No. 12-44

In the Supreme Court of the United States

ALI SHAYGAN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that petitioner was not entitled to an award of attorney's fees under the Hyde Amendment because the litigating position of the United States in prosecuting petitioner was not taken in bad faith.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-63) is reported at 652 F.3d 1297. The order of the court of appeals denying rehearing en banc and accompanying opinions (Pet. App. 144-178) are reported at 676 F.3d 1237. The order of the district court (Pet. App. 64-143) is reported at 661 F. Supp. 2d 1289.

JURISDICTION

The judgment of the court of appeals was entered on August 29, 2011. A petition for rehearing was denied on April 10, 2012. The petition for a writ of certiorari was filed on July 6, 2012. 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 Southern District of Florida, petitioner

was acquitted of illegally dispensing and distributing controlled substances, in violation of 21 U.S.C. 841(a)(1). Petitioner then sought an award of a reasonable attorney's fee, pursuant to the Department of Justice Appropriations Act, 1998 (commonly known as the Hyde Amendment), Pub. L. No. 105-119, § 617, 111 Stat. 2519 (reprinted in 18 U.S.C. 3006A historical and statutory notes). The district court granted the motion and awarded $601,795.88 in fees and costs. The court of appeals reversed. Pet. App. 1-63.

1. The Drug Enforcement Administration (DEA) began investigating petitioner (who is a physician) after his patient James Downey died from an overdose of prescription and illegal drugs. Pet. App. 5. Two undercover police officers, posing as prospective patients, visited petitioner's office and obtained prescriptions for controlled substances on their first office visit. *Ibid.* Before dispensing the prescriptions, petitioner conducted only a minimal physical examination of the undercover officers and did not review their medical records. *Ibid.*

On February 8, 2008, a grand jury returned a 23-count indictment, charging petitioner with dispensing and distributing controlled substances, in violation of 21 U.S.C. 841(a)(1), based on the prescriptions for controlled substances that petitioner wrote for Downey and the two undercover officers. Pet. App. 5. At the time the indictment was filed, the government had not yet identified any of petitioner's other patients. *Ibid.* On February 11, 2008, petitioner was arrested and consented to a search of his office. *Ibid.* Agents seized patient files and petitioner's day planner, which chronicled petitioner's meetings with Downey and with other patients. *Id.* at 5-6.

On May 14, 2008, petitioner filed a motion to suppress his post-arrest statements. Pet. App. 6. The motion alleged that, "[d]espite [petitioner's] repeated, unequivocal requests to speak with a lawyer, the agents continued to interrogate him, ignoring his requests as if they did not exist." *Ibid.* (first brackets in original). Petitioner also alleged that one of the interrogating agents "us[ed] scare tactics and repeatedly ma[d]e clicking noises with his firearm[] . . . [and] brandished his firearm in front of" petitioner, thereby "intimidating him." *Ibid.* (alterations in original). The government opposed the motion, contesting many of petitioner's factual allegations and contending that petitioner was advised of his right to counsel and did not unequivocally request an attorney. *Ibid.*

On July 31, 2008, the parties participated in a discovery conference. Pet. App. 6. At the conference, the lead prosecutor, Assistant United States Attorney (AUSA) Sean Cronin, confronted petitioner's attorney about the accusations in the suppression motion, which Cronin believed were unfounded. *Id.* at 6-7. Defense counsel later told a magistrate judge that Cronin warned him that if he continued to "litigate these issues, there was going to be no more plea discussions." *Id.* at 8. Defense counsel stated that Cronin told him that if he "went after [the government's] witnesses * * * there would be a seismic shift in the way [Cronin] would prosecute the case." *Ibid.* As a result, defense counsel had petitioner take a polygraph examination to confirm that petitioner was telling the truth. *Id.* at 7.

On August 26, 2008, a magistrate judge held an evidentiary hearing on the suppression motion, and the defense called only one fact witness who stated that he had heard petitioner make a single request for an attorney.

Pet. App. 8-9. The witness did not testify that the agents used scare tactics to intimidate petitioner, *id.* at 9, and petitioner ultimately abandoned those allegations, *id.* at 72. The magistrate judge credited the witness's testimony and recommended that the motion to suppress petitioner's statements be granted. The district court agreed. *Id.* at 8-9.

Meanwhile, from July through September 2008, agents continued to investigate petitioner, including by interviewing some of his patients. Pet. App. 6-8. One of the patients (Andrew Gribben) stated that he and a friend (David Falcon) had received prescriptions from petitioner without undergoing a medical examination. *Id.* at 7. Another patient (Carlos Vento) told investigators that petitioner had offered to pay him and a friend (Trinity Clendening, who later confirmed Vento's account) if they did not disclose petitioner's role in Downey's death. *Id.* at 6-7. On September 26, 2008, the grand jury returned a 141-count superseding indictment. *Id.* at 8. The additional charges were related to prescriptions petitioner had written for the newly-identified patients. *Ibid.*

