § 3161(h)(1)'s general language does not "apply to a matter specifically dealt with in another part of the same enactment," *Bloate* v. *United States*, 559 U.S. 196, 207 (2010) (quoting *D. Ginsberg & Sons, Inc.* v. *Popkin*, 285 U.S. 204, 208 (1932)); here, Congress limited its express exclusion to time the *court itself* spends considering a proposed plea

agreement presented by the parties. See §3161(h)(1)(G); see generally *Bloate*, 559 U.S. at 207. The Sixth Circuit's approach "creat[es] a big loophole in the statute," *Bloate*, 559 U.S. at 213, undermining Congress's decision to enact strict limits that would "give effect to the Sixth Amendment right," *United States* v. *MacDonald*, 456 U.S. 1, 7, n.7 (1982) (quoting S. Rep. No. 1021, 93rd Cong., 2d Sess. 1 (1974)).

Further review is warranted to resolve this stark and entrenched split on a commonly arising issue of critical importance to the proper administration of the federal criminal justice system.

STATEMENT

1. "[T]he Speedy Trial Act [of 1974] comprehensively regulates the time within which a trial must begin." *Zedner* v. *United States*, 547 U.S. 489, 500 (2006). The Act was designed to further "the speedy trial protections afforded both the individual and society by the Sixth Amendment" by setting "fixed time limits" for criminal cases. S. Rep. No. 212, 96th Cong., 1st Sess. 9 (1979).

The Act requires that an information or indictment be filed within 30 days of arrest, § 3161(b), and that trial commence within 70 days after the later of (1) the filing of the information or indictment; or (2) the first appearance on the charges, § 3161(c)(1). "Section 3161(h) specifies * * * delays that are excludable from the calculation." *Bloate*, 559 U.S. at 203. Some "delays are automatically excludable"—e.g., those associated with eight expressly enumerated and specific exemptions set forth in § 3161(h)(1)(A)-(G). *Ibid.* Others "are excludable only if the district court makes certain findings enu-

merated in the statute." *Ibid.* (citing § 3161(h)(7)). Subsection (h)(7), which permits courts to exclude time based on specific on-the-record findings that exclusion serves the "ends of justice," "provides '[m]uch of the Act's flexibility,' and gives district courts 'discretion—within limits and subject to specific procedures—to accommodate limited delays for case-specific needs[.]'" *Id.* at 214 (quoting *Zedner*, 547 U.S. at 498, 499).

The Act "entitles [a criminal defendant] to dismissal of the charges if [the relevant] deadline is not met." *Bloate*, 559 U.S. at 199. "Dismissal, however, need not represent a windfall. A district court may dismiss the charges *without prejudice*, thus allowing the Government to refile charges or reindict the defendant." *Id.* at 214 (citing § 3162(a)(1)).

2. a. On May 14, 2010, the Drug Enforcement Agency executed a search warrant at the home of petitioner Jimmie White, seizing a safe containing drugs, money, and a handgun. App., *infra*, 2a. Petitioner was arrested that same day for "probable cause" and on an outstanding Ohio warrant concerning a state offense. *Id.* at 4a. In October 2010, an Ohio state court sentenced petitioner to time served on that charge and released him.

Two-and-a-half years passed without further action by federal authorities. On May 2, 2013, petitioner was arrested on federal charges related to the contents of the safe. App., *infra*, 5a. Two weeks later, petitioner's then-counsel and the government stipulated that the upcoming 15-day period from May 23 to June 7 "should be excluded from computing the time within which an information or indictment must

be filed" under § 3161(b) "because the parties are engaged in plea negotiations, 18 U.S.C. § 3161(h)(1), and because the ends of justice served by such continuance outweigh the interests of the public and the defendant in a speedy trial. *See* 18 U.S.C. § 3161(h)(7)." App., *infra*, 31a. The magistrate judge accepted this stipulation, but his order stated only that "good cause exists" for excluding this period under § 3161. *Id.* at 32a. The order did not discuss the factors § 3161(h)(7)(B) requires a judge to consider before excluding time under the Speedy Trial Act, but simply stated that the time "should be excluded in calculating the time within which [petitioner] shall be indicted under the Speed Trial Act." *Id.* at 33a.

The government did not file an indictment against petitioner until June 4—33 days after his arrest. App., *infra*, 5a. The indictment charged four counts of drug and gun law violations. *Ibid.*

b. Petitioner moved for appointment of new counsel, arguing that his lawyer had stopped returning phone calls after petitioner asked that counsel move to dismiss the indictment for violation of the Speedy Trial Act. See R.20, R.31 (motion for new attorney for failure to contest Speedy Trial Act violations). Following appointment of new counsel, petitioner moved to dismiss the indictment. See R.35. The district court denied the motion, holding that "[t]here was no Speedy Trial Act violation." App., *infra*, 25a. According to the district court, although petitioner "was not indicted until thirty-three days" after his arrest, the magistrate judge's order properly excluded 13 days from the Speedy Trial Act clock "because the parties [were] engaged in plea negotiations." *Ibid.* The district court did not reference the Act's "ends of justice"

exception, much less make specific findings justifying the exclusion of time; it stated only that "[petitioner] and the government agreed that the time period should be enlarged," and "the magistrate judge ordered that" period excluded. *Ibid.*[2] A three-day trial followed, and petitioner was convicted on all counts. *Id.* at 6a.

c. Petitioner reprised the Speedy Trial Act issue in the Sixth Circuit. While "conced[ing]" that prior panels of that court had interpreted § 3161(h)(1) as automatically excluding time spent in plea negotiations, App., *infra*, 9a; see also C.A. Reply Br. vi (citing *United States* v. *Dunbar*, 357 F.3d 582, 593 (6th Cir. 2004)), petitioner invoked contrary Ninth Circuit authority holding that such time is not automatically excluded. C.A. Reply Br. vi (citing *United States* v. *Perez-Reveles*, 715 F.2d 1348 (9th Cir. 1983)). Arguing that "[t]he Ninth Circuit's reasoning is more in line with the Supreme Court's approach to the Act," petitioner quoted this Court's statement in an analogous context that "[h]ad Congress wished courts to exclude pretrial motion preparation time automatically, it could have said so." *Id.* at vi-vii (quoting *Bloate*, 559 U.S. at 211 n.13).

