No. 20-____

IN THE

Supreme Court of the United States

MARIO NELSON REYES-ROMERO,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Hyde Amendment authorizes a district court to award attorney's fees and costs to a prevailing criminal defendant "where the court finds that the position of the United States was vexatious, frivolous, or in bad faith." Pub. L. No. 105-119, title VI, § 617, 111 Stat. 2519 (1997), reprinted at 18 U.S.C. § 3006A, historical and statutory notes. Congress modeled the Hyde Amendment on the Equal Access to Justice Act (EAJA), which defines "position of the United States" to mean, "in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based." 28 U.S.C. § 2412(d)(2)(D). Congress also provided that Hyde Amendment "awards shall be granted pursuant to the procedures and limitations … provided for an award under [EAJA]." Hyde Amendment.

The circuit courts have divided 2–4 over whether the "position of the United States" under the Hyde Amendment is limited to the Department of Justice's litigating position or whether it also encompasses the conduct of non-prosecutor government agencies or employees. Here, the Third Circuit reversed the district court's award, which was based primarily on Department of Homeland Security officials' egregious misconduct in removing Petitioner from the country, including apparently forging documents purporting to waive Petitioner's right to a removal hearing, because it held that only the prosecutor's position was relevant.

The question presented is: Does the Hyde Amendment inquiry into whether "the position of the United States was vexatious, frivolous, or in bad faith" encompass actions of non-prosecutor government employees underlying the criminal case?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding below were Petitioner Mario Nelson Reyes-Romero and Respondent United States of America. There are no nongovernmental corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

RELATED PROCEEDINGS

United States District Court (W.D. Pa.):

United States v. Mario Nelson Reyes-Romero, No. 2:17-cr-00292 (July 2, 2018, and Mar. 6, 2019)

United States Court of Appeals (3d Cir.):

United States v. Mario Nelson Reyes-Romero, No. 19-1923 (May 19, 2020), rehearing denied (June 26, 2020)

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INTRODUCTION

This case presents a circuit split on a discrete question of statutory construction: Does the "position of the United States" under the Hyde Amendment, which allows courts to award attorney's fees and expenses to prevailing criminal defendants where that position was "vexatious, frivolous, or in bad faith," encompass the conduct of non-prosecutor government agencies or employees underlying the prosecution? The First and Sixth Circuits say yes. The Second, Ninth, and Eleventh Circuits, joined by the Third Circuit here, say no. And the difference in interpretation has significant consequences. As the opinions below show, the answer to the question presented can spell the difference between giving district courts a tool to deter abusive government conduct and make defendants and their attorneys whole, on the one hand, and leaving trial judges with mere exhortation to correct government misconduct, on the other.

Congress enacted the Hyde Amendment in 1997 in response to the concern that even successful defendants wrongfully subjected to criminal prosecution would be unable to rebuild their reputations or finances. *See, e.g.*, *United States v. Gilbert*, 198 F.3d 1293, 1299–1303 (11th Cir. 1999). The amendment authorizes a district court to award attorney's fees and costs to a prevailing criminal defendant "where the court finds that the position of the United States was vexatious, frivolous, or in bad faith." Pub. L. No. 105-119, title VI, § 617, 111 Stat. 2440, 2519 (1997), reprinted at 18 U.S.C. § 3006A, historical and statutory notes. Congress patterned the Hyde Amendment on the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412, not only by using similar wording but also by

expressly providing that Hyde Amendment "awards shall be granted pursuant to the procedures and limitations (but not the burden of proof) provided for an award under [EAJA]." Hyde Amendment.

As centrally relevant here, EAJA expressly defines "position of the United States" much more broadly than the Department of Justice's litigating position to include "the action or failure to act by the agency upon which the civil action is based." 28 U.S.C. § 2412(d)(2)(D). That definition applies to the Hyde Amendment as well: not only do such terms of art carry their "soil" with them, *Stokeling v. United States*, 139 S. Ct. 544, 551 (2019), but Congress expressly provided that EAJA's "limitations" would carry over to the Hyde Amendment. Unsurprisingly, the First and Sixth Circuits have understood the Hyde Amendment inquiry to necessarily encompass misconduct of government agents beyond prosecutors. *See United States v. Knott*, 256 F.3d 20, 28 (1st Cir. 2001); *United States v. Heavrin*, 330 F.3d 723, 730 (6th Cir. 2003).

But the Second, Ninth, and Eleventh Circuits, joined by the Third Circuit here, disagree. As the Third Circuit put it, "the 'position of the United States' for purposes of the Hyde Amendment refers only to the position taken by the department and officers charged with administering the prosecution." App. 31a–32a. In the court's view, the Hyde Amendment does not incorporate EAJA's definition. App. 29a–30a. But the court offered little more than conclusory analysis, and did not explain how its view was consistent with the Hyde Amendment's further provision that "[f]ees and other expenses … shall be paid by the agency over which the party prevails from any funds

made available to the agency by appropriation." Hyde Amendment.

The circuit disagreement goes to the core of the Hyde Amendment and whether district judges have adequate tools to curb government abuse—indeed, here, it was outcome-determinative. In this case, the government prosecuted Petitioner Mario Reyes-Romero, a noncitizen, for illegal reentry, in violation of 8 U.S.C. § 1326. But—all agree—that prosecution rested on the validity of a 2011 order of removal under which Mr. Reyes-Romero was deported. App. 29a; *see* 8 U.S.C. § 1326(d). And—all further agree—that removal order resulted from an indefensible proceeding in which Department of Homeland Security (DHS) officials "railroaded Reyes-Romero out of the country" with contradictory forms on which "he supposedly signed away his rights before he was charged and before those rights were read to him in Spanish." App. 88a; *see* App. 29a. The district court found that the DHS officers' conduct was "egregious" and "demonstrated a level of law enforcement outrageousness [he] ha[d] not seen in any other case since [he] ha[d] been a federal judge." App. 70a–71a. Thus, after dismissing the indictment, the district court awarded Mr. Reyes-Romero fees and expenses under the Hyde Amendment. App. 80a–81a, 110a.

