No. 11-262

IN THE

# Supreme Court of the United States

VIRGIL D. "GUS" REICHLE, JR., ET AL.

*Petitioners*,

v.

STEVEN HOWARDS

*Respondent*.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Tenth Circuit

**BRIEF OF WILLIAM G. MOORE, JR., AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY**

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## STATEMENT OF INTEREST OF *AMICUS CURIAE* [1]

William G. Moore, Jr., was respondent in *Hartman v. Moore*, 547 U.S. 250 (2006), which held that a plaintiff seeking damages for retaliatory inducement of a prosecution must plead and prove the absence of probable cause for the prosecution. This case asks whether the *Hartman* rule ought to be extended to claims of retaliatory arrest.

Although *amicus* Moore takes no position on that question, he has an interest in promoting the proper understanding of the rule announced in his case, because it continues to govern his still-pending, decades-old suit against the Inspectors of the United States Postal Service who procured Moore's baseless prosecution in retaliation for his public criticism of that agency. The D.C. Circuit has held that Moore's suit is supported by "evidence of retaliatory motive . . . close to the proverbial smoking gun," *Moore v. Hartman*, 388 F.3d 871, 884–85 (D.C. Cir. 2004), *rev'd on other grounds*, *Hartman*, 547 U.S. 250, and that "[w]hether the Postal Inspectors had probable cause is a disputed issue of fact to be decided by the jurors at trial," *Moore v. Hartman*, 644 F.3d 415, 426 (D.C. Cir. 2011). But the Inspectors even now seek to distort this Court's decision in *Hartman*—and to use the pendency of this case—in an attempt to obtain qualified immunity for their misconduct. For reasons

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[1] Counsel for all parties have consented to the filing of this brief. No counsel for a party in this case authored this brief in whole or in part, and nobody, other than *amicus* and his counsel, has made a monetary contribution to its preparation or submission.

explained below, their interpretation of *Hartman* is wrong, would amount to a dramatic departure from settled law, and should not be accepted—especially not in this case, which does not raise the issue.

## SUMMARY OF ARGUMENT

The Court granted certiorari in this case to decide whether a *Bivens* plaintiff alleging retaliatory arrest must satisfy the rule of *Hartman v. Moore*: Must he "plead and prove" the absence of probable cause for the challenged arrest? This special "no probable cause" proof requirement was originally, in *Hartman*, mandated for claims alleging retaliatory inducement of a prosecution.

*Amicus* William G. Moore, Jr., the respondent in *Hartman*, takes no position on whether the rule established there should be extended to retaliatory arrests. But he does have an interest in ensuring that the *Hartman* rule, which continues to govern his still-pending litigation against agents of the U.S. Postal Service, is not mischaracterized. In Moore's case, the defendant officers have tried, thus far without success, to twist the doctrine to create a broad, novel cloak of immunity unjustified by *Hartman*'s holding or reasoning, by contending that officers are entitled not only to judgment *on the merits* if probable cause *existed*, but also to *qualified immunity* if probable cause even *arguably* so existed, *i.e.*, if an officer could have "reasonably but mistakenly" believed that there was probable cause. Yet, as the D.C. Circuit recognized in unanimously rejecting this argument, that consequence does not flow from *Hartman* and would be inconsistent with the purpose and function of qualified immunity.

In arguing for *Hartman*'s extension in this case, Petitioners have, through loose language (perhaps inadvertent), mischaracterized the *Hartman* rule as "effectively confer[ring] qualified immunity from retaliation claims on all criminal investigators and other government actors who urge prosecution, when the prosecution is supported by probable cause." Br. for Pet. at 16–17. That is *not* the correct reading of *Hartman*. However, even a proper understanding of the *Hartman* rule, if extended to retaliatory arrests, would fully support Petitioners' primary argument and require judgment in their favor.

