

No. 12-44

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IN THE  
*Supreme Court of the United States*

ALI SHAYGAN,

*Petitioner,*

v.

UNITED STATES,

*Respondent.*

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

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**BRIEF OF FORMER FEDERAL JUDGES, FEDERAL  
PROSECUTORS, AND MEMBERS OF CONGRESS AS  
*AMICI CURIAE* IN SUPPORT OF PETITIONER**

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## **QUESTION PRESENTED**

The Hyde Amendment provides that sanctions, including attorney's fees, may be awarded against the United States if its position in a criminal case was "vexatious, frivolous, or in bad faith." Pub. L. No. 105-119, § 617 (codified at 18 U.S.C. § 3006A, historical and statutory notes). In this case, the district court found that the government's decisions to pursue a superseding indictment, to initiate a collateral witness tampering investigation against defense counsel, and to withhold from the court and petitioner various key documents in violation of its disclosure requirements were all motivated by personal animosity and taken in bad faith.

The question presented is whether sanctions may be awarded on the basis of such pervasive subjective bad faith, even if the decision to prosecute was objectively reasonable.

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### **INTEREST OF *AMICI CURIAE*<sup>1</sup>**

*Amici* are former federal judges, federal prosecutors, and members of Congress. The individual *amici* include Bob Barr, a former U.S. Attorney and member of Congress; former U.S. District Judge Paul Cassell; Judge Nathaniel Jones, who served on the U.S. Court of Appeals for the Sixth Circuit; Judge Michael McConnell, who served on the U.S. Court of Appeals for the Tenth Circuit; and former U.S. Attorney and U.S. Senator Joseph Tydings. A complete list of the *amici*, along with biographical data for each one, is included in the Appendix. *Amici* are interested in this case because of their many years of dedicated service to the United States and their commitment to the integrity of the criminal justice system. *Amici* are deeply concerned that the Eleventh Circuit's decision will allow serious prosecutorial misconduct to be excused and, in so doing, will undermine public confidence in our system of justice.

### **SUMMARY OF ARGUMENT**

When the government seeks an indictment – or a superseding indictment – in bad faith, sanctions are appropriate even if the charges are not objectively baseless. The decision to prosecute an individual, or

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<sup>1</sup> Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and that no person other than *amici* or their counsel made a monetary contribution to its preparation or submission. Counsel for both parties received notice of *amici*'s intention to file this brief at least ten days before its due date; letters reflecting the consent of both parties to the filing of this brief have been filed with the Clerk of this Court.

to substantially expand the scope of an existing prosecution, places that individual's freedom, livelihood, and reputation in peril. When such a decision is found to be tainted by discrimination, personal animosity, or other improper ulterior motive, the validity of the underlying charge is not the issue. Congress instead intended to deter prosecutors vested with the public's trust from abusing their power, and in so doing undermining the integrity of the criminal justice system itself.

In this case, petitioner, the government, and the district court all agree that subjective bad faith can warrant sanctions. But the Eleventh Circuit held to the contrary that the Hyde Amendment applies only to prosecutions that lack probable cause. That holding is a bolt from the blue. It conflicts not only with the consensus of the parties, but with the text and purpose of the Hyde Amendment, and with the reasoned conclusions of other courts of appeals that have considered the question. It also finds no support in this Court's precedents.

If 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, given the relatively lax standards for instituting federal prosecutions. When a court bends the law to excuse a prosecutor's bad faith, public confidence in the criminal justice system suffers. This Court should grant certiorari to bring clarity and uniformity to the law, to redeem the Eleventh Circuit's error, and to reiterate both the high standards that apply to federal prosecutors and the need to respect district courts' power to control the cases before them.



**ARGUMENT**

After the jury acquitted petitioner, an experienced district judge with an outstanding reputation found, “without doubt,” that two Assistant United States Attorneys and a DEA Special Agent “acted vexatiously and in bad faith in prosecuting [petitioner] for events occurring after the original indictment was filed and by knowingly and willfully disobeying the orders of this Court.” Pet. App. 68. The district court described the government’s conduct as “profoundly disturbing,” and noted that it raised “troubling issues about the integrity of those who wield enormous power over the people they prosecute.” *Id.* 68-69.

Specifically, the district court found – as a matter of fact, after hearing multiple witnesses and making determinations as to their credibility – that the government had pursued a superseding indictment in retaliation for petitioner’s filing a suppression motion, *id.* 81-82, that the government had initiated a collateral witness tampering investigation in a “tactical,” “bad-faith” effort to disqualify petitioner’s counsel on the eve of trial, *id.* 107-08, and that the government had withheld material information from both the court and the defendant in a “knowing and intentional” violation of court orders and discovery obligations, *id.* 108-12.