The court of appeals reversed. In its view, the Hyde Amendment does not incorporate EAJA's definition of "position of the United States," and that term in "the Hyde Amendment refers only to the position taken by the department and officers charged with administering the prosecution"—*i.e.*, not the DHS officials who "railroaded Reyes-Romero out of the country." App. 31a–32a; *see* App. 88a. Consequently, even

though the court of appeals "share[d] the District Court's view that Reyes-Romero's 2011 expedited removal proceeding deviated from the ordered, sensible process we demand of those who enforce the nation's immigration laws," it held that "alleged misconduct by DHS or its officers cannot independently create liability for attorney's fees and costs." App. 32a, 53a. And because the court of appeals went on to find that the prosecutor's own conduct was not "vexatious, frivolous, or in bad faith," App. 19a–20a, it held that "there can be no Hyde Amendment liability," App. 53a.

The question presented is important. For starters, the Hyde Amendment should not apply differently in Pennsylvania (Mr. Reyes-Romero's case), Florida (*United States v. Shaygan*, 652 F.3d 1297, 1311–12 (11th Cir. 2011)), or other states than it does in Massachusetts (*Knott* (1st Cir.)) or Kentucky (*Heavrin* (6th Cir.)). What's more, permitting the lower courts to continue without this Court's guidance (let alone allowing four circuits to carve off non-prosecutor misconduct) undermines congressional intent, the effective enforcement of the Hyde Amendment, and public confidence in the administration of justice. This Court has warned that while a prosecutor "may strike hard blows, he is not at liberty to strike foul ones." *Berger v. United States*, 295 U.S. 78, 88 (1935). But a blow is just as foul when it results from non-prosecutor governmental misconduct underlying the prosecution as when it results from the prosecutor alone.

This case cleanly presents a circuit split on an important question of statutory interpretation. The Court should grant review to resolve it.

OPINIONS BELOW

The court of appeals' opinion (App. 1a–53a) is reported at 959 F.3d 80. The district court's Hyde Amendment opinion (App. 54a–120a) is reported at 364 F. Supp. 3d 494, and its opinion dismissing the indictment (App. 121a–210a) is reported at 327 F. Supp. 3d 855.

JURISDICTION

The court of appeals entered judgment on May 19, 2020, App. 1a, and denied rehearing and rehearing en banc on June 26, 2020, App. 211a. By order of March 19, 2020, this Court extended the deadline for all petitions for writs of certiorari due on or after the date of the Court's order to 150 days from denial of rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Hyde Amendment provides:

> During fiscal year 1998 and in any fiscal year thereafter, the court, in any criminal case (other than a case in which the defendant is represented by assigned counsel paid for by the public) pending on or after the date of the enactment of this Act [Nov. 26, 1997], 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. To determine whether or not to award fees and costs under this section, the court, for good cause shown, may receive evidence ex parte and in camera (which shall include the submission of classified evidence or evidence that reveals or might reveal the identity of an informant or undercover agent or matters occurring before a grand jury) and evidence or testimony so received shall be kept under seal. Fees and other expenses awarded under this provision to a party shall be paid by the agency over which the party prevails from any funds made available to the agency by appropriation. No new appropriations shall be made as a result of this provision.

Pub. L. No. 105-119, title VI, § 617, 111 Stat. 2440, 2519 (1997), reprinted at 18 U.S.C. § 3006A, historical and statutory notes.

EAJA provides, in relevant part:

> **(d)(1)(A)** Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

…

(2) For the purposes of this subsection—

…

> **(C)** "United States" includes any agency and any official of the United States acting in his or her official capacity;
>
> **(D)** "position of the United States" means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based; except that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings;

…

(4) Fees and other expenses awarded under this subsection to a party shall be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise.

….

STATEMENT

The question in this case is whether courts may consider the conduct of non-prosecutor government agents, or whether they must instead assess only the Department of Justice's litigation position, in determining whether "the position of the United States was vexatious, frivolous, or in bad faith." Hyde Amendment. The Third Circuit here, to reverse the district court's award of fees based on DHS agents' misconduct, held that the inquiry looks "only to the position taken

by the department and officers charged with administering the prosecution." App. 31a–32a. Although that holding aligns with the views of the Second, Ninth, and Eleventh Circuits, it conflicts with the approach of the First and Sixth Circuits.

The Third Circuit's holding was outcome-determinative. Whereas the district court rested its award of fees and expenses centrally on the DHS officers' "egregious" conduct, App. 70a, the Third Circuit held that the district court should have looked to prosecutorial conduct alone. And because it found that the prosecutor had not acted frivolously, vexatiously, or in bad faith, notwithstanding the DHS agents' actions, the Third Circuit reversed the Hyde Amendment award. App. 32a–33a, 53a.

1. a. The Hyde Amendment permits an award of attorney's fees in favor of a criminal defendant "where the court finds that the position of the United States was vexatious, frivolous, or in bad faith." The amendment further provides that "[f]ees and other expenses … shall be paid by the agency over which the party prevails from any funds made available to the agency by appropriation."