Qualified immunity protects officers who violate constitutional rights that are not clearly established. By contrast, the *Hartman* rule (which arose in a case of retaliatory inducement of a prosecution) requires plaintiffs alleging *clear* violations of constitutional rights—namely, retaliation for protected speech—to satisfy a new, objective element, *viz.*, the absence of probable cause, as a way of overcoming difficulties of proof and weeding out damages claims that are easy to allege, difficult to dismiss, but unlikely to have merit. Probable cause suggests, or so *Hartman* reasoned, that the plaintiff's injuries (in *Hartman*, Moore's prosecution) would have occurred even absent the defendant's unconstitutionally motivated actions (in *Hartman*, the defendants' illegal manipulation of the grand-jury process and other retaliatory acts taken to induce Moore's prosecution): *Well-supported* prosecutions (or arrests) are far less likely to have been caused by forbidden retaliatory animus than ones not supported by probable cause.

All of this is defensible tweaking of the judicially created *Bivens* cause of action, but—contrary to

Petitioners' repeated but unsubstantiated assertions—has nothing whatsoever to do with First Amendment rights or qualified immunity. *Hartman* squarely reaffirmed that retaliation for the exercise of First Amendment rights is impermissible *even if* the adverse action is supported by objective grounds; it held only that damages actions will not be cognizable unless the plaintiff proves the absence of probable cause. Imposition of this additional tort element serves a reasonable policy goal, but in no way changes the long-established constitutional rule that an officer whose actions are actually motivated by retaliatory or discriminatory animus violates the Constitution, whatever their objective basis—and therefore that an officer who is shown to have done so is not entitled to the protection of qualified immunity.

While it should be aware of these implications as it considers extension of *Hartman* to the retaliatory-arrest context, this Court need not address this question now. In this case, probable cause is undisputed, and so if the *Hartman* rule applies, Respondent's *Bivens* suit fails *on the merits*. The question whether qualified immunity would have been available, let alone available upon a lesser showing of "arguable" probable cause, is thus not implicated here, and so need not be resolved.

## ARGUMENT

### I. THE *HARTMAN* RULE PROVIDES NO BASIS FOR QUALIFIED IMMUNITY

In *Hartman v. Moore*, this Court decided that it "ma[de] sense" to structure the cause of action, under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for retaliatory inducement to prosecute, by adding, "as

an element of a plaintiff's case," a requirement that he "plead and prove" the absence of probable cause for his prosecution. 547 U.S. at 265–66. The Court is now considering whether to demand the same of plaintiffs alleging retaliatory *arrest*.

Whether the Court decides to extend the *Hartman* rule or not—a question on which *amicus* takes no position—the "no probable cause" requirement is at most an *element* of the constitutional *tort*, not a *limit* on the constitutional *right*. Requiring a showing of no probable cause does not mean that retaliation is constitutionally permissible if probable cause exists. It means only that probable cause, as an objective standard, is a useful proxy for proving causation and for weeding out likely meritless damages claims. As *Hartman* reaffirmed, *id.* at 256, the constitutional standard remains focused on whether the official acted with a retaliatory motive.

As such, while probable cause might be grounds to dismiss a *Bivens* suit (like this one) *on the merits*, it does not follow that probable cause, let alone "arguable" probable cause, provides grounds for *qualified immunity*. Immunity protects officers who act reasonably in the face of confusion over constitutional rights—not those alleged to have violated clearly established rights through their own illicit retaliatory animus.

### A. Officers Who Violate Clearly Established Constitutional Rights, Such As By Acting For Forbidden Reasons, Are Not Protected By Qualified Immunity

Qualified immunity asks whether an objectively reasonable officer would have understood his actions to violate the Constitution; its purpose is to protect

officers who unwittingly intrude upon poorly or vaguely defined constitutional rights. *See Harlow v. Fitzgerald*, 457 U.S. 800, 815–19 (1982). Where, by contrast, the Constitution is violated if an officer acts for *forbidden reasons*, qualified immunity ordinarily would not shield him from liability; there is no "unfairness [in] holding one accountable for actions that he or she knew, or should have known, violated the constitutional rights of the plaintiff." *Crawford-El v. Britton*, 523 U.S. 574, 591 (1998).

