**No.**

IN THE
# Supreme Court of the United States

MICHAEL HARTMAN, *ET AL.*,
*Petitioners*,

v.

WILLIAM G. MOORE, JR.
*Respondent.*

**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 accused of retaliatory prosecution in violation of the First Amendment should receive qualified immunity where the officers could reasonably have believed that the prosecution was supported by probable cause.

## PARTIES TO THE PROCEEDINGS BELOW

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

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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Former U.S. Postal Inspectors Michael Hartman, Frank Kormann, Robert Edwards, and Pierce McIntosh, as well as Norman Eugene Robbins, Jr. and Pamela Sothan-Robbins (as the personal representatives of the estate of late Postal Inspector Norm Robbins), respectfully petition 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.[1]

## OPINIONS BELOW

The court of appeals' opinion (App., *infra*, 1a-3a) is reported at 704 F.3d 1003. That opinion reinstates the court of appeals' prior opinion (App., *infra*, 9a-29a),

[1] Petitioners Robbins and Sothan-Robbins were substituted on the death of Postal Inspector Norm Robbins. This petition uses "petitioners" and "Postal Inspectors" to include Postal Inspector Robbins or his next-of-kin as appropriate.

which is reported at 644 F.3d 415. This Court had vacated that earlier decision and remanded it for reconsideration in light of *Reichle* v. *Howards*, 132 S. Ct. 2088 (2012). App., *infra*, 4a. The district court's opinion (App., *infra*, 32a-42a) is reported at 730 F. Supp. 2d 174.

## STATEMENT OF JURISDICTION

The court of appeals entered judgment on January 15, 2013, App., *infra*, 1a-3a, and denied rehearing on April 24, 2013, App., *infra*, 73a-74a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

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

## INTRODUCTION

This case—now before this Court for a third time—concerns the scope of qualified immunity in retaliatory-prosecution cases. Seven years ago, the Court granted review in this case to decide whether "a plaintiff in a retaliatory-prosecution action must plead and show the absence of probable cause for pressing the underlying criminal charges." *Hartman* v. *Moore*, 547 U.S. 250, 257 (2006) ("*Hartman I*").[2] Reversing the D.C. Circuit's ruling that the Postal Inspectors were not entitled to qualified immunity even if probable cause was present, the Court held that a plaintiff must plead and prove the absence of probable cause. *Id.* at 256.

On remand, the D.C. Circuit again held that qualified immunity is not available to petitioners. This time, it ruled that probable cause is irrelevant to qualified immunity. Under *Hartman I*, the court held, "the absence of

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[2] This Court's decision in *Hartman I* is referred to as "*Moore IV*" in the decisions below.

probable cause is not an element of the free speech right allegedly violated in a First Amendment retaliatory inducement to prosecution case," but merely a prerequisite to recovering damages. App., *infra*, 26a. This Court vacated that decision and remanded for further consideration in light of *Reichle* v. *Howards*, 132 S. Ct. 2088 (2012). App., *infra*, 4a. The D.C. Circuit subsequently reinstated its prior ruling, this time over Judge Kavanaugh's dissent. *Id.* at 1a-3a.

In the wake of *Hartman I* and *Reichle*, the circuits are divided over whether an officer accused of retaliatory prosecution (or retaliatory arrest) is entitled to qualified immunity if a reasonable officer could have believed that probable cause was present. The issue is important and recurring. This Court's review is warranted.

## STATEMENT

### I. LEGAL FRAMEWORK

Qualified immunity shields government officials from suits for 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*, 555 U.S. 223, 231 (2009) (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982)). "To be clearly established, a right must be sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Reichle*, 132 S. Ct. at 2093 (quotation marks omitted). "[E]xisting precedent must have placed the statutory or constitutional question *beyond debate*." *Ibid.* (emphasis added).

That immunity is necessary because the "public interest requires decisions and action to enforce laws for the protection of the public." *Scheuer* v. *Rhodes*, 416 U.S. 232, 241 (1974). "Implicit in the idea that officials" have immunity "is a recognition that they may err. The con-

cept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all." *Id.* at 242. Qualified immunity thus ensures that officials do not "exercise their discretion with undue timidity." *Wood* v. *Strickland*, 420 U.S. 308, 321 (1975). Consistent with that objective, the "clearly established law" standard provides "'ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" *Hunter* v. *Bryant*, 502 U.S. 224, 229 (1991) (quoting *Malley* v. *Briggs*, 475 U.S. 335, 341, 343 (1986)).

In deciding whether an officer violated clearly established rights, it is not enough that the right was clearly established in the abstract, *e.g.*, "that it was firmly established that warrantless searches not supported by probable cause and exigent circumstances violate the Fourth Amendment." *Anderson* v. *Creighton*, 483 U.S. 635, 641 (1987). Rather, qualified immunity depends on whether the officer's actual conduct was obviously unlawful in the particular situation before him. *Ibid.* Thus, where a claim turns on the absence of probable cause—such as an action alleging an unlawful search, arrest, or prosecution—the officer is entitled to immunity unless it was "clearly established that the circumstances with which [the officer] was confronted did not constitute probable cause." *Id.* at 640-641. "Even law enforcement officials who 'reasonably but mistakenly conclude that probable cause is present' are entitled to immunity." *Hunter*, 502 U.S. at 227 (quoting *Anderson*, 483 U.S. at 641). A defendant "will not be immune if, on an objective basis, it is obvious that no reasonably competent official would have concluded that" probable cause was present; "but if officers of reasonable competence could disagree on this issue, immunity should be recognized." *Malley*, 475 U.S. at 341. Courts sometimes articulate that condition—

where an officer reasonably (if mistakenly) could have believed there was probable cause—as "arguable probable cause." App., *infra*, 21a.

## II. PROCEEDINGS BELOW

### A. Background

With "a procedural history portending another *Jarndyce* v. *Jarndyce*," *Hartman I*, 547 U.S. at 256, this case has its roots in this Nation's ZIP-code system.

The ZIP-code system was the brainchild of Robert Moon, who in 1944 proposed assigning each of the Nation's regional mail centers a 3-digit code to assist in routing mail throughout the country. U.S. Postal Serv. Off. of Inspector Gen., *The Untold Story of the ZIP Code* 3 (Report No. RARC-WP-13-006) (2013) ("*Untold Story*"). Moon's proposal caught the eye of Postmaster General Edward Day, who combined Moon's 3-digit system with an existing program that divided large cities into 2-digit local postal zones. *Ibid.* The resulting "Zone Improvement Plan" was unveiled in 1962. *Id.* at 1, 3-4. Postal system mascot "Mr. ZIP" announced to the Nation that the new ZIP codes would offer "accurate, complete and faster mail service" using "just 5 little digits." Historian, U.S. Postal Serv., *Mr. ZIP* 2 (2008), http://about.usps.com/who-we-are/postal-history/mr-zip.pdf. Within a few years, "the vast majority of Americans were in favor of the ZIP Code system." *Untold Story*, *supra*, at 5.

The Postal Service, however, eventually concluded that effective mail sorting required more than those "5 little digits." Beginning in the late 1970s, it proposed "add[ing] four digits to existing five-digit zip codes," launching an initiative known as "ZIP+4." App., *infra*, 44a. The Postal Service had urged that, with nine-digit codes, "efficient automatic sorting" could be performed

by "scanning only a single line of text," whereas sorting mail with five-digit ZIP codes required machines that could scan multiple lines to obtain sufficient routing information. *Ibid.*

ZIP+4, however, faced opposition. Critics "decried the burden of remembering the four extra numbers," condemning ZIP+4 as "a mnemonic plague of contagious digititous." *Hartman I*, 547 U.S. at 253 & n.1 (quotation marks omitted). Others doubted that ZIP+4's promised benefits would materialize, App., *infra*, 45a, or "objected to the foreign sources of [the] single-line scanners" the Postal Service planned to use, *Hartman I*, 547 U.S. at 253. Still, Postmaster General William Bolger maintained his support for ZIP+4, and "announced in late 1983 that the USPS would stick with single-line optical character readers." App., *infra*, 45a.

Respondent William G. Moore, Jr. was, at that time, the chief executive of Recognition Equipment Inc. ("REI"). A manufacturer of *multiple*-line optical character readers, REI "was pursuing a contract to sell its * * * readers to USPS for use in scanning postal addresses." App., *infra*, 10a. Respondent "obviously stood to gain financially from the adoption of multiline technology," *Hartman I*, 547 U.S. at 252, and stood to lose from the adoption of *single*-line scanners that ZIP+4 enabled.

Consequently, after Postmaster General Bolger announced the Postal Service's commitment to single-line technology, respondent and REI joined the opposition to ZIP+4. App., *infra*, 45a. Moore lobbied Congress, testified before congressional committees, and supported "a 'Buy American' rider to the Postal Service's 1985 appropriations bill." *Hartman I*, 547 U.S. at 253. Pursuing that agenda, REI retained a public relations firm called Gnau and Associates, Inc. ("GAI"). App., *infra*, 10a.

"GAI had been recommended to [respondent] by Peter Voss, a member of USPS's Board of Governors." *Ibid.*

In July 1985, the Postal Service yielded to mounting public and congressional pressure. Making "what it called a 'mid-course correction,'" the Postal Service "embraced multi-line technology." *Hartman I*, 547 U.S. at 253. Respondent, however, did not benefit from that change: The contract for providing the scanners was ultimately awarded to one of REI's competitors. *Ibid.*

Around the time of the Postal Service's "mid-course correction," the Postal Inspectors began investigating a kickback scheme involving REI's hiring of GAI. They discovered that GAI's chairman, John Gnau, "had paid kickbacks to [USPS Governor] Voss in return for Voss having referred REI (and other companies) to GAI." App., *infra*, 11a. Voss, Gnau, and a GAI vice president ultimately pleaded guilty to illegal gratuity offenses. *Ibid.*

After further investigation, a federal grand jury indicted respondent in October 1988, along with REI and REI's vice president, for conspiracy, theft, receipt of stolen property, mail fraud, and wire fraud. App., *infra*, 11a & n.1. At a bench trial, however, the district court found the evidence against the defendants insufficient. Viewing the question as "not simply whether there are instances of evidence in the government's case which on their own may reasonably support an inference of guilt," but rather as "whether all those inferences constitute evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt," the court granted the defendants' motion for judgment of acquittal. *United States* v. *Recognition Equip., Inc.*, 725 F. Supp. 587, 596 (D.D.C. 1989) (quotation marks and citation omitted).

### B. Proceedings Leading to This Court's Decision in *Hartman I*

1. In 1991, respondent filed this *Bivens* action in the U.S. District Court for the Northern District of Texas against the Assistant U.S. Attorney ("AUSA") and the Postal Inspectors who worked on the investigation and prosecution against him. App., *infra*, 12a.[3] The suit was eventually transferred to the District of Columbia. *Ibid.* Most of the claims were dismissed. The only remaining claim relevant here is respondent's claim that petitioners violated his First Amendment rights by engineering his prosecution in retaliation for his criticism of the Postal Service. *Ibid.*

Petitioners eventually moved for summary judgment, asserting that they were entitled to qualified immunity.[4] The suit, petitioners urged, should be dismissed because "they acted based on probable cause, the absence of which is a sine qua non of a First Amendment retaliatory inducement to prosecution claim." App., *infra*, 13a. The district court denied their motion in a one-paragraph or-

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[3] Respondent later filed a separate suit against the United States under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671-2680. App., *infra*, 12a. That claim, resolved against respondent on summary judgment for all but one claim (malicious prosecution), is not at issue here.

[4] Before that summary judgment motion was filed, respondent took two appeals to the D.C. Circuit. The first was taken after the district court dismissed the claims against petitioners. App. *infra*, 48a. The D.C. Circuit reversed in relevant part, reinstating the retaliatory-prosecution claim. *Ibid.* Respondent appealed again after the district court granted the AUSA's motion for summary judgment (holding he was entitled to absolute immunity) and granted the United States judgment on the pleadings for the FTCA claims. *Ibid.* The court of appeals largely affirmed, although it reinstated respondent's FTCA claim for malicious prosecution. *Ibid.*

der, declaring that "[t]here are material facts in dispute." *Ibid.*

2. The D.C. Circuit affirmed. App., *infra*, 43a-72a. The court recognized that it had jurisdiction because decisions denying immunity are immediately appealable under the collateral-order doctrine. *Id.* at 49a (citing *Mitchell* v. *Forsyth*, 472 U.S. 511, 524-525, 530 (1985)). And the case before it turned on pure issues of law, including "whether [respondent's] cause of action requires lack of probable cause." *Id.* at 50a-51a.