One of the patients who had been interviewed was Courtney Tucker. Pet. App. 6-9. Although the DEA interview report recounted that Tucker had said both positive and negative things about petitioner, Tucker later called a defense investigator to complain that the agent who had interviewed her had tried to put a negative spin on what she said about petitioner. *Id.* at 7-8. On November 21, 2008, Tucker called DEA Agent Christopher Wells to find out why she had been subpoenaed to testify for the prosecution and to seek reassurance that she and her boyfriend (who had also received controlled substances from petitioner and had also been subpoenaed)

would not be portrayed as drug addicts at trial. *Id.* at 7-9, 82-83. Agent Wells immediately called Cronin to report that Tucker may be "going south" as a witness. *Ibid.* Cronin discussed with Agent Wells and his immediate supervisor the possibility of initiating an investigation into witness tampering by the defense team. *Ibid.* Cronin also consulted with an attorney at the Office of Enforcement Operations at the Department of Justice about whether he needed the Department's approval to record telephone calls with the defense team and was told that he did not. *Ibid.*; *id.* at 90.

Cronin and AUSA Andrea Hoffman (the other prosecutor assigned to the case) then discussed the matter with AUSA Karen Gilbert, the chief of the narcotics section of the United States Attorney's Office. Pet. App. 9. Gilbert agreed that it would be permissible for Vento and Clendening to record calls from the defense team. *Id.* at 9-10. She told the trial prosecutors that she would oversee the collateral investigation into witness tampering and instructed that they should take no part in it. *Id.* at 10. Gilbert neglected to seek approval from the United States Attorney for initiating an investigation of the defense team, as required under the office's internal policy. *Ibid.* Cronin informed Agent Wells that Vento and Clendening could record calls from the defense team and instructed that Agent Wells should report only to Gilbert. *Ibid.* Cronin emphasized that he and Hoffman would have no further involvement in the witness-tampering aspect of the investigation. *Ibid.*

On December 9, 2008, Vento informed Agent Wells that he had recorded a telephone call from a defense investigator. Pet. App. 10, 96. Agent Wells later testified that he called Cronin to report the contact when he was unable to reach Gilbert. *Id.* at 10. Gilbert met with

Agent Wells the next day to listen to the recording. *Ibid.* Although Gilbert found no evidence of witness tampering on the recording, she decided to continue the investigation. *Ibid.* Agent Wells then prepared a report documenting his earlier conversation with Tucker and the recording of Vento's conversation with the defense team. *Id.* at 10-11. Later that month, Clendening told Agent Wells that he had attempted to record another call from defense counsel but obtained only a portion of the call because the recording device disconnected. *Id.* at 11. Agent Wells neither listened to that recording nor discussed it with Cronin and Hoffman. *Ibid.*

The DEA subsequently assigned the witness-tampering investigation to Agent James Brown, who asked Vento and Clendening to sign confidential-source agreements. Pet. App. 11. Vento signed the agreement and Brown documented it in a DEA report; Clendening never met with Brown and never signed an agreement. *Ibid.*

At a status conference held the week before petitioner's trial, the district court ordered the government to turn over to the court all DEA investigative reports so that the court could determine whether they were exculpatory and should be turned over to the defense. Pet. App. 11-12. Although Cronin had asked Agent Wells for all relevant reports, he did not specifically solicit reports that were generated during the collateral witness-tampering investigation. *Id.* at 12. The materials Cronin filed with the court two days later did not, therefore, include the two reports related to the collateral investigation. *Ibid.*

2. At trial, the government introduced "a wealth of evidence" suggesting that petitioner had illegally distributed and dispensed controlled substances. Pet. App.

150. Petitioner's former colleagues and patients, as well as Downey's girlfriend, all testified that petitioner routinely provided prescriptions for controlled substances that were not medically justified. *Id.* at 12-16. The undercover officers also testified about their interactions with petitioner, and the government played the recordings of those officers' conversations with petitioner. *Id.* at 13.

During the cross-examination of Clendening, defense counsel attempted to establish that Clendening had asked defense counsel for money in exchange for his favorable testimony at trial. Pet. App. 16. Clendening denied that, stating: "No. I got it on a recording at my house." *Ibid.* The prosecutors and agents had been unaware before that point that a recording between Clendening and the defense team existed. *Id.* at 117. At the conclusion of the next trial day, Gilbert informed the court of the circumstances surrounding the collateral witness-tampering investigation and reported that the matter had been closed. Gilbert explained that the office had established a taint team and that no substantive information from the investigation had been disclosed to Cronin or Hoffman. 2/23/09 Tr. 215-217, 220-226; see Pet. App. 16.

Petitioner moved for a mistrial and for dismissal of the indictment. Pet. App. 16-17. The court deferred decision on the motions and agreed, in the meantime, to reopen the cross-examination of Vento and Clendening. *Id.* at 17. When the witnesses were recalled, the district court instructed the jury that it was permitting additional cross-examinations because "the United States has acted improperly in not turning over the necessary discovery materials and also by allowing recordings" between members of the defense team and the witnesses.

Id. at 17-18. Defense counsel echoed the district court's criticism of the government in his summation, including by comparing the government's misconduct to the Salem witch trials. *Id.* at 18-19. The jury acquitted petitioner on all counts. *Id.* at 19.