The court of appeals affirmed. App., *infra*, 2a. The Sixth Circuit held that periods of plea negotiations are automatically excluded from the Speedy

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[2] In district court, petitioner argued that he had not authorized his former attorney to stipulate to the extension, and that even if the stipulation were attributable to him, "there was no determination made" as to the necessary "factual basis" for a continuance, "other than the stipulation." R.88 at 5, 17-18. The district court rejected those arguments, reasoning that "[t]he Magistrate Judge made a finding and I can rely on that." *Id.* at 17.

Trial Act clock under § 3161(h)(1) without a judge "making separate findings as required for an ends-of-justice continuance." *Id.* at 9a (citing *Dunbar*, 357 F.3d at 593). According to the Sixth Circuit, "[a]lthough the plea bargaining process is not expressly specified in" the lengthy list of exclusions in § 3161(h)(1), "the listed proceedings 'are only examples of delay resulting from other proceedings concerning the defendant and are not intended to be exclusive.'" *Id.* at 8a (quoting *United States* v. *Bowers*, 834 F.2d 607, 610 (6th Cir. 1987) (per curiam) (some internal quotation marks omitted)).[3]

Given *Dunbar*'s controlling force, the panel held that "[i]n this Circuit," the two-week period in which petitioner had "engaged, through counsel, in plea negotiations" "may be excluded [under § 3161(h)(1)] without making separate findings" under § 3161(h)(7). *Id.* at 8a-9a. The panel declined petitioner's invitation to revisit that precedent, stating that under *Dunbar*, "plea negotiations are 'period[s] of delay resulting from other proceedings concerning the defendant' automatically excludable under § 3161(h)(1)." *Id.* at 8a (collecting authorities).

REASONS FOR GRANTING THE PETITION

This case squarely presents an important and recurring question of federal law: whether plea negotia-

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[3] Petitioner separately argued that the district court erred in denying his motion to dismiss "because the magistrate judge did not make any of the findings required for an ends-of-justice continuance under § 3161(h)(7)." App., *infra*, 8a. The Sixth Circuit declined to reach that argument because, under circuit precedent, plea bargaining was automatically excludable under (h)(1) and could be excluded "without making separate findings as required for an ends-of-justice continuance." *Id.* at 9a.

tions that do not result in a finalized plea agreement are automatically excluded from Speedy Trial Act calculations as "other proceedings concerning the defendant" under § 3161(h)(1). The federal courts of appeals are sharply divided on this issue. Adhering to Sixth Circuit precedent, the panel below held that such time is automatically excludable as "other proceedings." App., *infra*, 8a. In so doing, it ignored both the plain meaning of § 3161(h)(1) and this Court's directive that categories of time already addressed by a specific exclusion (in this case, the exclusion for plea bargains) do not fall within the general language of § 3161(h)(1). *Bloate*, 559 U.S. at 207. This case presents a procedurally clean vehicle to resolve a broad and entrenched conflict on an issue that recurs frequently.

I. There Is An Acknowledged Split Over Whether Plea Negotiations Are Automatically Excluded Under 18 U.S.C. § 3161(h)(1)

The "circuits are divided as to whether plea negotiations" that do not result in a finalized plea agreement are "automatically excludable from the Speedy Trial Act calculation as 'other proceedings' pursuant to 18 U.S.C. § 3161(h)(1)." *Huete-Sandoval*, 668 F.3d at 7 n.8. The court below, adhering to Sixth Circuit precedent, held that such plea negotiations are automatically excludable as "other proceedings" under § 3161(h)(1). App., *infra*, 8a (citing *Dunbar*, 357 F.3d at 593). In so doing, the court further entrenched a deep split widely acknowledged by courts and commentators. See 3B Charles Alan Wright et al., *Federal Practice and Procedure* § 835 n.14 (4th ed.) ("There is a split in the circuits about whether plea negotiations, which are not specifically mentioned,

are automatically excludable from the Speedy Trial Act calculation as 'other proceedings' under § 3161(h)(1)."); *United States* v. *Mathurin*, 690 F.3d 1236, 1240 (11th Cir. 2012) ("Whether delay resulting from plea negotiations is automatically excludable under the Act is an issue upon which our sister Circuits have not always agreed."); *Speedy Trial*, 45 Geo. L.J. Ann. Rev. Crim. Proc. 449, 466 n.1299 (2016) ("There is a circuit split as to whether plea negotiations constitute automatically excludable 'other proceedings.'").

The Sixth Circuit's holding that plea negotiations are automatically excludable even without a finalized agreement is consistent with decisions from the Fourth, Seventh, and Eighth Circuits. However, the Second, Fifth, Ninth, and Eleventh Circuits have reached the opposite conclusion. The impact of plea negotiations on a defendant's statutory right to a speedy trial thus turns on the happenstance of where a defendant is prosecuted. The Court should grant review to further Congress's purpose that the Speedy Trial Act would "introduc[e] a measure of uniformity" to federal practices regarding pretrial delay. See 120 Cong. Rec. 41,781 (1974).

A. Four Circuits Have Held That Plea Negotiations Are Automatically Excluded From The Speedy Trial Calculation Under § 3161(h) As "Other Proceedings Concerning The Defendant"

The Fourth, Seventh, and Eighth Circuits agree with the Sixth: time engaged in plea negotiations that do not result in a finalized agreement is automatically excludable as "other proceedings" under

§ 3161(h)(1). See *Huete-Sandoval*, 668 F.3d at 7 n.8 (noting the split, and citing *United States* v. *Leftenant*, 341 F.3d 338, 344-345 (4th Cir. 2003), *United States* v. *Bowers*, 834 F.2d 607, 610 (6th Cir. 1987), *United States* v. *Montoya*, 827 F.2d 143, 150 (7th Cir. 1987), and *United States* v. *Van Someren*, 118 F.3d 1214, 1218-1219 (8th Cir. 1997), as cases taking this position).

