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

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

REPLY BRIEF FOR THE PETITIONERS

A showing that the prosecution lacked probable cause is a necessary element of a claim of First Amendment retaliatory prosecution. That rule provides an objective gateway for screening claims of retaliatory prosecution. It accords with the heightened deference traditionally afforded by the courts to the exercise of the prosecutorial function. It is deeply rooted in the common law tort of malicious prosecution, of which a claim of First Amendment retaliatory prosecution is simply one example. And, as with the tort of malicious prosecution generally, the requirement that the plaintiff establish the absence of probable cause as a necessary element of a First Amendment claim appropriately balances the public interest in encouraging the reporting of evidence of violations of the law to the prosecutor against the individual interest in not being subjected to baseless prosecution in retaliation for the exercise of First Amendment rights.

Under our constitutional system, the prosecutor and the grand jury exercise independent judgment in determining whether an individual will be prosecuted, and they therefore afford independent protection against unwarranted or malicious prosecutions. See *Gerstein* v. *Pugh*, 420 U.S. 103, 121 n.22 (1975); *Wood* v. *Georgia*, 370 U.S. 375, 390 (1962). The decision to prosecute is inherently discretionary and sufficiently likely to provoke potential litigation that the prosecutor (like the grand jury) enjoys absolute immunity from suit, in order to serve the broader public interest in the vigorous and fearless performance of his duties, including the exercise of his independent judgment in deciding whether to prosecute. See *Imbler* v. *Pachtman*, 424 U.S. 409 (1976). But the litigation that respondent envisions would routinely open up the prosecutorial decisionmaking process—a source of information relevant to the First Amendment plaintiff's burden to show that the retaliatory motive was the key causal

factor that led to the prosecution. The requirement to show an absence of probable cause thus furnishes a critical objective check against routine, chilling, and unwarranted judicial scrutiny of prosecutorial decisionmaking based on allegations concerning the motives of persons several steps removed from the ultimate decision to prosecute.

Respondent nonetheless contends (Br. 17-43) that a claim of retaliatory prosecution should not require a showing of an absence of probable cause for the charges and, indeed, should require *no* objective showing at all. As the brief of amici National League of Cities *et al.* underscores, however, the adoption of respondent's position would establish an inherently subjective and unworkable test that would chill legitimate law enforcement activities across the Nation. The various objections respondent raises to the probable cause element, moreover, are without merit. So, too, is respondent's contention (Br. 43-50) that there was no probable cause for the charges against him. Finally, respondent's assertions about the evidence of petitioners' motives (see Br. 4-8) are inaccurate. See pp. 18-20, *infra*.

I. TO ESTABLISH A CLAIM OF RETALIATORY PROSECUTION, A *BIVENS* PLAINTIFF MUST DEMONSTRATE THAT THERE WAS NO PROBABLE CAUSE FOR THE CHARGES

A. A First Amendment Claim Of Retaliatory Prosecution Does Not Lie If There Was Probable Cause For The Charges

1. Respondent contends that petitioners' submission —that absence of probable cause is an element of a First Amendment retaliatory prosecution claim—is "directly foreclosed" by the precedents of this Court stating that the decision to prosecute is "subject to constitutional constraints." Br. 23 (quoting *United States* v. *Batchelder*, 442 U.S. 114, 125 (1979)); accord *id.* at 18-19. That is a *non sequitur*. It is undisputed that a prosecution can violate the First

Amendment. At issue is whether the absence of probable cause is a necessary element of such a First Amendment claim. As five courts of appeals have held, it is. Adoption of that rule by this Court obviously would not mean that there are no First Amendment limitations on the decision to prosecute. It would merely subject the decision to prosecute to a bright-line "constitutional constraint."

Respondent is also mistaken in his contention (Br. 20-22) that adoption of petitioners' view is foreclosed by *Crawford-El* v. *Britton*, 523 U.S. 574 (1998). That case presented the question whether there should be "special procedural rules" for any "constitutional claim that requires proof of improper motive." *Id.* at 577. The Court answered that question no. This case concerns the distinct question of what *substantive* rules govern a constitutional challenge to *a decision to prosecute*. Because such a decision is "particularly ill-suited to judicial review," *Wayte* v. *United States*, 470 U.S. 598, 607 (1985), and because judicial review would "impair the performance of a core executive constitutional function," *United States* v. *Armstrong*, 517 U.S. 456, 465 (1996), this Court's 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.). The plaintiff in *Crawford-El* did not challenge a decision to prosecute, and the case did not purport to alter the well-established principle—reaffirmed only two years earlier in *Armstrong*—that special considerations apply to constitutional challenges to prosecutorial decisionmaking.