3. Following the verdict, petitioner filed a motion for attorney's fees and costs pursuant to the Hyde Amendment. Pet. App. 19. The district court held a two-day evidentiary hearing at which Agent Wells, Agent Brown, AUSA Gilbert, and AUSA Cronin testified on behalf of the government. *Ibid.* The government admitted that it had erred in both its handling of the collateral witness-tampering investigation and by failing to disclose discovery materials from the investigation. *Id.* at 20. But the government denied the allegation that the charges in the indictment were motivated by improper considerations and that its legal position was vexatious or pursued in bad faith. *Id.* at 20-22.

In acknowledgement of its mistakes in the collateral investigation, the government offered to pay petitioner's fees and costs associated with that collateral investigation and to "waive any legal defenses pursuant to the Hyde Amendment" with respect to the offered amount. Gov't Resp. to Mot. for Sanctions, 1:08-cr-20112-JEM Docket entry No. 299, at 5 (Mar. 25, 2009); Pet. App. 21. The government continued to maintain, however, that payment of fees for the entire prosecution was unwarranted because "the underlying criminal prosecution, as a whole, was not vexatious, frivolous, or pursued in bad faith." Pet. App. 22.

The district court granted petitioner's motion and ordered the government to pay the fees and costs (totaling $601,795.88) that petitioner had incurred starting on the date the superseding indictment was filed. Pet. App. 22.

Although the court agreed with the government that the original indictment was filed in good faith, it concluded that "the position taken by Cronin in filing the superseding indictment; initiating and pursuing the collateral investigation based on unfounded allegations; suppressing information about the roles of two key government witnesses as cooperating witnesses in the collateral investigation; and attempting to secure evidence from the collateral investigation that would have jeopardized the trial and severely prejudiced [petitioner], constitute bad faith." *Id.* at 131. The district court specifically concluded that Cronin's "displeasure and ill-will towards defense counsel as a result of [petitioner's] Motion to Suppress, as evidenced by [Cronin's] 'seismic shift' comment" led to the filing of the superseding indictment. *Id.* at 114-115. The court held that the government's conduct during the prosecution could support an award of attorney's fees under the Hyde Amendment, even if the prosecution was commenced "legitimately." *Id.* at 132-133. The district court additionally entered a public reprimand against the United States Attorney's Office, and against AUSAs Gilbert, Cronin, and Hoffman. *Id.* at 140-142.

4. The government appealed the award of fees and costs under the Hyde Amendment and the imposition of sanctions on the prosecutors.[1] A divided panel of the court of appeals reversed. Pet. App. 1-63.

a. The court of appeals declined to decide whether, as the government argued, the district court erred in concluding as a factual matter that the filing of the superseding indictment was "significantly motivated by ill-will." Pet. App. 25-26. The court held that, regardless

[1] Cronin and Hoffman also appealed the public reprimands. Pet. App. 2.

of whether the filing of the superseding indictment was subjectively motivated by ill-will, the district court's fee award was error because "the district court failed to understand the narrow scope of the Hyde Amendment." *Id.* at 26.

The court of appeals explained that a defendant is entitled to an award under the Hyde Amendment only if he can, "at a minimum, satisfy[] an objective standard that the legal position of the United States" underlying the prosecution "amounts to prosecutorial misconduct." Pet. App. 28. The court referred to dictionaries to define "vexatious" to mean "without reasonable or probable cause or excuse"; "frivolous" to mean "groundless"; and "bad faith" to mean "a state of mind affirmatively operating with furtive design or ill will." *Id.* at 28-29 (quoting *United States* v. *Gilbert*, 198 F.3d 1293, 1298-1299 (11th Cir. 1999)). "[A] prosecution brought in bad faith," the court elaborated, "is one where wrongful motives *are joined* to a prosecution that is either baseless or exceeds constitutional restraints." *Id.* at 39 (emphasis added).

The court of appeals stated that bad faith and vexatiousness are "not measure[d] * * * by whether a prosecutor expressed displeasure with defense counsel." Pet. App. 29. Although "a district court has every right to consider evidence of subjective ill-will," the court explained, "that evidence is not dispositive," and "[t]he starting point for a potential award of attorney's fees and costs under the Hyde Amendment is an objectively wrongful prosecution: that is, a prosecution that either is baseless or exceeds constitutional constraints." *Id.* at 40-41; *id.* at 34 (noting that petitioner "did not even argue that the charges in the superseding indictment were frivolous or exceeded any constitutional constraint").

Applying that standard to the prosecution below, the court concluded that, "regardless of Cronin's displeasure or subjective ill-will, the government had an objectively reasonable basis for superseding the indictment." *Id.* at 29; *id.* at 31 ("The filing of a superseding indictment supported by newly discovered evidence is not prosecutorial misconduct."). The court held that the government therefore "did not knowingly or recklessly pursue a frivolous claim, or exceed any constitutional restraint." *Id.* at 30 (internal quotation marks and citations omitted).

