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1 P R O C E E D I N G S .

2 (11:20 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 next in Case 09-1498, United States v. Tinklenberg.

5 Mr. Roberts.

6 ORAL ARGUMENT OF MATTHEW D. ROBERTS

7 ON BEHALF OF PETITIONER

8 MR. ROBERTS: Thank you. Mr. Chief Justice,
9 and may it please the Court:

10 To accommodate important pretrial
11 proceedings, the Speedy Trial Act contains several
12 automatic exclusions from its deadline for commencing
13 trial. This case concerns the exclusion for pretrial
14 motions, which excludes the period of delay resulting
15 from any pretrial motion from the filing of the motion
16 through the conclusion of the hearing on or other prompt
17 disposition of such motion.

18 For more than 30 years, the courts of
19 appeals had uniformly held that the exclusion applies
20 automatically upon the filing of any motion, regardless
21 of its effect on the trial schedule. The court below
22 correctly rejected that established rule, which accords
23 with this Court's decisions, is clear and easy to
24 administer, and has worked well for over 3 decades.

25 The Court's cases construing the exclusion,

1 Henderson and Bloate, support the established rule.
2 They make clear that the exclusion applies automatically
3 once a motion is filed without any need for district
4 court findings. Henderson and Bloate cannot be squared
5 with the approach of Respondent and the court below.

6 CHIEF JUSTICE ROBERTS: Well, all that might
7 be true. On the other hand, the statute does say "delay
8 resulting." And under your approach, the time would be
9 excluded even if delay does not result.

10 MR. ROBERTS: No, Your Honor. Delay refers
11 to the interval of time from the filing of the motion
12 through its disposition, during which the Speedy Trial
13 Act's deadline is tolled. We know that delay has the
14 meaning -- delay can often have the meaning of the
15 interval of time between two events.

16 And we know it has that meaning in the
17 statute here because subsection (D) tells us so. It
18 defines the period of excludable delay resulting from
19 the motion as the time from the filing through the
20 disposition of the motion. Respondent's definition --

21 JUSTICE KENNEDY: But the Chief Justice says
22 only if it -- it's really a circular argument -- only if
23 it results in a delay. Well, suppose it doesn't result
24 in a delay?

25 MR. ROBERTS: That's assuming that delay is

1 referring to delay of the trial, to a postponement in
2 the trial. But delay can't have that meaning because if
3 it has that -- if that meaning is inconsistent with
4 subsection (D) of the statute's exclusion of the time,
5 of saying that delay is the time from the filing of the
6 motion through the disposition of the motion, because
7 the statute excludes periods of delay.

8 And if delay meant postponement of the
9 trial, then the excluded period would be the time during
10 which trial is postponed, but that period is often
11 significantly shorter or longer than the time from the
12 filing of the motion to the disposition. And in
13 Henderson and Bloate --

14 JUSTICE KENNEDY: But that doesn't -- that
15 prove the point that I think is the concern of the Chief
16 Justice's question, that in some cases the delay --
17 there's a delay that results and in other cases there
18 isn't.

19 MR. ROBERTS: But, Your Honor, the statute
20 excludes the period of delay, and then it says the
21 period of delay is the time from the filing through the
22 disposition. If delay -- if delay means postponement of
23 the trial, then all that's excluded by the statute in
24 the first part is the -- is the time during which trial
25 is postponed, but that doesn't match up with subsection

1 (D) because that period is not necessarily the period
2 from the filing through the disposition.

3 If I could give you an example. Say a
4 motion is filed 14 days before trial could begin, and
5 the motion takes 16 days to resolve. Trial is postponed
6 only by two days. And so if delay means the
7 postponement of trial, then the period of delay should
8 be 2 days, but the statute says that the delay and the
9 excludable time is the time from the filing through the
10 disposition, which is 16 days.

11 And that's what this Court held in Henderson
12 and Bloate, that that's the exact time. So if you adopt
13 a definition of delay for the first part as a triggering
14 mechanism that's the postponement of trial, that doesn't
15 line up with the rest of the statute.

16 In addition, that would be a totally
17 unworkable rule because whether time is excludable would
18 turn on a complex and often uncertain analysis of
19 whether the motion would or could delay when trial would
20 begin, and it's often going to be difficult or
21 impossible to make that determination at the time that
22 the motion is filed.

23 JUSTICE GINSBURG: Mr. Roberts, is there --
24 is there any, anything to indicate that what Congress
25 might have had in mind is that in criminal cases

1 inevitably there are going to be motions, and so the
2 trial judge is likely to set the trial date for after
3 that period runs?

4 MR. ROBERTS: Yes, Your Honor. Sometimes
5 trial -- judges might take motions into account in
6 setting the trial date and other times they might not
7 take the motions into account. So a rule that -- that
8 said the exclusion only applies if the judge moves the
9 trial date in response to the motion would lead to
10 arbitrary results.

11 It would mean basically that whether time
12 was excludable depended on whether the judge took the
13 motions into account when it set the trial date
14 initially or whether the, whether the judge correctly
15 estimated the amount of time. And also sometimes
16 motions may be filed when no trial date is set, so the
17 rule would be totally unworkable in that situation.

18 And Respondent, in one of his formulations
19 for what the test might be, suggests that a motion
20 wouldn't create excludable delay unless it would
21 postpone the hypothetical earliest date on which trial
22 could otherwise begin. That's just a totally unworkable
23 rule, because to divine that hypothetical date, courts
24 would have to assess the effect of multiple different
25 factors that could affect when trial would begin, such

1 as: How much time do the parties and the counsel need
2 for factual investigation and legal analysis? How long
3 is discovery going to take?

4 There would be numerous questions that would
5 arise about how to apply those factors. For example,
6 the courts would have to decide: Should they take
7 potential obstacles to an earlier trial as given, or
8 should they instead think about whether those obstacles
9 could be eliminated? The courts would also have to
10 figure out what to do if the earliest possible trial
11 date changed between when the motion was filed and when
12 the motion was resolved. And how would they take into
13 account other periods of time that might exclude
14 delay -- might exclude -- that might be excludable also?

15 For example, say a court gets two motions
16 filed at the same time. Trial could start in 5 days
17 absent the motion. One motion's going to take 3 days to
18 resolve; the other motion's going to take 4 days to
19 resolve. What's the court supposed to do? Is one -- is
20 the 3-day motion excluded? Is the 4-day motion
21 excluded? Are both of the motions excluded? Does it
22 depend on the order in which the court decides them? It
23 just is not possible for a court to make these
24 determinations.

25 JUSTICE KENNEDY: You said at the outset

1 that things have been working fine. Of course, the
2 whole point of the Act was to hold district judges to a
3 pretty strict standard, and the concern is that there
4 might be a very complex case the judge just really wants
5 to put off as long as possible and will continue to
6 accept motion after motion. Is there anything I can --
7 I can read or consult to show that this has been working
8 very well and that there's not a problem?

9 MR. ROBERTS: Well, I -- I can't point to
10 anything particular, but there's been no outcry that --
11 that there's been a problem from pretrial motions being
12 filed as a -- as an attempt to extend the Speedy Trial
13 Act deadline. The court's been -- the -- Congress has
14 reviewed the Speedy Trial Act's operation in the past.
15 It made changes in 1979 to address problems that have
16 occurred. It hasn't felt the need to address this
17 problem since, and there's no evidence of any abuse of
18 the automatic exclusion on the other side.

