No. 10-327

In the Supreme Court of the United States

MARK CAPENER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was entitled to an award of an attorney's fee and litigation expenses under the Hyde Amendment, Pub. L. No. 105-119, Tit. VII, § 617, 111 Stat. 2519 (1997) (18 U.S.C. 3006A note), following his acquittal on charges of committing health care fraud, committing mail fraud, and making false statements.

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OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 28a-55a) is reported at 608 F.3d 392. The order of the district court (Pet. App. 56a-66a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 8, 2010. A petition for rehearing was denied on June 9, 2010 (Pet. App. 29a). On the same day, the court entered an amended opinion. The petition for a writ of certiorari was filed on September 7, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Nevada, petitioner was acquitted of 17 counts of committing health care fraud, in vio-

lation of 18 U.S.C. 1347(1); seven counts of committing mail fraud, in violation of 18 U.S.C. 1341; and one count of making false statements, in violation of 18 U.S.C. 1001. He moved for an award of an attorney's fee and litigation expenses under the Hyde Amendment, Pub. L. No. 105-119, Tit. VII, § 617, 111 Stat. 2519 (1997) (18 U.S.C. 3006A note). The district court granted petitioner's motion in part, awarding fees and expenses related to petitioner's defense against certain counts associated with one of the theories advanced by the government, on the ground that the government's theory was frivolous. The court of appeals reversed. Pet. App. 28a-55a.

1. Petitioner was an otorhinolaryngologist practicing in Nevada. In July 2005, after the government received a tip from an insurance company and conducted an almost-four-year investigation that included consultation with two physician experts, a grand jury in the District of Nevada returned a superseding indictment charging petitioner with 38 counts of committing health care fraud, in violation of 18 U.S.C. 1347(1); 13 counts of committing mail fraud, in violation of 18 U.S.C. 1341; and one count of making false statements, in violation of 18 U.S.C. 1001. The indictment alleged that petitioner had billed for sinus surgeries that were either "unnecessary, never performed," or exaggerated for billing purposes ("upcoded"). Pet. App. 30a-32a; Gov't C.A. Br. 5-8.

One of the experts consulted by the government during its investigation was Dr. Dale Rice, chairman of the Department of Otolaryngology at the University of Southern California. Dr. Rice reviewed petitioner's patient files, pathology reports, and CT scans and concluded that many of the surgeries that petitioner billed

for either were unnecessary or were not performed. Dr. Rice indicated to the government that his conclusions were supported by several factors, one of which was the fact that no bone fragments had been noted in reports of pathology samples taken from some of petitioner's patients. Dr. Rice theorized that, because some of the surgeries that petitioner claimed to have performed would require breaking bones, bone fragments should have been present in the pathology samples. In the case of samples for which the report did not indicate the presence of bone fragments, Dr. Rice reasoned that the associated surgery must not have been performed. Dr. Rice never indicated to the prosecutors that he needed further information or clarification regarding the presence or absence of bone fragments in those pathology samples. Pet. App. 32a-33a; Gov't C.A. Br. 5-6.

Dr. Rice testified for the government at trial. In opining that petitioner had not performed surgeries for which he had billed, Dr. Rice again relied on several theories, only one of which was the absence of bone fragments in the pathology reports, and he mentioned the absence of bone fragments only as to some patients. The government also presented the testimony of six other doctors to substantiate the charges against petitioner, and called several of petitioner's employees, who testified that petitioner had engaged in fraudulent billing practices. Pet. App. 35a-36a; Gov't C.A. Br. 8-14.

After Dr. Rice testified, it was discovered that most of the pathology samples in question did in fact contain bone fragments; the pathologist had failed to note that fact in some of his pathology reports, despite noting the presence of bone fragments in other reports. Although the government had interviewed the pathologist during its investigation, it had not discovered that the pathol-

ogy samples did in fact contain bone fragments. Pet. App. 33a-34a, 36a-37a; Gov't C.A. Br. 15-16.

Following the close of the evidence, petitioner moved to dismiss all charges against him. The district court dismissed some counts (though not those related to the bone-fragment issue), and sent others to the jury. The jury acquitted petitioner on those counts. Pet. App. 37a-38a; Gov't C.A. Br. 17-18.

