No. 04-1495

In the Supreme Court of the United States

MICHAEL HARTMAN, ET AL., PETITIONERS

v.

WILLIAM G. MOORE, JR.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether law enforcement agents may be liable under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for retaliatory prosecution in violation of the First Amendment when the prosecution was supported by probable cause.

2. Whether, if so, the law to that effect was clearly established at the time that criminal charges were filed against respondent, such that petitioners are not entitled to qualified immunity.

PARTIES TO THE PROCEEDING

Petitioners are Michael Hartman, Frank Kormann, Pierce McIntosh, Norman Robbins, and Robert Edwards. Respondent is William G. Moore, Jr.

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The Acting Solicitor General, on behalf of the federal-officer petitioners, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 388 F.3d 871. The order of the district court denying petitioners' motion for summary judgment (Pet. App. 42a) is unreported. The order of the district court denying reconsideration (Pet. App. 32a-41a) is reported at 332 F. Supp. 2d 252. Prior opinions of the court of appeals (Pet. App. 43a-58a, 112a-128a) are reported at 213 F.3d 705 and 65 F.3d 189. The prior opinion of the district court dated September 24, 1993 (Pet. App. 129a-149a) is not published in the *Federal*

Supplement but is available at 1993 WL 405785. The other prior district court orders and opinions (Pet. App. 59a-111a, 150a-151a, 152a-165a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 9, 2004. A petition for rehearing was denied on January 31, 2005 (Pet. App. 166a). On April 22, 2005, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 9, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides, in relevant part, that "Congress shall make no law * * * abridging the freedom of speech."

STATEMENT

1. An investigation of public corruption in the procurement of equipment by the United States Postal Service (Postal Service) resulted in the successful prosecution of a member of the Postal Service's Board of Governors and a number of consultants. Respondent, the president of a company that hired the consultants on the recommendation of the corrupt member of the Board of Governors, was indicted but then acquitted. In this *Bivens* action, see *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), respondent alleges that United States Postal Inspectors targeted him in retaliation for his criticism of the Postal Service and for his lobbying activities.

a. In the mid-1980s, respondent was president and chief executive officer of Recognition Equipment, Inc. (REI), which was engaged in an effort to market "multi-line" optical character readers (OCRs) to the

Postal Service. OCRs, which can interpret text on an envelope, are used to sort mail. The total value of the contracts sought by REI was between $250 and $400 million. After the Postal Service decided to purchase "single-line" OCRs instead, respondent and REI mounted a media and lobbying campaign that sought to overturn the Postal Service's decision. Pet. App. 2a-4a; C.A. App. 259.

During the course of that campaign, Robert Reedy, REI's Vice President for Marketing, met with Peter E. Voss, a member of the Board of Governors of the Postal Service. Voss recommended that REI hire John Gnau and his consulting firm, Gnau and Associates, Inc. (GAI), to assist in REI's efforts to obtain a Postal Service contract. Voss later called respondent and said that he hoped Reedy would act on his recommendation. Respondent thereafter told Reedy not to "drop the ball" with respect to the referral. In January 1985, REI hired GAI as a consultant. C.A. App. 147-149, 269-270.

As it turned out, Voss had a substantial financial interest in ensuring that Gnau got consulting work, because the two had agreed that Voss would refer clients to Gnau's firm in exchange for a kickback of a portion of GAI's fees. They had also agreed that Voss, Gnau, and two other GAI officers—William Spartin and Michael Marcus—would split the contingency fee that REI was obligated to pay GAI if it received the Postal Service contract. Pet. App. 4a, 44a, 113a.

United States Postal Inspectors ultimately discovered this scheme, as well as a related one involving the search for a new Postmaster General in 1985. Spartin, the nominal president of GAI, also headed an executive recruiting firm called MSL International. Through Voss, and despite GAI's representation of REI before the Postal Service, Spartin's firm received

the contract to find a new Postmaster General. Spartin thereafter called respondent and asked for recommendations. Respondent gave Spartin the names of three prominent business executives, including Albert V. Casey, who was ultimately selected as Postmaster General. Respondent also made an introductory call to Casey on Spartin's behalf. C.A. App. 152-153, 274.

The postal inspectors' investigation resulted in federal criminal charges against Voss, Gnau, and Marcus, all of whom pleaded guilty. Spartin was given immunity in exchange for his cooperation. Pet. App. 4a.

b. As the investigation continued, the postal inspectors determined that respondent and Reedy must have known about the criminal schemes from which they stood to benefit. Although neither Voss nor any of the GAI defendants implicated them, Pet. App. 25a, there was considerable circumstantial evidence that respondent and Reedy had been aware of the illegal agreement between Voss and Gnau and had used it to their company's advantage. For example:

- The postal inspectors discovered that Reedy, the REI vice president, had lied to them about prior contacts with Voss. When asked who had recommended GAI to him, Reedy said that he had gotten Gnau's name from a consultant during a chance encounter at the 1984 Republican National Convention. Reedy later admitted that he had received the referral from Voss. C.A. App. 270.