19 JUSTICE SOTOMAYOR: Counsel, on that issue,
20 do you accept the First Circuit's rule in U.S. v. Hood
21 that if the government is found to be attempting to
22 frustrate the operation of the Speedy Trial Act, that
23 those motions and their delays won't be counted?

24 MR. ROBERTS: Well, first, Your Honor, I
25 don't think that -- that Hood adopted any such rule.

1 The motion --

2 JUSTICE SOTOMAYOR: It suggests that
3 qualification?

4 MR. ROBERTS: It suggests that there might
5 be that qualification. I think that the statute
6 provides that the -- that any pretrial motion tolls the
7 deadline, regardless of the purpose for which it's
8 filed. But, of course, if -- in the unlikely event that
9 a prosecutor did file a motion solely to extend the
10 deadline and avoid proceeding to trial, that conduct
11 would be sanctionable under -- under the Act, under
12 section 3162(b)(4).

13 JUSTICE SOTOMAYOR: Sanctionable against the
14 government, or --

15 MR. ROBERTS: The attorney could be
16 sanctioned for that.

17 JUSTICE SOTOMAYOR: How does that help a
18 defendant whose speedy trial rights have been violated?

19 MR. ROBERTS: Well, the -- the court doesn't
20 need to put off trial just because time is excluded,
21 Your Honor, and the court has other mechanisms that it
22 can use --

23 JUSTICE SOTOMAYOR: You haven't answered my
24 question. The rights that this statute protects are the
25 rights to have your trial start within 70 days absent or

1 extended to these exclusions. If the government
2 frustrates that and makes the trial start later, why
3 shouldn't a defendant have the benefit of the Act and
4 have the indictment dismissed with or without prejudice?

5 MR. ROBERTS: Well, the statute provides the
6 circumstances in which time is excludable and in which
7 time is not, and it doesn't create an exception for
8 certain kinds of motions. It applies to any pretrial
9 motion. But I have to say, there's been no evidence
10 over the 30 years that anything like this is happening,
11 and in Hood itself, the motion was filed by defense
12 counsel, and the court was simply saying that this is
13 not -- that that's not what's going on here, there's no
14 suggestion that this motion is part of a process to try
15 to frustrate the Act. There's -- the problem just
16 hasn't arisen.

17 JUSTICE SOTOMAYOR: Counsel, I hope you
18 won't sit down without addressing the (h)(1)(F) issue
19 and explain why we shouldn't reach it, because the issue
20 is, as I see it, one of law, not like Nobles, one of
21 discretion. And although you say it's unimportant
22 because of a change in Rule 45, how could any criminal
23 conviction that's inappropriate be unimportant to the
24 defendant or insignificant enough for this Court to
25 address the question once the case is before us?

1 MR. ROBERTS: Well, the Court -- the Court
2 does decline to address questions if it doesn't consider
3 them of sufficient importance to -- general importance
4 to warrant a review. Nobles is one example. There are
5 others cited in Stern and Gressman. But the reason that
6 this issue is not of any ongoing importance is that the
7 rules have been amended. It now expressly applies to
8 statutes like this one that don't specify a method for
9 counting time.

10 And, you know, turning to the merits of the
11 issue, also -- one other point on the importance of it.
12 The circuits all have adopted the same approach as the
13 Court of Appeals here, and --

14 CHIEF JUSTICE ROBERTS: Two? How many
15 circuits are we talking about?

16 MR. ROBERTS: Two other circuits, but there
17 aren't any that have -- that have held to the contrary.

18 JUSTICE ALITO: If we were to decide this
19 based on subsection (F) involving the counting of 10
20 days, wouldn't that render our decision on anything that
21 we had to say about subsection (D) dictum?

22 MR. ROBERTS: I don't think it would render
23 it dictum, Your Honor. The Court can address issues
24 in -- in whatever order it chooses to, and it doesn't
25 mean that the -- the decisions that you make along the

1 way aren't precedential and binding if they're part of
2 the rationale to get there. But we would -- we don't
3 think --

4 JUSTICE SCALIA: It's not part of the
5 rationale. The rationale for our decision would be
6 (h)(1)(D) alone, and all the other discussion would be
7 perfectly gratuitous, because we're going to set this
8 individual free anyway. To say, well, this other thing
9 is not a good reason to set them free, but this one is,
10 I mean, that -- the former is just utterly irrelevant to
11 our decision.

12 MR. ROBERTS: Well, Your Honor, the
13 Respondent offered this argument as a ground not to
14 grant certiorari in its -- in his brief in opposition.
15 The Court nonetheless took the case. The circuits are
16 divided on this -- this issue --

17 JUSTICE SCALIA: I'm not disagreeing with
18 you. I'm trying to help you.

19 MR. ROBERTS: Well, I think you could -- I'm
20 not sure that I think that it would be impermissible for
21 -- for the Court to decide the issues in that order, but
22 if you think so and you think that that's a reason --

23 JUSTICE SCALIA: I'm sure it's not
24 impermissible, but I'm also sure that if we do it, what
25 we say about the ground for which we took the case would

1 be -- would be the purest dictum.

2 MR. ROBERTS: I can see how you might think
3 so.

4 CHIEF JUSTICE ROBERTS: Courts of appeal --

5 MR. ROBERTS: I think the courts of appeals
6 would follow it. But -- but I'm not arguing that you
7 should just --

8 JUSTICE SCALIA: It's their fault; they
9 shouldn't follow dictum, you know?

10 MR. ROBERTS: I'm not trying to argue you
11 should decide the issue. We don't think you should
12 decide the issue.

13 JUSTICE GINSBURG: Is it because,
14 Mr. Roberts, as you pointed out, it's not a continuing
15 problem since the amendment to Rule 45, it's calendar
16 days, and so there's no problem, and so what you're
17 suggesting is we would not have granted cert on that
18 question?

19 MR. ROBERTS: Exactly. You wouldn't have
20 granted cert on the question. It's of no continuing
21 importance. It's not going to affect cases going
22 forward, and there's no reason for the Court to reach
23 out and decide it. In any event, the court of appeals
24 correctly decided the question. The -- the statute
25 doesn't specify whether the 10 days are calendar days or

1 business days, and it's therefore reasonable to infer
2 that Congress expected that the -- that the courts would
3 interpret the provision in accordance with the counting
4 rules that are applicable in similar criminal contexts.

5 CHIEF JUSTICE ROBERTS: It -- it may be
6 pertinent on this question: Mr. Tinklenberg was
7 designated for transfer to MCC in Chicago on November
8 10th. How was that done? Was that done by -- is that a
9 court order or is that an administrative --

10 MR. ROBERTS: I believe what happened is the
11 court ordered -- the court ordered on the 2nd that there
12 should be a competency examination. On the 10th, the --
13 the BOP designated that the MCC would be where the
14 competency examination --

15 CHIEF JUSTICE ROBERTS: So the BOP did it,
16 not a court?

17 MR. ROBERTS: -- would take place.

18 Yes. And on then the 10th was, as it turns
19 out, was a Thursday before Veterans Day. Then there was
20 Veterans Day, and November 12th and 13th were the
21 weekend. So on the next Monday the Marshals Service
22 asked the Justice Transportation Service to transport
23 the defendant. But the way these things worked is that
24 when there are interdistrict transportation, they use
25 airlifts that go around the country; and the airlifts go

1 -- there are two flights a day.