The first circuit to address this issue was the Seventh Circuit in *United States* v. *Montoya*, 827 F.2d 143, 150 (1987). The court held that the Speedy Trial Act was not violated where delay was caused by a defendant's guilty plea to other charges in another state. *Id.* at 151. Among other things, the court stated that the "plea bargaining process also can qualify as one of many 'other proceedings' under the generic exclusion of section 3161(h)(1)." *Id.* at 150. The court explained that the "ten listed proceedings are inclusive, not exclusive" and that "negotiating a plea bargain could be considered a proceeding." *Ibid.* The Seventh Circuit has repeatedly reaffirmed that holding in cases where the delays involved criminal charges in the same case. See *United States* v. *Robey*, 831 F.3d 857, 863 (2016) ("the period of time in which [defendant] was negotiating his withdrawn plea agreement is automatically excluded" under § 3161(h)(1)); *United States* v. *Salerno*, 108 F.3d 730, 736 (1997) (plea negotiations are automatically excludable "other proceedings").[4]

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[4] Courts and commentators alike cite *Montoya* for the proposition that plea negotiations in general are automatically excludable "other proceedings" under § 3161(h)(1). See, *e.g.*, 3B Charles Alan Wright et al., *Federal Practice and Procedure*

The Sixth Circuit adopted the Seventh Circuit's rationale in *United States* v. *Bowers*, 834 F.2d 607, 610 (1987) (citing *Montoya*, 827 F.2d at 150). In *Bowers*, the court reiterated that the list contained in § 3161(h)(1) was not exclusive. *Ibid.* In the Sixth Circuit's view, "[a]ll the examples listed are of delaying circumstances that ought not be charged to the government." *Ibid.* The court then concluded, "the trial court was warranted in declining to charge this delay to the government, since the plea bargaining process can qualify as one of many 'other proceedings.'" *Ibid.* The Sixth Circuit has reaffirmed this holding in subsequent cases, including this one. See, *e.g.*, *United States* v. *Dunbar*, 357 F.3d 582, 593 (2004) (holding that plea negotiations are automatically excludable under § 3161(h)(1)), vacated on other grounds, *Dunbar* v. *United States*, 543 U.S. 1099 (2005); *United States* v. *Montgomery,* 395 F. App'x 177 (2010) (same); App., *infra*, 8a; see also *Zundel* v. *United States*, No. 11-20017, 2017 WL 712883, at *2 (E.D. Mich. Feb. 23, 2017) (same).

The Eighth Circuit agreed in *United States* v. *Van Someren*, 118 F.3d 1214, 1218-1219 (1997) (citing *Montoya*, 827 F.2d at 150, and *Bowers*, 834 F.2d at 610). *Van Someren* concluded that "time spent on plea negotiations is excludable * * * as a 'proceeding involving defendant' under § 3161(h)(1)."[5] The

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§ 835 (4th ed.); *Speedy Trial*, 45 Geo. L.J. Ann. Rev. Crim. Proc. 449, 466 n.1299 (2016); *United States* v. *Mathurin*, 690 F.3d 1236, 1240 n.6 (11th Cir. 2012).

[5] Although the court in *Van Someren* reached this conclusion as an "alternative holding," district courts in the Eighth Circuit apply it as a holding. See, *e.g.*, *United States* v. *Davis*, No. 3:07-cr-95-06-09, 2008 WL 544990, at *1 (D.N.D. Feb. 27, 2008) ("pe-

Eighth Circuit, however, has cautioned its district courts that while the plea negotiations in *Van Someren* were automatically excludable, there may be periods where plea negotiations are "dormant," and that time is not automatically excludable. *United States* v. *Elmardoudi*, 501 F.3d 935, 942 (2007); see also *United States* v. *Mathurin*, 690 F.3d 1236, 1240 n.6 (11th Cir. 2012) (recognizing that the Eighth Circuit has generally "embraced the idea that plea negotiations qualify as 'other proceedings concerning the defendant'" (quoting *Van Someren*, 118 F.3d at 1218)).

The Fourth Circuit also holds that plea negotiations are automatically excludable "other proceedings" under § 3161(h)(1). *Leftenant*, 341 F.3d at 345 (citing *Bowers*, 834 F.2d at 610, and *Montoya*, 827 F.2d at 150). Although *Leftenant* addressed plea negotiations related to criminal charges separate from the charges of conviction, the Fourth Circuit has reaffirmed the rule in cases where the plea bargaining involved the very same charges. See *United States* v. *Keita*, 742 F.3d 184, 188 (2014) (stating that plea negotiations are automatically excludable under

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riod of delay caused by plea negotiations is also excludable under 18 U.S.C. § 3161(h)(1) because plea negotiations are 'other proceedings concerning the defendant'"); *United States* v. *Anderson*, No. 3:07-cr-92, 2008 WL 879750, at *1 (D.N.D. Mar. 28, 2008) ("Any period of delay resulting from 'other proceedings' concerning the defendant, including other trials, plea negotiations, and the Court's consideration of a plea agreement, is excludable") (citing § 3161(h)(1)); *United States* v. *Goodman*, No. 05-cr-369, 2006 WL 1134761, at *1 (D. Minn. Apr. 27, 2006) (holding that plea negotiations are automatically excludable under *Van Someren* even when a plea was never submitted to the district court).

§ 3161(h)(1) in a case where no other charges were pending against the defendant); see also *United States* v. *Lesane*, No. 3:08-cr-185, 2008 WL 2662052, at *1 (E.D. Va. July 3, 2008) (same). Thus, *Leftenant* stands for the proposition that, "[i]n our circuit, delays related to plea negotiations constitute non-enumerated 'other proceedings' under § 3161(h)(1)." *United States* v. *Dixon*, 542 F. App'x 273, 276 (4th Cir. 2013); see also *id.* at 276 n.2 (contrasting the Fourth Circuit's conclusion with contrary decisions by the Second, Ninth, and Eleventh Circuits).

B. Four Other Circuits Hold That Plea Negotiations Are Not Automatically Excluded Under § 3161(h)(1)

In sharp contrast, the Second, Fifth, Ninth, and Eleventh Circuits all have concluded that time spent on failed plea negotiations is not automatically excluded as "other proceedings concerning the defendant." *United States* v. *Alvarez-Perez*, 629 F.3d 1053, 1058, 1059 (9th Cir. 2010); *United States* v. *Mathurin*, 690 F.3d 1236, 1241-1242 (11th Cir. 2012); *United States* v. *Lucky*, 569 F.3d 101, 107 (2d Cir. 2009); *United States* v. *Velasquez*, 890 F.2d 717, 719-720 (5th Cir. 1990). In these courts, such time can be excluded only if the district court makes specific on-the-record findings that the delay serves the "ends of justice" under § 3161(h)(7).

