No. 04-1495

In the Supreme Court of the United States

MICHAEL HARTMAN, ET AL., PETITIONERS

v.

WILLIAM G. MOORE, JR.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

PAUL D. CLEMENT
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
DAN HIMMELFARB
Assistant to the Solicitor General
BARBARA L. HERWIG
MATTHEW M. COLLETTE
STEPHANIE R. MARCUS
RICHARD MONTAGUE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether law enforcement agents may be liable under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for retaliatory prosecution in violation of the First Amendment when the prosecution was supported by probable cause.

PARTIES TO THE PROCEEDINGS

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

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 388 F.3d 871. The order of the district court (Pet. App. 42a) is unreported. Prior opinions of the court of appeals (Pet. App. 43a-58a, 112a-128a) are reported at 213 F.3d 705 and 65 F.3d 189. The prior opinion of the district court dated September 24, 1993 (Pet. App. 129a-149a) is not published in the *Federal Supplement* but is *available at* 1993 WL 405785. The other prior district court orders and opinions (Pet. App. 59a-111a, 150a-151a, 152a-165a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 9, 2004. A petition for rehearing was denied on January 31, 2005 (Pet. App. 166a). On April 22, 2005,

the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 9, 2005. The petition was filed on that date, and was granted on June 27, 2005. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

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

STATEMENT

1. An investigation of public corruption in the procurement of equipment by the United States Postal Service (Postal Service) resulted in the successful prosecution of a member of the Postal Service's Board of Governors and a number of consultants. Respondent, the president of a company that hired the consultants on the recommendation of the corrupt member of the Board of Governors, was indicted and then acquitted. In this *Bivens* action, see *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), respondent alleges that United States Postal Inspectors targeted him in retaliation for his criticism of the Postal Service and for his lobbying activities.

a. In the mid-1980s, respondent was president and chief executive officer of Recognition Equipment, Inc. (REI), which was engaged in an effort to market "multi-line" optical character readers (OCRs) to the Postal Service. OCRs, which can interpret text on an envelope, are used to sort mail. After the Postal Service decided to purchase "single-line" OCRs, respondent and REI mounted a media and lobbying campaign that sought to

overturn the decision.[1] When the Postal Service changed course and decided to purchase multi-line OCRs instead, respondent campaigned for the award of "sole source" contracts (*i.e.*, contracts without competitive bidding) to REI. The total value of the contracts sought by REI was between $250 and $400 million. Pet. App. 2a-4a; J.A. 56, 68.

In September 1984, Robert Reedy, REI's Vice President for Marketing, met with Peter E. Voss, a member of the Board of Governors of the Postal Service. Voss recommended that REI hire John Gnau and his consulting firm, Gnau and Associates, Inc. (GAI), to assist in REI's efforts to obtain Postal Service contracts. In January 1985, REI acted on Voss's recommendation, and hired GAI as a consultant. J.A. 54-55, 79.

As it turned out, Voss had a substantial financial interest in ensuring that Gnau got consulting work, because the two had agreed that Voss would refer clients to Gnau's firm in exchange for a kickback of a portion of GAI's fees. They had also agreed that Voss, Gnau, and two other GAI officers—William Spartin and Michael Marcus—would split the contingency fee that REI undertook to pay GAI if REI obtained the Postal Service contract. Pet. App. 4a, 44a, 113a.

United States Postal Inspectors ultimately discovered the kickback scheme. They also discovered a related scheme, which involved the search for a new Postmaster General in 1985. Spartin, the nominal president of GAI, headed an executive recruiting firm called MSL

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[1] Because single-line OCRs read only the last line of an address, their effectiveness is largely dependent on the use of nine-digit zip codes. That is not true of multi-line OCRs, which read the entire address and then convert the information into a bar code that corresponds to the nine-digit zip code. J.A. 78, 112.

International (MSL). Through Voss, and despite GAI's representation of REI before the Postal Service, Spartin's firm received the contract to find a new Postmaster General. Spartin sought to conceal his conflict of interest from the Postal Service. J.A. 58-59, 85.

After MSL received the contract, Spartin called respondent and asked for recommendations. Respondent gave Spartin the names of three prominent business executives, including Albert V. Casey, who was ultimately selected as Postmaster General. Respondent also made an introductory call to Casey on Spartin's behalf. J.A. 59, 85.

The postal inspectors' investigation resulted in federal criminal charges against Voss, Gnau, and Marcus, all of whom pleaded guilty. Spartin was given immunity in exchange for his cooperation. Pet. App. 4a.

b. As the investigation continued, the postal inspectors determined that respondent and Reedy must have known about the criminal schemes from which they stood to benefit. Although neither Voss nor any of the GAI defendants admitted that they had told respondent or Reedy about the illegal arrangement between Voss and Gnau, there was considerable circumstantial evidence that respondent and Reedy had been aware of both schemes and had used them to their company's advantage. For example:

- When Voss recommended that REI hire GAI, Voss told Reedy that he was capable of making the proper presentation to the Board of Governors on REI's behalf, but could not do so because he was a member of the Board. Voss made several follow-up calls about GAI and, on at least one occasion, asked respondent why his recommenda-

tion had not been acted upon. Respondent "kept pushing" Reedy, and told him not to "drop the ball" with respect to the referral. J.A. 54-55, 79-80; C.A. App. 414.

- Respondent's notes dated December 18, 1984, say "Get John Knau [sic] involved have broad scale association with John—get together." Respondent's notes also reflect what appears to be information, set out under the heading "Closed Session," from closed sessions of the Postal Service's Board of Governors, of which Voss was a member. And respondent's notes of April 29, 1985, contain the cryptic entry "Consultant—wired (Peter Voss)." J.A. 41, 55-56, 82, 126.
- Gnau informed the postal inspectors that Reedy had once asked what his arrangement was with Voss and that Gnau had responded, "[i]t's better you not know." Gnau also told the postal inspectors that he had suggested to Reedy that they refer to Voss as "our friend," and that Reedy had said, "I understand." In addition, Gnau said that, when discussing REI's payments to GAI, Reedy had told Gnau, "I know you have people to take care of," and that Gnau had understood Reedy to be referring to Voss. J.A. 57.
- Reedy lied to the postal inspectors about prior contacts with Voss. When asked who had recommended GAI to him, Reedy said that he had gotten Gnau's name from a consultant during a chance encounter at the 1984 Republican National Convention. Reedy later admitted that he had received the referral from Voss. J.A. 81.

- GAI's Michael Marcus recounted a conversation in which Spartin indicated that REI had purged records relating to the investigation, and there were in fact a number of omissions in the records that REI produced in response to a subpoena. Respondent's "Postal" notebook appeared to be missing 36 sheets of paper; there were no entries in the notebook for a six-month period in 1986; and respondent's telephone log for a three-month period in 1984-1985 was never located. In addition, an REI employee named Frank Bray admitted that he had altered his travel records to conceal meetings with Spartin. J.A. 60-61, 82, 85, 172-173.
- One of respondent's notebooks included an entry suggesting that he might have coached REI employees on how to answer questions from postal inspectors,[2] and REI employees subsequently testified before the grand jury that respondent had made comments consistent with that entry at a staff meeting the day the entry was made. By

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[2] The entry, dated January 27, 1987, reads as follows:

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

Pet. App. 23a-24a.

that time, postal inspectors had arranged to interview REI employees in the coming week. J.A. 61-62, 89-90.

- The postal inspectors found respondent's explanation of his involvement in Spartin's recruitment of a new Postmaster General implausible. Respondent told them that, when Spartin called and asked for referrals, he did not really believe that Spartin was recruiting a Postmaster General. That seemed implausible because respondent not only gave Spartin the names of candidates, but made an introductory telephone call to one of them. The inspectors were also informed by Spartin that he and respondent had agreed to say that it was respondent who called Spartin, even though it was in fact Spartin who placed the call. J.A. 59, 85-86.

