No. 20-718

In the Supreme Court of the United States

MARIO NELSON REYES-ROMERO, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the term "position of the United States," for purposes of the Hyde Amendment's authorization of an award of 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," Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, Tit. VI, § 617, 111 Stat. 2519, *reprinted in* 18 U.S.C. 3006A note, is defined as that term is defined in the Equal Access to Justice Act, which provides that the "'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," 28 U.S.C. 2412(d)(2)(D).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-53a) is reported at 959 F.3d 80. The opinion of the district court awarding attorney's fees and costs (Pet. App. 54a-120a) is reported at 364 F. Supp. 3d 494. The opinion of the district court dismissing the indictment (Pet. App. 121a-210a) is reported at 327 F. Supp. 3d 855.

JURISDICTION

The judgment of the court of appeals was entered on May 19, 2020. A petition for rehearing was denied on June 26, 2020 (Pet. App. 211a-212a). 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 the date of the lower court judgment or order denying a timely petition for rehearing. The petition for a writ of certiorari was filed

on November 20, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner is a citizen of El Salvador who entered the United States unlawfully and was removed from the United States in 2011 following a conviction for aggravated assault. Pet. App. 3a-4a; Gov't C.A. Br. 7-8, 10. In 2017, a federal grand jury in the United States District Court for the Western District of Pennsylvania returned an indictment charging petitioner with unlawful reentry, in violation of 8 U.S.C. 1326. Indictment 1. The district court dismissed the indictment. Pet. App. 121a-210a. The court subsequently determined that petitioner was entitled to attorney's fees and costs under the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998 (Hyde Amendment), Pub. L. No. 105-119, Tit. VI, § 617, 111 Stat. 2519, *reprinted in* 18 U.S.C. 3006A note. Pet. App. 54a-110a. The court of appeals reversed the district court's order awarding fees and costs. *Id.* at 1a-53a.

1. Petitioner, who is a citizen of El Salvador, entered the United States unlawfully in 2004. Pet. App. 3a. In 2009, petitioner was convicted of aggravated assault in a New Jersey court. Pet. App. 4a & n.2, 114a. An alien who has been convicted of an "aggravated felony" may be found removable in an administrative removal proceeding—that is, without a hearing before an immigration judge—unless the alien is a permanent resident. See 8 U.S.C. 1228(b)(1); 8 C.F.R. 238.1(b)(2)(i). On the ground that his state conviction constituted an aggravated felony, DHS placed petitioner in an administrative removal proceeding under Section 1228. Pet. App. 4a; see 8 U.S.C. 1101(a)(43)(F); 8 U.S.C. 1228(b)(1).

In 2011, DHS officer Trushant Darji, who is not a native Spanish speaker, conducted petitioner's administrative removal proceeding. See Pet. App. 4a; C.A. App. 286-288. DHS officer Jose Alicea accompanied Officer Darji to translate. See C.A. App. 290, 347; Gov't C.A. Br. 8. The officers at some point gave petitioner a Form I-826, which was inapplicable to petitioner's administrative removal proceeding. Pet. App. 4a; see C.A. App. 180. The I-826 stated that petitioner "had the right to a hearing before the Immigration Court," which generally is not true in an administrative removal. Pet. App. 4a (brackets and citation omitted). On petitioner's completed I-826, two contradictory boxes were checked: one indicating that petitioner "request[ed] a hearing before the Immigration Court" to determine his right to remain in the United States, and the other indicating that petitioner had "given up his right to a hearing" so that he could return to El Salvador. *Id.* at 4a-5a (brackets and citation omitted). Petitioner and the two officers signed the form. C.A. App. 180. Officer Darji dated it June 23, 2011, and included a time of 9 a.m. *Ibid.*

The DHS officers also provided petitioner with a Form I-851, which was the correct form for an individual in administrative removal proceedings like petitioner. See Pet. App. 5a; C.A. App. 96-97. The I-851 informed petitioner of the grounds for administrative removal, his right to contest those grounds, and his right to seek withholding or deferral of removal based on fear of persecution or likelihood of torture in El Salvador. Pet. App. 5a; C.A. App. 96. According to annotations on petitioner's completed I-851, petitioner conceded removability, acknowledged that he was ineligible for any form of relief or protection from removal, and waived judicial review. Pet. App. 5a. Petitioner and

Officer Darji signed the portion of the form containing these annotations; their signatures were accompanied by the date of June 23, 2011, and the time of 9 a.m. C.A. App. 97. Officer Alicea separately signed the form to certify that he had explained the form to petitioner in Spanish, and petitioner again signed the form indicating that he had received that explanation; here, petitioner's signature was accompanied by a time of 9:20 a.m. *Ibid.* A DHS supervisor signed the form at 10 a.m. *Id.* at 96, 306. Petitioner received a final administrative removal order the same day and was later removed to El Salvador. Pet. App. 5a.

