

No. 04-1611

In the Supreme Court of the United States

NEBRASKA BEEF LTD., PETITIONER

v.

DENNIS GREENING, ET AL.

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

SUPPLEMENTAL BRIEF FOR THE RESPONDENTS

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Pursuant to Rule 15.8 of the Rules of this Court, the Solicitor General, on behalf of respondents, respectfully calls the Court's attention to an intervening matter not available when the brief in opposition was filed.

The second question presented in the petition is whether, on appeal from an order denying qualified immunity, a court of appeals has jurisdiction to consider whether a cause of action should be recognized to subject the government-officer to suit under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). In *Hartman v. Moore*, cert. granted, No. 04-1495 (June 27, 2005), the Court will decide whether law enforcement agents may be liable under *Bivens* for retaliatory prosecution in violation of the First Amendment when the prosecution was supported by probable cause. In the merits brief in

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Hartman, which was filed on August 26, 2005, the federal law enforcement officer-petitioners argue that a criminal defendant has no right under the First Amendment to be free from a prosecution supported by probable cause that was motivated by the defendant's speech. 04-1495 Pet. Br. 19-36. The *Hartman* petitioners also point out that, if the Court wished to reserve the broader First Amendment question, it could decide the case on the narrower ground that the absence of probable cause is an element of a damages cause of action for retaliatory prosecution under *Bivens*. *Id.* at 36-37. In a footnote, the *Hartman* brief notes that limiting the holding to the context of a *Bivens* cause of action could implicate the jurisdictional question that is presented in this case (because *Hartman*, too, was an appeal from an order denying qualified immunity). *Id.* at 37 n.12. The footnote goes on to say that, although courts have provided different answers to the jurisdictional question, the decision of the court of appeals in this case is correct. *Ibid.*

There is no need for the Court to hold the petition in this case pending its decision in *Hartman*. First, the principal issue in *Hartman* is the broader issue of whether the respondent has a claim under the First Amendment at all. The Court would have no need to reach the jurisdictional question in that case unless it limited its holding to the *Bivens*/Section 1983 context. Second, the court of appeals in this case correctly held that there is no cause of action under *Bivens*. See Br. in Opp. 10-13. The ultimate outcome is therefore likely to be the same regardless of whether the court of appeals should have decided that question on appeal from an order denying qualified immunity.

Respectfully submitted.

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