No. 11-836

IN THE

Supreme Court of the United States

MICHAEL HARTMAN ET AL.,

Petitioners,

v.

WILLIAM G. MOORE, JR.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a government official who retaliates against an individual's First Amendment-protected speech by inducing a baseless prosecution against that individual is entitled to qualified immunity so long as the prosecutor "arguably" had probable cause to pursue the case.

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INTRODUCTION

This *Bivens* action is now more than twenty years old and on its fifth pre-trial appeal. The case arises out of Petitioners' procurement of Respondent Bill Moore's indictment and prosecution in retaliation for his outspoken criticism of the United States Postal Service. In its decision in this case in 2006, this Court held that, to recover damages against an investigating officer for retaliatory inducement of a criminal prosecution, a plaintiff like Moore must plead and prove the absence of probable cause as a proxy for establishing that the defendant officer's "unconstitutionally motivated" conduct "successful[ly]" induced "the prosecutor's decision to bring the charge." *Hartman v. Moore*, 547 U.S. 250, 262, 265 (2006).

On remand, the trial court concluded that Moore satisfied this standard at the summary-judgment stage, and rejected Petitioners' additional contention that they would be entitled to qualified immunity if an officer in their position could "reasonably but mistakenly" have believed that there existed probable cause to prosecute Moore, *i.e.*, if there was "arguable probable cause" for the prosecution. A unanimous panel of the D.C. Circuit affirmed, concluding, as to the latter point, that *Hartman*'s no-probable-cause requirement is a special rule of proof relative to the causation element of the *Bivens* cause of action, and has no bearing on whether the defendant officers violated Moore's clearly established constitutional rights. The court of appeals therefore directed that the case be remanded for, at long last, a trial on the merits.

Before proceedings in the district court could resume, this Court granted certiorari in another case, *Reichle v. Howards* (No. 11-262), to resolve a circuit split over whether the *Hartman* rule of pleading and proving the absence of probable cause also applies to claims of retaliatory *arrest*. Without contending that the court below erred on the question it decided, Petitioners ask this Court to hold their petition until issuing its decision in *Reichle*, because it is "possib[le]" that the court below "may" need to reconsider its decision in light of *Reichle*. Pet. at 6–7. Moore submits that this is not a proper request for review and the petition should be denied. The circuit split at issue in *Reichle*—whether *Hartman* applies to retaliatory-arrest claims—is irrelevant to the "arguable probable cause" question decided in this case, as the court below expressly recognized. Pet. App. 20a n.10. Conversely, the question presented in this case—whether merely "arguable" probable cause bars a retaliation claim as a matter of qualified immunity—is not presented in *Reichle*, where the existence of probable cause is undisputed and a ruling that *Hartman* applies would therefore necessarily bar the *Reichle* plaintiff's retaliation claim on the merits.

A hold is also especially inappropriate here because this petition arises on an interlocutory, pre-trial appeal. The courts below will therefore have ample opportunity to consider the applicability of this Court's ultimate holding in *Reichle*—in the unlikely event that the decision is applicable at all—long before this case becomes final. In contrast, holding the petition would be seriously prejudicial to Moore, whose right to be meaningfully heard on his claims against Petitioners has already been gravely

compromised by unconscionable delays and more than two decades of pretrial proceedings, and would be exacerbated even further by this Court's failure to promptly consider and rule upon this petition.

STATEMENT OF THE CASE

In 1982, Respondent William G. Moore, Jr. was recruited to reverse the falling fortunes of Recognition Equipment Inc. ("REI"), a pioneer in optical-scanning technology that had fallen on hard times and was flirting with bankruptcy. C.A. App. 3330-31.[1] Within a year, Moore returned the company to profitability and increased its stock price more than six-fold. *Id.* at 3331. Moore was widely acclaimed for REI's turnaround, with *Forbes Magazine* opining that "[f]ew [corporate] turnarounds owe so much to a single executive." *Id.* at 3331-32.