2. After he was removed, petitioner entered the United States without inspection. Pet. App. 5a. In 2017, a federal grand jury in the United States District Court for the Western District of Pennsylvania returned an indictment charging petitioner with unlawful reentry, in violation of 8 U.S.C. 1326. Indictment 1.

a. 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. Pet. App. 6a (quoting 8 U.S.C. 1326(d)) (brackets in original). Under that provision, petitioner was required to show that (1) he exhausted any available administrative remedies to seek relief from the removal order; (2) the removal proceeding improperly deprived him of the opportunity for judicial review; and (3) entry of the removal order was fundamentally unfair. 8 U.S.C. 1326(d). To meet the third requirement, Third Circuit precedent requires that a defendant demonstrate that he suffered prejudice as a result of a fundamental error. Pet. App. 6a (citing *United States* v. *Charleswell*, 456 F.3d 347, 358 (3d Cir. 2006)).

At a hearing on petitioner's Section 1326(d) motion, the district court expressed concern that DHS had provided petitioner with inconsistent immigration forms. Pet. App. 7a. And, in the court's view, the times listed on petitioner's I-851 suggested that petitioner had not been informed of his rights in Spanish until after he waived those rights. *Ibid.* Neither Officer Darji nor Officer Alicea could specifically recall petitioner or his proceeding, but both testified at the hearing about general DHS practices. *Id.* at 8a. Officer Darji explained that aliens charged with having committed aggravated felonies would first receive the "more general" I-826 form before receiving the I-851 form "specific to administrative removal." C.A. App. 294; see Pet. App. 8a. He also explained that if the alien made contradictory selections, the officers would confirm his intent. Pet. App. 8a. The court asked Officer Darji whether it "ma[d]e any sense" that, on the morning of petitioner's administrative removal proceeding, petitioner was told he had a right to hearing before an immigration judge, requested such a hearing, was told he could not have a hearing, and said he did not want a hearing. *Ibid.* (citation omitted); see *id.* at 8a-9a. Officer Darji responded "[n]o," which the court took to mean that "the process that was used" in petitioner's removal proceeding did not "ma[k]e . . . sense." *Id.* at 8a-9a (citations omitted; second set of brackets in original).

The district court indicated it was likely to find that petitioner's waiver of rights was invalid based on the defective forms and that petitioner was improperly deprived of the opportunity for judicial review. See Pet. App. 9a. The parties thus developed evidence and arguments regarding the third Section 1326(d) element: whether petitioner suffered prejudice that rendered the

entry of the removal order fundamentally unfair. See *ibid.*

b. Before briefing on the issue of prejudice was complete, the government moved to dismiss the indictment with prejudice under Federal Rule of Criminal Procedure 48, explaining that dismissal would be in the interest of justice based on the testimony at the prior hearing and additional factual information that had recently come to the government's attention. Pet. App. 10a, 45a. Petitioner opposed the government's motion and asserted that the district court should grant the government's motion only if the court also expressly barred the government from relying on the 2011 removal order to remove petitioner following the conclusion of the criminal case. *Id.* at 10a.

At a hearing on the government's motion to dismiss, the district court asked the government whether petitioner could be detained or removed based on the 2011 order of removal if the court dismissed the case with prejudice. See Pet. App. 10a. The Assistant United States Attorney (AUSA) representing the government informed the court that he could not speak for DHS regarding whether petitioner was at risk of detention or removal in such circumstances. *Id.* at 10a-11a; cf. *United States* v. *Igbonwa*, 120 F.3d 437, 442-444 (3d Cir. 1997) (recognizing that an AUSA cannot bind DHS in future immigration proceedings unless he or she has obtained consent from DHS), cert. denied, 522 U.S. 1119 (1998). The court also separately expressed the view that the DHS officers had lied and acted outrageously. Pet. App. 11a. The court then permitted additional briefing on the pending motions to dismiss. *Ibid.*

In its supplemental briefs, the government emphasized that it was not adopting or relying on the DHS officers' testimony. Pet. App. 12a. The government likewise emphasized that it was not contesting any element of petitioner's Section 1326(d) defense other than prejudice; regarding prejudice, the government argued that, as of 2011, petitioner's aggravated assault conviction was a "crime of violence" aggravated felony and a "'particularly serious crime'" that would have barred him from seeking asylum, protection from removal, or cancellation of removal. *Id.* at 12a, 14a-15a, 34a-36a (citation omitted); see 8 U.S.C. 1101(a)(43)(F); 8 U.S.C. 1158(b)(2)(A)(ii) and (B)(i); 8 U.S.C. 1229b(a)(3); 8 U.S.C. 1231(b)(3)(B)(ii); 18 U.S.C. 16.