2 CHIEF JUSTICE ROBERTS: Well, I don't
3 know --

4 MR. ROBERTS: They make three stops.

5 CHIEF JUSTICE ROBERTS: You seem to be
6 getting into this. I just wanted to know if it was a
7 court order on the 10th, and what you're telling me is
8 the last court order before he was moved was on the 2nd.

9 MR. ROBERTS: Yes.

10 JUSTICE BREYER: Is -- is it right that the
11 Rules Committee then changed it, and it basically said
12 the way the defendant here thinks it should be is that's
13 what it should be? Isn't that what happened?

14 MR. ROBERTS: Yes.

15 JUSTICE BREYER: Okay -- now --

16 MR. ROBERTS: The Rules --

17 JUSTICE BREYER: The Rules Committee said
18 count calendar days.

19 MR. ROBERTS: Changed the rule --

20 JUSTICE BREYER: They changed the rule.

21 MR. ROBERTS: -- for -- for Rule 45, yes.

22 JUSTICE BREYER: And now you think that the
23 Federal courts are right in saying, judge, when you have
24 a Speedy Trial Act case, look to Rule 45; you think
25 that's right to do?

1 MR. ROBERTS: Yes, we do. We think that
2 they --

3 JUSTICE BREYER: Okay. So why shouldn't
4 this defendant whose case was on appeal get the
5 advantage of that?

6 MR. ROBERTS: Because at the time, that
7 wasn't -- at the time that -- that the transportation
8 was done then --

9 JUSTICE BREYER: I know it was under a
10 different rule. But where -- normally with cases where
11 you have a new rule come in, it does apply to the
12 advantage of the people who were then on appeal. Is
13 there something special about this, that Federal rules
14 don't, or you just -- too bad, we thought it was a
15 really erroneous thing that they had, we used to have,
16 and we've corrected it, but just -- he's still on
17 appeal, it doesn't apply to him? Is there some law on
18 that?

19 MR. ROBERTS: I think -- I think that --
20 that at the time that was the method that -- that
21 dictated the transportation for him, and --

22 JUSTICE BREYER: I understand. I understand
23 they followed the rule at the time.

24 MR. ROBERTS: -- retroactively --

25 JUSTICE BREYER: They've changed the rule.

1 His case is still on appeal. Why shouldn't he get the
2 advantage of the new rule?

3 MR. ROBERTS: Because it's not -- it's not a
4 -- a rule of law that we're talking about. It's the
5 counting of the time, and it's impossible for a court to
6 anticipate --

7 JUSTICE SCALIA: No. You want to --

8 JUSTICE BREYER: It wasn't anybody's fault.
9 Why shouldn't we go back and say do it again, and now,
10 let's -- since his case is still on appeal, it's the
11 same question. What's the argument against doing that?
12 Why can't we?

13 I'm sure there's some rule out there that
14 says we can't do this, but I want to know what it is
15 because it seems fair.

16 JUSTICE SCALIA: May I suggest that perhaps
17 the reason not to do it is, assuming this person was
18 treated entirely fairly on the basis of the law that
19 existed at the time, the consequence of what Justice
20 Breyer proposes is to set free someone who has been duly
21 convicted of a crime.

22 MR. ROBERTS: That's right.

23 JUSTICE SCALIA: And to do that simply
24 because, although the -- the process was perfectly fair
25 when it was applied, there's been a change in the rule

1 and therefore we don't redo it, but we let this person
2 go; right?

3 MR. ROBERTS: I agree.

4 JUSTICE SCALIA: And can't be tried again.

5 JUSTICE BREYER: Any other reason?

6 MR. ROBERTS: I agree completely, Your
7 Honor. While, I think --

8 JUSTICE BREYER: I mean, I'm thinking that
9 we normally -- although all this is quite true, what
10 Justice Scalia says, normally we do apply new rules to
11 those who are on appeal at the time.

12 JUSTICE SCALIA: I don't -- I don't agree
13 with that. Do you agree with that?

14 CHIEF JUSTICE ROBERTS: Well, maybe --

15 MR. ROBERTS: I --

16 CHIEF JUSTICE ROBERTS: Do you agree with
17 that?

18 MR. ROBERTS: I don't think that you -- I
19 don't think that this is a new rule of law that you're
20 talking about. This is how the -- this is -- is the
21 counting method.

22 CHIEF JUSTICE ROBERTS: Who wants the
23 benefit of this new rule? Who wants the new rule? Does
24 the government want the new rule or does the defendant
25 want the new rule?

1 MR. ROBERTS: We -- we don't want the -- we
2 don't want the new rule. We're just telling you --

3 JUSTICE SOTOMAYOR: Counsel --

4 MR. ROBERTS: -- what we think the rule,
5 what the rule means.

6 JUSTICE SOTOMAYOR: -- there's a lot --

7 MR. ROBERTS: I don't -- I don't
8 understand --

9 JUSTICE SOTOMAYOR: Counsel, there's a lot
10 of discussion about the applicability or
11 nonapplicability of this rule to this case. The rule by
12 its terms applies to computing any period of time
13 specified in these rules, any local rule or any court
14 order. None of that includes the statute at issue here,
15 correct?

16 MR. ROBERTS: Yes, Your Honor. Our argument
17 is not that the rule by its terms applies.

18 JUSTICE SOTOMAYOR: So this whole debate
19 about whether the rule applies or not is irrelevant.
20 The only question is what does the statute intend,
21 correct?

22 MR. ROBERTS: Yes.

23 JUSTICE SOTOMAYOR: All right. So if what
24 the statute intends hasn't changed --

25 MR. ROBERTS: I agree with that.

1 JUSTICE SOTOMAYOR: -- between the old rule
2 or the revised rule, correct? Congress hasn't --

3 MR. ROBERTS: Yes, I like that.

4 JUSTICE SOTOMAYOR: -- made an amendment;
5 correct?

6 MR. ROBERTS: I like the way we're going.

7 (Laughter.)

8 JUSTICE GINSBURG: But I think you don't.

9 JUSTICE SOTOMAYOR: Will you like the way
10 we're going if I accept your proposition that when
11 Congress uses 10 days, it really means 10 business days?
12 I take words in a statute like that at their plain
13 meaning. It says 10 days, not 10 business days. So --

14 MR. ROBERTS: Well, Your Honor, I think that
15 there's no plain meaning. "Days" sometimes can mean
16 business days; they can sometimes mean calendar days,
17 and as I said before --

18 JUSTICE SOTOMAYOR: But Congress has used 10
19 -- has used business days in other provisions, hasn't
20 it?

21 MR. ROBERTS: I -- I don't know whether it's
22 used business days or not. Respondent does point out
23 that there are some statutes that contain specific
24 exclusions of weekends and holidays, but those statutes
25 were --

1 JUSTICE GINSBURG: Let's go back to -- I
2 don't think you should have been so happy with the way
3 the argument was going --

4 (Laughter.)

