

No. 01-

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IN THE

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RIVERDALE MILLS CORPORATION,  
*Petitioner,*

v.

UNITED STATES,  
*Respondent*

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**On Petition For Writ of Certiorari to the  
United States Court of Appeals  
For the First Circuit**

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**PETITION FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED FOR REVIEW

The district court, at the urging of the United States, dismissed a two-count felony indictment against petitioner Riverdale Mills Corporation (“RMC”) and its president and chief executive officer, James M. Knott, Sr. (“Knott”), for a regulatory offense under the Clean Water Act. The United States stated that the evidence was insufficient to sustain its burden of proof.

The district court granted petitioner RMC's subsequent motion for attorneys' fees and expenses under the Hyde Amendment, 18 U.S.C. §3006A (historical and statutory notes), finding as a fact that the government had no credible evidence to support the indictment and that the prosecution of RMC was “vexatious” within the meaning of the Hyde Amendment because it was conducted without any probable cause, noting, among other shortcomings, altered pH levels of RMC's rinsewater transcribed in EPA log books.

The court of appeals reversed, holding, contrary to the decisions of other circuit courts, that there must be “objective evidence of improper motive” and of “intent to harass or annoy” the defendants to establish that a prosecution was vexatious. The court also applied a *de novo* standard of review by declining to accord deference to the trial judge's findings of fact, and declined to remand the case for further proceedings consistent with its newly adopted definition of “vexatious.”

The questions presented for review are:

1. Whether the court of appeals improperly defined the term “vexatious” as used in the Hyde Amendment to require, contrary to other circuits,

“objective evidence of improper motive” and of “intent to harass or annoy” in addition to proof of the absence of probable cause.

2. Whether the court of appeals improperly applied a *de novo* standard of review instead of reviewing the district court’s findings of fact under an abuse of discretion standard.
3. Whether the court of appeals erred in refusing to remand the case for further proceedings, including opportunity for discovery consistent with the court of appeals’ newly adopted definition of “vexatious,” especially where, as here, there was evidence of altered pH readings, and where petitioner had proffered expert evidence showing that no Clean Water Act violation had occurred.

### **PARTIES TO THE PROCEEDING**

All of the parties to the proceeding in the Court of Appeals for the First Circuit, whose judgment is sought to be reviewed, are

Riverdale Mills Corporation  
James M. Knott, Sr.<sup>1</sup>  
United States of America

There is no parent corporation of Riverdale Mills Corporation and no publicly held company owns any of its shares of stock.

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<sup>1</sup> Co-defendant, James M. Knott, Sr., against whom the indictment was also voluntarily dismissed, had also sought an award of attorneys' fees. The District Court denied recovery by Knott because his net worth rendered him ineligible under the net worth limitations of 28 U.S.C. §2412(d) which the court held was incorporated into the Hyde Amendment. The Court of Appeals affirmed the District Court decision in that respect. Mr. Knott, who was also represented by counsel for petitioner Riverdale Mills Corporation, does not seek further review in this Court.

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## **PETITION FOR A WRIT OF CERTIORARI**

Riverdale Mills Corporation respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

### **OPINIONS BELOW**

The opinion of the United States Court of Appeals for the First Circuit in *United States of America v. James M. Knott, Sr. and Riverdale Mills Corp.* is reported at 256 F. 3d 20 (1<sup>st</sup> Cir. 2001) and is reprinted in the Appendix at App. 1a. The opinion of the United States District Court for the District of Massachusetts in *United States of America v. James M. Knott, Sr. and Riverdale Mills Corporation* is reported at 106 F. Supp. 2d 174 (D. Mass. 2000) and is reprinted at App. 30a. The judgment of the Court of Appeals entered on July 12, 2001 is unreported and reprinted at App. 29a.