2. Petitioner moved for an attorney's fee and litigation expenses under the Hyde Amendment, seeking almost $1.4 million.[1] Pet. App. 38a. At a hearing, the district court stated that the government had "every reason to have suspicion and, of course, ultimately to obtain a finding of probable cause that criminal conduct had been engaged in" and that it could not "fault the government for bringing this case." *Id.* at 39a. The court added, however, that it was "considering awarding maybe a quarter of the attorneys fees." *Ibid.*

In a subsequent written order, the district court granted in part and denied in part petitioner's motion, awarding approximately $280,000 in attorney's fees and litigation expenses. Pet. App. 56a-66a. The court stated that the government's position was not in bad faith because the government had not "consciously acted with ill

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[1] The Hyde Amendment provides in relevant part:

> [T]he court, in any criminal case * * * may award to a prevailing party, other than the United States, a reasonable attorney's fee and other litigation expenses, where the court finds that the position of the United States was vexatious, frivolous, or in bad faith, unless the court finds that special circumstances make such an award unjust. Such awards shall be granted pursuant to the procedures and limitations (but not the burden of proof) provided for an award under section 2412 of title 28, United States Code.

18 U.S.C. 3006A note.

will." *Id.* at 62a-63a. The court found that Dr. Rice was negligent and testified incorrectly, but stated that there was no evidence that he intentionally lied on the stand or that the government "actually participated with or encouraged Dr. Rice" in presenting erroneous testimony. *Id.* at 62a. Likewise, the court found that the prosecution was not vexatious because the government did not act maliciously or with an intent to harass, and because some of the counts against petitioner had merit objectively. *Id.* at 63a-64a.

The district court concluded, however, that part of the government's position was frivolous because the government "had reason to believe that its fraud theory based on the absence of bone in the pathology slides lacked merit." Pet. App. 60a. According to the court, "[e]ither the Government consciously decided to proffer a theory it knew was false, or it failed to conduct any investigation or inquiry to confirm whether Dr. Rice's contentions regarding lack of bone fragments was in fact accurate." *Id.* at 61a. The court thus concluded that the government pursued frivolous claims as to the fraud-related counts "based on the Government's first pillar—the lack of bone in the pathology reports from surgery." *Id.* at 61a-62a.

3. Both parties appealed, and the court of appeals reversed, holding that the district court should have denied petitioner's motion in its entirety. Pet. App. 28a-55a. The court first held that the district court clearly erred in concluding that part of the government's case was frivolous. It explained that although the government's failure to discover before trial that the pathology samples contained bone fragments was a "regrettable mistake," it was not "misconduct of the sort that could justify a fee award." *Id.* at 44a. The panel recognized

that, "under limited circumstances, a failure by the government to thoroughly investigate a case can constitute frivolousness," *ibid.* (citing *United States* v. *Braunstein*, 281 F.3d 982, 996-997 (9th Cir. 2002)), but explained that "a failure to sufficiently investigate generally can rise to the level of frivolousness only when the government had some affirmative reason to know that further investigation was needed," *ibid.* Here, the court of appeals held, "there [was] no evidence that the government had any affirmative reason to believe that its bone fragments theory was wrong" because the government relied on the opinion of an expert who did not indicate a need for any further investigation. *Id.* at 44a-45a. The court emphasized that "[t]he record simply does not substantiate the assertion that the government knew or had reason to believe that its lack of bone fragments theory was false," *id.* at 48a-49a, and it could find "no basis in the record for the district court's statement that the government might have consciously advanced a false theory," *id.* at 49a.

Next, the court of appeals rejected petitioner's argument that he should have been awarded fees for the entire case. Agreeing with the district court, the court of appeals found "nothing improper" about the government's theory of the case, Pet. App. 50a, and it saw "nothing wrong" with the government's initial opposition to petitioner's initial efforts to subpoena certain medical records because the subpoenas themselves were "legally invalid," *id.* at 51a. The court further found that, even assuming the government should have sought medical records that in petitioner's view would have undercut its theory, the government's "failure to do so was, at worst, negligence," which "cannot form the basis of an award under the Hyde Amendment." *Id.* at 52a-53a. In addi-

tion, the court held that petitioner offered nothing substantial to contradict the district court's finding that the government did not intentionally proffer false testimony from Dr. Rice; "[i]ndeed," the court held, "there is no basis for claiming that Dr. Rice's testimony was willfully false, rather than erroneous." *Id.* at 53a. In sum, the court of appeals concluded, "no fee award should have been granted in this case." *Id.* at 53a-54a.

