No. 20-718

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The Court should grant certiorari to resolve a circuit conflict regarding whether the Hyde Amendment authorizes courts to consider the conduct of the federal agency or employees underlying a criminal case in determining whether the "position of the United States was vexatious, frivolous, or in bad faith," or whether only the prosecution's conduct matters.

The Third Circuit here, reversing the district court's award of fees based on DHS agents' misconduct, held that the Hyde Amendment inquiry looks "only to the position taken by the department and officers charged with administering the prosecution." App. 31a-32a. In so holding, the Third Circuit rejected the argument that the Hyde Amendment, which expressly incorporates the "procedures and limitations" of the Equal Access to Justice Act ("EAJA"), must be read in light of EAJA's definition of "position of the United States," which includes "the action or failure to act by the agency upon which the … action is based." 28 U.S.C. § 2412(d)(2)(D). That misguided decision exacerbated a circuit split on an important and recurring question.

First, the statute's text, purpose, and legislative history confirm that non-prosecutorial agency conduct is appropriately considered part of the "position of the United States." Congress patterned the Hyde Amendment on EAJA, and when "a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." *Stokeling v. United States*, 139 S. Ct. 544, 551 (2019) (cleaned up; quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L.

Rev. 527, 537 (1947)). If there were any doubt, Congress expressly provided that EAJA's "procedures and limitations" would carry over to the Hyde Amendment, and a definition is a quintessential limitation.

Second, courts of appeals are deeply divided over whether the Hyde Amendment incorporates EAJA's definition of "position of the United States" or is limited to prosecutorial misconduct. The Third Circuit's decision here breaks with the First and Sixth Circuits and aligns with the Second, Ninth, and Eleventh Circuits. That leaves the circuits divided 2-4 on this important question of statutory interpretation.

Third, the Government does not dispute that the question presented is important and that this case is an excellent vehicle for resolving it.

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

ARGUMENT

I. The decision below is wrong.

The Hyde Amendment's text, purpose and legislative history confirm that the "position of the United States" in a criminal case encompasses more than just prosecutorial conduct.

Here, although the prosecutor's own conduct was not "vexatious, frivolous, or in bad faith," App. 19a-20a, the United States' prosecution of Reyes for unlawful reentry after removal, *see* 8 U.S.C. § 1326, was predicated on the misconduct of DHS officers who "railroaded [him] out of the country" in 2011. App. 32a,

88a.[1] Yet the Third Circuit refused to entertain any argument that the officers' misconduct was part of the "position of the United States" because, it held, "the Hyde Amendment refers only to the position taken by the department and officers charged with administering the prosecution." App. 31a-32a. That is wrong.

1. Courts uniformly agree that Congress patterned the Hyde Amendment on EAJA. *See* Pet. 25 (collecting cases). That origin matters for the Hyde Amendment's interpretation. "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; quotation omitted). That interpretative principle establishes "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).

The term "position of the United States" was copied from EAJA, which the Government acknowledges is the "civil counterpart" of the Hyde Amendment. Opp. 15. This canon of construction alone, therefore, should

[1] The Government attempts to frame the litigation positions it took before the district court as reasonable. This is irrelevant, as Reyes does not claim prosecutorial misconduct. That said, the Government did make legal arguments directly contrary to then-binding Third Circuit precedent. App. 165a n.38 (citing *Alaka v. Att'y Gen.*, 456 F.3d 88, 104 (3d Cir. 2006)); *see* App. 180a-82a. Moreover, the district court concluded that Reyes suffered prejudice from the 2011 removal proceeding, App. 150a, and the Government did not appeal.

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). Additionally, EAJA defines "'United States' [to] include[] any agency [or] any official of the United States acting in … official capacity." *Id.* § 2412(d)(2)(C).

Further, Congress's use of the word "position" in the singular form in EAJA "buttresses the conclusion that only one threshold determination for the entire civil action is to be made." *Comm'r, I.N.S. v. Jean*, 496 U.S. 154, 159 (1990). And that inquiry "may encompass both the agency's prelitigation conduct and the Department of Justice's subsequent litigation positions." *Id.*; *see id.* at 159 n.7. That reasoning applies equally 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 in and underlying the prosecution, not just what its *litigators* have done.

The Government catalogues the ways in which EAJA and the Hyde Amendment "differ[]," Opp. 14-15, but so long as two statutes have "similar purposes," a court may "presume that Congress intended that text to have the same meaning in both statutes." *Smith*, 544 U.S. at 233. In *Smith*, the Court applied this presumption to import into the ADEA the meaning of equivalent language found in Title VII, while acknowledging that "textual differences" between the two statutes give rise to different "scope[s]" of liability. *Id.* at 240; *see id.* at 233. So too here. Both EAJA and the Hyde Amendment authorize awards of attorneys' fees

as a remedy for Government misconduct. They therefore have similar purposes, despite differing in who bears the burden of establishing that the Government was in the wrong and in the standard for determining whether an award is permitted. Opp. 14. Far from requiring that "position of the United States" be given a meaning peculiar to the Hyde Amendment, the textual differences between EAJA and the Hyde Amendment show that Congress knew how to specify differences between the two statutes—and opted not to do so with "position of the United States."