### **JURISDICTION**

The judgment of the United States Court of Appeals for the First Circuit sought to be reviewed was entered on July 12, 2001. (App. 29a). The time for the appellees to file their petition for rehearing and rehearing en banc was enlarged to and including August 10, 2001 by order of the Court of Appeals entered on July 26, 2001. (App. 46a). On August 24, 2001 the Court of Appeals entered an Order denying appellee RMC's timely petition for rehearing and its timely suggestion for the holding of a rehearing en banc. (App. 47a).

The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

**STATUTE INVOLVED**

The statute which is the primary subject of this petition is the Hyde Amendment, Pub. L. No. 105-119, 111 Stat. 2440, 2519 (1997) (reprinted in 18 U.S.C.S. §3006A, historical and statutory notes). The full text of the statute follows:

During fiscal year 1998 and in any fiscal year thereafter, the court, in any criminal case (other than a case in which the defendant is represented by assigned counsel paid for by the public) pending on or after the date of the enactment of this Act, may award to a prevailing party, other than the United States, a reasonable attorney's fee and other litigation expenses, where the court finds that the position of the United States was vexatious, frivolous, or in bad faith, unless the court finds that special circumstances make such an award unjust. Such awards shall be granted pursuant to the procedures and limitations (but not the burden of proof) provided for an award under section 2412 of title 28, United States Code. To determine whether or not to award fees and costs under this section, the court, for good cause shown, may receive evidence ex parte and in camera (which shall include the submission of classified evidence or evidence that reveals or might reveal the identity of an informant or undercover agent or matters occurring before a grand jury) and evidence or testimony so received shall be kept under seal. Fees and other expenses awarded under this provision to a party shall be paid by the agency over which the party prevails from any funds made available to the agency by appropriation. No new appropriations shall be made as a result of this provision.

## STATEMENT OF THE CASE

The petitioner, Riverdale Mills Corporation (“RMC”), manufactures plastic-coated steel wire mesh at a manufacturing plant in Northbridge, Massachusetts. The manufacturing process involves two production lines, each of which utilizes contact rinsewater that is ultimately discharged into a publicly-owned wastewater treatment works of the Town of Northbridge (“POTW”).

The rinsewater discharge from the galvanizing line is acidic, while the rinsewater from the coating line is caustic. The two neutralize each other when they are mixed within RMC’s plant en route to a privately owned test pit located directly outside the plant (Manhole #1). From that pit the combined rinsewaters flow through 300 feet of a sewer line privately owned by defendant, Knott, to Manhole #2 where the public sewer begins. From there, the combined rinsewaters travel approximately three miles to the Northbridge POTW facility where, along with all other township wastewater, they are treated as necessary and discharged into the Blackstone River.

On October 21, 1997, two inspectors from the United States Environmental Protection Agency (“EPA”), acting on an alleged anonymous tip from an RMC employee, sought permission to inspect RMC’s wastewater treatment system. Mr. Knott, president and chief executive officer of RMC, granted permission on the condition that the EPA officials be accompanied by RMC representatives at all times during their inspection.

Despite the express condition imposed by Mr. Knott, the EPA officials took several rinsewater samples from private Manhole #1 and one sample from public Manhole #2 in the absence of any representative of RMC. The EPA asserted that these samples all had a pH below 5.0 s.u. Discharges of rinsewater below pH 5.0 s.u. into a POTW are prohibited under the Clean Water Act. See 40 C.F.R. §403.5; 33 U.S.C. §1251, *et seq.* There was only one reading at public Manhole #2 which was hand-recorded at 4.0 s.u.<sup>2</sup>

On November 7, 1997, approximately 21 armed EPA law enforcement agents made a surprise raid of RMC's plant—this time pursuant to a criminal search warrant. At that time, the EPA obtained seven rinsewater samples from the relevant public Manhole #2. All read above 5.0 s.u., within the legal limit prescribed by the Clean Water Act. (App. 33a). At no time did the EPA obtain or attempt to obtain any other rinsewater sample from public Manhole #2.