Moore's seemingly unlimited prospects, however, were soon destroyed by Petitioners (the "Postal Inspectors"[2]), who subjected Moore to years of investigation and an unfounded prosecution in retaliation for his criticism of the United States Postal Service ("USPS") and its senior management. Although Moore was easily acquitted upon motion at the end of the Government's criminal case against him, Moore's company and his career were ruined. *See* C.A. App. 3338.

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[1] "C.A. App." refers to pages of the Appendix filed below.

[2] As used herein, the term "Postal Inspectors" refers to Petitioners, as well as to Daniel Harrington and Norman Robbins, both of whom were originally defendants but died during the pendency of this lawsuit. *See* Pet. App. 4a n.3.

1. The Scanner Controversy. The facts leading to Moore's downfall revolve around the Postal Service's decision to automate its mail sorting by purchasing hundreds of millions of dollars of optical-character-reading devices. In late 1983, Postmaster General ("PMG") William Bolger announced that the Postal Service would purchase foreign-made single-line scanners, which required use of nine-digit ZIP codes, rather than multi-line scanners manufactured by REI, which were compatible with five-digit ZIP codes. Pet. App. 2a, 25a; C.A. App. 209-11.

The decision to use single-line scanners became a flash point with the USPS Board of Governors and Congress. *United States v. Recognition Equip. Inc.*, 725 F. Supp. 587, 590 (D.D.C. 1989). In 1984, a congressional study concluded that the use of single-line scanners would cause over $1 million per day in losses. C.A. App. 210. Ultimately, the Postal Service was forced to make a "mid-course correction" and employ multi-line scanners. Pet. App. 2a, 25a; C.A. App. 210-11. As a result, Bolger's successor and other senior USPS managers were reassigned, fired, or forced to retire. *Recognition Equip.*, 725 F. Supp. at 598–99.

2. Moore's Lobbying and Public Criticism of the USPS. Moore and REI were at the epicenter of the scanner controversy. Moore thought the decision to rely upon single-line scanners was unsound, and he unabashedly and aggressively took his case to PMG Bolger, the Board of Governors, Congress, and the media—as he was constitutionally entitled to do. Pet. App. 2a, 25a; C.A. App. 210-11, 3334-35. As a result of this lobbying, Moore persuaded Congressman Martin Frost to initiate the

congressional study and, later, to introduce an amendment requiring the USPS to purchase American multi-line technology. C.A. App. 210, 3334-35. Not surprisingly, USPS management saw Moore and REI as the enemy. Pet. App. 3a; C.A. App. 208, 3334, 3339.

3. Petitioners' Investigation of Moore's Political Activities. Motivated by hostility toward Moore for his role in the scanner controversy, the Postal Inspectors launched a retaliatory investigation of his activities. As early as December 1985, the Postal Inspectors prepared an "Investigative Strategies" memo that labeled Moore and REI as "coconspirators in a scheme to defraud the U.S. Postal Service" (C.A. App. 2061-62), even though, as Petitioner Edwards later conceded in deposition testimony, there was no evidence that any such conspiracy existed. C.A. App. 248, 2212-15, 2223.

Pursuant to this strategy, the Postal Inspectors scrutinized REI's and Moore's political contributions and communications with public officials, with no apparent regard for the First Amendment. C.A. App. 248-50. They issued subpoenas for records of Moore's and REI's political contributions, "meetings with United States Congressmen," "articles placed with trade publications and reporters," and "interviews with journalists and reporters." C.A. App. 6376-84; *see also* Pet. App. 8a n. 4.