Answering that question in the negative, the court of appeals held that retaliatory-prosecution claims under the First Amendment do not require the absence of probable cause. App., *infra*, 54a-61a. Citing its decision in *Haynesworth* v. *Miller*, 820 F.2d 1245 (D.C. Cir. 1987), the court ruled that existing circuit precedent "affords damages liability for prosecutions that would not have occurred without retaliatory motive, *even if the officers involved acted on the basis of probable cause*." *Id.* at 60a (emphasis added). In *Haynesworth*, the defendants "d[id] not dispute" that the plaintiff had adequately pleaded a constitutional violation; the issue was whether the defendants were "sufficiently implicated in the retaliatory prosecution averred to establish liability." 820 F.2d at 1255, 1257-1258. Footnote 93 of that decision, however, set forth the elements of retaliatory prosecution without listing absence of probable cause as a required element. *Id.* at 1257 & n.93. Although the *Haynesworth* complaint alleged that the plaintiff "was arrested and prosecuted without probable cause," *id.* at 1251 n.49, the D.C. Circuit took footnote 93's failure to mention probable cause as a conclusive holding that retaliatory-prosecution claims do not require the absence of probable cause, App., *infra*, 55a-56a.

For similar reasons, the court of appeals rejected the Postal Inspectors' argument that they were entitled to qualified immunity. The Inspectors urged that, even if absence of probable cause is not a prerequisite to retaliatory-prosecution claims, that was not clearly established when they acted. App., *infra*, 69a-70a. The court held that *Haynesworth* provided the requisite clarity. *Id.* at 70a-71a. It acknowledged that "*Haynesworth* stated the elements of retaliatory prosecution without analysis in a footnote in an opinion generally addressing other issues." *Id.* at 70a (quotation marks omitted). But it ruled that "*Haynesworth*'s description of the elements was part of its holding, and hence binding precedent." *Ibid.* As a result, neither the decision's "lack of analysis nor its use of a footnote freed the Postal Service from the obligation to take note of the opinion and instruct its inspectors accordingly." *Ibid.* The court did not mention that, in *Haynesworth* itself, absence of probable cause had been alleged.

3. This Court reversed. *Hartman I*, 547 U.S. 250. A "plaintiff in a retaliatory-prosecution action," the Court held, "must plead and show the absence of probable cause for pressing the underlying criminal charges." *Id.* at 257. The "strongest justification" for that requirement, the Court observed, is "the need to prove a chain of causation from animus to injury." *Id.* at 259. "'[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.'" *Id.* at 260 (quoting *Crawford-El* v. *Britton*, 523 U.S. 574, 593 (1998)). Although "[i]t may be dishonorable to act with an unconstitutional motive and perhaps in some instance be unlawful, * * * action colored by some degree of bad motive does not amount to a constitutional tort if that action would have been taken anyway." *Ibid.*

The Court then held that, for retaliatory-prosecution claims, there can be no causation where officers have probable cause. 547 U.S. at 265-266. When retaliatory prosecution is alleged, causation is particularly difficult because the decision whether to bring criminal charges lies not with the defendant officer, but with a prosecutor who is absolutely immune from suit. *Id.* at 261-262. The plaintiff thus must show that the defendant successfully "induced the prosecutor to bring charges that would not have been initiated without his urging." *Id.* at 262. There is, the Court further observed, a "longstanding presumption of regularity accorded to prosecutorial decisionmaking." *Id.* at 263. Courts must not "lightly discard" the "presumption that a prosecutor has legitimate grounds for the action he takes." *Ibid.*

Accordingly, this Court held that "absence of probable cause" must be alleged and shown "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." 547 U.S. at 263. The Court emphasized that that requirement is absolute: It refused to admit "any exemption to a no-probable-cause requirement" even where a plaintiff could show "a direct admission by a prosecutor that, irrespective of probable cause, the prosecutor's sole purpose in initiating a criminal prosecution was to acquiesce to the inducements of other government agents, who themselves harbored retaliatory animus." *Id.* at 264 n.10.

### C. Proceedings Leading to This Court's GVR

1. Following this Court's decision, the district court initially granted petitioners' motion for summary judgment. See App., *infra*, 14a. It concluded that respondent could not establish the absence of probable cause because he had failed to allege any misconduct in the grand jury

process that would "'undermine[] the validity of the indictment sufficiently to negate its conclusive effect as to probable cause.'" *Ibid.* On appeal, the D.C. Circuit vacated the district court's judgment, holding that an indictment creates only a rebuttable, not conclusive, presumption of probable cause. *Id.* at 15a-16a. It directed the district court to "'consider whether [respondent] ha[d] 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 16a.

On remand, petitioners renewed their motion for summary judgment, arguing that (1) the record established probable cause and (2) even if it did not, they were entitled to qualified immunity because they reasonably could have believed that probable cause existed. App., *infra*, 17a. This time the district court denied the motion, stating that "'a reasonable factfinder could conclude * * * that the government lacked probable cause to prosecute'" respondent. *Ibid.* The court did not address whether a reasonable officer could have believed that probable cause existed.

2. Petitioners appealed, and the D.C. Circuit dismissed in part and affirmed in part. App., *infra*, 9a-29a. With respect to the probable-cause issue, the court held that federal officers accused of retaliatory prosecution cannot claim qualified immunity by arguing that "a reasonable investigator in their position could have concluded, based on the evidence, that probable cause existed to prosecute," *i.e.*, based on "arguable" probable cause. *Id.* at 21a. The court acknowledged that defendants in cases alleging "arrest or prosecution in violation of the Fourth Amendment" are entitled to qualified immunity if an officer in their position could reasonably (if

mistakenly) conclude that probable cause was present. *Ibid.* But the court held that "arguable probable cause" is not sufficient—indeed, the concept "does not apply"—in "a First Amendment retaliatory inducement to prosecution case." *Id.* at 22a.

The court observed that qualified immunity depends on whether the officer's conduct violated clearly established "rights." App., *infra*, 26a. But absence of probable cause, the court stated, "is not an element of the First Amendment right allegedly violated." *Id.* at 22a. Rather, the court read *Hartman I*'s requirement that plaintiffs prove absence of probable cause as a judicially mandated "remedial requirement for proving causation" to which qualified immunity—and its requirement that the officer's conduct be proscribed by clearly established law—does not apply. *Id.* at 26a-27a & n.10.

The court of appeals also held that, under *Johnson* v. *Jones*, 515 U.S. 304 (1995), it lacked jurisdiction to consider petitioners' argument that probable cause existed. (*Johnson* prohibits interlocutory appeals on essentially factual issues, such as whether there is sufficient evidence to support particular historical facts.) App., *infra*, 18a-21a. The court of appeals, however, expressed no doubt about its authority to resolve the purely legal question of whether absence of probable cause—or arguable probable cause—may be considered for qualified-immunity purposes. *Id.* at 22a.

3. After the court of appeals issued its decision, this Court decided *Reichle* v. *Howards*, 132 S. Ct. 2088 (2012). The question in *Reichle* was whether the rule announced in *Hartman I*—that plaintiffs must prove the absence of probable cause for retaliatory-*prosecution* claims—applies to retaliatory-*arrest* claims as well. The Court held that, whether or not the rule applied, the officers in that

case were entitled to qualified immunity. At the time of the relevant arrest there (in June 2006), the Court held, "it was not clearly established that an arrest supported by probable cause could violate the First Amendment." *Id.* at 2093.

In so holding, *Reichle* addressed *Hartman I* at length. The Court rejected the argument that the law was clearly established because, in *Hartman I* (decided in April 2006), the Court had observed that, "'as a general matter, the First Amendment prohibits government officials from subjecting an individual to retaliatory actions' for his speech." 132 S. Ct. at 2093-2094 (additional quotation marks and brackets omitted). The proper question was whether there is a "specific right to be free from a retaliatory arrest *that is otherwise supported by probable cause*," an issue the Court had not yet resolved. *Id.* at 2094 (emphasis added). Nor did circuit precedent clearly establish such a right. Although the Tenth Circuit had previously held that a retaliatory arrest was unlawful irrespective of probable cause, *Hartman I's* subsequent impact on that precedent "was far from clear" when the plaintiff was arrested. *Id.* at 2094-2095. While *Hartman I* involved only retaliatory *prosecutions*, "reasonable officers could have questioned whether the rule of *Hartman* also applied to arrests." *Id.* at 2095. Like retaliatory prosecutions, "retaliatory arrest cases also present a tenuous causal connection between the defendant's alleged animus and the plaintiff's injury." *Ibid.* For example, an officer who bears animus against a plaintiff's speech may nonetheless legitimately "decide to arrest the suspect because his speech provides evidence of a crime or suggests a potential threat." *Ibid.* Thus, it was "at least arguable that *Hartman*'s rule extended to retaliatory arrests." *Id.* at 2096.

The plaintiff in *Reichle* also urged that "*Hartman* did not hold that a prosecution violates the First Amendment only when it is unsupported by probable cause," but merely made probable cause relevant to the plaintiff's ability to recover where a violation occurs. 132 S. Ct. at 2096 n.6; cf. App., *infra*, 24a-27a. The Court did "not resolve whether *Hartman* is best read as defining the scope of the First Amendment right or as simply establishing a prerequisite for recovery"; nor did the Court "decide whether that distinction matters." *Reichle*, 132 S. Ct. at 2096 n.6. For qualified-immunity purposes, it was enough that "the answer would not have been clear to a reasonable officer." *Ibid.*

4. Shortly after issuing its decision in *Reichle*, this Court granted the Postal Inspectors' petition, vacated the D.C. Circuit's judgment, and remanded this case for further consideration in light of *Reichle*. App., *infra*, 4a.

**D. The Decision Below**

On remand, the panel reinstated its previous judgment, with Judge Kavanaugh dissenting. App., *infra*, 1a-3a.

1. The majority acknowledged *Reichle*'s conclusion that, as of 2006, it was not clear whether *Hartman I*'s absence-of-probable-cause requirement defined the First Amendment right against retaliatory prosecution or was merely a precondition to recovery unrelated to the "right" being asserted. App., *infra*, 2a. But the court held that *Reichle* was irrelevant because it "hinged" on "the fact that *Hartman* unsettled Tenth Circuit precedent that had conflated retaliatory arrest *and* retaliatory prosecution claims." *Ibid.* "Because retaliatory arrest and retaliatory prosecution are distinct constitutional violations and because the precedent in *this* Circuit clearly established in 1988 * * * the contours of the First

Amendment right to be free from retaliatory prosecution," the court of appeals stated, "nothing in *Reichle* changes our conclusion that the absence-of-probable-cause requirement is not an element of a First Amendment retaliation violation." *Ibid.* (quotation marks omitted).

"If the Postal Inspectors believe that the Court in *Reichle* meant to decide what it refused to decide in *Hartman* and bring to a halt this three decades old case," the court of appeals added, "they are free to once again petition for certiorari and ask the Supreme Court if it wishes to end this saga." App., *infra*, 2a-3a.

2. Judge Kavanaugh dissented. App., *infra*, 3a. Although he had joined the panel's previous opinion, *Reichle* had changed his view. *Reichle*, he observed, "indicated that it is not clear whether the absence-of-probable-cause requirement identified in *Hartman* * * * is 'best read as defining the scope of the First Amendment right or as simply establishing a prerequisite for recovery.'" *Ibid.* "Because the First Amendment law on this point is not clear," he explained, "the defendants in this case cannot be said to have violated 'clearly established' First Amendment law." *Ibid.* He thus concluded that petitioners "are entitled to qualified immunity, and the suit may not proceed." *Ibid.*

3. Rehearing was denied on April 24, 2013. App., *infra*, 73a-74a.

## REASONS FOR GRANTING THE PETITION

The decision below holds that the absence of probable cause is not an element of the First Amendment right to be free from retaliatory prosecution and that, as a result, officers accused of retaliatory prosecution are not entitled to qualified immunity if they reasonably (though mistakenly) could have believed probable cause was pre-

sent. Those rulings squarely conflict with longstanding law in at least three other circuits. The issue is important and recurring. Review is warranted.

