No. 13-103

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 U.S. Postal Service agents who intentionally retaliated against Respondent's First Amendment-protected speech by inducing his baseless prosecution are entitled to immunity so long as the prosecution was "arguably" supported by probable cause.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

INTRODUCTION

As reports have emerged in recent months that the IRS apparently subjected certain groups applying for nonprofit status to far more rigorous screening and review based upon their political views, the condemnation of such targeting has been essentially unanimous. Even the President called the alleged acts "outrageous." *Obama: Alleged IRS Political Targeting 'Outrageous'*, CNN.COM (May 14, 2013). Everyone understands, at the most basic level, that discriminatory law enforcement based on political expression is fundamentally wrong.

Yet petitioners here, officials at the U.S. Postal Service (the "Postal Inspectors"), urge this Court to grant review to hold that such behavior is *perfectly constitutional*. Their position—unsuccessfully pressed before this Court seven years ago and rejected unanimously by the panel below—is that the First Amendment allows officials to discriminate based on speech when enforcing the law, so long as there is some objective basis for the charges they do pursue. Only *baseless* retaliatory actions violate the Constitution, they say, and therefore even *arguably* baseless retaliation is protected by qualified immunity. In other words, it does not violate the First Amendment to stop only Republicans or only Communists for broken tail-lights—and so even a baseless stop pursuant to such a policy is immune so long as someone could reasonably have thought that the politically targeted driver had a broken tail-light.

Based on that "outrageous" (to use the President's term) legal argument, the Inspectors ask this Court, for the third time in ten years—albeit represented by

private counsel this time, not the Solicitor General—to grant immunity. Certiorari should be denied.

At the outset, in light of procedural history omitted by petitioners, this petition is jurisdictionally out-of-time. And even if it had been timely filed, it would not have warranted this Court's attention. Contrary to the petition, the Circuits have not divided over the question presented. *No* Circuit, since this Court set forth the framework for a retaliatory inducement-to-prosecution claim in *Hartman v. Moore*, 547 U.S. 250 (2006), has held that merely "arguable" probable cause suffices to entitle the inducer to qualified immunity. Indeed, that question does not even appear to have arisen in *any* case other than this one, indicating that this is far from the type of recurring legal issue that deserves this Court's review. Moreover, the notion that it is *constitutional* to pursue charges based on an individual's protected expression is plainly wrong; it implicitly conflicts with this Court's resolution of the Inspectors' immunity claims in *Hartman* and with decades if not centuries of jurisprudence.

As if all of that were not reason enough to deny review, this case has now been mired in *pretrial* proceedings for more than twenty years; numerous witnesses have died during its pendency; and the trial that has finally been scheduled by the District Court (for October 2013) will eventually have to occur *whatever* this Court decides, due to Respondent's overlapping Federal Tort Claims Act claim against the Government, which has no immunity defense. This Court should not delay that trial yet another year or more, further undermining Respondent's practical ability to vindicate his constitutional rights.

STATEMENT OF THE CASE

In 1982, Respondent William G. Moore, Jr., was recruited to turn around Recognition Equipment Inc. ("REI"), a pioneer in optical-scanning technology that had fallen on hard times and was flirting with bankruptcy. C.A.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's success was widely acclaimed, with *Forbes Magazine* opining that "[f]ew [corporate] turnarounds owe so much to a single executive." C.A.3331-32.

Moore's seemingly unlimited business prospects were then destroyed by the Postal Inspectors, who subjected Moore to years of baseless investigation and prosecution in retaliation for his criticism of the Postal Service ("USPS") and its senior management. While Moore was easily acquitted on motion at the end of the Government's criminal case against him, his company and career were ruined. C.A.3338.

1. Moore's Lobbying and Public Criticism of the USPS. The events leading to the Inspectors' retaliation against Moore revolved around public debate over the Postal Service's decision to automate its mail sorting system with foreign-made, single-line optical scanning devices that required the use of nine-digit ZIP codes. Pet.App.45a; C.A.209-11, 3333-34. Moore and REI were at the epicenter of this political controversy. Moore thought the decision to rely upon single-line scanners was unsound and aggressively took his case to Postmaster General

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

Bolger, the USPS Board of Governors, Congress, the media, and the public—as he was constitutionally entitled to do. Pet.App.10a, 45a; C.A.210-11, 3334-35. USPS officials were angered by Moore's criticisms, came to view Moore as the enemy, and, after political pressure forced the USPS to make a "mid-course correction" and employ multi-line scanners (Pet.App.46a; C.A.210-11)—thus proving Moore had been right all along—were determined to prevent Moore and REI from obtaining the scanner contract. C.A.208-11, 249, 3334-35. Bolger and others warned Moore to "back off" his criticisms (C.A.3334) and "get the media and Congressmen off of our … back" (C.A.6554). The official responsible for scanner procurement told REI it would never get any USPS business so long as Moore was in charge. C.A.208-09.

2. 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. In December 1985, they prepared an "Investigative Strategies" memo falsely labeling Moore and REI as "coconspirators in a scheme to defraud the U.S. Postal Service" (C.A.2061-62), even though, as Petitioner Edwards later conceded in deposition testimony, there was no evidence that any such conspiracy existed. C.A.248, 2212-15, 2223.

Pursuant to their strategy, the Inspectors scrutinized Moore's and REI's activities with no regard for the First Amendment. C.A.248-50. They issued subpoenas for records of Moore's political contributions, "meetings with United States Congressmen," "articles placed with trade

publications and reporters," and "interviews with journalists and reporters," C.A.6376-84, and looked for "dirt" on REI's congressional supporters, C.A.248-52. *See also* Pet.App.16a n.4.

3. The Voss/Gnau Kickback Scheme. In late February 1986—months *after* falsely labeling Moore a "coconspirator" and beginning to investigate his 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"), the reputable consulting firm REI had hired through an "entirely normal" process to assist with its lobbying efforts. *United States v. Recognition Equip. Inc.*, 725 F. Supp. 587, 593 (D.D.C. 1989); *see also* Pet.App.11a. The Inspectors learned that Voss and his assistant, along with Gnau and two other GAI officials, were involved in the scheme. Pet.App.46a; C.A.218-19. Three conspirators pleaded guilty and two received immunity for cooperation. Pet.App.11a; C.A.183-84.