These are not the sort of findings a judge makes lightly, and the decision to award sanctions to a defendant is likewise grave. As the district court explained, sanctions are warranted when “substantial abuses occur . . . to make the risk of non-compliance too costly.” *Id.* 70. In this case, the court imposed sanctions because the prosecutors’

misconduct constituted “conscious and deliberate wrongs that arose from the prosecutors’ moral obliquity and egregious departures from the ethical standards to which prosecutors are held.” *Id.* 132. The court also concluded that the misconduct tainted the entire prosecution because “these acts were committed to avoid weakening the government’s case-in-chief and for the purpose of severely prejudicing the interests of” petitioner. *Id.* 133.

Nevertheless, the Eleventh Circuit held that sanctions were not appropriate because the superseding indictment was objectively valid. *Id.* 29. In so doing, the court not only misinterpreted the Hyde Amendment, but it also disempowered district judges presiding over criminal trials and undermined the high ethical standards that govern the conduct of federal prosecutors.

**I. Sanctions Under The Hyde Amendment Are Appropriate When, As Here, Prosecutors Act In Subjective Bad Faith.**

Subjective bad faith warrants sanctions, even if an indictment is supported by probable cause. In 1940, Attorney General Robert Jackson delivered remarks to his colleagues explaining the unique system of ethics that governs federal prosecutors – who wield “more control over life, liberty, and reputation than any other person in America.” Robert H. Jackson, *The Federal Prosecutor*, Address Delivered at the Second Annual Conference of United States Attorneys, Apr. 1, 1940, *reprinted in* 24 J. Am. Jud. Soc’y 18 (1940). Jackson explained:

Law enforcement is not automatic. It isn’t blind. One of the greatest difficulties of the position of prosecutor is that he must pick his

cases, because no prosecutor can even investigate all of the cases in which he receives complaints. If the Department of Justice were to make even a pretense of reaching every probable violation of federal law, ten times its present staff would be inadequate . . . . What every prosecutor is practically required to do is to select the cases for prosecution and to select those in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain.

If the prosecutor is obliged to choose his case, it follows that he can choose his defendants. *Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted.* With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone . . . . *It is in this realm – in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies.* It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself.

*Id.* (emphases added).

Jackson's wise remarks correctly recognize that even when an indictment may be supported by probable cause, a prosecutor's subjective motivations matter tremendously. An indictment (or a superseding indictment) filed in bad faith is no less dangerous to the integrity of the criminal justice system than a vexatious or frivolous one, and deserves no less sanction. If anything, a finding of subjective bad faith makes sanctions *more* appropriate, for in such cases prosecutors have not merely overreached; they have manifestly abused their position of power and trust.

In this case, the government has not disputed – and has at least implicitly acknowledged – that subjective bad faith justifies sanctions under the Hyde Amendment. This is evident from the fact that the government did not even argue for the legal standard that the court of appeals adopted in this case. Instead, the government sought to explain, in detail, the subjective motivations for the prosecutors' decision to seek a superseding indictment. *See* U.S. C.A. Br. 36-43 (arguing that the district court “clearly erred” in finding subjective bad faith because the facts did not support the finding). That the United States at least tacitly accepted a subjective bad faith standard is likewise apparent from the government's attempt to argue that even though isolated acts may have been motivated by bad faith, its position “as a whole” was not so tainted, *id.* 44-46, as well as from its reliance on a First Circuit decision that “reject[ed] a defendant's reliance on civil cases to support his Hyde Amendment claim,” reasoning that “[t]his reliance on occasional cases from a civil context *which did not require subjective bad faith* ignores the peculiar concern, unique to the criminal context, that

the drafters of the Hyde Amendment had to avoid chilling legitimate criminal prosecutions.” *Id.* 47 (citing *United States v. Knott*, 256 F.3d 20, 31 n.6 (1st Cir. 2001) (emphasis added)).

The Eleventh Circuit nevertheless held that “even if we assume that the filing of the superseding indictment was subjectively motivated by ill-will, that finding alone cannot support a sanction against the United States under the Hyde Amendment” because, “regardless of [the prosecutor’s] displeasure or subjective ill-will, the government had an objectively reasonable basis for superseding the indictment.” Pet. App. 26, 29.<sup>2</sup>

The Eleventh Circuit’s decision is contrary not only to the consensus of the parties in this case, and not only to the decisions of other courts that have considered the scope of the Hyde Amendment, but also to the text and purpose of the statute itself.