Finally, the court of appeals held that the district court did not err in denying petitioner's request for discovery in support of his motion. The court explained that, even assuming the Hyde Amendment provides for some level of discovery in certain circumstances, petitioner had "failed to show good cause for requiring the government to produce evidence," and thus the district court did not abuse its discretion in denying discovery. Pet. App. 54a-55a.

ARGUMENT

Petitioner contends that this Court's review is necessary to resolve "doctrinal dissonance" (Pet. 21) regarding the standards for a Hyde Amendment award and to decide whether Hyde Amendment movants are entitled to discovery. Pet. 21-33. Petitioner also asserts that the Ninth Circuit's "clearly erroneous" standard "seems inconsistent" (Pet. 34) with this Court's precedent. Pet. 33-35. Petitioner's claims lack merit, there is no meaningful division among the courts of appeals, and petitioner offers no explanation why a different interpretation of the Hyde Amendment would lead to a different result in his case. The court of appeals' factbound decision warrants no further review.

1. Petitioner argues (Pet. 21-31) that the courts of appeals have failed to produce "any satisfactory consen-

sus" (Pet. 24) regarding the standards for a Hyde Amendment award. Although different courts have sometimes used different phrases in discussing the Hyde Amendment's provisions, there is no fundamental disagreement that would warrant this Court's review—much less a disagreement that would be outcome-determinative in petitioner's case. The court of appeals' decision is correct.

a. As petitioner notes, the Eleventh Circuit, in *United States* v. *Gilbert*, 198 F.3d 1293 (1999), was the first court to analyze the Hyde Amendment in depth and provide definitions for the terms "vexatious," "frivolous," and "bad faith" as used in the Amendment. Since then, every court of appeals to issue a published Hyde Amendment decision has cited *Gilbert* with approval and has largely adopted *Gilbert*'s definitions. See *United States* v. *Knott*, 256 F.3d 20, 28-31 (1st Cir. 2001), cert. denied, 534 U.S. 1127 (2002); *United States* v. *Schneider*, 395 F.3d 78, 85-86 & n.3 (2d Cir.), cert. denied, 544 U.S. 1062 (2005); *In re 1997 Grand Jury*, 215 F.3d 430, 436-437 (4th Cir. 2000); *United States* v. *Truesdale*, 211 F.3d 898, 908-909 (5th Cir. 2000); *United States* v. *True*, 250 F.3d 410, 422-423 (6th Cir. 2001); *United States* v. *Porchay*, 533 F.3d 704, 711 (8th Cir. 2008); *United States* v. *Braunstein*, 281 F.3d 982, 994-995 (9th Cir. 2002); *United States* v. *Manchester Farming P'ship*, 315 F.3d 1176, 1182-1186 (9th Cir. 2003).

i. Those courts have, in explaining and expanding on *Gilbert*'s definitions of "vexatious," "frivolous," and "bad faith," used slightly varying terms to describe those standards. For example, the Ninth Circuit has explained that "'[v]exatious' has both a subjective and objective element: subjectively, the Government must have acted maliciously or with an intent to harass [the

defendant]; objectively, the suit must be deficient or without merit." *Manchester Farming*, 315 F.3d at 1182; accord *United States* v. *Sherburne*, 249 F.3d 1121, 1126-1128 (9th Cir. 2001). But contrary to petitioner's suggestion, the Ninth Circuit has never "rejected" (Pet. 25, 27) *Gilbert*'s definition of "vexatious." To the contrary, the Ninth Circuit—like the Eleventh Circuit in *Gilbert*—has appropriately looked to the dictionary for guidance, finding that *Black's Law Dictionary* defines "vexatious" both as "without reasonable or probable cause or excuse; harassing; annoying" and as "malicious[ ] and without good cause." *Sherburne*, 249 F.3d at 1126 (citing *Black's Law Dictionary* 1559 (7th ed. 1999)).