Though lacking any evident reason to protect him, none of the conspirators ever implicated Moore. Pet.App.66a. Employing "extraordinary," improper pressure tactics, *id.*, the Inspectors repeatedly urged the conspirators to do so, but again and again they told the Inspectors that Moore was not involved. C.A.227-28, 238-39, 256-57. Several conspirators told the Inspectors they had actively concealed the conspiracy from Moore. C.A.227. Voss, the ringleader, told the Inspectors there was "no way Moore knew" anything improper was occurring (C.A.6304-05), and, as the United States found especially significant at the time, Voss again

exonerated Moore "after great reflection while sitting in a federal prison camp" (C.A.6910). *See also* Pet.App.66a. Faced with this reality, the Inspectors effectively conceded in a contemporaneous internal writing that they lacked probable cause for Moore's prosecution because their evidence showed that "MOORE … individually" was "not … aware of Voss' corrupt actions and the exchange of confidential USPS information." C.A.3296.

4. Petitioners' Retaliatory Efforts to Procure Moore's Indictment. Having admittedly failed to find any evidence tying Moore to the kickback scheme, the Inspectors went to bizarre lengths and resorted to deceptive tactics to obtain Moore's indictment and disqualify REI from the procurement competition. On this point, the Court of Appeals recognized that Moore has developed "evidence of retaliatory motive … close to the proverbial smoking gun." Pet.App.68a.

The Inspectors candidly acknowledged in writing that their primary reason for their dogged pursuit of Moore and REI was Moore's effort to reverse, through lobbying and public criticism, the decision to employ single-line scanners. In their "Arguments for Indicting the Corporation" memorandum, the Inspectors' *first* justification for indicting REI, which they described as being 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," including by "stag[ing] questions and testimony before Congress [and lobbying for] Frost amendment to freeze USPS appropriations bill." C.A.3294.

Likewise, in a memorandum summarizing their evidence, the Inspectors treated Moore's lobbying and

media activities as criminal. They wrote that Moore's alleged fraudulent intent was "evident" in the fact that "at Moore's … suggestion and with [his] substantial input relative to its drafting, Congressman Frost proposed 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.3164. They similarly claimed Moore had fraudulent intent because "REI continued to undermine the competitive testing program via the media and Congress." C.A.3164.

The Inspectors aggressively lobbied the U.S. Attorney's office to pursue Moore's indictment. The Chief and Deputy Chief of Special Prosecutions concluded that the evidence that Moore and REI had acted criminally or knew about the payments to Voss was "not particularly strong," and the case against Moore especially weak. C.A.6908-11. Nonetheless, aided by a rogue AUSA who admitted in the presence of the Inspectors that "the merits of the case … did not concern him" (C.A.6693), the Inspectors continued to apply pressure, and, as a result of this "unusual prodding," Pet.App.67a, the U.S. Attorney's office relented and approved the prosecution. C.A.255-57; *see also* Pet.App.66a-67a.

Aware they lacked probable cause, the Inspectors "behaved … as if their case needed bolstering." Pet.App.68a. They went to extraordinary, improper lengths to keep the grand jury from hearing witnesses say that Moore was innocent, in violation of Justice Department guidelines requiring disclosure 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 ordinary questioning, but by reading statements the Inspectors scripted for them to prevent the witnesses from saying they never told Moore or anyone else at REI about the payments to Voss. Pet.App.7a, 31a; C.A.228-31. Contrary to USPS 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.243-45. The Inspectors 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 Voss was receiving money from Gnau—and then presented this "opinion" to the grand jury as evidence. C.A.235-41; *see also* Pet.App.66a, 68a. In reliance on this intentionally deceptive presentation of the case, the grand jury indicted Moore and REI, thereby foreclosing REI from obtaining the scanner contract. C.A.7249-7302.

5. Moore's Acquittal. With their retribution complete, the Inspectors' house of cards collapsed. After the Government presented its case for six weeks, the district court granted motions for acquittal, holding that there was a "complete lack of direct evidence to suggest that [Moore] knew of the illegal payoff scheme." *Recognition Equip.*, 725 F. Supp. at 596. The court emphasized that "[m]uch of what the government characterizes as incriminatory evidence is not persuasive of guilt when viewed in its full context," and, "[i]n fact, some of the government's evidence is exculpatory and points towards innocent conduct." *Id.* Consequently, even when viewed most favorably to the Government, the evidence did not

"support a reasonable inference that [Moore] knew" of the conspiracy he had allegedly joined. *Id.* at 589.

6. Moore's Lawsuit. Despite his acquittal, Moore was financially devastated and professionally destroyed by the wrongful indictment and prosecution. He filed this lawsuit in 1991, seeking compensation for his injuries from the Postal Inspectors and the prosecutor under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and from the United States under the Federal Tort Claims Act ("FTCA"). Pet.App.47a. The claim against the prosecutor was dismissed on the basis of absolute immunity, and the FTCA claim is awaiting trial.

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 immunity. The District Court denied summary judgment, and the D.C. Circuit affirmed, holding that the Inspectors were not immune because it has long been clearly established, at least in the D.C. Circuit, that the Constitution prohibits all prosecutions brought to retaliate against speech, not only ones lacking in probable cause. Pet.App.55a-57a. The Court also held that Moore was not required to prove the absence of probable cause as an element of his *Bivens* claim. Pet.App.58a-59a.

This Court granted review of that decision in 2005. In their briefing, the Inspectors contended, as they do here, that the First Amendment does not prohibit retaliatory prosecutions backed by probable

cause, Br. for Pet'rs at 15-16, 35-36, *Hartman*, 547 U.S. 250, and argued in the alternative that "[e]ven if the First Amendment were violated …, a cause of action for damages under *Bivens* should not lie if probable cause existed," *id.* at 17.