The Hyde Amendment provides that a court in a criminal case “may award to a prevailing party . . . 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.” Pub. L. No. 105-119, § 617, 111 Stat. 2440, 2519 (1997)

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<sup>2</sup> To its credit, the government also expressly acknowledged that the collateral investigation warranted Hyde Amendment sanctions. *See* Pet. App. 55 n.9 (Edmondson, J., dissenting). However, the Eleventh Circuit refused to award fees for even that misconduct. *See* Pet. App. 40 (majority opinion).

(reprinted in 18 U.S.C. § 3006A, historical and statutory notes). Both the “vexatious” and “frivolous” prongs create objective tests that look to the government’s basis for bringing a criminal case; they consider whether the government’s position was “without reasonable or probable cause or excuse” and whether it was “groundless . . . with little prospect of success . . . often brought to embarrass or annoy the defendant.” Pet. App. 47-48 nn.3-4 (Edmondson, J., dissenting); *see also id.* 28-29 (majority opinion adopting same definitions).

By contrast, the phrase “bad faith” refers to a subjective state of mind. The ordinary legal meaning of the term is “[d]ishonesty of belief or purpose.” Black’s Law Dictionary 134 (7th ed. 1999); *see also* 20 Am. Jur. 2d Costs § 56 (“‘Bad faith’ exists when a party litigates with the purpose of intentional harassment or unreasonable delay. For the purpose of a motion for an award of attorney’s fees, a finding of bad faith turns on a factual determination of a party’s subjective intent.”) (footnote omitted).<sup>3</sup>

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<sup>3</sup> This Court’s precedents regarding other sanctions and fee shifting statutes support the conclusion that “bad faith” refers to a subjective state of mind. In *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978), this Court acknowledged that “the term ‘vexatious’ in no way implies that the plaintiff’s subjective bad faith is a necessary prerequisite to a fee award against him.” Similarly, in *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46 (1991), this Court held that a court’s inherent powers authorize it to sanction litigation undertaken in bad faith, and described bad-faith conduct by reference to a litigant’s state of mind and motivations – not the validity of his underlying claim. *See also id.* at 47 n.11 (referring to the “subjective bad-faith standard” and contrasting it with the objective standard that governs sanctions under Federal Rule of Civil Procedure 11);

That “bad faith” refers to a subjective state of mind is also apparent from the text of the Hyde Amendment itself. If “bad faith” was interpreted to refer to the objective reasonableness of a suit, then it would be entirely redundant with the terms “vexatious” and “frivolous,” in violation of the “cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.” *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (internal quotation marks omitted).

The statute’s purpose likewise supports reading “bad faith” to refer exclusively to subjective intent. As Congressman Henry Hyde explained, the Amendment was intended to address cases in which “[p]eople . . . get pushed around by their government,” 143 Cong. Rec. H7786, H7791 (Sept. 24, 1997) – language that unquestionably suggests a focus on the prosecutors’ motive and conduct, rather than an inquiry into whether prosecutors may at some point have had an objectively reasonable basis for the charges.

If the phrase “bad faith” refers to the government’s subjective intent, then the statute

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*Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533, 548-49 (1991) (contrasting the “subjective bad faith standard” with the Rule 11 standard). And in the related context of discovery violations, this Court has repeatedly treated “bad faith” as a state of mind, holding that when the government violates its discovery obligations, its subjective “good faith or bad faith” is irrelevant to whether a violation occurred. *See, e.g., Brady v. Maryland*, 373 U.S. 83, 87 (1963).

plainly requires that such intent *alone* is sufficient to warrant sanctions. The disjunctive “or” separates the “bad faith” prong from the “vexatious” and “frivolous” prongs, indicating that bad faith can serve as an alternative basis for relief under the Hyde Amendment. *See Horne v. Flores*, 557 U.S. 433, 454 (2009) (interpreting Federal Rule of Civil Procedure 60(b) and holding that the “[u]se of the disjunctive ‘or’ makes it clear that each of the provision’s three grounds for relief is independently sufficient”); *see also Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) (“Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings . . .”). Thus, it does not matter whether “a criminal prosecution was conducted in an objectively reasonable way (not vexatious) and that the prosecution had an objectively realistic likelihood of success (not frivolous).” Pet. App. 46-47 (Edmondson, J., dissenting). Even if both of those criteria are met, the Hyde Amendment authorizes sanctions if prosecutors acted with subjective bad faith.<sup>4</sup>

That rule comports with our basic principles of criminal justice. Our system’s greatness rests, in part, on our insistence that the process be conducted in a principled, clean manner. Thus, for example, we permit the guilty to go free when the evidence against them was obtained in violation of their

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<sup>4</sup> Of course, the Hyde Amendment’s categories are not mutually exclusive. The same act may be vexatious, frivolous, and taken in bad faith. And indeed, vexatiousness or frivolity may be telling evidence of bad faith. But that does not mean that bad faith alone is insufficient as a matter of law.



