No. 11-836

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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QUESTION PRESENTED

Whether law enforcement agents should receive qualified immunity in a suit for retaliatory prosecution in violation of the First Amendment, when the officers could reasonably have believed that the prosecution was supported by probable cause.

PARTIES TO THE PROCEEDING

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

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of Michael Hartman, et al., 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 (App., *infra*, 1a-22a) is reported at 644 F.3d 415. The opinion of the district court (App., *infra*, 23a-33a) is reported at 730 F. Supp. 2d 174.

JURISDICTION

The judgment of the court of appeals was entered on July 15, 2011. A petition for rehearing was denied on October 6, 2011 (App., *infra*, 36a-39a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS 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. This case arises out of the prosecution in 1989 of respondent, the former CEO of Recognition Equipment Inc. (REI), for conspiracy, theft, receipt of stolen property, mail fraud, and wire fraud. App., *infra*, 1a-4a & n.1. The government alleged that respondent was involved in an illegal scheme involving the procurement of a contract for REI with the United States Postal Service (USPS). *Id.* at 1a-3a. A grand jury indicted respondent, but, following the government's presentation of evidence at trial, the district court granted respondent's motion for acquittal based on insufficient evidence. *Id.* at 4a.

2. In 1991, respondent filed suit on several theories against the United States and a number of federal officers. App., *infra*, 4a. Most of his claims have been dismissed. *Ibid.* Relevant here is one of his two remaining claims: a damages claim against petitioners, the postal inspectors who investigated him (or the next-of-kin of those inspectors), under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). App., *infra*, 4a. The claim alleges that petitioners induced his prosecution in retaliation for his criticism of the USPS, in violation of his First Amendment rights. *Ibid.*

At the outset of the litigation, the lower courts denied qualified immunity to petitioners on that claim, rejecting petitioners' argument that respondent was required to plead and prove the absence of probable cause in order to sustain a claim of retaliatory prosecution.

App., *infra*, 5a. In 2006, this Court granted certiorari and reversed, agreeing with petitioners that "want of probable cause must be alleged and proven" to prevail in a constitutional tort alleging retaliatory prosecution. *Hartman* v. *Moore*, 547 U.S. 250, 252 (2006).

The Court reasoned that proof of the absence of probable cause supplies a necessary evidentiary link between an investigator's allegedly retaliatory motive and the commencement of the prosecution. *Hartman*, 547 U.S. at 259-266. It emphasized that "action colored by some degree of bad motive does not amount to a constitutional tort if that action would have been taken anyway." *Id.* at 260 (citing, *inter alia*, *Crawford-El* v. *Britton*, 523 U.S. 574, 593 (1998)); see *Crawford-El*, 523 U.S. at 593 ("[A]t least with certain types of claims, proof of an improper motive is not sufficient to establish a constitutional violation—there must also be evidence of causation."). And it concluded that "the need to prove a chain of causation from animus to injury, with details specific to retaliatory-prosecution cases, * * * provides the strongest justification for [a] no-probable-cause requirement" in the context of a constitutional-tort claim alleging retaliatory prosecution. *Hartman*, 547 U.S. at 259. The Court accordingly remanded the case for further proceedings. *Id.* at 266.

3. On remand, the district court granted the government's motion for summary judgment, concluding that respondent could not establish the absence of probable cause. 569 F. Supp. 2d 133, 137 (D.D.C. 2008). The district court considered a valid grand-jury indictment to be "conclusive[]" evidence of the existence of probable cause, and determined that respondent could not show sufficient "misconduct or irregularities in the grand jury

proceeding sufficient to call into question the validity of the indictment." *Id.* at 137-138.

Respondent appealed, and the court of appeals vacated and remanded. 571 F.3d 62 (D.C. Cir. 2009). The court of appeals concluded that a grand-jury indictment does not create a conclusive presumption, but instead only a rebuttable presumption, of probable cause. *Id.* at 68-69. It remanded the case to the district court "to consider whether [respondent] has offered enough evidence to create a genuine issue of material fact as to the legitimacy, veracity, and sufficiency of the evidence presented to the grand jury." *Id.* at 69.

4. Petitioners then renewed their motion for summary judgment in the district court, arguing that (1) the summary-judgment record established probable cause, and (2) even if the government had lacked probable cause to prosecute, petitioners were entitled to qualified immunity because they reasonably could have believed that probable cause existed. App., *infra*, 10a. The district court denied the government's motion, stating that "a reasonable factfinder could conclude," notwithstanding the grand-jury indictment, "that the government lacked probable cause to prosecute." *Id.* at 32a.

Petitioners appealed, and the court of appeals dismissed in part and affirmed in part. App., *infra*, 1a-22a. It dismissed in part because it believed that some of petitioners' arguments simply challenged the district court's determination that genuine issues of material fact existed for trial, and that it consequently lacked appellate jurisdiction to address those arguments. *Id.* at 11a-13a. It affirmed in part by rejecting petitioners' argument that they would be entitled to qualified immunity if they could demonstrate "arguable probable cause"—*i.e.*, that

they reasonably could have believed that probable cause supported respondent's prosecution. *Id.* at 14a-22a.

The court of appeals recognized that "[q]ualified immunity 'protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" App., *infra*, 10a-11a (quoting *Pearson* v. *Callahan*, 555 U.S. 223, 231 (2009)) (nested quotation marks omitted). And it further recognized that when the absence of probable cause is an element of a constitutional violation, as it is under the Fourth Amendment, the existence of arguable probable cause entitles an official to qualified immunity, because he reasonably could have believed that his conduct did not violate the Constitution. *Id.* at 14a-16a (citing, *inter alia*, *Hunter* v. *Bryant*, 502 U.S. 224, 227 (1991) (per curiam)). But it concluded that "the absence of probable cause is not an element of the free speech right allegedly violated in a First Amendment retaliatory inducement to prosecution case and for this reason its presence vel non has no bearing on whether a defendant has violated a clearly established constitutional right of which a reasonable person would have known." *Id.* at 19a (citation omitted). It interpreted this Court's previous decision in this case to hold merely that the absence of probable cause is a prerequisite to recovering damages, not that the absence of probable cause is an element of the First Amendment violation itself. *Id.* at 17a-21a.

Judge Henderson, who also authored the panel opinion, concurred to express her "dismay" about the length of time the case has been pending. App., *infra*, 22a.

5. The court of appeals denied rehearing en banc. App., *infra*, 36a-37a.

REASONS FOR GRANTING THE PETITION

The Court should hold this case pending its decision in *Reichle* v. *Howards*, cert. granted, No. 11-262 (oral argument scheduled for Mar. 21, 2012). The issues in the two cases overlap significantly, and the court of appeals may well need to reconsider its decision in this case in light of this Court's decision in *Reichle*.

The court of appeals held here that a federal officer may be personally liable for money damages under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), on a claim of retaliatory prosecution in violation of the First Amendment, even if he reasonably could have believed that probable cause supported the prosecution. It interpreted this Court's decision in *Hartman* v. *Moore*, 547 U.S. 250 (2006), merely to hold that the absence of probable cause is an element of a plaintiff's entitlement to recover damages in a First Amendment retaliatory-prosecution suit, not an element of the constitutional violation itself. App., *infra*, 17a-21a. It therefore concluded that qualified immunity in such suits is unavailable to federal officers who make reasonable mistakes about the existence of probable cause. *Id.* at 20a-21a.

