No. 13-103

IN THE
Supreme Court of the United States

MICHAEL HARTMAN, *ET AL.*,
Petitioners,

v.

WILLIAM G. MOORE, JR.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY FOR PETITIONERS

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REPLY FOR PETITIONERS

Rather than dispute the square circuit conflict on the question presented, respondent wishes it away. He speculates that courts on the *prevailing* side of the split resolved in *Hartman* v. *Moore*, 547 U.S. 250 (2006) ("*Hartman I*"), may change their views, despite no reason to do so and despite post-*Hartman I* precedent reaffirming their position. The issue is important and recurring: It affects both substantive rights and the availability of interlocutory appeal. And respondent's claim that this Court has already resolved the issue defies *Reichle* v. *Howards*, 132 S. Ct. 2088 (2012). Respondent is thus reduced to concocting a timeliness issue. But that argument is refuted by the very authorities respondent invokes—and, if supported, would reflect another circuit conflict warranting review.

I. RESPONDENT'S UNTIMELINESS CLAIM IS MERITLESS

A certiorari petition filed within 90 days of "the denial of rehearing" is generally timely. Sup. Ct. R. 13.3, see Sup. Ct. R. 13.1; 28 U.S.C. §2101(c). Respondent concedes the petition here was filed within that window. But he dismisses the denial of rehearing as irrelevant on the theory that the rehearing petition—although filed in the D.C. Circuit within the 45 days provided by Fed. R. App. P. 40(a)(1)—was untimely. Noting that the D.C. Circuit issued the mandate "forthwith," he asserts that, "under Circuit law," the mandate's issuance "'reduce[d] to zero the period * * * for petitioning for rehearing.'" Br. in Opp. 16-17.

Under this Court's rules, however, the time to petition for certiorari runs from the denial of rehearing if the rehearing petition is "timely" *or* if "the lower court *appropriately entertains* an untimely petition for rehearing or *sua sponte considers rehearing.*" Sup. Ct. R. 13.3 (emphasis added). The D.C. Circuit plainly entertained rehearing here. It "request[ed] and receiv[ed] a response" to the petition "from Moore." Br. in Opp. 14.[1] And when it denied the petition, Pet. App. 73a-74a, it specified that the denial was issued "*[u]pon consideration* of appellants' petition for rehearing en banc." *Id.* at 73a (emphasis added). Respondent's speculation that the D.C. Circuit did not consider the petition ignores the court's own words. That the order was "standard," Br. in Opp. 17, hurts respondent: The court "denied" the petition in routine fashion, *id.* at 74a—it did not "dismiss" for want of jurisdiction. Contrast C.A. Order (Apr. 24, 2013) ("dis-

[1] The D.C. Circuit ordered the response "on the court's own motion," C.A. Order (Mar. 18, 2013), and thus at a minimum "*sua sponte* consider[ed] rehearing," Sup. Ct. R. 13.3.

miss[ing]" motion to recall mandate "as moot"); cf. *Ylst* v. *Nunnemaker*, 501 U.S. 797, 802 (1991) ("the disposition ('dismissed' rather than 'denied') * * * indicated that the basis was procedural default"); *id.* at 803 (presumption that "no procedural default has been invoked by a subsequent unexplained order that leaves the judgment or its consequences in place").

Respondent argues the D.C. Circuit "could *not* have *appropriately* entertained the petition" because "it had no jurisdiction to do so" once the mandate issued. Br. in Opp. 17 (quotation marks and brackets omitted) (emphasis altered). But the case respondent cites for that proposition says the opposite:

> We have said that "[i]ssuance of the mandate formally marks the end of appellate jurisdiction." * * * [B]ut *there are exceptions, as when we direct the mandate to issue immediately pursuant to Fed. R. App. P. 41(b), and later entertain a petition for rehearing or rehearing en banc.*

N. Cal. Power Agency v. *NRC*, 393 F.3d 223, 224 (D.C. Cir. 2004) (quoting *Johnson* v. *Bechtel Assocs. Prof'l Corp.*, 801 F.2d 412, 415 (D.C. Cir. 1986)) (emphasis added). The D.C. Circuit's rules confirm that rehearing may be considered without recalling the mandate first: "When rehearing en banc is granted, the court will recall the mandate if it has issued." D.C. Cir. R. 41(a)(4).