- GAI's Michael Marcus recounted a conversation in which Spartin indicated that REI had purged records relating to the investigation, and there were in fact a number of omissions in the records that REI produced in response to a

subpoena. Respondent's "Postal" notebook appeared to be missing 36 sheets of paper, and there were no entries for a six-month period in 1986. In addition, respondent's telephone log for a three-month period in 1984-1985 was never located. C.A. App. 155, 271, 274.

- One of respondent's notebooks included an entry suggesting that he might have coached REI employees on how to answer questions from postal inspectors,[1] and REI employees subsequently testified before the grand jury that respondent had made comments consistent with that entry at a staff meeting the same day. By that time, postal inspectors had arranged to interview REI employees in the coming week. C.A. App. 156.

- The postal inspectors found respondent's explanation of his involvement in the recruitment of a new Postmaster General implausible. Respondent told them that, when Spartin called and asked for referrals, he did not really

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[1] The entry, dated January 27, 1987, reads as follows:

- lot of homework
- drive a wedge between people (intimidate)
- answer "I don't know, I really can't remember"
- excitable
- all kinds of scenarios
- ask same questions over and over
- don't show him how smart you are
- don't relax
- long interrogation (tough questions at end)
- possible subpoena

Pet. App. 23a-24a.

> believe that Spartin was recruiting a new Postmaster General. That statement seemed implausible because respondent not only gave Spartin the names of candidates, but made an introductory telephone call to one of them. The inspectors were also informed by Spartin that he and respondent had agreed to say that it was respondent who called Spartin, even though it was in fact Spartin who placed the call. C.A. App. 153, 274-275.

After considerable deliberation, including 24 separate meetings during a seven-month period, the United States Attorney for the District of Columbia decided to seek an indictment of respondent, Reedy, and REI. In October 1988, a grand jury returned a seven-count indictment charging them with conspiracy to defraud the United States, in violation of 18 U.S.C. 371; mail and wire fraud, in violation of 18 U.S.C. 1341, 1343, and 2; theft of property used by the Postal Service, in violation of 18 U.S.C. 1707 and 2; and receiving stolen property, in violation of District of Columbia law. The indictment alleged that respondent and Reedy participated in the kickback scheme and the scheme involving the search for a Postmaster General. The lead prosecutor in the case was Assistant United States Attorney (AUSA) Joseph Valder. Pet. App. 4a-5a, 131a-132a; C.A. App. 294-296.

Respondent, Reedy, and REI pleaded not guilty to the charges, and proceeded to trial. At the close of the government's case, the district court granted the defendants' motion for judgment of acquittal, finding the evidence insufficient to support a reasonable inference that they knew of either criminal scheme. *United*

States v. *Recognition Equip. Inc.*, 725 F. Supp. 587 (D.D.C. 1989).

c. Respondent thereafter brought this *Bivens* action in the United States District Court for the Northern District of Texas, where respondent resided. The defendants in the civil case were AUSA Valder and six postal inspectors—petitioners and a postal inspector who has since died—who had worked on the investigation and prosecution. Respondent alleged a number of constitutional violations, including malicious prosecution and retaliatory prosecution in violation of the First Amendment. The theory of the complaint was that respondent was prosecuted in retaliation for his criticism of Postal Service policy concerning OCR technology. Respondent later filed a separate suit against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671-2680. Pet. App. 5a-6a, 46a, 113a-115a.

2. a. The district court dismissed all claims against AUSA Valder on the ground of absolute immunity and dismissed all claims against the postal inspectors, except the claims of malicious prosecution and retaliatory prosecution, on the ground of qualified immunity. The court then ruled that it lacked personal jurisdiction over the postal inspectors and transferred the case to the United States District Court for the District of Columbia. It also transferred the FTCA case. Pet. App. 152a-165a.

After the transfer, the cases were consolidated. The district court then dismissed respondent's claims of malicious prosecution and retaliatory prosecution, holding that the allegations did not satisfy the heightened pleading standard under then-applicable circuit law for *Bivens* claims asserting an unconstitutional motive.