4. The Voss/Gnau Kickback Scheme. In late February 1986—after preparing the "Investigative Strategies" memorandum and beginning to investigate Moore's and REI's political and media activities—the Inspectors discovered that Peter Voss, a member of the USPS Board of Governors, was

receiving payments from John Gnau, the principal of Gnau & Associates, Inc. ("GAI"), a consulting firm that REI had hired—on Voss's recommendation—to assist with its lobbying efforts. Pet. App. 3a, 25a; *Recognition Equip.*, 725 F. Supp. at 593. The Postal Inspectors quickly learned that Voss and his assistant, along with Gnau and two other GAI officials, were involved in the kickback conspiracy. Pet. App. 3a, 25a; C.A. App. 218-19. Three coconspirators plead guilty; the other two received immunity in exchange for cooperation. Pet. App. 3a, 25a; C.A. App. 183-84.

Though lacking any evident reason to protect him, none of the conspirators ever implicated Moore in the kickback conspiracy. *Moore v. Hartman*, 388 F.3d 871, 881, 883 (D.C. Cir. 2004) ("*Moore III*"), *rev'd on other grounds*, 547 U.S. 250. Employing "extraordinary" and improper pressure tactics, *id.*, the Inspectors repeatedly urged the conspirators to do so, but again and again the conspirators informed the Inspectors that Moore was not involved. C.A. App. 227-28, 238-39, 256-57. Voss even told the Inspectors that there was "no way Moore knew" about the improper activities. C.A. App. 6304-05; *see also* Pet. App. 8a.

5. Petitioners' Retaliatory Efforts to Procure Moore's Indictment. Having failed to find any direct evidence to tie Moore to the kickback scheme, the Postal Inspectors resorted to highly unusual and deceptive tactics to obtain Moore's indictment.

The Inspectors candidly acknowledged in writing that a primary reason for pursuing Moore and REI was their lobbying against, and public criticism of, USPS management. In a memorandum entitled

"Arguments for Indicting the Corporation"—which the court of appeals has described as "evidence of retaliatory motive . . . close to the proverbial smoking gun," *Moore III*, 388 F.3d at 884-85—the Inspectors' very *first* justification for indicting REI, completely "[i]ndependent of [the] Voss/GAI actions," was that "the corporation and its PAC funded a media and political campaign to discredit USPS management and cause financial harm to USPS, for example . . . staged questions and testimony before Congress [and] Frost amendment to freeze USPS appropriations bill." C.A. App. 3294.

Likewise, in a memorandum for the U.S. Attorney summarizing evidence supporting an indictment, the Inspectors wrote that Moore's and REI's fraudulent intent was evident in, among other things, "their substantial input" in drafting "an amendment to a USPS appropriat[ions] bill that in effect would freeze USPS revenue until [multi-line scanners] were purchased from REI." C.A. App. 3164.[3]

To secure prosecution, the Inspectors also met repeatedly with the U.S. Attorney's office to advocate the indictment of Moore and REI. The Chief and Deputy Chief of Prosecutions were not impressed,

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[3] This memorandum is littered with references to Moore's and REI's constitutionally protected lobbying activities. *See, e.g.*, C.A. App. 3152 ("REI lobbied several Congressmen to pressure USPS into purchasing equipment from REI"); *id.* ("REI drafted letters which Congressmen sent to USPS"); *id.* ("Moore worked with Congressman Frost to draft an amendment to a USPS appropriations bill").

concluding that, while Moore and REI "played 'hardball' with the Postal Service," the evidence that they acted criminally or knew about the payments to Voss was "not particularly strong," and the case against Moore especially weak. C.A. App. 6908-11. Nonetheless, the Inspectors continued to push for Moore's indictment, and, as a result of this "unusual prodding," *Moore III*, 388 F.3d at 884, the U.S. Attorney's office ultimately relented and approved the prosecution. *See* C.A. App. 255-57; *see also* Pet. App. 3a, 7a-8a, 31a-32a.

