No. 01-717

In the Supreme Court of the United States

RIVERDALE MILLS CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that the United States had not engaged in a "vexatious" prosecution entitling petitioner to an award of attorneys' fees and expenses under the Hyde Amendment, Pub. L. No. 105-119, § 617, 111 Stat. 2519 (18 U.S.C. 3006A note (Supp. V 1999)).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	7
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Cooter & Gell v. *Hartmarx Corp.*, 496 U.S. 384 (1990)	11
1997 Grand Jury, In re, 215 F.3d 430 (4th Cir. 2000)	2, 7, 8
Koon v. *United States*, 518 U.S. 81 (1996)	11
United States v. *Adkinson*, 247 F.3d 1289 (11th Cir. 2001)	7, 9
United States v. *Beeks*, 266 F.3d 880 (8th Cir. 2001)	9
United States v. *Gilbert*, 198 F.3d 1293 (11th Cir. 1999)	2, 7, 8
United States v. *Lindberg*, 220 F.3d 1120 (9th Cir. 2000)	2
United States v. *One Parcel of Real Prop.*, 960 F.2d 200 (1st Cir. 1992)	2
United States v. *Sherburne*, 249 F.3d 1121 (9th Cir. 2001)	7
United States v. *True*, 250 F.3d 410 (6th Cir. 2001)	7, 8
United States v. *Truesdale*, 211 F.3d 898 (5th Cir. 2000)	3

Statutes:

Clean Water Act, 33 U.S.C. 1319(c)(2)(a) 3
Equal Access to Justice Act, 28 U.S.C. 2412:
28 U.S.C. 2412(d)(1)(A) 2
28 U.S.C. 2412(d)(1)(C)(2)(B) 4
Hyde Amendment, Pub. L. No. 105-119, § 617, 111 Stat. 2519 (18 U.S.C. 3006A note (Supp. V 1999)) 1-2

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 256 F.3d 20. The opinion of the district court (Pet. App. 30a-45a) is reported at 106 F. Supp. 2d 174.

JURISDICTION

The judgment of the court of appeals was entered on July 12, 2001. A petition for rehearing was denied on August 24, 2001 (Pet. App. 47a-48a). The petition for a writ of certiorari was filed on November 21, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Hyde Amendment, Pub. L. No. 105-119, § 617, 111 Stat. 2519 (18 U.S.C. 3006A note (Supp. V

1999)), was enacted as part of the Department of Justice appropriations bill for the fiscal year 1998, in response to instances of perceived prosecutorial abuse. See Pet. App. 12a; *United States* v. *Gilbert*, 198 F.3d 1293, 1299-1303 (11th Cir. 1999) (reviewing the amendment's legislative history). Under the Hyde Amendment, a prevailing defendant in a federal criminal case may recover attorneys' fees and other litigation expenses "where the court finds that the position of the United States was vexatious, frivolous, or in bad faith." 18 U.S.C. 3006A note (Supp. V 1999).

Although the Hyde Amendment was modeled after the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d)(1)(A), which governs fee awards against the United States in civil actions, the Hyde Amendment differs from EAJA in at least two significant respects. First, the Hyde Amendment sets a more stringent test for an award of fees, authorizing payment only where "the position of the United States was vexatious, frivolous, or in bad faith," 18 U.S.C. 3006A note (Supp. V 1999), rather than, as EAJA provides, in all cases where the position of the United States was not "substantially justified," 28 U.S.C. 2412(d)(1)(A). Second, although EAJA has been construed to place the burden of proof on the United States, see, *e.g.*, *United States* v. *One Parcel of Real Property*, 960 F.2d 200, 208 (1st Cir. 1992), the Hyde Amendment places the burden of proof on the moving defendant. See 18 U.S.C. 3006A note (Supp. V 1999) (Hyde Amendment fee applications are to be adjudicated "pursuant to the procedures and limitations (but not the burden of proof) provided" by EAJA); see also *Gilbert*, 198 F.3d at 1302; *United States* v. *Lindberg*, 220 F.3d 1120, 1124 (9th Cir. 2000); *In re 1997 Grand Jury*, 215 F.3d 430, 436 (4th Cir. 2000);

United States v. *Truesdale*, 211 F.3d 898, 907 (5th Cir. 2000).

2. On August 12, 1998, a grand jury in the District of Massachusetts returned an indictment against petitioner Riverdale Mills Corporation and its president and chief executive officer, James M. Knott, Sr. Pet. App. 6a, 33a. The indictment charged each of the two defendants with two counts of knowingly violating the Clean Water Act, 33 U.S.C. 1319(c)(2)(a), by discharging industrial wastewater into publicly owned treatment works in violation of a national pretreatment standard prohibiting the discharge of industrial wastes with a pH below 5.0 s.u. Pet. App. 6a, 33a.