The court also dismissed the FTCA claims. Pet. App. 129a-151a.

b. Respondent appealed, and the court of appeals affirmed in part and reversed in part. Pet. App. 112a-128a. The court of appeals held that Valder was entitled to absolute immunity for certain of his alleged actions but not for others. *Id.* at 116a-123a. As for respondent's claims against the postal inspectors, the court affirmed the dismissal of the malicious-prosecution claim, because "it has not been clearly established that malicious prosecution violates any constitutional or statutory right," but reversed the dismissal of the retaliatory-prosecution claim, because that claim "does allege the violation of clearly established law" and "meet[s] any applicable heightened pleading standard." *Id.* at 124a-126a. The court of appeals also reinstated some of respondent's FTCA claims. *Id.* at 126a-128a.[2]

3. a. On remand, the district court granted Valder's motion for summary judgment, holding that respondent could not establish that Valder brought the prosecution to retaliate against respondent for his First Amendment activity, because absolute immunity protected his decision to prosecute. The district court denied the postal inspectors' motion for summary judgment, however, and allowed limited discovery on the question whether they had the requisite retaliatory motive. The court also granted the United States' motion for judgment on the pleadings on the FTCA claims. Pet. App. 59a-111a.

b. Respondent again appealed, and the court of appeals again affirmed in part and reversed in part. Pet. App. 43a-58a. The court of appeals held that the

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[2] Valder filed a petition for a writ of certiorari at that stage, which this Court denied. *Valder* v. *Moore*, 519 U.S. 820 (1996).

district court had correctly granted summary judgment for Valder, but it reinstated one of respondent's FTCA claims (for malicious prosecution). *Id.* at 48a-58a.[3]

4. On remand, the postal inspectors again moved for summary judgment, arguing that "they enjoy qualified immunity because probable cause supported [respondent's] prosecution." Pet. App. 6a. The United States also moved for summary judgment on respondent's malicious-prosecution claim under the FTCA. Concluding that "[t]here are material facts in dispute," the district court denied the motion in a one-paragraph order. *Id.* at 42a. The district court subsequently denied a motion for reconsideration. *Id.* at 32a-41a.

5. Petitioners (but not the United States) appealed, and the court of appeals affirmed. Pet. App. 1a-31a. The court of appeals first held that it had jurisdiction over petitioners' appeal, reasoning that the district court's denial of qualified immunity turned on an issue of law and was therefore a collateral order subject to immediate appeal despite the absence of a final judgment. *Id.* at 7a-9a. The court then held that petitioners' motion for summary judgment had been properly denied. *Id.* at 10a- 31a. Recognizing that a defendant in a *Bivens* suit is entitled to qualified immunity unless he violated a clearly established right, the court concluded that retaliatory prosecution violates the First Amendment even when there is probable cause for the charges, and that that principle was clearly established at the time the charges were brought against respondent. *Ibid.* The court therefore did not decide whether there was probable cause for the charges (or whether it was reasonable for petitioners to

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[3] This time, Moore filed a petition for a writ of certiorari, which this Court denied. *Moore* v. *Valder*, 531 U.S. 978 (2000).

believe there was probable cause). *Id.* at 12a. Instead, the court remanded for trial on the question whether petitioners had a retaliatory motive. *Id.* at 31a.

a. The court of appeals held that the first question in the qualified-immunity inquiry—whether probable cause defeats a claim of retaliatory prosecution—"has already been answered" by the District of Columbia Circuit, in a case called *Haynesworth* v. *Miller*, 820 F.2d 1245 (1987). Pet. App. 12a. That case, the court said, "described the 'essential elements of a retaliatory-prosecution claim,'" and did not "suggest that lack of probable cause is an element." *Id.* at 12a-13a (quoting *Haynesworth*, 820 F.2d at 1257 n.93). The court explained that, under the standard articulated in *Haynesworth*, "once a plaintiff shows protected conduct to have been a motivating factor in the decision to press charges, the burden shifts to the officials to show that they would have pursued the case anyway." *Id.* at 13a. The court went on to say that "that description of the tort was part of *Haynesworth*'s holding, [and] we lack authority to disregard it." *Id.* at 14a.

Citing decisions of the Second, Third, Fifth, Eighth, and Eleventh Circuits, the court recognized that "several other circuits" do "require lack of probable cause in retaliatory prosecution actions." Pet. App. 15a. But those decisions, the court said, "are not the law of this circuit—*Haynesworth* is." *Ibid.* The court also noted that two other circuits—the Sixth and the Tenth—do not require a showing of a lack of probable cause. *Ibid.* The court found support for its approach in *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977), which involved a public school teacher's claim that he had been fired because of his First Amendment activity. Pet. App. 15a-16a. In that case, the court of appeals explained, a showing that

the First Amendment activity was a "motivating factor" in the teacher's firing was deemed sufficient to shift the burden to the school board to establish that "it would have reached the same decision" even in the absence of the constitutionally protected conduct. *Ibid.* (quoting *Mt. Healthy*, 429 U.S. at 287).