Congress enacted the Hyde Amendment in 1997 to respond to the risk that even successful defendants wrongfully subjected to criminal prosecution would never be able to regain their reputations or rebuild their finances. *See, e.g.*, *Gilbert*, 198 F.3d at 1299–1303 (canvassing legislative history). Members of Congress referred in particular to the recent acquittals of one of their former colleagues as well as a former Secretary of Labor. *Id.*; *see* 143 Cong. Rec. H7786, H7791 (daily ed. Sept. 24, 1997) (statement of Rep. Henry Hyde, Chairman, H. Comm. on Judiciary). And

Representative Hyde explained that the law would address government wrongdoing including where the government "keep[s] information from you that the law says they must disclose"; "hide[s] information"; and "suborn[s] perjury." 143 Cong. Rec. at H7791. A conference report added that "a grand jury finding of probable cause to support an indictment does not preclude a judge from finding that the government's position was vexatious, frivolous or in bad faith." H.R. Rep. No. 105-405, at 194 (1997) (Conf. Rep.).

b. The Hyde Amendment does not define key terms, but Congress patterned the amendment on the Equal Access to Justice Act, 28 U.S.C. § 2412, *see, e.g.*, *Gilbert*, 198 F.3d at 1300, which does. EAJA requires a court to "award to a prevailing party other than the United States fees and other expenses … incurred by that party in any civil action … , unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A). As with the Hyde Amendment, "Congress' aim" with EAJA "was 'to ensure that certain individuals, partnerships, corporations … or other organizations will not be deterred from seeking review of, or defending against, unjustified governmental action because of the expense involved.'" *Scarborough v. Principi*, 541 U.S. 401, 407 (2004) (quoting H.R. Rep. No. 99-120, at 4 (1985)). EAJA thus helps to "reduce[] the disparity in resources between individuals … and the federal government." H.R. Rep. No. 99-120, at 4. Although Congress in the Hyde Amendment shifted the burden to the defendant and raised the required showing, *see, e.g.*, *Knott*, 256 F.3d at 28, it otherwise provided that "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." Hyde Amendment.

EAJA defines "position of the United States" to mean, "in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based." 28 U.S.C. § 2412(d)(2)(D). Congress added this definition in 1985 to make clear that "position of the United States" includes both the government's litigation position as well as prelitigation agency conduct. *See generally, e.g.*, Gregory C. Sisk, *The Essentials of the Equal Access to Justice Act: Court Awards of Attorney's Fees for Unreasonable Government Conduct (Part Two)*, 56 La. L. Rev. 1, 6–8 (1995). Consistent with "Congress' emphasis on the underlying Government action," the definition thus "may encompass both the agency's prelitigation conduct and the Department of Justice's subsequent litigation positions," even though courts make "only one threshold determination for the entire civil action." *Commissioner, INS v. Jean*, 496 U.S. 154, 159 & n.7 (1990).

Under *Jean*, courts must "treat[] a case as an inclusive whole, rather than as atomized line-items." *Id.* at 162. Consequently, courts must consider the totality of the circumstances, including "the reasonable overall objectives of the government and the extent to which the alleged governmental misconduct departed from them." *Roanoke River Basin Ass'n v. Hudson*, 991 F.2d 132, 139 (4th Cir. 1993). Where government misconduct is sufficiently egregious, it may, "even if confined to a narrow but important issue, taint the government's 'position' in the entire case as unreasonable." *Id.*

The question presented here is whether the Hyde Amendment incorporates EAJA's definition of "position of the United States" such that courts must consider governmental misconduct not only in, but also underlying, the prosecution.

2. a. In 2011, Mr. Reyes-Romero was removed from the United States to El Salvador after an expedited administrative removal proceeding. App. 3a–5a. Mr. Reyes-Romero's removal was the basis for the prosecution giving rise to this petition.

As relevant here, Trushant Darji and Jose Alicea, the two Department of Homeland Security officers who conducted Mr. Reyes-Romero's removal proceeding, served Mr. Reyes-Romero with two forms. But the times indicated on the forms, plus Mr. Reyes-Romero's apparent selections, made no sense.

First, the officers served Mr. Romero with Form I-826—the wrong form, because it does not apply to noncitizens in expedited administrative removal proceedings. App. 4a, 59a. The completed form, bearing a time of service of 9:00 am on June 23, 2011, indicated that Mr. Reyes-Romero *both* requested a hearing *and* surrendered his rights to a hearing. App. 4a–5a, 59a.

Second, the officers served Mr. Romero with Form I-851—the correct form. On this form, Mr. Reyes-Romero apparently conceded that he was removable. App. 5a, 60a. But the annotation for time of service in Spanish (9:20 am on June 23, 2011) suggested that the form was served *forty minutes before it was issued*, according to the annotation by the "Signature and Title of Issuing Officer." App. 5a, 60a. The form further indicated that Mr. Reyes-Romero waived his rights *still twenty minutes earlier* (at 9:00 am on June 23, 2011).

App. 5a, 60a–61a. The check marks by which Mr. Reyes-Romero apparently waived his rights to a hearing matched the officer's check mark on the certificate of service. App. 61a, 115a. In contrast, the request for a hearing on the Form I-826 was marked with an X. App. 61a, 112a.

That afternoon, Mr. Reyes-Romero received a final administrative removal order. He was later removed to El Salvador. App. 5a.

b. In October 2017, after Mr. Reyes-Romero returned to the United States, the government indicted him for unlawful reentry, in violation of 8 U.S.C. § 1326. App. 5a–6a, 56a. Mr. Reyes-Romero moved to dismiss under § 1326(d), contending that he had not intelligently waived his rights in the 2011 removal proceeding. App. 6a, 56a, 61a. Under § 1326(d), a noncitizen may "challenge the validity of the deportation order" on which the prosecution rests by showing that (1) he "exhausted any administrative remedies that may have been available to seek relief against the order"; (2) "the deportation proceedings at which the order was issued improperly deprived [him] of the opportunity for judicial review"; and (3) "the entry of the order was fundamentally unfair." 8 U.S.C. § 1326(d); *see also United States v. Mendoza-Lopez*, 481 U.S. 828, 842 (1987) ("Because respondents were deprived of their rights to appeal, and of any basis to appeal since the only relief for which they would have been eligible was not adequately explained to them, the deportation proceeding in which these events occurred may not be used to support a criminal conviction, and the dismissal of the indictments against them was therefore proper."). Mr. Reyes-Romero argued that the con-

tradictory forms and inconsistent selections invalidated any waiver of his rights and that the government's apparent misconduct rendered his proceeding fundamentally unfair. Mr. Reyes-Romero further argued that he had established prejudice: because he had not committed an aggravated felony, he was entitled in 2011 to a full hearing before an immigration judge. App. 6a.