In response, this Court 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.

7. The Initial Decision Below. After protracted proceedings on remand, the District Court again denied summary judgment, finding again that there are material issues of fact for the jury on the issue of probable cause. Pet.App.30a. On July 15, 2011, a unanimous panel of the D.C. Circuit affirmed. Pet.App.9a. The Court of Appeals squarely rejected the Inspectors' principal argument—namely, that, even if Moore's prosecution was unsupported by probable cause, they were entitled to immunity if the prosecutor *arguably* had probable cause to pursue charges. Pet.App.22a. "Arguable probable cause,"

used to measure whether officers acted reasonably in the Fourth Amendment context, has no relevance here, the panel explained, because *Hartman*'s no-probable-cause requirement is a special rule of proof relative to causation that has no bearing on whether the officers violated their clearly established constitutional duty to refrain from retaliating against Moore. Pet.App.23a-29a. That is, an officer clearly violates the Constitution by inducing prosecution for retaliatory motives, whether or not a prosecution *could have been* pursued for legitimate reasons. The latter just affects whether the plaintiff may recover damages, because "probable cause" tends to indicate that the prosecutor would have pursued charges even absent the inducer's retaliatory acts. *See id.*

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.29a. 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 denied the Inspectors' request for en banc review. Pet.App.5a.

8. The GVR in Light of *Reichle*. Several months after the panel decision, this Court granted certiorari in *Reichle v. Howards* to review a decision denying qualified immunity to two Secret Service agents who,

acting *with* probable cause, arrested a protestor, allegedly in retaliation for First Amendment conduct. 132 S. Ct. 2088, 2091-92 (2012). A month later, the Inspectors filed a certiorari petition, asking the Court to hold their case for *Reichle*. The petition speculated that *Reichle* might "clarify [the] decision in *Hartman* and potentially call into question … the court of appeals' decision here." Pet. for Cert. at 7, *Hartman v. Moore*, 132 S. Ct. 2740 (2012) (No. 11-836).

Reichle involved the arrest of the respondent, Steven Howards, during a visit by Vice President Cheney to a Colorado mall on June 16, 2006. *Reichle*, 132 S. Ct. at 2091. Howards approached Cheney, criticized his policies in Iraq, and "touched the Vice President's shoulder as the Vice President departed." *Id.* When a Secret Service agent sought to question Howards, he refused and, untruthfully, "denied assaulting the Vice President," at which time he was arrested. *Id.* at 2091-92. Howards brought suit against two Secret Service agents, alleging that they had arrested him for criticizing Cheney. *Id.* at 2092. By the time the case reached the Court, it was undisputed that the agents had probable cause to arrest Howards, based on his false statement denying touching Cheney. *Id.*

Ultimately, this Court resolved the case without answering any questions of law. Rather, it held that the agents were immune because, "at the time of Howards' arrest," it was not "clearly established" that the First Amendment prohibits "a retaliatory arrest that is supported by probable cause." *Id.* at 2093. In particular, the Court explained that *Hartman*—which had preceded the events at issue—had "injected uncertainty into the law governing

retaliatory arrests." *Id.* at 2096. *Hartman* created confusion, the Court reasoned, over whether its no-probable-cause requirement extends to retaliatory arrest claims, as well as over whether a retaliatory prosecution supported by probable cause "violates the First Amendment." *Id.* at 2096 & n.6. Without resolving either question, the Court concluded that, as a result of the uncertainty, it was not clearly established "when Howards was arrested" that "an arrest supported by probable cause could give rise to a First Amendment violation." *Id.* at 2097.

Once *Reichle* was decided, this Court granted the Inspectors' petition, vacated the D.C. Circuit's opinion, and remanded the case for reconsideration in light of *Reichle*. Pet.App.4a.

9. Decision on Remand. After supplemental briefing and argument, the D.C. Circuit held that "nothing in *Reichle* changes [its] conclusion that the absence-of-probable-cause requirement is not 'an element of a First Amendment retaliation violation.'" Pet.App.2a. *Reichle* "expressly declined" to resolve the question about *Hartman* that the panel's earlier decision answered. *Id.* Moreover, the law was clear in the D.C. Circuit when the Inspectors acted in 1988, and it was impossible for *Hartman*, not decided until 2006, to have led them in 1988 to think that a probable-cause-backed retaliatory prosecution was lawful. *Id.* While Judge Kavanaugh dissented, he did not reject the panel's interpretation of *Hartman* in the initial opinion (which he had joined). Rather, he reasoned that the Inspectors were immune because the law now is "not clear." Pet.App.3a.

The court thus issued a judgment reinstating its prior judgment, remanding "for trial on the merits."

Pet.App.29a. The court also took the unusual step of directing the clerk to issue the mandate immediately, which the clerk did that same day. D.C. Cir. Docket, No. 10-5334 (Jan. 15, 2013).

Although, under Circuit rules, issuance of the mandate barred a rehearing petition, the Inspectors filed simultaneous motions to recall the mandate and grant rehearing en banc. On April 24, 2013, after requesting and receiving a response from Moore, the court denied both motions in a per curiam order.

10. Proceedings in the District Court. On remand, the District Court scheduled trial to begin on October 15, 2013. The court denied without prejudice the Inspectors' motion to delay the trial pending the disposition of this petition. *See* D.D.C. Docket, No. 92-cv-2288 (Aug. 15, 2013).

REASONS FOR DENYING THE PETITION

The Postal Inspectors contend that, under this Court's decision in *Hartman*, it does not violate the First Amendment to retaliate against an individual's protected speech by inducing a criminal prosecution against him, unless that prosecution was objectively baseless. Accordingly, even if that prosecution was in fact baseless, qualified immunity attaches so long as probable cause was theoretically "arguable." The D.C. Circuit unanimously rejected this argument.