The court of appeals also held that the district court erred in concluding that discovery violations *alone* can support a Hyde Amendment award. Pet. App. 36. The court reasoned that a Hyde Amendment award against the United States is permitted only when the United States' "overall litigating position was vexatious, frivolous, or in bad faith. *Ibid.* The court clarified that it was not reading the word "or" out of the statute by construing "in bad faith" to "mean[] the same thing as either 'vexatious' or 'frivolous,'" as suggested by the dissenting judge. *Id.* at 38-39. "Subjective ill-will is relevant," the court explained, "but not sufficient for a finding of bad faith." *Id.* at 39. The court also explained that the relevant inquiry under the Hyde Amendment focuses on the "position of the United States"—which the court understood "to refer to the legal position of the government, not the mental attitude of its prosecutor." *Ibid.*

In addition, the court of appeals concluded that the district court violated AUSAs Cronin and Hoffman's procedural due process rights when it imposed sanctions against them without notice or an opportunity to participate in the hearing. Pet. App. 41-43. In remanding the

matter to the district court, the court of appeals "[did] not mean to suggest or even hint that the district court should consider sanctions against either Cronin or Hoffman," and further observed that it was "not apparent to [the court] that either attorney necessarily violated any ethical rule or any constitutional or statutory standard." *Id.* at 44. Petitioner does not challenge the court of appeals' vacatur of those sanctions. See Pet. 10 n.4.

b. Judge Edmondson dissented in part. Pet. App. 44-63. In his view, the bad-faith prong of the Hyde Amendment requires a factual determination of the "federal prosecutor's subjective intent as he drove a prosecution forward." *Id.* at 46. Judge Edmonson would have concluded that the district court's determination that a Hyde Amendment award was warranted based on the prosecutors' subjective bad faith was not clearly erroneous. *Id.* at 52-53.

c. The court of appeals denied petitioner's petition for rehearing en banc. Pet. App. 144-145.

Judge Martin, joined by Judge Barkett, dissented from the denial of rehearing en banc. Pet. App. 160-178. The dissent interpreted the panel decision as holding that, "in order to discern 'the position of the United States,' a court need only examine the basis for the charges," and stated that the circuit "stands alone" in adopting that rule. *Id.* at 173.

Judge Pryor, the author of the panel opinion, responded to the dissent in order "to set the record straight about a matter that the dissent misunderstands." Pet. App. 146. Judge Pryor emphasized that the Hyde Amendment's "rare waiver of sovereign immunity applies only when a court determines that the entire 'position of the United States' was vexatious, friv-

olous, or in bad faith" and that "Congress expected a court to assess the overall prosecution of a defendant and not base an award of fees only on discrete actions that took place during that prosecution." *Ibid.* (internal citation omitted). As a result, Judge Pryor explained, although the panel did not need to decide whether the district court's findings of misconduct were clearly erroneous for purposes of reviewing the Hyde Amendment award, it nonetheless had "refused * * * to endorse any findings of misconduct." *Id.* at 153-154. Judge Pryor added that the dissent erred in interpreting the panel opinion as limiting the inquiry under the Hyde Amendment to the question whether "the charges against the defendant [were] baseless." *Id.* at 156 (quoting dissent, *id.* at 170). Instead, he explained, the panel opinion held "that the appropriate inquiry under the Hyde Amendment is * * * was it reasonable to prosecute this case?" *Ibid.* Judge Pryor explained his disagreement with the dissent's assertion that the panel decision conflicts with decisions of the First and Sixth Circuits, with the dissent's view of the legislative history, and with the dissent's belief that the panel's decision leaves district courts without power to sanction prosecutorial misconduct that occurs during an otherwise reasonable prosecution. *Id.* at 155-160.

ARGUMENT

Petitioner asks (Pet. 14-29) this Court to review the court of appeals' interpretation of "bad faith" under the Hyde Amendment. The court of appeals' decision does not warrant review because it is correct and does not conflict with any decision of this Court or of any other court of appeals.

1. The court of appeals correctly determined that petitioner is not entitled to an award pursuant to the Hyde

Amendment, Pub. L. No. 105-119, § 617, 111 Stat. 2519 (reprinted in 18 U.S.C. 3006A historical and statutory notes), because the position of the United States in prosecuting him was not taken in bad faith. The Hyde Amendment permits fee awards in only a narrow category of cases and is not intended to deter government attorneys from being "zealous advocates of the law on behalf of their client, the people of the United States." *United States* v. *Gilbert*, 198 F.3d 1293, 1303 (11th Cir. 1999). The court of appeals correctly determined that the district court abused its discretion when it awarded fees and costs to petitioner based on a finding of bad faith by the government.

a. The Hyde Amendment permits a district court to award attorney's fees and costs to a prevailing defendant in a criminal case "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." The Hyde Amendment applies in cases of "prosecutorial misconduct, not prosecutorial mistake." *United States* v. *Braunstein*, 281 F.3d 982, 995 (9th Cir. 2002) (quoting *Gilbert*, 198 F.3d at 1304); see *United States* v. *Skeddle*, 45 Fed. Appx. 443, 446 (6th Cir. 2002) ("The Hyde Amendment is not aimed at the general run of prosecutions, or even those that the government loses, but instead at instances of prosecutorial misconduct, where the government had undertaken obviously groundless positions in a prosecution or positions intended solely to harass defendants rather than to vindicate the rule of law.") (internal quotation marks omitted), cert. denied, 538 U.S. 922 (2003). And, in enacting the Hyde Amendment, Congress did not seek to "undermin[e] appropri-

ate prosecutorial zeal." *United States* v. *Knott*, 256 F.3d 20, 29 (1st Cir. 2001), cert. denied, 534 U.S. 1127 (2002).