In *Reichle*, the Tenth Circuit held that two Secret Service agents who arrested a suspect based on probable cause were nevertheless not entitled to qualified immunity from a *Bivens* claim alleging retaliatory arrest in violation of the First Amendment. See U.S. Cert. Amicus Br. 4-6, *Reichle*, *supra* (No. 11-262). The questions presented in *Reichle* include the issues of (1) whether this Court's decision in *Hartman* v. *Moore*, *supra*, requires that the absence of probable cause must be alleged and proven for retaliatory-arrest claims as well as retaliatory-prosecution claims, and (2) whether

the Tenth Circuit erred in denying qualified immunity to the Secret Service agents. Pet. i, *Reichle*, *supra* (No. 11-262) (11-262 Pet.).

There is a significant possibility that the Court's decision in *Reichle* will clarify its decision in *Hartman* and potentially call into question the rationale for the court of appeals' decision here. For example, the Court may conclude that the Secret Service agents in *Reichle* are entitled to qualified immunity because the courts of appeals are in conflict over whether proof of the absence of probable cause is required in a retaliatory-arrest case. See, *e.g.*, 11-262 Pet. 27-29. That conclusion would necessarily imply that the circuits' divergent views constitute disagreement about the definition of a constitutional violation, not merely the scope of an entitlement to recovery. See, *e.g.*, *Camreta* v. *Greene*, 131 S. Ct. 2020, 2031 (2011) (inquiry for qualified-immunity purposes is whether official has "violated a clearly established right," not whether there is a clearly established entitlement to recovery) (citation omitted). And if the absence of probable cause is an element of the constitutional violation, then an official's reasonable mistake about it should entitle him to qualified immunity. See *Anderson* v. *Creighton*, 483 U.S. 635, 641 (1987).

To the extent that the court of appeals suggested in footnotes that retaliatory-prosecution cases like this one are distinct from retaliatory-arrest cases like *Reichle* (App., *infra*, 15a n.8, 20a n.10), that suggestion is mistaken. Not only does the petitioner in *Reichle* contend that the two are related, but courts of appeals have treated them similarly. The Eighth Circuit in *McCabe* v. *Parker*, 608 F.3d 1068 (2010), for example, applied circuit precedent to conclude that the probable-cause rule this Court set forth in *Hartman* for retaliatory-

prosecution cases applies equally to retaliatory-arrest cases. *Id.* at 1075 (citing *Williams* v. *City of Carl Junction*, 480 F.3d 871, 876 (8th Cir. 2007)). It then proceeded to determine that federal agents were entitled to qualified immunity from a retaliatory-arrest claim because "arguable probable cause" supported the arrest. *Id.* at 1078-1079. This Court's decision in *Reichle* is therefore likely to affect the rules governing not only retaliatory-arrest cases, but also retaliatory-prosecution cases like this one.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Reichle* v. *Howards*, No. 11-262, and disposed of as appropriate in light of that decision.

Respectfully submitted.

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JANUARY 2012

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-5334

WILLIAM G. MOORE, JR. ET AL., APPELLEES

v.

MICHAEL HARTMAN ET AL., APPELLANTS

Argued: Apr. 14, 2011
Decided: July 15, 2011

Appeal from the United States District Court
for the District of Columbia
(No. 1:92-cv-02288)

Before: HENDERSON, ROGERS and KAVANAUGH, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* HENDERSON.

Concurring opinion filed by *Circuit Judge* HENDERSON.

KAREN LECRAFT HENDERSON, *Circuit Judge*: William G. Moore alleges that six U.S. Postal Inspectors (Postal Inspectors) wrongly caused him to be criminally prosecuted in retaliation for his public criticism of the United States Postal Service (USPS) and its personnel.

The Postal Inspectors appeal the district court's denial of their motion for summary judgment, based on qualified immunity, on Moore's claim of retaliatory inducement to prosecution in violation of his right to free speech under the First Amendment to the United States Constitution. For the reasons set out below, we affirm in part and dismiss in part.

I.

In the early 1980s Moore was the chief executive of Recognition Equipment Inc. (REI), a publicly-traded corporation, which was pursuing a contract to sell its multipleline optical character readers to USPS for use in scanning postal addresses. At the time, many of USPS's top officials were advocating purchasing single-line scanners to use with USPS's new "zip + 4" nine-digit zip codes. REI lobbied members of the United States Congress and Moore personally testified before congressional committees in opposition to the zip + 4 codes and in favor of multiple-line scanners. In addition, notwithstanding the United States Postmaster General's admonition "to be quiet," REI hired public relations firm Gnau and Associates, Inc. (GAI) to advocate on REI's behalf. *Hartman v. Moore,* 547 U.S. 250, 253 (2006) (*Moore IV*). GAI had been recommended to Moore by Peter Voss, a member of USPS's Board of Governors.

REI's lobbying efforts bore fruit in July 1985 when USPS, at the urging of several members of the Congress, changed course and decided to use multiple-line scanners after all—yielding to the many critics (both within the government and without) who opposed the nine-digit zip codes and the single-line scanners. Unfortunately for REI, however, USPS decided to purchase

multiple-line scanners from one of REI's competitors—a decision Moore attributes to retaliation for his criticism of USPS and the zip + 4 codes. To make matters worse, shortly thereafter, USPS instigated an investigation of a kickback scheme in which, it maintained, Moore was a participant.

The Postal Inspectors discovered that GAI's chairman, John R. Gnau, Jr., had paid kickbacks to Voss in return for Voss having referred REI (and other companies) to GAI. They further learned that GAI president William Spartin and vice president Michael Marcus were also involved in the scheme. In April 1986, Spartin entered an agreement with the government in which he agreed, in exchange for immunity, to cooperate with the government's investigation and eventual criminal prosecution of the participants in the scheme. With Spartin's cooperation, the government secured guilty pleas from Voss, Gnau and Marcus to offenses related to the giving and receipt of illegal gratuities. "Notwithstanding very limited evidence linking Moore and REI to any wrongdoing," *Moore IV*, 547 U.S. at 253-54, then-Assistant United States Attorney Joseph B. Valder filed criminal charges against them and, on October 6, 1988, a federal grand jury indicted them, along with REI vice president Robert Reedy, on seven counts involving fraud and theft—all stemming from REI's attempts to contract with USPS for its multiple-line scanners.[1]

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[1] The indictment charged the defendants with one count each of conspiracy to defraud the United States (18 U.S.C. § 371), theft (*id.* §§ 1707, 2) and receiving stolen property (D.C. Code §§ 22-3832(a), (c)(1) and 22-105) (now §§ 22-3232, 22-1805) and two counts each of mail fraud (18 U.S.C. §§ 1341, 2) and wire fraud (*id.* §§ 1343, 2).

In November 1989, six weeks into the ensuing bench trial, the district court granted the defendants' motion for judgment of acquittal at the close of the government's case, concluding that the government had failed to establish a prima facie case. *United States v. Recognition Equip. Inc.*, 725 F. Supp. 587, 587-88 (D.D.C. 1989).

On November 19, 1991, Moore filed this *Bivens*[2] action in the Northern District of Texas, where he resided, alleging that prosecutor Valder and six named postal inspectors deprived him of rights under the First, Fourth and Fifth Amendments to the United States Constitution and asserting supplemental tort claims under the local laws of Texas and of the District of Columbia for defamation, invasion of privacy, false arrest, abuse of process and malicious prosecution. Moore subsequently filed a separate action for malicious prosecution against the United States pursuant to the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346, 2671-80. The two actions were transferred to the United States District Court for the District of Columbia and consolidated. The case has since been up and down the litigation ladder, disposing of all but two of Moore's claims: the *Bivens* retaliatory inducement to prosecution claim and the FTCA malicious prosecution claim. We now summarize the recent procedural history as it relates to the single claim at issue in this latest interlocutory appeal, the *Bivens* retaliatory inducement to prosecution claim.[3]

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[2] *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

[3] For the intervening procedural history, *see Moore v. Hartman*, Nos. 92-cv-2288 & 93-cv-0324, 1993 WL 405785 (D.D.C. Sept. 24, 1993); *Moore v. Valder*, 65 F.3d 189 (D.C. Cir. 1995) (*Moore I*), *cert. denied*,

In 2003, after two appeals to this court, the district court on remand denied a motion for summary judgment filed by the Postal Inspectors in a one-paragraph unpublished order, stating:

> Upon consideration of the motion of defendants, United States and Michael Hartman, et al., for summary judgment and the response thereto, the Motion for Summary Judgment is DENIED. There are material facts in dispute. The most significant are the facts surrounding the presentation of evidence to the grand jury and the disclosure of grand jury testimony to a key prosecution witness.