The Government's other textual arguments fare no better.

First, the Government contends that EAJA defines "position of the United States" only "[f]or the purposes of this subsection"—that is, for purposes of EAJA's cost-shifting provision—and "[t]he Hyde Amendment does not appear in that subsection." Opp. 18. But EAJA's cost-shifting provision, 28 U.S.C. § 2412(d), is precisely what the Hyde Amendment was modeled on. To avoid any doubt, Congress 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 …." Hyde Amendment, Pub. L. No. 105-119, tit. VI, § 617, 111 Stat. 2440, 2519 (1997), reprinted at 18 U.S.C. § 3006A, historical and statutory notes. And "definition is limitation." *Fed. Radio Comm'n v. Nelson Bros. Bond & Mortg. Co. (Station WIBO)*, 289 U.S. 266, 276 (1933). Congress did not need to "include any similar definition in the Hyde Amendment" itself, Opp. 18, because it had already specified that awards would be granted pursuant to the "limitations" provided in EAJA. No such incorpo-

rating provision was included in the patent fee-shifting statute that the Federal Circuit interpreted in *Hitkansut*. Opp. 18-19 (citing *Hitkansut LLC v. United States*, 958 F.3d 1162, 1167-68 (Fed. Cir. 2020)); *see* 28 U.S.C. § 1498(a).

The Government proffers nothing supporting its contention that the "position of the United States" is not a "procedure" or "limitation" in EAJA. The Government asserts that the definition of "position of the United States" is "substantive." Opp. 19. But it provides no authority saying that a definition (whether "substantive" or not) is not a limitation pursuant to which an award may be granted. And it fails to engage with or refute the Petition's plain-meaning argument. Pet. 27-28. Thus, the fact that the definitional provision is located in EAJA, not the Hyde Amendment itself, is no barrier.

Second, the Government argues that "the EAJA definition could not sensibly apply" to criminal prosecutions because the EAJA definition refers to the "*civil action[]*" in which fees are sought. Opp. 19. But the Government fails to engage with or counter the Petition's argument that this Court has recognized that terms incorporated from another statute may be "incorporated *mutatis mutandis*," *Bowen v. Mich. Acad. of Fam. Physicians*, 476 U.S. 667, 680 (1986)—that is, "[a]ll necessary changes having been made," *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 17 (2000). Pet. 28. The Hyde Amendment applies to criminal prosecutions, not civil actions, so the fix is simple: "the position taken by the United States in [a] [criminal prosecution] [and] the action or failure to act by the agency upon which the [criminal prosecution] is based." 28 U.S.C. § 2412(d)(2)(D). The Government

does not identify any reason why that meaning cannot sensibly apply to the Hyde Amendment. Instead, it leaps to the conclusion that this definition of "position of the United States" would "encompass all official conduct in events substantially preceding the formulation of a criminal prosecution." Opp. 20. Not necessarily: The position of the United States would include an official action or failure to act upon which the prosecution "is based." Here, the prosecution was "based" on the DHS officers' misconduct in removing Reyes because the 2011 removal was an element of the unlawful reentry crime. *See* 8 U.S.C. § 1326(a)(1). The Government does not argue otherwise and indeed appears to acknowledge that an unlawful reentry prosecution is "based" on a prior removal. *See* Opp. 4 ("Petitioner moved to dismiss the indictment under Section 1326(d), which permits a defendant to 'challenge the validity of the [removal] order' on which an unlawful reentry prosecution *is based*." (emphasis added)).

Third, the Government invokes the principle that "a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign." *Lane v. Pena*, 518 U.S. 187, 192 (1996); *see* Opp. 20. When interpreting statutes that authorize fee awards against the United States, however, this Court has sought to adopt "the most reasonable interpretation of Congressional intent," even as it takes "care … not to 'enlarge'" the statutory waiver of immunity "beyond what a fair reading of the language of the section requires." *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685-86 (1983); *see also Ardestani v. I.N.S.*, 502 U.S. 129, 137 (1991) (relying on "ordinary understanding of the statutory language"). Moreover, "once Congress has waived sovereign immunity over

certain subject matter," courts should not "'assume the authority to narrow the waiver that Congress intended.'" *Ardestani*, 502 U.S. at 137 (quoting *United States v. Kubrick*, 444 U.S. 111, 118 (1979)). The Hyde Amendment, read in light of EAJA's definitions, unambiguously encompasses more than just prosecutorial conduct. Even if the meaning of "position of the United States" were ambiguous, however, a court's task is to determine a fair reading of the statute, without narrowing the waiver that Congress intended.

Finally, the Government seeks to account for the provision that "[f]ees and other expenses awarded … shall be paid by *the agency over which the party prevails* from any funds made available to the agency by appropriation," Hyde Amendment (emphasis added), by asserting that the Department of Justice is necessarily "the agency over which a party 'prevails.'" Opp. 21. The IRS, however, sees it differently. Pet. 29. And the Government makes no attempt to explain why, if the Department of Justice is always to be the payor, Congress would not simply refer to it by name.