Armstrong allows a challenge to a prosecution decision that was allegedly based on race. Government actions based on race are especially odious under the Constitution and are generally subject to exacting review, even in contexts where significant deference is given to decisions alleged to violate other constitutional provisions, including the First Amendment. See, *e.g.*, *Johnson* v. *California*, 125 S. Ct. 1141 (2005) (holding deferential approach of *Turner* v. *Safley*, 482 U.S.

78 (1987), inapplicable to race-based equal protection claims). Even so, the Court has held that the standard for making out such a claim in the prosecution context is "rigorous" and "demanding," and requires an objective showing that similarly situated persons of a different race were treated differently. See pp. 6-7, *infra*. That requirement does not mean that prosecutorial decisionmaking is not subject to constitutional constraint, but it does prevent routine intrusion into prosecutorial decisionmaking. The showing required to make out a First Amendment retaliatory prosecution claim must likewise be rigorous and demanding, and must likewise avoid scrutiny of prosecutorial decisonmaking unless there is an objective showing—the absence of probable cause.

Respondent contends that petitioners' position is "conceptually incoherent," because "it makes no sense to say that the existence of a constitutional violation depends on the specific nature of the improperly motivated act." Br. 22-23. That contention is refuted by, *inter alia*, *Armstrong*, *Turner* v. *Safley*, and the line of cases that begins with *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), and includes *Mount Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977), one of the principal authorities on which respondent relies. The cases in the *Pickering* line hold that, when a public employer takes an adverse action against an employee on the basis of his speech, the action violates the First Amendment only if the speech is "on a matter of public concern" and the employee's interest in expressing himself is not "outweighed by any injury the speech could cause to 'the interest of the * * * employer[] in promoting the efficiency of the public services it performs.' " *Waters* v. *Churchill*, 511 U.S. 661, 668 (1994) (opinion of O'Connor, J.) (quoting *Connick* v. *Myers*, 461 U.S. 138, 142 (1983), in turn quoting *Pickering*, 391 U.S. at 568). Out of concern for the special nature of government employment, this Court's decisions in that area make clear that the existence of a First Amendment violation depends on the nature of the speech

and the nature of the justification for the action—*i.e.*, the "specific nature" (Resp. Br. 23) of the challenged action.

The specific nature of a decision whether to file criminal charges is that it reflects the exercise of "one of the core powers of the Executive Branch of the Federal Government," *Armstrong*, 517 U.S. at 467, and is therefore a decision that courts are "properly hesitant to examine," *Wayte*, 470 U.S. at 608. For that reason, it "makes no sense" (Resp. Br. 22) to apply the First Amendment to that decision the same way it is applied to "any [other] official act" (*id.* at 18). Rather, just as First Amendment interests must be weighed against other important considerations under *Pickering* and its progeny, First Amendment interests in this context must be balanced against the fundamental public interests in the investigative and prosecutorial functions and the vigorous enforcement of the law. See also *Reno* v. *American-Arab Anti-Discrimination Comm.* (*AADC*), 525 U.S. 471, 487-492 (1999) (declining to recognize First Amendment selective enforcement claim in immigration context).

2. In our opening brief (at 21-24), we show that the court of appeals' approach is flawed because, *inter alia*, it allows challenges to prosecutions allegedly based on speech to proceed under more relaxed standards than challenges to prosecutions allegedly based on race. Respondent contends, however, that it is actually petitioners' rule that would "destroy the * * * symmetry between the First Amendment and the Equal Protection Clause in the prosecutorial context," because a racially motivated prosecution violates equal protection "even if the prosecution is supported by probable cause." Br. 25 (emphasis omitted). It is true that, under petitioners' approach, a claim of selective prosecution and a claim of retaliatory prosecution have different objective elements (just as they have different subjective elements): the former requires proof that the decision to prosecute was motivated by the defendant's race and that similarly situated members of a different race were not prosecuted, while the

latter requires proof that the decision was motivated by the defendant's speech and that there was no probable cause for the charges. Respondent's approach creates a far more fundamental asymmetry, however, because it does not require proof of *any* objective element for a claim of retaliatory prosecution as opposed to a claim of selective prosecution.