Fourth Amendment rights. *See Mapp v. Ohio*, 367 U.S. 643, 656 (1961). We suppress coerced confessions, even when they bear every indicia of reliability. *See Rogers v. Richmond*, 365 U.S. 534, 543-45 (1961). And we do not permit the prosecution even of a guilty person on the grounds of that person's race. *See United States v. Armstrong*, 517 U.S. 456, 464 (1996). We do these things because we understand the real risk of tyranny inherent in prosecutorial discretion, and we understand the need to deter future violations. Permitting sanctions when prosecutors act in bad faith is not only consistent with this greater vision of justice, but essential to it.

A rule recognizing the importance of subjective intent is also consistent with the common law – specifically the tort of abuse of process. As this Court has explained, “[t]he gravamen of that tort is not the wrongfulness of the prosecution, but some extortionate perversion of lawfully initiated process to illegitimate ends.” *Heck v. Humphrey*, 512 U.S. 477, 486 n.5 (1994). The Restatement of Torts clarifies that “it is immaterial that the process was properly issued, that it was obtained in the course of proceedings that were brought with probable cause and for a proper purpose, or even that the proceedings terminated in favor of the person instituting or initiating them.” Restatement (Second) of Torts § 682 cmt. a. It explicitly provides that “[t]he *subsequent* misuse of the process, *though properly obtained*, constitutes the misconduct for which the liability is imposed.” *Id.* (emphases added). The Hyde Amendment, by including a “bad faith” prong, enacts a similar rule for federal prosecutors.

To be sure, prosecutors also require protection from baseless allegations of bad faith. Otherwise,

legitimate prosecutions might be chilled. Thus, the standard for determining that the position of the United States was taken in bad faith should be a high one – and as the statute makes clear, the burden must rest on the defendant seeking sanctions. But that does not mean that a finding of bad faith cannot be rooted in a prosecutor’s subjective intent. Importantly, there is no evidence whatsoever that district courts applying a subjective “bad faith” standard have authorized relief in a large number of cases, or have done so inappropriately. Indeed, as a general matter, Hyde Amendment sanctions for any reason are rare. That is a testament to the professional integrity of federal prosecutors, and to the restraint of district judges who, through years of experience, have learned how to draw the line between prosecutorial misconduct and prosecutorial mistakes. It also draws into sharp relief those few cases, including this one, in which prosecutors force a district court to impose sanctions.

In sum, the jury acquitted petitioner, and the district court rendered explicit and detailed factual findings that the prosecutors acted in bad faith by allowing their personal animosity toward defense counsel to guide their decision-making regarding the superseding indictment, the collateral (and fruitless) witness-tampering investigation, and their (wholly inadequate) response to the court’s orders for the production of information. The district court also found that these failures constituted significant breaches of the prosecutors’ ethical obligations, and severely prejudiced petitioner. Whatever the merits of the United States’s initial decision to prosecute this case, these abuses call out for a strong response,

and Hyde Amendment sanctions exist for precisely this purpose.

**II. A Subjective Standard Permits Judges To Control Their Courtrooms And Provides A Necessary Tool To Address Prosecutorial Misconduct.**

The conclusion that the Hyde Amendment permits sanctions for subjective bad faith is further reinforced by two additional factors that are essential to the proper functioning of, and public confidence in, the criminal justice system: the need to provide judges with control over their courtrooms, and the need to impose appropriate sanctions for prosecutorial misconduct.