Moore v. Valder, Nos. 92-cv-2288 & 93-cv-0324 (D.D.C. Aug. 5, 2003). On interlocutory appeal the Postal Inspectors, relying on extra-Circuit authority, argued that they were entitled to qualified immunity because the record established that they acted based on probable cause, the absence of which is a sine qua non of a First Amendment retaliatory inducement to prosecution claim.

We affirmed the summary judgment denial because "the clearly established law of this circuit barred government officials from bringing charges they would not have pursued absent retaliatory motive, *regardless of whether they had probable cause to do so*." *Moore v. Hartman*, 388 F.3d 871, 872 (D.C. Cir. 2004) (*Moore III*) (emphasis added).

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519 U.S. 820 (1996); *Moore v. United States*, 213 F.3d 705 (D.C. Cir.) (*Moore II*), *cert. denied*, 531 U.S. 978 (2000). In the course of the lengthy litigation, two of the defendant Postal Inspectors died, one of whom has been replaced by a personal representative.

The United States Supreme Court granted certiorari and reversed, holding that a retaliatory inducement to prosecution claimant must plead and prove the absence of probable cause as an element of his case. *Moore IV*, 547 U.S. at 265-66. The no-probable-cause requirement is justified, the Court wrote, because of "the need to prove a chain of causation from animus to injury, with details specific to retaliatory-prosecution cases." *Id.* at 259. Unlike other retaliatory constitutional torts, the Court explained, retaliatory inducement to prosecution involves two special issues affecting proof of causation: (1) evidence showing probable cause vel non will always be available as "a distinct body of highly valuable circumstantial evidence . . . apt to prove or disprove retaliatory causation"; and (2) "the requisite causation between the defendant's retaliatory animus and the plaintiff's injury is usually more complex than it is in other retaliation cases" because the plaintiff must show not only that "the nonprosecuting official acted in retaliation" but also "that he induced the prosecutor to bring charges that would not have been initiated without his urging"—a requirement the Court found must be met by the plaintiff's showing lack of probable cause. *Id.* at 261-63. After remand from the Supreme Court, we remanded to the district court "for further proceedings consistent with the Supreme Court's decision," noting that the district court had previously "expressed no view either on whether there was probable cause to support Moore's prosecution or on the relationship of probable cause to the Inspectors' qualified immunity." *Moore v. Hartman*, No. 03-5241 (D.C. Cir. Aug. 22, 2006) (unpublished).

The Postal Inspectors again moved for summary judgment in 2007. This time, the district court granted the motion on the ground the indictment conclusively established probable cause because Moore had failed to allege "misconduct" in the grand jury proceeding that "undermine[d] the validity of the indictment sufficiently to negate its conclusive effect as to probable cause." *Moore v. Hartman*, 569 F. Supp. 2d 133, 138 (D.D.C. 2008). The court concluded:

> Because the plaintiff has presented no evidence that causes the court to question the validity of the grand jury proceeding, the indictment conclusively establishes that the government had probable cause to bring the charges against him. And because absence of probable cause is an element of both the plaintiff's *Bivens* retaliatory prosecution claim and his malicious prosecution claim under the FTCA, the court grants the defendants' motion for summary judgment as to both claims.

Id. at 141.

Moore appealed and we vacated the grant of summary judgment, concluding that "the district court erred by holding that an indictment is conclusive evidence of probable cause in a subsequent retaliatory or malicious prosecution action." *Moore v. Hartman*, 571 F.3d 62, 63 (D.C. Cir. 2009) (*Moore V*). We first recited the evidence on which Moore relied to show lack of probable cause:

> First, the prosecutor made statements to grand jury witnesses to "not reveal" certain portions of their testimony to the grand jury. Second, senior attorneys in the U.S. Attorney's Office allegedly stated in

> memoranda that the government's evidence against appellant was "extremely thin," and openly questioned whether charges should be brought against appellant. Third, the postal inspectors stated in a memorandum after the grand jury investigation that witnesses could testify that appellant was not aware of the conspiracy. Finally, the postal inspectors improperly showed GAI Officer Spartin other witnesses' grand jury statements, intimidated Spartin by threatening to prosecute his son and tearing up his plea agreement, and lobbied the U.S. Attorney's Office to prosecute appellant.

Id. at 65.[4] We then remanded for the district court to determine "whether the evidence appellant put forth is

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[4] In *Moore III*, we had already concluded: "Considering all th[e] evidence together and interpreting it in Moore's favor, we cannot conclude that the postal inspectors would have prosecuted Moore had they not been irked by his aggressive lobbying against Zip + 4." 388 F.3d at 884. We noted:

> The evidence of retaliatory motive comes close to the proverbial smoking gun: in addition to subpoenas targeting expressive activity, Moore has produced not one, but two Postal Inspection Service documents specifically referring to his lobbying as a rationale for prosecution. At the same time, evidence of guilt seems quite weak: not only did none of the admitted conspirators implicate Moore, but even the U.S. Attorney's Office concluded that, at best, Moore "probably" knew about the charged conspiracies, and even that conclusion rested on the assumption that Reedy likely shared with Moore his misgivings about Gnau and Voss—an assumption the record fails to substantiate. Moreover, the U.S. Attorney's Office warned that the case would be "complicated" and "consume significant resources"—considerations that, under normal circumstances, might weigh against prosecuting a marginal case.

Id. at 884-85.

sufficient to overcome this presumption under the proper standard," namely, a "prima facie standard [that] creates a rebuttable presumption that will stand until the appellant introduces sufficient evidence to negate it." *Id.* at 69 (citing *Frito-Lay, Inc. v. Willoughby*, 863 F.2d 1029, 1033 (D.C. Cir. 1988)). In particular, we instructed the district court:

> On remand, the district court will of course take into account the rebuttable presumption in favor of probable cause, but should also consider whether appellant has offered enough evidence to create a genuine issue of material fact as to the legitimacy, veracity, and sufficiency of the evidence presented to the grand jury. Given the presumption, to carry his burden he must present evidence that the indictment was produced by fraud, corruption, perjury, fabricated evidence, or other wrongful conduct undertaken in bad faith.

Id.

On remand, the Postal Inspectors renewed their motion for summary judgment, asserting that (1) probable cause existed because Moore failed to overcome the probable cause presumption and, in any event, the evidence established probable cause and (2) even if there was no probable cause, the defendants were entitled to qualified immunity because a reasonable official could have believed there was probable cause.

The district court denied the Postal Inspectors' motion. *Moore v. Hartman*, 730 F. Supp. 2d 174 (D.D.C. 2010) (*Moore VI*). Citing the evidence we highlighted in *Moore V*, the district court concluded: "Based on this evidence, a reasonable factfinder could conclude that the

government procured the plaintiff's indictment through wrongful conduct undertaken in bad faith and that the government lacked probable cause to prosecute the plaintiff." *Id.* at 179 (quotation marks omitted).