Congress patterned the Hyde Amendment after the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412, with two significant departures. First, while EAJA authorizes fees when the position of the United States is not "substantially justified," 28 U.S.C. 2412(d)(1)(A), the Hyde Amendment imposes a more demanding standard that limits awards to cases in which the government's position was "vexatious, frivolous, or in bad faith." Second, while EAJA assigns to the government the burden of establishing that its position was substantially justified, the Hyde Amendment places the burden on a defendant to establish that the position of the United States was vexatious, frivolous, or in bad faith. The Hyde Amendment thus authorizes fee awards in a much narrower range of cases than its civil counterpart and imposes a higher hurdle to the recovery of fees. *Gilbert*, 198 F.3d at 1302-1303 (defendant must overcome a "daunting obstacle" to recover fees under the Hyde Amendment); see *United States* v. *Monson*, 636 F.3d 435, 439 (8th Cir. 2011) (same); *United States* v. *Isaiah*, 434 F.3d 513, 519 (6th Cir. 2006) (same); *In re 1997 Grand Jury,* 215 F.3d 430, 436 (4th Cir. 2000) (same).

The statute does not define the terms "vexatious," "frivolous," and "bad faith." Courts of appeals—including the court of appeals in this case—generally have looked to dictionary definitions of the terms to determine what standards to apply. Accordingly, courts will find a prosecution to be "vexatious" under the Hyde Amendment when it was "without reasonable or probable cause or excuse," *Gilbert*, 198 F.3d at 1298 (citation omitted), or "lacked either legal merit or factual foundation" and "manifests maliciousness or an intent to har-

ass or annoy," *Knott*, 256 F.3d at 29; accord *United States* v. *Sherburne*, 249 F.3d 1121, 1126 (9th Cir. 2001). Courts will consider an action to be "frivolous" when it is "groundless . . . with little prospect of success," *e.g.*, *Gilbert*, 198 F.3d at 1299 (citation and internal quotation marks omitted), "utterly without foundation in law or fact," *ibid.*; *United States* v. *Bowman*, 380 F.3d 387, 390 (8th Cir. 2004), cert. denied, 543 U.S. 1056 (2005), or "one for which a proponent can present no rational argument based upon the evidence or law in support of that claim," *United States* v. *Schneider*, 395 F.3d 78, 86 n.3 (2d Cir.) (citation and internal quotation marks omitted), cert. denied, 544 U.S. 1062 (2005). And courts have construed "bad faith" to mean more than "simply bad judgment or negligence," requiring instead "the conscious doing of a wrong because of dishonest purpose or moral obliquity" and "a state of mind affirmatively operating with furtive design or ill will." *Gilbert*, 198 F.3d at 1299 (citation omitted); see, *e.g.*, *United States* v. *Manchester Farming P'ship*, 315 F.3d 1176, 1185 (9th Cir. 2003) (adopting *Gilbert*'s definition of "bad faith"). Although each prong provides a separate basis for recovery, the definitions of each related type of prosecutorial misconduct overlap. See *United States* v. *Heavrin*, 330 F.3d 723, 729 (6th Cir. 2003) (noting overlap in the meaning of "frivolous" and "vexatious"); *Sherburne*, 249 F.3d at 1126 n.4 (noting that "vexatious" does not "overlap entirely" with "bad faith"). Courts of appeals reviewing the grant or denial of a Hyde Amendment award frequently review the government's conduct with an eye toward all three. See, *e.g.*, *United States* v. *Lain*, 640 F.3d 1134, 1140 (10th Cir. 2011); *United States* v. *Truesdale*, 211 F.3d 898, 909-910 (5th Cir. 2000); *Gilbert*, 198 F.3d at 1305.

b. The court of appeals correctly interpreted and applied the Hyde Amendment. Petitioner is correct that "bad faith means more than just the absence of probable cause." Pet. 16. But the court of appeals correctly held that a finding of bad faith under the Hyde Amendment requires *at least* a finding that the prosecution should not have been brought or pursued (as well as a finding that the prosecution was motivated by ill will). An award of fees and costs under the Hyde Amendment presupposes the existence of a prosecution that the government should not have brought or pursued. When the government does bring or pursue such a prosecution and a defendant can establish that it did so for an improper purpose, the defendant can establish bad faith under the Hyde Amendment. But, as the court of appeals correctly explained, "a prosecution brought in bad faith is one where wrongful motives *are joined to* a prosecution that is either baseless or exceeds constitutional restraints." Pet. App. 39 (emphasis added). Where, as here, the record establishes that the government had "an objectively reasonable basis" for prosecuting a defendant, *id.* at 29, the defendant cannot establish bad faith regardless of an individual prosecutor's subjective motives.