## I. The Circuits Are Divided Over The Relationship Between Probable Cause And Qualified Immunity In Retaliatory-Prosecution Cases

### A. Three Courts of Appeals Have Held That Officers Acting with Arguable Probable Cause Are Entitled to Qualified Immunity

The law of the Second, Fifth, and Tenth Circuits is clear: Officers who reasonably (if mistakenly) could have believed probable cause was present are entitled to qualified immunity in retaliatory-prosecution cases.

1. The Second Circuit resolved the issue more than 20 years ago in *Mozzochi* v. *Borden*, 959 F.2d 1174 (2d Cir. 1992). Lack of probable cause, that court held, is an element of the First Amendment right: "An 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." *Id.* at 1180 (emphasis added). Just last year, after *Reichle* v. *Howards*, 132 S. Ct. 2088 (2012), was decided, the Second Circuit reaffirmed its view that an "individual does not have a right under the First Amendment to be free from a criminal prosecution supported by probable cause,' even if that prosecution 'is in reality an unsuccessful attempt to deter or silence criticism of the government.'" *Fabrikant* v. *French*, 691 F.3d 193, 215 (2d Cir. 2012) (quoting *Mozzochi*, 959 F.2d at 1180).

The Second Circuit has also held—again contrary to the D.C. Circuit—that officers are entitled to qualified immunity in retaliatory-prosecution cases where arguable probable cause exists. In *Magnotti* v. *Kuntz*, 918

F.2d 364 (2d Cir. 1990), the plaintiff accused an investigator of "retaliatory prosecution in violation of his First and Fourteenth Amendment rights to criticize government activity." *Id.* at 366. The district court denied summary judgment, citing factual questions concerning the accuracy of representations the officer made in initiating the charges against the plaintiff. *Ibid.* The Second Circuit reversed. *Ibid.* It observed that the district court had not "squarely addressed the question whether objective probable cause supported Kuntz's action," and that normally it would remand for such a determination. *Id.* at 367. "But," the court continued, "when qualified immunity is considered, *the question of immunity remains, as it should, distinct from the question of probable cause*." *Ibid.* (quotation marks omitted) (emphasis added). Even if the evidence in the record "might be insufficient to sustain a finding of probable cause" outright, it might "yet be adequate for the judge to conclude it was reasonable for [the officer] to believe he had a good basis for his actions." *Ibid.* (citing *Anderson* v. *Creighton*, 483 U.S. 635, 641 (1987); *Malley* v. *Briggs*, 475 U.S. 335, 343 (1986)). Concluding that "an officer in [the defendant's] position had reasonable grounds to believe probable cause sustained the warrant," the Second Circuit held the officer was entitled to qualified immunity. *Id.* at 368; see *id.* at 366 ("[S]ince our decision rests on qualified immunity grounds, we need not determine whether probable cause for the warrant of arrest actually existed. We are required to decide only whether it was objectively reasonable for Kuntz to seek the warrant in the first instance."); see also *Singer* v. *Fulton Cnty. Sheriff*, 63 F.3d 110, 120 (2d Cir. 1995), cert. denied, 517 U.S. 1189 (1996).

2. The Fifth and Tenth Circuits agree: Officers in retaliatory-prosecution cases are entitled to qualified immunity when arguable probable cause is present. The

Fifth Circuit has ruled that, where "law enforcement officers might have a motive to retaliate but there was also a ground to charge criminal conduct against the citizen they disliked," "the objectives of law enforcement take primacy over the citizen's right to avoid retaliation." *Keenan* v. *Tejeda*, 290 F.3d 252, 261-262 (5th Cir. 2002) (citing *Mozzochi*, 959 F.2d at 1179). Officers are therefore entitled to assert qualified immunity. "If no reasonable police officer could have believed that probable cause existed for the law enforcement actions of [the defendant officers] against the plaintiffs, then their retaliation violated clearly established law in this circuit. If probable cause existed, however, *or if reasonable police officers could believe probable cause existed*, they are exonerated." *Id.* at 262 (citations omitted) (emphasis added).

The Tenth Circuit has likewise invoked arguable probable cause—that a "reasonable officer could have believed that probable cause existed"—in granting qualified immunity against a First Amendment retaliatory-prosecution claim. *Nielander* v. *Bd. of Cnty. Comm'rs*, 582 F.3d 1155, 1169 (10th Cir. 2009) (citing *Hunter* v. *Bryant*, 502 U.S. 224 (1991)). In *Nielander*, the defendant officer "sought out information upon which to convict" the plaintiff of making a threat, "report[ing] the events to the prosecutor, and prepar[ing] a probable cause determination, an order to appear, and a standard offense and arrest report." *Id.* at 1166. The charge was later dismissed in relevant part for lack of probable cause. *Id.* at 1163. The Tenth Circuit held that the officer nonetheless was entitled to qualified immunity: "[W]e cannot say that a reasonable officer in [the defendant's] position could not conclude that Mr. Nielander had made a true threat." *Id.* at 1169.

3. District courts in other circuits agree that, no less than in other cases, in retaliatory-prosecution cases arguable probable cause entitles officers to qualified immunity. See *Posey* v. *Swissvale Borough*, No. 2:12-cv-955, 2013 WL 989953, at *9 (W.D. Pa. Mar. 13, 2013); *Dowling* v. *City of Three Rivers*, No. 1:11-cv-556, 2012 WL 5876517, at *5 (W.D. Mich. Nov. 20, 2012); *Leonard* v. *Pryne*, No. 1:07-cv-283, 2008 WL 2557248, at *10 (S.D. Ohio June 24, 2008).

### B. The Decision Below Creates a Square Division in Circuit Authority

The D.C. Circuit's decision in this case holds precisely the opposite: "[A]rguable 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." App., *infra*, 22a (emphasis added). As a result, the court further held, defendants cannot assert failure to plead or prove absence of probable cause (or arguable probable cause) through qualified immunity. *Id.* at 28a. The court reasoned that qualified immunity turns on whether the alleged conduct violates a "clearly established . . . constitutional right[]." *Id.* at 26a. In this case, the court asserted, absence of probable cause is not an element of the constitutional violation—it does not address whether rights were violated—but rather serves only as a judicially imposed "remedial requirement for proving causation." *Id.* at 27a n.10. Questions of causation, the court concluded, cannot be asserted through the defense of qualified immunity. *Id.* at 28a-29a.

Consequently, the availability of qualified immunity in retaliatory-prosecution cases now turns on the happenstance of geography: Officers sued in the Second, Fifth and Tenth Circuits are entitled to qualified immunity if

they reasonably could have believed there was probable cause to prosecute the plaintiff. But officers sued in the D.C. Circuit are not.

The difficulties posed by that conflict are acute for federal officers with nationwide responsibilities: Postal inspectors based in Washington, D.C. may investigate possible corruption involving Texas businessmen; Secret Service agents may be detailed to Vice Presidential trips to Colorado; the Attorney General may issue policies for detaining material witnesses in Idaho. "The official with responsibilities in many jurisdictions may face ambiguous and sometimes inconsistent sources of decisional law." *Ashcroft* v. *al-Kidd*, 131 S. Ct. 2074, 2086 (2011) (Kennedy, J., concurring). Such officers now receive distinctly different protection depending on whether they are sued in the District of Columbia or elsewhere. Indeed, if this case had remained in the Northern District of Texas where it was originally filed—rather than being transferred to the District of Columbia—Fifth Circuit law would have entitled petitioners to claim qualified immunity based on arguable probable cause. See *Keenan*, 290 F.3d at 261-262; pp. 8, 18-19, *supra*. Because the case was transferred to the District of Columbia, however, immunity is unavailable. Federal officers should not forfeit the protections of qualified immunity simply because their *Bivens* action is litigated in the Nation's capital.

## II. THE ISSUE IS IMPORTANT AND RECURRING

As the cases discussed above attest, the question presented is important and recurring: Time and again the courts address this issue, now with disparate results. This Court previously granted review—in this very case—to resolve a circuit split over the role of probable cause in retaliatory-prosecution cases. *Hartman* v. *Moore*, 547 U.S. 250 (2006) ("*Hartman I*"). Following

two remands from this Court, another circuit split has developed. Review is again warranted.

The decision below, moreover, does not merely deny officers the ability to assert qualified immunity based on arguable probable cause. It also threatens to deprive them of their right of immediate appeal. This Court "repeatedly ha[s] stressed the importance of resolving immunity questions at the earliest possible stage in litigation" and has admonished that "[i]mmunity ordinarily should be decided by the court long before trial." *Hunter*, 502 U.S. at 227, 228. The Court has thus rejected as "wrong" the notion that "whether a reasonable officer could have believed he had probable cause is a question for the trier of fact, and summary judgment . . . based on lack of probable cause is proper only if there is only one reasonable conclusion a jury could reach." *Id.* at 228 (quotation marks and brackets omitted). Moreover, because qualified immunity "is an *immunity from suit* rather than a mere defense to liability"—and thus "effectively lost if a case is erroneously permitted to go to trial"—an order denying immunity is ordinarily immediately appealable. *Mitchell* v. *Forsyth*, 472 U.S. 511, 526-527 (1985). This Court routinely reviews interlocutory decisions denying qualified immunity on probable-cause grounds. See, *e.g.*, *Reichle*, 132 S. Ct. at 2092; *Hartman I*, 547 U.S. at 255; *Hunter*, 502 U.S. at 226.

Under the decision below, however, an immediate appeal may not be available even where the district court flatly errs in concluding that probable cause may have been absent. According to the D.C. Circuit, the absence of probable cause has no bearing on whether there was a violation of clearly established rights; it bears only on causation. App., *infra*, 26a-27a. And the D.C. Circuit took pains to point out that, where "'the issues raised on

appeal relate to . . . *causation*,'" an appellate court has "'*no jurisdiction* to review them in an interlocutory appeal of a denial of a summary-judgment motion based on qualified immunity.'" App., *infra*, 28a (quoting *Krout* v. *Goemmer*, 583 F.3d 557, 564-565 (8th Cir. 2009)) (emphasis added); see also *id.* at 29a ("court has 'no jurisdiction to address any causation issues' * * * 'at the qualified immunity stage'" (quoting *Wilkins* v. *DeReyes*, 528 F.3d 790, 802 (10th Cir. 2008)). The decision below thus threatens to shield even wholly mistaken probable-cause determinations from appellate review until the conclusion of lengthy district-court proceedings and a time-consuming trial. See App., *infra*, 29a (characterizing probable cause as "issue of fact to be decided by the jurors at trial"); contrast *Hunter*, 502 U.S. at 228 (rejecting notion that "'whether a reasonable officer could have believed he had probable cause is a question for the trier of fact'").[5] Officers should not be subjected to such an un-

[5] The court of appeals thus erred in characterizing probable cause as an issue of fact, ruling that "the district court's determination that 'there is a genuine issue of material fact as to whether the government lacked probable cause to prosecute'" precluded appellate review regarding the existence of probable cause. App., *infra*, 20a (citing *Johnson* v. *Jones*, 515 U.S. 304 (1995)). The district court did not deny qualified immunity based on a dispute over "whether the evidence could support a finding that particular conduct occurred," *i.e.*, whether certain historical facts could be proved (which is unreviewable on immediate appeal under *Johnson*). *Behrens* v. *Pelletier*, 516 U.S. 299, 313 (1996). Rather, the district court recited several alleged historical facts—such as senior government attorneys' questioning whether respondent should be charged—and determined that one could conclude, based on those facts, that the government lacked probable cause. App., *infra*, 40a-41a. That ruling is clearly reviewable: The court of appeals merely needed to decide whether, *taking those historical facts as true for purposes of summary judgment*, probable cause (or arguable probable cause) was present. See *Hunter*, 502 U.S. at 228. "As long as the defendant can support an

warranted burden and distraction from their official duties. Nor should the public suffer when officers, fearing those results, are deterred from "execut[ing] [their] office[s] with the decisiveness and the judgment required by the public good." *Scheuer* v. *Rhodes*, 416 U.S. 232, 240 (1974); see *Anderson*, 483 U.S. at 638.