5 JUSTICE GINSBURG: -- because -- because
6 your view is, Rule 40 -- if it's always assumed that
7 there be conformity between Rule 45 -- Rule 45, it was
8 business days, and then rule 45 changed not only to say
9 calendar days, but included statutes for the first time.

10 So I think what you're saying is that the
11 interpretation of the statute tracks with Rule 45, Rule
12 45 formerly was calendar -- was business days, it is now
13 calendar days, there is conformity. And plus, "statute"
14 is in Rule 45, and that was at least laid on the table
15 of Congress, so they know that it was there.

16 MR. ROBERTS: Yes, Your Honor. I think that
17 -- that the statute always meant the same thing, and
18 that it meant that 10 days should be interpreted in
19 light of whatever the background rule is at the time for
20 counting the time. And so there's no -- there's no new
21 rule; at the time the 10 days meant exclude the weekends
22 and holidays, and now because the background rule has
23 changed, it means count the weekends, and --

24 JUSTICE SOTOMAYOR: So Congress changed its
25 mind between the two rules?

1 MR. ROBERTS: No, I don't think Congress
2 changed its mind. Congress wanted the -- the statute
3 to --

4 JUSTICE SOTOMAYOR: How do I know that?
5 Where? Rule 45 doesn't apply to statutes.

6 MR. ROBERTS: Well --

7 JUSTICE SOTOMAYOR: Where in the statute
8 does it -- say, apply the criminal rules?

9 MR. ROBERTS: Well, I think that -- that my
10 point is that when it doesn't specify whether it's
11 business or calendar days, that Congress anticipated the
12 courts would say, okay, let's look to the background
13 rule; and the place, the sensible place to look to the
14 background rule is the rule -- is a rule of criminal
15 procedure in analogous contexts.

16 In fact, courts frequently do that when
17 they're trying to interpret statutes to figure out what
18 the 10-day limit is/ as many of the -- many of the cases
19 cited in the ALR article that Respondent cites show.

20 JUSTICE ALITO: When you're trying -- when
21 you're trying to figure out -- when you're dealing with
22 procedural rules that involve filing things in court, it
23 was once thought to make sense to exclude weekends
24 because things couldn't be filed on the weekends, but
25 when you're talking about transporting a prisoner. What

1 sense does it make to exclude the weekend? Does this --

2 MR. ROBERTS: Well --

3 JUSTICE ALITO: Do these flights of
4 prisoners from one facility to another come to a stop
5 when -- you know, when the whistle blows on Saturday --
6 on Friday afternoon?

7 MR. ROBERTS: Yes, Your Honor, generally the
8 flights don't occur on the weekends or holidays. That
9 was sort of what I was trying to explain in my extended
10 digression to the Chief -- to the Chief Justice before.

11 The BOP doesn't admit and discharge
12 prisoners on the weekends. In addition, there are
13 various other factors that -- that go into the need to
14 have two -- two deputy marshals transporting people. So
15 the transportation doesn't generally occur on the
16 weekends. And it's because of the weekends and holidays
17 that the transportation of the defendant actually took
18 the amount of time that it -- that it did here.

19 But I would say, as I started, in urging you
20 not to address this issue, which is of no ongoing
21 importance, that the question that we did ask the Court
22 to address and that the Court granted review on is a
23 very important question that's divided the circuits; and
24 that allowing the rule that the court below adopted to
25 continue to stand could frustrate the application of the

1 Speedy Trial Act, not only with respect to the pretrial
2 motions exclusion but potentially with respect to all
3 the other automatic exclusions; and I think it's very
4 important that the Court correct this error and reaffirm
5 the established rule.

6 If I could reserve the remainder of my time
7 for rebuttal.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.
9 Mr. Fisher.

10 ORAL ARGUMENT OF JEFFREY L. FISHER

11 ON BEHALF OF RESPONDENT

12 MR. FISHER: Mr. Chief Justice, and may it
13 please the Court:

14 Before turning to the substance, I would
15 like to, if I may, start with the procedural question
16 that Justice Sotomayor raised and that -- and that my
17 opponent just completed with, because I want to be sure
18 there's no confusion on the posture of this case.

19 In particular, this Court's precedents
20 squarely reject the notion that there's any history in
21 this Court's precedents for refusing to reach an
22 argument in this posture. In particular, in *Langness v.*
23 *Green*, 282 U.S. 531, this Court held in 1931 that a
24 Respondent's, quote, "right" to defend a judgment below
25 on a ground that is properly preserved all along and

1 that the lower court reached and rejected is, quote,
2 "beyond successful challenge."

3 Now, I'm not sure -- I'm not aware of any
4 exception from that rule in the 80 years since.

5 JUSTICE ALITO: Suppose the petition here
6 had simply raised one question, and that is the question
7 of how you count time under -- under a version of Rule
8 45 of the Federal Rules Of Criminal Procedure that is
9 not -- no longer in effect and as to which there is no
10 conflict in the circuits. How would you grade the
11 chances of the Court taking cert on that?

12 MR. FISHER: Well, I'll take your
13 hypothetical, Justice Alito, but I do want to be able to
14 correct the notion that it's of no longer continuing
15 importance. But I'll assume that your hypothetical on
16 that kind of a question would be cert denied. But
17 that's never been an obstacle to reaching the question.

18 Let me give you two things that are very
19 important here. The first is the problem with the
20 Government's citation to Nobles is not just a
21 distinction between discretion and law. If you look at
22 the Solicitor General's own reply brief in that case, it
23 pointed out that the problem with the alternative
24 argument there was that it would give the defendant
25 different relief. So it was therefore subject to the

1 cross-petitions rule, and that's the section in Stern
2 and Gressman that's cited in their brief. Those are the
3 only two citations they have, the citations to Nobles
4 and the citations to Stern and Gressman, which are all
5 about cross-petitions when the defendant wants different
6 relief. We want exactly the same relief. We want a
7 dismissal on the Speedy Trial Act.

8 So finally, even if it were somehow
9 discretionary and this Court were to consider in this
10 case breaking from its unbroken precedent of 80 years --
11 let me give you one more example before I turn to the
12 discretionary.

13 In the Walling case in 1947, this Court
14 reached as an alternative ground the defendant's
15 argument that there was insufficient evidence. Now,
16 that's sort of the quintessential un-cert-worthy
17 question, but this Court felt required to reach it
18 because the lower court had reached it and rejected it
19 and the defendant had preserved it all along in that
20 case.

21 And in the Union Pacific case in 2009 -- I
22 can keep giving you citations. But let me just say,
23 even if it were discretionary, you would still want to
24 reach it in this case, because at pages 18 and 19 of the
25 Solicitor General's brief there are citations to a

1 circuit split on this issue. And the new Rule 45 hasn't
2 made that go away for two reasons.

3 The first is because the Solicitor General's
4 own argument now doesn't depend on Rule 45. Instead,
5 it's that the Speedy Trial Act on its own terms counts
6 10 business days, not simply calendar days. And,
7 second, there continue to be decisions after the
8 amendment of Rule 45 in which lower courts have said
9 that this provision means only 10 business days.