The district court held an initial two-day hearing. App. 7a, 57a. The government called Officers Darji and Alicea, who claimed to have no memory of Mr. Reyes-Romero or his removal proceeding. App. 8a, 62a–64a. Their testimony, in the words of the district court, "was, at key points, internally inconsistent, contradictory in comparison with the content of the Forms, and simply nonsensical." App. 62a. Among other things, both officers testified that noncitizens like Mr. Reyes-Romero were read their rights in Spanish only *after* they signed waivers. App. 63a–64a. Even after this testimony, the government continued to argue that Mr. Reyes-Romero had validly waived his rights. App. 65a.

In January 2018, the district court tentatively found that Mr. Reyes-Romero had not voluntarily and intelligently waived his rights in the 2011 removal proceedings. App. 68a. The parties then began to litigate the remaining question of prejudice. App. 9a, 68a.

In February 2018, however, the government filed its own motion to dismiss the indictment, based in part on additional information it said it had discovered supporting Mr. Reyes-Romero's arguments in support of relief from removal. App. 10a, 69a. In the weeks that followed (Mr. Reyes-Romero opposed the

government's motion given concerns that the government would reinstate his 2011 removal order for future use, App. 10a, 70a), the government produced color copies of Mr. Reyes-Romero's I-826 and I-851 forms (reproduced at App. 117a–119a and 205a–207a). *See also supra* pp. 11–12. The color I-826 revealed that the officer who signed the form likely also filled in the box waiving Mr. Reyes-Romero's rights. App. 12a, 75a.

The district court granted Mr. Reyes-Romero's motion to dismiss. App. 15a, 80a, 120a. The court found that Mr. Reyes-Romero met his burden on all three elements of his § 1326(d) defense because any failure to exhaust (1) administrative remedies or (2) judicial review must be excused given the invalid waivers, and (3) Mr. Reyes-Romero had shown prejudice because his claims for relief from removal were reasonably likely to succeed and, in any event, that the procedural defects were so grave that prejudice must be presumed. App. 15a, 80a, 126a; *see United States v. Charleswell*, 456 F.3d 347, 358, 362 n.17 (3d Cir. 2006) ("fundamental[] unfair[ness]" requires a fundamental defect resulting in prejudice, "[b]ut some procedural defects may be so central or core to a proceeding's legitimacy … that prejudice may be presumed" (cleaned up)).

3. Mr. Reyes-Romero then filed a Hyde Amendment application for attorney's fees, which the district court granted. App. 17a, 55a–56a.

The district court began by setting out the relevant standard: *First*, "when assessing whether the 'position of the United States was vexatious, frivolous, or in bad faith,' the district court should … make only one finding, which should be based on the 'case as an inclusive whole.'" App. 83a (quoting *Heavrin*, 330 F.3d

at 730 (6th Cir.) (quoting *Jean*, 496 U.S. at 162)). Under that test, the court explained, "[e]ven if the district court determines that part of the government's case has merit, the movant might still be entitled to a Hyde Amendment award if the court finds that the government's 'position' as a whole was vexatious, frivolous, or in bad faith." App. 83a–84a (quoting *Heavrin*, 330 F.3d at 730).

Second, the district court held that the inquiry into "the position of the United States" required examination of both "the litigation position of the DOJ" and "the actions taken (or not taken) by the federal agency upon which the criminal case is based"—*i.e.*, the DHS officers. App. 85a. The court reasoned that the Hyde Amendment incorporates EAJA's "procedures and limitations," including EAJA's definition of the "position of the United States" as including "the action or failure to act by the agency upon which the civil action is based." App. 85a n.22 (quoting 28 U.S.C. § 2412(d)(2)(D)). And here, the court held, "the actions of the DHS Officers in 2011 are part and parcel with the DOJ's 2017 criminal indictment" and "[t]he 2011 Removal Order was a necessary element to the criminal charge." App. 86a. Consequently, the DHS officers' conduct in the 2011 removal proceedings had "to be considered in the Court's examination of the position 'of the United States.'" App. 87a.

Applying these principles, the district court found that "the position of the United States was both frivolous and in bad faith." App. 87a n.25. The court found that the government "plainly railroaded Reyes-Romero out of the country in 2011" with forms on which "he supposedly signed away his rights before he was charged and before those rights were read to him

in Spanish." App. 88a. In the court's view, "[t]here is no plausible 'benign' explanation for the manner (and order) in which the Forms were completed." App. 90a–91a. Thus, the officers' 2011 conduct alone "had no basis in law and easily meets the definition of frivolous." App. 88a. The court further concluded that DHS had color copies at the beginning of the prosecution but failed to submit them to the prosecution even when those very forms became the central issue in the case—"a clear implication of conscious wrongdoing." App. 103a. In addition, in the district court's view, the officers' 2018 testimony about the 2011 removal proceeding "demonstrate[d] clear bad faith." App. 89a. The court concluded that the officers' conduct "demonstrated a level of law enforcement outrageousness [he had] not seen in any other case since [he had] been a federal judge." App. 71a.

Beyond the officers' conduct, the district court determined that the prosecution's position was also frivolous and in bad faith. App. 91a. The court explained that, among other things, the prosecution had relied on the invalid waivers even after the DHS officers' nonsensical testimony and said it could not speak for DHS. App. 91a–93a.

The district court acknowledged that the prosecution's prejudice arguments "were largely reasonable and based in law." App. 106a. Even so, the court explained, "[t]he Government's ability not to commit misconduct during that one segment of this case does not override the multiple episodes of established misconduct, considering the proceeding as one inclusive whole." App. 108a (citing *Heavrin*, 330 F.3d at 730).

The district court ordered the United States to pay Mr. Reyes-Romero's costs and attorney's fees, calculated at $73,757. App. 18a.