While the court of appeals thought "*Haynesworth*'s binding effect" sufficient "to end the first part of [the] qualified immunity inquiry," the court acknowledged that petitioners had "raised serious objections to [its] approach," and thus deemed it "useful to flesh out the reasons why the existence of probable cause should not necessarily preclude liability." Pet. App. 16a. In the court's view, probable cause is "designed for the ordinary arrest or prosecution where courts may presume that government officials exercised their discretion in good faith," not cases where the plaintiff can "demonstrate hostility to free speech to have been a motivating factor in the decision to prosecute." *Ibid.* The court of appeals acknowledged this Court's admonition in the analogous context of a selective-prosecution claim that prosecutorial discretion is a "core executive constitutional function." *Id.* at 17a (quoting *United States* v. *Armstrong*, 517 U.S. 456, 465 (1996)). But the court of appeals nevertheless rejected petitioners' argument that, just as a claim of selective prosecution requires an "objective" showing that similarly situated defendants were not prosecuted, see *Armstrong*, 517 U.S. at 465, a claim of retaliatory prosecution requires an "objective" showing that there was no probable cause for the prosecution. Pet. App. 17a-18a.

The court of appeals characterized its theory of liability as "limited," because, in its view, a showing of probable cause "will be enough in most cases to establish that prosecution would have occurred absent

bad intent." Pet. App. 19a. Recovery will be possible, the court said, only in the "rare cases where strong motive evidence combines with weak probable cause to support a finding that the prosecution would not have occurred but for the officials' retaliatory animus." *Id.* at 20a. The court thought that the case before it was "an example of this rare circumstance." *Ibid.*

b. The court of appeals held that the second question in the qualified-immunity inquiry—whether it was clearly established that probable cause does not defeat a claim of retaliatory prosecution—was also answered by *Haynesworth*. That case, the court said, was "[d]ecided in 1987, a year before [respondent's] indictment," and it "clearly stated the elements of retaliatory prosecution, leaving no doubt that government officials could be liable for pressing charges they would not have pursued without bad motive." Pet. App. 29a. The court held that the law was clearly established despite the fact that *Haynesworth* addressed the nature of a First Amendment retaliatory-prosecution claim "without analysis in a footnote in an opinion generally addressing other issues," because "qualified immunity requires only that the law be clear, not that it be stated prominently or elaborately." *Ibid.* (quoting Pet. C.A. Reply Br. 12). The court also found it irrelevant that other circuits do require an absence of probable cause, because "a decision of this court—*Haynesworth*— provided guidance on exactly the issue [petitioners] confronted." *Id.* at 30a.

REASONS FOR GRANTING THE PETITION

Under well-established principles of qualified immunity, federal officers sued under *Bivens* are not liable for damages unless they violated "clearly established statutory or constitutional rights of which a reasonable

person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). In deciding a question of qualified immunity, courts "first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and, if so, proceed to determine whether that right was clearly established at the time of the alleged violation." *Wilson* v. *Layne*, 526 U.S. 603, 609 (1999) (quoting *Conn* v. *Gabbert*, 526 U.S. 286, 290 (1999)). The court of appeals held that, in order to make out a First Amendment claim of retaliatory prosecution, a plaintiff need not establish that the prosecution was not supported by probable cause. It also held that the law to that effect was clearly established when the charges were filed against respondent. The court of appeals' first holding conflicts with decisions of five other circuits and is incorrect. It also has recurring importance, because it "threatens to chill law enforcement by subjecting [officers'] motives and decision-making to outside inquiry," *United States* v. *Armstrong*, 517 U.S. 456, 465 (1996) (quoting *Wayte* v. *United States*, 470 U.S. 598, 607 (1985)), whenever retaliation is alleged. This Court should therefore review that holding, as well as the court of appeals' second holding, which is closely related to the first.

A. The Court Of Appeals' Holding That The Existence Of Probable Cause Does Not Defeat A Claim Of Retaliatory Prosecution Conflicts With Decisions Of Five Other Circuits

Petitioners' submission is that, regardless of law enforcement officers' motives for bringing criminal charges, a plaintiff cannot establish retaliatory prosecution by federal officials in a *Bivens* case (or state officials in a suit brought under 42 U.S.C. 1983) if there was probable cause for the charges. Five circuits—the

Second,[4] Third,[5] Fifth,[6] Eighth,[7] and Eleventh[8]—have so held. In contrast, three circuits—the District of

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[4] See *Mozzochi* v. *Borden*, 959 F.2d 1174, 1179-1180 (2d Cir. 1992) ("[B]ecause there was probable cause in this case to believe that [the plaintiff] violated the [criminal] statute, we will not examine the defendants' motives in reporting [the plaintiff's] actions to the police for prosecution."); *Singer* v. *Fulton County Sheriff*, 63 F.3d 110, 120 (2d Cir. 1995) ("[I]f the officer * * * had probable cause * * * , then we will not examine the officer's underlying motive in arresting and charging the plaintiff."), cert. denied, 517 U.S. 1189 (1996); *Curley* v. *Village of Suffern*, 268 F.3d 65, 73 (2d Cir. 2001) ("[B]ecause defendants had probable cause to arrest plaintiff, an inquiry into the underlying motive for the arrest need not be undertaken.").