After considerable deliberation, including 24 separate meetings during a seven-month period, the United States Attorney for the District of Columbia decided to seek an indictment of respondent, Reedy, and REI. In October 1988, a grand jury returned a seven-count indictment charging them with conspiracy to defraud the United States, in violation of 18 U.S.C. 371; mail and wire fraud, in violation of 18 U.S.C. 1341, 1343, and 2; theft of property used by the Postal Service, in violation of 18 U.S.C. 1707 and 2; and receiving stolen property, in violation of District of Columbia law. The indictment alleged that respondent and Reedy participated in the kickback scheme and the scheme involving the search for a Postmaster General. The lead prosecutor in the case was Assistant United States Attorney (AUSA) Jo-

seph Valder. Pet. App. 4a-5a, 130a-132a; J.A. 108-109, 474-525.[3]

Respondent, Reedy, and REI pleaded not guilty to the charges, and proceeded to trial. At the close of the government's case, the district court granted the defendants' motion for judgment of acquittal, finding the evidence insufficient to support a reasonable inference that they knew of either criminal scheme. *United States* v. *Recognition Equip. Inc.*, 725 F. Supp. 587 (D.D.C. 1989).

c. Respondent thereafter brought this *Bivens* action in the United States District Court for the Northern District of Texas, where respondent resided. The defendants in the civil case were AUSA Valder and six postal inspectors—petitioners and a postal inspector who has since died—who had worked on the investigation and prosecution. Respondent alleged a number of constitutional violations, including malicious prosecution and retaliatory prosecution in violation of the First Amendment. The theory of the complaint was that respondent was prosecuted in retaliation for his criticism of Postal Service policy concerning OCR technology. Respondent later filed a separate suit against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671-2680. Pet. App. 5a-6a, 46a, 113a-115a.

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[3] Although REI had lobbied for the award of "sole source" contracts for multi-line OCRs, the Postal Service decided to conduct a competitive procurement. After it was indicted, REI submitted a bid with Unisys Corporation (Unisys), but did not receive the contract. In rejecting Unisys's challenge to the award of the contract to its competitor, the United States District Court for the District of Delaware concluded that "the REI machine performed so poorly in relation to the [competitor's] machine" that "Unisys would have had to lower its original bid from $233.6 million to $3,805,585 in order to win the contract." J.A. 62 (quoting *Unisys Corp.* v. *USPS*, Civ. No. 89-331 LON, (D. Del. Aug. 4, 1989), slip op. at 22).

2. a. The district court dismissed all claims against Valder on the ground of absolute immunity and dismissed all claims against the postal inspectors, except the claims of malicious prosecution and retaliatory prosecution, on the ground of qualified immunity. The court then ruled that it lacked personal jurisdiction over the postal inspectors and transferred the case to the United States District Court for the District of Columbia. It also transferred the FTCA case. Pet. App. 152a-165a.

After the transfer, the cases were consolidated. The district court then dismissed respondent's claims of malicious prosecution and retaliatory prosecution, holding that the allegations did not satisfy the heightened pleading standard under then-applicable circuit law for *Bivens* claims asserting an unconstitutional motive. The court also dismissed the FTCA claims. Pet. App. 129a-151a.

b. Respondent appealed, and the court of appeals affirmed in part and reversed in part. Pet. App. 112a-128a. The court held that Valder was entitled to absolute immunity for certain of his alleged actions but not for others. *Id*. at 116a-123a. As for respondent's claims against the postal inspectors, the court affirmed the dismissal of the malicious prosecution claim, because "it has not been clearly established that malicious prosecution violates any constitutional or statutory right," but reversed the dismissal of the retaliatory prosecution claim, because that claim "does allege the violation of clearly established law" and "meet[s] any applicable heightened pleading standard." *Id*. at 124a-126a. The

court of appeals also reinstated some of respondent's FTCA claims. *Id.* at 126a-128a.[4]

3. a. On remand, the district court granted Valder's motion for summary judgment, holding that respondent could not establish that Valder brought the prosecution to retaliate against respondent for his First Amendment activity, because absolute immunity protected his decision to prosecute. The district court denied the postal inspectors' motion for summary judgment, however, and allowed limited discovery on the question whether they had the requisite retaliatory motive. The court also granted the United States' motion for judgment on the pleadings on the FTCA claims. Pet. App. 59a-111a.

b. Respondent again appealed, and the court of appeals again affirmed in part and reversed in part. Pet. App. 43a-58a. The court of appeals held that the district court had correctly granted summary judgment for Valder, but it reinstated one of respondent's FTCA claims (for malicious prosecution). *Id.* at 48a-58a.[5]

4. On remand, the postal inspectors again moved for summary judgment, arguing that "they enjoy qualified immunity because probable cause supported [respondent's] prosecution." Pet. App. 6a. The United States also moved for summary judgment on respondent's malicious prosecution claim under the FTCA. Concluding that "[t]here are material facts in dispute," the district court denied the motion in a one-paragraph order. *Id.* at 42a.

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[4] At this stage, Valder filed a petition for a writ of certiorari, which this Court denied. *Valder* v. *Moore*, 519 U.S. 820 (1996).

[5] This time, respondent filed a petition for a writ of certiorari, which this Court denied. *Moore* v. *Valder*, 531 U.S. 978 (2000).

5. Petitioners (but not the United States) appealed, and the court of appeals affirmed. Pet. App. 1a-31a. The court first held that it had jurisdiction over petitioners' appeal, reasoning that the district court's denial of qualified immunity turned on an issue of law and was therefore a collateral order subject to immediate appeal despite the absence of a final judgment. *Id.* at 7a-9a. The court then held that petitioners' motion for summary judgment had been properly denied. *Id.* at 10a-31a. Recognizing that a defendant in a *Bivens* suit is entitled to qualified immunity unless he violated a clearly established right, the court concluded that retaliatory prosecution violates the First Amendment even when there is probable cause for the charges and that that principle was clearly established at the time the charges were brought against respondent. *Ibid.* The court therefore did not decide whether there was probable cause for the charges (or whether it was reasonable for petitioners to believe there was probable cause). *Id.* at 12a. Instead, the court remanded for trial on the question whether petitioners had a retaliatory motive that was the but-for cause of the prosecution. *Id.* at 31a.

a. The court of appeals held that the first question in the qualified immunity inquiry—whether probable cause defeats a claim of retaliatory prosecution—"ha[d] already been answered" by the District of Columbia Circuit, in a case called *Haynesworth* v. *Miller*, 820 F.2d 1245 (1987). Pet. App. 12a. That case, the court said, "described the 'essential elements of a retaliatory prosecution claim,'" and did not "suggest that lack of probable cause is an element." *Id.* at 12a-13a (quoting *Haynesworth*, 820 F.2d at 1257 n.93). The court explained that, under the standard articulated in *Haynesworth*, "once a plaintiff shows protected conduct to have been a moti-

vating factor in the decision to press charges, the burden shifts to the officials to show that they would have pursued the case anyway." *Id.* at 13a. The court went on to say that "that description of the tort was part of *Haynesworth*'s holding, [and] we lack authority to disregard it." *Id.* at 14a.

Citing decisions of the Second, Third, Fifth, Eighth, and Eleventh Circuits, the court of appeals recognized that "several other circuits" do "require lack of probable cause in retaliatory prosecution actions." Pet. App. 15a. But those decisions, the court said, "are not the law of this circuit—*Haynesworth* is." *Ibid.* The court also noted that two other circuits—the Sixth and the Tenth—do not require a showing of a lack of probable cause. *Ibid.* The court found support for its approach in *Mount Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977), which involved a public school teacher's claim that he had been fired because of his speech. Pet. App. 15a-16a. In that case, the court of appeals explained, a showing that speech protected by the First Amendment was a "motivating factor" in the teacher's firing was deemed sufficient to shift the burden to the school board to establish that "it would have reached the same decision" even in the absence of the speech. *Ibid.* (quoting *Mt. Healthy*, 429 U.S. at 287).