Indeed, respondent's approach creates *two* fundamental anomalies. Just as respondent's rule imposes a *lesser* burden on a retaliatory prosecution claimant than on a selective prosecution claimant (despite the similarity of their claims and the degree of intrusion into the prosecutorial function they entail), it imposes *no greater burden* on a retaliatory prosecution claimant than on a plaintiff alleging speech-based retaliation *outside the prosecutorial context* (despite the special considerations that govern challenges to prosecutorial decisionmaking). Respondent's approach also provides more protection in the First Amendment context despite the reality that, unlike race, which never plays a legitimate role in the decision to prosecute, First Amendment activity may often be highly relevant evidence that informs a decision to prosecute. See Pet. Br. 23-24.

Respondent disputes the need for any special rule for claims of retaliatory prosecution on the asserted ground that this Court's decision in *Armstrong* does not "create[] a special Equal Protection rule" for claims of selective prosecution. Br. 25. That is not correct. In *Armstrong* the Court said that, because "[a] selective-prosecution claim asks a court to exercise judicial power over a 'special province' of the Executive," it has "taken great pains" to explain that the "standard for the elements" of such a claim is "rigorous" and "demanding." 517 U.S. at 463, 464, 468 (quoting *Heckler* v. *Chaney*, 470 U.S. 821, 832 (1985)). Citing *Armstrong*, the Court in *AADC* reiterated that, "in the criminal-law field, a selective prosecution claim is a *rara avis*." *Id.* at 489. It remains a *rara avis* notwithstanding the obvious incentive of

criminal defendants to bring such claims, because this Court has recognized that "such claims invade a special province of the Executive—its prosecutorial discretion," and the Court accordingly has "emphasized that the standard for proving them is particularly demanding." *Ibid.* (citing *Armstrong*, 517 U.S. at 463-465). If there were no "special Equal Protection rule in the context of criminal prosecutions" (Resp. Br. 25), the language in those decisions would be inexplicable, particularly in view of the absence of comparable language in equal protection cases outside the prosecutorial context. If "[t]he *Armstrong* rule" were the general rule, moreover, a plaintiff in an ordinary case who could show that the challenged government action was taken "on the basis of discriminatory [racial] animus," but was "incapable of showing similarly situated individuals who were treated differently," would be unable to establish an equal protection violation. *Pyke* v. *Cuomo*, 258 F.3d 107, 109 (2d Cir. 2001). As Judge Leval has observed, that is "clearly not the law" in the ordinary case. *Ibid.*[1]

Respondent also contends that, under his approach, a retaliatory prosecution claim and a selective prosecution claim are not fundamentally different. In particular, he asserts that the requirement of proof that a retaliatory prosecution claimant would not have been prosecuted but for his speech "serves the same purpose" that the "similarly situated" re-

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[1] Citing *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), respondent argues that, "under standard Equal Protection analysis applicable in all contexts, a showing of discriminatory effect is generally an 'important starting point' for showing that the adverse action furthered a discriminatory purpose." Br. 27 (quoting 429 U.S. at 266). What he seems to mean is that discriminatory effect is merely "circumstantial * * * evidence of intent." *Arlington Heights*, 429 U.S. at 266; see also *Washington* v. *Davis*, 426 U.S. 229, 242 (1976). While that may be true in an ordinary equal protection case like *Arlington Heights*, *Armstrong* requires proof of discriminatory effect regardless of whether other circumstantial evidence independently establishes discriminatory purpose.

quirement serves in a selective prosecution case. Br. 28. That assertion is flawed on a number of levels. First, because causation is an element of any constitutional claim based on an improper motive, see *Crawford-El*, 523 U.S. at 593, it is an element of *both* selective prosecution claims *and* retaliatory prosecution claims, and thus the independent "similarly situated" element of the former performs an objective screening function with no counterpart in the latter. Second, while the "similarly situated" element is objective, the "but for" element is purely subjective: it asks whether the prosecution was motivated by the plaintiff's speech, and, if so, whether there were additional motivations for the prosecution that, by themselves, would have resulted in the filing of charges. Third, because, under respondent's approach, a retaliatory prosecution plaintiff does not have to establish any objective element, and 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*, 523 U.S. at 585), respondent's standard makes it much easier for a retaliatory prosecution plaintiff to obtain discovery and defeat a motion for summary judgment than it is for a selective prosecution plaintiff, who must clear an objective hurdle. Finally, while it is the claimant in a selective prosecution case who bears the burden of establishing that similarly situated members of a different class were not prosecuted, under respondent's approach it is the government official who bears the burden of establishing that the prosecution would have been brought even if the plaintiff had not expressed the speech at issue. See Pet. App. 13a.