The first count of the indictment charged a violation occurring on or about October 21, 1997. On that date the Environmental Protection Agency (EPA) conducted a civil inspection of petitioner's manufacturing facility after receiving an anonymous tip, apparently from one of petitioner's employees, that petitioner's wastewater treatment system was not in operation. The second count charged a violation occurring on or about November 7, 1997, the date that one of two criminal search warrants was executed at the same facility. During that search, EPA agents observed that the required pretreatment system at the facility was largely inoperative, and they collected a number of samples indicating that the facility's wastewater was above the permissible level of acidity. Pet. App. 3a-6a, 31a-33a.

The defendants filed a motion to suppress the evidence obtained during the civil inspection and the subsequent criminal searches. The district court granted their motion in part, ruling that by engaging in certain sampling activities, the EPA inspectors had exceeded the scope of Mr. Knott's consent to the October 21

inspection. The court declined, however, to suppress the evidence obtained on November 7 through the execution of the criminal search warrant. Pet. App. 6a, 33a.

After receiving the district court's ruling on the motion to suppress, the government reevaluated its evidence in the case. On April 23, 1999, the United States sought leave to dismiss the indictment without prejudice. On May 6, 1999, the district court granted that motion. Pet. App. 6a-7a, 33a-34a.

3. Petitioner and Mr. Knott then sought attorneys' fees and expenses under the Hyde Amendment. The district court granted the fee application with respect to petitioner and denied it with respect to Mr. Knott. Pet. App. 30a-45a.[1]

In awarding fees and expenses to petitioner, the district court held that the government's conduct in the case, "although not provably frivolous or in bad faith, was clearly vexatious." Pet. App. 42a. The court stated that "[t]he government did not * * * have any credible evidence to support th[e] accusation" that petitioner had violated the Clean Water Act. *Id.* at 40a. The court also stated that "the EPA's collection of evidence in support of the government's charges is suspect," *ibid.*; that "[t]he defendants' humiliation at being criminally prosecuted was intensified" by a government press release announcing the indictment, *id.* at 41a; and that the court was "troubled by the government's

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[1] The district court held that Mr. Knott's net worth exceeded the eligibility limit set forth in EAJA, 28 U.S.C. 2412(d)(1)(C)(2)(B), and that the EAJA limitation was applicable to Hyde Amendment cases. Pet. App. 37a-38a. The court of appeals affirmed that ruling. *Id.* at 9a-12a. Mr. Knott has not sought review of that determination. See Pet. iii & n.1.

unnecessary harassment of defendants and their employees during the November search," *ibid.*

4. The court of appeals reversed the award of fees to petitioner. Pet. App. 1a-29a.

After analyzing the text and history of the Hyde Amendment, as well as relevant decisions of other circuits, the court of appeals held that

> a determination that a prosecution was "vexatious" for the purposes of the Hyde Amendment requires both a showing that the criminal case was objectively deficient, in that it lacked either legal merit or factual foundation, and a showing that the government's conduct, when viewed objectively, manifests maliciousness or an intent to harass or annoy.

Pet. App. 15a. The court rejected petitioner's contention "that 'vexatious' conduct can be shown simply by showing that the charges brought by the United States were ultimately determined to be without either evidentiary or legal foundation." *Ibid.* The court acknowledged that a defendant might be entitled to a Hyde Amendment award "if the government pursued a position so obviously wrong that no reasonable prosecutor could have supported it." *Ibid.* The court stated, however, that "[w]ithout a finding of bad faith or improper motive, * * * such a prosecution would more appropriately be deemed 'frivolous' than 'vexatious.'" *Id.* at 15a-16a.