In *United States* v. *Lucky*, the Second Circuit wrote that while "[s]everal other circuits have indicated that plea negotiations can trigger the § 3161(h)(1) automatic exclusion," it was "not yet convinced." 569 F.3d at 107. The court explained that "Section 3161(h)(1) covers 'other proceedings,'

which usually denotes formal judicial processes." *Ibid.* Indeed, "[t]he nonexclusive list of examples given in that section includes formal processes over which the parties have no direct control." *Ibid.* In contrast, the court explained, plea negotiations are "informal discussions between the parties and are directly controlled by the parties." *Ibid.*[6]

In *Mathurin*, the Eleventh Circuit acknowledged that "[w]hether delay resulting from plea negotiations is automatically excludable under the Act is an issue upon which our sister Circuits have not always agreed." 690 F.3d at 1240 (comparing *Alvarez-Perez*, 629 F.3d at 1058 and *Lucky*, 569 F.3d at 107, with *Leftenant*, 341 F.3d at 344-345 and *Bowers*, 834 F.2d at 610). The court aligned itself with the Second Circuit, holding that "reading the category of automati-

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[6] While the Second Circuit's conclusion about plea negotiations was not the grounds for its holding in *Lucky*, the case is widely recognized as setting forth the Second Circuit's position in this circuit split. See, *e.g.*, Br. for the United States 18 n.4, *United States* v. *Cooke*, Nos. 16-264 et al., 2016 WL 7336902 (Dec. 15, 2016) ("*Lucky* held that plea negotiations are not other proceedings under 18 U.S.C. § 3161(h)(1)"); *United States* v. *McFadden*, No. 16-264, 2017 WL 1540846, *1 (2d Cir. May 1, 2017) ("this Court has suggested that continuances for plea negotiations are not explicitly excludable as 'other proceedings' under 18 U.S.C. § 3161(h)(1)(A)"). See also *Dixon*, 542 F. App'x at 276 n.2 (describing the circuit split and citing *Lucky* for the proposition that "plea negotiations do not fit comfortably into the 'other proceedings' language of section 3161(h)(1)"); *Mathurin*, 690 F.3d at 1240) (same); *Huete-Sandoval*, 668 F.3d at 7 n.8 (describing the circuit split and citing *Lucky* for the proposition that plea negotiations do not trigger automatic exclusion); 3B Charles Alan Wright et al., *Federal Practice and Procedure* § 835 (4th ed.) (same); *Speedy Trial*, 45 Geo. L.J. Ann. Rev. Crim. Proc. at 466 n.1299 (same).

cally excludable delays to include the time during which plea negotiations are conducted is contrary to the structure and purpose of the Act." *Id.* at 1242. The court cited this Court's instruction from *Bloate*, 559 U.S. at 207, that if a category of delay is addressed by one of § 3161(h)(1)'s eight express subparagraphs, courts should look only to that subparagraph to determine excludability. *Id.* at 1241. If the delay is not excludable under the governing subparagraph, a court should not conclude that it is nevertheless excluded under § 3161(h)(1)'s more general "other proceedings" language. *Id.* (citing *Bloate*, 559 U.S. at 207). Following that directive, the Eleventh Circuit pointed to § 3161(h)(1)(G)'s express exclusion for "delay resulting from consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the Government" and concluded that it "determined entirely" the automatic excludability of delays associated with plea agreements. *Ibid.* Since "the governing subparagraph does not indicate that the delay is excludable," the court explained that it "may not read the delay as falling within § 3161(h)(1)'s scope." *Ibid.*

The Eleventh Circuit also explained in *Mathurin* that "when Congress illustrated the types of 'delay resulting from other proceedings' that would be automatically excludable under § 3161(h)(1), it listed events that usually occur only under the authority or at the direction of a court, * * * or delay attributable to a period during which a proceeding is under advisement by the court." 690 F.3d at 1242 (internal citations omitted). Plea negotiations, in contrast, are "informal discussions between the parties" and are not controlled by the court. *Ibid.* (quoting *Lucky*, 569

F.3d at 107). The Eleventh Circuit also reasoned that this reading was more "consistent with the structure and purpose of the statute" because it avoids creating a "loophole" under which the government and a defendant could use plea negotiations to "delay the process for as long as they wish, without having to get formal court approval." *Ibid.* Allowing the parties to routinely exclude such delays without judicial oversight would, the court explained, run afoul of the Act's purpose, which is "not only to protect defendants, but also to vindicate the public interest in the swift administration of justice." *Ibid.* (quoting *Bloate*, 559 U.S. at 211). The Eleventh Circuit emphasized that § 3161(h)(7)'s "ends-of-justice continuance"—the "most open-ended type of exclusion recognized under the Act," but which requires a judge to engage in contemporaneous, on-the-record factfinding—was the appropriate mechanism to address delay resulting from plea negotiations. *Ibid.* (quoting *Zedner*, 547 U.S. at 508).

The Ninth Circuit too has held that "[i]n general, time devoted to plea negotiations is not automatically excluded." *United States* v. *Hernandez-Meza*, 720 F.3d 760, 763 (2013); *Alvarez-Perez*, 629 F.3d at 1058; *United States* v. *Ramirez-Cortez*, 213 F.3d 1149, 1155 (2000). But, where a defendant notifies the court that he plans to plead guilty and the court sets a change of plea hearing, such time could be excluded under § 3161(h)(1)(G) as "delay resulting from consideration by the court of a proposed plea agreement," or under § 3161(h)(1)(D) as a "pretrial motion." *Hernandez-Meza*, 720 F.3d at 763; *Alvarez-Perez*, 629 F.3d at 1058; accord *United States* v. *Lopez-Osuna*, 242 F.3d 1191, 1197-1198 (9th Cir. 2001) (concluding

that such a delay would be excludable as an "other proceeding" under § 3161(h)(1). The Fifth Circuit has similarly held that time the parties spent in discussing a failed plea agreement is not automatically excluded, *Velasquez*, 890 F.2d at 719, but if the parties file a notice of intent to propose a guilty plea, § 3161(h)(1)(D)'s exclusion for "pretrial motions" may apply, *United States* v. *Dignam*, 716 F.3d 915, 925 (5th Cir. 2013).

* * * * *

This acknowledged split goes to the heart of § 3161(h)(1)'s general exclusion, and the effect of plea negotiations on a criminal defendant's statutory right to a speedy trial. Because eight circuits encompassing most of the Nation's federal criminal cases are equally divided, this Court's review is urgently warranted.

II. The Decision Below Is Wrong

The Speedy Trial Act excludes periods of "delay resulting from other proceedings concerning the defendant, including but not limited to" a representative list of examples. § 3161(h)(1). The Sixth Circuit's interpretation of "other proceedings" to encompass failed plea negotiations, App., *infra*, 8a, runs counter to the ordinary meaning of that phrase, this Court's explicit instructions on interpreting the statutory provision at issue, its legislative history, and Congress's purposes in enacting the Speedy Trial Act.