4. a. The Third Circuit reversed. As centrally relevant here, the court held that the district court should have focused only on the prosecutor's conduct and not on the conduct of the DHS officers. App. 28a–29a. In the court of appeals' view, "the Hyde Amendment is not a tool to combat misconduct by the federal government writ large," but instead only a provision for a "criminal case." App. 28a. The court cited decisions from the Second, Eighth, and Ninth Circuits as "shar[ing] that view." App. 28a (citing *United States v. Bove*, 888 F.3d 606, 608 (2d Cir. 2018), *cert. denied*, 139 S. Ct. 1274 (2019); *United States v. Monson*, 636 F.3d 435, 439–40 (8th Cir. 2011); *United States v. Mixon*, 930 F.3d 1107, 1111 (9th Cir. 2019)). To reach that result, the court of appeals held (with meager reasoning) that the Hyde Amendment does not incorporate EAJA's definition of the "position of the United States" because EAJA's definition is not a "procedure[]" or "limitation[]." App. 29a–30a. And, having carved the conduct of the DHS officers from the analysis, the Third Circuit held that the prosecutor's own conduct was not frivolous or in bad faith. App. 32a–33a.

b. On June 26, 2020, the court of appeals denied Mr. Reyes-Romero's petition for rehearing. App. 212a–213a.

This petition follows.

REASONS FOR GRANTING THE PETITION

I. The courts of appeals are divided 2–4 over whether the Hyde Amendment incorporates EAJA's definition of "position of the United States."

The circuits are divided 2–4 on the question whether the Hyde Amendment incorporates EAJA's definition of "position of the United States." If it does, then courts may consider actions taken (or not taken) by the federal agency or employees underlying the criminal case. If not, then only the prosecution's conduct matters. There is no sign that the split will resolve itself, and—as here—it can spell the difference between recompense for defense costs incurred by a victim of serious government misconduct and the absence of any remedy at all.

A. The First and Sixth Circuits interpret the Hyde Amendment inquiry to encompass agency misconduct.

Unlike the Third Circuit here—and the Second, Ninth, and Eleventh Circuits, too—the First and Sixth Circuits read the Hyde Amendment to permit consideration of non-prosecutor agency conduct to determine whether "the position of the United States was vexatious, frivolous, or in bad faith."

1. In *Knott*, the First Circuit held that courts may "consider the conduct of the investigation in order to provide a context in which to assess whether a prosecution was 'vexatious' within the terms of the Hyde Amendment." 256 F.3d at 31. The court began by observing that "[t]he Hyde Amendment was patterned after the Equal Access to Justice Act." *Id.* at 28. The Hyde Amendment's statement that awards "shall be

granted pursuant to the procedures and limitations (but not the burden of proof) provided for an award under [the Equal Access to Justice Act]," the court continued, made the Hyde Amendment "differ[]" from EAJA "in at least two important respects," *i.e.*, the standard and burden of proof. *Id.* But the "position" inquiry was not one of them. Reading "the language employed by Congress," the court concluded that a vexatiousness determination must look to "*both* a showing that the criminal case was objectively deficient … *and* a showing that the government's conduct, when viewed objectively, manifests maliciousness or an intent to harass or annoy." *Id.* at 29 (emphases added).

Applying this standard, the First Circuit in *Knott* evaluated the conduct of Environmental Protection Agency (EPA) investigators. *Id.* at 31–33. Specifically, the court addressed whether "their conduct was vexatious" in (1) exceeding the scope of their permission to investigate when they took water samples; (2) potentially altering the annotation of some sampling results; (3) continuing to take water samples at the wrong location; and (4) executing a search warrant in a humiliating manner. *Id.* Although the court ultimately concluded that the evidence was insufficient to show vexatious conduct, it nonetheless assessed the EPA investigators' conduct as an important component of the overall inquiry. *Id.*

2. Consistent with the First Circuit's focus on agency conduct, the Sixth Circuit in *Heavrin* concluded that "the term 'position' should be accorded the same meaning under the Hyde Amendment as it is in the EAJA." 330 F.3d at 730. In particular, the court reasoned that "the Hyde Amendment is subject to the

procedures and limitations of the EAJA." *Id.* Thus, the court explained, a district court should make just one finding based on the case as a whole, *id.* (citing *Jean*, 496 U.S. at 162), meaning that a Hyde Amendment award might be warranted even if "part of the government's case has merit," *id.* The Sixth Circuit remanded so the district court could apply the correct standard to a multicount bankruptcy fraud prosecution where the district court had incorrectly conducted a count-by-count analysis. *Id.* at 730–31.

The Sixth Circuit has subsequently (and recently) reiterated that "the term 'position' should be accorded the same meaning under the Hyde Amendment as it is in the EAJA." *Amezola-Garcia v. Lynch*, 835 F.3d 553, 556 (6th Cir. 2016) (quoting *Heavrin*, 330 F.3d at 730). And under that standard, the court has made clear, "the Government's 'position' comprehends both the underlying agency action and the current litigation," taking into account the government's position "as a whole." *Id.* at 555; *accord Jean*, 496 U.S. at 161–62 (under EAJA, courts must consider the "case as an inclusive whole").

3. The First and Sixth Circuits do not stand alone in looking to agency conduct underlying the criminal prosecution. As the district court here recognized, other district courts have adopted that position too. *See United States v. Holland*, 34 F. Supp. 2d 346, 360 n.25 (E.D. Va. 1999); *United States v. Gardner*, 23 F. Supp. 2d 1283, 1294–95 (N.D. Okla. 1998); *cf. Gray Panthers Project Fund v. Thompson*, 304 F. Supp. 2d 36, 41–42 (D.D.C. 2004) (in EAJA case, relying on *Heavrin* to "make one determination of bad faith concerning the Secretary's pre-litigation conduct"). In

Gardner, for instance, the court concluded that because EAJA is "incorporated into the Hyde Amendment" and both statutes "require fees to be paid by an 'agency,'" the Hyde Amendment "specifically contemplates that the Court will consider actions and events prior to the initiation of litigation." 23 F. Supp. 2d at 1294–95. Consequently, the court looked to "conduct of the IRS, since the Department of Justice is not an 'agency.'" *Id.*

B. The Second, Third, Ninth, and Eleventh Circuits limit the Hyde Amendment analysis to prosecutorial misconduct only.

At odds with the First and Sixth Circuits, the Second, Third, Ninth, and Eleventh Circuits hold that the Hyde Amendment inquiry is limited to prosecutorial misconduct alone.

