No. 05-64

In the Supreme Court of the United States

JOE ALFRED IZEN, JR., ET UX., PETITIONERS

v.

TERRANCE CATALINA

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, in an action under *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), a plaintiff asserting a claim of retaliatory prosecution in violation of the First Amendment must prove that there was no probable cause for the criminal charges.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 398 F.3d 363. The vacated opinion of the court of appeals (Pet. App. 12a-24a) is reported at 382 F.3d 566. The opinion of the district court (Pet. App. 25a-60a) is reported at 251 F. Supp. 2d 1327. An earlier opinion of the court of appeals (Pet. App. 61a-70a) is reported at 256 F.3d 324.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 2005. A petition for rehearing en banc was denied on April 12, 2005. The petition for a writ of certiorari was filed on July 11, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Joe Alfred Izen, Jr., is a Texas attorney who has long represented tax protesters and other defendants in criminal tax cases.[1] In August 1989, respondent, who was then a special agent with the Internal Revenue Service (IRS) Criminal Investigation Division (CID) in Houston, Texas, received a referral from the IRS Collection Division in Waco, Texas, advising that Izen had not filed income tax returns for 1986, 1987, and 1988. The referral also contained allegations from an informant that Izen was involved in money laundering and the failure of a private bank, and had accounts in foreign countries. Respondent knew nothing about Izen before the referral. Pet. App. 2a, 26a; 2 C.A. R. 780-781, 798-799.

In October 1989, the referral was accepted by CID for investigation as a tax evasion case. No recommendation was made to open a money laundering case at that time, because the allegations by the informant had not been sufficiently corroborated. Around the same time, a request was prepared for a grand jury investigation of potential criminal tax violations. The request pointed out that Izen had been in-house legal counsel for Nassau Life Insurance Co. (Nassau Life), a company in the Bahamas that had allegedly sold foreign business trusts for use in schemes to evade federal taxes. It was recommended that the investigation be conducted with a grand jury because many of the potential witnesses were tax protesters who would be hostile to government agents and would refuse to comply with administrative sum-

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[1] Izen's wife, Karen Suter Izen, is also a petitioner. References in this brief to "Izen" are to Joe Alfred Izen, Jr.

monses issued by the IRS. Pet. App. 2a, 9a-10a, 26a, 38a-40a; 2 C.A. R. 766, 774, 793-794.[2]

In December 1989, in a case summary report, respondent's supervisor summarized the facts relating to Izen's alleged involvement in money laundering, 2 C.A. R. 753-756, and concluded that the "potential for an undercover operation is good," *id.* at 755. The report directed respondent to "set up [an] undercover operation." *Id.* at 753.

Respondent thereafter learned from sources other than the informant that Izen had tried to set up offshore bank accounts on a number of occasions, had visited several countries known to be tax havens, and had agreed to set up a foreign trust. Money launderers frequently use offshore banks, tax havens, and foreign trusts. Respondent also learned that Izen had a bank account in the Bahamas, a tax haven, but, contrary to federal tax law, had not declared on his 1985 tax return that he had an interest in, or signature authority over, the account. In addition, respondent learned that Nassau Life, the company of which Izen was in-house counsel, had employed fugitives and had been used to commit illegal acts that may have included money laundering. Finally, respondent learned that there had been over 100 tax cases, and 31 convictions, involving Nassau Life. Pet. App. 9a-10a, 38a-41a; 2 C.A. R. 722-726, 732, 788-789.

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[2] Izen filed his 1986 tax return in September 1989, and filed his 1987 and 1988 returns in April 1990. The belated filing of those returns, however, did not render the investigation moot. As the request for a grand jury investigation noted, one of the matters under investigation was whether Izen had concealed his interests in foreign bank accounts. Filing a return that does not report income from a foreign bank account could constitute tax evasion. Pet. App. 26a-27a; 2 C.A. R. 766.

In April 1990, respondent prepared a request for an undercover money laundering operation, which was subsequently approved by various IRS officials, including the Assistant Commissioner in charge of criminal investigations. The undercover operation lasted from 1990 to 1992. During the investigation, an IRS special agent posed as someone seeking to create a foreign trust for the deposit of proceeds from the sale of purportedly stolen oil. Izen helped the undercover agent launder the money by establishing offshore accounts and a foreign trust and by using a bank in a tax haven. Pet. App. 3a, 11a, 41a-42a; 2 C.A. R. 728-735, 788.