For five reasons, certiorari should be denied. *First*, the petition was untimely filed and therefore is jurisdictionally barred, because the en banc petition below was itself untimely in light of the panel's immediate issuance of the mandate. At the very least, this presents a serious vehicle problem that could prevent the Court from reaching the merits. *Second*, there is no conflict among the Circuits. No

court has held that "arguable probable cause" suffices under *Hartman* to trigger immunity on a retaliatory inducement-to-prosecute claim. *Third*, the question presented is extremely narrow and rarely arises, as illustrated by the fact that Petitioners cannot identify a *single* other case since *Hartman* raising this fact pattern. In most retaliation cases, probable cause is present and itself defeats the claim. *Fourth*, the decision below is correct; the First Amendment cannot possibly tolerate selective enforcement of the law in retaliation for protected speech, even if (as *Hartman* held) plaintiffs cannot always recover money damages in such cases. *Fifth*, and finally, this is the wrong case in which to review this question, given its long history and the fact that a trial will need to occur *regardless* of what this Court holds.

I. THE INSPECTORS' PETITION IS UNTIMELY, AND SO THIS COURT LACKS JURISDICTION

A petition for certiorari must ordinarily be filed "within ninety days after the entry" of the judgment below. 28 U.S.C. § 2101(c); Sup. Ct. R. 13.1. The ninety-day period begins to run "from the date of entry of the judgment or order sought to be reviewed," except that "if a petition for rehearing is timely filed," or if "the lower court appropriately entertains an untimely petition for rehearing or *sua sponte* considers rehearing," the ninety-day period does not begin until "the date of the denial of rehearing." Sup. Ct. R. 13.3.

Because the judgment below was entered on January 15, 2013 (Pet.App.1a), the Inspectors' certiorari petition was due—absent a "timely filed" or "appropriately entertained" rehearing request—ninety days later, *i.e.*, in mid-April. The Inspectors

note that the Court of Appeals denied rehearing on April 24, 2013. Pet.2; Pet.App.73a-74a. But their petition for rehearing was neither "timely filed" nor "appropriately entertain[ed]" and so did not extend their time for filing. The certiorari petition is thus several *months* late, and is jurisdictionally barred.

Ordinarily, the D.C. Circuit allows rehearing petitions to be filed within forty-five days after entry of judgment where, as here, the United States or any of its officers are parties. Fed. R. App. P. 40(a)(1). However, that time may be "shortened … by order." *Id.* One way in which the court may shorten the time for filing a rehearing petition is by issuing its mandate early. The "ordinar[y]" practice of the D.C. Circuit (and other Circuits) is to withhold issuance of the mandate until seven days after any petition for rehearing has been resolved. D.C. Cir. R. 41(a)(1). However, the court may order the "expedited issuance of the mandate for good cause shown." *Id.* "Issuance of the mandate formally marks the end of appellate jurisdiction." *Johnson v. Bechtel Assocs. Prof'l Corp.*, 801 F.2d 412, 415 (D.C. Cir. 1986) (per curiam). Accordingly, when a panel orders that its mandate issue forthwith, that "reduce[s] to zero the period before issuance of the mandate, and necessarily the period for petitioning for rehearing." *Id.* In such a case, "[b]ecause the immediate issuance of the mandate preclude[s] a petition for rehearing," the "sole alternative" available to a displeased litigant is "a motion to recall the mandate." *Id.* at 416; *accord N. Cal. Power Agency v. NRC*, 393 F.3d 223, 224 (D.C. Cir. 2004); *Boston & Maine Corp. v. Town of Hampton*, 7 F. 3d 281, 282-83 (1st Cir. 1993).

Here, the D.C. Circuit panel ordered its mandate to issue immediately, and the mandate did so issue. Accordingly, under Circuit law, a rehearing petition was "precluded" as untimely. *Johnson*, 801 F.2d at 416. The en banc petition that the Inspectors nevertheless filed was therefore not "timely filed," Sup. Ct. R. 13.3, and so did not extend the time for filing a certiorari petition.

Nor did the Circuit "appropriately entertain[]" the Inspectors' petition. *Id.* It simply denied it, in a standard order, with no judge having even requested a vote. Pet.App.73a; *cf. Coleman v. Thompson*, 501 U.S. 722, 740-44 (1991) (assuming that unexplained denial of appeal was based on timeliness grounds where untimeliness was clear); *Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991). It also denied the Inspectors' motion to recall the mandate, which means that the court *could not have* "appropriately entertain[ed]" the petition—as it had no jurisdiction to do so. *N. Cal. Power*, 393 F.3d at 224; *Johnson*, 801 F.2d at 416; *Boston & Maine*, 7 F. 3d at 282.

This Court's few decisions construing § 2101(c) and Rule 13.3 confirm that the Inspectors' petition is barred. In *Young v. Harper*, 520 U.S. 143 (1997), petitioners had sought and obtained leave from the court of appeals to file an untimely rehearing petition *before the mandate had issued*. *Id.* at 147 n.1. Here, by contrast, the Inspectors never received leave from the D.C. Circuit to file a late petition; they asked the court to restore its jurisdiction by recalling its mandate, but that relief was denied, and the court never otherwise authorized or gave its imprimatur to the Inspectors' belated filing (nor, again, could it have done so without first recalling the mandate).

Similarly unhelpful to the Inspectors is *Hibbs v. Winn*, 542 U.S. 88 (2004), in which the lower court had "recalled its mandate and ordered the parties to brief the question whether the case should be reheard en banc." *Id.* at 97. The time for filing a certiorari petition was extended, this Court ruled, while the court, appropriately re-vested with jurisdiction, was "considering, on its own initiative, whether rehearing should be ordered." *Id.* at 98. By contrast, the D.C. Circuit did *not* recall its mandate and thereby restore its jurisdiction even though the Inspectors asked it to. Consequently the court cannot be deemed to have been considering whether to grant rehearing—that question was never properly before it.

This jurisdictional bar to consideration of the Inspectors' petition is, at the least, a substantial vehicle problem counseling in favor of denial. And, significantly, because the petition is interlocutory, denial does not mean that the Inspectors may never receive this Court's review (for the third time). It simply means that they will have to await a final judgment against them—if that comes to pass—and then file a *timely* certiorari petition therefrom.