10 Let me give you one more citation, and
11 forgive me for this because we didn't get to file a
12 reply brief in this case on this issue. But the Zabawa
13 case, 2010 Westlaw, 307-5044, is a case in the Eastern
14 District of Michigan last summer where the Government's
15 own filing, which we looked at on PACER, asked the court
16 to apply Tinklenberg and hold that subsection (F) meant
17 only ten business days.

18 JUSTICE ALITO: If I could just come back to
19 where you started before you go on to these additional
20 points. Your argument is that if the Government
21 petitions for cert on one issue that's a legal issue on
22 which there's a conflict in the circuits and the
23 Respondent in a criminal case says that the -- asks to
24 have the decision below affirmed on 15 other grounds, we
25 -- and raises those in the bio, we take the case anyway,

1 we are duty-bound to decide every one of those 15
2 grounds?

3 MR. FISHER: You're not duty-bound to decide
4 it, Justice Alito. But I do think under this Court's
5 precedent, at least, you have never reversed the
6 decision below without reaching them. So you may well
7 affirm on the question presented or some one or two of
8 those questions. You may also dismiss the case as
9 improvidently granted, which happens sometimes in these
10 circumstances. Of course, what ordinarily what would
11 happen is when the cert -- when the ops was filed this
12 Court would realize there was a serious obstacle to
13 reaching the question and might well deny cert in the
14 first place. But as I said, there's no decision on this
15 Court's books and certainly the Solicitor General hasn't
16 appointed one where you've reversed and reinstated a
17 conviction or, in fact, reversed and done anything to a
18 Respondent in these circumstances.

19 Now, let me turn to the merits of the ten
20 day argument and make a few points before I'm sure the
21 Court might want to talk about the pretrial motions
22 issue as well. There's a few important points to make.
23 Now, remember, the Solicitor General has now basically
24 abandoned the Sixth Circuit's view that Rule 45
25 automatically gets incorporated into the Speedy Trial

1 Act and now they're making the making the argument that
2 what Congress intended in the Speedy Trial Act was
3 somehow for Rule 45 to operate as some background
4 principle. So that the meaning of the Act, I guess,
5 would wax and wane according to what Rule 45 said. Now,
6 there's two versions of this argument. I can't tell
7 which it's making. First it could be saying that what
8 Congress meant when it passed subsection F in 1979 was
9 that whatever the rule is in Rule 45 right now, that's
10 what we expect to be applied. Well, that can't possibly
11 be the Solicitor General's argument because in 1979 Rule
12 45, consistent with the traditional rule, excluded
13 weekends and holidays only for periods of less than
14 seven days. That wasn't changed until 1985. So the
15 Congress at the time, even if they had cared about Rule
16 45, wouldn't have, wouldn't have thought you counted,
17 excluded weekends and holidays here.

18 JUSTICE GINSBURG: Why wouldn't Congress
19 think, we have a bunch of statutes that have times and
20 we have a bunch that don't and the ones that don't, they
21 should be interpreted into the Federal rule, that Rule
22 45?

23 MR. FISHER: I think the much more natural
24 reading, Justice Ginsburg, in light of the traditional
25 rule, which is not just cited in Am. Jur., please

1 understand, this is a cannon of common law, traditional
2 construction of time periods that goes back to
3 Sutherland's treatise in 1904. There's a Second Circuit
4 case called Morasca in 1921, 277 F.2727, I could cite
5 you 20 or 30 state cases all up and down the last
6 century. So the common law rule has always been for
7 periods of less than seven days -- I'm sorry, for
8 periods of more than seven days, it's up to the
9 legislature to expressly tell the court to exclude
10 weekends and holidays. And if you look at the U.S.
11 Code, it's perfectly consistent with that common law
12 understanding because when Congress wanted, such as in
13 the Bail Reform Act, to exclude weekends and holidays
14 from a ten day period, it expressly says so. Now, we
15 cited three or four examples in our brief. Again, this
16 is at page 40, 41 of our brief. I could have cited 15
17 or 20. So the U.S. Code is quite clear and I think the
18 much more natural inference its that when Congress
19 wanted to exclude weekends and holidays consistent with
20 the traditional rule, it felt duty bound to say so in
21 the U.S. Code, and when it hasn't, it wants simply
22 calendar days -- now, if you want confirmation.

23 JUSTICE GINSBURG: Under the 2009 amendment,
24 Rule 45 includes statutes it didn't before and now it
25 does?

1 MR. FISHER: It does now, but two things are
2 telling about the 2009 amendments. The first is that
3 when it switched to statutes, it reverted to counting
4 calendar days.

5 JUSTICE SCALIA: You're not relying on the
6 2009 --

7 MR. FISHER: No.

8 JUSTICE SCALIA: You don't say -- you say
9 this was wrong when it was decided?

10 MR. FISHER: Yes.

11 JUSTICE SCALIA: Regardless of the 2009?

12 MR. FISHER: That's right, that's right.
13 But if you want to talk about Congressional intent, I
14 don't think we have to even go there. But, remember,
15 after the -- in 2009 there's also a Federal law, the
16 Technical Amendments Statutory Act made a hash of that.
17 But Congress went through, most recently about a year
18 and a half ago, and amended various provisions of the
19 U.S. Code according to whether it wanted weekends or
20 holidays excluded or times enlarged, and it left this
21 alone. So I think every indicia of evidence you can
22 look at from every possible angle shows that ten days
23 meant ten days at the time of the trial, and that's not
24 to affirm the judgment.

25 The last point I'll make concerning --

1 JUSTICE ALITO: Congress thought about the
2 Speedy Trial Act when it made those technical
3 amendments, isn't it likely to have thought the courts
4 had interpreted it as excluding the weekends up to that
5 point?

6 MR. FISHER: No, my point, Justice Alito, is
7 Congress didn't think of the Speedy Trial Act, it didn't
8 do anything with the Speedy Trial Act.

9 JUSTICE ALITO: Didn't think about -- okay.

10 MR. FISHER: Well, maybe we leave that where
11 it was, but let me make one final point that I think is
12 the clincher here. Remember, we have not just this
13 alternative argument, we have a second alternative
14 argument, which is that the time in relation to Mr.
15 Tinklenberg's competency hearing exceeded the 30 day
16 provision in section 4247 in the Insanity Defense Reform
17 Act. Now, I don't think you have to get to that
18 argument, you can simply affirm on the ten day issue,
19 but, again, let's think about what the Solicitor General
20 is arguing with respect to the ten day issue. They're
21 saying that Congress sub silentio, without saying
22 anything at all in the Speedy Trial Act, somehow assumed
23 that the time in subsection F would wax and wane
24 according to this rule. Well, if that's -- even though
25 the rule didn't even apply to statutes at the time.

1 Well, if that's the case, then I don't think there's any
2 basis for arguing that Congress would have had exactly
3 the same assumption with respect to another Federal
4 statute, that is the Insanity Defense Reform Act.

5 CHIEF JUSTICE ROBERTS: And if we don't
6 agree with you on your Rule 45 argument, you say we
7 would have to reach this third argument, right?

8 MR. FISHER: Yes. So I think the only
9 way -- somehow, you've accepted the Solicitor General's
10 argument, which I don't think you can, but if you did
11 accept it on merits, it runs headlong into our third
12 argument, which the Solicitor General takes exactly the
13 opposite position, which is, the Speedy Trial Act is its
14 own self-contained universe that doesn't incorporate any
15 other statutes or any other provisions of law.

