NO: 12-44

In the Supreme Court of the United States

ALI SHAYGAN,
***Petitioner*,**

v.

UNITED STATES OF AMERICA,
***Respondent*.**

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTORY AND OTHER AUTHORITY:

REPLY BRIEF OF PETITIONER

A wide array of amici—former federal circuit and district judges, former federal prosecutors, criminal defense lawyers, doctors, surgeons, and a neutral scholarly group supporting the Constitution—agree that this Court should review the Eleventh Circuit's holding, which is wrong as a matter of statutory interpretation, binding precedent, legislative history, and policy, and which neuters this important check on prosecutors. *See, e.g.,* American Physicians & Surgeons Amicus Br. 5 (stating that the Eleventh Circuit's reading of the Hyde Amendment "eviscerat[es] ... a congressional enactment").

Perhaps the New York Times editorial urging this Court to grant this petition said it best:

> The Supreme Court should take this case for review. . . . It should reaffirm that a prosecutor's duty is to seek justice, not victory at all costs, and affirm the intent of the Hyde Amendment. Prosecutors are rarely punished for wrongdoing. Other sanctions like a reprimand from a bar association or largely ineffective. The amendment is a check against gross misconduct.

New York Times, "Editorial: Prosecutorial Abuse," August 22, 2012, at A24.

Nevertheless, the government opposes review. We briefly respond to its arguments here, and respectfully request that the petition be granted.

1. The Hyde Amendment requires only a finding of bad faith.

Given the government's neglect of the actual text of the Hyde Amendment, it is worth reviewing the statute itself:

> [T]he court . . . may award to a prevailing party . . . a reasonable attorney's fee . . . where the court finds that the position of the United States was vexatious, frivolous, or in bad faith . . .

Pet.App.27. The statute permits a defendant to recover attorneys' fees in the rare case that he is found not guilty, *and* can show that the government's position is vexatious, frivolous, or in bad faith; i.e., that the government tried to convict him by cheating.

The Eleventh Circuit, breaking with the plain text of the statute and other circuits, held that the existence of pervasive bad faith misconduct is not sufficient for a prevailing defendant to recover. It found that "so long as a prosecutor has an objective basis for charging a defendant, even patterns of serious prosecutorial misconduct are immune from sanction under the Hyde Amendment." Pet.App.163. Though it never advocated this standard below, the government has now embraced it.

But the question is not, as Judge Pryor put it, "was it reasonable to prosecute this case." The Hyde Amendment does not "presuppose[] the existence of a

prosecution that the government should not have brought or pursued." Opp.17. There is no precondition under the bad faith prong of the statute that the government acted without probable cause.[1] Rather, the concept of objective unreasonableness in the filing decision is the basis for sanctions under the "frivolous" prong, an *alternative* means for obtaining sanctions.

While not disputing that there was gross prosecutorial misconduct in this case, the government argues *for the first time* that no analysis of whether a prosecution is "vexatious, frivolous, or in bad faith" occurs until a defendant has met an initial requirement that the prosecution was "objectively unreasonable." The government's entire premise is that "the Hyde Amendment *presupposes* the existence of a prosecution that the government should not have brought or pursued." Opp.17. Unsurprisingly, this fundamental revision of the Hyde Amendment's plain language is made without citation to the statute or a single case. This interpretation is entirely without support in the language of the statute; indeed, it is "a bolt from the blue." Former Fed. Judges and Prosecutors Amicus Br. 2. The statute requires only that the position of the United States be in "bad faith,"

[1] This Court is clear that "bad faith may be found, not only in the actions that led to the lawsuit, but also in the conduct of the litigation." *Hall v. Cole*, 412 U.S. 1, 15 (1973).

and nothing more.[2]

After first grafting a new provision into the Hyde Amendment, the government then seeks to rewrite the existing language by asserting that the case turns on the words "'bad faith." Opp.13. This is incorrect. As Judge Edmondson pointed out, "[t]his appeal presents a question of statutory construction: what is the significance of the words '**or** in bad faith'." Pet.App.44 (emphasis added). The critical term in the statutory language is "or," which necessarily means that a finding of bad faith is an alternative path from any other method of obtaining Hyde Amendment recovery. With regard to assessing this critical statutory language, "or in bad faith," the government offers nothing, effectively conceding the bad faith nature of the prosecution's actions.[3]

Although Petitioner seeks review of a purely legal question, the government utilizes the first 13 pages of its brief opposing certiorari to paint an incomplete and misleading picture of the purposeful,

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[2] This is a very difficult burden which rarely has been met. Between its enactment in 1997 and 2010, there were only 13 successful Hyde Amendment cases. *See* USA Today, "Va. Bankers Scored a Rare Victory Against Federal Prosecutors," September 28, 2010.