II. NO COURT HAS CONSTRUED *HARTMAN* AS ALLOWING IMMUNITY ON A RETALIATORY PROSECUTION CLAIM BASED ON MERELY "ARGUABLE" PROBABLE CAUSE

In *Hartman*, this Court decided that a plaintiff alleging retaliatory inducement-to-prosecution must prove that the prosecution was objectively baseless—lacking in "probable cause"—to recover damages. *Hartman*, 547 U.S. at 262, 265. Here, the question is whether that no-probable-cause rule is a function of the First Amendment itself—meaning that an official

does not even violate the Constitution by retaliating against someone if the action *could have* been taken for legitimate reasons—or whether the rule is simply how *Bivens* plaintiffs must show that the retaliation actually caused their injury, *i.e.*, that the defendants' unconstitutional actions induced the prosecutor to bring charges that he otherwise would not have brought. The only practical difference between these two distinct rationales for *Hartman*'s rule is that, if "no probable cause" is an element of the constitutional violation itself, then an official who retaliates will not only be excused from liability if there was "probable cause" for the charges he induced, but may also be entitled to immunity so long as a reasonable officer could reasonably (albeit mistakenly) have thought there was probable cause, *i.e.*, if probable cause even *arguably* existed.

Below, the D.C. Circuit panel unanimously agreed that *Hartman* was structuring the causation aspect of the constitutional *tort*, not radically revising the constitutional *right*. Pet.App.24a-25a. Petitioners' principal basis for urging certiorari is an alleged conflict among the Circuits on this issue of *Hartman*'s meaning. The Inspectors claim that the Second, Fifth, and Tenth Circuits disagree with the decision below and hold that the First Amendment is not violated by inducement-to-prosecution that is motivated by retaliatory animus but could objectively be supported by probable cause, such that immunity is available on a showing of "arguable" probable cause. Pet.17-21. This conflict is imagined. In fact, *no* Circuit has understood *Hartman* to immunize officials based merely on arguable probable cause.

A. Of the five allegedly conflicting appellate cases, *three* were decided *before* this Court's *Hartman* decision. *See Mozzochi v. Borden*, 959 F.2d 1174 (2d Cir. 1992); *Magnotti v. Kuntz*, 918 F.2d 364 (2d Cir. 1990); *Keenan v. Tejeda*, 290 F.3d 252 (5th Cir. 2002). Indeed, these *same* cases were cited by the Government in its certiorari petition and briefing in *Hartman* itself; *Keenan* and *Mozzochi* were even cited in the Court's *opinion*. 547 U.S. at 255-56.

It makes no sense to argue that cases predating *Hartman* can "conflict" with the D.C. Circuit's interpretation of that case. *Hartman* fundamentally reshaped the landscape of retaliatory inducement law by "structur[ing]" the *Bivens* cause of action to require proof of the absence of probable cause. *Id.* at 264-66. Cases decided *before* that seminal decision cannot show that the lower courts are *now* divided over how to evaluate these claims, or show a conflict over the proper understanding of *Hartman*'s rule.

B. The Inspectors also cite a post-*Hartman* case from the Second Circuit, *Fabrikant v. French*, 691 F.3d 193 (2d Cir. 2012). But the question whether "arguable" probable cause suffices for immunity was not presented in *Fabrikant*. Rather, the officers there were not liable because *actual* probable cause existed, which suffices on any reading of *Hartman*.

In *Fabrikant*, the plaintiff had been charged with animal cruelty; the court in the criminal proceeding denied a motion "to dismiss all charges for lack of probable cause." *Id.* at 201. A jury nonetheless acquitted, and the plaintiff thereafter sued officials for, *inter alia*, retaliation in violation of the First Amendment. The district court granted summary judgment to the officials, as the record "allowed for no

conclusion other than that defendants had probable cause." *Id.* at 204. On appeal, the Second Circuit agreed, observing that "[t]he existence of probable cause will defeat a claim of malicious prosecution … [and] will also defeat a First Amendment claim that is premised on the allegation that defendants prosecuted a plaintiff out of a retaliatory motive." *Id.* at 215. The plaintiff's claims thus "fail[ed] because defendants had probable cause to believe Fabrikant committed animal cruelty." *Id.* at 216.

The *Fabrikant* decision was therefore nothing more than a straightforward application of *Hartman*, which holds that a retaliatory inducement claim fails if the plaintiff cannot show absence of probable cause. *See* 547 U.S. at 265-66. The case did not implicate the question decided below, *i.e.*, whether immunity is available if probable cause did *not* exist but could "arguably" have been thought to exist.

The Inspectors rely on a single sentence from *Fabrikant*, which quotes *Mozzochi*'s statement that there is no "right under the First Amendment to be free from a criminal prosecution supported by probable cause." 691 F.3d at 215 (quoting *Mozzochi*, 959 F.2d at 1180). But an offhand remark in a case where the subtle distinction between no-probable-cause as a constitutional element versus as a tort element made no difference cannot seriously be seen as conflicting with the D.C. Circuit's careful analysis of that distinction where it *did* matter, which the Second Circuit did not cite or acknowledge.

C. The only other post-*Hartman* appellate case that the Inspectors rely on is *Nielander v. Board of County Commissioners*, 582 F.3d 1155 (10th Cir. 2009), reflecting just how far they have to stretch to

allege a circuit split here. The *Nielander* decision has nothing at all to do with the question presented. It granted immunity because it was not clear that the plaintiff's speech (for which he had been allegedly retaliated) was even constitutionally protected.

In *Nielander*, the Tenth Circuit explained that any First Amendment retaliation claim has at least three elements, including that the plaintiff "was engaged in constitutionally protected activity." *Id.* at 1165. But because a "reasonable officer could have thought Mr. Nielander's speech was unprotected," *id.* at 1167, the defendant could not be held liable for retaliating against that speech, *id.* at 1169. The decision thus had nothing to do with probable cause, "arguable" probable cause, or whether retaliation against *clearly* protected speech can ever be constitutional. Indeed, *Nielander* did not even cite *Hartman*. The case is thus completely irrelevant to this petition.