While the court thought "*Haynesworth*'s binding effect" sufficient "to end the first part of [the] qualified immunity inquiry," the court acknowledged that petitioners had "raised serious objections to [its] approach," and thus deemed it "useful to flesh out the reasons why the existence of probable cause should not necessarily preclude liability." Pet. App. 16a. In the court's view, probable cause is "designed for the ordinary arrest or prosecution where courts may presume that government

officials exercised their discretion in good faith," not cases where the plaintiff can "demonstrate hostility to free speech to have been a motivating factor in the decision to prosecute." *Ibid.* The court of appeals acknowledged this Court's admonition in the analogous context of a selective prosecution claim that prosecutorial discretion is a "core executive constitutional function." *Id.* at 17a (quoting *United States* v. *Armstrong*, 517 U.S. 456, 465 (1996)). But the court of appeals nevertheless rejected petitioners' argument that, just as a claim of selective prosecution requires an objective showing that similarly situated people were not prosecuted, see *Armstrong*, 517 U.S. at 465, a claim of retaliatory prosecution requires an objective showing that there was no probable cause for the prosecution. Pet. App. 17a-18a. The court said that "*Haynesworth*'s framework" is "[r]espectful of executive discretion," because it "allows the government to proceed with prosecutions that, though motivated in part by hostility to First Amendment activity, can be justified on legitimate grounds." *Id.* at 17a. It is only when "hostility to speech represents a but-for cause of the prosecution," the court explained, that a plaintiff can establish a violation of the First Amendment. *Ibid.*

The court of appeals characterized its theory of liability as "limited," because, in its view, a showing of probable cause "will be enough in most cases to establish that prosecution would have occurred absent bad intent." Pet. App. 19a. Recovery will be possible, the court said, only in the "rare cases where strong motive evidence combines with weak probable cause to support a finding that the prosecution would not have occurred but for the officials' retaliatory animus." *Id.* at 20a. The

court thought that the case before it was "an example of this rare circumstance." *Ibid.*

b. The court of appeals held that the second question in the qualified immunity inquiry—whether it was clearly established that probable cause does not defeat a claim of retaliatory prosecution—was also answered by *Haynesworth*. That case, the court said, was "[d]ecided in 1987, a year before [respondent's] indictment," and it "clearly stated the elements of retaliatory prosecution, leaving no doubt that government officials could be liable for pressing charges they would not have pursued without bad motive." Pet. App. 29a. The court held that the law was clearly established despite the fact that *Haynesworth* addressed the nature of a First Amendment retaliatory prosecution claim "without analysis in a footnote in an opinion generally addressing other issues," because "qualified immunity requires only that the law be clear, not that it be stated prominently or elaborately." *Ibid.* (quoting 03-5241 Pet. C.A. Reply Br. 12). The court also found it irrelevant that other circuits do require an absence of probable cause, because "a decision of this court—*Haynesworth*—provided guidance on exactly the issue [petitioners] confronted." *Id.* at 30a.

SUMMARY OF ARGUMENT

Petitioners are entitled to summary judgment on respondent's claim of retaliatory prosecution. That claim requires an absence of probable cause for the criminal charges, and respondent cannot make that showing.

I. The process leading to a decision to prosecute is one that courts are hesitant to examine, because it is "particularly ill-suited to judicial review," *Wayte* v.

United States, 470 U.S. 598, 607 (1985), and examination by courts risks "unnecessarily impair[ing] the performance of a core executive constitutional function," *United States* v. *Armstrong*, 517 U.S. 456, 465 (1996). This Court has relied on those considerations in a variety of contexts, including cases involving a claim of selective prosecution, in violation of the defendant's equal protection rights. The Court's decisions make clear that the standard for selective prosecution is highly demanding and thus rarely satisfied. *United States* v. *Bass*, 536 U.S. 862 (2002) (per curiam); *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489-490 (1999); *Armstrong*, *supra*; *Wayte*, *supra*. In a selective prosecution case, there must be both a subjective showing that the decision to prosecute was motivated by a discriminatory purpose and an objective showing that similarly situated members of a different class were not prosecuted. While this Court's decisions thus make clear that a claimant cannot establish selective prosecution merely by showing that his race was the but-for cause of the prosecution, the court of appeals held that a claimant *can* establish *retaliatory* prosecution merely by showing that his *speech* was the but-for cause of the prosecution. There is no basis for treating these claims so differently.

Contrary to the court of appeals' conclusion, a claim of retaliatory prosecution also requires an objective showing, and that showing, as five courts of appeals have held, is an absence of probable cause for the charges. Retaliatory prosecution is a form of malicious prosecution (the malicious purpose being retaliation for the defendant's speech), and at common law, the absence of probable cause was an essential element of a claim of malicious prosecution. That was the rule when the First

Amendment was adopted, and it remains the rule today. Because the "particular concern" about the "systemic costs" of judicial inquiry necessitates an objective element for a claim that a prosecution was motivated by a constitutionally prohibited factor, *Wayte*, 470 U.S. at 607, and because this Court routinely consults the common law in attempting to determine the content of constitutional provisions, a prosecution motivated by the defendant's speech does not violate the First Amendment if there was probable cause for the charges.

The standard adopted by the court of appeals is not, as the decision claimed, either "[r]espectful of executive discretion" (Pet. App. 17a) or otherwise "limited" (*id.* at 19a), because it permits an inquiry into the motives for a prosecution in virtually every retaliatory prosecution case. The court of appeals' requirement that "hostility to speech [be] a but-for cause" of the challenged conduct (*id.* at 17a) is a general rule for retaliation claims, not a special rule for claims of retaliatory *prosecution*. And even if it were, it would not limit the ability of a court or civil jury to examine the motives of law enforcement officers. Nor is there any reason to suppose that a showing of probable cause "will be enough in most cases" to satisfy the court of appeals' standard. *Id.* at 19a. That statement appears to rest on an empirical assumption (that prosecutions are generally brought if probable cause exists) whose accuracy may vary depending on the nature of the crime. More broadly, probable cause is only one of many factors that bear upon the exercise of prosecutorial discretion. In any event, even if probable cause will ordinarily enable law enforcement officers to avoid *liability* under the court of appeals' standard, it will not enable them to avoid *protracted litigation*, because an improper motive is "easy to allege

and hard to disprove." *National Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 175 (2004) (quoting *Crawford-El* v. *Britton*, 523 U.S. 574, 585 (1998)). The court of appeals' but-for test thus invites discovery into prosecutorial decisionmaking, a prospect this Court has studiously avoided in cases like *Armstrong* and *Bass*. For these reasons, the court of appeals' reliance on *Mount Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977), is misplaced. The retaliatory action in that case was alleged to have been taken by an *employer* against an *employee*, and thus the special considerations governing challenges to prosecutorial decisionmaking were inapplicable.

Even 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. That conclusion follows from *Heck* v. *Humphrey*, 512 U.S. 477 (1994), in which this Court looked to the elements of the analogous common law tort in determining the elements of a constitutional tort in an action under 42 U.S.C. 1983. As noted above, malicious prosecution is the common law tort most analogous to retaliatory prosecution, and absence of probable cause is an essential element of the common law tort.

II. Because the court of appeals' mistaken analysis obviated the need for that court to inquire into the existence of probable cause, this Court could leave that issue for remand. If the Court chooses to reach the issue, however, it is clear that there was probable cause for the charges against respondent. Voss pressed respondent to act on his recommendation to hire GAI, and respondent in turn pressed Reedy to do so. Gnau made comments to Reedy, respondent's close associate, suggest-

ing that Gnau's arrangement with Voss was improper, and Reedy later denied—falsely—having gotten the referral from Voss. Respondent's own notes reflect what appear to be conversations with Voss that suggest awareness of the kickback scheme, and there was evidence that respondent may have altered or destroyed records relating to the investigation and coached his employees on how to answer questions from investigators. Respondent also provided an implausible explanation of his involvement in Spartin's recruitment of a new Postmaster General. Accordingly, even if the evidence did not establish respondent's guilt beyond a reasonable doubt, it was "sufficient to warrant a prudent man in believing," *Beck* v. *Ohio*, 379 U.S. 89, 91 (1964), that he was a member of the conspiracy.