Particularly in light of the core Executive interests at stake in the decision whether to prosecute an individual for a crime and the public interest in encouraging the vigorous enforcement of the criminal laws, this is an area in which the need for a bright-line rule is paramount. Probable cause provides courts and law enforcement officers with a familiar ob-

jective standard for identifying meritorious claims at an early stage of litigation. Respondent's purely subjective motive test provides no objective, much less workable, criterion for identifying meritorious claims and, instead, would only invite additional litigation by disgruntled former defendants and intrusive discovery into the prosecutorial process.[2]

3. As the opening brief explains (at 24-30), the common law tort of malicious prosecution furnishes the proper framework for identifying the elements of a claim of retaliatory prosecution in violation of the First Amendment. That tort—and the strict limits placed on it to protect the public interest in pursuing well-founded prosecutions—predated the First Amendment, and this Court has repeatedly recognized that the absence of probable cause is an element of the tort. See Pet. Br. 26-29. As the Court has explained, "a person actuated by the plainest malice may nevertheless prefer a well-founded accusation." *Wheeler* v. *Nesbitt*, 65 U.S. (24 How.) 544, 550 (1861). The requirement of showing an absence of probable cause serves to protect the public interest in proceeding with such a "well-founded accusation." See also W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 119, at 876 (5th ed. 1984) ("[I]t is the part of a good citizen to bring about the prosecution of those who are reasonably suspected of crime, and the addition of a personal motive should not result in liability for performing a public obligation."); cf. *Devenpeck* v. *Alford*, 125 S. Ct. 588, 594

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[2] The requirement to show the absence of probable cause can be conceptualized either as an objective screen analogous to the similarly situated requirement in retaliatory prosecution claims, or as a recognition that individuals lack a constitutionally protected interest in a prosecutor's decision to exercise discretion not to prosecute despite the existence of probable cause, unless that decision is based on a suspect classification. Either way, the requirement to show the absence of probable cause reflects an appropriate reconciliation of First Amendment interests with the unique nature of the decision whether or not to initiate a prosecution.

(2004) (subjective motivation of police officer irrelevant to lawfulness of arrest supported by probable cause).[3]

Respondent contends that, while it is appropriate to "look to the common law to determine the contemporaneous understanding of particular terms * * * used in the Constitution," it is not appropriate to "search for a common-law tort analogy" to the particular context in which the constitutional right is raised and then "use that analogy to contract the scope of the constitutional right." Br. 31 (emphasis omitted). The suggestion that adherence to the common law would contract the scope of a constitutional right, however, simply assumes the answer to the question presented in this case: whether the First Amendment accords a right to be free from a prosecution that is fully supported by probable cause simply because an investigative officer was motivated by a desire to retaliate against the defendant for his speech. And contrary to respondent's suggestion that petitioners are not relying on the common law "to determine the content" of the First Amendment (*ibid.*), the fact that the Founding-era common law did *not* accord a right to be free from a prosecution supported by probable cause that was motivated by a malicious purpose (see Pet. Br. 28-29) is evidence of the "contemporaneous understanding of [the First Amendment's] guarantees," *Lynch* v. *Donnelly*, 465 U.S. 668, 673 (1984). Cf. *Branzburg* v. *Hayes*, 408 U.S. 665, 685 (1972) (holding that First Amendment accords no right to withhold identity of confidential source from grand jury, and relying, in part, on fact that, "[a]t common law, courts consistently refused to recognize the existence of any privilege authorizing a

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[3] Respondent's theory presumably would provide a constitutional tort remedy no matter how manifestly guilty the defendant, so long as the "smoking gun" evidence was rooted out by an officer who had a retaliatory motive. The societal interest in ensuring that the prosecutor, who controls the intervening decision to prosecute, has all available probative evidence suggests the need for caution in policing the motives of those who furnish the prosecutor with evidence of a crime.

newsman to refuse to reveal confidential information to a grand jury"). Nor is there anything unusual about relying upon "a common-law tort analogy" (Resp. Br. 31) in this context. See, *e.g.*, *Wilson* v. *Arkansas*, 514 U.S. 927, 933 (1995) (unanimously holding that common law "knock and announce" principle is part of reasonableness inquiry under Fourth Amendment; relying, in part, on fact that "[e]arly American courts" embraced that principle; and citing decisions involving common law tort of trespass) (citing *Walker* v. *Fox*, 32 Ky. (2 Dana) 404 (1834), *Burton* v. *Wilkinson*, 18 Vt. 186 (1846), and *Howe* v. *Butterfield*, 58 Mass. (4 Cush.) 302 (1849)).