"[B]ehav[ing] before the grand jury as if their case needed bolstering," *Moore III*, 388 F.3d at 884, the Postal Inspectors then went to extreme, improper lengths to keep the grand jury from hearing witnesses say that Moore did not know about the kickback scheme, in violation of Department of Justice guidelines requiring presentation of exculpatory evidence to the grand jury, *see* Department of Justice, United States Attorneys' Manual § 9-11.233 (Oct. 1, 1988). Certain coconspirators and other witnesses testified, not by way of ordinary questioning, but by reading statements carefully scripted for them by the Postal Inspectors to prevent the witnesses from saying that they never told Moore or anyone else at REI about the payments to Voss. Pet. App. 7a, 31a; C.A. App. 228-31. Contrary to Postal Service policy, the Inspectors refused to honor the request of one witness to correct the statement they drafted for him, and refused to allow that witness to answer questions from the grand jury. C.A. App. 243-45. The Inspectors also illegally showed another witness the scripted grand-jury statements of his coconspirators to elicit a false "opinion," contrary to the witness's

personal knowledge, that Moore knew that Voss was receiving money from Gnau—and then presented this "opinion" to the grand jury as evidence. C.A. App. 235-41; *see also* Pet. App. 8a, 32a.

6. Moore's Acquittal. Following Moore's indictment, the house of cards constructed by the Postal Inspectors collapsed. After the Government presented its case for six weeks, Moore and REI filed motions for acquittal, which were granted:

> 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 incriminatory evidence is not persuasive of guilt when viewed in its full context. In fact, some of the government's evidence is exculpatory and points towards innocent conduct of the Defendants.

Recognition Equip., 725 F. Supp. at 587–88. There was, the district judge noted, a "complete lack of direct evidence to suggest that the Defendants knew of the illegal payoff scheme"; indeed, "[a]ll of the unindicted coconspirators who testified expressly stated that they never told Moore . . . about the payments from Gnau to Voss." *Id.* at 596. Consequently, even when viewed in the light most favorable to the prosecution, the Government's evidence did not "support a reasonable inference that the Defendants knew" of the conspiracy they allegedly joined. *Id.* at 589. *See also* Pet. App. 4a, 25a-26a.

7. Moore's Lawsuit. Despite being acquitted, Moore was financially devastated by the prosecution. The indictment alone caused REI to be debarred from the scanner procurement, and Moore was suspended

pursuant to a post-indictment "cleansing plan" formulated by the Inspectors and imposed on REI. C.A. App. 7317. REI was acquired by a smaller competitor and eventually went out of business. C.A. App. 3338. Moore also suffered the career equivalent of the death penalty. Prior to his indictment, Moore had a reasonable prospect of eventually becoming the CEO of a major public company. C.A. App. 3338. After the indictment, he became in essence a tarnished executive unsuitable to public companies. *Id.*

In 1991, Moore filed this lawsuit, seeking compensation for his injuries, against the Postal Inspectors and the prosecutor under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and against the United States under the Federal Tort Claims Act ("FTCA"). Pet. App. 4a, 26a. The claim against the prosecutor was dismissed on the basis of absolute immunity, and the FTCA claim is now awaiting trial following the district court's (unappealed) denial of the United States' motion for summary judgment.

After ten years of motions and appeals on the pleadings and limited discovery, the Inspectors in 2001 filed the first of several repetitive motions for summary judgment arguing that Moore had not shown an "absence of probable cause" for his prosecution and that this entitled the Inspectors to qualified immunity. [Dkt. Nos. 253 & 254] The district court denied summary judgment, and the D.C. Circuit affirmed, holding that the Inspectors were not entitled to immunity because it has long been clearly established that the First Amendment prohibits all prosecutions brought to retaliate against speech, not only baseless ones. *Moore III*, 388 F.3d at

879–80. The Court also held that Moore did not need to prove the absence of probable cause to succeed on his claim. *Id.* at 881. *See also* Pet. App. 5a, 26a.

This Court granted review of that decision in 2005. It first rejected the Inspectors' immunity defense, holding that "the law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out." *Hartman*, 547 U.S. at 256. The Court went on, however, to "structur[e]" the *Bivens* cause of action to require Moore to prove the absence of probable cause as part of the "causation" element of the claim. *Id.* at 264–66. The majority reasoned that proving an absence of probable cause would so effectively "bridge the gap" between constitutional violation (*viz.*, retaliatory conduct by the investigating officers designed to induce a prosecution) and injury (*viz.*, the prosecution) that the Court ought "to require" that it be "pleaded and proven." *Id.* at 263, 266.