Petitioner does not ask this Court to review the court of appeals' conclusion that the prosecution (including the charges in the superseding indictment) had an objectively reasonable basis. He argues instead (see Pet. 15-17) that whether the position of the United States was in bad faith does not turn, even in part, on the objective reasonableness of the prosecution. That is not correct. The court of appeals' conclusion that the bad-faith standard under the Hyde Amendment includes an inquiry into the objective reasonableness of the prosecution is consistent with this Court's decisions applying an

objective test in evaluating the government's conduct or intent during a criminal investigation or prosecution. For example, the availability of qualified immunity does not turn on whether an officer is motivated by good intentions or malice, but rather "on the 'objective reasonableness' of an official's conduct." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 817-818 (1982). Similarly, "[a]n action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, as long as the circumstances, viewed *objectively*, justify [the] action." *Brigham City* v. *Stuart*, 547 U.S. 398, 404 (2006) (citation omitted); see also, *e.g.*, *Graham* v. *Connor*, 490 U.S. 386, 397 (1989) ("An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable [action]; nor will an officer's good intentions make an objectively unreasonable [action] constitutional.").

Even in cases where the government's charging decisions give rise to a presumption of vindictiveness in violation of due process, the government may rebut the presumption by "objective evidence justifying the prosecutor's action." *United States* v. *Goodwin*, 457 U.S. 368, 376 n.8 (1982). And, when a presumption of vindictiveness does not apply—such as when a prosecutor makes pre-trial charging decisions, see *id.* at 381-382—a defendant must "prove objectively that the prosecutor's charging decision was motivated by a desire to punish him for doing something that the law plainly allowed him to do," *id.* at 384. Nothing in the text or enactment history of the Hyde Amendment suggests that Congress intended to depart from this well-settled approach to evaluating government conduct in the criminal context.

c. Petitioner and his amici erroneously contend (Pet. 15-18, Former Fed. Judges Amicus Br. 9-10) that the

court of appeals rendered the bad-faith prong of the Hyde Amendment superfluous by focusing on the merits of the charges filed against petitioner. On the contrary, the court of appeals specifically recognized the differences among the prongs. See Pet. App. 28-29, 38-39. It is true that all three prongs require an inquiry into the merits of the relevant charges. That does not mean, however, that the different bases of liability are duplicative—because each term requires proof of something in addition to the unreasonableness of the charges. Petitioner's assertion (Pet. 17) that, "if Congress had wanted the Hyde Amendment to apply solely to cases lacking probable cause, it would have been quite simple for it to have said so directly" therefore misses the point. Congress wanted the Hyde Amendment to apply only to *some* cases lacking probable cause—those that not only are objectively unreasonable but also are vexatious, frivolous, or in bad faith.

Petitioner's contention (Pet. 15) that the court of appeals' interpretation of the statutory language collapses the bad-faith and frivolous prongs misunderstands each prong. Proof that a prosecution was objectively unreasonable, *i.e.*, without probable cause, is not sufficient to prove either bad faith or frivolousness. If it were, a defendant would be entitled to fees without any showing of misconduct. Instead, in order for a defendant to establish that a prosecution was frivolous, he must demonstrate that it was indefensible on the merits or "utterly" without factual or legal support. See *United States* v. *Porchay*, 533 F.3d 704, 711 (8th Cir. 2008) ("Once probable cause to proceed against [the defendant] was established the district court need not have proceeded further to address [the defendant's] frivolous * * * prosecution claim[]."). And a finding of vexatiousness not only

requires a showing that the prosecution was objectively deficient (*e.g.*, without reasonable or probable cause), see, *e.g.*, *Knott*, 256 F.3d at 29; *Sherburne*, 249 F.3d at 1126-1127 & n.4, it also requires a showing that the prosecution was brought with intent to harass or annoy, see *Monson*, 636 F.3d at 440 n.4; *Porchay*, 533 F.3d at 711. See *Knott*, 256 F.3d at 29 ("We hold 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.").

The court of appeals therefore correctly held that "[t]he starting point," Pet. App. 41, for awarding fees under the bad-faith prong (as under any prong) is an evaluation of the objective merits of the prosecution. If a court finds that the relevant charges were supported by the evidence or otherwise did not exceed "constitutional constraints," *id.* at 30 (quoting *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996)), that is the end of the inquiry under any of the Hyde Amendment prongs. Conversely, when a court concludes that a prosecution was *not* objectively reasonable, it must then consider whether the defendant has adduced evidence that the prosecution was vexatious, frivolous, or in bad faith.[2]

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[2] Contrary to amici's representation, the government did not "implicitly acknowledge[] * * * that subjective bad faith justifies sanctions under the Hyde Amendment." Former Fed. Judges Amicus Br. 6. Although the government contended that the district court erred in attributing the filing of the superseding indictment to Cronin's animus towards defense counsel, it consistently argued that the charges in the superseding indictment were justified by the evidence and the

Each prong of the Hyde Amendment requires a defendant to make a different *additional* showing after establishing that the prosecution was not based on probable cause. In order to establish frivolousness, for example, a defendant must show not only that a prosecution was objectively unreasonable, but also that the government's position was "so obviously wrong that no reasonable prosecutor could have supported it." *Knott*, 256 F.3d at 29. That is a higher objective showing of unreasonableness than is required to prove either vexatiousness or bad faith. A defendant may establish that a prosecution was vexatious or in bad faith if he shows that it lacked probable—but he *also* has to show that the prosecution was based on an improper motive (*e.g.*, an intent to harass for vexatiousness or a dishonest purpose and moral obliquity for bad faith). Because each prong requires proof of something the others do not, none is superfluous.