D. Given that the appellate decisions do not reveal any disagreement over the meaning of *Hartman*, the Inspectors feel the need to bolster their petition with district court decisions. Pet.20. But even these do not conflict with the decision below.

In *Posey v. Swissvale Borough*, No. 2:12-cv-955, 2013 WL 989953 (W.D. Pa. Mar. 13, 2013), the court found that the First Amendment retaliation claim failed because "there was probable cause to charge Mr. Posey with the false reporting of a crime." *Id.* at *9. Thus, because *Hartman* requires the plaintiff to "plead and prove a lack of probable cause," *id.* at *8, summary judgment was granted. It was not clear whether probable cause existed for the second charged count, but the court found that uncertainty over whether no-probable-cause must be proved for

each count sufficed for immunity. *See id.* at *10. That, of course, is not the question presented here.

In *Dowling v. City of Three Rivers*, No. 1:11-cv-556, 2012 WL 5876517 (W.D. Mich. Nov. 20, 2012), not only was it clear that "[p]robable cause existed for the arrests," but there was also "no evidence beyond Plaintiffs' bare assertion that the charges were retaliatory." *Id.* at *5. This is a far cry from the "smoking gun" evidence of "retaliatory motive" here. Pet.App.68a

And in *Leonard v. Pryne*, No. 1:07-cv-283, 2008 WL 2557248 (S.D. Ohio June 24, 2008), similarly, the plaintiff did not have "sufficient evidence to prove a want of probable cause" and lost for that reason. *Id.* at *10 (citing *Hartman*, 547 U.S. 250).

* * *

In sum, there is no conflict among *any* lower courts on the question presented. No court since *Hartman* has held that "arguable" probable cause suffices for immunity on a retaliatory inducement claim. The Inspectors' cited cases do not identify a conflict; many do not even cite *Hartman*, and the others were resolved on a conventional application of its rule. Review is simply unwarranted given that no court has disagreed with the D.C. Circuit's understanding of *Hartman*, or even had opportunity to do so.

III. THE QUESTION PRESENTED IS NARROW AND RARELY MATTERS IN PRACTICE

Not only is there currently no conflict on this issue; there is not likely to be one. The difference between treating *Hartman*'s no-probable-cause requirement as a constitutional ruling versus as a causation test has not mattered, and will not matter, in all but the

most unusual of cases. (Indeed, it may not matter even here. *See infra* Part V.A.)

A. The Inspectors submit that "the cases discussed above" attest to the recurring nature of the question presented. Pet.21. As shown, however, not one of those cases even implicated that question. Indeed, the Inspectors cannot identify even a *single* other case since *Hartman* where probable cause was absent but "arguable," such that there was any practical significance to the distinction between no-probable-cause as a rule of constitutional law versus as part of the *Bivens* causation inquiry. This is largely an academic dispute, not a practical one.

Officers are entitled to summary judgment under *Hartman* if there existed *actual* probable cause. Hence the dismissals in *Fabrikant*, *Posey*, and *Leonard*. And for reasons that the Inspectors explain, the existence of probable cause will often be subject to resolution as a question of law. *See* Pet.23 n.5. Moreover, to reach a jury, the plaintiff must plausibly allege retaliatory animus and then adduce sufficient proof to avoid summary judgment. Moore adduced "smoking gun" evidence of animus, Pet.App.68a, but (as *Dowling* shows) that is hardly an "easy" thing to do (Pet.25). The relevance of "arguable" probable cause is thus limited to cases where true probable cause is absent and there is real evidence of retaliatory intent. That is a tiny category.

B. The Inspectors worry that the decision below will be "a recipe for evasion." Pet.25. They suggest that if "arguable" probable cause is not a sufficient basis for immunity, plaintiffs "need only add an allegation that defendants sought to punish their speech" to avoid dismissal of frivolous claims. *Id.*

That is an old and overblown concern. In *Crawford-El v. Britton*, 523 U.S. 574 (1998), this Court spent pages detailing "existing procedures available to federal trial judges in handling claims that involve examination of an official's state of mind." *Id.* at 597. Given those "various procedural mechanisms [that] already enable trial judges to weed out baseless claims that feature a subjective element," the Court found that "judicial revision" of the burden of proof for constitutional tort claims was not warranted. *Id.* at 592-93. Yet the Inspectors here are relying on the same fear of baseless suits to seek "judicial revision" of the *Constitution itself*. And that is *after* this Court in *Hartman* added the no-probable-cause element to the retaliation tort, thus largely ameliorating the concern by incorporating an objective element into the claim.

C. The Inspectors argue that the decision below is important because it "may extend to retaliatory-arrest cases." Pet.24. But this Court in *Reichle* declined to hold that *Hartman*'s no-probable-cause requirement applies in the retaliatory arrest context. *Reichle*, 132 S. Ct. at 2096 ("To be sure, we do not suggest that *Hartman*'s rule in fact extends to arrests."). One can thus hardly claim that the D.C. Circuit's reading of *Hartman* is critically important due to its dubious impact on retaliatory-arrest cases.

D. For some reason, the Inspectors think it is meaningful that Moore filed an *amicus* brief in *Reichle*, urging this Court to clarify that *Hartman* meant what the D.C. Circuit held it meant. Pet.25-26. Obviously this issue matters *to Moore*. It affects whether his trial, already delayed for more than twenty years, may finally take place—or whether he

must await yet another round of qualified immunity motions and appeals. But that does not mean the issue has broad importance beyond this case or that it warrants this Court's attention. It does not.

IV. THE DECISION BELOW IS INDISPUTABLY CORRECT

The Inspectors' argument—unsuccessfully pressed in *Hartman* itself, rejected unanimously by the D.C. Circuit panel below, and not accepted by any other court—is that the Constitution *permits* officers to retaliate against individuals for their protected speech by inducing prosecutions against them, so long as "probable cause" exists for those prosecutions. That outrageous claim is contrary to basic First Amendment jurisprudence and, indeed, foreclosed by any plausible reading of this Court's previous decision in this case.