[3] Despite its protestations to the contrary, Opp.20-21, n. 2, the government absolutely admitted liability below under the Hyde Amendment because of its "serious failings." Pet.App.55.

tactical, and malicious misconduct by the prosecution, coupled with a misguided and inaccurate description of the evidence against Dr. Shaygan. In support, the government does not cite to the factual record, but rather to its *own* brief and the appellate decision below (which expressly declined to consider the underlying facts).[4] The government ignores nearly entirely the twenty single-spaced pages of undisturbed factual findings made by the district judge after lengthy evidentiary hearings, Pet.App.71-112, which concludes "without doubt" that the government engaged in "conscious and deliberate wrongs that arose from the prosecutors' moral obliquity and egregious departures from the ethical standards to which prosecutors are held." Pet.App.68, 132.

The Hyde Amendment was enacted precisely to combat these extreme examples of bad faith. The government is right that bad faith means more than 'simply bad judgment or negligence,' requiring instead 'the conscious doing of a wrong because of dishonest purpose of moral obliquity' and 'a state of mind affirmatively operating with furtive design or ill will.'"

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[4] The majority panel opinion assumed that the district court's findings were true for purposes of the appeal. Pet.App.25; *see also id.* at 163 ("This Court's opinion sets aside none of Judge Gold's findings of misconduct by the prosecutors, but relieves the government of all Hyde Amendment sanctions, holding that the attorney's fees were not permitted as a matter of law.").

Opp.16 (citation omitted).[5] That is exactly what the district court found here. This Court should grant certiorari to clarify that nothing more is required.

The government also offers an unhelpful comparison to the Fourth Amendment, which protects against "unreasonable searches and seizures" and therefore (unlike the Hyde Amendment) compels an analysis of reasonableness by its very terms. Moreover, the manner in which a search is carried out can render it unreasonable (and thus unconstitutional) *even if* probable cause exists and a warrant was issued. *See, e.g., San Jose Charter of Hells Angels Motorcycle Club v. City of San Jose*, 402 F.3d 962 (9th Cir. 2005).

Neither is the government aided by its reference to the standard for qualified immunity. In articulating this standard, this Court held that insofar as a government official's action "does not violate clearly established statutory [] rights," then "objective reasonableness of an official's conduct" should be the measure. *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982). In the case of the Hyde Amendment, however, there *is* a "clearly established statutory right"—the right to be free of bad faith prosecutions—and thus no

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[5] Bad faith means the same across many different fields of law, namely evil intent or purpose. *See, e.g.,* Black's Law Dictionary (9th ed. 2009). Congress invoked this common-law term in drafting the Hyde Amendment subject to its ordinary meaning, which has existed since the time of Blackstone.

need to resort to a standard of objective reasonableness.

Moreover, these are inapt comparisons because here, unlike in other contexts, the government seeks to compel a finding of objective unreasonableness *at a different phase in the proceedings than the phase being scrutinized*. The Eleventh Circuit did not graft a reasonableness analysis onto the interpretation of what constitutes bad faith conduct during a prosecution. Instead, the Eleventh Circuit imposed a new and distinct precondition of unreasonableness in the bringing of the case at the outset, which is a distinct and separate action on the part of the prosecution. Accordingly, general references to "objective unreasonableness" in other contexts are not useful.

2. The legislative history confirms unequivocally that the Eleventh Circuit holding is wrong.

There is, of course, no reason to turn to legislative history given the statute's plain language, which nowhere hints at a threshold inquiry of objective unreasonableness. In any event, the government's read of the legislative history is wrong. Opp.24, n.3. The history of the revised Amendment completely undercuts the government's position: **"The conferees understand 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.), reprinted in 1997 U.S.C.C.A.N. 2941, 3045 (emphasis added).