On August 12, 1998, a Grand Jury returned an indictment against RMC and Knott charging them in two counts with having violated the Clean Water Act on October 21 and November 7, 1997 by knowingly discharging rinsewater with a pH of less than 5.0 s.u. into a POTW sometime during each of those two days.

On October 14, 1998, RMC and Knott moved to suppress the evidence obtained from the EPA's surreptitious

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<sup>2</sup> The district judge, who conducted a hearing on the defendants' successful motion to suppress the unconstitutionally obtained evidence on October 21, 1997, found that the alleged 4.0 reading had actually been 7.0, but had been altered to appear as 4.0 (App. 32a, 40a, 49a, 50a).

afternoon sampling on October 21, 1997. The district court allowed that motion on February 16, 1999, finding that the EPA inspectors violated the fourth amendment rights of RMC and Knott by sampling rinsewater discharges in the absence of an RMC representative, contrary to the terms of Knott's conditional consent to the inspection. (App. 32a, 33a). The United States declined to appeal the suppression order.

On April 23, 1999, the government sought leave of court to dismiss the indictment because, in the course of preparing for trial, it determined that the evidence was insufficient to sustain its burden of proof for *either* count, even though the evidence that was suppressed related only to pH readings for October 21, 1997, that formed the basis of Count 1. The district court granted leave to dismiss the indictment on May 6, 1999. (App. 33a, 34a).

RMC and Knott timely filed their motion to recover attorneys' fees and litigation expenses pursuant to the Hyde Amendment. At the same time they moved for leave to conduct discovery to support their Hyde Amendment application. During the pendency of the Hyde Amendment proceedings, the defendants renewed their requests for an opportunity to conduct such discovery.

After consideration of RMC's Hyde Amendment motion and the government's opposition, Judge Nathaniel Gorton of the United States District Court for the District of Massachusetts (who had conducted the hearing on the motion to suppress evidence and was the only judge to see or hear any evidence in this case) ruled, without holding a hearing, that the government's prosecution of the defendants was "vexatious" within the meaning of the Hyde

Amendment because he found as facts that “the government did not . . . have any credible evidence to support [the] accusation. To the contrary, the samples taken at Manhole #2, the point of discharge into the public sewer, showed that RMC was not in violation of the Clean Water Act.” (App. 40a). The district court did not find it necessary to address RMC’s proffered expert evidence showing that readings below 5pH could not occur because of the configuration of the plant’s rinsewater disposal system.

Judge Gorton defined “vexatious” as meaning “without reasonable or probable cause or excuse.” (App. 39a). In addition to finding that the government lacked any credible evidence to support the indictment, Judge Gorton cited several instances of the EPA’s vexatious conduct. Among them were his findings that:

- The EPA’s collection of evidence was suspect because of the surreptitious sampling on October 21, 1997, in direct violation of RMC’s and Knott’s fourth amendment rights. (App. 40a).
- Obvious alterations in the EPA agent’s field notes where neutral pH readings in the “7” range were changed to appear as acidic readings in the “2” and “4” ranges. (App. 40a, 49a, 50a, 51a, 52a).
- The government’s failure to collect any additional wastewater samples at public Manhole #2 after all samples it had obtained there on November 7, 1997, proved to be innocuous and exculpatory, and despite the fact that the government was fully aware as early as December 1997 of Knott’s claim of private ownership

of the sewer pipe leading from Manhole #1 to Manhole #2 and of the street above that pipe. (App. 40a, 41a).

- The government's misrepresentation in its mandatory pretrial disclosures that "The United States is unaware of the existence of any exculpatory evidence," when, in fact, every pH reading at public Manhole #2 was at or above the legal minimum of 5.0 s.u. (App. 41a).

- The government's excessive zeal in executing the November 7, 1997 search when it stormed the defendants' premises with a virtual "SWAT team" of twenty-one EPA law enforcement officers and agents, many of whom were armed. The agents "vigorously interrogated and videotaped employees causing them great distress and discomfort." (App. 41a, 42a).