[5] See *Merkle* v. *Upper Dublin Sch. Dist.*, 211 F.3d 782, 796 (3d Cir. 2000) ("An employer incurs no risk of a suit for malicious prosecution [in violation of the First Amendment] when the employer has probable cause to believe that its employee ha[s] committed a criminal violation.").

[6] See *Keenan* v. *Tejeda*, 290 F.3d 252, 260 (5th Cir. 2002) ("[R]etaliatory criminal prosecutions in violation of the First Amendment are actionable only if a plaintiff can * * * prove the common-law elements of malicious prosecution, including the absence of probable cause to prosecute."); *Izen* v. *Catalina*, 398 F.3d 363, 367-368 (5th Cir. 2005) ("to make out a retaliation claim," plaintiffs "in the prosecution context" must "establish each of the common law malicious prosecution elements," one of which is "an absence of probable cause to prosecute") (quoting *Keenan*, 290 F.3d at 257).

[7] See *Smithson* v. *Aldrich*, 235 F.3d 1058, 1063 (8th Cir. 2000) (because of "the finding of probable cause to believe that [the plaintiff] was violating the * * * ordinance, * * * the [First Amendment] claim of pretext [for the arrest] is immaterial").

[8] See *Dahl* v. *Holley*, 312 F.3d 1228, 1236 (11th Cir. 2002) (rejecting claim that plaintiff "was arrested in retaliation for her constitutionally protected speech," because, "[w]hatever the officers' motivation, * * * the existence of probable cause to arrest [the plaintiff] defeats her First Amendment claim"); *Wood*

Columbia Circuit (in this case) and the Sixth[9] and Tenth[10] Circuits—have held that the existence of probable cause does not defeat a claim of retaliatory prosecution. There is thus a five-to-three circuit conflict on the first question presented in the petition. That conflict was acknowledged by the court below, see Pet. App. 15a, and has since been acknowledged by the Fifth Circuit, see *Izen* v. *Catalina*, 398 F.3d 363, 368 n.7 (2005).[11]

B. The Court Of Appeals' Holding That The Existence Of Probable Cause Does Not Defeat A Claim Of Retaliatory Prosecution Is Incorrect

Like a claim of selective prosecution, a claim of retaliatory prosecution requires an objective showing in addition to the showing that the officer-defendants acted with an improper motive. For a claim of

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v. *Kesler*, 323 F.3d 872, 883 (11th Cir.) ("Th[e] retaliatory prosecution claim * * * is * * * defeated by the existence of probable cause."), cert. denied, 540 U.S. 879 (2003); *Draper* v. *Reynolds*, 369 F.3d 1270, 1277 n.11 (11th Cir.) (rejecting claim that defendant violated plaintiff's First Amendment rights by "arrest[ing] him for proclaiming his innocence," because "[the defendant] had probable cause to arrest [the plaintiff] regardless of [his] motivation"), cert. denied, 125 S. Ct. 507 (2004).

[9] See *Greene* v. *Barber*, 310 F.3d 889, 896-897 (6th Cir. 2002) ("[T]he existence of probable cause would not justify the arrest if * * * the arrest was the product of an improper motive.").

[10] See *Poole* v. *County of Otero*, 271 F.3d 955, 961 (10th Cir. 2001) (fact that "conduct warranted the charges" is "not relevant to [the] First Amendment claim" of retaliatory prosecution).

[11] The Fifth Circuit decision states that the minority view has also been adopted by the Seventh Circuit. See *Izen*, 398 F.3d at 368 n.7. But it does not cite any decision of that court, and we are not aware of any Seventh Circuit decision that addresses the issue. The reference to the Seventh Circuit, therefore, was apparently inadvertent.

retaliatory prosecution, the required objective showing is an absence of probable cause, which is an essential element of the analogous common-law tort of malicious prosecution. The court of appeals erred in holding otherwise.

1. Because the prosecution of crimes is a "special province" of the Executive Branch, *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489 (1999); *Heckler* v. *Chaney*, 470 U.S. 821, 832 (1985), courts are "properly hesitant to examine the decision whether to prosecute," *Wayte* v. *United States*, 470 U.S. at 608. As this Court has explained, judicial deference to prosecutorial decisionmaking has two related justifications. The first is "the relative competence of prosecutors and courts," *Armstrong*, 517 U.S. at 465, for "the decision to prosecute is particularly ill-suited to judicial review," *Wayte*, 470 U.S. at 607. As the Court has recognized, factors like "the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan" are not "readily susceptible to the kind of analysis the courts are competent to undertake." *Ibid.* The second justification for judicial deference in this area is "a concern not to unnecessarily impair the performance of a core executive constitutional function." *Armstrong*, 517 U.S. at 465. Examining the underlying motivations for a prosecution "[can] delay[] the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy." *Wayte*, 470 U.S. at 607.