In May 1995, respondent testified before a grand jury, which returned a four-count indictment charging Izen with conspiracy to commit money laundering and aiding and abetting money laundering. In May 1996, the charges were dismissed. Pet. App. 4a, 27a.

2. Izen thereafter sued respondent under *Bivens* v. *Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Asserting malicious prosecution, retaliatory prosecution, and other constitutional tort claims, the complaint alleged that the impetus for the investigation and prosecution was a desire to retaliate against Izen for his association with tax protesters and his representation of criminal tax defendants. The district court dismissed all of Izen's claims, but the court of appeals reversed the dismissal of the malicious prosecution and retaliatory prosecution claims. Pet. App. 4a, 61a-70a.

3. On remand, after respondent supplemented the record, the district court granted summary judgment for respondent on Izen's claims of malicious prosecution and retaliatory prosecution. Pet. App. 25a-60a. With respect to the latter claim, the district court concluded

both that Izen had "completely fail[ed] to present any evidence" that respondent "had any retaliatory motivation" and that respondent's evidence "clearly establishes legitimate and substantial reasons for the money laundering investigation and prosecution." *Id.* at 51a. The court explained that respondent had therefore "present[ed] evidence that establishes probable cause for the prosecution as a matter of law" and "adduced uncontradicted evidence that retaliation was not a major motivating factor in the decision to investigate." *Ibid.* In the alternative, the district court held that, even if Izen could establish a constitutional violation, respondent was entitled to qualified immunity, because the evidence against Izen was "more than sufficient" to make respondent's actions "objectively reasonable." *Id.* at 53a.

4. The court of appeals initially reversed the district court's entry of summary judgment on the retaliatory prosecution claim. Pet. App. 12a-24a. After respondent filed a petition for rehearing, however, the court of appeals vacated its original opinion and substituted an opinion that affirmed the district court's judgment. *Id.* at 1a-11a.

With respect to the retaliatory prosecution claim, the court of appeals held that Izen was required to establish "each of the common law malicious prosecution elements," one of which is "an absence of probable cause to prosecute." Pet. App. 7a (quoting *Keenan* v. *Tejeda*, 290 F.3d 252, 257 (5th Cir. 2002)). The court held that Izen could not establish that element, because respondent had "verifiable, independent information concerning Izen's questionable activities that amounted to probable cause." *Id.* at 9a. See *id.* at 9a-11a (describing evidence). Having held that Izen could not establish an essential element of retaliatory prosecution, the court of

appeals found it unnecessary to "reach the qualified immunity issue." *Id.* at 11a n.9.

ARGUMENT

Petitioners contend (Pet. 8-18) that the absence of probable cause is not an element of a claim of retaliatory prosecution in violation of the First Amendment, and that the court of appeals' contrary decision conflicts with decisions of three other circuits. Petitioners ask this Court (Pet. 19) either to grant certiorari or to hold the petition pending the Court's decision in *Hartman* v. *Moore*, cert. granted, No. 04-1495 (June 27, 2005). The court of appeals' decision is correct. And while there is a circuit conflict on the question whether probable cause defeats a claim of retaliatory prosecution, there is no need for the Court to grant certiorari or to hold the petition pending the decision in *Hartman*, which presents the same question, because respondent is entitled to qualified immunity regardless of whether the absence of probable cause is an element of a claim of retaliatory prosecution. The petition should therefore be denied.

1. The process leading to a decision to prosecute is one that courts are hesitant to examine, because it is "particularly ill-suited to judicial review," *Wayte* v. *United States*, 470 U.S. 598, 607 (1985), and examination by courts risks "unnecessarily impair[ing] the performance of a core executive constitutional function," *United States* v. *Armstrong*, 517 U.S. 456, 465 (1996). This Court has relied on those considerations in a variety of contexts, including cases involving a claim of selective prosecution in violation of the defendant's equal protection rights. The Court's decisions make clear that the standard for stating a claim of selective prosecution is exceptionally demanding and thus rarely satisfied.