ARGUMENT

PETITIONERS ARE ENTITLED TO SUMMARY JUDGMENT ON RESPONDENT'S CLAIM OF RETALIATORY PROSECUTION

The court of appeals held that a plaintiff can bring a *Bivens* action for retaliatory prosecution in violation of the First Amendment if he shows that the charges were motivated by the plaintiff's protected speech and the defendant fails to show that the case would otherwise have been pursued. The court of appeals' holding is incorrect. A claim of retaliatory prosecution requires a showing that there was no probable cause for the charges. And because there was probable cause for the charges against respondent, petitioners are entitled to summary judgment.

I. A *BIVENS* PLAINTIFF MUST SHOW THE ABSENCE OF PROBABLE CAUSE TO ESTABLISH A CLAIM OF RETALIATORY PROSECUTION

A. Special Considerations Govern Constitutional Challenges To Prosecutorial Decisionmaking

The authority to prosecute crimes is an essential component of the President's constitutional responsibility to "take Care that the Laws be faithfully executed," U.S. Const. Art. II, § 3, and thus is "one of the core powers of the Executive Branch of the Federal Government," *United States* v. *Armstrong*, 517 U.S. 456, 467 (1996). Because the prosecution of crimes is a "special province" of the Executive Branch, *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489 (1999); *Heckler* v. *Chaney*, 470 U.S. 821, 832 (1985), courts are "properly hesitant to examine the decision whether to prosecute," *Wayte* v. *United States*, 470 U.S. 598, 608 (1985). As this Court has explained, judicial deference in this area has two related justifications.

The first is "the relative competence of prosecutors and courts." *Armstrong*, 517 U.S. at 465. The decision to file criminal charges "requires consideration of a wide range of factors," *United States* v. *Lovasco*, 431 U.S. 783, 794 (1977), including "the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan," *Wayte*, 470 U.S. at 607. Other factors that bear upon the exercise of prosecutors' "broad discretion," *ibid.* (quoting *United States* v. *Goodwin*, 457 U.S. 368, 380 n.11 (1982)), include the "extent of the harm caused by the offense," the "disproportion of the authorized punishment in relation to the particular offense or the of-

fender," the "reluctance of the victim to testify," the "cooperation of the accused in the apprehension or conviction of others," and the "availability and likelihood of prosecution by another jurisdiction," *Lovasco*, 431 U.S. at 794 n.15 (quoting ABA Project on Standards for Criminal Justice, *The Prosecution Function* § 3.9(b) (App. Draft 1971)). Because these factors are not "readily susceptible to the kind of analysis the courts are competent to undertake," the decision to prosecute is "particularly ill-suited to judicial review." *Wayte*, 470 U.S. at 607.

The second justification for judicial deference in the area of prosecutorial decisionmaking is "a concern not to unnecessarily impair the performance of a core executive constitutional function." *Armstrong*, 517 U.S. at 465. Accord *United States* v. *Bass*, 536 U.S. 862, 864 (2002) (per curiam). Examining the underlying motivations for a prosecution "[can] delay[] the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy." *Wayte*, 470 U.S. at 607. Challenges to prosecutorial decisionmaking also "cause a deflection of the prosecutor's energies from his public duties" and may cause the prosecutor to "shade his decisions instead of exercising the independence of judgment required by his public trust." *Imbler* v. *Pachtman*, 424 U.S. 409, 423 (1976).

This Court has relied on these considerations in a variety of contexts, and its cases "uniformly have recognized that courts normally must defer to prosecutorial decisions as to whom to prosecute." *Town of Newton* v. *Rumery*, 480 U.S. 386, 396 (1987) (opinion of Powell, J.). For example, the Court has held that a prosecutor is

absolutely immune from a suit under 42 U.S.C. 1983 that challenges any action taken in the prosecutor's capacity as an advocate. *Kalina* v. *Fletcher*, 522 U.S. 118 (1997); *Burns* v. *Reed*, 500 U.S. 478 (1991); *Imbler*, *supra*. It has held that delay in the filing of charges does not violate due process, even if the defendant has been prejudiced by the lapse of time. *Lovasco*, *supra*. It has held that filing more serious charges after the defendant declines to plead guilty to the original charge does not violate due process. *Goodwin*, *supra*; *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978). It has held that an agreement to dismiss charges in exchange for the defendant's agreement not to file a civil suit is enforceable. *Rumery*, *supra*. And, as explained below, the Court has relied on principles of deference to prosecutorial decisionmaking in cases involving a claim of selective prosecution. *Bass*, *supra*; *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. at 489-490; *Armstrong*, *supra*; *Wayte*, *supra*.

B. A Claim Of Retaliatory Prosecution Requires An Objective Showing That The Prosecution Was Not Supported By Probable Cause

1. Because the "systemic costs" of judicial inquiry in the area of prosecutorial decisionmaking are of "particular concern," *Wayte*, 470 U.S. at 607, this Court's decisions involving a claim of selective prosecution, in violation of the defendant's equal protection rights, have "taken great pains to explain that the standard is a demanding one," *Armstrong*, 517 U.S. at 463. The standard requires "clear evidence" displacing the presumption of regularity, *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. at 489 (quoting *Armstrong*, 517 U.S. at 464 (quoting *United States* v. *Chemi-*

cal Found., Inc., 272 U.S. 1, 14 (1926))), and imposes a "significant barrier" to relief, *Armstrong*, 517 U.S. at 464. As this Court has explained, a successful selective prosecution claim is therefore "a *rara avis*." *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. at 489. That is true even though government actions based on race are generally subject to highly exacting review, even in contexts where deference is otherwise required. See, *e.g.*, *Johnson* v. *California*, 125 S. Ct. 1141, 1146-1152 (2005).

The "particularly demanding" standard for claims of selective prosecution, *American-Arab Anti-Discrimination Comm.*, 525 U.S. at 489, has both a subjective and an objective component. To prevail, the claimant must show not only that the decision to prosecute "was motivated by a discriminatory purpose," but also that it "had a discriminatory effect." *Wayte*, 470 U.S. at 608. The latter, objective requirement means that the claimant must show that similarly situated members of a different group were treated differently. Thus, when the allegation is that the prosecution was motivated by the claimant's race, there must be a showing that "similarly situated individuals of a different race were not prosecuted." *Armstrong*, 517 U.S. at 465. The objective element serves as a screening mechanism, so that courts will not be required to "[e]xamin[e] the basis of [the] prosecution," *Wayte*, 470 U.S. at 607, in every case in which there is a claim of discriminatory motive. See, *e.g.*, *Bass*, 536 U.S. at 863; *id.* at 864 (allowing discovery without proof of objective element "threatens the 'performance of a core executive constitutional function'") (quoting *Armstrong*, 517 U.S. at 465); *Armstrong*, 517 U.S. at 469-470. An improper motive is "easy to allege and hard to disprove," *National Archives & Records*

Admin. v. *Favish*, 541 U.S. 157, 175 (2004) (quoting *Crawford-El* v. *Britton*, 523 U.S. 574, 585 (1998)), and can be expected to be alleged "with some frequency," for "a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the [government's] advocate," *Imbler*, 424 U.S. at 425.

Under this Court's cases, therefore, a selective prosecution claimant cannot obtain discovery into prosecutorial decisionmaking merely by alleging an improper motive, and cannot establish a violation simply by showing a discriminatory purpose, without making an objective showing that others similarly situated were treated differently. In this case, by contrast, the court of appeals held that a *retaliatory* prosecution claimant *can* obtain discovery into prosecutorial decisionmaking merely by alleging an improper motive, and *can* establish a violation by showing that his *speech* was the but-for cause of the prosecution, without making an objective showing. Indeed, the court of appeals further widened the disparity by placing the burden on the defendant to demonstrate that the prosecution would have otherwise been brought. In the selective prosecution context, by contrast, the burden to make the objective showing rests on the claimant, even though much of the relevant information may be in the prosecution's files.