- The United States Attorney and the EPA exacerbated the defendants' humiliation at being criminally indicted by issuing press releases, on the day of the indictment, falsely accusing the defendants of knowingly polluting the rivers of the Commonwealth when they knew no evidence supported that conclusion. (App. 41a).

Based on all of these factual findings, Judge Gorton concluded that the government's prosecution of the defendants was "clearly vexatious." (App. 42a). He awarded fees and litigation expenses to RMC. The judge also denied the defendants' requests for discovery as moot. (App. 44a, 45a).

The government appealed to the United States Court of Appeals for the First Circuit. The First Circuit adopted a definition of “vexatious” that it acknowledged differed from the definition embraced by the district court and from the definition applied by other circuit courts of appeal. The First Circuit required that in order for a prosecution to be “vexatious” within the meaning of the Hyde Amendment, it must not only lack legal merit or factual foundation, but also must be proven to have been based on “objective evidence of improper motive” and to have been undertaken with “intent to harass or annoy.” (App. 19a, 17a).

Despite having adopted this unprecedented definition of “vexatious,” the Court of Appeals declined RMC’s suggestion that the case be remanded to the District Court for proceedings consistent with the newly defined standard. Instead, the Court of Appeals vacated the award of fees to RMC and remanded the Hyde Amendment application to the District Court for dismissal with prejudice. (App. 28a).

The Court of Appeals also failed to accord proper deference to the district judge’s findings of fact on the issue of probable cause to support the prosecution. Instead of reviewing the district judge’s findings for abuse of discretion, the Court of Appeals actually applied an improper *de novo* standard of review.

RMC’s timely petition for rehearing and suggestion for rehearing *en banc* was denied on August 24, 2001. (App. 47a, 48a).

## **REASONS FOR GRANTING THE WRIT**

1. This Court should review this case because the United States Court of Appeals for the First Circuit has entered a decision in conflict with the decision of all other United States Courts of Appeals that have addressed the same important matter. Since its passage four years ago, there have been a steadily increasing number of reported cases based on the Hyde Amendment. The substantial likelihood that prevailing defendants in criminal cases initiated by the United States will increasingly resort to the amendment for recovery of their legal fees and expenses makes it important for this Court to interpret the language of the Hyde Amendment in order to provide guidance to the lower courts, the public, and the bar, and to resolve the conflict demonstrated by the decisions of those Courts of Appeals which have considered the issue.<sup>3</sup> This case provides the Court with an opportunity to resolve these circuit differences, and there is no sound reason to delay addressing this issue. Moreover, the First Circuit has decided an important question of federal law that has not been, but should be, settled by this Court.

2. The Court of Appeals also applied an incorrect standard of review. Instead of according deference to the district judge's findings of fact, as required by an abuse of discretion standard, the Court of Appeals reviewed his findings *de novo* and afforded them no deference whatsoever.

3. The Court of Appeals for the First Circuit has so far departed from the accepted and usual course of judicial

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<sup>3</sup> See *Circuit Split Roundup*, 70 U.S.L.W. 2166 (Sept. 18, 2001) (describing circuit split between First Circuit and other circuits on the proper interpretation of the Hyde Amendment).

proceeding as to call for an exercise of this Court's supervisory power. By adopting a definition of "vexatious" at odds with the standard applied by any other Court of Appeals as well as with the standard applied by the district judge, and then declining to remand the case to the district court for further proceedings consistent with the newly enunciated standard—including an opportunity for discovery—the Court of Appeals has deprived the petitioner of its right fully and fairly to present its case to meet the court's newly minted interpretation of the statute.