A. Because it is designed to protect officials who act reasonably, qualified immunity turns on the clarity of the constitutional *right* at issue. *Anderson v. Creighton*, 483 U.S. 635, 638-39 (1987). By contrast, mere "factual controversies" about causation and other elements of a constitutional tort claim are distinct from and irrelevant to qualified immunity. *See Johnson v. Jones*, 515 U.S. 304, 316 (1995); *Losch v. Borough of Parkesburg*, 736 F.2d 903, 907 (3d Cir. 1984) ("lack of probable cause … as an element of plaintiff's substantive … claim" and "qualified immunity defense" are "distinct"). Simply put, an officer's "claim that he did not in fact cause the alleged wrong is not an argument that he is entitled to immunity, but rather … that he is not liable." *Bonitz v. Fair*, 804 F.2d 164, 174 (1st Cir. 1986); *see also McLaughlin v. Alban*, 775 F.2d 389, 391-92 (D.C. Cir. 1985) (per curiam) (recognizing these distinct questions).

Of course, if a plaintiff fails to plead or prove an element of his cause of action (such as causation), then the defendant would be entitled to dismissal or judgment. But the defendant would not be entitled to immunity simply by identifying *doubts* about the element—by showing its existence to be "arguable."

B. In *Hartman*, this Court explained that, while "[o]fficial reprisal for protected speech 'offends the Constitution,'" 547 U.S. at 256 (quoting *Crawford-El*, 523 U.S. at 588 n.10), a *Bivens* plaintiff must also "show a causal connection between a defendant's retaliatory animus and subsequent injury," *id.* at 259. In the unique context of retaliatory inducement of a prosecution, that causal link is especially complex, because "the defendant will be a nonprosecutor, an official, … who may have influenced the prosecutorial decision but did not himself make it." *Id.* at 262. In order to show that the unconstitutionally motivated action *caused* the prosecution, the plaintiff must show that the defendant "induced the prosecutor to bring charges *that would not have been initiated without his urging*." *Id.* (emphasis added). The point is that if the *prosecutor* would have pursued the charges *anyway*, then the *defendant's* retaliatory acts did not matter.

This Court further observed that, in retaliatory prosecution cases, "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." *Id.* at 261. In other words, it is fair to presume that if probable cause existed for a prosecution, then prosecutors would have pursued it, whether or not the defendant had—for improper motives—pressed them to do so. Conversely, if

there was no probable cause, the inducement likely caused the ultimate charging decision.

This Court accordingly determined that "the complexity of causation in a claim that prosecution was induced by an official bent on retaliation should be addressed specifically in defining the elements of the tort," by "requir[ing]" the plaintiff to prove "absence of probable cause" as part of his claim. *Id.* at 265-66. That is, the Court "structur[ed]" the *Bivens* claim to account for unique causation issues posed by this type of claim. *Id.*; *cf. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 286 (1977) ("[A] test of causation … distinguishes between a result caused by [the] constitutional violation and one not so caused").

Applying these holdings to Moore, this Court made clear that the Inspectors were not entitled to immunity, as their conduct violated the "settled" First Amendment rule that government officials may not "subject[] an individual to retaliatory actions, including criminal prosecutions, for speaking out." *Hartman*, 547 U.S. at 256. However, Moore would be required, in order to succeed in his tort claim, to plead, adduce evidence showing, and prove to the satisfaction of a jury that prosecutors lacked probable cause to charge him.

C. These holdings leave no doubt that "arguable" probable cause is irrelevant to the Inspectors' immunity defense. Probable cause goes to whether the Inspectors' acts *caused* Moore's injury, *i.e.*, to the causation element of his claim, not to whether the Inspectors violated Moore's clearly established rights. Everyone knows that it is fundamentally wrong to selectively enforce the law based on one's politics or speech. *See, e.g.*, *Wayte v. United States*, 470 U.S. 598, 608 (1985) ("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"). That alone disposes of the Inspectors' immunity defense.

The court below understood this. As it emphasized, this Court in *Hartman* "identified no … connection" between probable cause and the First Amendment; and it did *not* say that probable cause defined the scope of Moore's First Amendment rights or the Inspectors' concomitant duties to refrain from targeting Moore in retaliation for their exercise, Pet.App.24a, though the Inspectors had urged it to do just that, *see* Br. for Pet'rs at 15-16, 35-36, *Hartman*, 547 U.S. 250 (No. 04-1495). Rather, this Court "introduced a no-probable-cause proof requirement into the remedial framework for recovering in a retaliatory inducement to prosecution suit." Pet.App.24a-25a. This Court determined that presence or absence of probable cause would serve as a sensible proxy for whether the Inspectors' "unconstitutionally motivated" conduct "successful[ly]" induced "the prosecutor's decision to bring the charge." *Hartman*, 547 U.S. at 262, 265. And, as the courts below found, Moore has adduced sufficient evidence to allow a jury to find in his favor on this element.

D. The Inspectors largely attack a straw man, arguing that "animus does not violate the Constitution where the officer would have acted the same regardless." Pet.28. Of course the Inspectors would not have violated the First Amendment had *they* not acted on their retaliatory animus. But they did take numerous concrete actions, motivated by that animus, to induce and facilitate Moore's baseless prosecution, *see supra* pp. 4-8; the sufficiency of the evidence on that score is not disputed. Those actions

violated the Constitution, which is why the Inspectors are not immune. What this case and the no-probable-cause requirement are about is whether the *prosecutor* would have pursued charges notwithstanding the Inspectors' retaliatory inducements. *That* question, while bearing upon Moore's right to damages, has nothing to do with whether the Inspectors acted reasonably or properly, and therefore has nothing to do with immunity.