There is no basis for treating these similar types of constitutional challenges to prosecutions so differently. Free speech rights are important to criminal defendants, but certainly no more so than the equal protection of the laws. Indeed, while race never plays a proper role in the exercise of prosecutorial discretion, statements by defendants and other First Amendment-protected activity often provide evidence of a crime in a way that prop-

erly influences prosecutorial discretion. See, *e.g.*, *Wayte*, 470 U.S. at 612-613 (noting that letters to the Selective Service, which clearly involved First Amendment activity, "provided strong, perhaps conclusive evidence" of "one of the elements of the offense"). Likewise, the exercise of the power to prosecute—"one of the core powers of the Executive Branch," *Armstrong*, 517 U.S. at 467—is no less important to the federal government when it is challenged under the First Amendment than when it is challenged under the equal protection component of the Due Process Clause. To the contrary, the Court has generally recognized that, in the absence of an equal protection violation, the prosecutor is free to file charges supported by probable cause. See *Bordenkircher*, 434 U.S. at 364-365. Accordingly, if a selective prosecution claimant must make an objective showing before a court or civil jury may take the extraordinary step of inquiring into the government's motives for bringing criminal charges, then, *a fortiori*, some objective showing is likewise required of a retaliatory prosecution claimant.

2. The remaining question is what objective showing is required for a retaliatory prosecution claim. The answer, as five courts of appeals have held,[6] is an absence

[6] See *Izen* v. *Catalina*, 398 F.3d 363, 367-368 (5th Cir. 2005), petition for cert. pending, No. 05-64 (filed July 11, 2005); *Draper* v. *Reynolds*, 369 F.3d 1270, 1277 n.11 (11th Cir.), cert. denied, 125 S. Ct. 507 (2004); *Wood* v. *Kesler*, 323 F.3d 872, 883 (11th Cir.), cert. denied, 540 U.S. 879 (2003); *Dahl* v. *Holley*, 312 F.3d 1228, 1236 (11th Cir. 2002); *Keenan* v. *Tejeda*, 290 F.3d 252, 260 (5th Cir. 2002); *Curley* v. *Village of Suffern*, 268 F.3d 65, 73 (2d Cir. 2001); *Smithson* v. *Aldrich*, 235 F.3d 1058, 1063 (8th Cir. 2000); *Merkle* v. *Upper Dublin Sch. Dist.*, 211 F.3d 782, 796 (3d Cir. 2000); *Singer* v. *Fulton County Sheriff*, 63 F.3d 110, 120 (2d Cir. 1995), cert. denied, 517 U.S. 1189 (1996); *Mozzochi* v. *Borden*, 959 F.2d 1174, 1179-1180 (2d Cir. 1992). But see

of probable cause for the charges. Probable cause generally defines the point at which respect for prosecutorial discretion predominates. "[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Wayte*, 470 U.S. at 607 (quoting *Bordenkircher*, 434 U.S. at 364). Accordingly, "[a]n individual does not have a right under the First Amendment to be free from a criminal prosecution supported by probable cause that is in reality an * * * attempt to deter or silence criticism of the government." *Mozzochi* v. *Borden*, 959 F.2d 1174, 1180 (2d Cir. 1992). Any other rule would open up the prosecutorial decisionmaking process whenever a retaliatory motive is alleged.

This conclusion finds support in *Heck* v. *Humphrey*, 512 U.S. 477 (1994), a constitutional tort case that relied on common law principles. In *Heck*, a state prisoner filed an action under 42 U.S.C. 1983, alleging that the prosecutors and a police investigator in the criminal case had violated his constitutional rights by conducting an illegal investigation, destroying exculpatory evidence, and using an unlawful voice-identification procedure at trial. This Court held that the prisoner's claims were not cognizable under Section 1983. In so holding, the Court "look[ed] * * * to the common law of torts." 512 U.S. at 483. It determined that "[t]he common-law cause of action for malicious prosecution provides the closest analogy to claims of the type considered here," and that "[o]ne element that must be alleged and proved

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Greene v. *Barber*, 310 F.3d 889, 896-897 (6th Cir. 2002); *Poole* v. *County of Otero*, 271 F.3d 955, 961 (10th Cir. 2001).

in a malicious prosecution action is termination of the prior criminal proceeding in favor of the accused." *Id.* at 484. Because the plaintiff could not establish that element, the Court held that he had no cause of action. Cf. *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Indus., Inc.*, 508 U.S. 49, 59-63 (1993) (to establish sham exception to antitrust immunity under *Noerr-Pennington* doctrine, plaintiff must satisfy threshold objective element, drawn from tort of malicious prosecution, of absence of probable cause for prior suit before court examines defendant's subjective motivations).

Similar logic applies here. A claim of retaliatory prosecution has been aptly described as "a First Amendment claim of malicious prosecution." *Johnson* v. *Louisiana Dep't of Agric.*, 18 F.3d 318, 320 (5th Cir. 1994). The common law tort requires proof that the prosecution was commenced "primarily for a purpose other than that of bringing an offender to justice," Restatement (Second) of Torts § 653, at 406 (1977), and a retaliatory prosecution is a prosecution commenced for one such purpose. Indeed, at an earlier stage of the case, respondent acknowledged that his claim is "essentially [one] of malicious prosecution in retaliation for the exercise of a constitutional right." 99-5197 Resp. C.A. Br. 35.

As this Court recognized in *Heck*, one of the elements of a malicious prosecution claim is that "the prior proceeding was without probable cause." 512 U.S. at 485 n.4 (1994). See, *e.g.*, Restatement (Second) of Torts, *supra*, § 653, at 406 (plaintiff must prove that defendant "initate[d] or procure[d] the proceedings without probable cause"); 8 Stuart M. Speiser et al., *The American Law of Torts* § 28:7, at 38 (1991) ("it is fundamental that lack or want of probable cause is an essential element

for successful pursuance of such an action"). Indeed, nearly 150 years ago, the Court explained that

> [m]alice alone * * * is not sufficient to sustain the action, because a person actuated by the plainest malice may nevertheless prefer a well-founded accusation, and have a justifiable reason for the prosecution of the charge. Want of reasonable and probable cause is as much an element in the action for a malicious criminal prosecution as the evil motive which prompted the prosecutor to make the accusation.

Wheeler v. *Nesbitt*, 65 U.S. (24 How.) 544, 550 (1861). Accord *Brown* v. *Selfridge*, 224 U.S. 189, 191-193 (1912); *Crescent City Live Stock Co.* v. *Butchers' Union Slaughter-House Co.*, 120 U.S. 141, 147-151 (1887); *Stewart* v. *Sonneborn*, 98 U.S. 187, 192-197 (1879); *Stacey* v. *Emery*, 97 U.S. 642, 645-646 (1878); *Dinsman* v. *Wilkes*, 53 U.S. (12 How.) 390, 402 (1852); *White* v. *Nicholls*, 44 U.S. (3 How.) 266, 289 (1845); *Gelston* v. *Hoyt*, 16 U.S. (3 Wheat.) 246, 281 (1818). The rationale for that principle is the "obvious polic[y] of the law in favor of encouraging proceedings against those who are apparently guilty." W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 119, at 876 (5th ed. 1984). Accord 8 Stuart M. Speiser et al., *supra*, § 28:3, at 10-11. Perhaps because of that policy, lack of probable cause has been described, not only as an essential element, but as the "most important element," *Porter* v. *Mack*, 40 S.E. 459, 464 (W. Va. 1901), and the "lynchpin," *Kerney* v. *Aetna Cas. & Sur. Co.*, 648 S.W.2d 247, 251 (Tenn. Ct. App. 1982), of the common law tort of malicious prosecution.