Simply put, an appellate court may properly *consider whether* to hear (or rehear) a case without first asserting (or reasserting) jurisdiction over it. The court need only obtain jurisdiction before it *does* hear (or rehear) the case. That is the rule in other contexts.[2] And it is undis-

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[2] A court of appeals appropriately entertains an application for interlocutory review under 28 U.S.C. § 1292(b) even though it lacks juris-

puted that the D.C. Circuit could have (re)obtained jurisdiction here by granting the motion to recall the mandate. Br. in Opp. 17; D.C. Cir. R. 41(a)(4).

In *Hibbs* v. *Winn*, 542 U.S. 88 (2004), this Court found rehearing had been considered solely because "the Court of Appeals *ordered briefing* on the rehearing issue"—not because it recalled the mandate. *Id.* at 98 (emphasis added). "The court-initiated briefing order," the Court held, "left unresolved whether the court would modify its judgment," suspending the certiorari clock. *Ibid.*[3] Similarly here, the D.C. Circuit's order that Moore respond to the rehearing petition "raise[d] the question" whether the court would grant rehearing, recall its mandate, and "alter the parties' rights" en banc. *Ibid.* While that possibility remained, there was no "genuinely final judgment" to trigger the clock for certiorari. *Ibid.*

This Court's rules specify, moreover, that "[t]he time to file a petition for a writ of certiorari" does "not [run] from the issuance date of the mandate." Sup. Ct. R. 13.3; see 16AA C. Wright, *et al.*, *Federal Practice & Procedure* §3986 (4th ed. updated 2013) (certiorari period "in no way affected by the issuance of the mandate of the court of appeals"). Respondent's claim that the time to petition for certiorari started running once the D.C. Circuit "or-

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diction over the case until it grants permission to appeal. See Fed. R. App. P. 5(d)(2); *Griggs* v. *Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982). This Court appropriately entertains a certiorari petition before asserting jurisdiction by granting the writ.

[3] Respondent's rationale that the court was "re-vested with jurisdiction," Br. in Opp. 18, appears nowhere in *Hibbs*. In *Young* v. *Harper*, 520 U.S. 143, 147 n.1 (1997), this Court noted that "no mandate issued until after the [rehearing] petition was denied" only as evidence that the Tenth Circuit "treated [the petition] as timely," *ibid.*; that was necessary because, at the time, this Court's Rules did not provide for tolling when courts considered *un*timely petitions.

dered its mandate to issue immediately," Br. in Opp. 17, defies that rule.

If D.C. Circuit law were as respondent suggests, that would *favor* review. It would create a conflict with the Second and Fourth Circuits, which hold that "no reacquisition of appellate jurisdiction is needed to deny a petition for rehearing filed after the mandate has issued." *United States* v. *Black*, 733 F.2d 349, 351 (4th Cir. 1984); *United States* v. *DiLapi*, 651 F.2d 140, 144 n.2 (2d Cir. 1981).[4] This Court regularly addresses such issues together with the merits, *e.g.*, *Limtiaco* v. *Camacho*, 549 U.S. 483, 487 (2007); *Hibbs*, 542 U.S. at 96-98; *Young*, 520 U.S. at 147 n.1; *Missouri* v. *Jenkins*, 495 U.S. 33, 45-50 (1990), and for good reason: Litigants should not have to guess about this Court's jurisdiction.

II. THE QUESTION PRESENTED DIVIDES THE CIRCUITS

Respondent nowhere denies that the Second and Fifth Circuits have held that there is no "right under the First Amendment to be free from a criminal prosecution supported by probable cause," *Mozzochi* v. *Borden*, 959 F.2d 1174, 1180 (2d Cir. 1992), and that officers are therefore entitled to qualified immunity from retaliatory-prosecution suits "if reasonable * * * officers could believe probable cause existed," *Keenan* v. *Tejeda*, 290 F.3d 252, 262 (5th Cir. 2002); accord *Magnotti* v. *Kuntz*, 918 F.2d 364, 366-368 (2d Cir. 1990). Nor does he dispute that the decision below held the opposite: Because "probable cause is not an element of the First Amendment right allegedly violated," qualified immunity's "arguable probable cause" standard "does not apply to a First Amendment retaliatory inducement to prosecution case." Pet. App. 22a.