**A. Judicial Control**

This Court has long recognized that sanctions, including fee awards, assist district courts in controlling and managing the cases before them. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-46 (1991). Such control is necessary, the *Chambers* Court explained, “to achieve the orderly and expeditious disposition of cases.” *Id.* at 43 (quoting *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-31 (1962)). However, that control is substantially eroded if prosecutors are authorized to act in bad faith to disregard explicit orders by the court and fail to provide the court with information necessary to the proper functioning of a trial. In a criminal case,

Hyde Amendment sanctions provide an important mechanism to restore that control.<sup>5</sup>

In this case, the district court ordered the government to turn over all DEA-6 reports for an *in camera* review before trial. This order was presumably intended to ensure that both the court and petitioner had all relevant evidence and information prior to the trial. Notwithstanding the district court's order, however, prosecutors failed to turn over a DEA-6 for Courtney Tucker that would have revealed for the first time both the "very serious" charge purportedly made by Ms. Tucker against the defense and that another witness, Carlos Vento, was acting as a confidential informant for the government. Pet. App. 87. Had this document been disclosed as the court's order had required, the district court explained, it "immediately would have provided it to the defense team." *Id.*

In the same vein, prosecutors failed to disclose the existence of the collateral witness-tampering investigation. Instead, a supervisor from the U.S.

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<sup>5</sup> This Court has further recognized that when trial courts decide to impose sanctions, appellate review of those decisions should be circumscribed because the trial court has the clearest and most comprehensive perspective on the events. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 403-04 (1990) (adopting deferential standard of review for Rule 11 sanction orders because district courts are better positioned to decide questions of misconduct, because deference allows district courts to cope with the highly fact-specific inquiries inherent in sanctions, and because district courts are familiar with local practice norms); *Pierce v. Underwood*, 487 U.S. 552, 559-62 (1988) (reaching same conclusion for similar reasons in the context of the Equal Access to Justice Act, 28 U.S.C. § 2412(d)).

Attorney's Office learned of the collateral investigation for the first time essentially by accident, because she happened to be at a dinner – a social event – with prosecutors Cronin and Hoffman; she then reported the investigation to more senior officials in the U.S. Attorney's office and to the court. Had the supervisor not attended the dinner, the district court observed, “none of the disclosures before me would have transpired, and the jury may well have reached a different result.” Pet. App. 118.

Of course, Hyde Amendment sanctions are not the only mechanism that a district court has to enforce its orders. But Congress's enactment of the statute is itself a recognition that the availability of such sanctions is a powerful and necessary tool when the government's non-compliance is particularly egregious. The Eleventh Circuit's crabbed interpretation of the Hyde Amendment deprives district courts of that tool and implicitly sanctions the government's bad-faith refusal to comply with the district court's orders.

### **B. Prosecutorial Misconduct**

In *Berger v. United States*, 295 U.S. 78, 88 (1935), this Court explained that “[t]he United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.” In the experience of *amici*, this Court's description fits the overwhelming majority of federal prosecutors to a tee: they are honest and ethical officials who – as Judge Martin emphasized in her dissent from the

denial of rehearing – “almost always do their job so as to bring honor to the remarkable criminal justice system that is ours.” Pet. App. 161.

Although virtually all prosecutors do comply with the legal and ethical standards required of them, significant adverse consequences can result from the rare cases in which rogue prosecutors decline to comply with those obligations. As the district court put it in explaining the need for Hyde Amendment sanctions in petitioner’s case, “[o]ur system of criminal justice cannot long survive unless prosecutors strictly adhere to their ethical obligations, avoid even the appearance of partiality, and directly obey discovery obligations and court orders.” Pet. App. 69. That rationale is correct – and there is no basis for limiting its application only to cases in which the basis for a prosecution is objectively unreasonable *as well as* brought in bad faith.

In the rare cases in which prosecutors depart from their obligations, meaningful sanctions are required both to punish the misconduct and to deter future misconduct by others. Unfortunately, other tools to address prosecutorial misconduct during the course of the prosecution are largely ineffective. For example, prosecutors are immune from most lawsuits relating to their official conduct. *See Imbler v. Pachtman*, 424 U.S. 409, 427-28 (1976). And even when they are not immune, damages are often not available. *See Connick v. Thompson*, 131 S. Ct. 1350, 1365-66 (2011) (holding that disclosure violations did not support claim for damages on failure-to-train theory).

Formal complaint procedures likewise produce little fruit. Although Justice Powell emphasized in *Imbler*, that “a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers,” 424 U.S. at 429, filing complaints with state bar associations has not proven to be a meaningful tool to punish or deter prosecutorial misconduct.