While supplemental briefing was ongoing, DHS provided the government's attorneys with color copies of the original documents in petitioner's immigration file, and the government disclosed those documents to petitioner. Pet. App. 12a. The color copy of petitioner's Form I-826 revealed that the contradictory check marks on that form—one waiving a hearing and one requesting it—were made in different colors of ink. *Ibid.* Based on the different ink colors, it appeared that a DHS officer who signed the form may have filled in the box corresponding to petitioner's waiver of rights. *Ibid.* The waiver mark was also drawn over a pre-printed black "X," suggesting that the officer may have given petitioner a pre-filled form. *Ibid.*

After reviewing the color copy of the form, the district court stated that it was "more convinced than ever" that the DHS officers had lied. Pet. App. 12a (citation omitted). The court also opined that, instead of merely stating that it would not rely on the DHS officers' testi-

mony, the government should have affirmatively asserted that their testimony was not credible. *Id.* at 13a. In addition, the court took issue with the government's position that an AUSA could not bind DHS to a specific course of action in future immigration proceedings. *Id.* at 12a-13a. And the court suggested that the government's motion to dismiss was intended to ensure that DHS could use the 2011 removal order in future immigration proceedings against petitioner, and that the government had thus acted in bad faith by moving to dismiss. *Id.* at 13a.

c. The district court granted petitioner's motion to dismiss the indictment under Section 1326(d). Pet. App. 121a-210a. The court found that the waivers in the I-826 and I-851 forms were "facially invalid" and that petitioner did "not enter[] into [them] voluntarily or intelligently"—and thus petitioner was excused from demonstrating exhaustion of administrative remedies under Section 1326(d)(1) and was deprived of judicial review under Section 1326(d)(2). *Id.* at 141a-142a; see *id.* at 128a-145a. The court also found that the irregularities in petitioner's removal proceeding constituted fundamental error that prejudiced petitioner because he had a reasonable likelihood of success on his claims for relief from removal. See *id.* at 145a-187a.

Instead of denying the government's motion to dismiss the indictment on mootness grounds, the district court considered and denied the motion on the merits. Pet. App. 188a-202a; see *id.* at 15a-16a. In the court's view, that approach was necessary "to limit [petitioner's] exposure to future prosecutorial efforts reliant on the invalid 2011 Removal." *Id.* at 191a. Following the conclusion of the criminal proceedings, DHS did not rely on the 2011 removal order, and instead initiated

new removal proceedings under 8 U.S.C. 1229a. See Pet. App. 16a & n.6. An immigration judge ordered petitioner removed, *ibid.*; the Board of Immigration Appeals dismissed his appeal, *ibid.*; and the Sixth Circuit denied his petition for review, 832 Fed. Appx. 426.

3. Petitioner moved in this case for attorney's fees and costs under the Hyde Amendment, 18 U.S.C. 3006A note. The Hyde Amendment permits a defendant who prevails in a federal criminal prosecution to apply to have his attorney's fees and costs covered by the government. To receive such an award, the defendant must show that "the position of the United States" in the prosecution "was vexatious, frivolous, or in bad faith." *Ibid.*

The district court awarded petitioner attorney's fees and costs. Pet. App. 54a-120a; see *id.* at 18a. The court took the view that "the position of the United States," 18 U.S.C. 3006A note, includes "the actions and lack of actions by DHS in relation to the criminal prosecution," Pet. App. 86a. The court stated that "evidence in the record related to the conduct of DHS Officers in the 2011 Removal Proceedings" was relevant to determining the position of the United States. *Id.* at 87a. And it opined "that the position of the United States was both frivolous and in bad faith," *id.* at 87a-88a, relying heavily on actions taken by DHS during the 2011 administrative removal proceeding and during petitioner's prosecution for unlawful reentry, see, *e.g.*, *id.* at 88a-91a.

The district court recognized that the government's arguments on the prejudice component of petitioner's Section 1326(d) motion "did not brush up against any prosecutorial misconduct" and "were largely reasonable and based in law." Pet. App. 106a. But the court

stated that the government's reasonable arguments did not "outweigh[] the 'bad' in this case." *Ibid.* (citation omitted). The court ordered the government to pay $73,757 in attorney's fees and costs. *Id.* at 18a.

4. The court of appeals reversed. Pet. App. 1a-53a.

a. The court of appeals observed that the Hyde Amendment's standard for the award of attorney's fees and costs is a "demanding" one that "requires far-reaching prosecutorial misconduct affecting the criminal case 'as an inclusive whole.'" Pet. App. 2a (citation omitted). And the court explained that the "grounds for a cost- and fee-shifting award were 'curtailed significantly' from those in the more permissive [Equal Access to Justice Act (EAJA), Pub. L. No. 96-481, Tit. II, 94 Stat. 2325] provision on which the Hyde Amendment was generally modeled." *Id.* at 19a (citation omitted).