Because the "systemic costs" of judicial inquiry in this area are of "particular concern," *Wayte*, 470 U.S. at

607, this Court's decisions involving a claim of selective prosecution, in violation of the defendant's equal protection rights, have "taken great pains to explain that the standard is a demanding one," *Armstrong*, 517 U.S. at 463, and that "a selective prosecution claim is [therefore] a *rara avis*," *American-Arab Anti-Discrimination Comm.*, 525 U.S. at 489. That is true even though government actions based on race are generally subject to highly exacting review. See, *e.g.*, *Johnson* v. *California*, 125 S. Ct. 1141, 1146-1152 (2005). The "particularly demanding" standard for claims of selective prosecution, *American-Arab Anti-Discrimination Comm.*, 525 U.S. at 489, has both a subjective and an objective component. To prevail, the claimant must show not only that the decision to prosecute "was motivated by a discriminatory purpose," but also that it "had a discriminatory effect." *Wayte*, 470 U.S. at 608. When the allegation is that the prosecution was racially motivated, the latter, objective, requirement means the defendant must show that "similarly situated individuals of a different race were not prosecuted." *Armstrong*, 517 U.S. at 465.

Under this Court's cases, therefore, a claimant cannot establish a selective-prosecution claim merely by showing that the claimant's race was a but-for motivation for the prosecution. In this case, by contrast, the court of appeals held that a claimant *can* make out a *retaliatory*-prosecution claim merely by showing that the claimant's *speech* was a but-for motivation for the prosecution. There is no basis for treating these two closely analogous types of constitutionally prohibited prosecutions differently. Free speech rights are important to criminal defendants, but no more so than the equal protection of the laws. Likewise, the exercise of the power to prosecute—"one of the core powers of

the Executive Branch," *Armstrong*, 517 U.S. at 467—is no less important to the government when it is challenged under the First Amendment than when it is challenged under the equal-protection component of the Due Process Clause. Accordingly, if a selective-prosecution claimant must make an objective showing before a court may take the extraordinary step of inquiring into the government's motives for bringing criminal charges, some objective showing is likewise required of a retaliatory-prosecution claimant.

2. This Court "frequently consult[s] * * * common law in attempting to determine the content of constitutional provisions." *Loving* v. *United States*, 517 U.S. 748, 779 (1996) (Thomas, J., concurring in the judgment).[12] The common-law analog of a claim of retaliatory prosecution in violation of the First Amendment is the tort of malicious prosecution. Indeed, a First Amendment-based claim of retaliatory prosecution can be viewed simply as one *form* of the tort of malicious prosecution. The common-law tort requires proof that the prosecution was commenced "primarily for a purpose other than that of bringing an offender to justice," Restatement (Second) of Torts § 653, at 406 (1977), and a retaliatory prosecution is a prosecution commenced for one such purpose: retaliating for the exercise of First Amendment rights. That is why a claim of retaliatory prosecution has been aptly described as "a First Amendment claim of malicious prosecution." *Johnson* v. *Louisiana Dep't of Agric.*, 18 F.3d 318, 320 (5th Cir. 1994).

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[12] See, *e.g.*, *United States* v. *Booker*, 125 S. Ct. 738, 753 (2005); *Crawford* v. *Washington*, 541 U.S. 36, 54 (2004); *Wilson* v. *Arkansas*, 514 U.S. 927, 931 (1995); *Branzburg* v. *Hayes*, 408 U.S. 665, 685 (1972).

As this Court recognized in *Heck* v. *Humphrey*, 512 U.S. 477 (1994), an essential element of the common-law tort of malicious prosecution is that "the prior proceeding was without probable cause." *Id.* at 485 n.4.[13] One rationale for that principle is the "obvious polic[y] of the law in favor of encouraging proceedings against those who are apparently guilty." W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 119, at 876 (5th ed. 1984). In light of this common law rule, the majority of the courts of appeals to consider the question are correct in holding that absence of probable cause is a necessary objective element of the constitutional claim of retaliation in the special context of prosecutorial decisionmaking.

C. Whether The Existence Of Probable Cause Defeats A Claim Of Retaliatory Prosecution Is A Question Of Recurring Importance

The court of appeals' decision will routinely allow courts and civil juries to conduct an after-the-fact "[e]xamin[ation] [of] the basis of a prosecution," *Wayte*, 470 U.S. at 607, in retaliatory-prosecution cases, because probable cause is irrelevant and there is no other objective screen. In addition, the decision may well increase the number of retaliatory-prosecution actions that are brought, because the existence of probable cause is not an obstacle to suit and "a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions" to

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[13] See, *e.g.*, Restatement (Second) of Torts § 653, at 406 (plaintiff must prove that defendant "initiate[d] or procure[d] the proceedings without probable cause"); 8 Stuart M. Speiser et al., *The American Law of Torts* § 28:7, at 38 (1991) ("it is fundamental that lack or want of probable cause is an essential element for successful pursuance of such an action").