16 JUSTICE ALITO: Well, why aren't they
17 trying -- why isn't the effect of what you're doing to
18 prompt us to dismiss this case that the petitioner has
19 improvidently granted? If we were to write an opinion
20 that says that the -- the Sixth Circuit was wrong in its
21 interpretation of subsection (f), and therefore, we're
22 not going to get to -- and anything we then had to say
23 about subsection (d) is just dictum, and that's the
24 issue that we took the case to decide, why should we
25 keep the case at all?

1 JUSTICE GINSBURG: I think you would be very
2 happy if we didn't.

3 MR. FISHER: I think you could do that,
4 Justice Ginsburg. I think you could decide based on my
5 discussion of the Zabawa case. There's another case
6 that postdates the rule 45 amendments, called Clifton,
7 out of the Southern District of Mississippi. So you
8 might decide that there's enough of an ongoing question
9 here to write an opinion. You could do either one.

10 JUSTICE GINSBURG: But then you would have
11 to -- we would have to wait for another case to decide
12 this issue, one which is a split, that is, the delay
13 resulting from. What does that mean?

14 JUSTICE KENNEDY: And I can't stand the
15 suspense. I -- I would like to hear about the delay
16 point.

17 MR. FISHER: Right. And I think, Justice
18 Ginsburg, as to your -- your question, I'll just leave
19 it to this Court's best discretion how it wants to
20 handle that issue.

21 Now, Justice Kennedy, let me turn to the
22 merits.

23 We think this is a straightforward case
24 where the text dictates the outcome of the case.
25 Remember, the key words in the statute are "delay

1 resulting from," and I think the -- I think the ordinary
2 meaning, in fact, the only meaning, of "delay" is a
3 hindrance to progress or a postponement. So it's --

4 CHIEF JUSTICE ROBERTS: I'm sorry to
5 interrupt you so early, but what about Justice
6 Ginsburg's point, which I understood to be there's
7 always delay resulting from these pretrial motions; it's
8 just that the district judge takes that into account,
9 says, well, I'm going to have a lot of the usual
10 pretrial motions, so I'm going to set the trial date at
11 this point.

12 So that is delay, when the trial date might
13 otherwise have been set, resulting from these pretrial
14 motions, and then the -- the statute goes on to tell you
15 how you count that delay.

16 MR. FISHER: That's exactly our argument,
17 Mr. Chief Justice. Our argument is there's two ways you
18 can have delay: One is by the trial date simply being
19 moved to accommodate the motion. The other -- and this
20 is where we agree with what the Solicitor General said
21 here today, as well as at page 38-39 of his opening
22 brief -- delay can also, in the ordinary English
23 language, mean that the trial date was originally set to
24 accommodate the motions in the way you just described.
25 But what the Solicitor General is arguing for is

1 something much more dramatic than that. They are
2 arguing for an exclusion of the time, even if trial date
3 was set irregardless of the motions --

4 JUSTICE GINSBURG: How would you ever know
5 that? How would we ever know that, Mr. Fisher? A trial
6 judge that has had a lot of criminal cases knows that
7 there's going to be some motions as you get closer to
8 trial, but how would we know whether the judge -- this
9 particular judge took into account the likelihood of
10 motions in setting the trial date or didn't?

11 MR. FISHER: Well, ordinarily, Justice
12 Ginsburg -- remember, this is only a small subset of
13 cases. But in those cases, ordinarily, I would think
14 the trial judge would say on the record when the date is
15 set. Now, if it's -- if there's motion practice before
16 there's any date that's ever set, the NACDL brief, I
17 think, explains how that works in the district in the
18 Sixth Circuit right now. Parties often stipulate or are
19 asked to stipulate by the court. Common sense goes a
20 long way in this scenario, Justice Ginsburg. It's
21 obvious.

22 JUSTICE GINSBURG: Why -- why would the
23 defendant stipulate?

24 MR. FISHER: Pardon me?

25 JUSTICE GINSBURG: Why would -- why would a

1 defendant who would benefit from the clock running
2 stipulate?

3 MR. FISHER: Defendants don't always benefit
4 from the clock running, Justice Ginsburg. I think
5 there's two reasons why they might stipulate. One is
6 because it might simply be obvious that the motion is of
7 sufficient weight and difficulty that it's going to
8 consume the court's resources, so why argue something
9 that wouldn't have a basis to begin with?

10 But I think the NACDL brief is forthright in
11 saying, at least at the beginning of criminal cases,
12 often defendants find themselves wanting more time, and
13 so, again, they don't have the incentive to argue
14 against that.

15 JUSTICE ALITO: How do you reconcile your
16 argument with the situation in which the motion is
17 pending for 30 days, so that's the period from the
18 filing until the prompt disposition, and as a result of
19 that motion, the trial judge says this has caused --
20 this is going to force me, this is going to result in 10
21 days' delay in the date on which the case can begin, so
22 the trial date is pushed back 10 days? Now, in that
23 situation, how much time is excluded?

24 MR. FISHER: I think the -- the text of the
25 statute allows you to say either 30 or 10. I think in

1 light of this Court's Henderson decision -- and perhaps
2 I think Congress had administrability concerns in mind
3 with that last clause -- I think 30 days could be
4 excluded. But if you disagree with me on that and you
5 want to have a rigid textual reading of the statute
6 resulting from only meaning 10 days, I think that's your
7 only other option.

8 Because, if I could ask the Court, or at
9 least direct the Court to page 6 of the Solicitor
10 General's reply brief, this is where they give --
11 because I think what the government wants to do is pose
12 these difficult hypotheticals, and the sort of difficult
13 question you just raised, Justice Alito, and have this
14 Court respond by saying, oh, we're just going to throw
15 the words "delay resulting from" out of the statute.
16 Because there's only two definitions, two ways to deal
17 with what the Solicitor General offers.

18 First, they say that delay means time, and I
19 think ordinary -- in ordinary English language, "delay"
20 means something more than time. It means postponement.
21 So then the fallback argument -- this is the second
22 paragraph on page 6 -- is that the occurrence that is
23 postponed is the STA's deadline for commencing trial,
24 and our suggestion is that that begs the whole question.
25 That can't possibly be right, because the whole reason

1 that you're looking to subsection (d) to apply it is to
2 ask whether you should exclude the time.

3 JUSTICE SOTOMAYOR: Excuse me, but isn't
4 that what the statute says? Meaning, if you look at
5 (h), the beginning paragraph at (h), it says, "The
6 following periods of delay shall be excluded in
7 computing the time within which the trial of any such
8 offense must commence."

9 It's not talking about the delay of the
10 trial. It's talking about the computation of the start
11 date for the trial. So if that's what that commands you
12 to do, doesn't -- isn't only the Solicitor General's
13 position consistent with that? It's telling you to take
14 the periods of delay and compute the date the trial must
15 start by excluding those. That's the language.

16 MR. FISHER: I think for two reasons, I
17 would disagree, respectfully, Justice Sotomayor. First
18 is, I take that language to say that we're going to now
19 tell you all the circumstances under which you exclude
20 time, and so if any of these subsections are satisfied,
21 you exclude the time. But the --

22 JUSTICE SOTOMAYOR: That's the --

23 MR. FISHER: -- Solicitor General's argument
24 is that you start from the premise. "Delay resulting
25 from" means you've already excluded the time. That's

1 the premise.