In particular, the court of appeals found that the district court had erred in viewing the "position of the United States" as incorporating both the litigation position of the Department of Justice "'*and* the actions taken (or not taken)' by DHS officers, including as far back as [petitioner's] administrative removal proceeding in 2011." Pet. App. 29a (citations omitted). The court of appeals emphasized that "the Hyde Amendment is not a tool to combat misconduct by the federal government writ large" and instead "demands" that a court "'[f]ocus[] on the *prosecutors'* conduct.'" *Id.* at 28a-29a (brackets in original; citation omitted). The court also noted the similar approaches of other courts of appeals. *Ibid.* (citing cases).

The court of appeals explained that the district court's contrary approach was premised on a "mistaken" assumption about the relationship between the Hyde Amendment and the EAJA. Pet. App. 29a. The

court of appeals acknowledged that the Hyde Amendment incorporates the EAJA's "procedures and limitations," 18 U.S.C. 3006A note, and that the EAJA defines "position of the United States" to include, "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). Pet. App. 29a-30a. But the court explained that "the EAJA's substantive definition of 'position of the United States' is neither a 'procedure[]' nor a 'limitation[],' so it cannot be read into the Hyde Amendment." *Id.* at 30a (brackets in original). The court also found "good reasons not to compare EAJA apples to Hyde Amendment oranges." *Ibid.* For example, the court observed that "the EAJA covers a much broader swath of litigation, including civil actions arising from agency enforcement or adjudication." *Ibid.* The court explained that "a criminal prosecution for unlawful reentry does not fit that paradigm" because "the criminal prosecution is distinct from and collateral to the immigration proceeding that led to the order and thus unlike agency enforcement actions that directly lead to civil actions in federal court." *Id.* at 30a-31a.

The court of appeals emphasized that "misconduct by law enforcement officers or other executive departments can be *relevant* to a Hyde Amendment application if prosecutors leverage that misconduct to further a prosecution that has no factual or legal basis or that is brought for purposes of harassment." Pet. App. 32a. But the court explained that "because the [Hyde] Amendment is concerned only with prosecutorial misconduct * * * alleged misconduct by DHS or its officers cannot independently create liability for attorney's fees and costs." *Ibid.*

b. The court of appeals found that petitioner was not entitled to an award of attorney's fees and costs under the Hyde Amendment, concluding that the "AUSA, * * * acting on behalf of the Government, satisfied the high ethical and professional standards to which we hold prosecutors" and that the "record [did not] support" the district court's "findings about the prosecution." Pet. App. 26a-27a; see *id.* at 32a-53a.

The court of appeals rejected petitioner's assertion that the government's position was frivolous. Pet. App. 33a-39a. The court noted that petitioner did not contest either element required for a conviction for unlawful reentry under 8 U.S.C. 1326(a)—that he had been removed and was later found in the country without authorization—and limited his defense to a collateral attack on the removal order under 8 U.S.C. 1326(d). Pet. App. 34a. And the court found that "at every point in the prosecution * * * the Government had—at minimum—a reasonable argument that [petitioner] could not show prejudice under [Section] 1326(d)(3) and thus could not make out the affirmative defense" because the government had a reasonable argument that petitioner's aggravated assault conviction was a crime of violence that barred him from seeking relief from removal, and that it also was a particularly serious crime that barred him from obtaining protection from removal. *Ibid.*; see *id.* at 34a-36a.

The court of appeals also found that the government did not pursue the prosecution in bad faith. Pet. App. 40a-53a. The court rejected the district court's finding "that the Government relied on 'facially invalid waivers'" and saw "nothing in [petitioner's immigration file] to suggest" that petitioner "could show a reasonable likelihood of any outcome other than removal." *Id.* at

41a-42a (citation omitted). The court of appeals likewise found "no basis in the record to conclude that [the DHS officers] * * * deliberately perjur[ed] themselves." *Id.* at 44a; see *id.* at 42a-45a. Thus, the court accordingly explained that the government did not violate any prosecutorial obligation by declining to label the DHS officers' testimony as false. *Id.* at 42a, 44a. And the court found "no sign[] of bad faith" in the AUSA's "inability to tell the District Court whether, if the prosecution were dismissed, DHS would detain [petitioner] or seek reinstatement of the 2011 removal order." *Id.* at 46a. The court also commended the AUSA for his "responsiveness, candor, and professionalism in answering unanticipated questions" and noted that his behavior was indicative of "good faith on his part and in the 'position of the United States.'" *Id.* at 48a (citation omitted).

Finally, the court of appeals rejected the assertion that the prosecution was vexatious for the same reasons that it reversed the district court's view that the prosecution was frivolous and in bad faith. Pet. App. 27a; see *id.* at 33a-34a.