E. The Inspectors' notion that retaliatory action could actually be *permissible* is not just contrary to long-standing doctrine, but would have dramatic effects well beyond the *Bivens* context. If retaliation is constitutional so long as there exists an objective basis (like probable cause) for the adverse official action, the broad guarantees of the First Amendment are debased: A plaintiff would not even be entitled to an *injunction* were a police department to announce, for example, that it would henceforth pull over all cars with broken tail-lights—but only if a license-plate search revealed that the driver was Republican, or Communist, or, for that matter, of a certain race. In such a case, there would always be probable cause, but such policy would also indisputably be retaliatory or discriminatory, and clearly unconstitutional.

Admitting that such a result could not possibly be right, the Inspectors offer that injunctive relief may still be available under the *Equal Protection* Clause, because the existence of probable cause is concededly irrelevant to that Clause. *See* Pet.29; *see also Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886). That is no answer. Why would the Equal Protection Clause's general policy against disparate treatment be *more* generous than the First Amendment's specific policy

against penalizing *speech* (especially since *neither* provision mentions probable cause)? And if it were, all of the Inspectors' gripes about the evils of rights that turn on subjective motive would simply be shifted from First Amendment claims to Equal Protection claims. Are the Inspectors seriously saying that Moore's suit ought to fail because he did not plead an Equal Protection claim? Or that Moore can avoid the Inspectors' supposed immunity defense simply by repleading that claim on remand? If so, this Court's intervention would be beyond pointless.

F. Finally, the Inspectors tack on an argument that is entirely unrelated to their question presented. They contend that, whatever the scope of *Hartman*, the D.C. Circuit erred because it would not have been clear to a reasonable officer within the D.C. Circuit in 1988 that retaliation where probable cause existed violated the First Amendment. Pet.31-33. The D.C. Circuit has thrice rejected that view of its own law. *See* Pet.App.54a-56a; Pet.App.13a; Pet.App.2a. And there is no serious argument that a question about the meaning of D.C. Circuit law more than twenty-five years ago warrants certiorari; it *literally* has no significance outside this case, especially in light of the substantial changes in the law since that time. This Court does not sit to review Courts of Appeals' analyses of their own precedent, even in qualified immunity cases. *Cf. United States v. Lanier*, 520 U.S. 259, 269, 272 (1997) (clarifying that Circuit precedent may suffice to defeat immunity claim, but remanding for Court of Appeals to reconsider immunity defense under that standard). That is presumably why this Court denied review of that separate question presented in 2005. *See* 545 U.S. 1138 (2005). It should do the same now.

V. THIS CASE IS A POOR VEHICLE FOR RESOLVING THE QUESTION PRESENTED

If all of the above were not enough basis to deny certiorari, this Court should still stay its hand on this interlocutory petition in light of the equities of this long-running litigation. Even if this Court were to grant this case and agree with the Inspectors, a trial on the merits would *still* be necessary—but even further delayed, exacerbating the already-severe prejudice suffered by Moore.

A. Moore has two claims that have been consolidated—one for retaliatory inducement against the Inspectors; the other for malicious prosecution under the FTCA against the United States. The two claims rely on the same basic facts, and there is no immunity defense to an FTCA claim. Accordingly, even if this Court were to grant review and hold that "arguable" probable cause suffices for immunity, a nearly identical trial would still need to be held on the FTCA claim—involving the *same* witnesses testifying about the *same* events. The Inspectors thus have to face the burdens of trial in all events.

Indeed, a trial would be needed even on the *Bivens* claim and even if this Court were to grant certiorari and agree with the Inspectors. At most, the Court could hold that "arguable" probable cause suffices for immunity. But that would still leave the question whether probable cause was even *arguable*, which on this record would have to be sent to the jury. *See, e.g.*, *Walczyk v. Rio*, 496 F.3d 139, 163 (2d Cir. 2007) (sending "arguable probable cause" to jury in Fourth Amendment case); *Kingsland v. City of Miami*, 382 F.3d 1220, 1233 (11th Cir. 2004) (same). While the Inspectors argue that probable cause and "arguable"

probable cause are questions of law, they obviously depend on facts—which here are materially disputed, Pet.App.15a-17a. *Cf. Hunter v. Bryant*, 502 U.S. 224, 228 (1991) (granting summary judgment in Fourth Amendment case given "undisputed facts" as to probable cause).

B. Thus, while denying the petition would not save the Inspectors from a trial—and certainly would not prevent them from seeking review again if and when a final judgment issues—granting it now *would* cause further, unnecessary delays in a case that has already entered its *third* decade. Granting review would facilitate the delay strategy condemned below by Judge Henderson: "To say that his has not been the government's finest hour is a colossal, and lamentable, understatement." Pet.App.29a.

When litigation goes on for so many 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. WMATA*, 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 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," *Jones v. Clinton*, 72 F.3d 1354, 1365 (8th Cir. 1996) (Beam, J., concurring).

Two of the Inspector defendants have died during the pendency of this case, *see* Pet.App.23a n.3, as have at least six other important witnesses, two of whom in the five months since the District Court set a trial date. Those who are still alive will have to

testify about events more than two decades old. This shocking 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 express "dismay over the herculean effort the plaintiff has had to expend simply to get his day in court." Pet.App.29a.

The Inspectors now seek, through this petition, to delay Moore's day in court even longer. The District Court has indicated that it will not hold the scheduled trial if this Court grants review. D.D.C. Docket, No. 92-cv-2288 (Aug. 15, 2013). If the Court grants certiorari, any trial would thus be delayed at least until spring 2014. Whatever this Court rules, the Inspectors would surely find some basis therein to pursue another appeal to the D.C. Circuit, resolution of which could take at least another year. Moore—who is now in his seventies—would then have to wait for the mandate to issue, and then for a status conference to set a new trial date—all of which could be delayed even further by the filing of yet another certiorari petition. At best, Moore will be in a position to obtain a trial date sometime in 2015—by then more than a quarter century after he was acquitted of all charges.

This delay would cause substantial prejudice, and there is simply no reason for it. This petition should be denied, and if the jury holds the Inspectors liable, they can then pursue all appropriate post-trial and appellate relief.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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