Exemplifying the former situation, all officers should know that while searching a home without a warrant is ordinarily impermissible, such a search is constitutional if there exist "exigent circumstances." *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). But, in the heat of the moment, even well-meaning officers might "reasonably but mistakenly conclude" that circumstances are, in fact, exigent; "in such cases those officials—like other officials who act in ways they reasonably believe to be lawful—should not be held personally liable." *Id.* The officers' objective *actions* were unlawful, but that would not necessarily have been clear to them at the time.

As an example of the latter situation, the Equal Protection Clause prohibits official acts taken for discriminatory reasons, even if those acts would—if taken for other reasons—be perfectly legitimate. *See, e.g.*, *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886) (discriminatory license denials); *Batson v. Kentucky*, 476 U.S. 79, 85–89 (1986) (discriminatory exercise of peremptory challenges); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720–21 (2007) (discriminatory assignment of students to schools). Likewise, the First Amendment prohibits

retaliation if taken on account of protected speech, even if the same adverse action would be otherwise unobjectionable. *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" (citations and internal quotation marks omitted)); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 283–84 (1977).

Where this Court's precedents clearly establish the unconstitutionality of acting based on a specific motive—such as discrimination based on race or retaliation for protected speech, *see Wayte*, 470 U.S. at 608—there is ordinarily no place for qualified immunity, and certainly not by reference to the *objective* validity of the conduct. Because the officer is alleged to have acted with a prohibited motive, he cannot claim to have acted "reasonably." As this Court explained in *Crawford-El*, plaintiffs who claim retaliation are "alleg[ing] misconduct that was plainly unlawful," and there is thus no "obvious unfairness in imposing liability"; the officer "knew, or should have known," that acting on such motives "violated the constitutional rights of the plaintiff." *Crawford-El*, 523 U.S. at 591. The Court, accordingly, squarely rejected the contention that an officer should receive immunity if his acts are *objectively* justified, calling that an "unprecedented proposal." *Id.* at 593–94. Because "improper intent" defines the constitutional right and violation, officers alleged to have acted with such intent cannot be

"immunize[d]" while "the merits of a claim that [he] knowingly violated the law are being resolved." *Id.*[2]

### B. The *Hartman* Rule Adds An Objective Element To Torts Alleging Violation of *Clearly Established* Constitutional Rights

Qualified immunity protects officers who violated constitutional rights that were *not* clearly established. By contrast, the *Hartman* rule shields from liability officers who acted for plainly forbidden reasons, violating *clearly established* rights. It does so for special reasons of policy: By superimposing an objective "no probable cause" element onto *Bivens* retaliation claims, the *Hartman* rule of proof seeks to overcome a particular "difficulty" in "the need to prove a chain of causation from animus to injury," *Hartman*, 547 U.S. at 259, thereby filtering out cases in which something other than the officer's illicit animus, such as a prosecutor's independent decision, was the likely cause of the harm to the plaintiff. Unlike the qualified immunity defense, this does not excuse—much less legitimize—the retaliation, which is unlawful even if it was objectively justifiable.

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[2] This does not mean, of course, that simply alleging unlawful purpose is enough to reach a jury. As *Crawford-El* pointed out, a defendant can still obtain immunity if it was not clear when he acted that his motives were prohibited—*e.g.*, if there was doubt "whether a plaintiff's speech was on a matter of public concern" and thus protected. 523 U.S. at 593. Further, a claim of unlawful motive fails on the pleadings if it is not "plausible." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1951 (2009). And, even a defendant who violated clearly established rights could procure a dismissal if his violation did not proximately cause any damages. *See Crawford-El*, 523 U.S. at 593.