ARGUMENT

Petitioner argues (Pet. 25-29) that, when determining whether the "position of the United States" was vexatious, frivolous, or in bad faith for purposes of the Hyde Amendment, 18 U.S.C. 3006A note, a district court must consider "non-prosecutorial conduct," Pet. 25, such as the actions of the DHS officers who conducted petitioner's 2011 administrative removal proceeding. The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or another court of appeals. Further review of petitioner's fact-intensive Hyde Amendment motion is unwarranted.

1. a. The Hyde Amendment creates a limited waiver of sovereign immunity that permits a district court to award attorney's fees and costs to a prevailing defendant in a criminal case "where the court finds that the position of the United States was vexatious, frivolous, or in bad faith, unless the court finds that special circumstances make such an award unjust." 18 U.S.C. 3006A note. The Hyde Amendment differs from the EAJA, 28 U.S.C. 2412, which permits awards of attorney's fees and costs in certain civil cases in which the United States is a party, but cross-references the EAJA for certain purposes by 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 [the EAJA]." 18 U.S.C. 3006A note.

In adopting the Hyde Amendment, Congress included distinguishing features that make Hyde Amendment awards significantly more difficult to obtain than EAJA awards. For example, while the EAJA permits an award when the position of the United States was not "substantially justified," 28 U.S.C. 2412(d)(1)(A), the Hyde Amendment imposes a more demanding standard that limits awards to cases in which the government's position was "vexatious, frivolous, or in bad faith," 18 U.S.C. 3006A note. In addition, while the EAJA assigns to the government the burden of establishing that its position was substantially justified, the Hyde Amendment places the burden on the defendant to establish that the United States' position was vexatious, frivolous, or in bad faith. See *ibid.*; Pet. App. 19a; *United States* v. *Manchester Farming P'ship*, 315 F.3d 1176, 1182 (9th Cir.), amended on denial of reh'g, 326 F.3d 1028 (9th Cir. 2003).

The Hyde Amendment thus authorizes awards of attorney's fees and costs in a much narrower range of cases than its civil counterpart and imposes a higher hurdle to the recovery of fees. *United States* v. *Gilbert*, 198 F.3d 1293, 1302-1303 (11th Cir. 1999) (defendant must overcome a "daunting obstacle" to recover fees under the Hyde Amendment); see *United States* v. *Monson*, 636 F.3d 435, 439 (8th Cir. 2011) (same); *United States* v. *Isaiah*, 434 F.3d 513, 519 (6th Cir. 2006) (same); *In re 1997 Grand Jury*, 215 F.3d 430, 436 (4th Cir. 2000) (same). It applies in cases of "prosecutorial misconduct, not prosecutorial mistake." *United States* v. *Braunstein*, 281 F.3d 982, 995 (9th Cir. 2002) (quoting *Gilbert*, 198 F.3d at 1304); see *United States* v. *Skeddle*, 45 Fed. Appx. 443, 446 (6th Cir. 2002) (per curiam) ("The Hyde Amendment is not aimed at the general run of prosecutions, or even those that the government loses, but instead at instances of 'prosecutorial misconduct,' where the government had undertaken obviously groundless positions in a prosecution or positions intended solely to harass defendants rather than to vindicate the rule of law.") (citation omitted), cert. denied, 538 U.S. 922 (2003).

In accord with the decision below, courts of appeals have consistently recognized that the Hyde Amendment's reference to a singular government "position" requires a court to consider whether there was "prosecutorial misconduct affecting the case as an inclusive whole, not [whether there was] misconduct in distinct government proceedings []or isolated errors by individual law enforcement officers in the course of the investigation or prosecution," in determining whether "the position of the United States was vexatious, frivolous,

or in bad faith," Pet. App. 27a-28a (citations and internal quotation marks omitted). See, *e.g.*, *United States* v. *Mixon*, 930 F.3d 1107, 1111-1112 (9th Cir. 2019) (finding that fees may be shifted only "for egregious prosecutorial misconduct that causes the government's litigating position as a whole to be vexatious, frivolous, or in bad faith, not for other types of bad conduct by government employees during the course of an investigation" and affirming the denial of fees where the defendant's sole assertion was that "the conduct of the government agents who investigated her case * * * was vexatious"); *United States* v. *Bove*, 888 F.3d 606, 608 (2d Cir. 2018) (explaining that the "'position of the United States'" under the Hyde Amendment is "the government's general litigation stance: its reasons for bringing a prosecution, its characterization of the facts, and its legal arguments"), cert. denied, 139 S. Ct. 1274 (2019); *United States* v. *Shaygan*, 652 F.3d 1297, 1311-1312 (11th Cir. 2011) (reversing a fees award where "the district court failed to understand the narrow scope of the Hyde Amendment" which requires the defendant to "satisfy[] an objective standard that the legal position of the United States amounts to prosecutorial misconduct"), cert. denied, 568 U.S. 1019 (2012).

b. The court of appeals correctly determined that the position of the United States in this case was not vexatious, frivolous, or in bad faith. See Pet. App. 27a, 33a-53a. That determination was correct because the government at all times had a reasonable argument that petitioner was not prejudiced by anything that occurred during his 2011 administrative removal proceeding. *Id.* at 34a-36a.