A. The Text And Structure Of § 3161(h)(1) Do Not Permit Automatic Exclusion Of Plea Negotiations

Courts interpret "plain and unambiguous statutory language according to its terms." *Hardt* v. *Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010). In determining plain meaning, courts rely on the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Food & Drug Admin.* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (internal quotation marks omitted). Viewed in context, § 3161(h)(1) does not permit automatic exclusion of plea negotiations.

1. By its plain terms, § 3161(h)(1) only applies to "proceedings concerning the defendant." § 3161(h). That phrase is most naturally read to refer to formal matters under judicial control.

When the Speedy Trial Act was enacted, the word "proceedings" was commonly understood to refer to "the form and manner of conducting juridical business before a court or judicial officer," "[a]n act which is done by the authority or direction of the court, agency, or tribunal," *Black's Law Dictionary* 1083 (5th ed. 1979), "the course of procedure in a judicial action," *Webster's Third New International Dictionary* 1807 (1976), or "legal action; litigation," *The American Heritage Dictionary of the English Language* 1043 (1976). The same understanding holds today. See, *e.g.*, *Black's Law Dictionary* 1398 (10th ed. 2014) (defining proceeding as "[t]he business conducted by a court or other official body; a hearing"); *Garner's Dic-*

tionary of Legal Usage 714 (3rd ed. 2011) ("business done by a tribunal of any kind"); *Merriam-Webster's Collegiate Dictionary* 990 (11th ed. 2003) ("an official record of things said or done."); *Oxford English Dictionary* (3rd ed. 2007) ("any act done by authority of a court of law").

Although some dictionary definitions indicate a broader meaning of the word, see, *e.g.*, *Webster's Third New International Dictionary* 1807 (1976) ("a particular action or course of action"), the context of a criminal prosecution suggests Congress meant the term "proceedings" in its formal, legal sense. For example, one would not ordinarily describe a prosecutor's interview with a crime victim as a legal "proceeding," but that victim's testimony at trial would ordinarily be so described.

Thus, the most natural reading of the phrase "proceedings concerning the defendant" in § 3161(h)(1) does not encompass informal discussions between the prosecution and defense counsel. As Judge Calabresi recognized in *Lucky*, "proceeding" in this context "usually denotes formal judicial processes." 569 F.3d at 107.

2. The understanding that § 3161(h)(1) applies only to formal judicial processes is confirmed by statutory context. The examples of "proceedings" listed in § 3161(h)(1) all involve formal undertakings supervised by a court: Competency hearings, trials, interlocutory appeals, pretrial motions, transfer hearings, court-ordered transportation, the court's consideration of proposed plea agreements, and the court's consideration of other issues concerning the defend-

ant all fit that description.[7] Mere conversations between a prosecutor and defense counsel lack judicial oversight and the same degree of formality. "The nonexclusive list of examples given in that section includes formal processes over which the parties have no direct control. Plea negotiations, however, are informal discussions between the parties and are directly controlled by the parties, not the court. Therefore, plea negotiations do not fit comfortably into the 'other proceedings' language of section 3161(h)(1)." *Lucky*, 569 F.3d at 107.

That reading accords with the bedrock canon of *ejusdem generis*, which "limits general terms which follow specific ones to matters similar to those specified." *Gooch* v. *United State*s, 297 U.S. 124, 128 (1936). Because the list of specifically excluded "proceedings" in § 3161(h)(1) are all formal matters under the court's power, the provision's general phrase "other proceedings" should not be read to cover informal negotiations that lie beyond judicial control.

3. The Sixth Circuit's reading of § 3161(h)(1) conflicts with another foundational rule of statutory construction: It ignores the maxim that "a specific provision controls over one of more general application." *Gozlon-Peretz* v. *United States*, 498 U.S. 395, 407 (1991).

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[7] See § 3161(h)(1)(A) (excluding delay from competency hearings); (h)(1)(B) (trials); (h)(1)(C) (interlocutory appeals); (h)(1)(D) (pretrial motions); (h)(1)(E) (transfer hearings); (h)(1)(F) (compliance with court-ordered transportation); (h)(1)(G) (a court's consideration of proposed plea agreements); (h)(1)(H) (a court's consideration of other issues concerning the defendant).

As this Court explained in *Bloate*, the "[g]eneral language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment." 559 U.S. at 207-208 (quoting *D. Ginsberg & Sons, Inc.* v. *Popkin*, 285 U.S. 204, 208 (1932)). *Bloate* applied that principle to the very statutory provision at issue here, differing only with respect to the particular subparagraph involved. See *Bloate*, 559 U.S. at 207 ("There is no question that subparagraph (D) is more specific than the 'general' language in subsection (h)(1)."). *Bloate* explained that each of the subparagraphs in § 3161(h)(1) addressed a particular category of excludable time. And although it "treat[ed] the list [in § 3161(h)(1)] as illustrative," the Court "construe[ed] each of the eight subparagraphs in (h)(1) to govern, conclusively unless the subparagraph itself indicates otherwise, the automatic excludability of the delay resulting from the category of proceedings it addresses." *Id.* at 209 (internal citations omitted).

Under the construction adopted in *Bloate*, subparagraph (G) conclusively governs the automatic exclusion of plea-related delays. By expressly excluding "delay resulting from *consideration by the court* of a proposed plea agreement to be entered into by the defendant and the attorney for the Government," § 3161(h)(1)(G) (emphasis added), Congress implicitly expressed a desire not to automatically exclude any *other* periods of time related to plea agreements. As the Eleventh Circuit explained, "[b]ecause subparagraph (G) addresses the automatic excludability of delays associated with plea agreements, the question of whether the delay * * * is automatically excludable

is determined entirely by the requirements of that subparagraph." *United States* v. *Mathurin*, 690 F.3d 1236, 1241 (11th Cir. 2012). Where, as here, "the District Court was never asked to review a proposed plea agreement during the relevant period * * * the governing limits of subparagraph (G) foreclose the government's claim that the delay arising from plea negotiations * * * is automatically excludable as 'delay resulting from other proceedings concerning the defendant.'" *Ibid.*

"Had Congress wished courts to exclude [time for plea negotiations] * * * automatically it could have said so." *Bloate*, 559 U.S. at 211 n.13. As this Court has recognized, "Congress knew how to define the boundaries of an enumerated exclusion broadly when it so desired." *Id.* at 206 (pointing to § 3161(h)(1)(A), which provides for the automatic exclusion of "delay resulting from *any* proceeding, *including* any examinations, to determine the mental competency or physical capacity of the defendant." (emphasis added)). Subparagraph (G)'s narrow targeting of "delay resulting from consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the Government" belies the notion that Congress intended to broadly exclude all delays related to pleas. The phrase "proceedings concerning the defendant" cannot bear the weight the Sixth Circuit put on it.