2. Interpreting the Hyde Amendment to incorporate EAJA's definition of "position of the United States" also makes sense of the statute's purpose and legislative history. The Hyde Amendment gives district courts an important tool for shifting costs and fees where the Government has wrongly forced the defendant to suffer the reputational and financial harm attending a criminal prosecution. *See, e.g.*, *United States v. Shaygan*, 676 F.3d 1237, 1246, 1252 (11th Cir. 2012) (Martin, J., dissenting from denial of reh'g en banc). It makes little sense to withhold that 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 leading to the prosecution. 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) (quotation omitted).

Turning to the legislative history, the Government suggests that the Hyde Amendment was "watered down" before enactment, as its original form would have permitted the award of fees under the same standard as EAJA (if the Government's position was not "substantially justified"), with the Government bearing the burden of proof. Opp. 21-22. But these changes have nothing to do with the scope of "position of the United States," *see supra* p. 5, and the Government has not mustered any legislative history to support its view that "the position of the United States" is limited to prosecutorial conduct.

II. The Circuits are deeply divided.

The courts are divided on whether the "position of the United States" must be read in light of EAJA—where the definition includes agency misconduct underlying the action—or is limited to prosecutorial misconduct, as the Third Circuit held here, joining with the Second, Ninth, and Eleventh Circuits and exacerbating a conflict with the First and Sixth Circuits.

Attempting to minimize this conflict, the Government offers elaborate descriptions of the First and Sixth Circuit decisions—only to show that those cases were decided on their own facts. But the Government's hair-splitting cannot obscure the conflict.

1. The Third and Sixth Circuits directly conflict regarding whether the "position of the United States" means the same thing in the Hyde Amendment as it does in EAJA.

The Sixth Circuit held that because "the Hyde Amendment is subject to the procedures and limitations of the EAJA, the term 'position' should be accorded the same meaning under the Hyde Amendment as it is in the EAJA." *United States v. Heavrin*, 330 F.3d 723, 730 (6th Cir. 2003); *see also Amezola-Garcia v. Lynch*, 835 F.3d 553, 556 (6th Cir. 2016) (EAJA case citing *Heavrin*).

The Third Circuit held the opposite here, refusing to incorporate EAJA's definition of "position of the United States" in the Hyde Amendment. *See* App. 29a-31a. Thus, the Third Circuit limited its consideration of the "position of the United States" to the prosecutors' litigation conduct. *See* App. 28a-32a.

To be sure, the Sixth Circuit went on to rule in *Heavrin* that the district court should have treated the "position of the United States" "as an inclusive whole" under the Hyde Amendment. *See* 330 F.3d at 730. But that does not change the Circuits' starkly conflicting statutory readings. Had the Sixth Circuit's view prevailed here, the Third Circuit could not have decided the Hyde Amendment question as it did, disregarding EAJA's definition of the "position of the United States."

2. The Third and the First Circuits directly conflict as to whether a district court can independently consider agency misconduct underlying the prosecution.

The Third Circuit forbids that analysis. *See* App. 28a-32a. But the First Circuit conducted just such an

analysis in *United States v. Knott*, considering "an array of government conduct both before the indictment and during litigation." 256 F.3d 20, 31 (1st Cir. 2001). The *Knott* defendants alleged EPA misconduct at the outset of its investigation as well as later EPA and prosecutorial misconduct "during litigation." *See id*. at 31-34.

The First Circuit held it "permissible … to 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." *Id*. at 31.

The Government mischaracterizes that holding, equating it with the Third Circuit's observation that "misconduct by law enforcement officers or other executive departments can be relevant . . . if prosecutors leverage that misconduct." App. 32a; *see* Opp. 23. But the First Circuit performed no such truncated analysis. Instead, it painstakingly addressed four allegations of pre-indictment EPA misconduct to decide if the alleged misconduct, whether "taken independently or collectively," satisfied the Hyde Amendment. *Knott*, 256 F. 3d at 31-34.

Accordingly, the Third Circuit's holding that the "position of the United States" in the Hyde Amendment does not incorporate EAJA's definition cannot be reconciled with the Sixth Circuit's holding in *Heavrin*. Nor can the Third Circuit's focus on prosecutorial misconduct, to the exclusion of agency misconduct, be squared with the First Circuit's full and independent analysis of agency misconduct in *Knott*.

III. The question presented is important, and the Government offers no persuasive reason to deny review.

The Government does not deny that the question presented is important and that this case presents an excellent vehicle to resolve it. Although the Government contends in passing that the issue is "fact intensive," Opp. 13, its description of the question presented and its arguments effectively concede that it is a clean one of statutory interpretation, squarely presented here.

Nor does the Government dispute that the interest of national uniformity and the equities of this case strongly favor review. DHS's underlying conduct was outrageous, and Hyde Amendment attorneys' fees should be available, whether the court sits in Pennsylvania or Massachusetts.

CONCLUSION

The Court should grant the petition.

April 20, 2021

Respectfully submitted,

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