Amici err in relying (Former Fed. Judges Amicus Br. 8 n.3, 11) on this Court's interpretation of the term "bad

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government's reasonable litigation strategy. See Gov't C.A. Br. 38, 41-42; Gov't C.A. Reply Br. 10; see also Gov't C.A. Br. 48 (arguing that discovery violations and errors in the collateral investigation "do not call into question the legitimacy of the prosecution" and do not represent the position of the United States as a whole); Gov't C.A. Reply Br. 12 (arguing that, "[b]ecause the collateral investigation, even if conducted in 'bad faith' * * * , did not result in a bad-faith or vindictive prosecution of [petitioner], this Court need not review the district court's findings as to the prosecutors' motives in conducting that investigation"). Nor did the government "expressly acknowledge[] that the collateral investigation warranted Hyde Amendment sanctions," Former Fed. Judges Amicus Br. 7 n.2, when, in recognition of its mistakes, the government volunteered to pay the fees and costs that petitioner had incurred as a result of the collateral investigation and to waive its legal defenses under the Hyde Amendment to paying that portion of petitioner's fees and costs.

faith" outside the criminal context to support their argument that Hyde Amendment sanctions are warranted for the government's "subjective bad faith" alone. In doing so, amici fail to acknowledge that the Hyde Amendment is a partial waiver of sovereign immunity that must be "strictly construed, in terms of its scope, in favor of the sovereign." *Lane* v. *Pena*, 518 U.S. 187, 192 (1996). Accordingly, "[a]ny ambiguities in the statutory language are to be construed in favor of immunity," and "[a]mbiguity exists if there is a plausible interpretation of the statute that would not authorize money damages against the Government." *F.A.A.* v. *Cooper*, 132 S. Ct. 1441, 1448 (2012) (internal citations omitted).

Amici's construction of the Hyde Amendment is also not compelled by its plain language. "Bad faith" does not uniformly refer to subjective intent alone. On the contrary, in awarding fees under the "bad faith" exception to the "American Rule" prohibiting fee shifting, some courts have required that the losing party's claim be both "entirely without color *and* * * * asserted wantonly, for purposes of harassment or delay, or for other improper reasons." *FTC* v. *Freedom Commc'ns, Inc.*, 401 F.3d 1192, 1201 (10th Cir. 2005); accord *First Bank of Marietta* v. *Hartford Underwriters Ins. Co.*, 307 F.3d 501, 524 (6th Cir. 2002); *Sierra Club* v. *United States Army Corps of Eng'rs*, 776 F.2d 383, 390 (2d Cir. 1985), cert. denied, 475 U.S. 1084 (1986); *McCandless* v. *Great Atl. & Pac. Tea Co., Inc.*, 697 F.2d 198, 200 (7th Cir. 1983).

Although Congress used EAJA as a starting point when it drafted the Hyde Amendment, it did *not* incorporate the EAJA provision that waives the United States' sovereign immunity for fees and costs "to the same extent that any other party would be liable under

the common law or under the terms of any statute which specifically provides for such an award." 28 U.S.C. 2412(b). That choice displays a specific intent not to incorporate background rules found in the common law and other fee-shifting statutes. In addition, even the EAJA provision that Congress did use as a model (before substituting a more rigorous standard) contains an objective standard. See *Pierce* v. *Underwood*, 487 U.S. 552, 565 (1988) ("substantially justified" means "justified to a degree that could satisfy a reasonable person"); *id.* at 566 n.2 ("a position can be * * * substantially * * * justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact").

As the court of appeals explained, if petitioner and his amici were correct that subjective bad faith alone is sufficient to entitle a defendant to a Hyde Amendment award, then a defendant could obtain fees *more* easily under the Hyde Amendment than a prevailing party could under EAJA's "substantially justified" standard. In fact, however, "Congress intended the opposite." Pet. App. 32; see *Truesdale*, 211 F.3d at 910 ("Because Appellants failed even to establish that the government's prosecution of them was not substantially justified, they cannot establish that the prosecution was vexatious, frivolous, or in bad faith."); *United States* v. *Pease*, 137 Fed. Appx. 220, 226 (11th Cir. 2005) ("[B]ecause the Government's position with regard to the Rule 36 matter was substantially justified, [defendant] has not shown that it was vexatious, frivolous, or pursued in bad faith.").

d. Petitioner is also incorrect in arguing (Pet. 18-20) that the court of appeals' decision conflicts with this Court's decision in *Commissioner, INS* v. *Jean*, 496 U.S.