The Postal Inspectors filed a timely notice of appeal.

II.

The three elements of a *Bivens* action for retaliatory inducement to prosecution are:

> (1) the appellant's conduct allegedly retaliated against or sought to be deterred was constitutionally protected; (2) the government's bringing of the criminal prosecution was motivated at least in part by a purpose to retaliate for or to deter that conduct; and (3) the government lacked probable cause to bring the criminal prosecution against the appellant.

Moore V, 571 F.3d at 65. The Postal Inspectors challenge the district court's treatment of the third element on two grounds. Before addressing the merits of their arguments, we first consider whether and to what extent we have jurisdiction to review the denial of the Postal Inspectors' summary judgment motion.

"Ordinarily, orders denying summary judgment do not qualify as 'final decisions' subject to appeal." *Ortiz v. Jordan*, 131 S. Ct. 884, 891 (2011) (quoting 28 U.S.C. § 1291). A summary judgment order denying qualified immunity, however, presents a special case. Qualified immunity "protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009) (quoting

Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). This means:

> Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action. But where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken with independence and without fear of consequences.

Harlow, 457 U.S. at 819 (footnote & internal quotation omitted). "Because a plea of qualified immunity can spare an official not only from liability but from trial," the Supreme Court has recognized "a *limited* exception to the categorization of summary judgment denials as nonappealable orders." *Ortiz*, 131 S. Ct. at 891 (citing *Mitchell v. Forsyth*, 472 U.S. 511, 525-26 (1985)) (emphasis added). "Provided it 'turns on an issue of law,'" a district-court order denying qualified immunity is immediately appealable because it "'conclusively determine[s]' that the defendant must bear the burdens of discovery; is 'conceptually distinct from the merits of the plaintiff's claim'; and would prove 'effectively unreviewable on appeal from a final judgment.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1946 (2009) (quoting *Mitchell v. Forsyth*, 472 U.S. at 530, 527-28 (citing *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949))). This exception is significantly limited, however, in that "a defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of

fact for trial." *Johnson v. Jones*, 515 U.S. 304, 319-20 (1995). In articulating this limitation, the Supreme Court explained that, after considering the "'competing considerations'" of "delay, comparative expertise of trial and appellate courts, and wise use of appellate resources," the Court was "persuaded that '[i]mmunity appeals . . . interfere less with the final judgment rule if they [are] limited to cases presenting neat abstract issues of law.'" *Id.* at 317 (quoting 5A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3914.10, at 664 (1992)) (alterations and ellipsis in *Johnson*). Thus, summary judgment orders denying qualified immunity are immediately appealable only "when they resolve a dispute concerning an 'abstract issu[e] of law' relating to qualified immunity—typically, the issue whether the federal right allegedly infringed was clearly established." *Behrens v. Pelletier*, 516 U.S. 299, 313 (1996) (quoting *Johnson*, 515 U.S. at 317) (alteration in *Behrens*) (other internal quotation omitted).[5] The Postal Inspectors' first argument fails this test.

The Postal Inspectors first challenge the sufficiency of the evidentiary basis for the district court's determi-

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[5] The *Johnson* Court was primarily concerned that review of the district court's factual determinations on summary judgment would require the appellate court "to consult a 'vast pretrial record, with numerous conflicting affidavits, depositions, and other discovery materials,'" *Iqbal*, 129 S. Ct. at 1947 (quoting *Johnson*, 515 U.S. at 316)—a point well illustrated by this appeal in which the parties filed a 23-volume joint appendix. The *Iqbal* Court concluded, however, that the same concern does not justify extending the *Johnson* limitation to a denial of a motion to dismiss where the appellate court "consider[s] only the allegations contained within the four corners of [the] complaint." *Id.*

nation that "there is a genuine issue of material fact as to whether the government lacked probable cause to prosecute [Moore]," *Moore VI*, 730 F. Supp. 2d at 175. This is precisely the sort of determination, however, that the Supreme Court held in *Johnson* is not immediately appealable. In *Moore V*, we remanded to the district court to "consider whether appellant has offered enough evidence to create a genuine issue of material fact as to the legitimacy, veracity, and sufficiency of the evidence presented to the grand jury." 571 F.3d at 69. On remand, the district court did just that—it examined the evidence and decided that, based thereon, "a reasonable factfinder could conclude that the government procured the plaintiff's indictment through wrongful conduct undertaken in bad faith and that the government lacked probable cause to prosecute the plaintiff." *Moore VI*, 730 F. Supp. 2d at 179 (quotation marks omitted). Under *Johnson*, we lack jurisdiction at this stage of the proceeding to review the court's fact-based determination because it is not a "final decision[]" within the meaning of 28 U.S.C. § 1291.[6]

Next, the Postal Inspectors assert that a reasonable investigator in their position could have concluded,

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[6] The Postal Inspectors argue that we should review the evidence *de novo* because the district court "failed to review the record to determine what facts supported its conclusion that plaintiff successfully rebutted the presumption of probable cause." Appellants' Br. 55. It is true that in *Johnson* the Supreme Court acknowledged that "occasionally," "a court of appeals may have to undertake a cumbersome review of the record to determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed." *Johnson*, 515 U.S. at 319. This is not such a case. The district court set out with adequate specificity the "evidence" on which it relied. *See Moore VI*, 730 F. Supp. 2d at 179.

based on the evidence, that probable cause existed to prosecute Moore. In a suit alleging arrest or prosecution in violation of the Fourth Amendment, a defendant who "'mistakenly conclude[s] that probable cause is present'" is nonetheless entitled to qualified immunity "if 'a reasonable officer could have believed [the arrest] to be lawful, in light of clearly established law and the information the [arresting] officers possessed.'" *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (quoting *Anderson v. Creighton*, 483 U.S. 635, 641 (1987)); *see also Wardlaw v. Pickett*, 1 F.3d 1297, 1304-05 (D.C. Cir. 1993), *cert. denied*, 512 U.S. 1204 (1994). Such a reasonable if mistaken belief that probable cause exists is sometimes termed "arguable probable cause." *See, e.g., Grider v. City of Auburn, Ala.*, 618 F.3d 1240, 1257 (11th Cir. 2010) (defining "arguable probable cause"); *Carmichael v. Village of Palatine, Ill.*, 605 F.3d 451, 459 (7th Cir. 2010) (same); *Escalera v. Lunn*, 361 F.3d 737, 743 (2d Cir. 2004) (same). This probable cause shields a defendant from a Fourth Amendment wrongful prosecution claim as well as a Fourth Amendment arrest claim. *See Grider*, 618 F.3d at 1257 n.25; *Droz v. McCadden*, 580 F.3d 106, 109 (2d Cir. 2009).[7] Whether the doctrine applies as well to Moore's retaliatory inducement to prosecution claim under the First Amendment constitutes, we believe, an issue sufficiently legal to come within the qualified immunity exception to the final deci-

[7] Although this Circuit has not used the term "arguable probable cause," we have applied a comparable analysis. *See Wardlaw*, 1 F.3d at 1305 ("[A]ssuming *arguendo* that probable cause was lacking, the deputies' conclusion that probable cause existed was objectively reasonable.").

sion rule.[8] *See Behrens*, 516 U.S. at 313 (immediately appealable issue is "typically . . . whether the federal right allegedly infringed was clearly established ") (quotation marks omitted); *Moore IV*, 547 U.S. at 257 n.5 (requirement to show absence of probable cause comes within definition of tort and is "directly implicated by the defense of qualified immunity and properly before us on interlocutory appeal"). Accordingly, we address this argument on its merits and conclude that arguable probable cause does not apply to a First Amendment retaliatory inducement to prosecution case because probable cause is not an element of the First Amendment right allegedly violated.