4. As the opening brief makes clear (at 30-34), the court of appeals' standard disregards the special considerations that govern constitutional challenges to a decision to prosecute. Respondent contends, however, that "[t]he relative competence of prosecutors and courts in determining whether a prosecution is justified" has no relevance when it is *law enforcement officers* who "procure[] [an] indictment and prosecution" with "retaliatory animus." Br. 33. Respondent acknowledges that, under the court of appeals' approach, courts would still routinely be required to examine "the *prosecutor*'s decisionmaking as part of their inquiry into causation," but argues that "the purpose of doing so will not be to second-guess the prosecutor, but to determine whether an individual subjected to a retaliatory prosecution was actually injured thereby." *Ibid.* But while second-guessing the prosecutor might not be the purpose of the inquiry, it would be the effect. Indeed, an inquiry whose purpose is to divine whether a prosecution would have been brought absent certain input would require both a reconstruction of the prosecutorial decisionmaking that led to a particular indictment and a broader inquiry into prosecutorial standards to determine whether a particular prosecution was typical. Such inquiries would threaten to "chill law enforcement by subjecting the prosecutor's motives and decisionmaking to out-

side inquiry" and "undermine prosecutorial effectiveness by revealing the Government's enforcement policy." *Armstrong*, 517 U.S. at 465 (quoting *Wayte*, 470 U.S. at 607). Those are the principal reasons for "[j]udicial deference" in this area. *Ibid.*

Respondent also contends that petitioners have "greatly overstate[d]" the extent to which his rule would impair "a core executive function," because, under his approach, a retaliatory prosecution claim "will be viable only where, as here, law enforcement officers had a substantial role in procuring the indictment or prosecution." Br. 34. But it is the rare case in which law enforcement officers *do not* play a substantial role in procuring a prosecution. Prosecutors generally do not discover criminal conduct on their own; cases are brought to them for prosecution (or at least for further investigation) by law enforcement officers, who thereby become potential defendants in a retaliatory prosecution suit. As amici National League of Cities *et al.* explain, the court of appeals' approach would "discourage law enforcement officers from pursuing the prosecution of serious crimes," and thus "undermine[] the strong public interest in having law enforcement officers present cases of criminal conduct to prosecutors." Br. 18.

According to respondent, the rule that petitioners advocate is unnecessary, because district courts can employ "various procedural mechanisms," including requiring more specific allegations, narrowly focused discovery, and summary judgment, to "screen out baseless motive claims and avoid unnecessary and burdensome discovery." Br. 34-35. This Court has never relied on such mechanisms in cases involving a constitutional challenge to the decision to prosecute, however, and it certainly has not done so in selective prosecution cases. A successful claim of selective prosecution is a "*rara avis*," *AADC*, 525 U.S. at 489, not because of procedural mechanisms, but because there is "a rigorous

standard for *the elements*" of the claim, *Armstrong*, 517 U.S. at 468 (emphasis added).

Respondent says that "trials of claims relating to retaliatory procurement of indictments and prosecutions are exceedingly rare," and that he is unaware of any case in the circuits that apply his standard in which a government official has been found liable. Br. 35. But a decision by this Court embracing his standard could change all that, by causing more cases to be brought and leading to verdicts against law enforcement officers following well-founded prosecutions. In any event, it is not only the fact that law enforcement officers will be required to stand trial, or will be found liable, that "threatens to chill law enforcement" and "undermine prosecutorial effectiveness." *Armstrong*, 517 U.S. at 465 (quoting *Wayte*, 470 U.S. at 607). The filing of the lawsuit itself, which, under respondent's standard, cannot be terminated at an early stage on the basis of an objective showing, would have that effect. Indeed, the *mere possibility* that a law enforcement officer who recommends prosecution will be subject to a civil suit despite the existence of probable cause may lead the officer to "shade his decision[] instead of exercising the independence of judgment required by his public trust." *Imbler* v. *Pachtman*, 424 U.S. at 423.