8. The Decision Below. After protracted proceedings on remand—including a fourth appeal concerning the evidentiary import of the grand-jury indictment, *see* 571 F.3d 62 (D.C. Cir. 2009)—the district court again refused summary judgment, finding that there remained material issues of fact for the jury on the issue of probable cause. Pet. App. 32a–33a. On July 15, 2011, a unanimous panel of the D.C. Circuit affirmed and remanded the case for trial on the merits. Pet. App. 22a. After concluding that it lacked jurisdiction to review the sufficiency of the evidentiary basis for the district court's determination that a reasonable jury could find

probable cause absent, *see* Pet. App. 12a–13a, the court of appeals squarely rejected the Inspectors' principal legal argument on appeal—namely, that, even if Moore's prosecution was unsupported by probable cause, they were entitled to qualified immunity if the prosecutor *arguably* had probable cause to pursue the charges. Pet. App. 13a–22a. The "arguable probable cause" standard, used to measure whether officers acted reasonably in the Fourth Amendment context, has no relevance here, the court of appeals explained, because *Hartman*'s no-probable-cause requirement is a special rule of proof relative to causation that has no bearing on whether the defendant officers violated their clearly established constitutional duty to refrain from retaliating against Moore for his exercise of First Amendment rights. Pet. App. 13a–22a.

Judge Henderson wrote separately "to express dismay over the herculean effort [Moore] has had to expend simply to get his day in court." Pet. App. 22a. By her count, "[i]t 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." *Id.*

The D.C. Circuit subsequently denied the Inspectors' request for en banc review of the panel's decision. *See* Pet. App. 36a.

REASONS FOR DENYING THE PETITION

In their petition, the Inspectors (represented here by the Solicitor General) do not ask for review of the decision below. Nor do they even claim that the decision was wrong on the merits. Rather, they contend that this Court should *hold* their petition, based on the "possibility" that a decision in a recently granted case, *Reichle v. Howards* (No. 11-262), will "potentially" say something that would warrant asking the D.C. Circuit to reconsider its decision in this case. Pet. at 7.

There is no basis for holding the petition. The court below expressly stated that its decision did not turn in any way on the circuit split concerning the applicability of *Hartman* to claims of retaliatory arrest, which this Court granted certiorari in *Reichle* to resolve. Conversely, the only legal issue actually resolved by the court below—namely, the relevance of "arguable" probable cause—is not even *presented* in *Reichle*, where the existence of probable cause is conceded as a matter of law. Even if there is some small chance, as a theoretical matter, that this Court's *Reichle* decision will speak, in an indirect or incidental way, to the question presented by this case, there is no need for a hold to preserve Petitioners' rights, because the decision below was interlocutory and there will be ample opportunity, before this case becomes final, for Petitioners to seek relief based on *Reichle* in the courts below. But, on the other hand, holding this petition would be seriously prejudicial to Moore, whose day in court has already been postponed for over two decades by the litigation strategy excoriated by Judge Henderson. The Court should deny the petition.

I. THIS COURT'S DECISION IN *REICHLE* WILL NOT AFFECT THIS CASE

Holding a petition would only be appropriate if the decision in the granted case is likely to require reconsideration of the decision below. Here, this Court's decision in *Reichle* will not speak to the issue addressed by the D.C. Circuit, because the questions presented by the two cases do not overlap.