The keystone to whether an arrest or prosecution violates an individual's Fourth Amendment right "to be secure . . . against *unreasonable* searches and seizures" (emphasis added) is whether the action taken is based on probable cause to believe the person committed a crime. *See Martin v. Malhoyt*, 830 F.2d 237, 262 (D.C. Cir. 1987) ("It is well settled that an arrest without probable cause violates the fourth amendment.") (citing *Gerstein v. Pugh*, 420 U.S. 103, 111 (1975)); *Pitt*

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[8] At least two circuits have required a no-probable-cause showing for First Amendment retaliatory *arrest* claims and have extended the "arguable probable cause" doctrine to such arrests. *See McCabe v. Parker*, 608 F.3d 1068, 1077-79 (8th Cir. 2010) (relying on *Moore IV*); *Brown v. City of Huntsville, Ala.*, 608 F.3d 724, 734 (11th Cir. 2010) (citing circuit precedent going back pre-*Moore IV*). Other circuits have read *Moore IV* not to require a no-probable-cause showing in retaliatory *arrest* cases. *See Howards v. McLaughlin*, 634 F.3d 1131, 1147-48 (10th Cir. 2011) (noting circuit split *post-Moore IV* and rejecting requirement); *Skoog v. Cnty. of Clackamas*, 469 F.3d 1221, 1231-32 & n.31 (9th Cir. 2006) (same). We have no occasion to address First Amendment retaliatory *arrest* requirements here.

v. District of Columbia, 491 F.3d 494, 511-12 (D.C. Cir. 2007) ("We join the large majority of circuits in holding that malicious prosecution is actionable under 42 U.S.C. § 1983 to the extent that the defendant's actions cause the plaintiff to be unreasonably 'seized' without probable cause, in violation of the Fourth Amendment."). Thus, in a Fourth Amendment suit, the defendant's entitlement to qualified immunity often turns on whether he "reasonably but mistakenly conclude[s] that probable cause is present," that is, whether he acted with arguable probable cause. *Hunter*, 502 U.S. at 227 (quoting *Anderson*, 483 U.S. at 641); *see, e.g., Droz*, 580 F.3d at 109; *Frye v. Kansas City, Mo. Police Dep't*, 375 F.3d 785, 792 (8th Cir. 2004). Unlike the Fourth Amendment claim, however, the First Amendment does not itself require lack of probable cause in order to establish a retaliatory inducement to prosecution claim.

The First Amendment guarantees various rights that have been found to prohibit governmental punishment in retaliation for their exercise—specifically, for our analysis, the right to free speech. *See Wilkie v. Robbins*, 551 U.S. 537, 555-56 (2007) (noting Court's "longstanding recognition that the Government may not retaliate for exercising First Amendment speech rights"); *id.* at 584 (Ginsburg, J, concurring in part and dissenting in part) ("The Court has held that the Government may not unnecessarily penalize the exercise of constitutional rights. This principle has been applied, most notably, to protect the freedoms guaranteed by the First Amendment."). "The reason why such retaliation offends the Constitution is that it threatens to inhibit exercise of the protected right." *Crawford-El v. Britton*, 523 U.S. 574, 588 n.10 (1998); *accord Moore IV*, 547 U.S. at 256 ("Offi-

cial reprisal for protected speech offends the Constitution because it threatens to inhibit exercise of the protected right. . . . ") (quotation and alteration omitted). Criminal prosecution is among the retaliatory government actions that violate the First Amendment. *See Moore IV*, 547 U.S. at 256 ("[A]s a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out."). But nothing about the First Amendment's right to free speech or the concomitant right to be free from punishment therefor[e] suggests any connection between the right and criminal "probable cause." And the Supreme Court identified no such connection in *Moore IV*. In fact, the Court rejected the Postal Inspectors' argument that First Amendment retaliatory inducement to prosecution is "a close cousin of malicious prosecution under common law, making the latter's no-probable-cause requirement a natural feature of the constitutional tort." *Id.* at 258; *see id.* ("[I]n this instance we could debate whether the closer common-law analog to retaliatory prosecution is malicious prosecution (with its no-probable-cause element) or abuse of process (without it)."). Nor did *Moore IV* purport to add no probable cause as an element of a First Amendment retaliation *violation*. As we explained *supra*, pp. 5-6, *Moore IV* simply introduced a no-probable-cause proof requirement into the remedial framework for recovering in a retaliatory inducement to prosecution suit—requiring that it "must be pleaded and proven," "as an element of a plaintiff's case," in order to establish the requisite causal connection in such a suit. 547 U.S. at 265-66. The plaintiff "must show a causal connection between a defendant's retaliatory animus and subsequent injury in any sort of retaliation action"

and often may do so circumstantially simply by offering the fact of a retaliatory motive and the infliction of an injury. *Moore IV*, 547 U.S. at 259-60. For an inducement-to-prosecute case such as this, however, the *Moore IV* Court determined, as we noted above, that a special rule of proof is needed—one which requires that the plaintiff establish causation by proving the absence of probable cause. The court added this requirement because of two characteristics peculiar to the litigation of such a suit: (1) the happenstance that "there will always be a distinct body of highly valuable circumstantial evidence available and apt to prove or disprove retaliatory causation, namely evidence showing whether there was or was not probable cause to bring the criminal charge" and (2) the greater complexity of "the requisite causation between the defendant's retaliatory animus and the plaintiff's injury" *Id*. at 261. The causal complexity arises from the fact that, unlike plaintiffs alleging other retaliatory acts,[9] a retaliatory inducement to prosecution plaintiff must show that the nonprosecuting defendant official not only acted in retaliation but also "induced the prosecutor to bring charges that would not have been initiated without his urging." *Id*. at 262. Not only does this require a two-step causal showing—both

[9] For retaliatory acts other than prosecution that have been found to violate the First Amendment, *see, e.g., Bd. of Cty. Comm'rs v. Umbehr*, 518 U.S. 668, 674-75, 686 (1996) (termination of contract by county in retaliation for contractor's criticism of county and its commissioners); *Crawford–El v. Britton*, *supra* (misdirecting transferred prisoner's belongings in retaliation for interview with reporter regarding prison overcrowding); *Perry v. Sindermann*, 408 U.S. 593 (1972) (retaliatory nonrenewal of state junior college professor's contract); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 566–567 (1968) (retaliatory firing of teacher for writing public letter criticizing school board's financial administration).

retaliatory animus and actual inducement—it is further complicated at the second step because "there is an added legal obstacle in the longstanding presumption of regularity accorded to prosecutorial decisionmaking." *Id.* at 263. Thus, in *Moore IV*, the Supreme Court concluded:

> Some sort of allegation, then, is needed both to bridge the gap between the nonprosecuting government agent's motive and the prosecutor's action, and to address the presumption of prosecutorial regularity. And at the trial stage, some evidence must link the allegedly retaliatory official to a prosecutor whose action has injured the plaintiff. The connection, to be alleged and shown, is the absence of probable cause.