B. There Is No Cause Of Action Under *Bivens* If There Was Probable Cause For The Charges

There is no merit to respondent's arguments (Br. 39-43) against the narrower ground for reversing the court of appeals—*i.e.*, that absence of probable cause is an element of the constitutional tort of retaliatory prosecution (see Pet. Br. 36-37). Even if *Heck* v. *Humphrey*, 512 U.S. 477 (1994), does not require *every* Section 1983 or *Bivens* plaintiff to establish "each substantive element" of the common law tort most analogous to the constitutional violation asserted (Resp. Br. 43), there are no countervailing considerations that would

justify *not* incorporating the elements of the common law tort of malicious prosecution into the constitutional tort of retaliatory prosecution. On the contrary, the principal considerations that bear on the question (other than the firmly grounded rule of the common law itself) are those that counsel great hesitation in reviewing a decision to prosecute, and they strongly confirm the correctness of limiting the availability of a damages action for retaliatory prosecution to cases in which probable cause was absent. The Court relied on considerations of that kind in holding that 42 U.S.C. 1983 incorporates the common law rule of absolute immunity for prosecutors, see, *e.g.*, *Burns* v. *Reed*, 500 U.S. 478, 484-487 (1991); *Imbler*, 424 U.S. at 420-429, and they likewise justify incorporating the elements of the common law tort of malicious prosecution in a damages action for retaliatory prosecution against investigators. Cf. *Chappell* v. *Wallace*, 462 U.S. 296, 304 (1983) ("special factors" preclude recognition of *Bivens* cause of action by enlisted military personnel against superior officers). Inasmuch as prosecutors (like the one in this case) are absolutely immune from a damages suit for retaliatory prosecution even though it is they who make the ultimate decision to prosecute, it can hardly be objected that such a result is overly protective of other law enforcement officers, who enjoy only qualified immunity from a retaliatory prosecution suit despite being able to do no more than recommend that a prosecution be brought. Cf. Pet. App. 50a n.2 (earlier appeal) ("It may seem odd that the only official who could not be held liable for * * * retaliatory prosecution is the prosecutor.").

Contrary to respondent's contention (Br. 37-39), the fact that this case is on appeal from the denial of petitioners' motion for summary judgment on the ground of qualified immunity, see *Mitchell* v. *Forsyth*, 472 U.S. 511, 524-530 (1985), does not prevent the Court from deciding the case on the

narrower ground.[4] An appellate court's jurisdiction to consider a claim of qualified immunity gives it the authority to consider the antecedent question whether a *Bivens* cause of action is available at all. See Pet. Br. 37 n.12 (citing cases). As the Eighth Circuit has explained, the question whether a cause of action is available is "purely legal," and it is " 'inextricably intertwined' with," "analytically antecedent to," and "in a sense also pendent to" the question whether the defendants violated a clearly established constitutional right. *Nebraska Beef, Ltd.* v. *Greening*, 398 F.3d 1080, 1083 (8th Cir. 2005) (internal quotation marks omitted), petition for cert. pending, No. 04-1611 (filed May 31, 2005). Moreover, the issue is potentially "dispositive," and deciding it "serves the interests of judicial economy." *Ibid.* Federal officers should not be burdened with "the cost and time of litigating a lawsuit which, if no *Bivens* remedy exists, is doomed from its inception." *Ibid.*[5]

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[4] Nor does the fact that the ground was not separately relied upon in the lower courts. The theories advanced by petitioners in this Court —that the absence of probable cause is an element of a First Amendment claim and that (even if it is not) it is an element of a *Bivens* cause of action—are "not separate *claims*"; they are, rather, "separate *arguments* in support of a single claim"—namely, that the existence of probable cause defeats a claim of retaliatory prosecution. *Yee* v. *City of Escondido*, 503 U.S. 519, 535 (1992). Cf. *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 378-379 (1995). The question on which certiorari was granted, moreover, is not whether the First Amendment is violated when a prosecution motivated by the defendant's speech is supported by probable cause, but whether officers "may be liable" for retaliatory prosecution when there was probable cause for the charges. Pet. I.

[5] *Swint* v. *Chambers County Commission*, 514 U.S. 35 (1995), on which respondent relies (Br. 38-39), is not to the contrary. It was undisputed in *Swint* that the denial of the county commission's summary judgment motion was not "inextricably intertwined" with the denial of the police officers' request for qualified immunity. 514 U.S. at 51. The same cannot be said, however, of the questions at issue here. See *Nebraska Beef*, 398 F.3d at 1083.

II. THERE WAS PROBABLE CAUSE FOR THE CHARGES AGAINST RESPONDENT

Respondent acknowledges (Br. 13, 16, 44, 50) that, if the absence of probable cause is an element of a claim of retaliatory prosecution, petitioners are entitled to qualified immunity as long as a law enforcement officer could reasonably have believed that there was probable cause for the charges. See *Hunter* v. *Bryant*, 502 U.S. 224, 228-229 (1991) (per curiam); *Anderson* v. *Creighton*, 483 U.S. 635, 641 (1987). Respondent contends, however, that petitioners "could not reasonably have believed[] that there was probable cause to prosecute [him]." Br. 44. That contention is without merit.