those responsible for his prosecution. *Imbler* v. *Pachtman*, 424 U.S. 409, 425 (1976). That is one of the justifications for absolute immunity for prosecutors. See *Burns* v. *Reed*, 500 U.S. 478, 485 (1991); *Imbler*, 424 U.S. at 425. The court of appeals' decision is also likely to make litigation more expensive and time-consuming, because defendants cannot terminate the suit at an early stage through a showing of probable cause and an improper motive is "easy to allege and hard to disprove." *Crawford-El* v. *Britton*, 93 F.3d 813, 821 (D.C. Cir. 1996), vacated on other grounds, 523 U.S. 574 (1998). The standard adopted by the court of appeals thus threatens to "undermine prosecutorial effectiveness," *Wayte*, 470 U.S. at 607, by "revealing the Government's enforcement policy," *ibid.*, diverting officers from their duties, and generally "chill[ing] law enforcement," *ibid.* These threats are most pronounced in the area of public corruption, where, by virtue of their interactions with government officials, subjects and targets of criminal investigations will frequently be in a position to assert a First Amendment claim.

The court of appeals insisted that its standard *is* "[r]espectful of executive discretion," because it "allows the government to proceed with prosecutions that, though motivated in part by hostility to First Amendment activity, can be justified on legitimate grounds." Pet. App. 17a. But a legal standard is not "[r]espectful of executive discretion" merely because it requires an ultimate finding that "hostility to speech [was] a but-for cause of the prosecution." *Ibid.* As this Court's selective-prosecution cases make clear, inquiry into law enforcement officers' motives for bringing a prosecution should be the exception rather than the rule, and should be limited to cases where the claimant can make the requisite objective showing at the threshold. The court

of appeals' standard permits an inquiry into motives in *every* retaliatory-prosecution case, and thus interferes with "one of the core powers of the Executive Branch," *Armstrong*, 517 U.S. at 467, regardless of whether the officers are ultimately found to have had an improper motive that was the but-for cause of the prosecution. The notion that the court of appeals' decision is sensitive to the *special* considerations applicable to prosecutorial decisionmaking is particularly difficult to reconcile with the fact that its standard is identical to the one applied in *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977), which involves retaliatory action against an *employee* by a public *employer*. See Pet. App. 15a-16a (relying on *Mt. Healthy*).

The court of appeals also claimed that its "theory of liability" is "limited" because "probable cause ordinarily suffices to initiate a prosecution," and a showing of probable cause will therefore "be enough in most cases to establish that prosecution would have occurred absent bad intent." Pet. App. 19a. As an initial matter, a legal standard for retaliatory prosecution cannot reasonably be viewed as "limited" when, regardless of the ultimate outcome, it permits inquiry in every case into law enforcement officers' motives for bringing criminal charges. Beyond this basic flaw, it is hard to see why a showing of probable cause will ordinarily enable officer-defendants to prevail, especially without a full trial. As the court of appeals itself recognized, "probable cause usually represents only one factor among many in the decision to prosecute—some others being the strength of the evidence, the resources required for the prosecution, the relation to enforcement priorities, and the defendant's culpability." *Id.* at 13a. Accord *Armstrong*, 517 U.S. at 465; *Wayte*, 470 U.S. at

607. There are thus likely to be many cases in which there is not "weak," Pet. App. 20a, but strong probable cause, and the jury nevertheless finds for the plaintiff, based on its assessment of whether the many other considerations that bear upon the exercise of prosecutorial discretion would have resulted in the filing of charges absent an improper motive.

D. The Court Should Also Grant Certiorari To Decide Whether, If The Existence Of Probable Cause Does Not Defeat A Claim Of Retaliatory Prosecution, The Law Was Clearly Established At The Time Of The Challenged Conduct

1. The court of appeals also erred in holding that the law petitioners are alleged to have violated was clearly established. At the time respondent was indicted (October 1988), no court had squarely addressed the question whether probable cause is relevant to a claim of retaliatory prosecution. And since that time, "a split among the Federal Circuits [has] in fact developed on the question." *Wilson* v. *Layne*, 526 U.S. at 618. "If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Ibid.*

The court of appeals believed that *Haynesworth* (a 1987 case) *had* held that the existence of probable cause does not defeat a claim of retaliatory prosecution. Pet. App. 29a-31a. But that view is mistaken. No question concerning the relationship between retaliatory prosecution and probable cause was presented in that case.