**I. THE DECISION OF THE FIRST CIRCUIT CONFLICTS WITH DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS ON THE SAME IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.**

In November 1997, Representative Henry Hyde, Chairman of the House Judiciary Committee, offered an amendment to an appropriations bill to enable defendants who prevailed in criminal prosecutions initiated by the United States to recover reasonable attorneys' fees and litigation expenses from the government. Representative Hyde was concerned about the irreparable damage to reputation and the considerable expense incurred by an innocent defendant who had been subjected to unfounded prosecution by the United States.

As originally proposed, the Hyde Amendment was modeled after the Equal Access to Justice Act ("EAJA"), 28 U.S.C. §2412, that applies in civil proceedings by or against the United States. The amendment would have permitted a

prevailing criminal defendant to recover attorney's fees and expenses from the United States unless the government could prove that the prosecution was "substantially justified." The House of Representatives adopted the Hyde Amendment, but the Senate passed the appropriations bill without the amendment.

The Conference Committee compromised the differences by replacing the "substantially justified" standard of the EAJA with a requirement that a prevailing defendant must bear the burden of proving 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." The Hyde Amendment became law in that revised form.<sup>4</sup>

All United States Courts of Appeals which have ruled on the issue agree that a prevailing party in a criminal case brought by the United States may recover reasonable attorneys' fees and expenses under the Hyde Amendment if he can establish that the position of the United States was either vexatious, frivolous, or in bad faith. (18 U.S.C. §3006A, historical and statutory notes). Circuit Courts have differed, however, in their interpretation of the term "vexatious."

In *United States v. Gilbert*, 198 F. 3d 1293 (11<sup>th</sup> Cir. 1999), the Eleventh Circuit defined "vexatious" as "without reasonable or probable cause or excuse." 198 F. 3d at 1298-99. See *United States v. Adkinson*, 247 F.3d 1289 (11<sup>th</sup> Cir.

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<sup>4</sup> For a comprehensive review of the legislative history of the Hyde Amendment, see *United States v. Gilbert*, 198 F. 3d 1293, 1299-1303 (11<sup>th</sup> Cir. 1999).

2001) (affirming *Gilbert's* definition of “vexatious”). The Fourth Circuit adopted the same definition *In Re: 1997 Grand Jury*, 215 F. 3d 430, 436 (4<sup>th</sup> Cir. 2000). The Sixth Circuit has weighed in with the Eleventh and the Fourth in *United States v. True*, 250 F. 3d 410, 423 (6<sup>th</sup> Cir. 2001). In *United States v. Sherburne*, 249 F. 3d 1121 (9<sup>th</sup> Cir. 2001) the Ninth Circuit held that a prosecution was “vexatious” under the Hyde Amendment only if it *both* lacked merit *and* was prosecuted with some *subjective* malice or intent to harass or annoy. See also *United States v. Lindberg*, 220 F. 3d 1120, 1125 (9<sup>th</sup> Cir. 2000) (resisting any rigid definition of “vexatious, frivolous or in bad faith”); *United States v. Beeks*, 2001 U.S. App. Lexis 20614 (8<sup>th</sup> Cir. 2001) (adopting *Gilbert's* definition).

The District Court in this case adopted the definition of "vexatious" enunciated in *Gilbert* and followed by most other circuits that have addressed the issue. The court found that the prosecution was vexatious because the government had no probable cause to support it.

The First Circuit's decision in this case rejects both the subjective malice standard of *Sherburne* and the absence of probable cause standard of *Gilbert*. The First Circuit attempts to strike a muddled middle ground by defining a vexatious prosecution as one which *both* lacks either legal merit or factual foundation *and* is proven to have been based on “*objective* evidence of improper motive.” (App. 35a). The Court required proof that “the government's conduct when viewed objectively, manifests maliciousness or an intent to harass or annoy.” (App. 17a).

The Court acknowledged that other circuits had applied conflicting definitions (App. 14a), but it adopted a definition

that differed from any previously articulated. The issue is sufficiently important to justify review by this Court in order to provide a reliable definition for the guidance of lower courts, the public, and the bar on an issue which is arising with increasing frequency. *See* S. Ct. R. 10(a).