Heck's reliance on the common law to identify the contours of an actionable constitutional violation is far from anomalous. This Court "frequently consult[s] * * * common law in attempting to determine the content of constitutional provisions." *Loving* v. *United States*, 517 U.S. 748, 779 (1996) (Thomas, J., concurring in the judgment).[7] As a number of the authorities on which this Court relied in *Wheeler* v. *Nesbitt* demonstrate, see 65 U.S. (24 How.) at 550-551, the common law at the time of the adoption of the First Amendment was the same as the common law today: it was not a civil wrong to file criminal charges on the basis of an improper motive so long as there was probable cause to believe that a crime had been committed. "From 1766 to the present day, such has been constantly held to be the law, both in England and this country." *Stewart* v. *Sonneborn*, 98 U.S. at 193. Indeed, the rule was recognized by Blackstone himself. See 3 William Blackstone, *Commentaries* 127 (1768) (in malicious prosecution action, "any probable cause for preferring [the indictment] is sufficient to justify the defendant"). The common law

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[7] See, *e.g.*, *United States* v. *Booker*, 125 S. Ct. 738, 753 (2005) (Sixth Amendment right to trial by jury); *Crawford* v. *Washington*, 541 U.S. 36, 54 (2004) (Sixth Amendment right to confront witnesses); *United States* v. *Balsys*, 524 U.S. 666, 674 & n.5, 680-688 (1998) (Fifth Amendment privilege against self-incrimination); *Wilson* v. *Arkansas*, 514 U.S. 927, 931 (1995) (Fourth Amendment prohibition of unreasonable searches); *Honda Motor Corp.* v. *Oberg*, 512 U.S. 415, 430 (1994) (Fourteenth Amendment right to due process); *United States* v. *Dixon*, 509 U.S. 688, 704 (1993) (Fifth Amendment double jeopardy prohibition); *Griffin* v. *United States*, 502 U.S. 46, 49-51 (1991) (Fifth Amendment right to due process); *Ingraham* v. *Wright*, 430 U.S. 651, 659 (1977) (Eighth Amendment prohibition of cruel and unusual punishments); *Branzburg* v. *Hayes*, 408 U.S. 665, 685 (1972) (First Amendment rights to free speech and free press).

thus precluded a challenge to a prosecution that *could have been brought* (because there was probable cause), even if it could be shown that it *would not have been brought* (because of an improper motive). See *Dinsman* v. *Wilkes*, 53 U.S. (12 How.) at 402 ("[T]he reason for the rule * * * is 'that it would be a very great discouragement to public justice * * * if prosecutors, who had a tolerable ground of suspicion, were liable to be sued at law whenever their indictments miscarried.'") (quoting 3 William Blackstone, *supra*, at 126).

Grounding the First Amendment standard in the specific context of retaliatory *prosecution* in the law of malicious *prosecution* only makes sense. Concerns about improper retaliation for activity protected by the First Amendment need to account for the form the alleged retaliation takes and the constitutional norms relevant to that particular type of government conduct. See, e.g., *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. at 487-491. The prosecution context involves acute risks of "very great discouragement to public justice," *Dinsman*, 53 U.S. (12 How.) at 402 (quoting 3 Blackstone, *supra*, at 126), and the First Amendment test is appropriately tailored to that context.

The long-recognized common law rule thus affords a "background presumption," *Armstrong*, 517 U.S. at 463 (quoting *United States* v. *Mezzanatto*, 513 U.S. 196, 203 (1995)), regarding the showing necessary for a claim that a prosecution had an improper motivation, including retaliation for the exercise of First Amendment rights. It is both logical and faithful to the Nation's legal heritage and traditions that an absence of probable cause is the objective element of a First Amendment claim of retaliatory prosecution necessitated by this Court's

"particular concern" about the "systemic costs" of judicial inquiry, *Wayte*, 470 U.S. at 607, into the exercise of the "core executive constitutional function" of prosecutorial decisionmaking, *Armstrong*, 517 U.S. at 465.

C. The Court Of Appeals' Standard Disregards The Special Considerations That Govern Constitutional Challenges To Prosecutorial Decisionmaking

1. The court of appeals' decision does not require a retaliatory prosecution claimant to establish *any* objective element. Under its standard, a plaintiff need only allege and then show that "protected conduct" was "a motivating factor in the decision to press charges," and the burden then shifts to the defendant to show that he "would have pursued the case anyway." Pet. App. 13a. If that standard were adopted by this Court, there would be an after-the-fact "[e]xamin[ation] [of] the basis of a prosecution," *Wayte*, 470 U.S. at 607, in every case in which the speech at issue was protected by the First Amendment. Adoption of that standard would also make litigation more expensive and time-consuming, because an improper motive is "easy to allege and hard to disprove," *National Archives & Records Admin.*, 541 U.S. at 175 (quoting *Crawford-El*, 523 U.S. at 585), and a defendant would be unable to terminate the suit at an early stage by virtue of the plaintiff's inability to make an objective showing. The court of appeals' standard is thus inconsistent with the considerations on which this Court has relied in its decisions addressing constitutional challenges to prosecutorial decisionmaking. In particular, the standard threatens to "undermine prosecutorial effectiveness," *Wayte*, 470 U.S. at 607, by "revealing the Government's enforcement policy," *ibid.*, "deflect[ing]" the "energies" of officers from their "pub-

lic duties," *Imbler*, 424 U.S. at 423, "delay[ing] the criminal proceeding" (if the claim can be raised in the criminal case), *Wayte*, 470 U.S. at 607, and generally "chill[ing] law enforcement," *ibid*. These threats are most pronounced in the area of public corruption, where, by virtue of their status as, or interactions with, government officials, subjects and targets of criminal investigations will frequently be in a position to assert a First Amendment claim. But the potential difficulty will be present in many criminal cases, because First Amendment-protected activity often factors into the exercise of prosecutorial discretion. See *supra*, pp. 23-24.

The court of appeals insisted that its standard *is* "[r]espectful of executive discretion" because it "allows the government to proceed with prosecutions that, though motivated in part by hostility to First Amendment activity, can be justified on legitimate grounds." Pet. App. 17a. But a legal standard is not respectful of Executive discretion merely because it requires an ultimate finding that "hostility to speech [was] a but-for cause of the prosecution." *Ibid*. That requirement provides no unique rule for retaliation claims *in the prosecutorial context*. Rather, it is a minimum showing applicable in *every* context; a retaliatory motive causes no injury if the action would have been taken in any event. See *Crawford-El* v. *Britton*, 523 U.S. at 593. Even if the requirement were unique to prosecutorial decisions, the court of appeals' standard would still not be respectful of Executive discretion, because this Court's cases make clear that inquiry into motives for bringing a prosecution should be the rare exception rather than the rule, and should be limited to cases where the claimant can make the requisite objective showing at the threshold.

The court of appeals' standard permits an inquiry into motives, supported by discovery, in virtually every retaliatory prosecution case, and thus interferes with "one of the core powers of the Executive Branch," *Armstrong*, 517 U.S. at 467, regardless of whether the officers are ultimately found to have had an improper motive that was the but-for cause of the prosecution.

The court of appeals also claimed that its "theory of liability" is "limited" because "probable cause ordinarily suffices to initiate a prosecution," and a showing of probable cause will therefore "be enough in most cases to establish that prosecution would have occurred absent bad intent." Pet. App. 19a. That observation suffers from several flaws. As an initial matter, it rests on an unproven empirical assumption (that almost all potential prosecutions that satisfy the probable cause standard are in fact brought) whose accuracy likely varies depending on the nature of the underlying crime. While the assumption may be accurate for particularly heinous crimes, there are other, less serious, crimes for which a finding of probable cause would be far from a sufficient basis for expending prosecutorial resources. In any event, the court of appeals' decision all but demands inquiry into the standards for exercising prosecutorial discretion, and thus cannot reasonably be viewed as "limited." Whether the existence of probable cause would, by itself, have led to the filing of charges can only be determined after discovery into the prosecutorial decisionmaking of the relevant prosecutor's office.

More fundamentally, once it is accepted that the absence of probable cause is not an element of the cause of action (and that its presence is not a defense), there is no reason to think that evidence about the existence of probable cause will be particularly significant to the in-

quiry before the jury. As the court of appeals recognized, "probable cause usually represents only one factor among many in the decision to prosecute—some others being the strength of the evidence, the resources required for the prosecution, the relation to enforcement priorities, and the defendant's culpability." *Id.* at 13a. See also *Armstrong*, 517 U.S. at 465; *Wayte*, 470 U.S. at 607; *Lovasco*, 431 U.S. at 794 n.15. Under the court of appeals' standard, there are thus likely to be many cases in which there is not "weak," Pet. App. 20a, but strong probable cause, and the jury nevertheless returns a verdict for the plaintiff, based on a finding of improper motive and a determination that the many other considerations that bear upon the exercise of prosecutorial discretion would not independently have resulted in the filing of charges. Cf. *Imbler*, 424 U.S. at 425 (suits against prosecutors that went to trial would pose "substantial danger of liability even to the honest prosecutor," because they would often raise issues on which even judges sometimes come to "differing conclusions").