Respondent relies on the fact that "the known conspirators" did not admit that they "ever told [respondent] * * * about the payments at the core of the conspiracy." Br. 45. Contrary to respondent's contention, however, petitioners have never "fail[ed] to acknowledge" that fact. *Ibid.* As explained in our opening brief, the basis for the charging decision was not testimony from co-conspirators, but the "considerable circumstantial evidence" that respondent knowingly participated in the criminal schemes. Pet. Br. 4; see *id.* at 4-7, 39-41 (describing evidence). It is hardly unusual for a complex fraud conspiracy prosecution to be based mainly, or even entirely, on circumstantial evidence. See *id.* at 38. As this Court has observed, moreover, "[c]ircumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." *Desert Palace, Inc.* v. *Costa*, 539 U.S. 90, 100 (2003) (quoting *Rogers* v. *Missouri Pac. R.R.*, 352 U.S. 500, 508 n.17 (1957)).[6]

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[6] Respondent contends that most of the evidence identified in petitioners' opening brief "purports to show [his] knowledge of the conspiracy," and that "mere knowledge of a conspiracy is insufficient to create criminal liability." Br. 46; see also *id.* at 44. But criminal intent "can rarely be proved by direct evidence," *Bailey* v. *Alabama*, 219 U.S. 219, 233 (1911), and knowledge of a conspiracy can be circumstantial evidence of membership in it, particularly when, as in this case, the person with

Respondent also challenges the circumstantial evidence on which petitioners relied (Resp. Br. 47-50), but in so doing he asks the Court to consider each item of evidence in isolation. He argues, for example, that there was "nothing suspicious" about one piece of evidence (Br. 47); that a second did "not suggest anything illegal" (*ibid.*); that there was "nothing remotely suspicious" about a third (Br. 48); that a fourth had an "innocent explanation" (Br. 49); and that a fifth was "innocuous" (*ibid.*). Such consideration of each item of evidence "in isolation" is "mistaken in light of [this Court's] precedents," *Maryland* v. *Pringle*, 540 U.S. 366, 372 n.2 (2003), which "preclude[] this sort of divide-and-conquer analysis," *United States* v. *Arvizu*, 534 U.S. 266, 274 (2002). While a piece of evidence, by itself, may be "innocuous," *Pringle*, 540 U.S. at 372 n.2, "readily susceptible to an innocent explanation," *Arvizu*, 534 U.S. at 274, "not illegal," *United States* v. *Juvenile TK*, 134 F.3d 899, 903 (8th Cir. 1998), or "not suspicious," *United States* v. *Caldwell*, 423 F.3d 754, 761 (7th Cir. 2005), the question whether there is probable cause must "take into account the 'totality of the circumstances,'" *Arvizu*, 534 U.S. at 274; accord *Pringle*, 540 U.S. at 372 n.2. Based on the totality of the circumstances in this case, see Pet. Br. 4-7, 39-41, petitioners could reasonably have believed that there was probable cause to charge respondent.[7]

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knowledge is a beneficiary of the criminal agreement. See, *e.g.*, *United States* v. *Ranum*, 96 F.3d 1020, 1026 (7th Cir. 1996) ("[P]roof that the defendant had both a motive and an opportunity to deceive the Government provides powerful circumstantial evidence that he acted with the requisite intent."), cert. denied, 519 U.S. 1094 (1997).

[7] Respondent's other arguments concerning probable cause are also without merit.

Respondent asserts that the allegation that he conspired with William Spartin to conceal Spartin's association with Gnau & Associates Inc. (GAI) and Recognition Equipment, Inc. (REI) was "spurious," because, he says, the evidence demonstrated that Spartin openly held himself out to the Postal Service as president of GAI, and that respondent knew that this

III. RESPONDENT'S ASSERTIONS ABOUT THE EVIDENCE CONCERNING PETITIONERS' MOTIVES ARE INACCURATE

Petitioners have consistently denied that they had a retaliatory motive. Although factual issues about petitioners' motives are not now before it, the Court should not be left with a mistaken impression of the record.

For example, respondent erroneously relies (Br. 4) on the fact that he was questioned, and asked to produce records, about lobbying, political contributions, and other activities protected by the First Amendment. Those investigative steps were perfectly appropriate, inasmuch as petitioners were investigating the corruption of a public official who received a portion of the money that REI had spent on lobbying. See *Wisconsin* v. *Mitchell*, 508 U.S. 476, 489 (1993)

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was so. Br. 45. Far from openly holding himself out as GAI's president, Spartin sought to cover up his affiliation with GAI and REI by backdating a resignation letter and enlisting respondent to assist with a false cover story. J.A. 85, 307.