First, studies have shown that complaints to state bar associations “are rarely brought against prosecutors . . . . Of the 2,000-plus appeals [since 1970 in which prosecutorial misconduct involved dismissal of charges, sentence reductions, or reversals], only 44 involved disciplinary action.” Emily Bazelon, *Playing Dirty in the Big Easy*, Slate, [http://www.slate.com/articles/news\\_and\\_politics/crime/2012/04/new\\_orleans\\_district\\_attorney\\_leon\\_cannizzaro\\_is\\_being\\_questioned\\_for\\_his\\_ethics\\_in\\_pursuing\\_convictions\\_.html](http://www.slate.com/articles/news_and_politics/crime/2012/04/new_orleans_district_attorney_leon_cannizzaro_is_being_questioned_for_his_ethics_in_pursuing_convictions_.html) (Apr. 18, 2012).

This dearth of complaints can be attributed to several different factors. Defense lawyers, who are likely to encounter the misbehaving prosecutor in future cases, may be reluctant to file complaints because they fear retribution that may affect other clients. David Keenan et al., *The Myth of Prosecutorial Accountability After Connick v. Thompson: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 Yale L.J. Online 203, 211 (2011), <http://yalelawjournal.org/2011/10/25/keenan.html>. Similarly, other prosecutors who observe misconduct may refrain from reporting it for “fear of professional repercussions.” *Id.* at 210.

Nor do defendants have any real incentive to file a complaint with the state bar: the overwhelming majority of criminal defendants plead guilty, and thus are unlikely even to discover serious misconduct; even if a defendant goes to trial and is convicted in a proceeding involving prosecutorial misconduct, “[i]t flies in the face of reason to expect a defendant to risk a prosecutor’s actual or imagined displeasure by instituting proceedings that cannot directly benefit him. The defendant may not unreasonably believe such action will adversely affect his case in subsequent proceedings . . . or his later chances for parole.” *Id.* (quoting *People v. Green*, 274 N.W.2d 448, 464 (Mich. 1979) (Levin, J., dissenting)).

As the recent trial of the late Senator Ted Stevens demonstrated, the federal government is also unlikely and unwilling to step in to impose meaningful sanctions or discipline for prosecutorial misconduct during the course of the litigation. Stevens was convicted of seven felony counts and consequently lost his battle for reelection. However, the conviction was subsequently dismissed after it was revealed that prosecutors had withheld evidence, including – among other things – notes from an interview with the prosecution’s key witness that contradicted his testimony at trial. The dismissal of the Stevens case in turn led to the reversal of the convictions of two Alaskan state senators “because significant exculpatory information in those cases was concealed from the defense, including the same impeachment information about the same government key witness that had been concealed from Senator Stevens.” Report to Hon. Emmet G. Sullivan of Investigation Conducted Pursuant to the



Court's Order, dated April 7, 2009, No. 09-mc-198-EGS, at 1 (D.D.C. Mar. 15, 2012).

The prosecutorial misconduct in the Stevens case was sufficiently egregious that the district judge who handled the trial, Emmet Sullivan, stated that in twenty-five years on the bench, he had “never seen mishandling and misconduct like what [he had] seen” there. Joe Palazzolo, *Justice Department Opposes Expanded Brady Rule*, Main Justice, Oct. 15, 2009, available at <http://www.mainjustice.com/2009/10/15/justice-department-opposes-expanded-brady-rule/>.

While the Department of Justice has emphasized its commitment to avoid future violations, it disciplined only the two line attorneys who failed to turn over evidence; they received suspensions of just fifteen and forty days, respectively. See Charlie Savage, *Prosecutors Face Penalty in '08 Trial of a Senator*, N.Y. Times, May 24, 2012, at A22.<sup>6</sup>

In light of the inadequacy of other remedies, sanctions provide a crucial means of redress and deterrence for misconduct. And there is absolutely no reason why the availability of that mechanism

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<sup>6</sup> The Department of Justice has also opposed legislation that might ultimately obviate the need for discipline by requiring early disclosure of evidence helpful to the defense; the Department sought to justify its opposition on the ground that “[t]he *Stevens* case is one in which the current rules governing discovery were violated, not one in which the rules were complied with but shown to be inadequate.” U.S. Dep’t of Justice, Statement for the Record, Hearing on the Special Counsel’s Report on the Prosecution of Senator Ted Stevens 7 (Mar. 28, 2012), available at <http://www.justice.gov/ola/testimony/112-2/03-28-12-doj-statement.pdf>.

should be restricted only to cases in which the decision to prosecute was objectively unreasonable. When, as here, an acquitted defendant demonstrates to a district court's satisfaction that prosecutors acted in bad faith – including by stacking 118 additional counts into a superseding indictment for the purpose of prolonging petitioner's trial and period of house arrest, by conducting a covert collateral investigation for the purpose of disqualifying petitioner's attorneys on the eve of trial, and by refusing to turn over materials expressly covered by a court order – there is no reason to withhold sanctions.