Id. At the same time, however, the Court expressly recognized the limited role probable cause plays as a mechanism to prove causation: "It would be open to us, of course, to give no special prominence to an absence of probable cause in bridging the causal gap, and to address this distinct causation concern at a merely general level, leaving it to such pleading and proof as the circumstances allow." *Id.* at 264. In sum, the absence of probable cause is not an element of the free speech right allegedly violated in a First Amendment retaliatory inducement to prosecution case and for this reason its presence vel non has no bearing on whether a defendant has violated a "clearly established . . . constitutional right[] of which a reasonable person would have known." *Harlow*, 457 U.S. at 818 (emphasis added); *see Wilson v. Layne*, 526 U.S. 603, 615 (1999) ("[A]s we explained in *Anderson*, the *right allegedly violated* must be defined at the appropriate level of specificity before a court can

determine if it was clearly established." (citing A*nderson*, 483 U.S. at 641) (emphasis added)). Rather, the plaintiff's ability vel non to plead and prove the absence of probable cause determines only whether he has made a showing of causation through the specific means the court mandates.[10] The contours of the right to be free from retaliatory inducement to prosecution were sufficiently clear that the Postal Inspectors "could be expected to know" at the time whether their conduct violated the First Amendment. *Harlow*, 457 U.S. at 819. Accordingly, we conclude the doctrine of arguable probable cause does not apply to a First Amendment retalia-

[10] That the absence of probable cause is only a remedial requirement for proving causation (and not an element of a First Amendment right or its violation) is reinforced by the distinction three circuits have drawn between the "ordinary" single-actor retaliatory prosecution (or arrest) case, which does not require a no-probable-cause showing, and an inducement case such as this, where causation is "more complex than it is in other retaliation cases," *Moore IV*, 547 U.S. at 261, and such a showing *is* required. *See Howards v. McLaughlin*, 634 F.3d 1131, 1147-48 (10th Cir. 2011) (noting circuit "split over whether [*Moore IV*] applies to retaliatory arrests" and "declin[ing] to extend [*Moore IV*]'s 'no-probable-cause' requirement to this retaliatory arresy case" inasmuch as officers were alleged to have arrested plaintiff "with their own retaliatory motives, because of the exercise of his First Amendment rights"—"the quintessential 'ordinary retaliation claim' as outlined in [*Moore IV*]" (citing *Moore IV*, 547 U.S. at 259–60)); *Kennedy v. City of Villa Hills, Ky.*, 635 F.3d 210, 217 n.4. (6th Cir. 2011) (not requiring no-probable-cause showing for claims of simple retaliatory arrest, concluding *Moore IV* applies "to claims of wrongful arrest only when prosecution and arrest are concomitant"; distinguishing *Barnes v. Wright*, 449 F.3d 709, 720 (6th Cir. 2006), which applied no-probable-cause requirement to arrest as well as prosecution because defendants arrested plaintiff only after inducing grand jury to indict him); *Skoog v. Cnty. of Clackamas*, 469 F.3d 1221, 1234 (9th Cir. 2006) (no-probable-cause showing was not required because "retaliation claim . . . d[id] not involve multi-layered causation as did the claim in [*Moore IV*]").

tory inducement to prosecution claim. This conclusion is consistent with the Supreme Court's decision in *Moore IV* which, notwithstanding the Court was reviewing an interlocutory qualified immunity denial, held that "probable cause" (not *arguable* probable cause) must be pleaded and proven as an element of a plaintiff's case in order to establish a causal link between those inducing the prosecution and the prosecutors themselves. *Moore IV*, 547 U.S. at 265-66.

At bottom, the Postal Inspectors' arguable probable cause argument is nothing more than an attempt to end-run the jurisdictional limitation on interlocutory review. They seek to frame as a qualified immunity defense what is in fact a challenge to the district court's determination that a disputed issue of fact exists on the issue of causation, to be determined by the existence vel non of probable cause. *See Dominguez v. Hendley*, 545 F.3d 585, 589 (7th Cir. 2008) ("[Q]ualified immunity is a doctrine designed to respond to legal uncertainty, but causation (a factual matter) has nothing to do with *legal* uncertainty.") (emphasis in original), *cert. denied*, 129 S. Ct. 2381 (2009). Under the Supreme Court's *Johnson v. Jones* holding, the district court's finding of disputed issues of fact is unreviewable on interlocutory appeal. *See Krout v. Goemmer*, 583 F.3d 557, 564-65 (8th Cir. 2009) ("[I]f the issues raised on appeal relate to . . . *causation*, or other similar matters that the plaintiff must prove, we have no jurisdiction to review them in an interlocutory appeal of a denial of a summary-judgment motion based on qualified immunity." (emphasis in original) (quotation omitted)); *Wilkins v. DeReyes*, 528 F.3d 790, 802 (10th Cir. 2008) (court has "no jurisdiction to address any causation issues" when deciding case "at

the qualified immunity stage"); *Charles v. Grief*, 522 F.3d 508, 516 (5th Cir. 2008) (where district court "clearly ruled [plaintiff] produced sufficient evidence to show that there existed a genuine issue of material fact on the issue of causation," court "lack[ed] jurisdiction over such appeal[] of fact-based denial[] of qualified immunity"). Whether the Postal Inspectors had probable cause is a disputed issue of fact to be decided by the jurors at trial.

For the foregoing reasons, insofar as the appeal challenges the district court's determination that there are genuine issues of disputed fact, we dismiss it for lack of jurisdiction. Insofar as the district court declined to find the Postal Inspectors protected by qualified immunity based on "arguable probable cause," we affirm. Accordingly, we remand to the district court for trial on the merits.

So ordered.

KAREN LECRAFT HENDERSON, *Circuit Judge*, concurring:

I write separately to express dismay over the herculean effort the plaintiff has had to expend simply to get his day in court. It has taken twenty-five years, a criminal trial, eleven appellate judges as well as all participating members of the United States Supreme Court—not one of whom has rejected his claim as a matter of law—to get to the point that a jury will finally hear and decide if government officials engaged in pay-back because the plaintiff sought to do business with the government. To say that this has not been the government's finest hour is a colossal, and lamentable, understatement.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. Action No. 92-2288 (RMU)

WILLIAM G. MOORE, JR. ET AL., PLAINTIFF

v.

MICHAEL HARTMAN ET AL., DEFENDANTS

MEMORANDUM OPINION

Filed: Aug. 12, 2010

DENYING THE DEFENDANTS' RENEWED MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

This matter comes before the court on the defendants' renewed motion for summary judgment. The plaintiff commenced this action nearly twenty years ago, alleging that inspectors employed by the United States Postal Service ("USPS") violated his First Amendment rights by inducing the United States Attorney's Office to bring criminal charges against him in retaliation for speaking out against USPS policies. In addition, the plaintiff brings an action under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b)(1), 2671-2680, alleging malicious prosecution. The defendants—the United

States and five postal inspectors—move for summary judgment, asserting that the plaintiff cannot establish that the government lacked probable cause to prosecute him, as he must to prevail on his claims. The plaintiff opposes the motion, contending that a reasonable fact-finder could conclude that there was no probable cause to prosecute him. Because the court concludes that there is a genuine issue of material fact as to whether the government lacked probable cause to prosecute him, the court denies the defendants' renewed motion for summary judgment.