United States v. *Bass*, 536 U.S. 862 (2002) (per curiam); *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489-490 (1999); *Armstrong*, *supra*; *Wayte*, *supra*. In a selective prosecution case, there must be both a subjective showing that the decision to prosecute was motivated by a discriminatory purpose and an objective showing that similarly situated members of a different class were not prosecuted. *Armstrong*, 517 U.S. at 465. Since this Court's decisions make clear that a claimant cannot establish selective prosecution merely by showing that his race was the but-for cause of the prosecution, *ibid.*, petitioners are mistaken in their contention (Pet. 15-16) that a claimant *can* establish *retaliatory* prosecution merely by showing that his *speech* was the but-for cause of the prosecution. These similar types of constitutionally prohibited prosecutions should be treated similarly.

Contrary to petitioners' contention, a claim of retaliatory prosecution requires an objective showing, and that showing is an absence of probable cause for the charges. Retaliatory prosecution is a form of malicious prosecution (the malicious purpose being retaliation for the defendant's speech), and the absence of probable cause is an essential element of a claim of malicious prosecution. That was the common law rule when the First Amendment was adopted, see, *e.g.*, *Wheeler* v. *Nesbitt*, 65 U.S. (24 How.) 544, 550-551 (1861) (citing cases); 3 William Blackstone, *Commentaries* 127 (1768), and it remains the common law rule today, see, *e.g.*, Restatement (Second) of Torts § 653, at 406 (1977); 8 Stuart M. Speiser et al., *The American Law of Torts* § 28:7, at 38 (1991). Because the "particular concern" about the "systemic costs" of judicial inquiry necessitates an objective element for a claim that a prosecution was moti-

vated by a constitutionally prohibited factor, *Wayte*, 470 U.S. at 607, and because this Court routinely consults the common law in attempting to determine the content of constitutional provisions, a prosecution motivated by the defendant's speech does not violate the First Amendment if there was probable cause for the charges.

Petitioners rely (Pet. 15-17) on this Court's decisions in *Mount Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977), and *Crawford-El* v. *Britton*, 523 U.S. 574 (1998), but those cases are inapposite. *Mount Healthy* did not involve retaliatory *prosecution*. Like the other decisions in the line of cases beginning with *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), *Mount Healthy* involved retaliatory action against an *employee* by a public *employer*, and thus the special considerations governing constitutional challenges to prosecutorial decisionmaking were inapplicable. As for *Crawford-El*, that case rejected "special procedural rules" for "constitutional claim[s] that require[] proof of improper motive," 523 U.S. at 577, and also rejected a "proposal to immunize all officials whose conduct is 'objectively valid,' regardless of improper intent," *id*. at 594. This case does not implicate an across-the-board rule of procedure or immunity for claims requiring proof of improper motive. Rather, the rule applied by the court of appeals is that, in the unique context of prosecutorial decisionmaking (which was not at issue in *Crawford-El*), a substantive claim of retaliation in violation of the First Amendment will not lie if the charges were supported by probable cause.

2. In agreement with the court below, four other circuits have held that the absence of probable cause is

an element of a claim of retaliatory prosecution.[3] Three circuits have reached the opposite conclusion.[4] In *Hartman* v. *Moore*, No. 04-1495, this Court granted certiorari to resolve the conflict. 125 S. Ct. 2977 (2005). There is no need for the Court to grant certiorari in this case as well, or even to hold the petition pending the decision in *Hartman*, because Izen would not be entitled to relief even if this Court decided that probable cause does not defeat a claim of retaliatory prosecution.

A government official is entitled to qualified immunity if his conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Wilson* v. *Layne*, 526 U.S. 603, 609 (1999) (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982)). Accordingly, even if respondent "violated a constitutional right," he is still entitled to qualified immunity if "the right was [not] clearly established." *Saucier* v. *Katz*, 533 U.S. 194, 201 (2001). The constitutional right at issue here—the right to be free from a prosecution supported by probable cause that was motivated by the defendant's speech—was not clearly established when the criminal charges were filed