In holding that *Haynesworth* had decided the issue presented here, the court of appeals relied on the fact that a footnote in the opinion that described the burdens of proof in adjudicating a retaliatory-prosecution claim—and introduced that discussion as

identifying the "essential elements" of such a claim—did not refer to the presence or absence of probable cause. Pet. App. 12a-13a. (quoting *Haynesworth*, 820 F.2d at 1257 n.93).[14] But some cases that *have* held that the existence of probable cause defeats a claim of retaliatory prosecution did not list the absence of probable cause as one of the "elements" of the retaliation claim.[15] Moreover, the elements of retaliatory prosecution were not at issue in *Haynesworth*, so the description of the mechanics for adjudicating such a claim was dictum. The question before the court was not whether a claim of retaliatory prosecution had been

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[14] The relevant portion of the *Haynesworth* footnote reads as follows:

> The Court should consider whether the plaintiffs have shown, first, that the conduct allegedly retaliated against or sought to be deterred was constitutionally protected, and, second, that the State's bringing of the criminal prosecution was motivated at least in part by a purpose to retaliate for or to deter that conduct. If the Court concludes that the plaintiffs have successfully discharged their burden of proof on both of these issues, it should then consider a third: whether the State has shown by a preponderance of the evidence that it would have reached the same decision as to whether to prosecute even had the impermissible purpose not been considered.

820 F.2d at 1257 n.93 (quoting *Wilson* v. *Thompson*, 593 F.2d 1375, 1387 (5th Cir. 1979)).

[15] See *Keenan* v. *Tejeda*, 290 F.3d at 258-260 (listing elements of "First Amendment retaliation claim" similar to those described in *Haynesworth* and noting elsewhere that, in retaliatory-prosecution case, plaintiff must prove elements of common-law tort of malicious prosecution); *Curley* v. *Village of Suffern*, 268 F.3d at 73 (listing elements of "First Amendment retaliation claim" similar to those described in *Haynesworth* and then noting that there is no inquiry into motive—the second element—if there was probable cause).

stated at all, but whether a claim had been stated against defendants who had only an indirect connection to the challenged conduct.[16] Thus, to the extent that *Haynesworth* can be said to stand for the proposition that the absence of probable cause is not a requirement in a retaliatory-prosecution case, the source of the proposition is a negative implication from obiter dictum in a footnote. That is a far cry from clearly established law.

2. When this Court grants certiorari in a *Bivens* or Section 1983 case to decide whether the defendant official violated a constitutional right, it ordinarily also grants certiorari on the second component of the qualified-immunity inquiry—whether the right was clearly established at the time of the alleged violation.[17] That practice is sensible, because the two issues are closely related. Indeed, they are part of the same ultimate question, which is whether the officer is entitled to qualified immunity. Cf. *Mitchell* v. *Forsyth*, 472 U.S. 511, 530-535 (1985) (granting certiorari on general question whether petitioner was entitled to qualified immunity and addressing both components of question).

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[16] As the court explained, the defendants "d[id] not dispute" that the challenged conduct was unconstitutional, *Haynesworth*, 820 F.2d at 1255, and the district court's entry of judgment for them was "not based on any defect in the constitutional claim alleged," *id.* at 1258. Instead, the judgment under review was "premised on a determination that these defendants were not sufficiently implicated in the retaliatory prosecution averred to establish liability." *Ibid.*

[17] See, *e.g.*, *Devenpeck* v. *Alford*, 125 S. Ct. 588 (2004); *Groh* v. *Ramirez*, 540 U.S. 551 (2004); *Hanlon* v. *Berger*, 526 U.S. 808 (1999) (per curiam); *Wilson* v. *Layne*, 526 U.S. 603 (1999); *Conn* v. *Gabbert*, 526 U.S. 286 (1999); *County of Sacramento* v. *Lewis*, 523 U.S. 833 (1998).

Since, for the reasons explained above, certiorari is warranted on the first question presented in the petition, the Court, in keeping with its usual practice, should also grant certiorari on the second question. That course is especially warranted here, because the basis for the court of appeals' conclusion that the law was clearly established was a negative inference from dictum in a footnote in a prior decision in which the elements of a retaliatory prosecution claim were not at issue. Moreover, if the Court grants review on the merits of the constitutional dispute, it can evaluate the qualified-immunity question in the broader context of the court of appeals decisions that have addressed the constitutional question. Cf. *Wilson* v. *Layne*, 526 U.S. at 618. Whether qualified immunity exists here presents an important issue of law.[18]

[18] Because the court of appeals affirmed the denial of petitioners' summary judgment motion and remanded for trial, the case is in an interlocutory posture. That is not a reason to deny certiorari, however, because qualified immunity is "an entitlement not to stand trial," which is "effectively lost if a case is erroneously permitted to go to trial." *Mitchell* v. *Forsyth*, 472 U.S. at 526. Many of this Court's qualified-immunity cases reviewed court of appeals decisions holding that the officer defendants were not entitled to summary judgment. See, *e.g.*, *Brosseau* v. *Haugen*, 125 S. Ct. 596 (2004) (per curiam); *Chavez* v. *Martinez*, 538 U.S. 760 (2003); *Saucier* v. *Katz*, 533 U.S. 194 (2001).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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