II. BACKGROUND[1]

A. Factual History

The factual history of this case dates back to the mid-1980s, when the plaintiff served as President and Chief Executive Officer of Recognition Equipment, Inc. ("REI"), a company specializing in optical scanning technology. *Moore v. Hartman*, 571 F.3d 62, 64 (D.C. Cir. 2009). REI urged the USPS to purchase REI's multi-line optical character readers ("MLOCRs"), devices capable of mechanically interpreting multiple lines of text on a piece of mail. *Id.* Many individuals within the USPS advocated for the use of MLOCRs, while many others advocated adding another four digits to the existing five-digit zip codes, which would have required the use of scanners capable of scanning only one line of text on a piece of mail (single-line optical character

[1] The factual and procedural history of this case has been set forth in more detail in numerous prior opinions. *See, e.g., Hartman v. Moore*, 547 U.S. 250, 252-55 (2006); *Moore v. United States*, 213 F.3d 705, 706-09 (D.C. Cir. 2000); *Moore v. Valder*, 65 F.3d 189, 191-92 (D.C. Cir. 1996); *Moore v. Hartman*, 569 F. Supp. 2d 133, 135-36 (D.D.C. 2008).

readers, or "SLOCRs"). *Id.* The plaintiff was heavily involved in the debate over MLOCRs versus SLOCRs, launching an intensive media and lobbying campaign in support of MLOCRs. *Id.* The campaign was successful: after several members of Congress endorsed the use of MLOCRs, the USPS Board of Governors reversed its initial position favoring the use of SLOCRs and instead voted in favor of using MLOCRs. *Id.*

Shortly thereafter, the defendants, postal inspectors for the USPS, commenced an investigation into the activities of the plaintiff and others, whom the inspectors suspected were engaged in a scheme to defraud the USPS. *Id.* Specifically, the investigation was focused on Peter Voss, a member of the USPS Board of Governors; REI; and Gnau & Associates, Inc. ("GAI"), a consulting firm that REI had hired on Voss's recommendation. *Id.* Through their investigation, the postal inspectors learned that Voss was receiving illegal payments from John Gnau, the chairman of GAI. *Id.* The payments were made to compensate Voss for referring REI to GAI. *Id.* Voss, Gnau and another GAI official, Michael Marcus, ultimately pleaded guilty for their involvement in the conspiracy, and a third GAI official, William Spartin, entered into a cooperation agreement with the government. *See United States v. Recognition Equip., Inc.*, 725 F. Supp. 587, 589 (D.D.C. 1989).

In October 1988, a grand jury returned an indictment against the plaintiff, REI and REI's vice president, charging them with conspiracy to defraud the United States, theft, receiving stolen property and mail and wire fraud. *Id.* at 587. The matter proceeded to trial, but at the close of the government's case, the court granted the plaintiff's motion for judgment of acquittal,

ruling that there was insufficient evidence for the jury to find beyond a reasonable doubt that the plaintiff was aware of the conspiracy. *Id.* at 602.

B. Procedural History

Following his acquittal in the criminal case, the plaintiff brought a civil suit against the postal inspectors and the Assistant United States Attorney who had prosecuted the case, contending that the inspectors had induced his prosecution in retaliation for his criticism of the USPS. *See generally Compl.* After nearly two decades of litigation that, as the Supreme Court has noted, "portend[s] another *Jarndyce v. Jarndyce*," *Hartman v. Moore*, 547 U.S. 250, 256 (2006), two claims out of the original five remain: a *Bivens*[2] claim alleging that the postal inspectors committed retaliatory prosecution in violation of the plaintiff's First Amendment rights, and a malicious prosecution claim against the inspectors brought under the FTCA. *Moore*, 571 F.3d at 63.

In 2003, the court[3] denied the defendants' motion for summary judgment on the plaintiff's *Bivens* retaliatory prosecution claim. *See* Order (Aug. 5, 2003). The Circuit affirmed, concluding that a reasonable jury could find that the criminal case against the plaintiff would not have been brought absent the defendants' retaliatory motive. *See generally Moore v. Hartman*, 388 F.3d 871 (D.C. Cir. 2004). The Supreme Court reversed, resolving a Circuit split and holding that to prevail on his *Bivens* retaliatory prosecution claim, the plaintiff would be required to prove not only that the defendants pos-

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[2] *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

[3] This case was originally assigned to another judge in this court.

sessed retaliatory motive, but also that the prosecutor lacked probable cause to bring the charges against the plaintiff. *Hartman*, 547 U.S. at 265-66. Because the Supreme Court decision established that probable cause is "a decisive element of the plaintiff's claims," Mem. Op. (Mar. 27, 2007) at 6, and because the plaintiff bears the burden of proving its absence, the court denied without prejudice the defendants' renewed motion for summary judgment and granted the plaintiffs' motion for additional discovery, *see generally id.*

Following the additional period of discovery, the defendants again moved for summary judgment, arguing that the plaintiff cannot prevail on either of his remaining claims because he is unable to show an absence of probable cause. *See generally* Defs.' Mot. for Summ. J. (Oct. 15, 2007). In an August 2008 opinion, the court granted the defendants' motion, holding that "[a] valid indictment conclusively determines the existence of probable cause to bring charges" unless the plaintiff "allege[s] misconduct or irregularities in the grand jury proceeding sufficient to call into question the validity of the indictment," Mem. Op. (Aug. 8, 2008) at 6-7, and concluding that the plaintiff had failed to satisfy the heavy burden of overcoming the conclusive effect of the indictment, *see generally id.*

The plaintiff appealed, and in July 2009 the Circuit reversed the court's grant of summary judgment, defining for the first time "what presumption a grand jury indictment is afforded in a *Bivens* retaliatory prosecution claim." *Moore*, 571 F.3d at 67. The Circuit held that "a grand jury indictment is prima facie evidence of probable cause which may be rebutted," *id.*, by "evidence that the indictment was produced by fraud, cor-

ruption, perjury, fabricated evidence, or other wrongful conduct undertaken in bad faith," *id.* at 69.

Following remand, the defendants filed this renewed motion for summary judgment, contending that both of the plaintiff's remaining claims fail even under this newly articulated standard. *See generally* Defs.' Renewed Mot. for Summ. J. ("Defs.' Mot."). The plaintiff opposes the defendants' motion. *See generally* Pl.'s Opp'n. With the defendants' renewed motion now ripe for adjudication, the court turns to the applicable legal standard and the parties' arguments.

III. ANALYSIS

A. Legal Standard for a Motion for Summary Judgment

Summary judgment is appropriate when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Diamond v. Atwood*, 43 F.3d 1538, 1540 (D.C. Cir. 1995). To determine which facts are "material," a court must look to the substantive law on which each claim rests. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A "genuine issue" is one whose resolution could establish an element of a claim or defense and, therefore, affect the outcome of the action. *Celotex*, 477 U.S. at 322; *Anderson*, 477 U.S. at 248.

In ruling on a motion for summary judgment, the court must draw all justifiable inferences in the nonmoving party's favor and accept the nonmoving party's evidence as true. *Anderson*, 477 U.S. at 255. A nonmov-

ing party, however, must establish more than "the mere existence of a scintilla of evidence" in support of its position. *Id.* at 252. To prevail on a motion for summary judgment, the moving party must show that the nonmoving party "fail[ed] to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. By pointing to the absence of evidence proffered by the nonmoving party, a moving party may succeed on summary judgment. *Id.*

The nonmoving party may defeat summary judgment through factual representations made in a sworn affidavit if he "support[s] his allegations . . . with facts in the record," *Greene v. Dalton*, 164 F.3d 671, 675 (D.C. Cir. 1999) (quoting *Harding v. Gray*, 9 F.3d 150, 154 (D.C. Cir. 1993)), or provides "direct testimonial evidence," *Arrington v. United States*, 473 F.3d 329, 338 (D.C. Cir. 2006). Indeed, for the court to accept anything less "would defeat the central purpose of the summary judgment device, which is to weed out those cases insufficiently meritorious to warrant the expense of a jury trial." *Greene*, 164 F.3d at 675.

B. The Court Denies the Defendants' Renewed Motion for Summary Judgment

In support of their renewed motion for summary judgment, the defendants assert that even though the Circuit held that an indictment does not provide *conclusive* evidence of probable cause, "it follows logically from this Court's prior review of [the plaintiff's] allegations and evidence that he cannot rebut the probable cause presumption" created by the indictment. Defs.'