For these reasons, the court of appeals' reliance on *Mount Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977), see Pet. App. 15a-16a, is misplaced. *Mount Healthy* holds that a plaintiff has the burden of proving that his speech was constitutionally protected and that it was a motivating factor in the decision being challenged; the burden then shifts to the defendant to show that the same decision would have been reached even if the plaintiff had not expressed the speech in question. 429 U.S. at 287. The court of appeals' adoption of that standard is erroneous because *Mount Healthy* did not involve retaliatory *prosecution*. Like the other decisions in the line of cases beginning with *Pickering* v. *Board of Education*, 391 U.S. 563

(1968), *Mount Healthy* involved retaliatory action against an *employee* by a public *employer*, and thus the special considerations governing constitutional challenges to prosecutorial decisionmaking were inapplicable.

As Judge Leval has observed, "a plaintiff alleging a claim of selective *prosecution* in violation of the Equal Protection Clause must plead and establish the existence of similarly situated individuals who were not prosecuted," because "courts grant special deference to the executive branch in the performance of the 'core' executive function of deciding whether to prosecute." *Pyke* v. *Cuomo*, 258 F.3d 107, 109 (2d Cir. 2001). In an ordinary equal protection case, by contrast, "[t]he *Armstrong* rule has no application" and the plaintiff "need not plead or show the disparate treatment of other similarly situated individuals." *Ibid.* The same is true *a fortiori* in First Amendment cases. In an ordinary retaliation case, like *Mount Healthy*, the defendants are not performing a "'core' executive function," *ibid.*, there is typically little justification for "special deference to the executive branch," *ibid.*, and there is consequently no basis for requiring the plaintiff to plead and prove an objective element.[8] There is manifestly a basis for an objective element, however, in a case, like this one, that involves a claim of retaliatory *prosecution*.[9]

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[8] Of course, if the plaintiff challenging an employment action is a high-ranking politically appointed official, there is a greater potential for interference with core Executive functions, and no First Amendment claim lies. See *Waters* v. *Churchill*, 511 U.S. 661, 672 (1994) (opinion of O'Connor, J.)

[9] The court of appeals' reliance on *Crawford-El* v. *Britton*, *supra*, see Pet. App. 19a, is also misplaced. In *Crawford-El*, this Court rejected "special procedural rules" for "constitutional claim[s] that re-

2. The logic of the First Amendment holding below is not just that those acquitted in unsuccessful prosecutions should be able to bring constitutional tort actions even if the prosecution was supported by probable cause. The court of appeals' decision also suggests that criminal defendants would possess a First Amendment defense to an ongoing prosecution that, while supported by probable cause, would nonetheless not have been brought but for an allegedly retaliatory motive. That is not the context in which retaliatory prosecution claims have tended to arise, presumably because of the firmly grounded common law rule that a necessary prerequisite for a malicious prosecution claim is the favorable (to the defendant) resolution of the criminal case. See *Heck*, 512 U.S. at 484-486. The logic of the opinion below, however, would dispense with both the favorable-termination requirement and the absence-of-probable-cause requirement, and would routinely allow defendants to raise a First Amendment defense to criminal charges supported by probable cause. That prospect only underscores the flaw in the court of appeals' reasoning and the

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quire[] proof of improper motive," 523 U.S. at 577, and also rejected a "proposal to immunize all officials whose conduct is 'objectively valid,' regardless of improper intent," *id.* at 594. This case does not implicate an across-the-board rule of procedure or immunity for claims requiring proof of improper motive. Rather, petitioners' position is that, in the unique context of prosecutorial decisionmaking (which was not at issue in *Crawford-El*), a substantive claim of retaliation in violation of the First Amendment will not lie if the charges were supported by probable cause. Of course, the absence of an across-the-board procedural device to weed out frivolous claims only heightens the need for an objective standard in a context like prosecution, where many defendants are likely to believe that they are victims of discrimination or retaliation and routine inquiry into the government's decisionmaking would undermine a core Executive function.

need, at a minimum, for an objective screen, as in *Wayte* and *Armstrong*.[10]

If, however, the Court wanted to reserve the broader First Amendment question, it could limit its holding to the elements of the constitutional tort under *Bivens* and 42 U.S.C. 1983. That approach would be consistent with this Court's decision in *Heck* v. *Humphrey*, *supra*, which established the principle that a cause of action for a constitutional violation under Section 1983 incorporates the elements of the analogous common law cause of action. See 512 U.S. at 483-490. See also *Kalina* v. *Fletcher*, 522 U.S. 118, 123 (1997) ("we have examined common-law doctrine when identifying both the elements of the [Section 1983] cause of action and the defenses available to state actors").[11] Although petitioners focused their arguments in the lower courts on the broader First Amendment issue, the contention that the absence of probable cause is an element of the constitutional tort in

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[10] Indeed, the equal protection context appears to be the only one in which courts will entertain this type of constitutional challenge to the initial charges in an ongoing criminal prosecution.

[11] While *Heck* was a Section 1983 action against state officials, its rationale applies *a fortiori* to *Bivens* actions against federal officials. See, *e.g.*, *Clemente* v. *Allen*, 120 F.3d 703, 705 (7th Cir. 1997) (per curiam) (citing cases from other circuits); *Martin* v. *Sias*, 88 F.3d 774, 775 (9th Cir. 1996) (per curiam) (same). Cf. *Antoine* v. *Byers & Anderson, Inc.*, 508 U.S. 429, 433 n.5 (1993) ("For purposes of immunity, we have not distinguished actions brought under 42 U.S.C. § 1983 against state officials from actions brought against federal officials."). The remedy for constitutional violations by state officials is an explicit one created by Congress, while the remedy for constitutional violations by federal officials is an implied one fashioned by this Court. Because the cause of action was developed in a common law manner, it is proper here that the elements of the cause of action be grounded in the common law.

a *Bivens* or Section 1983 cause of action is not a new claim, see, *e.g.*, *Yee* v. *City of Escondido*, 503 U.S. 519, 534-535 (1992), and it is within the question presented, see Pet. (I).[12]

II. THERE WAS PROBABLE CAUSE FOR THE CHARGES AGAINST RESPONDENT

The court of appeals concluded, incorrectly, that the absence of probable cause is not an element of a First Amendment action for retaliatory prosecution, and thereby obviated the need to consider petitioners' argument that probable cause existed. See Pet. App. 12a. This Court could therefore leave that issue for consideration by the court of appeals in the first instance. If the Court reaches the issue, however, it is clear that there was probable cause for the charges.

A. Respondent was charged principally with conspiracy to defraud the United States, in violation of 18 U.S.C. 371. For a defendant to be guilty of conspiracy, there need not be a "formal agreement" to violate the law, *American Tobacco Co.* v. *United States*, 328 U.S. 781, 809 (1946), and the defendant need not be aware of

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[12] Limiting the holding to the context of a *Bivens* cause of action could implicate a jurisdictional question about whether that issue is properly before the court of appeals on an interlocutory qualified immunity appeal. Although courts have provided different answers to that question, compare *Nebraska Beef, Ltd.* v. *Greening*, 398 F.3d 1080, 1082-1084 (8th Cir. 2005) (immediately appealable), petition for cert. pending, No. 04-1611 (filed May 31, 2005), and *Hill* v. *Department of the Air Force*, 884 F.2d 1318, 1320 (10th Cir. 1989) (same), cert. denied, 495 U.S. 947 (1990), with *Pelletier* v. *Federal Home Loan Bank*, 968 F.2d 865, 871 (9th Cir. 1992) (contra), the better view is that the issue is fairly included in the interlocutory appeal, see 04-1611 Br. in Opp. 6-10. In any event, the Court need only reach that jurisdictional issue if it limits its holding to the *Bivens*/Section 1983 context.

all the conspiracy's details or members, *Blumenthal* v. *United States*, 332 U.S. 539, 557 (1947). It is enough that there was a "tacit understanding," *Direct Sales Co.* v. *United States*, 319 U.S. 703, 714 (1943), and that the defendant had a "slight connection" to the conspiracy, *e.g.*, *United States* v. *Alvarez*, 358 F.3d 1194, 1201 (9th Cir.), cert. denied, 125 S. Ct. 126 (2004); *United States* v. *Strickland*, 245 F.3d 368, 385 (4th Cir.), cert. denied, 534 U.S. 894 (2001). Nor is it necessary that the existence of the conspiracy or the defendant's participation in it be proved "by direct evidence." *Glasser* v. *United States*, 315 U.S. 60, 80 (1942). Both elements "may be inferred from a 'development and a collocation of circumstances.'" *Ibid.* (quoting *United States* v. *Manton*, 107 F.2d 834, 839 (2d Cir. 1939), cert. denied, 309 U.S. 664 (1940)). That is particularly true of white-collar conspiracies, like this one, which are often established by "a complex web of inferential proof." *United States* v. *Ashfield*, 735 F.2d 101, 103 (3d Cir.), cert. denied, 469 U.S. 858 (1984).