The issue's importance, moreover, may extend to retaliatory-arrest cases. As *Reichle* observed, see 132 S. Ct. at 2096, many courts of appeals require proof that probable cause was absent in retaliatory *arrest* cases. See *Thayer* v. *Chiczewski*, 705 F.3d 237, 253 (7th Cir. 2012); *McCabe* v. *Parker*, 608 F.3d 1068, 1079 (8th Cir. 2010); *Anderson* v. *City of Naples*, 501 F. App'x 910, 916 (11th Cir. 2012) (citing *Wood* v. *Kesler*, 323 F.3d 872, 878 (11th Cir. 2003), a retaliatory prosecution case). The D.C. Circuit's ruling that absence of probable cause is not an element of the constitutional violation, and therefore not subject to the defense of qualified immunity, would apply to those cases as well.[6]

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immunity defense on * * * the plaintiff's version of the facts, * * * an interlocutory appeal is available to assert that an immunity defense is established." *Martinez* v. *City of Schenectady*, 115 F.3d 111, 114 (2d Cir. 1997). By treating probable cause here as fundamentally a jury issue, the D.C. Circuit committed the very error this Court corrected by summary reversal in *Hunter*, 502 U.S. at 228.

[6] Attempting to distinguish *Reichle*, the D.C. Circuit urged that "retaliatory arrest and retaliatory prosecution are distinct constitutional violations." App., *infra*, 2a. But that is upside-down: *Reichle* held that the officers there were entitled to qualified immunity because, given the similarities between retaliatory prosecution and arrest, a reasonable officer could read *Hartman I*—a retaliatory-*prosecution* case—as potentially applying to retaliatory-*arrest* cases. 132 S. Ct. at 2096. As a result, whatever the role of probable cause (and arguable probable cause) in retaliatory-arrest cases, it plays no lesser role in retaliatory-prosecution cases.

Finally, the decision below is a recipe for evasion. As the D.C. Circuit observed, plaintiffs challenging their arrest or prosecution under the Fourth Amendment must show that probable cause was not even arguable—that no reasonable officer could have thought probable cause was present. App., *infra*, 21a. To avoid that burden, plaintiffs now need only add an allegation that defendants sought to punish their speech (or some other protected conduct) in violation of the First Amendment. Such allegations are relatively easy; many defendants will have said or done something that plausibly *could* prompt retaliation. "Because an official's state of mind is easy to allege and hard to disprove," even "insubstantial claims" of retaliatory animus could not be dismissed pre-trial. *Crawford-El* v. *Britton*, 523 U.S. 574, 584-585 (1998); see *Harlow* v. *Fitzgerald*, 457 U.S. 800, 817 (1982) ("questions of subjective intent so rarely can be decided by summary judgment").

Plaintiffs could thus, in effect, strip officers of their "entitle[ment] to immunity [where] a reasonable officer could have believed that probable cause existed." *Hunter*, 502 U.S. at 228. Instead, officers will be forced to face trial despite arguable probable cause, and without the ability to seek immediate appeal. "Even if the [officer] could escape judgment after trial," the decision below "make[s] it far more difficult to dismiss dubious claims at the summary judgment stage." *Univ. of Texas Sw. Med. Ctr.* v. *Nassar*, 133 S. Ct. 2517, 2532 (2012) (rejecting lower standard for Title VII retaliation claims because that might "contribute to the filing of frivolous claims" and "tempt[ ]" plaintiffs facing discharge "to make an unfounded charge" to manufacture a retaliation lawsuit).

Respondent himself has underscored the importance of the question presented, personally filing an *amicus*

brief in this Court to argue the issue. In *Reichle*, respondent filed an *amicus* brief to argue that *Hartman I*'s absence-of-probable-cause requirement "has nothing whatsoever to do with First Amendment rights or qualified immunity." Brief of William G. Moore, Jr. as *Amicus Curiae* 4, in *Reichle*, 132 S. Ct. 2088 (No. 11-262) (filed Jan. 26, 2012) ("Moore *Amicus*"). Respondent did not take the trouble to file a brief on that issue—and urge the Court to avoid deciding it, *id.* at 4, 21—because the issue lacks importance. To the contrary, respondent's brief urged that the issue's "resolution should await a case in which the issue is properly presented and matters to the outcome." *Id.* at 21. This is that case. Respondent's repeated references to it in his *amicus* brief make that clear. *Id.* at 1, 2, 17, 18, 19. As the decision below emphasized, if petitioners believe that absence of probable cause should be considered on qualified immunity, "they are free to once again petition for certiorari and ask the Supreme Court if it wishes to end this saga." App., *infra*, 3a. The question presented thus is squarely before the Court; it was squarely pressed and passed upon below; and it has squarely divided the courts of appeals. This Court's review is warranted.

## III. THE DECISION BELOW IS INCORRECT

In ruling that qualified immunity is not available in retaliatory-prosecution cases where officers arguably had probable cause, the D.C. Circuit put itself at odds with the overwhelming weight of authority. See pp. 17-20, *supra*. It also doubly erred. Absence of probable cause is an element of the First Amendment violation. And even if it were not, it still is subject to the defense of qualified immunity.

### A. Absence of Probable Cause Is an Element of the First Amendment Violation

The D.C. Circuit ruled that the absence-of-probable-cause requirement is not subject to qualified immunity because it is not "an element of a First Amendment retaliation *violation*," but merely "a remedial requirement for proving causation." App., *infra*, 24a, 27a n.10. Nothing in this Court's decision in *Hartman I*, however, says that an element bearing on "causation" cannot be part of the underlying constitutional right. To the contrary, the Court specifically noted that, "'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*.'" 547 U.S. at 260 (quoting *Crawford-El*, 523 U.S. at 593) (emphasis added). Simply put, unless the improper motive *caused* the challenged conduct, there is no intrusion on First Amendment rights.

Indeed, in *Reichle*, the Court emphasized the relationship between requiring an absence of probable cause and the existence of a constitutional violation. The requirement does not merely address the complex causation issues that arise where one actor (the defendant officer) is alleged to have caused a prosecution to be pursued by another actor (the prosecutor) who is absolutely immune, as well as from the presumption of prosecutorial regularity. 132 S. Ct. at 2095-2096. The absence-of-probable-cause requirement also addresses mixed motives. As the Court explained, even if "[a]n officer might bear animus toward the content of a suspect's speech," he may nevertheless "decide to arrest the suspect because his speech provides evidence of a crime or suggests a potential threat"—or for reasons independent of speech. *Id.* at 2095. Because such action is "unexceptionable if taken on [nonretaliatory] grounds," courts must determine wheth-

er those "nonretaliatory grounds are in fact insufficient to provoke the adverse consequences" before they can conclude the action amounts to "official action offending the Constitution." *Hartman I*, 547 U.S. at 256.

The D.C. Circuit relied on its view that, in *Hartman I*, this Court "rejected" the argument that retaliatory-prosecution is analogous to common-law malicious-prosecution. App., *infra*, 24a. But *Hartman I* did not reject that argument. It called the point "debat[able]" before turning to what it considered "the strongest justification for the no-probable-cause requirement"—the need to prove causation. 547 U.S. at 258, 259. Moreover, as explained above, even causation is properly described as an element of the violation: Discriminatory animus does not violate the Constitution where the officer would have acted the same regardless; the Constitution punishes conduct, not "dishonorable" thought. *Id.* at 260.

Nor did *Hartman I* "squarely reject[]" the argument that "'a prosecution motivated by the defendant's speech does not violate the First Amendment if there was probable cause for the charges.'" Moore *Amicus*, *supra*, at 13. *Reichle*'s refusal to "resolve whether *Hartman* is best read as defining the scope of the First Amendment right or as simply establishing a prerequisite for recovery," 132 S. Ct. at 2096 n.6, makes plain that *Hartman I* did not "squarely reject" that view.[7]

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[7] Respondent's support for his contrary reading of *Hartman I* is that decision's statement that "'as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out.'" Moore *Amicus*, *supra*, at 13. (quoting *Hartman I*, 547 U.S. at 256). But that quotation supports the opposite view: There is no violation unless the individual was prosecuted "*for* speaking out," not "incident to" speaking out. In any event, *Reichle* makes clear such general statements do *not* resolve whether retaliatory actions violate

Nor would dire consequences result from holding there is no constitutional violation when allegedly retaliatory law-enforcement activities are supported by probable cause. Moore *Amicus*, *supra*, at 14. Respondent prophesies that police departments could announce a policy of stopping all vehicles with broken tail lights "only if a license-plate search revealed that the driver was Republican, or Communist," and that a plaintiff would be unable even to obtain an injunction against that practice. *Ibid.* But even if such extreme selective-enforcement policies were plausible—they are hardly rampant in circuits rejecting a First Amendment right to be free from retaliatory prosecution or arrest supported by probable cause, see pp. 17-19, *supra*—they could be challenged on equal-protection grounds, which do not require the absence of probable cause. See *United States* v. *Armstrong*, 517 U.S. 456, 464-465 (1996); *Wayte* v. *United States*, 470 U.S. 598, 607-608 (1985) ("It is appropriate to judge selective prosecution claims according to ordinary equal protection standards.").

Even if one were to think otherwise, that would merely support the conclusion that the judicially implied *Bivens* action for damages ought not be expanded to the new context of retaliatory prosecution. See *Reichle*, 132 S. Ct. at 2093 n.4 ("We have never held that *Bivens* extends to First Amendment claims."); *Ashcroft* v. *Iqbal*, 556 U.S. 662, 675 (2009) (similar); *Bush* v. *Lucas*, 462 U.S. 367, 368 (1983) (declining to extend *Bivens* to First Amendment claim). The complexities of causation, and the need to probe the prosecutorial mind, are reasons enough not to extend *Bivens* here.

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the First Amendment where they are "otherwise supported by probable cause." 132 S. Ct. at 2094.

### B. Officers Should Not Be Liable for Retaliatory Prosecution Where They Reasonably Could Have Believed Probable Cause Existed

Even assuming "*Hartman* is best read as * * * simply establishing a prerequisite for recovery" and not as "defining the scope of the First Amendment right," *Reichle*, 132 S. Ct. at 2096 n.6, it does not follow that immunity is unavailable. In *Reichle*, this Court expressed doubt "whether that distinction matters," *ibid.*, and rightly so.

The doctrine of qualified immunity, at bottom, regulates officer conduct. It prevents "fear of personal monetary liability and harassing litigation" from "unduly inhibit[ing] officials in the discharge of their duties," *Anderson*, 483 U.S. at 638, giving them "breathing room to make reasonable but mistaken judgments about open legal questions," *al-Kidd*, 131 S. Ct. at 2085. The arguable-probable-cause standard thus reflects a judgment that it is better to hold officers harmless when they erroneously but reasonably step over the often unclear line between probable cause and its absence, than to impose strict liability that might prompt undue timidity. Whether the absence-of-probable-cause requirement is part of the constitutional violation as a matter of theory, or instead only a judicially imposed prerequisite to recovery, the practical impact of withholding qualified immunity is the same: Confronted with the possibility of costly and distracting litigation for pursuing their duties vigorously, officers will forbear actions they should pursue. And it is not difficult for a would-be plaintiff to encourage such hesitance; he need only find some way to antagonize public officials. Cf. *Nassar*, 133 S. Ct. at 2532 (employee on verge of dismissal "might be tempted to make an unfounded charge" of discrimination to allege the subsequent firing was retaliatory). While criticism of the gov-

ernment should not make citizens magnets for prosecution, neither should it be a force-field against legitimate law-enforcement scrutiny.

Given the conduct-regulating nature of qualified immunity, the defense should protect officers acting with probable cause (or arguable probable cause) against a retaliatory-prosecution claim no less than any other. Absent that protection, officers fearing the potentially ruinous and always distracting consequences of protracted litigation will be overly hesitant to enforce the law for the public good—especially when being antagonized in a way that might give rise to a retaliation claim. Whether or not probable cause bears on the First Amendment right as a matter of theory, in practice it regulates conduct by "defining the elements of the tort." *Hartman I*, 547 U.S. at 265. Accordingly, it should be subject to qualified-immunity analysis.

### C. Any Constitutional Violation Was Not Clearly Established

Petitioners are entitled to qualified immunity under *Reichle*. *Reichle* refused to resolve whether the absence-of-probable-cause requirement is constitutional or merely remedial. 132 S. Ct. at 2096 n.6. Accordingly, whether an officer violates the First Amendment by acting with a bad motive, while supported by probable cause, remains an open question even today.