### 1. *The Court in* Hartman *required proof of "no probable cause" as a proxy for causation in the unique context of retaliatory inducement to prosecute*

In *Hartman*, this Court recognized that the conduct allegedly committed by the petitioners—*viz.*, "[o]fficial reprisal for protected speech"—unquestionably "'offends the Constitution.'" 547 U.S. at 256 (quoting *Crawford-El*, 523 U.S. at 588 n.10). The Court further observed, however, that to succeed in obtaining damages for this type of unconstitutional conduct, 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 to prosecute, that causal link is especially complex, as the defendant "will be a nonprosecutor . . . who may have influenced the prosecutorial decision but did not himself make it." *Id.* at 262. So even if the defendant officer acted improperly by pursuing an individual's prosecution in retaliation for his protected speech, the plaintiff was not harmed by that unconstitutional conduct if prosecution would anyway "have been initiated without his urging." *Id.* In such a case, the unlawful, retaliatory conduct did not *cause* the prosecution from which the plaintiff's injuries arose.

*Hartman* further observed that, in retaliatory-inducement-to-prosecute 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, the existence of probable cause "will suggest" that

prosecutors would have pursued the prosecution whether or not the defendant had—for improper, retaliatory reasons—pressed them to do so. *Id.* And, conversely, if no probable cause existed, that would have "powerful evidentiary significance," strongly suggesting that the defendant's unlawful behavior *did* induce the decision to pursue the injurious prosecution. *Id.* The presence or absence of probable cause is thus a handy, objective proxy for the ultimate tort-law question of causation.

Exercising its judicial discretion under *Bivens* to "make the kind of remedial determination that is appropriate for a common-law tribunal," *Bush v. Lucas*, 462 U.S. 367, 378 (1983), this Court therefore ruled 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. *Hartman*, 547 U.S. at 265–66 (emphasis added). 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*, 429 U.S. at 286 ("a test of causation . . . distinguishes between a result caused by [the] constitutional violation and one not so caused").

*2. In retaliatory-arrest cases, requiring proof of "no probable cause" would allow for dismissal of likely meritless cases*

Since *Hartman*, courts have divided over whether its reasoning applies in the context of retaliatory arrests. *See* John Koerner, Note, *Between* Healthy *and* Hartman*: Probable Cause in Retaliatory Arrest Cases*, 109 COLUM. L. REV. 755 (2009). Obviously, the

unique two-actor chain of causation that operates in retaliatory-inducement-to-prosecute cases is not replicated in retaliatory arrest cases; there is only one officer, and he arrests the plaintiff (allegedly) based on forbidden, retaliatory motives.

This Court may nonetheless decide to extend the special *Hartman* rule to the single-actor arrest scenario. While the rule's rationale does not apply with as much force to the arrest context, it remains true that here, as in *Hartman*, the *Bivens* plaintiff must prove not only retaliatory motives but also that those motives caused his arrest. If they did not, the plaintiff should not be entitled to damages; that would put him "in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing." *Mt. Healthy*, 429 U.S. at 285. And, here as in *Hartman*, 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" for the arrest. *Hartman*, 547 U.S. at 261. Probable cause arguably "suggests" that the arrest would have occurred even absent the alleged unconstitutional motives, while the absence of probable cause arguably "suggests" the opposite.[3]

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[3] Of course, if a plaintiff challenges the validity of an arrest only under the *Fourth* Amendment, then the requirement to show an absence of probable cause derives from the constitutional right itself, *i.e.*, from the right to be free from seizures not backed by probable cause. *See supra* at 6; *see also infra* at 18. In such a case, and unlike a retaliation case, the presence of probable cause means there was no constitutional violation.

Once again, this Court may see the *objective* standard of probable cause as a readily available, rough proxy for whether an (alleged) clearly established constitutional violation caused harm to a plaintiff. Requiring that it be disproved, as an element of the retaliation tort, would thus arguably allow the weakest claims of injurious retaliation to be dismissed before trial, as a matter of law, dispensing with the need for a costly, factbound inquiry into the constitutionally dispositive intent of the arresting officer. As such, it would—or so this Court might well conclude—"mak[e] sense" to once again "defin[e] the elements of the tort" to require the *Bivens* retaliation plaintiff to "plead and prove" the absence of probable cause for his arrest. *Id.* at 265–66.