B. Legislative History Does Not Support The Sixth Circuit's Reading

The Speedy Trial Act's history provides further evidence that Congress's omission of plea negotiations from § 3161(h)(1) was a conscious choice.

Congress was well aware of delays from plea negotiations when it amended the Act in 1979, and yet it declined to address the issue in its amendments. For example, Assistant Attorney General Philip Heymann testified that time spent considering, negotiating, and rejecting plea offers played a major role in delaying trials. See Speedy Trial Act Amendments of 1979: Hearings on S. 961 and S. 1028 before the S. Comm. on the Judiciary, 96th Cong. 51 (1979) (statement of Philip Heymann, Assistant Att'y Gen., Dep't of Justice). Judge Alexander Harvey II similarly testified that, "[u]nder the present practice, a defendant usually does not have time to complete plea negotiations before the 10-day arraignment period." Speedy Trial Act Amendments of 1979: Hearings on S. 961 and S. 1028 before the S. Comm. on the Judiciary, 96th Cong. 62 (1979) (statement of Judge Alexander Harvey II).

Despite these well-known concerns, Congress chose not to include plea discussions within the scope of the express automatic exclusions in § 3161(h)(1). Instead, the Senate Judiciary Committee expressed a preference for a "case-by-case approach" rather than excluding time for plea bargaining "*per se*." S. Rep. No. 212, 96th Cong., 1st Sess. 25-26 (1979) (expressing reluctance to "automatically excuse plea bargaining *per se*" from the statute because of "the difficulty of measuring the beginning o[f] a bonafide bargaining"). Congress provided for that "case-by-case approach" under § 3161(h)(7), by excluding delay from continuances granted on the basis of an explicit "finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial." The

courts below pointedly elected not to rely on that section here.

C. Automatically Excluding Plea Negotiations Undermines The Act's Purposes

The speedy trial right "is an important safeguard to prevent undue and oppressive incarceration prior to trial," *United States* v. *Loud Hawk*, 474 U.S. 302, 312 (1986) (quoting *United States* v. *Ewell*, 383 U.S. 116, 120 (1966)), and "vindicate[s] the public interest in the swift administration of justice," *Bloate*, 559 U.S. at 211. In light of these important interests, this Court has strictly construed the Speedy Trial Act's timing requirements. See *United States* v. *Tinklenberg*, 563 U.S. 647, 662 (2011) (holding that the ten-day limit for transportation-related delays includes weekends and holidays); *Bloate*, 559 U.S. at 203-204 (holding that time to prepare pre-trial motions is not automatically excludable delay); *United States* v. *Taylor*, 487 U.S. 326, 343-344 (1988) (noting that "[t]he Speedy Trial Act * * * confines the exercise of [ordinary trial court] discretion more narrowly, mandating dismissal of the indictment upon violation of precise time limits, and specifying criteria to consider in deciding whether to bar reprosecution."). Because "the Act serves not only to protect defendants, but also to vindicate the public interest in the swift administration of justice," *Bloate*, 559 U.S. at 211, even defendants themselves cannot prospectively waive these vital safeguards. See *Zedner*, 547 U.S. at 500-501.

By allowing prosecutors and defendants to indefinitely delay trials without judicial oversight, the Sixth Circuit's automatic exclusion of plea negotiations enfeebles the statutory 30-day indictment peri-

od. Here, as in *Bloate*, the "automatic exclusion" reading "relies on an interpretation of subsection (h)(1) that admits of no principled, text-based limit on the definition of a 'proceeding concerning the defendant,' and thus threatens the Act's manifest purpose of ensuring speedy trials by construing the Act's automatic exclusion exceptions in a manner that could swallow the [3]0-day rule." *Bloate*, 559 U.S. at 210.

III. This Case Presents A Recurring Issue Of National Importance

Whether § 3161(h)(1) requires the automatic exclusion of time spent in plea negotiations is a recurring and important question. As the many cases cited above make clear, this issue arises frequently; indeed, given the ubiquity of plea bargaining, it has the potential to arise in virtually every federal criminal prosecution.

A. This Issue Arises Frequently

The question presented here is all too familiar to federal courts and criminal defendants. As explained above, see pp. 9-18, *supra*, eight federal courts of appeals, including jurisdictions responsible for the vast majority of federal prosecutions each year, have considered this question in recent years. The issue also arises constantly in federal district courts. See, *e.g.*, *Zundel* v. *United States*, No. 11-cr-20017, 2017 WL 712883, at *2 (E.D. Mich. Feb. 23, 2017) (excluding time for plea negotiations under § 3161(h)(1)).[8] Still

[8] See also, *e.g.*, *United States* v. *Riley*, No. CRIM. WDQ-13-0608, 2015 WL 501786, at *12 (D. Md. Feb. 4, 2015); *United States* v. *Sanders*, No. CRIM. 12-20218, 2013 WL 5719113, at *3 (E.D. Mich. Oct. 21, 2013); *United States* v. *Carter*, No. 11-CR-20752, 2013 WL 1340121, at *2 (E.D. Mich. Apr. 2, 2013); *Harris*

other litigants have raised the applicability of § 3161(h)(1) to plea negotiations in motions to dismiss that did not result in published opinions. See, *e.g.*, Gov't Opp'n to Def.'s Mot. for Release Based on the Speedy Trial Act, *United States* v. *Cohen*, 2014 WL 10464010 (D. Md. Nov. 4, 2014) (arguing plea negotiations are excludable from 70-day period under § 3161(h)(1)).[9] The available decisions unquestiona-

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v. *United States*, No. 3:07CR419, 2009 WL 5098970, at *3 (E.D. Va. Dec. 16, 2009); *United States* v. *Anderson*, No. CRIM. 3:07-CR-92, 2008 WL 879750, at *1 (D.N.D. Mar. 28, 2008); *United States* v. *Montgomery*, No. CRIM.A.3:07CR-36-S, 2008 WL 655982, at *2 (W.D. Ky. Mar. 6, 2008), *aff'd,* 395 F. App'x 177 (6th Cir. 2010); *United States* v. *Ginyard*, 572 F. Supp. 2d 30, 37 (D.D.C. 2008) (reserving judgment on this question because of dispute about when plea negotiations actually commenced); *United States* v. *Cobar*, No. 2:07-CR-00014 JCM RJJ, 2007 WL 2344841, at *8 (D. Nev. Aug. 13, 2007); *United States* v. *Goodman*, No. CRIM. 05-369 DWF/RLE, 2006 WL 1134761, at *1 (D. Minn. Apr. 27, 2006); *United States* v. *Alcantar*, No. 1:04 CR 595-18, 2005 WL 1541095, at *1 (N.D. Ohio June 30, 2005); *United States* v. *Morales-Aldahondo*, No. CRIM. 03-107(DRD), 2005 WL 1308899, at *2 (D.P.R. May 31, 2005); *United States* v. *Castillo-Pacheco*, 53 F. Supp. 2d 55, 61 (D. Mass. 1999) (discussing question but finding resolution unnecessary); *United States* v. *Maloy*, 835 F. Supp. 1373, 1377 (M.D. Fla. 1993) (discussing issue, but declining to reach it because of timing).