Moreover, while *Gilbert* does not state in so many words that "vexatious" has a subjective component, it strongly suggests that, if the question arose in a proper case, the Eleventh Circuit would hold that a malicious motive by the government is required to show that a prosecution was vexatious. See 198 F.3d at 1304 ("Even in its earliest form, the Hyde Amendment was targeted at prosecutorial misconduct, not prosecutorial mistake."). The Eleventh Circuit appears not to have decided the issue. The two courts of appeals to have decided the issue both have held that "vexatious" has a subjective component. See *Knott*, 256 F.3d at 29; *Sherburne*, 249 F.3d at 1126-1128. Thus, there is neither a present division of authority on the question nor any reason to expect disagreement in the future.

ii. Petitioner further complains that the Ninth Circuit has described a "frivolous" position as one that is "obviously wrong." Pet. 25 (citing *Braunstein*, 281 F.3d at 995). But there is no apparent difference between "obviously wrong" and "utterly without foundation in law or fact" (*Gilbert*, 198 F.3d at 1299), nor does peti-

tioner suggest what difference there might be. Indeed, in using the phrase "obviously wrong," the Ninth Circuit said it was *adopting* the Eleventh Circuit's definition. See *Braunstein*, 281 F.3d at 995 ("Because the Eleventh's Circuit's approach to defining 'frivolous' and 'bad faith' is clear and well-reasoned, we join the Fourth Circuit in adopting it."). Similarly, petitioner criticizes (Pet. 26) the Sixth Circuit's definition of "frivolous" as "lacking a reasonable legal basis or * * * lack[ing] a reasonable expectation of attaining sufficient material evidence by the time of trial." *United States* v. *Heavrin*, 330 F.3d 723, 729 (2003). In the Hyde Amendment context, there is no meaningful difference among "lacking a reasonable legal basis" (*ibid.*), "obviously wrong" (*Braunstein*, 281 F.3d at 995), and "without foundation in law" (*Gilbert*, 198 F.3d at 1299). Moreover, *Heavrin* itself approvingly quotes both other formulations in addition to using its own. See 330 F.3d at 728-729.[2]

iii. Petitioner also asserts (Pet. 26-27) that the courts of appeals are divided on the question whether reasonable or probable cause to indict is sufficient to demonstrate that the government's position was not vexatious or frivolous. That contention is incorrect. Courts have appropriately held that where a court reviewing a Hyde Amendment motion concludes that the government had a reasonable basis for pursuing a prosecution, the gov-

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[2] Petitioner claims (Pet. 26) that the Eighth Circuit also defines "frivolous" differently, but the cases he cites use *Gilbert*'s language verbatim. See *United States* v. *Bowman*, 380 F.3d 387, 390 (2004) ("We have stated a position is frivolous for the purposes of the Hyde Amendment when the position is utterly without foundation in law or fact."), cert. denied, 543 U.S. 1056 (2005); *United States* v. *Beeks*, 266 F.3d 880, 883-884 (2001) (defining "frivolous" as "utterly without foundation in law or fact" and citing *Gilbert*).

ernment's position cannot be considered vexatious or frivolous. See, *e.g.*, *Porchay*, 533 F.3d at 711; *United States* v. *Isaiah*, 434 F.3d 513, 519 (6th Cir. 2006). The Ninth Circuit has not held to the contrary; it has held only that a grand jury's decision to indict, standing alone, does not demonstrate that the government's position was not frivolous. *Manchester Farming*, 315 F.3d at 1184. Like the Sixth and Eighth Circuits, the Ninth Circuit holds that where the district court independently concludes that there was reasonable cause for the prosecution, the government's position is not frivolous. *Ibid.*

b. Under any of the cited formulations, the court of appeals' decision is correct. Neither the district court nor the court of appeals found any aspect of the government's case to reflect "bad faith" or to be "vexatious." See Pet. App. 50a-54a (court of appeals); *id.* at 62a-64a (district court). Petitioner offers no reason why the result in his case would be different under some other interpretation of the Hyde Amendment. And this Court does not "undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Exxon Co., U.S.A.* v. *Sofec, Inc.*, 517 U.S. 830, 841 (1996) (quoting *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949)); see *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts."). There is no such "obvious and exceptional showing" here—or indeed, any showing at all on petitioner's part.

Furthermore, the court of appeals found nothing in the record to support a finding of objectively *or* subjectively frivolous conduct by the government, let alone both. See, *e.g.*, Pet. App. 48a-49a ("The record simply does not substantiate the assertion that the government

knew or had reason to believe that its lack of bone fragments theory was false."); *id.* at 49a ("[T]here is no basis in the record for the district court's statement that the government might have consciously advanced a false theory."); *id.* at 50a (holding there was "nothing improper" about the government's theory of the case); *id.* at 53a ("[H]aving found that the government's advancement of the bone fragment theory was not frivolous, we see nothing further in the prosecution's case to suggest that liability was appropriate under the Hyde Amendment."). Thus, even if the court of appeals had used a purely objective definition of "vexatious" (as petitioner claims the Eleventh Circuit uses), there would still be no factual finding supporting a Hyde Amendment fee award here.[3]