Mot. at 1. More specifically, the defendants argue that there is no evidence that the allegedly improper conduct of the postal inspectors and the Assistant United States Attorney resulted in the grand jury indictment. *Id.* at 10-22. And even assuming *arguendo* that the defendants are not entitled to a *presumption* of probable cause, they contend, the plaintiff's claims must fail because probable cause existed to prosecute him. *Id.* at 22-29. The plaintiff responds that the defendants "fail[ed] to make a complete and full statement of facts to the grand jury" and improperly disclosed grand jury witnesses' testimony, thereby engaging in "wrongful conduct" that, pursuant to the rule recently established in this Circuit, rebuts the presumption of probable cause created by the indictment. Pl.'s Opp'n at 18-32.

In its July 2009 decision in this case, the Circuit established that "to carry his burden [the plaintiff] must present evidence that the indictment was produced by fraud, corruption, perjury, fabricated evidence, or other wrongful conduct undertaken in bad faith." *Moore*, 571 F.3d at 69. Because this Circuit has not yet had the opportunity to draw the contours of this standard, the court is guided by the authority of other Circuits whose decision this Circuit cited favorably in *Moore*. In *Rothstein v. Carriere*, for instance, the Second Circuit held that the presumption of probable cause created by the indictment may be overcome by evidence that the government did "not ma[k]e a complete and full statement of facts either to the Grand Jury or to the District Attorney, that they have misrepresented or falsified evidence, that they have withheld evidence or otherwise acted in bad faith." 373 F.3d 275, 283 (2d Cir. 2004); *accord White v. Frank*, 855 F.2d 956, 961-62 (2d Cir. 1988).

Similarly, in *Hand v. Gary*, the Fifth Circuit held that "the finding of probable cause [can be] tainted by the malicious actions of . . . government officials," 838 F.2d 1420, 1426 (5th Cir. 1988), such as the use of "extreme methods" to extract evidence from witnesses, the lack of any basis for the initial investigation, the investigator's personal interest in the prosecution and other indicia of bad faith, *see id.* at 1425; *see also Gonzalez Rucci v. U.S. Immigration & Naturalization Serv.*, 405 F.3d 45, 49 (1st Cir. 2005) (holding that "a grand jury indictment definitively establishes probable cause" unless "law enforcement defendants wrongfully obtained the indictment by knowingly presenting false testimony to the grand jury"); *Riley v. City of Montgomery, Ala.*, 104 F.3d 1247, 1254 (11th Cir. 1997) (noting that "[a] grand jury indictment is prima facie evidence of probable cause which can be overcome by showing that it was induced by misconduct"); *Rose v. Bartle*, 871 F.2d 331, 353 (3d Cir. 1989) (holding that "a grand jury indictment or presentment constitutes prima facie evidence of probable cause to prosecute, but . . . this prima facie evidence may be rebutted by evidence that the [indictment or] presentment was procured by fraud, perjury or other corrupt means").

With this standard in mind, the court turns to an examination of the evidence proffered by the plaintiff. The Circuit summarized this evidence as follows:

> [The plaintiff] assert[s] that he ha[s] shown a lack of probable cause, and point[s] to a number of facts to support his argument. First, the prosecutor made statements to grand jury witnesses to "not reveal" certain portions of their testimony to the grand jury. Second, senior attorneys in the U.S. Attorney's Of-

> fice allegedly stated in memoranda that the government's evidence against [the plaintiff] was "extremely thin," and openly questioned whether charges should be brought against [him]. Third, the postal inspectors stated in a memorandum after the grand jury investigation that witnesses could testify that [the plaintiff] was not aware of the conspiracy. Finally, the postal inspectors improperly showed GAI Officer Spartin other witnesses' grand jury statements, intimidated Spartin by threatening to prosecute his son and tearing up his plea agreement, and lobbied the U.S. Attorney's Office to prosecute [the plaintiff].

Moore, 571 F.3d at 65.

Based on this evidence, a reasonable factfinder could conclude that the government procured the plaintiff's indictment through "wrongful conduct undertaken in bad faith" and that the government lacked probable cause to prosecute the plaintiff. *See Zahrey v. New York*, 2009 WL 54495, at *10-11 (S.D.N.Y. Jan. 7, 2009) (denying the defendants' motion for summary judgment after concluding that a reasonable jury could determine that the defendants acted in bad faith by coercing an unreliable witness into implicating the plaintiff); *Manganiello v. Agostini*, 2008 WL 5159776, at *2 (S.D.N.Y. Dec. 9, 2008) (holding that the plaintiff had provided sufficient evidence for a reasonable jury to conclude that the defendants failed to investigate or inform the District Attorney of potentially exculpatory leads, created a detective report describing the plaintiff's actions that contradicted another detective's report created two weeks earlier, induced inculpatory testimony from unreliable third-party witnesses and misrepre-

sented evidence before the grand jury, and thereby "failed to make a complete and full statement of facts to the District Attorney, misrepresented or falsified evidence, withheld evidence or otherwise acted in bad faith") (internal quotation marks omitted); *Cipolla v. Rensselaer*, 129 F. Supp. 2d 436, 455 (N.D.N.Y. 2001) (holding that a reasonable jury could conclude that the government officials testified falsely before the grand jury, asked potential witnesses to testify falsely, chose not to call a witness who would not testify falsely, circumscribed witness testimony and tampered with evidence); *Gallo v. Philadelphia*, 1999 WL 1212192, at *4 (E.D. Pa. Dec. 17, 1999) (denying the defendants' motion for summary judgment and noting that the court "cannot properly calculate probable cause . . . by merely 'subtracting' the allegedly corrupted testimony from the totality of the Government's case"). Accordingly, the court denies the defendants' renewed motion for summary judgment and directs the parties to file a joint status report on or before August 23, 2010, that includes a joint proposal as to how this matter should proceed.

IV. CONCLUSION

For the foregoing reasons, the court denies the defendants' renewed motion for summary judgment. An Order consistent with this Memorandum Opinion is separately and contemporaneously issued this 12th day of August, 2010.

RICARDO M. URBINA
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No.: 92-2288 (RMU)
Re Document No.: 352

WILLIAM G. MOORE, JR., PLAINTIFF

v.

MICHAEL HARTMAN ET AL., DEFENDANTS

Filed: Aug. 12, 2010

ORDER

DENYING THE DEFENDANTS' RENEWED MOTION FOR SUMMARY JUDGMENT

For the reasons stated in the court's Memorandum Opinion separately and contemporaneously issued this 12th day of August, 2010, it is hereby

ORDERED that the defendants' renewed motion for summary judgment is **DENIED**; and it is

FURTHER ORDERED that the parties shall file a joint status report on or before August 23, 2010, that includes a joint proposal as to how this matter should proceed.

SO ORDERED.

RICARDO M. URBINA
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

1:92-cv-02288-RMU

WILLIAM G. MOORE, JR. ET AL., APPELLEES

v.

MICHAEL HARTMAN ET AL., APPELLANTS

Filed: Oct. 6, 2011

ORDER

Before: SENTELLE, Chief Judge, and GINSBURG, HENDERSON, ROGERS, TATEL, GARLAND[*], BROWN, GRIFFITH, and KAVANAUGH, *Circuit Judges*

Upon consideration of appellants' petition for rehearing en banc, the response thereto, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

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[*] Circuit Judge Garland did not participate in this matter.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ _____
Jennifer M. Clark
Deputy Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

1:92-cv-02288-RMU

WILLIAM G. MOORE, JR. ET AL., APPELLEES

v.

MICHAEL HARTMAN ET AL., APPELLANTS

Filed: Oct. 6, 2011

ORDER

Before: HENDERSON, ROGERS, and KAVANAUGH, Circuit Judges

Upon consideration of appellants' petition for panel rehearing filed on August 29, 2011, and the response thereto, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

BY: /s/

Jennifer M. Clark
Deputy Clerk