The D.C. Circuit denied petitioners qualified immunity nonetheless "because the precedent in *th[at]* Circuit clearly established in 1988 * * * [that] the contours of the First Amendment right to be free from retaliatory prosecution" do not include the absence of probable cause. App., *infra*, 2a. Even "[a]ssuming arguendo that controlling Court of Appeals' authority could be a dispositive source of clearly established law," *Reichle*, 132 S. Ct. at

2094, that ruling cannot be sustained. The D.C. Circuit's sole basis for its ruling (despite contrary out-of-circuit precedent) was footnote 93 (of 241 footnotes) in the court's 1987 decision in *Haynesworth* v. *Miller*, 820 F.2d 1245 (D.C. Cir. 1987). That footnote recited the "essential elements" of a retaliatory prosecution claim without mentioning probable cause. App., *infra*, 54a (citing 820 F.2d at 1257 n.93). Characterizing "*Haynesworth*'s description of the elements [as] part of its holding" that the complaint's allegations "stated a claim for retaliatory prosecution," the D.C. Circuit deemed it "binding precedent" that clearly established the law. *Id.* at 55a, 70a.

But *Haynesworth* did not merely recite the elements of retaliatory prosecution "without analysis in a footnote in an opinion generally addressing other issues." App., *infra*, 70a (quotation marks omitted). It did so in obiter dictum. In *Haynesworth*, the defendants "d[id] not dispute" that the complaint alleged a viable First Amendment violation, 820 F.2d at 1255, and the district court's dismissal of his complaint was "not based on any defect in the constitutional claim alleged," but rather "on a determination that the[ ] [named] defendants were not sufficiently implicated in the retaliatory prosecution averred to establish liability," *id.* at 1257-1258. And the complaint met any absence-of-probable cause requirement, alleging "that [Haynesworth] *was arrested and prosecuted without probable cause*." *Id.* at 1251 n.49 (emphasis added). Thus, whether a retaliatory-prosecution plaintiff must plead the absence of probable cause was neither pressed nor passed upon, and the answer could have made no difference to the outcome.

A court of appeals may be within its rights to accept, as binding precedent, a negative implication from a footnote addressing an issue that made no difference and no

one contested. But such a "footnoted dictum" cannot be said to "have placed the * * * constitutional question beyond debate." *Al-Kidd*, 131 S. Ct. at 2083. Undoubtedly "reasonable officers could have questioned whether" *Haynesworth* in fact decided the probable-cause issue (which was the subject of a circuit split at the time, see App., *infra*, 70a-71a), or, by failing to mention whether absence of probable cause was required, simply left the issue unresolved. *Reichle*, 132 S. Ct. at 2095. Now that *Reichle* has identified the issue as still open, moreover, the D.C. Circuit cannot be right in declaring that *Haynesworth* closed the books on the subject. For those reasons, this Court may wish to consider the alternative of summary reversal.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 2013

## APPENDIX

TABLE OF CONTENTS

**APPENDIX A**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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NO. 10-5334

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WILLIAM G. MOORE, JR. AND BLANCHE K. MOORE,
*Appellees,*

v.

MICHAEL HARTMAN, *et al.*,
*Appellants,*
ANTONIO SANTOS,
*Appellee,*
PAMELA JEAN SOTHAN-ROBBINS,
*Appellant,*
UNITED STATES OF AMERICA,
*Appellee.*

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On Remand from the U.S. Supreme Court

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OPINION

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**JANUARY 15, 2013**

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

Opinion for the Court filed PER CURIAM.

Dissenting opinion filed by Circuit Judge KAVANAUGH.

PER CURIAM:

The Supreme Court has directed this court to determine whether our decision in *Moore v. Hartman*, 644 F.3d 415 (D.C. Cir. 2011) ("*Moore V*"), holding that "probable cause is not an element of the First Amendment right allegedly violated" in a retaliatory prosecution suit, *id.* at 423, remains good law in light of *Reichle v. Howards*, 132 S. Ct. 2088 (2012). There, in examining whether the law governing retaliatory *arrest* claims was clearly established *in the Tenth Circuit* in 2006, the court expressly declined to decide whether the absence-of-probable-cause requirement identified in *Hartman v. Moore*, 547 U.S. 250, 265-66 (2006), is "best read as defining the scope of the First Amendment right or as simply establishing a prerequisite for recovery." *Reichle*, 132 S. Ct. at 2096 n.6. Instead, the Court hinged its decision in *Reichle* on the fact that *Hartman* unsettled Tenth Circuit precedent that had conflated retaliatory arrest *and* retaliatory prosecution claims. *See id.* at 2094-96. Because it was uncertain whether the Tenth Circuit's retaliatory arrest law remained clearly established, the defendants in *Reichle* were entitled to qualified immunity. The Court in *Reichle* was thus agnostic on the issue central to our holding in *Moore V*.

Because retaliatory arrest and retaliatory prosecution are distinct constitutional violations and because the precedent in *this* Circuit clearly established in 1988, when the challenged conduct by the Postal Inspectors took place, the contours of the First Amendment right to be free from retaliatory prosecution, nothing in *Reichle* changes our conclusion that the absence-of-probable-cause requirement is not "an element of a First Amendment retaliation violation." *Moore V,* 644 F.3d at 424. If the Postal Inspectors believe that the Court in *Reichle*

meant to decide what it refused to decide in *Hartman* and bring to a halt this three decades old case involving evidence that, unlike in *Reichle* where probable cause was conceded, "comes close to the proverbial smoking gun," *Moore v. Hartman*, 388 F.3d 871, 884 (D.C. Cir. 2004) ("*Moore III*"), they are free to once again petition for certiorari and ask the Supreme Court if it wishes to end this saga.

KAVANAUGH, *Circuit Judge*, dissenting:

In its recent decision in *Reichle v. Howards*, 132 S. Ct. 2088 (2012), the Supreme Court indicated that it is not clear whether the absence-of-probable-cause requirement identified in *Hartman v. Moore*, 547 U.S. 250, 252 (2006), is "best read as defining the scope of the First Amendment right or as simply establishing a prerequisite for recovery." *Reichle*, 132 S. Ct. at 2096 n.6. Because the First Amendment law on this point is not clear, the defendants in this case cannot be said to have violated "clearly established" First Amendment law. Therefore, the defendants are entitled to qualified immunity, and the suit may not proceed. I respectfully dissent.

**APPENDIX B**

**IN THE SUPREME COURT OF THE UNITED STATES**

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NO. 11-836

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MICHAEL HARTMAN, *et al.*,

v.

WILLIAM G. MOORE

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ORDER

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**JUNE 11, 2012**

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The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the District of Columbia Circuit for further consideration in light of *Reichle* v. *Howards*, 556 U.S. ____ (2012). Justice Kagan took no part in the consideration or decision of this petition.

**APPENDIX C**

**IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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NO. 10-5334

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WILLIAM G. MOORE, JR. *et al.*,
*Appellees,*

v.

MICHAEL HARTMAN *et al.*,
*Appellants.*

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ORDER

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**OCTOBER 6, 2011**

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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 D**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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NO. 10-5334

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WILLIAM G. MOORE, JR. *et al.*,
*Appellees,*

v.

MICHAEL HARTMAN *et al.*,
*Appellants.*

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ORDER

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**OCTOBER 6, 2011**

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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

**APPENDIX E**

**IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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NO. 10-5334

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WILLIAM G. MOORE, JR. *et al.*,
*Appellees,*

v.

MICHAEL HARTMAN *et al.*,
*Appellants.*

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Appeal from the United States District Court
for the District of Columbia

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OPINION

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**JULY 15, 2011**

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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]

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

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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).

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*, 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.

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).

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 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

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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 884-885.

> 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 non-

appealable 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 determination 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

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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.*

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, 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

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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.

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 decision 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.

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[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.").

[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.

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 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 ("Official 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 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

[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, 566–67 (1968) (retaliatory firing of teacher for writing public letter criticizing school board's financial administration).

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 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 *Anderson*, 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 Post-

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[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 arrest 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*]").

al 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 retaliatory 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 265-266.

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 F**

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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CIVIL ACTION NO. 92-2288 (RMU)

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WILLIAM G. MOORE, JR.,
*Plaintiff,*

v.

MICHAEL HARTMAN *et al.,*
*Defendants.*

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ORDER

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**AUGUST 12, 2010**

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**DENYING THE DEFENDANTS' RENEWED MOTIONS 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 G**

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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CIVIL ACTION NO. 92-2288 (RMU)

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WILLIAM G. MOORE, JR.,
*Plaintiff,*

v.

MICHAEL HARTMAN *et al.,*
*Defendants.*

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MEMORANDUM OPINION

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**AUGUST 12, 2010**

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**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 readers, or

[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).

"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 bey-

ond 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 possessed retaliatory motive, but also that the prosecutor lacked probable cause to bring the charges against the plaintiff. *Hart-*

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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.

*man*, 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, corruption, 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 nonmoving 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 non-

moving 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 con-

tend, 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 Office 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 improp-

> erly 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 misrepresented 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 H**

**IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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NO. 03-5241

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WILLIAM G. MOORE, JR.,
*Appellee,*

v.

MICHAEL HARTMAN, *et al.*,
*Appellants.*

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Appeal from the United States District Court
for the District of Columbia
(No. 92cv02288)

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OPINION

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**NOVEMBER 9, 2004**

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Before: SENTELLE and TATEL, Circuit Judges, and WILLIAMS, Senior Circuit Judge.

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

TATEL, Circuit Judge:

Qualified immunity generally shields public officials from civil damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In this case,

appellee William G. Moore, Jr., claims that government officials—in particular six postal inspectors—pursued criminal charges against him in retaliation for his political activities. The postal inspectors argue that even though the criminal charges against Moore were dismissed, they enjoy qualified immunity because probable cause supported the prosecution. At the time of Moore's indictment, however, 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. Because a reasonable jury could find on the basis of the record before us that Moore's prosecution violated this standard, we reject the inspectors' immunity defense and affirm the district court's denial of summary judgment on this issue.

**I.**

In the mid-1980s, William G. Moore, Jr., served as CEO of Recognition Equipment, Inc. ("REI"), a company specializing in optical scanning technology. Among other products, REI produced a multi-line optical character reader ("MLOCR")—a device capable of mechanically interpreting multiple lines of text. Encouraged by some $50 million in research and development funding REI had received from the U.S. Postal Service ("USPS"), Moore urged Postmaster General ("PMG") William F. Bolger to consider purchasing REI's MLOCRs to aid the USPS in automating its mail sorting functions. Moore was disappointed, however. Since the late 1970s, the USPS had been pursuing an initiative, known as "Zip + 4," to add four digits to existing five-digit zip codes; with the new nine-digit codes, efficient automatic sorting required scanning only a single line of text, rather than the multiple lines read by REI's device.

Accordingly, PMG Bolger—a staunch supporter of Zip + 4—announced in late 1983 that the USPS would stick with single-line optical character readers ("SLOCRs") instead of using REI's product.

Zip + 4, however, was politically controversial. "Bureaucratic arrogance," one senator called it. Another urged the USPS to "Zap the ZIP!!" In December 1981, the House Committee on Government Operations accused the USPS of "repeatedly overstat[ing] and misrepresent[ing] the benefits that might accrue" due to the nine-digit codes. And despite PMG Bolger's testimony that prohibiting Zip + 4 would "cut the Postal Service from the only major opportunity it now has to meet all its obligations at controlled costs," Congress imposed a two-year moratorium on Zip + 4 in July 1981 and barred the USPS from making the nine-digit codes mandatory.

Chagrined by PMG Bolger's procurement of SLOCRs, Moore plunged REI into the political fray. To members of Congress and USPS governors, he argued that REI's MLOCRs were superior technology because they were not dependent on Zip + 4. He also pointed out that unlike SLOCRs, REI's MLOCRs were American-made. USPS managers reacted angrily: PMG Bolger told Moore to "back off," and another top official told Moore REI would never receive USPS business. Moore's position nevertheless gained influence. Several members of Congress pressed REI's case with the USPS Board of Governors, and Representative Martin Frost, working closely with Moore, introduced legislation (later withdrawn) to force USPS to buy American-made MLOCRs. More important, the General Accounting Office (now the Government Accountability Office) and the Office of Technology Assessment ("OTA") produced reports concluding that the USPS's operational losses due

to the use of SLOCRs rather than MLOCRs exceeded one million dollars a day. The OTA report attributed the procurement of SLOCRs to unrealistic expectations for Zip + 4, noting that while MLOCR technology might have been inferior in the past, it was now "fully competitive," making it unreasonable for USPS to continue using single-line technology despite low usage of the nine-digit codes.