Judge Martin debunked the other argument presented by the government—that Representative Hyde's statements were in support of an earlier version of the statute—explaining that none of the changes to the statute "had anything to do with the meaning of the term 'the position of the United States,' which remained unchanged throughout the legislative process." Pet.App.177-78 (citing *United States v. Gilbert*, 198 F.3d 1293, 1299-1302 (11th Cir. 1999)).

3. The existing circuit split should not be left to stand.

In her dissent, Judge Martin detailed how the *Shaygan* opinion "marks an unwarranted departure from the decisions of [the] sister Circuits," and is in conflict with this Court's decision in *Commissioner, INS v. Jean*, 496 U.S. 154 (1990).[6] Pet.App.171-174.

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[6] The government's attempt to distinguish *Jean* is unavailing. As the government notes, *Jean* requires "one threshold determination for the entire civil action." Opp.24. Yet the government asserts that "[i]f 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,

To support its assertion that no circuit split exists, the government references "the handful of cases in which courts of appeals have affirmed fee awards (or reversed district courts orders denying fees)" and then claims that in those cases, the government had initiated or pursued prosecutions that lacked factual or legal support. Opp.25. These cases, however, forcefully undercut the government's position.

In *United States v. DeJong*, 26 Fed. Appx. 626, 627-28 (9th Cir. 2001), the Ninth Circuit found that the defendant was entitled to his attorney's fees under each of the Hyde Amendment prongs. It held–just like the district court in this case—that the defendant had shown "*subjective* bad faith" and that the prosecution had been infected by "personal animus." The court explained that one witness "was personally interested in the outcome" of the case, just as the witnesses who were signed up as confidential informants to tape record defense counsel. The opinion nowhere suggests that the court affirmed sanctions only after determining that there was an absence of probable cause to file the case. The case merely suggests that—like with Shaygan, and indeed most cases that result in an acquittal—the evidence marshalled by the government *at trial* was weak. *Id.* Though cited by the government, *DeJong* is a paradigmatic example of a case squarely in conflict with the Eleventh Circuit's

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or in bad faith." *Id.* This sounds unmistakably like two separate determinations, not the one determination required by *Jean*. *See* Pet.19.

holding. Other Ninth Circuit cases also demonstrate conflict with the Eleventh Circuit. *See, e.g., United States v. Manchester Farming P'ship*, 315 F.3d 1176, 1185-86 (9th Cir. 2003) (explaining that the inquiry under the bad faith prong is the government's post-indictment conduct and whether it had acted with subjective bad faith).

The government points to *United States v. Braunstein*, 281 F.3d 982 (9th Cir. 2002), yet this case also demonstrates conflict and the error in the Eleventh Circuit's holding. *Braunstein* addresses the frivolous prong of the Hyde Amendment and thus necessarily, and correctly, involves an analysis of probable cause. Indeed, that is the point: sanctions for pursuing a case lacking probable cause fall under the "frivolous" prong of the Hyde Amendment, not the "bad faith" prong.

Curiously, the only Circuit besides the Ninth that the government points to in an attempt to show that there is no split with the Eleventh Circuit is the Eleventh Circuit itself. *United States v. Adkinson*, 247 F.3d 1289, 1292-93 (11th Cir. 2001). But like the prior examples, *Adkinson* actually conflicts with *Shaygan*. In that case, the Eleventh Circuit permitted recovery for a defendant who showed "bad faith joinder" of a count with the rest of the indictment because that count "tainted the entire proceedings." Similarly, the government added 118 counts in this case based on personal animus which the district judge found tainted the entire proceedings.

Eventually, the government concedes that the Second, Eighth, and Ninth Circuits have considered whether *post-charging* conduct amounts to bad faith under the Hyde Amendment. These cases do not consider whether the indictment was filed with probable cause, and therefore are in conflict with the *Shaygan* decision. Opp.16; Pet.21-22; Constitution Project Amicus Br. 6 (detailing circuit split). No other court except the Eleventh Circuit has such a requirement.