The Eleventh Circuit's decision to the contrary sends a signal that prosecutors may pursue a vindictive agenda with impunity so long as they have reason to believe in the defendant's guilt. That rule bears no resemblance to the high standards that govern the behavior of federal prosecutors. This Court should grant certiorari to reaffirm our society's commitment to just criminal enforcement.

**CONCLUSION**

For the foregoing reasons, as well as those outlined in the petition, certiorari should be granted.

Respectfully submitted,

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August 9, 2012

## APPENDIX

List of *Amici Curiae*

Bob Barr	United States Attorney for the Northern District of Georgia (1986-90); United States House of Representatives (1995-2003)
William G. Bassler	United States District Judge for the District of New Jersey (1991-2006)
Rick Berne	Assistant United States Attorney, Northern District of California (1978-80) and Eastern District of New York (1976-78)
Stephen Binhak	Assistant United States Attorney for the Southern District of Florida (1994-99)
Martha Boersch	Assistant United States Attorney for the Northern District of California (1992-2004); Chief of the Securities Fraud Section (2001-02); Chief of the Organized Crime Strike Force (2002-04)
James S. Brady	United States Attorney for the Western District of Michigan (1977-81)

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Bob Brennan	Assistant United States Attorney for the Southern District of Georgia (2003-06)
A. Bates Butler, III	United States Attorney for the District of Arizona (1980-81); First Assistant United States Attorney for the District of Arizona (1977-80)
J.A. Canales	United States Attorney for the Southern District of Texas (1977-80)
Zachary W. Carter	United States Attorney for the Eastern District of New York (1993-99)
Paul Cassell	United States District Judge for the District of Utah (2002-07); Associate Deputy Attorney General with the United States Justice Department (1986-88); Assistant United States Attorney for the Eastern District of Virginia (1988-1991)
U.W. Clemon	United States District Judge for the Northern District of Alabama (1980-2009)
Michael Cohen	Assistant United States Attorney for the Southern

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	District of Florida (1981-85)
Amy Lee Copeland	Assistant United States Attorney, Appellate Chief, for the Southern District of Georgia (2000-09)
Joseph A. DeMaria	Special Attorney, Department of Justice Organized Crime & Racketeering Section, Miami Strike Force (1985-88)
Thomas A. Durkin	Assistant United States Attorney for the Northern District of Illinois (1978-84)
Tyrone C. Fahner	Attorney General of Illinois (1980-83); Assistant United States Attorney for the Northern District of Illinois (1971-75)
Charles Fels	Assistant United States Attorney for the Middle District of Tennessee (1974-77); Assistant United States Attorney for the Eastern District of Tennessee (1982-84)
Daniel S. Fridman	Assistant United States Attorney for the Southern

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	District of Florida (2004-07); Senior Counsel to the Deputy Attorney General (2006-07)
Craig Gillen	Assistant United States Attorney for the Northern District of Georgia (1978-1989)
Daniel F. Goldstein	Assistant United States Attorney for the District of Maryland (1976-82)
Steven Gordon	Assistant United States Attorney for the District of Columbia, Chief of Felony Trial Division (1975-86)
Gabriel Gore	Assistant United States Attorney for the Eastern District of Missouri (1995-1999); Assistant Special Counsel, John C. Danforth Office of Special Counsel, Waco Investigation (1999-2000)
Rodger A. Heaton	United States Attorney for the Central District of Illinois (2005-09); Assistant United States Attorney (2003-05); Assistant United States Attorney for the Southern

5a

	District of Indiana (1989-2000)
Daniel K. Hedges	United States Attorney for the Southern District of Texas (1981-85)
Nathaniel Jones	United States Circuit Judge for the Sixth Circuit (1979-2002); Assistant United States Attorney for the Northern District of Ohio (1962-68)
Roy Kahn	Assistant United States Attorney for the Southern District of Florida (1983-85)
Glenn B. Kritzer	Assistant United States Attorney for the Eastern District of New York (1977-79); Assistant United States Attorney for the Southern District of Florida (1979-82)
Thomas Lambros	United States District Judge for the Northern District of Ohio (1967-95); Chief Judge (1990-95)
Steven H. Levin	Assistant United States Attorney for the Middle District of North Carolina (1999-2002); Assistant