Responding to these pressures, the USPS Board of Governors voted in July 1985 to make a "mid-course correction" and switch to multi-line technology. Although this was just what Moore's media and lobbying campaign had sought, the result turned out unhappily for Moore and his company.

In the months following the mid-course correction, the USPS Postal Inspection Service uncovered two criminal schemes relating, at least incidentally, to REI. The first, a kickback arrangement, involved a USPS Governor, Peter Voss, and a consulting firm, Gnau & Associates, Inc. ("GAI"), that REI had hired in connection with its lobbying campaign. As it turned out, GAI was paying Voss for referrals, and three GAI officers—John Gnau, Jr., Michael Marcus, and William Spartin—had agreed to share the proceeds of the REI contract with Voss. The second scheme, the details of which are unimportant to this case, involved Spartin's and REI's role in the search for a new PMG. In connection with these two schemes, Voss, Gnau, and Marcus pleaded guilty to criminal charges, while Spartin accepted immunity in exchange for cooperation.

Having uncovered these crimes, the postal inspectors sought to determine whether anyone at REI had participated in them. Following an investigation we describe in more detail below, a grand jury returned a seven-count

indictment against Moore, REI, and REI's Vice President for Marketing, Robert Reedy, in October 1988. The case went to trial a year later, but six weeks into the proceedings at the close of the government's case, the district court issued a judgment of acquittal. *See United States v. Recognition Equip. Inc.*, 725 F. Supp. 587, 587-88, 602 (D.D.C. 1989). Emphasizing a "complete lack of direct evidence to suggest the Defendants knew of the illegal payoff scheme," *id.* at 596, the district court concluded, "The government's evidence is insufficient, even when viewed in the light most favorable to it, for a trier of fact to find guilt beyond a reasonable doubt. Much of what the government characterizes as incriminating evidence is not persuasive of guilt when viewed in its full context. In fact, some of the government's evidence is exculpatory and points toward innocent conduct of the Defendants." *Id.* at 587-88.

Exonerated of the criminal charges, Moore set about obtaining civil damages for the harm to his life and career. Joined by his wife, Moore began by filing a complaint in the Northern District of Texas asserting constitutional claims under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against the prosecutor and six postal inspectors (one of whom is now deceased). Shortly thereafter, the Moores filed a second complaint, also in the Northern District of Texas, seeking recovery from the United States under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§2671-2680. The Texas federal court dismissed Mrs. Moore's claims for lack of standing; found that absolute immunity barred the claims against the prosecutor; and, citing qualified immunity, threw out a Fifth Amendment abuse-of-process claim against the inspectors. *Moore v. Valder*, No. 91-2491 (N.D. Tex. Sept. 21,

1992). The court transferred the remaining claims to the U.S. District Court for the District of Columbia, which dismissed the entire suit. *Moore v. Hartman*, No. 92-2288, 1993 WL 405785 (D.D.C. Sept. 24, 1993).

Reviewing the decisions of the D.C. and Texas district courts, we reinstated certain claims against the prosecutor and the United States along with a retaliatory prosecution *Bivens* claim against the postal inspectors. *Moore v. Valder*, 65 F.3d 189 (D.C. Cir. 1995) ("*Moore I*"). On remand, the district court denied the inspectors' motion for summary judgment, allowing limited discovery on the retaliatory prosecution claim. As to the prosecutor and the United States, however, the court again dismissed Moore's claims. *Moore v. Valder*, No. 92-2288 (D.D.C. Feb. 5, 19[9]8). Moore appealed a second time, and we affirmed the district court's ruling except as to one FTCA claim not relevant here. *Moore v. United States*, 213 F.3d 705 (D.C. Cir. 2000) ("*Moore II*").

The inspectors, setting up the issue we now face, again sought summary judgment on the retaliatory prosecution claim, this time on the theory that they enjoy qualified immunity because probable cause supported Moore's prosecution. In the alternative, the inspectors argued that the record contained insufficient evidence of retaliatory motive. The district court denied the inspectors' motion in the following one-paragraph order:

> 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 as to a key prosecution witness.

The inspectors now appeal, arguing, as they did in the district court, that they enjoy qualified immunity because they had probable cause to pursue the criminal charges against Moore.

**II.**

Before addressing the merits of the inspectors' qualified immunity claim, we must consider whether we have jurisdiction over this interlocutory appeal. Though 28 U.S.C. § 1291 permits us to hear appeals only from "final decisions" of the district court, denial of a claim of qualified immunity falls within the "small class" of collateral orders subject to immediate appeal under that statute despite the absence of a final judgment. *See Mitchell v. Forsyth*, 472 U.S. 511, 524-25, 530 (1985). The reason for this is simple: appeal after trial cannot remedy an erroneous denial of qualified immunity, since by then the defendant will already have suffered the burdens of litigation the immunity is intended to prevent. *See id.* at 525-30; *Int'l Action Ctr. v. United States*, 365 F.3d 20, 23 (D.C. Cir. 2004). As Moore observes, however, the collateral order doctrine applies only "to the extent [the denial of qualified immunity] turns on an issue of law." *Mitchell*, 472 U.S. at 530. Pointing out that many facts in the record are disputed, Moore argues that the inspectors cannot establish a "purely legal" issue subject to interlocutory appeal, *id.* at 530, unless they concede the plaintiff's view of the facts—something Moore says the inspectors refuse to do. Accordingly, Moore argues, we lack jurisdiction to entertain the inspectors' appeal.

We have little trouble rejecting Moore's argument. Although in one interlocutory case where we found jurisdiction, we did describe the facts as "effectively con-

ceded," *see Farmer v. Moritsugu*, 163 F.3d 610, 614 (D.C. Cir. 1998), we never suggested that such a concession was required for jurisdictional purposes. In fact, such a requirement would conflict with *Behrens v. Pelletier*, 516 U.S. 299 (1996), which held that denial of a claim of qualified immunity remains an appealable collateral order even if the underlying facts are disputed—indeed, even if, as in this case, the district court denied the motion for summary judgment due to the presence of material issues of fact. *See id.* at 312-13. While noting in reliance on *Johnson v. Jones*, 515 U.S. 304 (1995), that "determinations of evidentiary sufficiency at summary judgment are not immediately appealable merely because they happen to arise in a qualified-immunity case," *Behrens* explained that the solution to a disputed record on qualified immunity is the same as in any other summary judgment case: the court determines "what facts the district court, in the light most favorable to the nonmoving party, likely assumed," performing "a cumbersome review of the record" if necessary. *Behrens*, 516 U.S. at 313 (quoting *Johnson*, 515 U.S. at 319). Once the facts are established under that standard, an immunity claim like the inspectors' raises "the purely legal question of whether or not an official's actions violate clearly established law," no less than in an appeal based on agreed facts. *See Meredith v. Fed. Mine Safety & Health Review Comm'n*, 177 F.3d 1042, 1048-49 (D.C. Cir. 1999). Such legal questions—which sharply divide the parties in this case—fall squarely within the collateral order doctrine as expounded in *Mitchell v. Forsyth*.

Though neither party raises the issue, we also note that our statement in *Moore I* that "Moore's retaliatory prosecution claim . . . does allege the violation of clearly established law," 65 F.3d at 196, neither deprives us of

jurisdiction nor controls our resolution of the issues before us. The denial of qualified immunity at summary judgment is a "final decision" subject to immediate appeal even if the defendant previously appealed a denial of the same claim on a motion to dismiss. *See Behrens*, 516 U.S. at 309-11. Thus, although the inspectors conceded in the appeal from their motion to dismiss that Moore's claim stated a violation of clearly established law, they are free to assert qualified immunity now: the "legally relevant factors bearing upon the [qualified immunity] question will be different on summary judgment than on an earlier motion to dismiss," because the court now conducts the immunity inquiry based on "the evidence before it," rather than the pleadings. *Id.* at 309. Furthermore, as we explained in *Moore II*, our opinion in *Moore I* "said nothing about the elements of [a retaliatory prosecution claim], or whether Moore could succeed on his complaint." *Moore II*, 213 F.3d at 709. Accordingly, whether Moore's cause of action requires lack of probable cause remains a live issue.

**III.**

As the Supreme Court has recognized, although damages suits like Moore's "may offer the only realistic avenue for vindication of constitutional guarantees," such suits also carry substantial social costs, including the expense of litigation, the diversion of official energy, and the risk of deterring legitimate official action. *See Harlow*, 457 U.S. at 814. Striking "a balance between the evils inevitable in any available alternative," *id.* at 813, qualified immunity protects "government officials performing discretionary functions . . . 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," *id.* at 818.

Underlying this doctrine is the basic principle of fair notice: officials may be held liable if "[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right," *Anderson v. Creighton*, 483 U.S. 635, 640 (1987); otherwise, the unfairness of holding officials responsible on grounds they could not have anticipated trumps the individual's interest in vindicating transgressed rights. *See id.* at 641; *Crawford-El v. Britton*, 523 U.S. 574, 590-91 (1998). To ensure that shielding public officials from unclear law does not freeze the law in place, however, courts facing qualified immunity claims ordinarily engage in a two-step inquiry, considering first what the law is, and only then whether that law was clearly established. *See Wilson v. Layne*, 526 U.S. 603, 609 (1999). Were the procedure otherwise, constitutional avoidance might lead courts to rest on findings of uncertainty without first clarifying the law for future cases—a result contrary to the interest of both government officials and individuals claiming that such officials violated their constitutional rights. *See id.*; *County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998).

Because the qualified immunity inquiry focuses on whether the officials could have known "what [they were] doing" was unlawful, *Anderson*, 483 U.S. at 640, defining the right "at the appropriate level of specificity" is critical. *Wilson*, 526 U.S. at 615; *see also Butera v. District of Columbia*, 235 F.3d 637, 646 (D.C. Cir. 2001). While the right need not have arisen in identical or even "fundamentally" or "materially similar" circumstances, *see Hope v. Pelzer*, 536 U.S. 730, 739, 741 (2002), the right can be considered clearly established only if the unlawfulness was "apparent" in light of pre-existing law, *see Anderson*, 483 U.S. at 640. The "salient question," then,

is "whether the state of the law [at the relevant time] gave [the officials] fair warning that their alleged treatment of [the plaintiff] was unconstitutional." *Hope*, 536 U.S. at 741.

In this case, Moore seeks to vindicate his right to be free from prosecution undertaken in retaliation for First Amendment activity. The inspectors, though conceding that right generally exists, *see Crawford-El*, 523 U.S. at 592 (describing the "general rule" that "the First Amendment bars retaliation for protected speech" as one that "has long been clearly established"), urge us to define the claim more specifically. Insisting the record shows that they acted with probable cause, the inspectors argue that what they were doing could violate a clearly established right only if the First Amendment prohibits retaliatory prosecution even when probable cause exists. Based on cases from other jurisdictions requiring lack of probable cause as an element of a retaliatory prosecution claim, the inspectors argue that no such right exists, much less a clearly established one. Moore disputes both points in the inspectors' syllogism: this circuit, he insists, clearly permitted liability despite probable cause at the time of his indictment, and in any event the inspectors acted without sufficient grounds for suspicion.

As instructed by *Wilson*, we consider this debate in two stages, asking first what the law is, and second whether that law was clearly established at the time of Moore's indictment. Because, as we shall explain, we agree with Moore that the inspectors may be liable even if they had probable cause, we have no need to determine whether, as the inspectors insist, they actually had probable cause to pursue Moore's indictment.

*Were Moore's Rights Violated?*

The question presented under the first element of the qualified immunity test—does the retaliatory prosecution cause of action require a lack of probable cause?—has already been answered by this circuit. In *Haynesworth v. Miller*, 820 F.2d 1245 (D.C. Cir. 1987), we described the "essential elements of a retaliatory-prosecution claim" as follows:

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

*Id.* at 1257 n.93 (quoting *Wilson v. Thompson*, 593 F.2d 1375, 1387 (5th Cir. 1979) (footnote omitted)). Nowhere does this statement suggest that lack of probable cause is an element of the claim, nor does its silence imply such a requirement. The standard *Haynesworth* articulated is this: once a plaintiff shows protected conduct to have been a motivating factor in the decision to press charges, the burden shifts to the officials to show that they would have pursued the case anyway. Given that probable cause usually represents only one factor among many in the decision to prosecute—some others being the strength of the evidence, the resources required for the

prosecution, the relation to enforcement priorities, and the defendant's culpability—there is no reason to expect that the mere existence of probable cause will suffice under *Haynesworth* to protect government officials from liability.