A. The Court Below Expressly Stated That The Circuit Split At Issue In *Reichle* Did Not Matter To Its Resolution Of This Case

This Court, in its previous decision in this case, held that a *Bivens* plaintiff alleging a retaliatory inducement to prosecute in violation of the First Amendment must "plead and prove" the absence of probable cause to support his prosecution. *Hartman*, 547 U.S. at 265. That decision did not address whether a *Bivens* plaintiff alleging retaliatory *arrest* must follow the same rule, and a circuit split subsequently developed on that distinct question. *See* John Koerner, Note, *Between* Healthy *and* Hartman*: Probable Cause in Retaliatory Arrest Cases*, 109 Colum. L. Rev. 755 (2009). Some courts refused to apply the *Hartman* rule to the retaliatory-arrest context, reasoning that the rule is only justified by the unique nature of retaliatory-inducement-to-prosecute cases, where "the requisite causation between the defendant's retaliatory animus and the plaintiff's injury"—which is always caused by the intervening conduct of a separate actor, the prosecutor—"is usually more complex than it is in other retaliation cases," *Hartman*, 547 U.S. at 261. *See, e.g.*, *Skoog v. Cnty. of Clackamas*, 469 F.3d 1221, 1231–32 & n.31 (9th Cir. 2006). Other courts extended *Hartman* to require a showing of probable cause even in the single-actor,

retaliatory-arrest context. *See, e.g.*, *McCabe v. Parker*, 608 F.3d 1068, 1077–79 (8th Cir. 2010).

In the decision under review in *Reichle*, the Tenth Circuit adopted the former position, holding that the *Hartman* requirement to prove a lack of probable cause does *not* apply to retaliatory-*arrest* plaintiffs, who need only show that the arresting officer was motivated by retaliatory animus. *See Howards v. McLaughlin*, 634 F.3d 1131, 1147–48 (10th Cir. 2011). The defendants in that case sought certiorari, contending that *Reichle* "presents the question *Hartman* left open: whether probable cause bars a First Amendment retaliatory *arrest* claim." Pet. for Cert. at 3, *Reichle* (No. 11-262). Accordingly, the first Question Presented in *Reichle* is whether "the existence of probable cause to make an arrest . . . bar[s] a First Amendment retaliatory arrest claim . . . , including under *Hartman v. Moore*." *Id.* at i.

Whether the *Hartman* rule applies to retaliatory arrests is an interesting question, but the answer plainly has no relevance here, to the *Hartman* case itself. By definition, the *Hartman* rule applies to *Hartman*. Whether this Court chooses to extend the rule to a new context is immaterial to application of the rule in its original context. In other words, *Hartman* obviously governs this case, and the question whether that decision also governs a *different* case simply does not matter here.

Indeed, the court below said as much. In a footnote, the unanimous panel observed the circuit split on the question of extension of *Hartman* to retaliatory arrests—citing, among other cases, the Tenth Circuit decision at issue in *Reichle*. But, for the obvious reasons explained above, the panel went on to say that it "ha[d] no occasion to address First Amendment retaliatory

arrest requirements here." Pet. App. 15a n.8. If this case gave the court below no occasion to address the issue presented by *Reichle*, then resolution of *Reichle* would, necessarily, not impact this case.

The Inspectors discount this plain statement by the court of appeals, pointing out that other courts have treated retaliatory-arrest cases and retaliatory inducement to prosecute cases "similarly." Pet. at 7. But, for one thing, it is the view of the court below that matters, since it is that court that would assess the significance of *Reichle* should this Court hold this petition and then vacate the decision for further consideration. More importantly, that some courts have treated retaliatory-arrest and retaliatory-inducement-to-prosecute cases "similarly" is of no moment. The question in *Reichle* is whether retaliatory-arrest cases should be treated the same way as retaliatory-inducement-to-prosecute cases; even if the answer is yes, that has no implications for the proper treatment of the latter, which is precisely why the court below had "no occasion to address" the question. Pet. App. 15a n.8.