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	United States Attorney, Deputy Chief for the District of Maryland (2002-08)
Jared Lopez	Assistant United States Attorney for the District of Puerto Rico (2000-04)
David S. Mandel	Assistant United States Attorney for the Southern District of Florida (1989- 95)
Nina Stillman Mandel	Assistant United States Attorney for the Southern District of Florida (1990- 99)
Richard Marmaro	Assistant United States Attorney for the Central District of California (1980-84)
John G. Martin	Assistant United States Attorney for the Eastern District of New York (2003- 08)
Jon May	Assistant United States Attorney for the Southern District of Florida (1981- 85)

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Michael W. McConnell	United States Circuit Judge for the Tenth Circuit (2002-09)
A. Melvin McDonald	United States Attorney, for the District of Arizona (1981-85); Maricopa County (Arizona) Superior Court Judge (1974-81)
Michael D. McKay	United States Attorney for the Western District of Washington (1989-93)
Jane Moscovitz	Senior Litigation Counsel (1985-87); Assistant United States Attorney for the Southern District of Florida (1982-87); Assistant United States Attorney for the District of Maryland (1978-82);
Norman Moscovitz	Senior Litigation Counsel (1987-93); Assistant United States Attorney for the Southern District of Florida (1982-93)
Stephen M. Orlofsky	United States District Judge for the District of New Jersey (1996-2003)
Michael Pasano	Assistant United States Attorney for the District of Columbia and the

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	Southern District of Florida (1978-85)
H. James Pickerstein	United States Attorney for the District of Connecticut (1974); Chief Assistant United States Attorney for the District of Connecticut (1974-86)
Redding Pitt	United States Attorney for the Middle District of Alabama (1994-2001)
Sidney Powell	Assistant United States Attorney for the Western District of Texas, Northern District of Texas and Eastern District of Virginia (1978-88)
Jim Richmond	United States Attorney for the Northern District of Indiana (1985-91)
Lilly Ann Sanchez	Assistant United States Attorney for the District of Columbia; Assistant United States Attorney for the Southern District of Florida (1994-2005)
Leonard Sands	Trial Attorney, Criminal Division United States Department of Justice (1971-79)

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David W. Shapiro	United States Attorney for the Northern District of California (2001-02); Chief, Criminal Division, (1998-2001); Chief, Appellate Section, (1998); Assistant United States Attorney (1986-98)
William I. Shockley	Assistant United States Attorney for the District of Connecticut (1981-85); Southern District of Florida (1986-91); Northern District of California (1991-2006)
Wick Sollers	Assistant United States Attorney for the District of Maryland (1985-88)
Neal R. Sonnett	Assistant United States Attorney for the Southern District of Florida, Chief of Criminal Division, (1967-72)
Stephen S. Stallings	Assistant United States Attorney for the Western District of Pennsylvania and Southern District of Florida (2001-08)
Herbert Stern	United States District Judge for the District of

10a

	New Jersey (1973-87); United States Attorney for the District of New Jersey (1971-73)
David J. Stetler	Assistant United States Attorney for the Northern District of Illinois (1979-88); Deputy Chief, Special Prosecutions Division (1984-86); Chief, Criminal Receiving and Appellate Division (1986-88)
Sanford Svetcov	Chief, Appellate Section, United States Attorney's Office, San Francisco (1984-89); Attorney-in- Charge, Organized Crime Strike Force (1981-84); Chief Assistant United States Attorney (1978-81)
Neil Taylor	Assistant United States Attorney for the Southern District of Florida (1981-83)
Michael Tein	Assistant United States Attorney for the Southern District of Florida (1995- 2000)

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Joseph Tydings	United States Attorney for the District of Maryland (1961-63); United States Senator from Maryland (1965-71)
Bruce Udolf	Assistant United States Attorney for the Southern District of Florida (1987-98)
Julie M. Wade	Assistant United States Attorney for the Southern District of Georgia (2007-08)
Dan K. Webb	United States Attorney for the Northern District of Illinois (1970-76)
Kira Anne West	Assistant United States Attorney for the Southern District of Texas, Houston Division (1990-99)
Solomon L. Wisenberg	Deputy Independent Counsel, Whitewater Investigation; Assistant United States Attorney for the Western District of Texas (1989-97); Eastern District of North Carolina (1987-89)
Tom Withers	Assistant United States Attorney for the Southern

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District of Georgia (1990-98)

Alfred Wolin

United States District Judge for the District of New Jersey (1988-2004)

David M. Zlotnick

Assistant United States Attorney for the District of Columbia (1989-93)