#### *3. In neither case does proof of an objective basis negate the constitutional violation or validate the official's alleged acts*

Critically, in neither the retaliatory-inducement-to-prosecute nor the retaliatory-arrest context does the requirement to prove the absence of probable cause change the definition of the First Amendment right. It is beyond dispute that any official action *actually* taken by virtue of animus toward protected speech violates the constitutional rights of the speaker—whether or not a reasonable officer *could have* taken that same action on legitimate grounds. For good reason, that has always been the law, *see supra* at 6–7, and *Hartman* in no way suggests anything else; it held only that a *Bivens* plaintiff cannot recover *damages* caused by retaliation—*even if* he has alleged a violation of his clearly established First Amendment rights—unless he can *also* show absence of objective basis for the adverse action. It

did so, as explained, because this Court thought it would "make sense," *Hartman*, 547 U.S. at 265–66, due to evidentiary difficulties, to thereby filter out cases in which the alleged unconstitutional acts *probably* did not occur or *probably* did not cause injury—not due to any doubt over whether those alleged acts were indeed unlawful or clearly so.

Indeed, *Hartman* squarely rejected the argument that an objective basis for a prosecution means that retaliatory inducement toward it is permissible. The Government's principal argument in *Hartman* was that "a prosecution motivated by the defendant's speech does not violate the First Amendment if there was probable cause for the charges." Pet. Br. at 16, *Hartman*, 547 U.S. 250. This Court firmly disagreed, holding instead 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"—even if the very same actions "might well be unexceptionable if taken on other grounds." 547 U.S. at 256. To support this "settled" proposition, the Court cited, among other authorities, *Crawford-El*, *Perry*, and *Mt. Healthy*. *Id.*

The Government's *fall-back* argument in *Hartman* was that, "[e]ven if the First Amendment were violated whenever a retaliatory motive was the but-for cause of a prosecution, a cause of action for damages under *Bivens* should not lie if probable cause existed." Pet. Br. at 17, *Hartman*, 547 U.S. 250. And that, as explained, is exactly the argument that this Court accepted, deciding that even if the plaintiff has properly alleged a clear violation of the First Amendment, it would "make sense" to

"structure" the *Bivens* claim to demand a showing of no probable cause, too. 547 U.S. at 264 n.10, 265–66.

*Hartman* thus reaffirmed that the constitutional standard turns solely on the retaliatory motives for the official's conduct, even while imposing a new, objective threshold for plaintiffs seeking money damages for proscribed retaliation. And if this Court now extends the *Hartman* rule to retaliatory arrests, it will likewise be the result of a policy determination based on the costs and benefits of narrowing the judicially created *Bivens* remedy in this context—not because of any doubt over the "settled" principle that retaliation for protected speech is *always* prohibited, without regard to its objective defensibility.

None of this is surprising. The notion that retaliatory action could actually be *permissible* if objectively well-founded 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 local 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 for the seizure, but such policy—of taking action based on the specific, forbidden basis of an individual's race or protected political speech—would also indisputably be retaliatory or discriminatory, and clearly unconstitutional.

In sum, the *Hartman* rule—in whatever context—does not remotely change the long-established, well-settled rule that even objectively valid action violates the Constitution if the government official took the action based on proscribed motives, like retaliation for protected speech or discrimination against protected characteristics. Rather, the no-probable-cause proof requirement allows even officers who are alleged to have violated this clearly established constitutional rule to escape damages liability if the *Bivens* plaintiff cannot satisfy an added, objective threshold that is, at most, a rough proxy for whether the alleged violation actually harmed him.