In this case, the court of appeals considered the instances of alleged prosecutorial overreaching discussed by the district court and found that the evidence did not support an inference of governmental malice or intent to harass or annoy. Pet. App. 18a-24a. The court further held that the district court had committed "clear error" in finding that the government lacked

"credible evidence" of a Clean Water Act violation. *Id.* at 24a. The court explained that "[t]he EPA had ample reason to initiate an investigation" in light of the anonymous tip it had received. *Ibid.* The court added that the evidence obtained in the course of the investigation "confirmed that the pretreatment system had been out of operation for several months and that Knott was aware that it was not functioning." *Id.* at 24a-25a. The court also found that "in concluding that the prosecution lacked 'any credible evidence [of a Clean Water Act violation],' the district court erroneously discounted all the evidence that it had suppressed." *Id.* at 27a. The court explained that "[t]he government was entitled to rely on its evidence so long as it had a good-faith basis for contending that the evidence was admissible," and that "[t]he suppression issue presented here was not so clear cut as to deprive the prosecution of a reasonable basis for believing that its evidence was admissible." *Ibid.* Finally, the court observed that "even after the suppression ruling, there remained an adequate evidentiary foundation for the prosecution, at least as concerns the second count," based on the evidence obtained during the November 7 search. *Ibid.*; see *id.* at 28a ("Although the EPA ultimately concluded that it would not proceed, there remained credible evidence to support a prosecution.").

The court of appeals concluded:

> Since the EPA had a reasonably sufficient evidentiary basis upon which to pursue charges against the defendants, both before and even after the suppression ruling, and absent any finding or reason to believe that the government acted either out of malice or with any intent to harass or annoy, the fee

> award to [petitioner] constituted an abuse of discretion.

Pet. App. 28a.

ARGUMENT

Petitioner contends (Pet. 8-18) that the courts of appeals are in conflict on the meaning of the term "vexatious" in the Hyde Amendment, and that the court of appeals' application of the Hyde Amendment in this case warrants this Court's review. Although the courts of appeals have articulated somewhat different standards in defining the Hyde Amendment term "vexatious," those verbal distinctions are unlikely to affect the outcome of a significant number of cases. The court of appeals correctly declined to award fees here, and there is no reason to believe that petitioner would have been awarded fees if this case had arisen in another circuit. Further review is not warranted.

1. As petitioner points out (Pet. 11), some courts of appeals in discussing the Hyde Amendment standard have quoted a dictionary definition of "vexatious" as "without reasonable or probable cause or excuse." See *United States* v. *True*, 250 F.3d 410, 423 (6th Cir. 2001); *United States* v. *Adkinson*, 247 F.3d 1289, 1291 (11th Cir. 2001); *In re 1997 Grand Jury*, 215 F.3d 430, 436 (4th Cir. 2000); *United States* v. *Gilbert*, 198 F.3d 1293, 1298 (11th Cir. 1999).[2] The court of appeals in this case

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[2] Petitioner also cites (Pet. 11-12) *United States* v. *Sherburne*, 249 F.3d 1121 (9th Cir. 2001), as adopting a "subjective malice standard" that the court of appeals in this case rejected. The court of appeals in this case did "reject the approach of Sherburne to the extent it suggests that such attention to subjective motivations is required," Pet. App. 17a, and instead framed the issue as "whether the government's conduct, when viewed objectively, manifests, or

concluded that "something more than simply an inadequate evidentiary foundation is required to demonstrate that the prosecution was 'vexatious' within the meaning of the Hyde Amendment—that is, some finding of malice or improper motivation is required." Pet. App. 16a-17a.[3] For at least three related reasons, however, that difference in the articulation of the governing standard does not warrant this Court's review.

a. In none of the cases on which petitioner relies did the definition of "vexatious" dictate the result. In three of the cases, the courts of appeals affirmed district court judgments denying fees under the Hyde Amendment. See *True*, 250 F.3d at 426; *In re 1997 Grand Jury*, 215 F.3d at 437; *Gilbert*, 198 F.3d at 1305. And, as the court of appeals noted in this case, the *Gilbert* court assessed the prosecution's conduct "in light of all three elements that would support a Hyde Amendment award simultaneously, so it is not entirely clear how the court would apply 'vexatious' in isolation." Pet. App.

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is tantamount to, malice or an intent to harass or annoy," *ibid.* Since subjective intent is often proved inferentially from objective circumstances, it is not clear that the approaches of the Ninth Circuit and the First Circuit would differ in practice. In any event, petitioner does not contend that it would benefit from application of the *Sherburne* test, so this case would not be an appropriate vehicle to resolve any differences on that score.

[3] The court of appeals in this case relied in part on the same source—*Black's Law Dictionary*—from which the Sixth, Fourth, and Eleventh Circuits had drawn their definition of the word "vexatious." The court of appeals noted, however, that in addition to "without reasonable or probable cause or excuse," *Black's Law Dictionary* includes "harassing" and "annoying" within its basic definition of "vexatious," and that it specifically defines the term "vexatious suit" to mean a "lawsuit instituted maliciously and without good cause." Pet. App. 13a-14a.