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[4] Indeed, *Black* held that a rehearing petition was "actually under advisement" for speedy-trial purposes even though the court did not recall the mandate to consider it. 733 F.2d at 351-352.

Respondent urges that those cases should be ignored because they predate *Hartman I*. Br. in Opp. 20. But there is no reason to think the Second and Fifth Circuits will disavow those decisions now that *Hartman I* has confirmed that retaliatory prosecution "require[s] proof of the absence of probable cause." *Ibid.* Indeed, *Hartman I* recognized that those courts *already* "burden[ed] plaintiffs with the obligation to show its absence." 547 U.S. at 255-256 (citing *Keenan* and *Mozzochi*). And this Court has not resolved "whether *Hartman* is best read as defining the scope of the First Amendment right or as simply establishing a prerequisite for recovery." *Reichle*, 132 S. Ct. at 2096 n.6. The suggestion that the Second and Fifth Circuits might abandon decades-old precedent is unsupported speculation.

Indeed, after *Hartman I* and *Reichle*, the Second Circuit reaffirmed that there is no "right under the First Amendment to be free from a criminal prosecution supported by probable cause." *Fabrikant* v. *French*, 691 F.3d 193, 215 (2d Cir. 2012).[5] Respondent asserts (at 20-21) that, because *actual* probable cause existed in *Fabrikant*, the court did not hold that *arguable* probable cause would support qualified immunity. But he concedes (at 19) that that necessarily follows from any holding that "'no probable cause' is an element of the constitutional violation." By contrast, the decision below holds that "arguable probable cause does not apply to a First Amendment retaliatory inducement to prosecution case because probable cause is not an element of the First Amendment right." Pet. App. 22a.

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[5] That was no "offhand remark," Br. in Opp. 21—it restated longstanding Second Circuit precedent and was the reason for rejecting Fabrikant's "allegation that defendants prosecuted [her] out of a retaliatory motive." 691 F.3d at 215.

The decision below likewise conflicts with *Nielander* v. *Board of County Commissioners*, 582 F.3d 1155 (10th Cir. 2009), which granted qualified immunity because the defendant did not "act[] *unreasonably* in writing [the] *probable cause* determination" that led to the plaintiff's prosecution for making threats. *Id.* at 1169 (emphasis added). The "question presented" was "whether a reasonable officer * * * could have thought true threats had been made." *Id.* at 1167. While the protected-or-unprotected status of the plaintiff's statements was relevant, the Tenth Circuit granted immunity in reliance on this Court's seminal arguable-probable-cause cases. See *id.* at 1169 (citing *Hunter* v. *Bryant*, 502 U.S. 224 (1991); *Anderson* v. *Creighton*, 483 U.S. 635 (1987)). And it observed that *Hunter* similarly granted qualified immunity "because a reasonable officer could have believed that probable cause existed to arrest the plaintiff for making a threat." *Ibid.* Respondent thus errs in claiming (at 22) that *Nielander* "had nothing to do with probable cause [or] 'arguable' probable cause."

Contrary to respondent's claims (at 22-23), district courts also invoke arguable probable cause in granting qualified immunity in retaliatory-prosecution cases. See *Posey* v. *Swissvale Borough*, No. 2:12-cv-955, 2013 WL 989953, at *9 (W.D. Pa. Mar. 13, 2013) ("Officers' [probable-cause] determinations were well within reason so as to be shielded by qualified immunity"); *Dowling* v. *City of Three Rivers*, No. 1:11-cv-556, 2012 WL 5876517, at *5 (W.D. Mich. Nov. 20, 2012) ("it would not be clear to a reasonable officer that [his] conduct was unlawful"); *Leonard* v. *Pryne*, No. 1:07-cv-283, 2008 WL 2557248, at *9-10 (S.D. Ohio June 24, 2008) (evidence insufficient because "reasonable officers could disagree as to whether there was probable cause").