A *charge* of conspiracy, of course, requires only probable cause, which is "more than bare suspicion," but "'less than evidence which would justify condemnation' or conviction." *Brinegar* v. *United States*, 338 U.S. 160, 175 (1949) (quoting *Locke* v. *United States*, 11 U.S. (7 Cranch) 339, 348 (1813) (Marshall, C.J.)). Probable cause is a "commonsense, nontechnical conception[]" that deals with "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Ornelas* v. *United States*, 517 U.S. 690, 695 (1996) (quoting *Illinois* v. *Gates*, 462 U.S. 213, 231 (1983) (quoting *Brinegar*, 338 U.S. at 175)). This Court has stated that "[t]he substance of all the definitions" of the term is "a reasonable ground for be-

lief of guilt." *Carroll* v. *United States*, 267 U.S. 132, 161 (1925) (quoting *McCarthy* v. *De Armit*, 99 Pa. 63, 69 (1881)). Probable cause exists if "the facts and circumstances" about which there is "reasonably trustworthy information" are "sufficient to warrant a prudent man in believing that the [defendant] * * * committed * * * an offense." *Beck* v. *Ohio*, 379 U.S. 89, 91 (1964).

B. The charges against respondent were contained in an indictment, the return of which is generally regarded as *prima facie* evidence of probable cause. See *Tinsley* v. *Treat*, 205 U.S. 20 (1907) (proceeding for removal of criminal defendant to district where he was charged); Restatement (Second) of Torts, *supra*, § 664(2), at 432 (common law action for malicious prosecution). On this record, respondent cannot rebut that evidence. There was indisputably a conspiracy involving Gnau's payment of kickbacks to Voss in exchange for his referral of business to GAI and Spartin's acceptance of a contract to search for a new Postmaster General while seeking to conceal his association with GAI and REI. It is also indisputable that REI stood to benefit from both schemes. The only question is whether respondent was a knowing member of the conspiracy. As explained below, the "collocation of circumstances," *Glasser*, 315 U.S. at 80 (quoting *Manton*, 107 F.2d at 839), was "sufficient to warrant a prudent man in believing" that he was, *Beck* v. *Ohio*, 379 U.S. at 91.

After Voss recommended that REI hire GAI, he called respondent several times and, on at least one occasion, asked why his recommendation had not been acted upon. Respondent, in turn, "kept pushing" Reedy, and told him not to "drop the ball." After REI hired GAI, Gnau told Reedy that it was better that he not know about Gnau's arrangement with Voss. Gnau also

told Reedy that they should refer to Voss as "our friend," and Reedy replied, "I understand." Reedy later denied—falsely—that he had gotten the GAI referral from Voss. Respondent's notes also suggest that respondent had access to information from closed sessions of the Postal Service's Board of Governors, of which Voss was a member. J.A. 41, 54-57, 79-82, 126; C.A. App. 414.

After the investigation began, the postal inspectors were informed that REI may have purged records. There were in fact a number of omissions in the records that REI produced, including respondent's "Postal" notebook, and REI's Frank Bray admitted that he had altered his travel records to conceal meetings with Spartin. In addition, one of respondent's notebooks included an entry suggesting that he might have coached REI employees on how to answer questions from postal inspectors, and respondent made comments consistent with that entry at a staff meeting. J.A. 60-62, 82, 85, 89-90, 172-173.

Finally, respondent provided an implausible explanation of his involvement in the recruitment of a new Postmaster General. He told the postal inspectors that, when Spartin called and asked for referrals, he did not believe that Spartin was recruiting a new Postmaster General, even though respondent gave Spartin the names of candidates and made an introductory call to one of them. Respondent and Spartin also agreed to say that it was respondent who had called Spartin, even though it was in fact Spartin who placed the call. J.A. 59, 85-86.

Voss's persistence in urging respondent to hire GAI suggested that Voss had a personal interest in the decision, and thus is evidence that respondent had knowl-

edge of the conspiracy. So, too, is the presence in respondent's notebook of information from closed sessions of the Postal Service's Board of Governors. The comments that Gnau made to Reedy also suggested an improper arrangement between Voss and Gnau, and thus are evidence that Reedy had knowledge of the conspiracy. Because respondent was Reedy's close associate, and because Reedy is known to have conveyed to respondent the substance of his discussion with Voss about GAI, see J.A. 54, it is reasonable to infer that Reedy told respondent at least some of what Gnau told Reedy about Gnau's relationship with Voss. In addition, Reedy's statement concealing the fact that it was Voss who had referred GAI and respondent's deceptive statement about the Postmaster General search are evidence of consciousness of guilt—and, by extension, of knowing membership in the conspiracy. See *Hickory* v. *United States*, 160 U.S. 408, 417 (1896). The same is true of the evidence that respondent altered or destroyed records, and of the evidence that he coached witnesses. See *ibid*

In expressing the view that "the evidence supporting the government's case * * * appears quite weak," Pet. App. 22a, the court of appeals suggested that some of the evidence had an innocent explanation, *id.* at 24a-25a. "The fact that an innocent explanation may be consistent with the facts alleged, however, does not negate probable cause." *United States* v. *Fama*, 758 F.2d 834, 838 (2d Cir. 1985). As this Court has explained, "[i]n making a determination of probable cause the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts." *Gates*, 462 U.S. at 244 n.13.

C. Under principles of qualified immunity, petitioners were entitled to summary judgment even if, in fact

and in hindsight, there was *not* probable cause for the charges against respondent. As with "other officials who act in ways they reasonably believe to be lawful," qualified immunity protects law enforcement officials who "reasonably but mistakenly conclude that probable cause is present" from being held "personally liable." *Anderson* v. *Creighton*, 483 U.S. 635, 641 (1987). Even if the evidence of respondent's guilt did not rise to the level of probable cause, it was not so one-sided that no reasonable person in petitioners' position could believe there was probable cause. That is especially true inasmuch as the final judgment as to the existence of probable cause rested with the prosecutors, who exercised independent judgment (and, of course, enjoy absolute immunity). Accordingly, if petitioners "erred in concluding that probable cause existed," they are still "entitled to qualified immunity because their decision was reasonable, even if mistaken." *Hunter* v. *Bryant*, 502 U.S. 224, 228-229 (1991) (per curiam).[13]

[13] The fact that the district court entered a judgment of acquittal in the criminal case does not require a different conclusion. Even if, as the district court found, no rational trier of fact could find respondent guilty beyond a reasonable doubt, a reasonable law enforcement officer could believe that there was probable cause that respondent committed an offense. There is no inconsistency between the two determinations, because, "[w]hatever evidence may be necessary to establish probable cause in a given case, * * * it never need rise to the level required to prove guilt beyond a reasonable doubt." *United States* v. *Watson*, 423 U.S. 411, 431 n.4 (1976) (Powell, J., concurring).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
PETER D. KEISLER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
DAN HIMMELFARB
Assistant to the Solicitor General
BARBARA L. HERWIG
MATTHEW M. COLLETTE
STEPHANIE R. MARCUS
RICHARD MONTAGUE
Attorneys

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