2 JUSTICE SOTOMAYOR: Well, but that's what
3 (h) says; (h) says you compute the start date of the
4 trial, when it must start, by excluding all of these
5 periods of delay. It's defining it for you.

6 MR. FISHER: Well, if -- if there was delay.
7 Maybe another example, Justice Sotomayor. In
8 subsection 7, which is at (4)(a) of the government's
9 appendix, I think is another way of showing that it
10 can't possibly -- even if it weren't begging the
11 question, it can't possibly be right. It has to be
12 talking about the trial itself, because this is the
13 continuance -- the end of the justice continuance
14 section. And it says, "Any period of delay resulting
15 from a continuance granted by a judge on his own
16 motion," and blah, blah, blah, "if certain criteria are
17 met."

18 Now, it's very clear that in that section,
19 "period" -- "period of delay resulting from" can't mean
20 that we've already said that the clock is stopped,
21 because there's an "if" clause that gives you certain
22 things that have to be satisfied in order to exclude it.
23 So I think starting with the very title of the Act we're
24 talking about, the Speedy Trial Act, and the -- the idea
25 of the words "delay resulting from" can only sensibly

1 mean delay resulting from trial.

2 And so I think the definition that we've
3 given you again, which is, delay results from a trial if
4 the trial itself is postponed, or if the trial is set in
5 a way that accommodates the motion, is the only way to
6 give meaning to the operative words in the statute.

7 JUSTICE SOTOMAYOR: So it doesn't matter how
8 substantial and important a motion is, whether it was
9 your motion to dismiss for Speedy Trial Act reasons or
10 the administrative motions here that you say really
11 didn't require time? It doesn't matter; all that
12 matters is keeping track from day one, the commencement
13 of the trial, as to when the Court is about to set the
14 trial date, that it does it at the end of all the
15 motions. That's the only time the court can do it.

16 MR. FISHER: The distinction between
17 administrative and nonadministrative motions, I think,
18 doesn't matter in this case because trial wasn't --

19 JUSTICE SOTOMAYOR: Why wouldn't it matter?

20 MR. FISHER: Well, it would matter, I think,
21 Justice Sotomayor, in a circumstance where the trial
22 date hadn't been set yet and then was set, and an
23 argument might arise -- well, I think we've had this
24 dialogue already to some degree. I didn't -- I expected
25 these kinds of motions to be filed. I knew there was

1 going to be a suppression hearing. We had the whole --
2 therefore, I set the trial out. That would seem to be
3 saying this was a nonadministrative matter that I had to
4 accommodate. I don't think a trial judge -- put another
5 way, I don't think a trial judge could say I'm setting
6 trial date outside the 70-day deadline because I had to
7 sign my name to that pro haec vice motion.

8 JUSTICE SOTOMAYOR: Well, actually it
9 happens all the time. In the "rocket docket" in
10 Virginia, the court sets a trial date, and you file
11 whatever motions you're going to file. Under your
12 theory, until that last motion actually delays the trial
13 date, none of those motions exclude time.

14 MR. FISHER: That may well be correct, but I
15 don't know why it would matter, because it doesn't
16 matter until you get outside of the 70 days to begin
17 with. So --

18 JUSTICE BREYER: It matters because the
19 trial judges have to know what to do, and while your
20 reading might fit the language in ordinary English
21 better, I think it does.

22 It's also possible to read those words
23 "delay resulting from" as simply referring to a period
24 of time; and the statute is saying these periods of time
25 are excluded from accounting. Now, the virtue of that

1 is just what Justice Ginsburg started with; all the
2 trial judges know how to do it; the lawyers don't get
3 mixed up; and the problem with what you're arguing for,
4 in my mind -- if you want to say anything more about it,
5 do -- is that it seems very unworkable to strike trying
6 to figure out what causes what.

7 MR. FISHER: Let me say a couple things,
8 Justice Breyer. First, with all due respect, I have to
9 disagree with your premise that it's possible to read
10 the statute the way the Solicitor General wants to read
11 it. Now I'll accept for purposes of responding to your
12 question, let's imagine that it were possible to read it
13 that way. I think our rule is not as difficult to
14 administer as you think it might be in the -- NACDL
15 brief LDY. And indeed the Solicitor General -- this has
16 been the -- this has been the law in -- in the Sixth
17 Circuit for 17 months. They haven't pointed to a single
18 dismissal as a result of it.

19 Now let me take the other side, and this
20 brings us to the dialogue during Mr. Roberts' argument;
21 the Solicitor General's rule isn't so easy, either,
22 unless you simply cease caring at all about the Act.
23 You could have a perfectly administrable rule that says
24 every singly motion, no matter what the circumstances,
25 tolls the clock.

1 But that's not the law in the First Circuit,
2 for example. They're made clear as Justice Sotomayor
3 said that if a motion is filed to frustrate the speedy
4 trial clock, then we're not going to exclude it; and
5 that makes perfect sense. I mean, look at this case.
6 And I'm not going to suggest there was any ill will or
7 bad faith in this case; but the facts of the case
8 illustrate the problem.

9 On August 1st, trial date was set for August
10 14th. There were 14 days before the trial was going to
11 happen. Yet there were only -- even under the best
12 reading there were only 10 days left on the clock. So
13 if no motions had been filed, unquestionably we would
14 have a Speedy Trial Act violation. So the government's
15 whole case hinges on the fact that because it filed this
16 purely administrative motion to bring a gun into the
17 courtroom, a motion I might add that at the pretrial
18 conference the judge had already told the government was
19 going to be granted, and so I don't know why it couldn't
20 have been made at the moment the evidence was
21 introduced; and one other administration motion, then
22 the Speedy Trial Act isn't violated.

23 And to borrow the Solicitor General's own
24 phrase from page 38 of his brief, that outcome bears no
25 relation to the Act's purpose. So what you have to do

1 to have, I think, the government's argument be at all
2 faithful, even if it were possible under the language --
3 have it be at all faithful with the purpose of the Act,
4 is to have some kind of exception for motions that
5 frustrate, motions that are pretextual, motions that are
6 purely administrative, however it would be defined.

7 JUSTICE GINSBURG: Why do you think that --

8 MR. FISHER: And you walk in --

9 JUSTICE GINSBURG: -- your motion -- I mean,
10 the government had administrative motions, but you had a
11 Speedy Trial Act motion; and you say that doesn't count,
12 either?

13 MR. FISHER: I -- well, two things, Justice
14 Ginsburg. First of all, we're not relying in this Court
15 on the Speedy Trial Act motion to get us to the Speedy
16 Trial Act violation. The two motions the government
17 filed get you to the 70 days, and so we haven't made an
18 argument with respect to the Speedy Trial Act. But if
19 we had to, the argument would be -- with regard to that
20 motion, would be that it didn't delay trial. Trial had
21 already been set, the Court said this is when we're
22 going to trial; trial wasn't moved, and we all went to
23 trial. And so --

24 JUSTICE SOTOMAYOR: Counsel, I don't believe
25 I had a trial in my district court days where between

1 the time I had the pretrial conference and the time
2 trial started, there wasn't a slew of motions, because
3 that's about the time counsel tends to wake up.