### C. In Retaliation Cases, Probable Cause Can Therefore Be Grounds For Judgment On The Merits, But "Arguable" Probable Cause Cannot Be Grounds For Qualified Immunity

The above discussion should make clear why, even if the *Hartman* rule applies and the defendant is thus entitled to judgment on the merits if there existed probable cause for his allegedly retaliatory acts, the same defendant would have no entitlement to qualified immunity—and surely not on a mere showing that probable cause "arguably" existed. The reason is the crucial difference between the *definition* of a constitutional *violation* and the *elements* of a constitutional *tort*. Petitioners simply fail to grapple with this distinction, assuming throughout their brief that failure to satisfy the *Hartman* "no-probable-cause" element "effectively confers" qualified immunity, Pet. Br. at 16—even though such an assumption is unnecessary to the majority of their arguments, *see infra* Part II.

In those cases where a constitutional violation occurs only if an objective condition is met—*e.g.*, under the Fourth Amendment, which "generally requires a law enforcement officer to have probable cause" before conducting a search, *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2639 (2009)—then any reasonable doubt over satisfaction of that condition entitles an official to immunity even if he *did* violate the right; he cannot fairly be blamed because probable cause "arguably" existed for the search, such that the constitutional violation was not clear at the time. *See Malley v. Briggs*, 475 U.S. 335, 345 (1986); *see also supra* Part I.A.

By contrast, where a constitutional violation turns not on an objective condition but rather on the officer's *motive*—*e.g.*, his intent to retaliate for speech—then the officer's conduct cannot be excused and qualified immunity cannot be invoked. The officer may still be saved from damages liability if the plaintiff fails to adduce evidence of some other element of the *Bivens* cause of action—such as proximate causation or damages—but such failure of proof in no way validates the officer's conduct, which violated *clearly established* rights. Put another way, an officer's argument that he "did not in fact cause the alleged wrong is not an argument that he is entitled to immunity, but rather is an argument that he is not liable." *Bonitz v. Fair*, 804 F.2d 164, 174 (1st Cir. 1986); *see also Hulen v. Yates*, 322 F.3d 1229, 1239 (10th Cir. 2003) (per curiam); *McLaughlin v. Alban*, 775 F.2d 389, 391–92 (D.C. Cir. 1985) (per curiam). That the violation did not cause the harm hardly justifies the conduct, or suggests that the plaintiff would have been unable to obtain an injunction to prevent it; it merely means that he

cannot succeed on a claim for damages after the fact. And since the plaintiff's failure to establish an element of his claim does not imply immunity for a defendant who allegedly violated clearly established rights, it is true *a fortiori* that a plaintiff's "arguable" failure to do so *certainly* does not create immunity.

As shown above, the *Hartman* rule requires proof of the absence of probable cause as part of the *Bivens* tort, not as an aspect of a constitutional violation. Thus, while probable cause defeats a *Bivens* claim for First Amendment retaliation (like Respondent's, if *Hartman* applies) on the merits, *arguable* probable cause no more entitles a defendant to immunity than would "arguable" lack of damages, "arguable" flaws in the chain of causation, or "arguable" doubts about the identity of the perpetrating officer. All of these go to liability, to elements of the constitutional tort, but *not* to the definition of the constitutional right or the existence of the constitutional violation—and only the latter matters for the qualified-immunity defense. *See Crawford-El*, 523 U.S. at 594 (describing as "unprecedented" the argument that officers should be immunized for retaliation claims if adverse action could have been taken on legitimate grounds).

Indeed, the thus-far unsuccessful attempt by the defendants in *amicus* Moore's case to persuade the courts that an "arguable" objective basis for action taken for clearly unconstitutional motives should result in immunity would, if accepted, lower the bar for official conduct, conflict with *Harlow*, reject *Crawford-El*, and, as a practical matter, virtually eliminates the *Bivens* cause of action for intent-based constitutional torts. Characterizing *Hartman* as an immunity rule is thus not just wrong, but dangerous.