Petitioner did not contest that the elements of unlawful reentry under 8 U.S.C. 1326(a) were satisfied,

but instead limited his defense to a collateral attack on the underlying removal order under Section 1326(d). See Pet. App. 34a. While prosecuting petitioner for unlawful reentry, the government had a reasonable argument that petitioner was not prejudiced by any irregularities in the prior administrative removal because his New Jersey aggravated assault conviction was a "crime of violence," 18 U.S.C. 16, rendering him ineligible for relief from removal, see 8 U.S.C. 1101(a)(43)(F); 8 U.S.C. 1158(b)(2)(A)(ii) and (B)(i); 8 U.S.C. 1229b(a)(3).

In 2011, it was unsettled in the Third Circuit whether a New Jersey aggravated assault conviction was a crime of violence under either the elements clause or the residual clause of the definition of a "crime of violence." See 18 U.S.C. 16 (defining "crime of violence" to include "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another" (elements clause) or "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense" (residual clause)). Although later decisions held the residual clause void for vagueness, see *Sessions* v. *Dimaya*, 138 S. Ct. 1204, 1210 (2018); *Baptiste* v. *Attorney Gen.*, 841 F.3d 601, 621 (3d Cir. 2016), cert. denied, 138 S. Ct. 2018 (2018), those decisions postdated petitioner's 2011 administrative removal proceeding. And the government had a reasonable argument that prejudice must be assessed at the time of the underlying removal proceeding, not the time of a later criminal prosecution that results from the defendant's unlawful reentry into the United States. See Pet. App. 35a. The government also reasonably argued that petitioner's factual circumstances would not have

supported protection from removal, even if he were eligible. See *id.* at 36a n.13. Because of the government's reasonable prejudice argument, the court of appeals correctly determined that there was no "'prosecutorial misconduct' affecting the 'case as an inclusive whole'" that could provide the basis for a Hyde Amendment award. *Id.* at 28a (citation omitted).

2. Petitioner contends (Pet. 25-29) that the court of appeals erred in declining to consider the actions taken by the DHS officers in 2011 when the court determined the "position of the United States" under the Hyde Amendment. According to petitioner, the phrase "position of the United States" in the Hyde Amendment should be defined exactly as the EAJA defines that term in the context of a civil case. Petitioner is incorrect.

a. Under the EAJA, "'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." 28 U.S.C. 2412(d)(2)(D). But the EAJA defines "position of the United States" only "[f]or the purposes of this subsection," 28 U.S.C. 2412(d)(2)—that is, for purposes of the EAJA's cost-shifting provision. The Hyde Amendment does not appear in that subsection, so the definition by its terms does not apply. And Congress did not include any similar definition in the Hyde Amendment. Cf. *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[I]t is generally presumed that Congress acts intentionally and purposely in * * * disparate inclusion or exclusion.") (citation omitted); *Hitkansut LLC* v. *United States*, 958 F.3d 1162, 1167-1168 (Fed. Cir. 2020) (finding that "'the position of the United

States,'" in 28 U.S.C. 1498(a), a patent fee-shifting statute, "refers to the litigation positions taken by the United States in the civil action in which the attorneys' fees were incurred" and that the EAJA's definition of "position of the United States" was not incorporated into the patent fee-shifting provision because "[w]hile Congress elected to use the same 'position of the United States' language from EAJA, it did not incorporate the later-added express definition of the term").

Contrary to petitioner's contention (Pet. 27-28) the Hyde Amendment's limited cross-reference to the EAJA does not incorporate the EAJA's definition of "position of the United States." Congress provided that awards under the Hyde Amendment "shall be granted pursuant to the procedures and limitations * * * provided for an award under [the EAJA]." 18 U.S.C. 3006A note. But, as the court of appeals correctly recognized, the substantive definition of "position of the United States" is not a "procedure" or "limitation" set forth in the EAJA, such as a time limit for seeking an award of fees, 28 U.S.C. 2412(d)(1)(B); the process for requesting fees, *ibid.*; or a limitation on the EAJA's applicability to proceedings brought under certain provisions of the Internal Revenue Code, 28 U.S.C. 2412(e). Pet. App. 30a.