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[3] Petitioner also argues (Pet. 29) that the court of appeals erred in concluding that the government did not engage in the type of misconduct required for a Hyde Amendment award when it relied in good faith on a preeminent expert who did not indicate the need for any further investigation. See Pet. App. 45a-46a. Petitioner acknowledges (Pet. 29) that there is no division of authority on this question. Moreover, the court of appeals explicitly declined to hold that a prosecutor's reliance on an expert can never support liability under the Hyde Amendment. Pet. App. 47a. It held only that "this case does not present such a situation" because there was "nothing" in the facts of the case to suggest that the government's reliance on the expert was frivolous. *Ibid.* The court of appeals' factbound conclusion does not warrant this Court's review.

Similarly misplaced is petitioner's contention (Pet. 30-31) that a Hyde Amendment award was effectively mandatory in light of Congress's "intent that [18 U.S.C. 1347] *not* be used to criminalize differences in medical opinion," and the district court's dismissal of certain Section 1347 counts concerning whether certain surgeries were medically necessary. The question is not (as petitioner would appear to have it) whether the evidence at trial was ultimately insufficient to convict because it showed only a reasonable difference of medical opinion. Rath-

c. The foregoing considerations aside, this would be an unsuitable vehicle for resolving any disagreement on the proper standard for an award under the Hyde Amendment because that provision does not permit a fractional award like the district court made here. Rather, the Hyde Amendment permits only an award "in [a] criminal *case* * * * where * * * *the position* of the United States was vexatious, frivolous, or in bad faith." 18 U.S.C. 3006A note (emphasis added). By speaking of an entire "case" and using the definite article to refer to "the" overall "position of the United States," the Hyde Amendment requires that awards be made only in contemplation of the position of the United States as a whole. The Amendment therefore does not authorize fractional or piecemeal awards based on particular aspects of a criminal case, litigation over specific factual issues within a criminal case, or proceedings in connection with individual motions. See *Heavrin*, 330 F.3d at 730 ("When assessing whether the 'position of the United States was vexatious, frivolous, or in bad faith,' the district court should therefore make only one finding, which should be based on the case as an inclusive whole.") (quoting *Commissioner* v. *Jean*, 496 U.S. 154, 162 (1990)) (some internal quotation marks omitted). Indeed, this Court held in *Jean*, 496 U.S. at 161-162, that fee awards against the government under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412, require assessment of the government's position as a whole, and the Hyde Amendment is in part modeled on

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er, as *Heavrin*, 330 F.3d at 729, explains, the question is whether in bringing the prosecution, the government had "a reasonable expectation of attaining sufficient material evidence by the time of trial" on the question of petitioner's intent to defraud (see Pet. App. 25a, 50a). That factbound issue does not warrant review.

the EAJA, and subject to the EAJA's procedures, see *Manchester Farming*, 315 F.3d at 1182.

Neither of the courts below suggested that the United States' position as a whole was "vexatious, frivolous, or in bad faith." At most, the district court accepted that the Hyde Amendment standard was met "in regards to those claims based on lack of bone [fragments]." Pet. App. 64a. But as *Heavrin* explains, "[a] count-by-count analysis [of the government's position] is inconsistent with [*Jean*'s] approach." 330 F.3d at 730. Petitioner fails to explain why *Heavrin* is incorrect, or why this Court should undertake to review the factual conclusion of both courts below, see *Exxon*, 517 U.S. at 841, that the government's position as a whole was not "vexatious, frivolous, or in bad faith."[4]

2. Petitioner also asserts (Pet. 31-33) that lower courts are divided over the availability of discovery under the Hyde Amendment. That contention is mistaken. The courts of appeals have consistently held that although a district court may have the discretion to order limited discovery in certain circumstances, the Hyde Amendment does not permit discovery as of right, and a Hyde Amendment movant must at least make a threshold showing that liability under the Amendment is likely.[5] The court of appeals here followed that con-

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[4] Although the government argued in the court of appeals that this was a sufficient basis on which to reverse the district court's fee award, the court of appeals instead reversed on the facts. See Pet. App. 42a.