1. In *Bove*, the Second Circuit held that "the position of the United States" means only "the government's general litigation stance: its reasons for bringing a prosecution, its characterization of the facts, and its legal arguments." 888 F.3d at 608. Despite recognizing that "[t]he Hyde Amendment apparently borrowed the phrase 'position of the United States' from the Equal Access to Justice Act," the court reasoned that "[t]he phrase cannot mean precisely the same thing in both provisions" because it does not "appl[y] exactly in a criminal prosecution." *Id.* at 608 n.10. Consistent with its understanding, the court looked only to whether the prosecutors' theory or conduct was vexatious, frivolous, or in bad faith. *Id.* at 609–12.

2. a. The Eleventh Circuit takes a still narrower view, focusing only on the criminal charges. In

Shaygan, the court held that a defendant must "satisfy[] an objective standard that the legal position of the United States amounts to prosecutorial misconduct." 652 F.3d at 1311–12. The district court, in contrast, had rested a Hyde Amendment award in part on the bad faith of Drug Enforcement Administration (DEA) agents who improperly recorded conversations between witnesses and the defense team. *Id.* at 1304–05, 1307–09. In the district court's view, government misconduct could support a finding of "bad faith even if the commencement of the prosecution was commenced legitimately." *Id.* at 1310, 1315. But the Eleventh Circuit disagreed, holding that "[t]he Hyde Amendment establishes a more stringent standard and applies only to a prosecution *brought* vexatiously, [frivolously, or] in bad faith." *Id.* at 1316 (emphasis added; citation and quotation marks omitted).

b. Judge Martin dissented from the denial of rehearing en banc and sided with the First and Sixth Circuits' approach in *Knott* and *Heavrin*. *United States v. Shaygan*, 676 F.3d 1237, 1245–52 (11th Cir. 2012). In her view, the panel "opinion rewrites the statute by limiting the term 'the position of the United States' to mean only the basis for bringing charges," thus "collaps[ing] the Hyde Amendment inquiry into only a single question: were the charges against the defendant baseless?" *Id.* at 1246, 1250.

Critically, the dissent explained, "Congress adopted the term 'the position of the United States' from the Equal Access to Justice Act." *Id.* at 1251. That term "had acquired a specific meaning" by the time of the Hyde Amendment, such that "an award may properly be based on 'an array of government conduct both before the indictment and during litigation.'"

Id. (quoting *Knott*, 256 F.3d at 31). That conduct must be taken into account when considering the "case as an inclusive whole," *id.* (quoting *Jean*, 496 U.S. at 161–62), and courts "must not fail to see the forest for the trees," *id.* (quoting *Heavrin*, 330 F.3d at 730).

The dissent explained that even though the district court found that the prosecutors did not bring the indictment frivolously or in bad faith, government misconduct, including statements "fabricated" by a DEA agent, plagued the prosecution. *Id.* at 1247–48. The panel's ruling, the dissent warned, "strips our federal trial judges of a rarely needed, but critical tool for deterring and punishing prosecutorial misconduct." *Id.* at 1246. And it "contradicts what Congress said when it passed the Hyde Amendment and renders the statute incapable of doing what Congress intended." *Id.* at 1250.

3. Relying on *Bove*, *Shaygan*, and the Third Circuit's earlier holding in *United States v. Manzo*, 712 F.3d 805 (3d Cir. 2013) (addressing allegations only of prosecutorial misconduct), the Ninth Circuit in *Mixon* likewise concluded that the Hyde Amendment's "position of the United States" inquiry reaches only "the government's litigating position." 930 F.3d at 1111 & n.4. The Ninth Circuit reasoned that Congress enacted the Hyde Amendment "as a method through which to sanction the Government for 'prosecutorial misconduct,'" "not for other types of bad conduct by government employees during the course of an investigation." *Id.* at 1111 (citation omitted). Thus, the court rejected the defendant's arguments based on the conduct of agents from the Federal Bureau of Investigation, Bureau of Prisons, and the Department of Justice's Office of the Inspector General who investigated

her case. *Id.* In the Ninth Circuit's view, "a defendant would not be eligible for attorneys' fees under the Hyde Amendment even if a prosecutor relied on fabricated evidence cooked up by a rogue agent, assuming no independent prosecutorial misconduct." *Id.*

4. The Third Circuit here joined the Second, Ninth, and Eleventh Circuits in focusing narrowly on prosecutorial conduct alone. App. 28a (citing *Bove*, 888 F.3d at 608; *Mixon*, 930 F.3d at 1111). The court of appeals faulted the district court for focusing on "*both* 'the litigation position of the DOJ through th[e] … U.S. Attorney's Office *and* the actions taken (or not taken) by' DHS officers." App. 29a (emphasis in original; quoting App. 85a). Rather than disagree with the district court's finding "that DHS officers 'railroaded [Mr. Reyes-Romero] out of the country in 2011' in a manner that was 'lacking in any reasonable factual or legal basis' and was therefore frivolous," the court of appeals held that the district court should not have rested a Hyde Amendment award on agency misconduct. App. 29a, 31a–32a (quoting App. 88a–89a).

To reach that result, the court of appeals held that the Hyde Amendment does not incorporate EAJA's definition of "position of the United States." App. 29a–30a. First, the court reasoned, that definition "is neither a 'procedure[]' nor a 'limitation[],' so it cannot be read into the Hyde Amendment." App. 30a. Second, the court suggested (without elaboration), it had declined to incorporate EAJA's definition of "position of the United States" in *Manzo*, *id.*—even though the court in *Manzo* addressed only allegations of *prosecutorial* misconduct and so did not address the question presented here, *see* 712 F.3d at 810–14. And finally, the Third Circuit reasoned, while EAJA covers "civil

actions arising from agency enforcement or adjudication," prosecutions like Mr. Reyes-Romero's are "distinct from and collateral to the immigration proceeding." App. 30a–31a.