[9] Accord Mot. to Dismiss Under Speedy Trial Act, *United States* v. *Morales-Laureano*, 2013 WL 3214718 (D. Puerto Rico, Feb. 14, 2013); United States' Opp'n to Second Mot. to Dismiss, *United States* v. *Graves*, No. PJM-10-0164, 2012 WL 10829596 (D. Md. Feb. 17, 2012); Gov't Resp. to Def.'s Mot. to Dismiss Case for Undue Delay and Violation of Speedy Trial Rights, *United States* v. *Zaitar*, 2011 WL 9687351 (D.D.C. Sept. 9, 2011) (arguing plea negotiations are excludable from 70-day period under § 3161(h)(1) or (h)(7)); Gov't Mot. to Exclude Time Under the Speedy Trial Act, *United States* v. *Watson*, 2010 WL 8346379 (D. Md. Aug. 6, 2010) (arguing plea negotiations are

bly underrepresent the number of affected cases, since circuit precedent has rendered such exclusions routine.

The issue's pervasiveness is unsurprising: "[p]lea bargaining is a defining, if not the defining, feature of the federal criminal justice system." U.S. Dep't of Justice, Bureau of Justice Assistance, *Plea and Charge Bargaining, Research Summary* 1 (2011) (internal quotation marks and citation omitted), https://goo.gl/SG4af3; see also *Blackledge* v. *Allison*, 431 U.S. 63, 71 (1977) ("[T]he fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system."). Indeed, "scholars estimate that about 90 to 95 percent of both federal and state court cases are resolved through this process." *Plea and Charge Bargaining*, *supra*, at 1. Given plea bargaining's central role in the criminal justice system, it is no exaggeration to say that the question presented by this petition has the potential to arise in almost every criminal prosecution.

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excludable from 70-day period under § 3161(h)(1) and (h)(8)); Reply to Gov't Resp. to Def.'s Mot. to Dismiss, *United States* v. *Mathurin*, 2010 WL 3499076 (S.D. Fla. May 11, 2010); Gov't Resp. to Def.'s Mot. to Dismiss Indictment for Violation of the Speedy Trial Act, *United States* v. *Johnson*, 2010 WL 1805181 (E.D. Mich. Mar. 2, 2010) (arguing plea negotiations excludable from 30- and 70-day limits under § 3161(h)(1)); U.S. Resp. and Opp'n, *United States* v. *Martinez-Ortiz*, 2007 WL 3020730 (S.D. Cal. Jan. 3, 2007); Combined Resp. and Br. in Opp'n to Def.'s Mot. to Dismiss for Violations of the Speedy Trial Act, *United States* v. *Hasanaj*, 2005 WL 5893985 (E.D. Mich. Aug. 12, 2005) (arguing plea negotiations are excludable from 30-day limit under § 3161(h)(1)).

B. The Statutory 30-Day Limit Must Be Strictly Enforced

The Speedy Trial Act operates in "categorical terms," *Zedner*, 547 U.S. at 508, by "*mandating* dismissal of the indictment upon violation of precise time limits," *United States* v. *Taylor*, 487 U.S. 326, 344 (1988) (emphasis added). Any indictment filed more than thirty days after arrest must therefore be dismissed. § 3161(b); *United States* v. *Watkins*, 339 F.3d 167, 170 (3d Cir. 2003) ("The Speedy Trial Act * * * requires that an indictment or information be filed within thirty days from the date on which the defendant was arrested." (citation omitted)).

That mandate applies regardless of the length of the violation. See, *e.g.*, *United States* v. *Bryant*, 523 F.3d 349, 361 (D.C. Cir. 2008) (holding that when case exceeds § 3161(c)'s 70-day deadline by even one day, court is "obligated" to "remand the case to the District Court with instructions to dismiss the indictment").[10] Granting certiorari in this case allows the Court to reaffirm the important principle that there is no "*de minimis*" exception to the Speedy Trial Act's explicit and mandatory time limits.

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[10] Accord *United States* v. *Ojo*, 630 F. App'x 83 (2d. Cir. 2015) (one day); *United States* v. *Cox*, 553 F. App'x 123, 129 (3d Cir. 2014) (two days); *United States* v. *Hernandez-Meza*, 720 F.3d 760, 764 (9th Cir. 2013) (two days); *United States* v. *Hamelin*, 243 F. App'x 529, 531 (11th Cir. 2007) (unpublished) (per curiam) (one day); *United States* v. *Hope*, 202 F. Supp. 2d 458 (E.D.N.C 2001) (one day).

C. The Speedy Trial Act Serves Important Societal Objectives Beyond The Interests Of Individual Defendants

The Speedy Trial Act safeguards important policies of our criminal justice system. Congress carefully balanced the need for fixed time limits with narrowly tailored, judicially supervised exceptions. By adding an automatic exclusion that Congress plainly did not intend, the rule adopted below distorts that balance.

1. The Speedy Trial Act "protect[s] and promote[s] speedy trial interests that go beyond the rights of the defendant"—it was "designed with the public interest firmly in mind." *Zedner*, 547 U.S. at 501 (internal quotation marks and citation omitted). Lengthy pre-trial delays reduce the "deterrent value resulting from punishment," increase "the danger of recidivism," and undermine "confidence in the fairness and administration of criminal justice." S. Rep. 212, 96th Cong., 1st Sess. 6 (1979); see *Zedner*, 547 U.S. at 501 (identifying similar harms). By imposing firm arrest-to-trial deadlines, the Act reduces the risks of these social harms and promotes "the public interest in the swift administration of justice." *Bloate*, 559 U.S. at 211. Accordingly, even defendants cannot waive the Act's protections. See *Zedner*, 547 U.S. at 500-501.