Moreover, the First Circuit's novel interpretation of the Hyde Amendment decides an important question of federal law that has not been, but, for the reasons heretofore indicated, should be, settled by this Court. *See* S. Ct. R. 10(c).

## **II. THE COURT OF APPEALS APPLIED AN IMPROPER STANDARD OF REVIEW.**

All of the parties agree that the appropriate standard of review in Hyde Amendment proceedings is for abuse of discretion. Although the Court of Appeals paid lip service to that standard (App. 28a), it failed to apply it. Instead, the Court of Appeals accorded no deference to the district judge's findings of fact. It made its own findings, thereby so far departing from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. *See* S. Ct. R. 10(a).

Every court of appeals that has considered the issue has held that the appropriate standard of review in Hyde Amendment proceedings is for abuse of discretion by the trial judge. An abuse of discretion occurs only if the district judge bases an award of attorneys' fees and expenses on findings of fact that are clearly erroneous. *United States v. Gilbert*, 198 F. 3d 1293, 1298 (11<sup>th</sup> Cir. 1999); *United States v. Lindberg*, 220 F. 3d 1120, 1124 (9<sup>th</sup> Cir. 2000); *United*

*States v. Beeks*, 2001 U.S. App. Lexis 20614, 5 (8<sup>th</sup> Cir. 2001) (and cases cited therein).

In *United States v. Truesdale*, 211 F. 3d 898, 905-06 (5<sup>th</sup> Cir. 2000) the Fifth Circuit held, citing *Pierce v. Underwood*, 487 U.S. 552, 563 (1988), that the district court's findings of fact in awarding fees under the Hyde Amendment are entitled to deference for several reasons. First, the district court is the only court with first-hand familiarity with the underlying facts. Second, the circuit court should not be burdened with evaluating the merits of the underlying case or the government's litigation strategy. See *United States v. True*, 250 F. 3d 410, 422 (6<sup>th</sup> Cir. 2001) (court generally reviews district court decisions regarding attorney's fees under a deferential standard).

The First Circuit's decision stands these principles of review for abuse of discretion on their head. Instead of according the required deference to the district judge's findings, the Court completely ignored them and substituted its own findings of fact as in a case of *de novo* review. It accorded no deference whatsoever to the district court's findings of fact.

The decision second guesses the trial judge. Where Judge Gorton found as fact, for example, that someone changed the only incriminating reading on October 21, 1997, at Manhole #2 from a 7 to a 4, (App. 32a, 49a, 50a) the Circuit Court cavalierly disregarded that factual finding, speculating that the altered reading could have been a simple mistake. (App. 20a). But the trial judge was not bound to conclude that it was a simple mistake. And he did not so conclude.

Another example is the Court of Appeals' disregard of the trial judge's finding that the "government knew, or should have known, that RMC's discharge did not enter the public sewer until it reached manhole #2, yet for unexplained reasons, the government failed to take further tests there." (App. 41a). This finding was firmly supported by the evidence presented at the suppression hearing. But the Court of Appeals improperly concluded that the trial judge's finding of fact was wrong. (App. 20a).

Similarly, the Court of Appeals improperly discounted the district judge's finding that the government had withheld evidence of the exculpatory November 7, 1997 pH readings at Manhole #2. (App. 41a). While the district court emphasized the significance of that improperly withheld evidence, the Court of Appeals ignored it without any basis for finding that the trial judge's finding was clearly erroneous. (App. 21a).