4 MR. FISHER: Yes.

5 (Laughter.)

6 JUSTICE SOTOMAYOR: Okay? And -- and decide
7 that really now they've got to get ready.

8 MR. FISHER: Yes.

9 JUSTICE SOTOMAYOR: Why should we care
10 whether it's an administrative motion or simply to
11 clarify the functioning of the trial? Why should we not
12 exclude those times, because those -- those motions,
13 whether they're administrative or not, will cause the
14 trial to go faster, because issues that would otherwise
15 consume the time of the court during trial are being
16 resolved before trial.

17 MR. FISHER: I think that might be an
18 argument for writing the Speedy Trial Act a different
19 way, Justice Sotomayor; but if the question is whether
20 the motion delayed trial -- and that's the question that
21 the Speedy Trial Act requires the judge to ask and
22 answer -- then the administrative piece of paper going
23 across the judge's desk when the judge knows ahead of
24 time it isn't going to cause any difficulty, simply
25 doesn't delay trial.

1 At page, I believe it's 5 or 6 of the NACDL
2 brief, they talk about pretrial conferences. And they
3 say what happens in the Sixth Circuit right now is the
4 judge holds the conference; as you say, counsel wakes
5 up; and everybody -- and the judge says tell me the
6 motions you're going to file. And the counsel from both
7 sides tell the judge what motions are going to be filed,
8 and they discuss right then and there whether they're
9 going to delay -- whether they're going to cause some
10 delay for trial. And so --

11 JUSTICE SCALIA: Mr. Fisher -- delay, you
12 make an argument about the meaning of delay. I am
13 troubled by the meaning of the "from the filing of the
14 motion" of that clause. You read that, I think, to mean
15 delay resulting from any pretrial moment and not to
16 exceed -- right -- the period of the filing of the
17 filing of the motion to the conclusion of the hearing.
18 Right? Isn't that right?

19 MR. FISHER: I think that's right, and I
20 think that's --

21 JUSTICE SCALIA: Well, where do you -- where
22 to you get that "not to exceed"? It doesn't say not to
23 exceed; it says delay resulting from the filing of the
24 motion.

25 MR. FISHER: I think the difficulty is with

1 the word "from," Justice Scalia. I think it's a tough
2 word to know exactly what transition is taking place
3 there, but in this Court's Bloate decision, last term, I
4 think -- what I'm -- the argument I'm making is
5 perfectly consistent with that decision, where it said
6 the "from clause" is sort of the boundaries on when
7 subsection D applies. If you're talking about delay
8 that a motion caused either after the hearing or before
9 the filing, we don't want to hear from you. But the
10 from clause tells you if the delay falls within those
11 two goalposts, then it's excludable.

12 JUSTICE SCALIA: It's a funny way to say it.
13 It's a funny way to say it.

14 MR. FISHER: I don't think it's a perfect
15 way to say it, either, Justice Scalia. And I said -- in
16 my dialogue with Justice Alito, I think that you could
17 also say, especially with a little bit of pushing on
18 Henderson, that "resulting from" actually gives you a
19 specific time period in between those that you have to
20 exclude. But I think that that's the best reading of
21 the Act, and again, it's the only one that gives -- that
22 gives meaning to the phrase delay resulting from.

23 If I might just say one or two words to
24 circle back to where I began, Mr. Tinklenberg urges you
25 to affirm the Sixth Circuit decision or to dismiss this

1 case as improvidently granted; but what he urges you not
2 to do and thinks there's no basis in precedent for
3 doing, which is to reverse the lower court without
4 reading the alternative arguments; and with all due
5 respect, the 10-day argument that we preserved in our
6 bio and we fully made in our bottom side brief in this
7 case, I think is extraordinarily strong, and it's
8 difficult to get around in this case for all the reasons
9 I've explained.

10 So with that, I'll -- I'll answer any other
11 questions this Court has about that argument, because I
12 think it's very important. Otherwise, I'm happy to
13 submit the case.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.

15 Mr. Roberts, you have 3 minutes remaining.

16 REBUTTAL ARGUMENT OF MATTHEW D. ROBERTS

17 ON BEHALF OF PETITIONER

18 MR. ROBERTS: Thank you, Your Honor.

19 First I would like to stress that the
20 government thinks that it's very important that the
21 Court address the question that we raised in our cert
22 petition, and that the Court granted certiorari to
23 answer, on which there's a split in the circuits and
24 which we believe that if it's left standing will result
25 in serious disruption to the Speedy Trial Act.

1 Turning to -- to that question, a few points
2 first. Respondent's definition of delay is plainly
3 inconsistent with Henderson which already holds that the
4 period of delay that's excludable is the time between
5 the filing of the motion and the disposition of the
6 motion. That can't be squared with the notion that
7 delay is the period during which trial is postponed.

8 Second, Respondent's definition of delay
9 gives delay a different meaning in the first part of the
10 statute and in subsection D, where this Court's already
11 held that it has the meaning that we suggest.

12 Third, Respondent's test is totally
13 unworkable, because you can't tell at the time a motion
14 is filed how much time it's going to take to resolve and
15 whether trial is going to be postponed. District Court
16 judges have over 500 pending cases on their docket, an
17 average District Court judge. A hundred of them are
18 criminal. The court -- the Speedy Trial Act cannot
19 function if the judges are going to have to make a
20 complex judicial determination in each case to determine
21 whether each motion is excludable.

22 Respondent says that NACDL says defendants
23 won't object or that they'll stipulate to the exclusion
24 of time, but NACDL also says that defendants may change
25 their mind if the case goes to trial, and if they change

1 their mind and file a motion to dismiss under the Speedy
2 Trial Act, their prior failures to object and
3 stipulations may very well not be binding because this
4 Court held in Zedner that defendants can prospectively
5 waive the application of the Act. And Respondent's
6 tests would also throw the established way that the
7 Speedy Trial Act has been operating for over 30 years
8 into disarray.

9 Turning to whether this Court has to address
10 the alternative arguments for affirmance, Nobles plainly
11 says that the Court has discretion not to address those
12 issues if those issues are not independently worthy of
13 certiorari. It doesn't base that on the fact that
14 the -- on the fact that the argument would expand the
15 judgment below, and the rule that it's discretionary
16 makes sense, because the contrary rule would require the
17 court to address numerous issues that are not important
18 and -- in every case where they're raised, and would
19 also lead the court to either dismiss writs as
20 improvidently granted or to address only as dicta
21 important issues on which the Court has granted
22 certiorari.

23 Finally --

24 JUSTICE ALITO: So given the choice between
25 a dismissal and an affirmance with good dictum about

1 subsection (d), you would prefer the latter?

2 MR. ROBERTS: Yes, I think that we would
3 like the Court to address the issue on which cert was
4 granted. We think it's a very important issue. We
5 think that the courts of appeals would follow it even if
6 it might technically be viewed as dicta. We would think
7 that it would be an alternative holding or ratio
8 decidendi.

9 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
10 The case is submitted.

11 (Whereupon, at 12:19 p.m., the case in the
12 above-entitled matter was submitted.)

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