The Act also protects defendants' ability to mount an effective defense. Pre-trial delays increase the likelihood that evidence will be lost or damaged, or witnesses will die, disappear, or forget events. *Barker* v. *Wingo*, 407 U.S. 514, 532 (1972); *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). Excessive pretrial incarceration can also disrupt family life and jeopardize employment—with the loss of the defendant's ability to support dependents that this necessarily entails. See *Barker*, 407 U.S. at 532–533.

2. "[I]ntolerable delays" in our criminal justice system threaten these important interests. S. Rep. No. 212, 96th Cong., 1st Sess. 8 (1979) (statement of William H. Rehnquist, Assistant Attorney General, to the Committee on the Judiciary in 1971). The Speedy Trial Act therefore mandates "fixed time limits" for the arrest-to-indictment and indictment-to-trial periods. *Id.* at 9; § 3161(b)-(c). Without such limits, "the speedy trial protections afforded both the individual and society by the Sixth Amendment [are] largely meaningless." S. Rep. No. 212, *supra*, at 9.

Congress also "set forth with reasonable particularity the types of delay which" would be *automatically excludable* "consistent with the objectives" of the Act. S. Rep. No. 212, *supra*, at 10; § 3161(h)(1)-(6). But courts are not "forced to choose" between rejecting a request to automatically exclude certain time "and risking dismissal of the indictment" due to anticipated delays. *Bloate*, 559 U.S. at 214. Instead, trial courts have the *discretion* to exclude reasonable periods of delay. But to ensure that courts do not too readily depart from the Act's important time limits, Congress required judges to "set[] forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the

public and the defendant in a speedy trial." § 3161(h)(7)(A).[11]

The Sixth Circuit's decision automatically excluding plea-negotiation time undermines Congress's carefully formulated exceptions. "[R]eading subsection (h)(1) to exclude" automatically something better resolved under the "ends of justice" catchall risks "creating a big loophole in the statute." *Bloate*, 559 U.S. at 213 (internal quotation marks omitted). That rule also pushes against "the legislative judgment that * * * the societal interest in prompt administration of justice * * * require[s], as a matter of law, that criminal cases be tried within a fixed period." S. Rep. No. 212, *supra*, at 6-7.

IV. This Case Presents An Ideal Vehicle To Resolve This Deep Circuit Split

This case presents a single issue of federal law: whether time engaged in plea negotiations is automatically excluded from the Speedy Trial Act clock under § 3161(h)(1). Eight circuits have weighed in, and the issue is ripe. This case presents a procedurally clean vehicle to resolve the circuit split. There is no dispute about this Court's jurisdiction. As it comes to this Court, the case involves none of the factual disputes that often arise in calculating time engaged in plea negotiations. Compare App., *infra*, 8a (noting that petitioner concedes "that the parties were engaged in plea negotiations during the period in question"), with *United States* v. *Berry*, No. 10-cr-20653, 2013 WL 2898211, at *8 (E.D. Mich. June 13,

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[11] Neither the magistrate judge nor the district court included such findings in the orders under review here. See App., *infra*, 24a-25a; *id.* at 32a-33a.

2013) (distinguishing between days with active negotiations and days without negotiation) and *United States* v. *Ginyard*, 572 F. Supp. 2d 30, 37 (D.D.C. 2008) (reserving judgment on the exclusion of time engaged in plea negotiations because the parties disputed when negotiations commenced). The Sixth Circuit squarely reached the issue presented after briefing by the parties. Its judgment rests on no alternative ground. See App., *infra*, 8a-9a. If petitioner prevails on the sole question presented, the judgment below will necessarily be invalid.

That petitioner's former counsel stipulated that the time was excludable is no impediment to resolving the question presented. The Sixth Circuit did not suggest it would be. See App., *infra*, 6a-9a. And for good reason. This Court has unanimously held that "a defendant may not prospectively waive the application of the [Speedy Trial] Act."[12] *Zedner*, 547 U.S. at 503; see also *Bloate*, 559 U.S. at 211 ("[A] defendant may not opt out of the Act even if he believes it would be in his interest."). "[A]llowing prospective waivers would seriously undermine the Act because there are many cases * * * in which the prosecution, the defense, and the court would all be happy to opt out of the Act, to the detriment of the public interest."

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[12] While the Sixth Circuit had no occasion to address the issue (and thus it is not before this Court), *Zedner's* prohibition on waivers readily applies to this case. Indeed, the government has conceded as much in addressing the significance of a similar time-limited waiver of the Speedy Trial Act. See Supp. Br. for the United States, *United States* v. *Mosteller*, 741 F.3d 503 (4th Cir. 2013), 2013 WL 3555523, at *8 ("Under *Zedner*, the district court erred by requiring Mosteller to prospectively waive her [Speedy Trial Act] rights as a condition for granting her mistrial motion.").

Bloate, 599 U.S. at 211-212 (quoting *Zedner*, 547 U.S. at 502). Tellingly, the government did not argue before the Sixth Circuit that counsel's stipulation forfeited or waived petitioner's Speedy Trial argument. The government simply argued that the stipulation demonstrated "that the parties were engaging in plea negotiations and that White had personally consented to the[negotiations]," Gov't C.A. Br. 46-47, and that time was therefore properly excludable under Sixth Circuit law. See *id*. at 44-52.

The district judge's order provides no alternate ground to support the exclusion, because it does not satisfy the requirements for a § 3161(h)(7)(A) continuance. Before granting such a continuance, "the court [must] set[] forth in the record of the case * * * its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial." § 3161(h)(7)(A). Neither the magistrate judge nor the district judge made the required findings here, though the government argued that the ends-of-justice criteria were satisfied. See App., *infra*, 24a-25a, 32a-33a. The ends-of-justice provision thus furnishes no alternative basis to affirm the judgment below. Cf. *Zedner*, 547 U.S. at 507 ("at the very least * * * [ends of justice] findings must be put on the record by the time a district court rules on a defendant's motion to dismiss," and findings made later would not support exclusion); *United States* v. *Ammar*, 842 F.3d 1203, 1211 (11th Cir. 2016) (where district court declines to make ends-of-justice finding "notwithstanding the repeated entreaties of the government that it do so, we are left with little choice but to conclude that the district court did not think

that the ends of justice warranted the continuance"); *United States* v. *Moran*, 998 F.2d 1368, 1372 (6th Cir. 1993) ("A district judge cannot wipe out violations of the Speedy Trial Act after they have occurred by making the findings that would have justified granting an excusable delay continuance before the delay occurred.") (quoting *United States* v. *Crane*, 776 F.2d 600, 606 (6th Cir. 1985)).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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