II. The Hyde Amendment incorporates EAJA's definition of "position of United States" and permits consideration of government misconduct underlying the criminal case.

The Hyde Amendment's text, purpose, and legislative history confirm that the First and Sixth Circuits have taken the correct approach in considering non-prosecutorial conduct as relevant to the "position of the United States." The Third Circuit here erred in concluding that the inquiry is limited to prosecutorial misconduct.

A. Courts uniformly agree that Congress patterned the Hyde Amendment on EAJA. *See, e.g.*, *Knott*, 256 F.3d at 28 (1st Cir.); *Bove*, 888 F.3d at 608 nn.3, 10 (2d Cir.); App. 19a (3d Cir.); *United States v. Truesdale*, 211 F.3d 898, 903–09 (5th Cir. 2000); *Heavrin*, 330 F.3d at 730 (6th Cir.); *Shaygan*, 652 F.3d at 1311–13 (11th Cir.). That choice was consequential. "If a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." *Stokeling*, 139 S. Ct. at 551 (cleaned up; quoting Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947)). That interpretive principle establishes "the premise that when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes." *Smith v. City of Jackson*, 544 U.S. 228, 233 (2005).

And the term “position of the United States” was borrowed from EAJA.

This canon of construction alone should resolve the question presented. When Congress enacted the Hyde Amendment, EAJA defined “position of the United States” to include “the action or failure to act by the agency upon which the civil action is based.” 28 U.S.C. § 2412(d)(2)(D). In addition, EAJA defines “United States” to “include[] any agency or any official of the United States acting in his or her official capacity.” *Id.* § 2412(d)(2)(C). But Congress left nothing to doubt, providing in the Hyde Amendment that “awards shall be granted pursuant to the procedures and limitations (but not the burden of proof) provided for an award under [EAJA].” Hyde Amendment.

Further, as this Court explained in *Jean*, Congress’ use of the word “position” in the singular form in EAJA “buttresses the conclusion that only one threshold determination for an entire civil action is to be made.” 496 U.S. at 159. And that inquiry “may encompass both the agency’s pre-litigation conduct and the Department of Justice’s subsequent litigation positions.” *Id.*; *see id.* at 159 n.7. That reasoning applies with the same force to the Hyde Amendment. Looking at the “position of the United States” as an “inclusive whole,” *id.* at 162, favors assessing what *the government* has done, not just what its *litigators* have done.

B. Interpreting the Hyde Amendment to incorporate EAJA’s definition of “position of the United States” is also the only way to make sense of the statute’s purpose and legislative history. The amendment’s sponsor, Representative Hyde, explained that the amendment “takes the concepts in the Equal Access to Justice Act and applies them in the criminal

context." Comments, Questions, and Answers on the Hyde Amendment, 105th Cong., 2d Sess. (1997). If EAJA "is good for a civil suit," he observed, "why not for a criminal suit?" 143 Cong. Rec. at H7791. If, for example, the government "keep[s] information from you that the law says [it] must disclose," or "hide[s] information," or fails to "disclose exculpatory information to which you are entitled" or "suborn[s] perjury," he said, then "[i]n that circumstance, as in the Equal Access to Justice Act for civil litigation, you should be entitled to your attorney's fees reimbursed and the costs of litigation." *Id.* And a conference report indicated that Congress took a broad view of government misconduct and how it could not be cured by probable cause alone. The report noted that "a grand jury finding of probable cause to support an indictment does not preclude a judge from [awarding attorney's fees.]" H.R. Rep. No. 105-405, at 194.

C. The Third Circuit nonetheless held that the inquiry into the "position of the United States" did not encompass the DHS agents' misconduct because the inquiry is narrowly focused on *prosecutorial* misconduct and does not incorporate EAJA's definition of "position of the United States." App. 28a–32a. That conclusion is unsound.

1. The court of appeals first reasoned that EAJA's definition of "position of the United States" is not a "procedure[]" or limitation[]." App. 30a. But that statement fails as a matter of ordinary English. To "define" is to "mark the limits of"—indeed, the word derives from the French "*finire*," "to limit." *Webster's Third New International Dictionary of the English Language* 592 (1961). As this Court has observed,

"definition is limitation." *Fed. Radio Comm'n v. Nelson Bros. Bond & Mortg. Co. (Station WIBO)*, 289 U.S. 266, 276 (1933).

The "position of the United States" is no exception. Indeed, the definition contains an express limitation, namely, "that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings." 28 U.S.C. § 2412(d)(2)(D). What's more, reading the Hyde Amendment not to incorporate EAJA's definitions would also leave the Hyde Amendment without clear definitions of "fees and other litigation expenses" or even the qualifications for a "party" who may recover fees, despite EAJA's definition of these terms. *See id.* § 2412(d)(2)(A), (B); *Heavrin*, 330 F.3d at 732–33 (applying EAJA's definition of "party" to Hyde Amendment case).

2. The Third Circuit next reasoned that its precedent foreclosed incorporating EAJA's definition of "position of the United States," and that the phrase "'cannot mean precisely the same thing in both' the Hyde Amendment and the EAJA." App. 30a (quoting *Bove*, 888 F.3d at 608 & n.10). Moreover, the court noted, "the EAJA covers a much broader swath of litigation, including civil actions arising from agency enforcement or adjudication." App. 30a.