The government also seeks to sidestep the fact that district courts around the country consider Hyde Amendment claims based on bad faith alone without an initial probable cause screening test. Pet. 22-23. Although the government is correct that these cases "are not precedential," Opp.26, n.4, that argument misses the point. These cases demonstrate that other circuits interpret the Hyde Amendment very differently than district courts located in the Eleventh Circuit must after *Shaygan*. Because this issue is so important, and because uniformity is needed with respect to issues like sovereign immunity and prosecutorial conduct, the Court should hear this case.

4. Compelling policy reasons support a grant of certiorari.

Each of the appellate opinions in this matter, including the majority opinion, recognize the significance of this case. Pet.App.2, 62, 174 (opinions of Pryor, Edmondson, and Martin). The government does not quarrel with the notion that this case is of great

public importance.

Sixty-eight former federal circuit and district judges and federal prosecutors submitted an amicus brief outlining this case's importance: "[i]f allowed to stand, the Eleventh Circuit's holding will disempower district judges, and send a clear signal that even grave prosecutorial misconduct will generally be overlooked." Amicus Br. 2. Moreover, "public confidence in the criminal justice system suffers." *Id.*

A near constant barrage of articles discussing the problem of prosecutorial misconduct demonstrate that the consensus of the amici is correct: the Hyde Amendment must not be read in such a way as to make it toothless.[7]

The government contends that Hyde Amendment sanctions are not necessary as a deterrent because other more effective remedies are available.

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[7] Media coverage of this case has been significant because the public is deeply concerned with prosecutorial misconduct. *See, e.g.,* New York Times, "Editorial: Prosecutorial Abuse," August 22, 2012, at A24; CNN, "Ex-judges, attorneys oppose government in prosecutorial misconduct case," August 10, 2012; Wall Street Journal Law Blog, "Ex-Judges Press SCOTUS on Prosecutorial Misconduct," August 10, 2012; The Blog of Legal Times, "Ex-Judges, Prosecutors Join Fight Over Prosecutorial Misconduct," August 10, 2012.

Opp.27 n.5. The government's argument simply ignores the real world. Constitution Project Amicus Br. 26-20 (exposing "the myth" that other sanctions actually deter prosecutors); National Association of Criminal Defense Lawyers Amicus Br. 3-12 (citing numerous studies concerning the lack of a meaningful deterrent outside of the Hyde Amendment, including one by USA Today in which showed that only six prosecutors were disciplined between 1997-2010). Former Fed. Judges and Prosecutors Amicus Br. 17-19 (describing how other deterrents mentioned by the government have not "proven to be a meaningful tool to punish or deter prosecutorial misconduct"); Association of American Physicians & Surgeons Amicus Br. 11 (same).

In the government's view, a mere finding of probable cause by a grand jury is enough to insulate bad prosecutors. But the grand jury is simply not an effective protection for defendants. *See, e.g., United States v. Kaley*, 579 F.3d 1246, 1266 (11th Cir. 2009) (Tjoflat, J. concurring) (explaining that the grand jury is not designed to protect a defendant and is a procedure that does not "significantly reduce[] the risk of an erroneous" determination).

And the government's argument that the Hyde Amendment was not intended to chill "zealous advocates" or to punish "prosecutorial mistake," while true, misses the point. Opp.14. This case has nothing to do with a zealous or mistaken prosecutor. As the National Association of Criminal Defense Lawyers explains, "[t]here is no reason to conclude that the Hyde Amendment poses a serious danger of chilling

prosecutorial decision making and advocacy." Amicus Br. 12, n.7. The Hyde Amendment chills only extreme bad faith misconduct, which is exactly its purpose.

CONCLUSION

The Eleventh Circuit's holding, which insulates the government from sanctions even in the face of extreme bad faith misconduct, creates a breathtaking revision of existing law that is nowhere supported by the text of the Amendment. Opp.17. The Hyde Amendment exists because the ends do not justify the means. When a defendant is found not guilty and can show that the government tried to convict by cheating, he should be able to recover his fees and costs.

For these reasons, and the reasons raised in the petition, a writ of certiorari should be granted.

Miami, Florida
October 2012

Respectfully submitted,

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