Only one appellate court has squarely addressed this issue in a reasoned opinion, and it agreed entirely with the analysis offered here. The D.C. Circuit, in its most recent foray into *amicus* Moore's long-pending *Bivens* litigation against Inspectors of the U.S. Postal Service who procured his baseless prosecution in retaliation for his public criticism of the Service's leadership, considered the Inspectors' argument for immunity on the basis of "arguable" probable cause for the prosecution. *See Moore v. Hartman*, 644 F.3d 415, *pet. for cert. filed*, No. 11-836 (U.S. Jan. 4, 2012). Unanimously, the panel there rejected the argument. *Id.* at 423. It reasoned that, in the Fourth Amendment context, where the "keystone" of the constitutional analysis is "whether the action taken [was] based on probable cause," an officer should be immune if "he acted with arguable probable cause." *Id.* By contrast, however, "the First Amendment does not itself require lack of probable cause in order to establish a retaliatory inducement to prosecution claim." *Id.* Indeed, "nothing about the . . . right to be free from punishment [for free speech] suggests any connection between the right and criminal 'probable cause.'" *Id.* at 424. Nor did this Court in *Hartman* "purport to add no probable cause as an element of a First Amendment retaliation *violation*"; rather, it created "a special rule of proof," working the no-probable-cause requirement "into the remedial framework" as a way "to establish the requisite causal connection" between violation and injury. *Id.* Accordingly, the court held that "the absence of probable cause is not an element of the free speech right" and therefore "has no bearing" on qualified immunity. *Id.* at 425.

Although the D.C. Circuit was not convinced, the defendants in Moore's case have often pointed to a footnote in *Hartman* to try to blur the line between the definition of the right and the elements of the tort. Seeking to explain why the Court had interlocutory appellate jurisdiction to define the elements of the *Bivens* claim, the footnote said that "element[s] of the tort," such as the absence of probable cause, are "directly implicated by" the defense of qualified immunity. *Hartman*, 547 U.S. at 257 n.5. This does not mean, however, that (contrary to the body of the Court's opinion) subjective retaliation is lawful if supportable by probable cause, or that (contrary to the understanding of the lower courts) officers are immune if any element of the tort has "arguably" not been met. Rather, as two more recent decisions show, the footnote simply explicated the Court's pendent jurisdiction to review purely legal questions on interlocutory appeal. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1946–47 (2009); *Wilkie v. Robbins*, 551 U.S. 537, 549 n.4 (2007). The fact that appellate courts may decide, on interlocutory appeal, that a cause of action includes an element as a matter of law does not mean that an officer alleged to have violated clearly established rights obtains immunity by virtue of doubts about the sufficiency of the evidence concerning that new element of the tort.

In sum, qualified immunity protects officers who act reasonably in the face of confusion, not those alleged to have violated clearly established rights through their own plainly illicit retaliatory animus, but are nonetheless saved from damages liability by the plaintiff's failure of proof on a distinct, policy-driven element of the judicially created tort—much less a merely "arguable" such failure.

### D. Even If *Hartman* Is Understood To Confer A Type Of Immunity, "Arguable" Probable Cause Is Insufficient To Trigger It

For these reasons, *amicus* believes that *Hartman* is best understood as a refashioning of the *Bivens* cause of action in the retaliation context, and that failure to show an absence of probable cause should result in judgment for the defendant on the merits, not qualified immunity. But even if this Court would now view *Hartman*'s holding as a form of immunity, it is a unique form motivated by distinct policy concerns, and one that is triggered only by *actual* probable cause, not merely *arguable* probable cause.

Requiring retaliation plaintiffs to prove the absence of probable cause would prevent them from too readily invading the "subjective worlds" of officers who took only *objectively legitimate* action. *Crawford-El*, 523 U.S. at 605 (Rehnquist, C.J., dissenting). But granting immunity based on merely *arguable* probable cause would go much further—and much too far. It would result in the dismissal of some cases in which plaintiffs adduce enough evidence to prove that the defendant took *objectively baseless* adverse action for *forbidden* retaliatory reasons. Such a rule would not generate sufficient "societal benefit" to "outweig[h]" the "cost they create in terms of unremedied meritorious claims." *Id.* at 606.