But those distinctions do not work either. For starters, this Court has recognized that terms incorporated from another statute may be "incorporated *mutatis mutandis*," *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 680 (1986)—that is, "all necessary changes having been made," *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 17 (2000). In addition, the Hyde Amendment provides that

“[f]ees and other expenses awarded … shall be paid *by the agency over which the party prevails*.” Hyde Amendment (emphasis added). The Third Circuit did not explain why its interpretation would not render this language superfluous. The Hyde Amendment’s express language contemplates that agencies will pay fee awards even in the criminal cases to which the amendment applies. It makes no sense that agencies would pay fee awards only for misconduct by the Department of Justice but not for their own malfeasance.

* * *

Given the Hyde Amendment’s clear text, structure, and legislative history, even the Internal Revenue Service has recognized that in criminal tax cases, the Hyde Amendment may provide for fees “against the United States *and its agencies*.” Mem. for Assistant Reg’l Counsel (Criminal Tax) Regarding Attorney’s Fees Awards Under the Hyde Amendment and the Equal Access to Justice Act (EAJA) from Barry J. Finkelstein, Assistant Chief Counsel (Criminal Tax), at 1 (Nov. 12, 1999) (emphasis added), *available at* https://www.irs.gov/pub/irs-wd/0024022.pdf. In the IRS’s view, “[t]he Hyde Amendment applies to the conduct of the investigating agency, as well as Department of Justice prosecutors.” *Id.* For that reason, the IRS itself “may be wholly or partially liable for payment of such awards based on the conduct of its personnel during the underlying criminal investigation and/or referral of a case for prosecution.” *Id.* The IRS has it right.

III. The question presented is important, and this case is an ideal vehicle for resolving it.

A. The question presented is important. To begin, the Hyde Amendment should not apply differently across the United States. Criminal defendants and government agents alike should know whether defendants may recover attorney's fees based on the frivolous, vexatious, or bad faith conduct of government agents underlying a prosecution. The courts of appeals' divergent positions necessitate this Court's guidance.

In addition, the rule the Third Circuit adopted below—and that adopted by the Second, Ninth, and Eleventh Circuits—undermines enforcement of the Hyde Amendment. The Hyde Amendment gives district courts an important tool for shifting costs and fees where the government wrongly forces a defendant to suffer the reputational and financial harm attending a criminal prosecution. *See, e.g.*, *Shaygan*, 676 F.3d at 1246, 1252 (Martin, J., dissenting from denial of reh'g en banc). It makes little sense to withhold that crucial relief just because "the position of the United States was vexatious, frivolous, or in bad faith," Hyde Amendment, based not on misconduct by the prosecutor but instead on misconduct by other government agents. It also sends a concerning message to the public about the integrity of the criminal justice system. Regardless of whether prosecutors or other government agents are responsible for the misconduct, the government's interest in the "criminal prosecution is not that it shall win a case, but that justice shall be done." *Strickler v. Greene*, 527 U.S. 263, 281 (1999) (quoting *Berger*, 295 U.S. at 88). Deterring govern-

mental misconduct is just as important where the defendant suffers at the hands of government agents as when he suffers at the hands of prosecutors.

B. This case is an excellent vehicle for resolving the question presented. The question was squarely decided by both courts below, and it was the crux of the court of appeals' decision to reverse the district court's Hyde Amendment award in favor of Mr. Reyes-Romero. In the court of appeals' view, "the District Court mistakenly extrapolated from errors on the part of DHS to make findings about the prosecution that the record cannot support," App. 27a, because the only question was "the way the prosecution litigated this case," App. 48a. The Third Circuit asked only whether "reasonable minds may differ about precisely how the prosecution should have reacted." App. 53a.

Under the First and Sixth Circuits' (and the district court's) rule, however, no such "extrapolat[ion]" is required. The DHS officers' misconduct is relevant in its own right. And the Third Circuit did not disagree with the district court's assessment "that DHS officers 'railroaded [Mr. Reyes-Romero] out of the country in 2011' in a manner that was 'lacking in any reasonable factual or legal basis' and was therefore frivolous." App. 29a (quoting App. 88a–89a). Nor did the court of appeals disagree that "a previous removal order is 'a necessary element to the [§ 1326] charge.'" App. 30a (quoting App. 86a). Reversal and remand by this Court would give the Third Circuit the opportunity to incorporate the DHS officers' misconduct into its one inclusive assessment of whether the "position of the United States was vexatious, frivolous, or in bad faith."

* * *

The question presented is ripe for review, and this case is an excellent vehicle. Both federal courts below agreed on at least one thing: Mr. Reyes-Romero's removal proceeding, with its two confusing forms, contradictory declarations, and inexplicable time annotations, made no sense and could not support Mr. Reyes-Romero's removal order. The only explanation, the Third Circuit could not contest, was that the government "plainly railroaded Reyes-Romero out of the country in 2011," in violation of the Due Process Clause and DHS policy, with forms on which "he supposedly signed away his rights before he was charged and before those rights were read to him in Spanish." App. 88a; *see* App. 29a (quoting App. 88a); App. 53a ("We share the District Court's view that Reyes-Romero's 2011 expedited removal proceeding deviated from the ordered, sensible process we demand of those who enforce the nation's immigration laws."). As the district judge put it, the DHS officers' conduct was "egregious" and "demonstrated a level of law enforcement outrageousness [he] ha[d] not seen in any other case since [he] ha[d] been a federal judge." App. 70a–71a. And the resulting removal order, in turn, was "a necessary element to the [§ 1326] charge." App. 30a.

Even so, the court of appeals reversed the district court's Hyde Amendment award, finding that only the prosecutor's conduct and legal positions were relevant. But the Third Circuit "fail[ed] to see the forest for the trees." *Heavrin*, 330 F.3d at 730. Unlike the Third Circuit, the First and Sixth Circuits would have recognized that the proper inquiry was the government's conduct—including the DHS officers' actions—as an inclusive whole. And that conduct confirmed

that "the position of the United States" was frivolous and in bad faith.

Both the government and criminal defendants need this Court's guidance. And the Hyde Amendment's critical tools for reining in government abuse should apply no differently in Pennsylvania or Florida than they do in Massachusetts or Kentucky.

CONCLUSION

The Court should grant the petition for writ of certiorari.

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