[5] See *Schneider*, 395 F.3d at 91-92 ("We need not decide whether, upon a sufficient threshold showing, a court may order the production of government materials either to the defendant, or to the court for *ex parte* and *in camera* inspection. Schneider, lacking evidence that even raised a likelihood of government liability, hoped to make his case by requiring the government to disclose its confidential materials to the

sensus view. See Pet. App. 54a-55a. And as the court of appeals explained, the district court properly denied petitioner's request for discovery into the prosecutors' bad faith because petitioner "failed to present any evidence to the district court supporting his allegations of bad faith." *Id.* at 55a.

3. Finally, petitioner asserts (Pet. 33-35) that the court of appeals' application of clearly erroneous review conflicts with a previous Ninth Circuit case, *United States* v. *Hinkson*, 585 F.3d 1247 (2009) (en banc), and this Court's decision in *Anderson* v. *City of Bessemer City*, 470 U.S. 564 (1985). Those contentions do not warrant review in this case.

As an initial matter, even if the court of appeals' decision were inconsistent with *Hinkson*, that would merely reflect an intra-circuit conflict for the court of appeals, not this Court, to resolve. *Wisniewski* v. *United States*, 353 U.S. 901, 901 (1957) (per curiam). In any event, there is no inconsistency: The court of appeals amended its opinion on rehearing precisely to address *Hinkson* (compare Pet. App. 13a with *id.* at 41a), and it cited and faithfully applied *Hinkson (*see *id.* at 41a, 42a, 48a-49a).

Furthermore, *Hinkson* itself is consistent with *Anderson*. *Hinkson* holds that a court of appeals may properly reverse a district court's application of law to

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court. We are confident that in such circumstances, the Hyde Amendment does not compel such production."); *United States* v. *Lindberg*, 220 F.3d 1120, 1126 (9th Cir. 2000) (denying discovery because defendant's Hyde Amendment motion was based on nothing but "his assertion that the government lacked sufficient evidence to convict him of conspiracy"); *Truesdale*, 211 F.3d at 906-907 (holding that Hyde Amendment does not provide for discovery as a matter of right but finding it unnecessary in the circumstances of the case to "determine the situations under which discovery or a hearing is allowed or required, assuming either is allowed at all").

fact as an abuse of discretion when "the district court's findings of fact, [or] its application of those findings of fact to the correct legal standard, were illogical, implausible, or without support in inferences that may be drawn from facts in the record." 585 F.3d at 1251. That is consistent with *Anderson*, which held that the court of appeals incorrectly reversed the district court after concluding that its findings were clearly erroneous, because the district court's interpretation of the facts was not "illogical or implausible" and had "support in inferences that may be drawn from the facts in the record." 470 U.S. at 577.

Petitioner appears to take issue (see Pet. 34) with *Hinkson*'s further statement that "even when a court of appeals determines a trial court's findings are 'permissible' * * * or not a 'mistake' * * *, the court of appeals must *reverse* if the district court's determination is 'illogical or implausible' or lacks 'support in inferences that may be drawn from facts in the record.'" 585 F.3d at 1261. The import of this statement is not entirely clear; it is not obvious why a reviewing court might think a lower court's findings were "permissible" but nonetheless "illogical." But *Hinkson* goes on to recast this statement in unexceptionable terms: that if the district court's determination is illogical, implausible, or unsupported, "only then [is the court of appeals] able to have a 'definite and firm conviction' that the district court reached a conclusion that was a 'mistake' or was not among its 'permissible' options," and must therefore be reversed. *Id.* at 1262. Petitioner expresses no disagreement with that formulation.

More to the point, the court of appeals' discussion is nothing but a precise and thorough application of principles this court articulated in *Anderson*, and for that rea-

son, it does not warrant further review. Nothing suggests the court of appeals thought the district court's finding of frivolousness was "permissible" or anything but a "mistake." The court of appeals expressly stated its own view of the record: "The district court's finding that [the government's belated discovery of the flaw in its bone-fragment theory] was misconduct of the sort that could justify a fee award * * * goes too far." Pet. App. 44a; see *ibid.* ("[T]here is no evidence that the government had any affirmative reason to believe its bone fragments theory was wrong."); *id.* at 47a ("There is nothing * * * about the facts surrounding the prosecutors' reliance on Dr. Rice that suggests that this reliance was frivolous."). And in a portion of the opinion distinct from that discussion, the court of appeals went on to explain, as a separate matter, that the district court's key "finding * * * [wa]s implausible based on the record," *id.* at 48a, and that another of the district court's statements had "no basis in the record," *id.* at 49a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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