Respondent also contends that he received information from closed sessions of the Postal Service's Board of Governors "through legitimate congressional channels," and that petitioners were aware of that fact. Br. 48. While respondent may have received information through "congressional channels" before REI retained GAI, J.A. 159, 304, that does not necessarily render such access to confidential Postal Service information "legitimate." In any event, GAI's Michael Marcus admitted that Peter Voss leaked confidential Postal Service information to him and that he passed it on to REI officials. J.A. 68-69, 126.

Finally, respondent asserts that petitioners "concede[d] in a contemporaneous writing that, in their view, their evidence showed that REI, '*but not MOORE . . . individually*, w[as] aware of Voss' corrupt actions.'" Br. 45 (quoting J.A. 333); see also *id.* at 6, 50. The memo to which respondent refers, however, did not address what the "evidence showed." It addressed only what John Gnau, Marcus, and others could "conclusively testify"—*viz.*, that REI, but not Moore individually, was aware of the scheme. J.A. 333. In any event, the issue is not whether petitioners subjectively believed that the charges were supported by probable cause, but whether "it was objectively legally reasonable" to believe that they were. *Anderson* v. *Creighton*, 483 U.S. at 641.

("The First Amendment * * * does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent.").

In a similar vein, respondent errs in asserting (Br. 6) that a memo titled "Arguments for Indicting the Corporation" (J.A. 329-334) identified REI's media and political campaign as the first justification for indicting the company (J.A. 329-330). The memo merely identified that campaign as one of nine "bases" for the "conclusion" that "[t]his is a case of an underlying corrupt management strategy to obtain [Postal Service] business rather than the isolated and independent overzealous actions of two corporate officers." J.A. 329-332. Likewise, while respondent claims (Br. 6-7) that a "Details of the Offense" memo (J.A. 301-328) treated respondent's lobbying and media activities as criminal, the memo treated those activities merely as one aspect of an overall "corrupt corporate management strategy" (J.A. 329).

Respondent also asserts that, in an "unprecedented move," petitioners aggressively urged the United States Attorney to charge respondent, Robert Reedy, and REI. Br. 7. But it is hardly unusual for an investigative agency to urge a prosecutor's office to file charges when the agency believes that its investigation has uncovered evidence of a crime. Nor is there anything unusual about the fact that the Chief Postal Inspector wrote letters to the United States Attorney requesting a decision on whether charges would be filed. See J.A. 242. The case involved a corrupt member of the Postal Service's Board of Governors, a Presidential appointee, and the very first allegation of possible wrongdoing on his part was made directly to the Chief Inspector by the Deputy Postmaster General. J.A. 114.

Finally, respondent is mistaken in his assertion (Br. 8, 46) that petitioners engaged in misconduct before the grand jury. There was nothing improper about using summary statements of witnesses, which provide "an economical and expedient means of presenting evidence to a grand jury,"

United States v. *Al Mudarris*, 695 F.2d 1182, 1187 (9th Cir.), cert. denied, 461 U.S. 932 (1983), particularly since the summaries were adopted by the witnesses under oath and the prosecutor and grand jurors had an opportunity to ask follow-up questions, J.A. 105.[8]

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For the foregoing reasons, as well as those stated in petitioners' opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

NOVEMBER 2005

[8] Contrary to respondent's assertion, petitioners did not prevent Frank Bray from "correct[ing]" his statement. Resp. Br. 8. When Bray's counsel wanted to include a particular paragraph, petitioners referred the matter to the prosecutor, who reached an agreement with counsel under which the paragraph would be deleted but the prosecutor would consider asking certain questions before the grand jury that were suggested by Bray's lawyers. J.A. 106, 424-425. Nor did petitioners "attempt[] to coerce" Spartin into incriminating respondent. Resp. Br. 8. Petitioners confronted Spartin, who had signed a non-prosecution agreement, about several matters as to which they believed he was being untruthful, but none involved whether respondent had been told about the kickback payments to Voss. J.A. 93-95, 129-130. And the reason Spartin was shown excerpts of other witnesses' statements was that his lawyer claimed a need to refresh Spartin's recollection and the prosecutor agreed to provide the excerpts. J.A. 96-97, 107-108. Finally, while Spartin did opine in his grand jury testimony that respondent knew about the kickbacks to Voss, the prosecutor cautioned the grand jury that very same day that respondent's knowledge was "a very difficult question." J.A. 102.