B. The Question Presented By This Case Is Not Presented By The Facts Of *Reichle*

Since it is undisputed that Moore must, under *Hartman*, plead and prove the absence of probable cause in order to recover against the Inspectors, and since "[w]hether the Postal Inspectors had probable cause is a disputed issue of fact to be decided by the jurors at trial," Pet. App. 22a, the decision below focused on a derivative, secondary question: Even if Moore *can* prove that his prosecution lacked probable cause, are the Postal Inspectors nevertheless entitled to qualified immunity if the existence of probable cause was "arguable" (*i.e.*, if an officer could have

"reasonably but mistakenly" concluded that there was probable cause)? In essence, the Postal Inspectors, now facing a trial on the merits—including on the no-probable-cause element added by *Hartman*—are trying to forge an entirely new immunity defense under which they might be declared the winners on a factual record that is not yet fully developed.

The court of appeals "address[ed] this argument on its merits and"—correctly—"conclude[d] that arguable probable cause does not apply to a First Amendment retaliatory-inducement-to-prosecute case because probable cause is not an element of the First Amendment right allegedly violated." Pet. App. 15a. The panel reasoned that "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," Pet. App. 20a, not whether the official acted reasonably or in compliance with the Constitution. To the contrary, every official knows that, as this Court reaffirmed in *Hartman*, "reprisal for protected speech 'offends the Constitution,'" 547 U.S. at 256 (quoting *Crawford-El v. Britton*, 523 U.S. 574, 588 n.10 (1998)), whether or not the reprisal could have been objectively justified. The latter question is relevant only to *causation*, namely whether the defendant "induced the prosecutor to bring charges *that would not have been initiated without his urging*." *Id.* at 262 (emphasis added). The point is that if the prosecutor would have pursued charges anyway, the defendant's unlawfully motivated acts did not matter. But the unlawfully motivated acts are unconstitutional in all events, providing no basis for a qualified immunity defense.

Moore obviously believes that the court of appeals correctly answered this question. (Notably, the Solicitor General never directly contends otherwise.) But, for purposes of the Inspectors' request to hold their petition, the critical fact is that *Reichle* does not and will not involve this question at all. In *Reichle*, this Court will have no opportunity to address the derivative question whether "arguable" probable cause entitles a retaliating official to immunity, because it is undisputed that—as a matter of law—there existed *actual* probable cause for the petitioners to make the challenged arrests. *See Howards*, 634 F.3d at 1142 ("[T]here is no doubt that Agent Reichle possessed probable cause to arrest Mr. Howards for lying to a federal agent in violation of 18 U.S.C. § 1001."). Since probable cause is conceded in *Reichle*, dismissal on the merits will be required if this Court concludes that the *Hartman* rule applies to retaliatory arrests; the complication of immunity for "arguable" probable cause will thus never arise. Indeed, the merits brief filed by the *Reichle* petitioners nowhere contends that they would be entitled to relief based on the presence of merely "arguable" probable cause.

C. The Request For A Hold Rests On Mere Speculation That This Court Might, In Passing, Clarify The *Hartman* Rule

Because the issue in *Reichle* does not matter to this case, and the issue in this case does not arise in *Reichle*, the Inspectors are reduced to arguing that their petition should be held on the chance that "the Court's decision in *Reichle* will clarify its decision in *Hartman* and potentially call into question the rationale for the court of appeals' decision here." Pet. at 7. This Court's decision in *Hartman* obviously controls this case and, as to the relevant point, needs no clarification. Petitioners

are simply hoping for a new pronouncement that they might try to say overrides the earlier decision in this case. That speculation is no basis for a hold. There is *always* a chance that this Court will, in its decisions, explain or add color to a prior holding in a way that "potentially" calls into question the rationale for other decisions. If that happens, the courts below are in a position to apply any new law in further proceedings in pending cases. A grant of certiorari in one case does not mean that all pending cases must grind to a halt until litigants see if there is anything new which might impact their cases.