154 (1990). Petitioner apparently interprets (see Pet. 19) the court of appeals' decision to preclude consideration of any post-indictment government misconduct. But that is not what the court of appeals held. If the court had concluded that the government pursued charges that objectively lacked a legitimate basis, it would have considered the government's post-indictment conduct in determining whether the position of the United States was vexatious, frivolous, or in bad faith. See Pet. App. 156-157 (Pryor, J., respecting the denial of rehearing en banc) ("It is not difficult to imagine a prosecution that begins with objectively reasonable charges and later becomes unreasonable to prosecute.").[3]

The court of appeals' decision is also consistent with this Court's holding in *Jean* that, in determining whether the position of the United States is "substantially justified" under EAJA, "only one threshold determination for the entire civil action" is made. *Jean*, 496 U.S. at 159; see *id.* at 161-162 (explaining that, "[w]hile the parties' postures on individual matters may be more or less justified," EAJA's substantial-justification test "favors treating a case as an inclusive whole, rather than as atomized line-items"). Applying the *Jean* standard, the

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[3] Petitioner errs in relying (Pet. 17-18) on a legislative-history statement by Representative Hyde in support of his contention that the Hyde Amendment inquiry does not depend on whether a prosecution lacked probable cause. The statement petitioner relies on referred to an earlier (never enacted) version of the Hyde Amendment that incorporated EAJA's "substantially justified" standard and was rejected as too lenient. See Pet. App. 158-159 (Pryor, J., respecting denial of rehearing en banc) (noting that Representative Hyde's other comments "referred to instances where an entire prosecution is wrong" and "support the view that the Amendment applies only to wrongful prosecutions, not isolated wrongs during reasonable prosecutions").

court of appeals criticized the district court for failing to consider "the overall litigating position" of the United States and rejected the district court's conclusion that discovery violations *alone* can justify a Hyde Amendment award. Pet. App. 36; see also *id.* at 154 (Pryor, J., respecting denial of rehearing en banc) ("The term 'position of the United States' refers broadly to the overall litigating position of the United States, not to isolated instances of misconduct in an otherwise justifiable prosecution."). Petitioner, in contrast, contravenes *Jean* by focusing on particular errors to the exclusion of considering the reasonable basis for the case as a whole. See Pet. App. 157 (Pryor, J., respecting denial of rehearing en banc) (criticizing the dissent from denial of rehearing en banc for "rest[ing] its case on alleged discovery violations related to two witnesses' roles in a collateral investigation" and "fail[ing] to explain how these alleged wrongs represent the entire 'position of the United States'").

e. Petitioner is also incorrect (Pet. 20-24) that the court of appeals' decision conflicts with decisions of other courts of appeals. Petitioner does not identify even one case in which a court of appeals has upheld an award of fees under the Hyde Amendment when a prosecution was objectively reasonable. On the contrary, in the handful of cases in which courts of appeals have affirmed fee awards (or reversed district courts' orders denying fees), the government had initiated or pursued prosecutions that lacked factual or legal support. See *Braunstein*, 281 F.3d at 996-997; *United States* v. *DeJong*, 26 Fed. Appx. 626, 627-628 (9th Cir. 2001); *United States* v. *Adkinson*, 247 F.3d 1289, 1292-1293 (11th Cir. 2001). That comports with the Eleventh Circuit's view that a prosecution's objective unreasonable-

ness is a prerequisite to a fee award under the Hyde Amendment.

Petitioner identifies decisions of the Second, Eighth, and Ninth Circuits that considered the government's post-charging conduct to determine whether a prosecution was vexatious or in bad faith. See Pet. 20-21 (citing *Schnieder*, 395 F.3d at 88; *Porchay*, 533 F.3d at 711; *Manchester Farming P'ship*, 315 F.3d at 1185-1186). But that approach is perfectly consistent with the court of appeals' approach in this case, which would have considered such conduct if petitioner had established that the prosecution was objectively unreasonable. None of the cases petitioner relies on from other courts of appeals holds that a defendant is entitled to a Hyde Amendment award when the prosecution is supported factually and legally but the prosecutor is motivated by personal animus towards the defense.[4]

2. Finally, the policy arguments advanced by petitioner and his amici (see Pet. 24-28; Former Fed. Judges Amicus Br. 13-20; NACDL Amicus Br. 3-12) provide no basis for granting the petition for a writ of certiorari. Petitioner asserts that the court of appeals' decision eliminates "the *only* meaningful mechanism by which a judge can protect the integrity of his or her courtroom," Pet. 27, and urges this Court to restore the Hyde Amendment's effectiveness as a sanction against prosecutorial misconduct. But the Hyde Amendment is effective at addressing the severe prosecutorial misconduct by the United States at which it aims. It is a partial waiver of the United States' sovereign immunity and

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[4] Petitioner also cites Pet. 22-23) federal district court cases that he asserts conflict with the decision below. District court decisions are not precedential and therefore do not establish a conflict warranting this Court's review. See Sup. Ct. R. 10(a).

does not seek to address all misconduct that might occur in a prosecution.[5] Still less is it a mechanism for "controlling and managing" compliance with orders related to discovery or the "'orderly and expeditious disposition of cases.'" Former Fed. Judges Amicus Br. 13-15 (quoting *Chambers* v. *NASCO, Inc.*, 501 U.S. at 32, 43 (1991)). Courts have other tools for sanctioning such noncompliance. See Pet. App. 146-147 (Pryor, J., respecting denial of rehearing en banc) ("Traditional sanctions exist for discrete wrongs like discovery violations that occur during an otherwise reasonable prosecution, but an award of attorney's fees under the Hyde Amendment is not one of those sanctions.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5] In fact as the district court recognized, a court has an array of sanctions available for the purported misconduct that occurred in this case. See Pet. App. 139 (identifying available sanctions as including contempt citations, fines, public reprimands, suspension from the court's bar, recommendations to bar associations to take disciplinary actions, and removal from office).