The Court of Appeals inappropriately emphasized and relied upon the proffered and untested opinion of a government "expert" regarding the probability that acidic discharges of less than 3.0 pH at Manhole #1 would reach Manhole #2 at less than 5.0 pH. (App. 25a, 26a). However, the district judge never referred to this proffered opinion in its own decision. Nothing in the record establishes that the government obtained that opinion at any time prior to its motion to dismiss the indictments.<sup>5</sup> Moreover, the Court of Appeals conveniently failed to mention that the record before the district judge contained a detailed report and

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<sup>5</sup> The government's expert's affidavit of Brian McKeown is dated October 12, 1999. It appears as Tab 28 in the Joint Appendix (JA) filed at the Court of Appeals.

affidavit from the defendants' own expert that established the impossibility of a discharge of less than 5.0 pH into Manhole #2 based on conditions within the plant as reported by the EPA's own inspectors.<sup>6</sup>

Perhaps most important is the Court of Appeals disavowal of the district judge's factual finding that the government had no credible evidence to support the prosecution. (App. 40a). Without an opportunity to have heard the witnesses at the suppression hearing, the Court of Appeals improperly usurped the role of the trial judge and erroneously applied a *de novo* standard of review to his findings of fact.

**III. THE COURT OF APPEALS IMPROPERLY REMANDED THE CASE FOR DISMISSAL WITH PREJUDICE INSTEAD OF REMANDING IT FOR FURTHER PROCEEDINGS CONSISTENT WITH THE COURT'S NEWLY MINTED DEFINITION OF "VEXATIOUS."**

The district judge denied the defendants' several requests for leave to conduct discovery to support their Hyde Amendment motion. He did so initially without prejudice, and ultimately because the issue of discovery became moot as a result of his award of fees and expenses based on his determination that the prosecution was "vexatious" as the term was used in the Hyde Amendment. He did not believe that the law required a finding of objective malice. He applied the Black's Law Dictionary definition of "vexatious"

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<sup>6</sup> The defendants' expert's report of James C. O'Shaughnessy, Ph.D., P.E., appears at Tab 13 of the JA.

as meaning “without probable cause or excuse” and relied on precedent established by *Gilbert*. (App. 39a). When the district judge decided this case, no court had ever defined “vexatious” to require proof of objective malice—whatever that may mean—or of intent to harass or annoy. The trial judge could not have foreseen that the Court of Appeals for the First Circuit would impose such a heavy and ambiguous burden of proof on a Hyde Amendment applicant.

The Court of Appeals’ decision is replete with references to the absence in the undeveloped record of findings of objective malice or of an intent to harass or annoy the defendants. (App. 18a, 20a, 22a, 41a). But the district judge did not believe that proof of objective malice or of an intent to harass or annoy was required to establish that the prosecution was vexatious. He believed that a complete absence of credible evidence to justify the prosecution was sufficient.

If the district judge had known that the Court of Appeals would require proof of objective malice or of an intent to harass or annoy, he would most likely have allowed the defendants’ motions to conduct discovery as expressly contemplated by the language of the Hyde Amendment.

The petitioner should not be deprived of its fee award because the Court of Appeals adopted a definition of “vexatious” that differed from that of any court that had previously addressed the issue. Under these circumstances, the appropriate disposition would have been to remand the case for further proceedings consistent with the newly adopted definition of “vexatious” including an opportunity for the petitioner to develop evidence through discovery of “objective malice” and of “intent to harass or annoy.” See,

e.g., *Millipore Corp. v. Travelers Ind. Co.*, 115 F. 3d 21, 41 (1<sup>st</sup> Cir. 1997) (Lynch, J.) (citing cases) (district court, with its extensive knowledge of the facts and proceedings is in a far better position than the Court of Appeals to address and first apply new case law; “justice requires” remand.) See also *United States v. Gardner*, 23 F. Supp. 2d 1283 (N.D. Okla. 1998) (Hyde Amendment itself provides for discovery controlled by the court *even where there has been a full trial of the underlying criminal case.*)

Accordingly, even if the Court of Appeals interpretation of the term “vexatious” is correct, the Court of Appeals so departed from the usual course of judicial proceedings by failing to remand the case as to call for an exercise of this Court’s supervisory power.

### CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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