In any event, the language of the EAJA definition could not sensibly apply to the criminal prosecutions covered by the Hyde Amendment because the EAJA refers to "the position taken by the United States *in [a] civil action[]* [and] the action or failure to act by the agency upon which *the civil action* is based." 28 U.S.C. 2412(d)(2)(D) (emphases added). Accordingly, "'position of the United States'" "cannot mean precisely the same thing" in the Hyde Amendment and the EAJA because the EAJA's references to civil proceedings and

agency actions that form the basis for civil proceedings could not "appl[y] exactly" if at all "in a criminal prosecution." *Bove*, 888 F.3d at 608 n.10 (citation omitted). The definition of "position of the United States" in the EAJA comports with the EAJA's context and scope, which covers a "broad[] swath of litigation, including civil actions arising from agency enforcement or adjudication." Pet. App. 30a. The definition in the EAJA will be applicable in proceedings where a government agency is the *defendant*, which is in no way analogous to a criminal prosecution, and to which the agency's underlying actions are directly relevant. And it also makes sense to consider an agency's position in its own affirmative enforcement proceedings; such conduct can more easily be viewed as part of the singular "position of the United States" in civil enforcement litigation that may follow. But no such logic would encompass all official conduct in events substantially preceding the formulation of a criminal prosecution.

Even if the statutory text and context admitted of ambiguity, that ambiguity must be resolved in favor of the government because the Hyde Amendment is a waiver of the United States' sovereign immunity. Petitioner's proposed reading of the Hyde Amendment "runs afoul of the longstanding principle that 'a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign.'" *Mixon*, 930 F.3d at 1112 n.6 (quoting *Lane* v. *Pena*, 518 U.S. 187, 192 (1996)); see *FAA* v. *Cooper*, 566 U.S. 284, 290-291 (2012) (explaining that the Court "construe[s] any ambiguities in the scope of a waiver [of sovereign immunity] in favor of the sovereign" and that "[a]mbiguity exists if there is a plausible interpretation of the statute that would not authorize money damages

against the Government"); see also *Ardestani* v. *INS*, 502 U.S. 129, 137 (1991) (similar).

b. Petitioner contends (Pet. 28-29) that the government's interpretation must be incorrect because the Hyde Amendment provides 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." 18 U.S.C. 3006A note. But under *any* approach to the statute, the Department of Justice would be the agency over which a party "prevails" in the litigation when a prosecution brought by the Department of Justice is dismissed. The Department of Justice accordingly pays Hyde Amendment awards in those circumstances—not the investigating agency.[*]

Petitioner's assertion (Pet. 26-27), that the Hyde Amendment's legislative history supports petitioner's broad reading of "position of the United States" is likewise misplaced. Instead, the Hyde Amendment's legislative history supports a narrower reading of the statute's text. While "in its original form the Hyde Amendment" would have permitted the award of fees under the same standard in the EAJA (that the government's position was not "'substantially justified'"), that approach "drew opposition" from a number of members of Congress and the executive branch. *Gilbert*, 198 F.3d at 1300; see *id.* at 1300-1301. Congress "watered down" and "significantly" "curtailed" the text before enacting it into law—including by shifting the burden of proof to

[*] Notwithstanding the memo from the Internal Revenue Service (IRS) that petitioner cites (Pet. 29), this Office is informed that neither the Department of Justice nor the IRS has any record of the IRS ever paying a fees award under the Hyde Amendment.

defendants and imposing a heightened standard for obtaining fees—to "place[] a daunting obstacle before defendants." *Id.* at 1301-1302. At all events, petitioner points to nothing in the legislative history that suggests that Congress in fact deliberately intended to implicitly incorporate the EAJA's definition of the term "position of the United States" into the Hyde Amendment—particularly where such incorporation would be in tension with both the text of the EAJA and the text of the Hyde Amendment. See pp. 18-20, *supra*.

3. Petitioner errs in asserting (Pet. 18-25) that the court of appeals' decision conflicts with decisions of the First and Sixth Circuits. Neither of those courts has held that the term "position of the United States" in the Hyde Amendment incorporates the EAJA's definition of that term to the extent that it includes "the action or failure to act by the agency upon which the civil action is based," 28 U.S.C. 2412(d)(2)(D). Nor have those courts held that, when determining the "position of the United States" under the Hyde Amendment, a court must look to the actions of officers of a different agency that occurred years before the government initiated—or even began investigating—a separate prosecution.

a. In *United States* v. *Knott*, 256 F.3d 20 (1st Cir. 2001), cert. denied, 534 U.S. 1127 (2002), the civil and criminal divisions of the Environmental Protection Agency (EPA) engaged in a number of inspections of a wastewater plant, and, based on evidence obtained from the inspections, the government commenced a prosecution of two defendants for violations of the Clean Water Act, Pub. L. No. 95-217, 91 Stat. 1566. *Knott*, 256 F.3d at 22-24. After the district court granted the defendants' motion to suppress some of the evidence because it found one of the inspections unlawful, the government

moved to dismiss the indictment, and the court granted that motion. *Id.* at 24-25. The court subsequently found that the prosecution was vexatious and awarded one of the defendants attorney's fees and costs under the Hyde Amendment. *Id.* at 25-26.