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[3] See *Draper* v. *Reynolds*, 369 F.3d 1270, 1277 n.11 (11th Cir.), cert. denied, 125 S. Ct. 507 (2004); *Wood* v. *Kesler*, 323 F.3d 872, 883 (11th Cir.), cert. denied, 540 U.S. 879 (2003); *Dahl* v. *Holley*, 312 F.3d 1228, 1236 (11th Cir. 2002); *Curley* v. *Village of Suffern*, 268 F.3d 65, 73 (2d Cir. 2001); *Smithson* v. *Aldrich*, 235 F.3d 1058, 1063 (8th Cir. 2000); *Merkle* v. *Upper Dublin Sch. Dist.*, 211 F.3d 782, 796 (3d Cir. 2000); *Singer* v. *Fulton County Sheriff*, 63 F.3d 110, 120 (2d Cir. 1995), cert. denied, 517 U.S. 1189 (1996); *Mozzochi* v. *Borden*, 959 F.2d 1174, 1179-1180 (2d Cir. 1992).

[4] See *Moore* v. *Hartman*, 388 F.3d 871, 877-881 (D.C. Cir. 2004), cert. granted, 125 S. Ct. 2977 (2005); *Greene* v. *Barber*, 310 F.3d 889, 896-897 (6th Cir. 2002); *Poole* v. *County of Otero*, 271 F.3d 955, 961 (10th Cir. 2001).

against Izen. If anything, the law at that time was to the contrary.

By 1995, when the grand jury returned the indictment, the Fifth Circuit had already held that a plaintiff alleging retaliatory prosecution in violation of the First Amendment must establish "all of the elements of the common law tort" of malicious prosecution, *Johnson* v. *Louisiana Dep't of Agric.*, 18 F.3d 318, 320 (1994), one of which is an absence of probable cause. Similarly, the Second Circuit had held that "[a]n individual does not have a right under the First Amendment to be free from a criminal prosecution supported by probable cause that is in reality an unsuccessful attempt to deter or silence criticism of the government." *Mozzochi* v. *Borden*, 959 F.2d 1174, 1180 (1992). Both of those decisions were relied upon by the Fifth Circuit in the decision below. Pet. App. 7a-8a. In contrast, no court of appeals squarely held that probable cause does *not* defeat a claim of retaliatory prosecution until 2001—six years after petitioner was indicted. See note 4, *supra*.

Nor is this Court's decision in *Hartman* likely to shed any additional light on the question whether the right at issue was clearly established in 1995. The petition in *Hartman* did raise the question whether, if law enforcement officers may be liable for retaliatory prosecution when there was probable cause for the charges, the law to that effect was clearly established in 1988, when the charges in that case were filed. 04-1495 Pet. (I). But the Court did not grant certiorari on that question. 125 S. Ct. 2977 (2005).[5]

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[5] The fact that petitioners also raise a claim of retaliatory *investigation* (Pet. 17-18) is not a reason to hold the petition for *Hartman*, because no such claim is raised in that case. There is also no reason for the Court to grant plenary review on the issue. First, as in

CONCLUSION

The petition for a writ of certiorari should be denied. In the alternative, the petition should be held pending this Court's decision in *Hartman* v. *Moore*, No. 04-1495, and then disposed of as appropriate in light of the decision in that case.

Respectfully submitted.

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SEPTEMBER 2005

Hartman, the question presented in the petition in this case is whether the absence of probable cause is an element of a claim of retaliatory *prosecution*, Pet. i, and the issue of retaliatory *investigation* is not "fairly included therein," Sup. Ct. R. 14.1(a). Second, the court of appeals did not separately address a claim of retaliatory investigation, and petitioners cite no precedents from any court that has. (The only case cited by petitioners on that question is the initial decision of the court below, see Pet. 17-18, which was vacated when the court issued the decision of which petitioner seeks review.) Third, Izen's retaliatory-investigation claim is without merit. Since an investigation, unlike a prosecution, does not require probable cause, see, *e.g.*, *United States* v. *Powell*, 379 U.S. 48, 57 (1964), a claim of retaliatory investigation, if such a claim exists at all, should require *more* than a claim of retaliatory prosecution, not less, as petitioners suggest (Pet. 18). At a minimum, petitioners cannot show that Izen had a *clearly established* right to be free from an investigation, supported by evidence of wrongdoing, that was allegedly motivated by his speech.