The inspectors insist that this circuit has never "squarely addressed" the issue they raise, leaving us free to require lack of probable cause. (Appellant's Br. at 25.) Again reading *Haynesworth*, we disagree. The relevant passage reads as follows:

> We share the conviction . . . that retaliatory prosecution unconstitutionally impinges on the right of access to the courts guaranteed by the First Amendment. Haynesworth alleged that he was charged with disorderly conduct solely because he refused to release his civil claims against the arresting officers. That averment, we think, partakes from the circumstances enough substance to entitle him to proceed directly under the First Amendment for damages.

*Haynesworth*, 820 F.2d at 1257 (footnotes omitted). Because this conclusion—that plaintiff had stated a claim for retaliatory prosecution—required some vision of what the claim entailed, *Haynesworth*'s articulation of the elements was central to its holding. True enough, plaintiff described his prosecution as "unmerited," *id.* at 1255, and the opinion said the charges arose "*solely* because" of protected activity, *id.* at 1257 (emphasis added), implying, perhaps, that plaintiff was prosecuted without probable cause. As we noted above, however, *Haynesworth*'s description of the cause of action left little doubt that probable cause would not automatically immunize a retaliatory prosecution. Because that description of the

tort was part of *Haynesworth*'s holding, we lack authority to disregard it.

*Haynesworth*, moreover, is not the only case in which we have suggested liability may arise regardless of probable cause. In *Martin v. D.C. Metropolitan Police Department*, 812 F.2d 1425 (D.C. Cir. 1987*), overruled on other grounds by Crawford-El v. Britton*, 93 F.3d 813 (D.C. Cir. 1996) (en banc), *rev'd*, 523 U.S. 574 (1998), in which plaintiff alleged that police pressed charges to deter the vindication of civil rights, we noted "the at least arguable existence of probable cause," yet went on to consider the sufficiency of the motive allegations. *Id.* at 1434. That disposition implied that a showing of probable cause, by itself, is insufficient to preclude liability. *Id.* at 1434. As the inspectors argue, *Martin* could be read to have simply assumed the validity of the claim so as to reach the motive issue, but the case at least reinforces the view that probable cause is not conclusive. Demonstrating the continuing vitality of *Haynesworth*, moreover, our two prior opinions in this case relied on that decision in discussing retaliatory prosecution. *See Moore I*, 65 F.3d at 196 & n.12; *Moore II*, 213 F.3d at 709.

As the inspectors point out, several other circuits require lack of probable cause in retaliatory prosecution actions. *See, e.g., Mozzochi v. Borden*, 959 F.2d 1174, 1180 (2d Cir. 1992); *Merkle v. Upper Dublin Sch. Dist.*, 211 F.3d 782, 796-97 (3d Cir. 2000); *Keenan v. Tejeda*, 290 F.3d 252, 260 (5th Cir. 2002); *Smithson v. Aldrich*, 235 F.3d 1058, 1063 (8th Cir. 2000); *Redd v. City of Enterprise*, 140 F.3d 1378, 1383-84 (11th Cir. 1998). These cases, however, are not the law of this circuit—*Haynesworth* is. Besides, two other circuits agree with *Haynesworth*. *See Greene v. Barber*, 310 F.3d 889, 897-98 (6th Cir. 2002); *Poole v. County of Otero*, 271 F.3d 955, 961

(10th Cir. 2001). Our approach, moreover, comports with the Supreme Court's framework in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). In that case, which involved an untenured public school teacher's claim that the school board fired him because of his First Amendment activity, the Court explained that if the teacher could show his constitutionally protected conduct to have been a "motivating factor" in the firing, the burden would shift to the board to establish that "it would have reached the same decision . . . even in the absence of the protected conduct." *Id.* at 287, 97 S. Ct. at 576. While the criminal context, of course, involves considerations of prosecutorial discretion absent in a school employment decision, *Mt. Healthy* provides considerable support for *Haynesworth*.

Although *Haynesworth*'s binding effect is enough to end the first part of our qualified immunity inquiry, the inspectors have raised serious objections to our approach, so we think it useful to flesh out the reasons why the existence of probable cause should not necessarily preclude liability. To begin with, probable cause, requiring no more than "information sufficient to warrant a prudent man in believing the suspect has committed or is committing an offense," *United States v. Kayode*, 254 F.3d 204, 209 (D.C. Cir. 2001) (internal quotations and alterations omitted), is designed for the ordinary arrest or prosecution where courts may presume that government officials exercised their discretion in good faith, so long as their actions were not obviously unfounded. Yet when plaintiffs demonstrate hostility to free speech to have been a motivating factor in the decision to prosecute—as in a prima facie case under *Haynesworth*—courts may no longer presume that appropriate consider-

ations guided the government's decision-making. In such circumstances, were courts to demand no more than a showing of probable cause, as the inspectors urge, law enforcement officers could freely bring marginal cases against advocates of disfavored views, even if the officers' only reason for doing so were hostility to those views. The inspectors' approach, in other words, interprets the First Amendment to prevent only baseless prosecutions, i.e., prosecutions lacking probable cause. As the inspectors see it, constitutional free speech protections say nothing about prosecutions brought only because the defendant is, say, a peace activist, a Klan member, a Democrat, or a Republican.

In our view, the First Amendment prohibits such targeted prosecutions, just as it prohibits legislation aimed at punishing free speech. To be sure, prosecutorial discretion is a "core executive constitutional function," *United States v. Armstrong*, 517 U.S. 456, 465 (1996), but as the Supreme Court has made clear, "the decision to prosecute may not be deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification, including the exercise of protected statutory and constitutional rights." *Wayte v. United States*, 470 U.S. 598, 608 (1985) (internal quotations and citations omitted). Respectful of executive discretion, *Haynesworth*'s framework allows the government to proceed with prosecutions that, though motivated in part by hostility to First Amendment activity, can be justified on legitimate grounds. When hostility to speech represents a but-for cause of the prosecution, however, the charges are "deliberately based upon an unjustifiable standard." *Id.*

We also disagree with the inspectors that analogous First Amendment *Bivens* claims call for imposing an

"objective" threshold requirement relating to the defendant's culpability. Pointing out that "courts in other contexts have interposed rules requiring some objective showing before scrutinizing a criminal prosecution for bad faith or other ill motive," the inspectors argue that lack of probable cause should be required in the retaliatory prosecution context because it affords "a ready-made (but not insurmountable) objective criterion as a first step in assessing prosecutorial discretion." (Appellant's Br. at 29-30.) Yet the two defenses the inspectors cite in support of their theory—selective prosecution and vindictive prosecution—are hardly irreconcilable with *Haynesworth*. It is true that a selective prosecution claim requires proof not only that prosecutors acted with bad intent, but also that "similarly situated individuals [outside the protected category] were not prosecuted." *Armstrong*, 517 U.S. at 465. But once that showing has been made, the accused has a defense to the charges. *See United States v. Mangieri*, 694 F.2d 1270, 1273 (D.C. Cir. 1982); *United States v. Steele*, 461 F.2d 1148, 1151-52 (9th Cir. 1972). Thus, contrary to the inspectors' theory, selective prosecution doctrine supports our view that constraints on prosecutorial motive may at times override the interest in punishing objectively culpable conduct.

As for vindictive prosecution, that defense entails a framework much like the one *Haynesworth* adopted for retaliatory prosecution: if evidence indicates a "reasonable likelihood" that the government acted "to punish a defendant for exercising his legal rights," a presumption of vindictiveness arises, which the government may rebut with "objective information in the record justifying the increased sentence or charges." *United States v. Gary*, 291 F.3d 30, 34 (D.C. Cir. 2002) (quoting *Maddox v. Elzie*, 238 F.3d 437, 446 (D.C. Cir. 2001)).

Though the government's burden under this standard may be lighter than under *Haynesworth*, in both cases prima facie evidence of bad motive triggers an obligation on the government's part to show that permissible considerations supported its action. The standard the inspectors propose, in contrast, requires plaintiffs—the alleged victims—to establish lack of justification in the first instance.

Our reluctance to impose objective limitations finds support in the logic of *Crawford-El*. In that case, the Supreme Court held that while qualified immunity protects officers who comply with an objectively reasonable view of the law, it affords no protection against claims under clearly established law that entail the subjective element of improper intent. *See Crawford-El*, 523 U.S. at 593-94. Consistent with this reasoning, we see no reason why compliance with the objective probable cause standard should bar scrutiny of subjective motivations here. Other constraints identified in *Crawford-El*—procedural mechanisms for limiting discovery and facilitating summary judgment, as well as the opportunity to show the prosecution would have happened anyway, *id.* at 592-93, 597-601—may screen out baseless motive claims without precluding recovery in cases where officers pursue retaliatory charges they would not have undertaken but for their unconstitutional animus.

In sum, the law of this circuit, as expressed in *Haynesworth*, affords damages liability for prosecutions that would not have occurred without retaliatory motive, even if the officers involved acted on the basis of probable cause. This theory of liability, we hasten to stress, is limited. Given that probable cause ordinarily suffices to initiate a prosecution, that showing will be enough in most cases to establish that prosecution would have occurred

absent bad intent. A *Bivens* recovery remains possible, however, in those rare cases where strong motive evidence combines with weak probable cause to support a finding that the prosecution would not have occurred but for the officials' retaliatory animus. In such circumstances, government officers cannot prevail under *Haynesworth* because they cannot establish that legitimate considerations supported their action.

Moore's case appears to be an example of this rare circumstance, at least when we view the evidence in the light most favorable to Moore, as we must at summary judgment, *see, e.g.*, *Beckett v. Air Line Pilots Ass'n*, 59 F.3d 1276, 1278 (D.C. Cir. 1995). Looking at the record through that lens, we detect not only strong evidence of retaliatory motive, but also quite weak indicators of probable cause.

Beginning with motive, we think the record permits, at the least, a reasonable inference that the inspectors had Moore's lobbying campaign in mind as they pursued his indictment. The inspectors referred explicitly to Moore's political activities in two reports summarizing the evidence in the REI investigation. The first, titled "Arguments for Indicting the Corporation," lists the following as the first of nine "bas[es]" for indicting REI:

> Independent of Voss/GAI actions, the corporation and its PAC funded a media and political campaign to discredit USPS management and cause financial harm to USPS, for example:
>
> a. staged questions and testimony before Congress
>
> b. Frost amendment to freeze USPS appropriations bill.

Similarly, a "Details of Offense" memorandum submitted to the U.S. Attorney's Office refers to REI's lobbying

activities as evidence that Moore and Reedy (the REI vice president) had "intent to defraud the USPS":

> Moore's, Reedy's and REI's intent to defraud the USPS is evident in the following events and transactions that related to Voss' official influence but were independently initiated by Moore and Reedy.
>
> - On or about July 25, 1985, at Moore's and Reedy's suggestion and with their substantial input relative to its drafting, Congressman Frost proposed an amendment to a USPS appropriate [sic] bill that in effect would freeze USPS revenue until MLOCRs were purchased from REI.
>
> . . . .
>
> - During the period August 1985 to April 1986, REI continued to undermine the competitive testing program [an aspect of OCR procurement] via the media and Congress.

Read in Moore's favor, these documents suggest that the inspectors regarded Moore's speech and lobbying—activities clearly subject to First Amendment protection—as grounds for prosecution, even though these activities were "independent of Voss/GAI actions" (presumably a reference to the alleged conspiracy). Consistent with this view of the inspectors' motives, subpoenas in the REI investigation targeted speech and lobbying activity, seeking, among other things, "articles placed with trade publications and reporters," "interviews with journalists and reporters," "meetings with United States Congressmen," and "consulting services or meetings with or regarding the REI Political Action Committee."

Reinforcing the inference that the prosecution would not have happened without retaliatory motive, the evi-

dence supporting the government's case—again, viewed in the light most favorable to Moore—appears quite weak. To begin with, the strongest evidence connecting REI to the conspiracy related to Moore only indirectly. Though Voss, the corrupt USPS governor, called Moore at one point to ask "why hadn't it [a contract with GAI] been done," Voss gave his initial referral not to Moore, but to Reedy. Reedy may have known the GAI contract was fishy; at the least, information from Gnau about conversations he had with Reedy gave the inspectors reason to suspect as much. *See REI*, 725 F. Supp. at 593-94. In addition, Reedy, perhaps revealing a guilty conscience, initially lied to the inspectors about the source of the GAI referral. *Id.* at 595-96. Yet no record evidence indicates that Reedy shared with Moore whatever misgivings he may have had about the contract.