The First Circuit reversed that award, finding that the government's conduct was not vexatious because the government did not manifest "maliciousness or an intent to harass or annoy." *Knott*, 256 F.3d at 29; see *id.* at 28-36. As part of its analysis, the court "consider[ed] the conduct of the investigation"—including the EPA's conduct—"in order to provide a context in which to assess whether [the] prosecution was 'vexatious' within the terms of the Hyde Amendment," and found that there was insufficient evidence of "the level of conduct required to find vexatiousness." *Id.* at 31.

Knott's reversal of an award under the Hyde Amendment does not conflict with the reversal of such an award in this case. *Knott* never defined "position of the United States" or analyzed whether the Hyde Amendment incorporates the EAJA's definition of that term. And *Knott*'s consideration of investigatory conduct as part of this inquiry is in line with the decision below, which confirmed that "misconduct by law enforcement officers or other executive departments can be *relevant* to a Hyde Amendment application if prosecutors leverage that misconduct to further a prosecution that has no factual or legal basis or that is brought for the purposes of harassment." Pet. App. 32a. Indeed, the court of appeals in this case considered whether the DHS officers had perjured themselves when offering testimony as part of petitioner's prosecution for unlawful reentry, see *id.* at 42a-44a; the court merely declined to consider

their conduct in the 2011 administrative removal proceeding, see *id.* at 29a-32a.

b. In *United States* v. *Heavrin*, 330 F.3d 723 (6th Cir. 2003), the government prosecuted a defendant on multiple fraud counts, and, after trial but before the case was submitted to the jury, the district court granted the defendant's motion for judgment of acquittal. *Id.* at 726-727. The court later granted the defendant a partial award of fees and costs under the Hyde Amendment, concluding that some of the charges brought by the government were vexatious, frivolous, or in bad faith. *Id.* at 728.

To determine whether the district court's count-by-count approach was appropriate, the Sixth Circuit considered the definition of the term "position." *Heavrin*, 330 F.3d at 728-730. The court noted that "the word[] 'position' * * * [is] not defined in [the Hyde Amendment]" and thus "must be accorded [its] ordinary meaning." *Id.* at 728 (citation omitted). And the court stated that "[b]ecause 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." *Id.* at 730. Relying on this Court's decision in *Commissioner* v. *Jean*, 496 U.S. 154 (1990), which "interpret[ed] the term 'position' in the context of the EAJA" and determined that the singular form of "position" indicates that "'only one threshold determination for the entire civil action is to be made,'" the Sixth Circuit determined that the district court's count-by-count approach was incorrect and vacated the district court's fees award, *Heavrin*, 330 F.3d at 730 (quoting *Jean*, 496 U.S. at 159); see *id.* at 730-731, 733.

Heavrin's vacatur of a Hyde Amendment award does not conflict with the court of appeals' decision below. *Heavrin* determined that it was appropriate to define the term "position"—which is undefined in the Hyde Amendment and which is not defined as a standalone word in the EAJA—in the same way in both the statutes. It did not consider—let alone hold—that the EAJA's explicit definition of "position of the United States" is incorporated into the Hyde Amendment to the extent that the EAJA definition includes "the action or failure to act by the agency upon which the civil action is based." 28 U.S.C. 2412(d)(2)(D). And it did not consider whether or to what extent the conduct of officers from another agency in collateral proceedings that occurred years before the investigation and prosecution are relevant to the determination of whether the "position of the United States" was vexatious, frivolous, or in bad faith.

For similar reasons, the Sixth Circuit's decision in *Amezola-Garcia* v. *Lynch*, 835 F.3d 553 (2016), does not suggest a division among the courts of appeals on the question presented. *Amezola-Garcia* involved a request for fees under the EAJA, not the Hyde Amendment. *Id.* at 554. And the Sixth Circuit's statement that "the *Heavrin* court specifically stated that 'the term "position" should be accorded the same meaning under the Hyde Amendment as it is in the EAJA,'" came in the context of concluding that a court must look to the government's position as a whole when determining whether an award of fees is appropriate under the EAJA. *Id.* at 556 (quoting *Heavrin*, 330 F.3d at 730). *Amezola-Garcia* thus does not speak to whether the EAJA's precise statutory definition of "position of the

United States" in the context of a "civil action" is incorporated into the Hyde Amendment's standard for criminal prosecutions, or whether a court considering a request for fees under the Hyde Amendment must consider actions taken by officers of a different agency that occurred years before a prosecution was initiated.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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