So, even if the *Hartman* rule is incorrectly viewed as going to a defendant's immunity rather than simply to his tort liability, it is nevertheless triggered only by the actual existence of probable cause, not by the fact that an officer "reasonably but mistakenly" could have believed that probable cause existed.

## II. BECAUSE THE *HARTMAN* RULE'S IMPLICATIONS FOR IMMUNITY DO NOT MATTER HERE, HOWEVER, THIS COURT NEED NOT RESOLVE THEM NOW

Having said all of this, however, *amicus* notes that the relationship between qualified immunity and the *Hartman* rule is unlikely to be implicated by this case. While the Court should be aware of the disagreement on this issue, there is no need to resolve it at this time, should the Court have any doubts about the argument presented above. Rather, resolution should await a case in which the issue is properly presented and matters to the outcome.

In this case, it is undisputed that—as a matter of law, and viewing all facts in the light most favorable to Respondent—there existed probable cause to arrest him. The court below held as much, and Respondent has not challenged or requested review of that finding. *See* Pet. App. 18a ("[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."). If this Court concludes that the *Hartman* rule extends to the context of retaliatory arrest, such that the plaintiff must prove the absence of probable cause to win his *Bivens* suit, the result will therefore be an award of summary judgment for Petitioners. In other words, because probable cause *simpliciter* is conceded here, a new requirement to prove the absence thereof necessarily spells the end of this litigation *on the merits*. The question whether *arguable* probable cause might also be enough to dispose of such a case as a matter of *qualified immunity* does not ever arise.

Thus, even though Petitioners' brief repeatedly refers to qualified immunity and assumes that *Hartman* is a rule of immunity, Petitioners' principal argument does *not* depend on that assumption. Their principal argument is that *Hartman* applies to retaliatory arrests, *see* Pet. Br. at 13–22, 24–29; as explained, if that is true, Petitioners are entitled to judgment on the merits, because Respondent was unable to create a triable issue as to the absence of probable cause for his arrest. If Petitioners succeed on their primary argument, there is absolutely no need to address qualified immunity.

Petitioners also argue, in the alternative, that even if *Hartman* does *not* apply to retaliatory-arrest cases, they are entitled to qualified immunity for various reasons. Again, several of these arguments do *not* require, as their premise, any necessary relationship between the *Hartman* rule and the qualified-immunity defense. For example, Petitioners contend that they should be immune because it ought to be *permissible* for Secret Service agents to consider a suspect's speech when deciding whether he poses a threat to "the immediate physical safety of the President." Pet. Br. at 38. That argument goes directly to the legitimacy of Petitioners' conduct under the First Amendment, and therefore, unlike disputes over the scope or application of the *Hartman* rule of proof, *see* Pet. Br. at 41–43, 51–53, presents a plausible claim for immunity. Petitioners also ask for immunity based on confusion over the scope of absolute immunity in this area, *see* Pet. Br. at 43–45, and that likewise has nothing to do with the meaning of the *Hartman* rule.

In all events, however it may resolve Petitioners' various arguments, under no circumstances should this Court find it necessary to consider the consequences of "arguable" probable cause on a claim of qualified immunity, *see supra* Part I.D, because (as noted) *actual* probable cause exists and is not challenged here. There is therefore *no* reason for this Court to weigh in on that question in this case.

Because the record here shows there was probable cause, the consequences of "arguable" probable cause are not implicated, and the parties lack incentives to zealously litigate over the question. As such, the prudent course, in keeping with this Court's ordinary practice, would be to avoid deciding that question until faced with a case that properly presents it.

## CONCLUSION

For the foregoing reasons, *amicus* respectfully urges this Court to heed, in its decision, the distinction between the boundaries of a constitutional right and the elements of a constitutional tort.

Respectfully submitted,

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