Attempting to connect Moore to the conspiracy, the inspectors point to several scribbles about Voss and GAI in a notebook Moore labeled "Postal." One entry, apparently dating from December 18, 1984, reads as follows:

> Get John Knau [*sic*] involved—have broad scale assoc w/ John—get together
>
> ———
>
> * Call Peter Voss
>
> ———
>
> "The business to be had here is substantial"

Another entry dated April 29, 1985 again mentions Gnau and Voss, while also referring to Zip + 4; to John McKean, the Chairman of the USPS Board of Governors; to Electrocom Automation, Inc., a competing producer of scanning technology; and to James Jellison, a top USPS official:

> USPS—prudent to do contingency planning

- ZIP + 4 not going well
- Consultant—wired (Peter Voss)
- Inside vs outside control
- 100 systems—$150m-$250m
- McKean—West Point/airborne/Gonzaga HS
- Upgrade at Electrocom
- Jellison

Elsewhere, the notes appear to refer to information from a "closed session" of the USPS Board of Governors, and an entry dating from January 27, 1987—more than six months after Voss's guilty plea—suggests that Moore gave advice to employees in preparation for Postal Inspection Service interviews:

<u>Critical Incident</u>

- Lawyer in DC—late for hearing—
  Martin Luther King—no copy of transcript
  (plea arrangement)—date of plea
  —conversation between judge +
  U.S. Attorney

- Final "fishing trip"

---

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

Note [illegible] B/S list based (1/27) on
high number of charges

The inspectors interpret these notes to show that Moore (1) formed a "broad scale" criminal association with Gnau and Voss, (2) sought "inside control" of the Board of Governors through a "wired" consultant (i.e., Gnau), and (3) obstructed the Postal Inspection Service investigation.

Reading the notes in Moore's favor, however, we think it at least as plausible that the notes reflect perfectly innocent business considerations, such as Moore's interest in forming a legitimate relationship with a well-connected lobbyist and protecting his employees from potentially damaging litigation. To be sure, as the inspectors point out, Moore's interview advice includes no instruction to tell the truth, while the instruction to answer "I don't know, I really can't remember" could suggest a coverup. But Moore points to evidence suggesting he did encourage his employees to tell the truth, and in light of that evidence, Moore's "I don't know" statement could mean nothing more than that he cautioned employees to avoid guesswork and speculation—guidance that, like Moore's other notes, reflects standard deposition advice.

Next, the inspectors think it suspicious that Moore's notebook was missing thirty-six of its eighty pages, and that REI failed to locate certain subpoenaed phone records from late 1984 and early 1985—the "critical period," as the inspectors see it, for the formation of the conspiracy. Because Marcus told the inspectors he had heard from Spartin that "Reedy, Moore, Gnau and Voss . . . met and developed a story to cover up their involvement," the inspectors suspected that REI officials removed the pages and records to cover their tracks. Yet

phone records were also missing from early 1984—long before the Voss referral—while REI produced other evidence (including at least one phone message) revealing contacts between Moore and Voss. As for the notebook, Moore explained during his deposition that he often tore out sheets for his secretary to type. Given the posture of this case, we must resolve these ambiguities in Moore's favor, leading us to conclude that the missing notes and records fail to establish a coverup.

Other evidence points to Moore's innocence. Though lacking any evident reason to protect Moore, not one of the conspiracy's admitted members fingered him. Spartin, for example, failed to corroborate Marcus's assertion that Moore and Reedy agreed to a coverup. In fact, despite extraordinary pressure—at one point as many as ten inspectors surrounded Spartin while an Assistant United States Attorney tore up his immunity agreement—Spartin never indicated that Moore knew of the conspiracy. Instead, Spartin stated that although he "[didn't] give a hoot and hell about Bill Moore," he would not "make up a story" to incriminate Moore. Asked whether "anyone in REI knew Peter Voss was involved in this scheme . . . or was being paid," Spartin offered only that other witness statements the inspectors had shown him suggested Moore's guilt: "Let me answer you this way," Spartin said. "Being paid, no sir, I don't. I have no knowledge of that at all. Peter Voss being part of the deal, no knowledge. But, you know I read that goddamn testimony and I'm not a lawyer but Jesus, there's enough there to seem to me to hang REI from the yardarm." Voss even told the inspectors there was "no way Moore knew" of anything improper.

Recognizing the deficiencies in the inspectors' evidence, the U.S. Attorney's Office hesitated to indict—

even though the inspectors urged it to do so. "The facts underlying this [proposed] indictment are complicated, and the evidence is entirely circumstantial," the Chief and Deputy Chief of Special Prosecutions wrote in a memo to the U.S. Attorney. "If this matter goes to trial it will be a very difficult case and consume significant resources." While concluding—incorrectly, as it turned out—that "there is enough evidence to get by an MJOA [motion for judgment of acquittal]," the memo described the chances of convicting Moore, Reedy, and REI as "questionable." As to Moore specifically, the two Assistant United States Attorneys observed:

> [N]one of the evidence shows direct knowledge by Moore of the payments to Voss through GAI. Even when the evidence is considered in light of Moore's close association with Reedy—from which one can infer that Moore knew of at least some of Reedy's conversations with Gnau—it proves no more than that Moore probably knew of the payments to Voss.

True enough, Joseph Valder, the AUSA handling the investigation, disagreed with the memo, stating in a response that "hundreds, if not thousands, of pieces of direct evidence . . . show that the defendants are guilty beyond a reasonable doubt." Nevertheless, the opinion of the Chief and Deputy Chief of Special Prosecutions—two experienced prosecutors—that the evidence was "questionable" adds weight to Moore's assertion that unbiased officials would never have pressed charges against him.

The record also suggests that unusual prodding from the Postal Inspection Service contributed to the eventual decision to indict—an inference that could, again, support Moore's theory of retaliatory motive. The Chief Postal Inspector, C.R. Clauson, twice wrote to the U.S. Attorney, Jay Stephens, urging him to press charges against

Moore, Reedy, and REI. In the second letter, which followed the AUSAs' memorandum, Clauson wrote, "Frankly, Jay, I am disappointed by your office's failure to act on this matter and the series of broken promises from your staff (review committee) relative to the date and nature of their recommendation." Both Clauson and another inspector (one of the defendants in this case) said in their depositions that they were unable to recall the Postal Inspection Service ever sending a similar letter.

Moreover, some record evidence could lead a reasonable trier of fact to conclude that when the U.S. Attorney's Office finally decided to indict, the inspectors behaved before the grand jury as if their case needed bolstering. For example, when Robert Bray, an REI Vice President, wanted to explain in his grand jury statement that to his knowledge Moore and Reedy knew nothing about the payoffs, Valder and the inspectors refused to let him say any such thing, despite protracted negotiations with Bray's lawyer. Valder apparently circled portions of Bray's draft statement and wrote "don't reveal." The record also suggests that the inspectors and Valder showed the prepared grand jury statements to Spartin during his polygraph examination, and that they shared investigative materials—allegedly including grand jury evidence—with Bolger's ousted successor as PMG, Paul Carlin.

Considering all this 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. 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. Applying the *Haynesworth* test, we believe this combination of factors—complexity and expense plus strong indications of retaliation and weak evidence of probable cause—suggests not only that hostility to free expression was at least a motivating factor in Moore's prosecution, but also that the inspectors may be unable to rebut that inference. Accordingly, Moore has alleged the violation of a constitutional right, precluding summary judgment under the first element of the qualified immunity test.

*Was the Law Clearly Established?*

As to the qualified immunity test's second element, *Haynesworth* again stands as the key authority. Decided in 1987, a year before Moore's indictment, *Haynesworth* clearly stated the elements of retaliatory prosecution, leaving no doubt that government officials could be liable for pressing charges they would not have pursued without bad motive. Our conclusion, then, that the inspectors' conduct was actionable under *Haynesworth* constrains us to hold that Moore has alleged the violation of a clearly established right.

The inspectors' argument to the contrary misapprehends the standard for clear law. True, *Haynesworth* stated the elements of retaliatory prosecution "without analysis in a footnote in an opinion generally addressing other issues." (Reply Br. at 12.) But as we noted earlier, *Haynesworth*'s description of the elements was part of its holding, and hence binding precedent, even if it appeared in a footnote. In any event, qualified immunity requires only that the law be clear, not that it be stated prominently or elaborately. Here, *Haynesworth* established the elements of retaliatory prosecution, making plain that what the inspectors were doing—prosecuting a case they otherwise would have left alone—violated the First Amendment. *See Anderson*, 483 U.S. at 640; *Butera*, 235 F.3d at 646. Neither *Haynesworth*'s purported lack of analysis nor its use of a footnote freed the Postal Service from the obligation to take note of the opinion and instruct its inspectors accordingly.

Nor did the decisions of other courts give the government reason to doubt that *Haynesworth* meant what it said. The law of other circuits may be relevant to qualified immunity, but only in the event that no cases of "controlling authority" exist in the jurisdiction where the challenged action occurred. *See Wilson*, 526 U.S. at 617. Here, a decision of this court—*Haynesworth*—provided guidance on exactly the issue the inspectors confronted. Moreover, even if cases from other jurisdictions could somehow infuse *Haynesworth* with ambiguity, they did not do so before 1988, for nearly all decisions on which the inspectors rely came later. At the time of Moore's indictment, only the Third Circuit required lack of probable cause, *see Losch v. Borough of Parkesburg*, 736 F.2d 903, 906-09 (3d Cir. 1984), although the Eleventh Circuit had hinted at such a requirement in *Motes v. Myers*, 810

F.2d 1055, 1060 (11th Cir. 1987); *see also Redd v. City of Enterprise*, 140 F.3d at 1383 (11th Cir. 1998). In contrast, and also at the time of Moore's indictment, the Fifth Circuit, though later embracing the Third Circuit's view, see Keenan, 290 F.3d at 260, had stated that an enforcement practice could be unconstitutional "if those who file such charges upon probable cause can be presumed to be motivated by a retributive purpose," *Gates v. City of Dallas*, 729 F.2d 343, 346 (5th Cir. 1984); *cf. Izen v. Catalina*, 382 F.3d 566, 571-72 (5th Cir. 2004) (holding that although "the government need not have even reasonable suspicion to undertake an investigation," an investigation undertaken "with the substantial motivation of retaliating" against protected speech may violate the First Amendment). Against this ambiguous background—at best, two circuits immunizing prosecutions based on probable cause and one apparently not—Postal Service officials could not reasonably have read *Haynesworth* to require lack of probable cause.

To sum up, because *Haynesworth's* framework for Moore's claim is incompatible with the probable cause-based standard the inspectors advocate, we conclude that the Postal Service had, as the Supreme Court put it in *Hope*, 536 U.S. at 741, "fair warning" that government officers could be liable under the circumstances alleged here. Agreeing with the district court, we therefore reject the inspectors' claim of qualified immunity.

**IV.**

Some fifteen years after the district court dismissed the indictment and found evidence probative of Moore's innocence and thirteen years after Moore filed his first complaint, Moore's attorney quipped at oral argument: "I suppose I'd be the poster boy that a lawyer has to be crazy to take a *Bivens* case because you die before it

ends." We trust this opinion will reassure *both* sides—Moore and the postal inspectors—that this case may now be resolved within the lifetime of their attorneys. With the inspectors' immunity theory dispatched, nothing stands in the way of a judgment on the merits; indeed, because the district court found material issues of fact in the record, the next step, presumably, will be preparation for trial. We affirm the decision of the district court and remand the case for further proceedings consistent with this opinion.

*So ordered.*

**APPENDIX I**

**IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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NO. 10-5334

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WILLIAM G. MOORE, JR. AND BLANCHE K. MOORE,
*Appellees,*

v.

MICHAEL HARTMAN, *et al.*,
*Appellant,*
ANTONIO SANTOS,
*Appellee,*
PAMELA JEAN SOTHAN-ROBBINS,
*Appellant,*
UNITED STATES OF AMERICA,
*Appellee.*

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ORDER

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**APRIL 24, 2013**

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BEFORE: Garland*, Chief Judge, and Henderson*, Rodgers, Tatel, 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

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* Chief Judge Garland and Circuit Judge Henderson did not participate in this matter.

**ORDERED** that the petition be denied.

**Per Curiam**

**FOR THE COURT:**
Mark J. Langer, Clerk

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