16a n.5. The court in the fourth case concluded that "the district court abused its discretion in denying the awards and in making a clearly erroneous finding that the government did not prosecute the appellants in bad faith on charges that the government knew not to be crimes, as established by this Court's binding precedent. The government's litigating position in this case was vexatious, frivolous, and taken in bad faith." *Adkinson*, 247 F.3d at 1293. Petitioner cites no case in which an award of fees under the Hyde Amendment has been based on a finding of "vexatious[ness]" alone.[4]

b. The court of appeals in this case acknowledged that "[i]t may be that if the government pursued a position so obviously wrong that no reasonable prosecutor could have supported it, the defendant would be entitled to a fee award under the Hyde Amendment." Pet. App. 15a. The court explained, however, that "[w]ithout a finding of bad faith or improper motive, * * * such a prosecution would more appropriately be deemed 'frivolous' than 'vexatious.'" *Id.* at 15a-16a. In light of the First Circuit's recognition that a prosecution's entire lack of legal or factual merit may be a sufficient basis for a Hyde Amendment fee award, without regard to the motives of the prosecutor, the question whether such a prosecution is "vexatious" *as well as* "frivolous" is unlikely to have any meaningful practical significance.

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[4] Petitioner errs in suggesting (Pet. 12) that *United States* v. *Beeks*, 266 F.3d 880, 883 (8th Cir. 2001) (per curiam), adopted *Gilbert*'s definition of "vexatious." *Beeks* not only held that the defendant there was ineligible for a fee award because he was not a "prevailing party," but also held that the defendant "is not able to satisfy the three-pronged 'vexatious, frivolous, or in bad faith' standard, *however defined*." *Ibid.* (emphasis added); *id.* at 883-884 (finding no "prosecutorial misconduct" of any variety).

c. The court of appeals' conclusion that "something more than simply an inadequate evidentiary foundation is required to demonstrate that the prosecution was 'vexatious'" (Pet. App. 16a) was not essential to the court's ultimate disposition of the case. The court also held that "the district court's finding that there was no 'credible evidence' upon which to pursue charges was clear error." *Id.* at 24a. The court of appeals explained that in assessing the initial decision to bring criminal charges, the district court had erroneously failed to consider evidence that the government reasonably believed at that time to be admissible but that was subsequently suppressed. *Id.* at 27a. The court of appeals further explained that "even after the suppression ruling, there remained an adequate evidentiary foundation for the prosecution, at least as concerns the second count." *Ibid.* Because the court of appeals held that petitioner was not entitled to a Hyde Amendment award even under petitioner's own proposed legal standard, this case is an unsuitable vehicle for resolving the interpretive question on which petitioner seeks review.

2. Petitioner contends (Pet. 13-16) that the court of appeals erred by reviewing the district court's fee award de novo rather than for abuse of discretion. That claim lacks merit. The court of appeals concluded that "the fee award to [petitioner] constituted an abuse of discretion." Pet. App. 28a. In support of its decision, the court of appeals explained that (a) the district court had employed a legally erroneous standard of "vexatious[ness]" (*id.* at 15a), and (b) "the district court's finding that there was no 'credible evidence' upon which to pursue charges was clear error" (*id.* at 24a). Contrary to petitioner's suggestion (Pet. 16), the latter determination did not rest on disagreement with any

"factual finding" of the district court. Rather, the court of appeals explained that in various respects the district court had misapprehended the *legal* significance of the record evidence. See Pet. App. 24a-28a. The court's analysis was fully consistent with the applicable abuse-of-discretion standard. Cf. *Koon* v. *United States*, 518 U.S. 81, 100 (1996) ("A district court by definition abuses its discretion when it makes an error of law."); *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 405 (1990) ("A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.").

3. The court of appeals held that a criminal prosecution is "vexatious" within the meaning of the Hyde Amendment only if "the criminal case was objectively deficient, in that it lacked either legal merit or factual foundation, and * * * the government's conduct, when viewed objectively, manifests maliciousness or an intent to harass or annoy." Pet. App. 15a. Petitioner contends (Pet. 16-18) that the court of appeals should have remanded the case to afford the district court an opportunity to determine whether the second prong of that test—*i.e.*, proof of governmental malice or intent to harass or annoy—is satisfied here. A remand to address that issue would have been pointless, however, in light of petitioner's "failure to meet the first part of the test of vexatiousness: that the government's suit lacked either legal merit or factual foundation." Pet. App. 24a; see *id.* at 24a-28a. The court of appeals therefore acted properly in directing the district court to dismiss petitioner's fee application. See *id.* at 28a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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