II. PETITIONERS' RIGHTS WILL BE FULLY PRESERVED EVEN WITHOUT A HOLD

The primary reason why this Court sometimes holds petitions for certiorari is that, otherwise, the decisions below would become final, such that even a favorable ruling in a granted case raising the same issue would provide no basis for relief. To avoid that unfairness, the Court occasionally holds petitions when it anticipates that its imminent decision in another, granted case might potentially affect their outcomes.

That rationale has no force here. This petition arises from an *interlocutory*, pre-trial decision. Therefore, if this Court denies the petition, the effect would be the resumption of proceedings in the district court—not final termination of the case. As such, should *Reichle* (unexpectedly) say something that bears upon the issues litigated in this case, the Inspectors will have ample opportunity to raise the matter and seek appropriate relief from the courts below long before this case proceeds to final judgment.

III. HOLDING THIS PETITION WOULD FURTHER DELAY THE LITIGATION, CAUSING UNDUE PREJUDICE

While denying the petition would not affect Petitioners' rights should, against all odds, this Court say something in *Reichle* that implicates their claim for immunity, holding the petition would cause further, unnecessary delays in a case that has already entered its third decade. Acceding to the hold request would only facilitate a delay strategy that Judge Henderson strongly condemned in her concurring opinion below. "To say that his has not been the government's finest hour is a colossal, and lamentable, understatement." Pet. App. 22a.

When litigation goes on for many years—in this case *over twenty years*—the "plaintiff's case grows stale. Witnesses vanish, memories dim, and the record grows more distant and difficult to retrieve with every day." *Rohr Indus., Inc. v. Wash. Metro. Area Transit Auth.*, 720 F.2d 1319, 1326 (D.C. Cir. 1983). Civil litigants must be afforded "a meaningful opportunity to be heard in . . . court[]," *Tennessee v. Lane*, 541 U.S. 509, 532 (2004), and this due-process right is violated by inordinate delay of "an ordinary citizen's timely vindication of his or her most fundamental right against alleged abuse of power by governmental officials," *Jones v. Clinton*, 72 F.3d 1354, 1365 (8th Cir. 1996) (Beam, J., concurring), *aff'd*, 520 U.S. 681 (1997).

Given the decades that have passed since Moore first filed his claims in 1991, this case is quickly approaching the point where his right to vindicate his interests are no longer meaningful. Two of the Postal Inspectors have died during the pendency of this

litigation, *see* Pet. App. 4a n.3, as have at least four other important witnesses. Those who are still alive will have to testify about events that are now more than two decades old. This stunning delay—caused by the Inspectors' insistence on briefing and re-briefing the same issues on multiple, successive motions and interlocutory appeals—is what prompted Judge Henderson to concur separately below to express her "dismay over the herculean effort the plaintiff has had to expend simply to get his day in court." Pet. App. 22a.

The Inspectors now seek, through this petition, to delay Moore's day in court even longer. They successfully moved the district court to stay all proceedings (including so much as a scheduling conference) pending the filing of their petition, and have since moved to extend this stay pending disposition of the petition. [Dkt. Nos. 366, 373.] If this Court agrees to hold the petition, proceedings in the trial court would thus be delayed at least until the Court decides *Reichle*, probably in June 2012. Given the obscure basis for a hold, Petitioners would presumably follow that with a request for vacatur of the decision below for reconsideration based on *Reichle*. Such a "GVR" would, in turn, likely necessitate recall of the mandate and supplemental briefing before the D.C. Circuit, which does not sit during the summer months. Following that court's reconsideration, Moore—who is now in his seventies—would have to wait for the mandate to issue to the district court, and then for a status conference—all of which could be delayed even further by Petitioners' filing of another certiorari petition with this Court. At best, Moore will be in a position to resume pretrial proceedings in early 2013,

with a possible trial date set later that year—by then nearly a quarter century after he was acquitted of all charges in November 1989.

This delay would cause substantial prejudice to Moore, and there is simply no reason for it. The far more sensible course is to deny this petition, and in the unlikely event that *Reichle* clarifies a point of significance for this case, the Inspectors can seek appropriate relief from the courts below.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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