III. THE ISSUE IS IMPORTANT AND RECURRING

Those cases refute respondent's claim that the question presented lacks "practical significance." Br. in Opp. 24. The issue arises with regularity. Nor is it limited to cases "where probable cause [i]s absent but 'arguable.'" *Ibid.* Even where probable cause may be present, the arguable-probable-cause standard assists in resolving immunity early on: The often thorny question of "[w]hether any of [the relevant] facts, standing alone or taken together, actually establish probable cause" becomes something the court "need not decide." *Messerschmidt* v. *Millender*, 132 S. Ct. 1235, 1249 (2012). So long as probable cause is arguable, the case cannot proceed. The decision below renders that expedient unavailable. Respondent's assurance (at 24) that insubstantial claims can instead be culled based on subjective "animus" strains credulity. "[Q]uestions of subjective intent so rarely can be decided by summary judgment." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 816 (1982).

Respondent also ignores the impact on officer conduct: Qualified immunity's "accommodation for reasonable error" ensures officials do "not err always on the side of caution because they fear being sued." *Hunter*, 502 U.S. at 229 (quotation marks omitted). The decision below eliminates that protection. Whenever the individual under investigation is critical of government, there is no room for error.

More fundamentally, by labeling probable cause a question of "causation" and not constitutional rights, the decision below precludes an immediate appeal based even on *actual* probable cause. Pet. 22-23; Pet. App. 28a-29a. Respondent ignores that consequence. But it refutes his claim (at 24) that the decision below affects only a "tiny

category" of retaliatory-prosecution cases—it determines the availability of interlocutory appeal in *all* such cases.

IV. THE DECISION BELOW IS INCORRECT

Respondent argues strenuously (at 26-31) that the decision below is "indisputably correct," deeming the contrary position "outrageous" and "foreclosed by any plausible reading of" *Hartman I*. That rhetoric is irreconcilable with *Reichle* and its discussion of *Hartman I*—which respondent conspicuously ignores.

Respondent claims (at 28) that *Hartman I* "leave[s] no doubt" that arguable probable cause is irrelevant to qualified immunity because probable cause goes to "causation," "not to whether the Inspectors violated Moore's clearly established rights." But *Reichle* granted qualified immunity precisely *because* of doubt over the nature of *Hartman I*'s no-probable-cause requirement: It "would not have been clear to a reasonable official" whether "*Hartman* is best read as defining the scope of the First Amendment right or as simply establishing a prerequisite for recovery." 132 S. Ct. at 2096 n.6. *Reichle* declined to decide the issue, or even "whether that distinction matters." *Ibid.* For that reason, this Court GVR'd this case "for further consideration in light of *Reichle*." Pet. App. 4a.

Respondent claims the Inspectors are "not entitled to immunity" because they allegedly violated "'settled' First Amendment law," Br. in Opp. 28, invoking *Hartman I*'s statement that "the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out," 547 U.S. at 256. But he ignores *Reichle*'s discussion of *that very statement*, explaining that it reflects "a broad general proposition" that does not clearly define "the contours of the right." 132 S. Ct. at 2094

(quotation marks omitted). "[T]he right in question is *not* the general right to be free from retaliation for one's speech," as respondent asserts, "but the more specific right to be free from a retaliatory arrest [or prosecution] *that is otherwise supported by probable cause*. This Court has never held that there is such a right." *Ibid.* (emphasis added).

Finally, respondent never defends the D.C. Circuit's implausible assertion that footnote 93 of *Haynesworth* v. *Miller*, 820 F.2d 1245 (D.C. Cir. 1987), "clearly established" that probable cause is irrelevant to the First Amendment right against retaliatory prosecution. Pet. 31-33. Although he urges that "[t]his Court does not sit to review Courts of Appeals' analyses of their own precedent," Br. in Opp. 31, *Reichle* "consider[ed] Tenth Circuit precedent" and concluded it did "not satisfy the 'clearly established' standard," 132 S. Ct. at 2094. Given the D.C. Circuit's patent error, the Court may wish to consider summary reversal as an alternative to plenary review.[6]

V. IMMEDIATE REVIEW IS WARRANTED

Respondent claims (at 32-34) that this case is a "poor vehicle" because it should go to trial before qualified immunity is resolved. That is backward: Immunity from *suit*—not just judgment—is irreparably "lost if a case is erroneously permitted to go to trial." *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985). Respondent asserts that the Inspectors would confront the "burdens" of trial anyway because they might have to testify regarding his malicious-prosecution claim against the United States. But

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[6] This issue is not "unrelated" to the question presented. Br. in Opp. 31. Absent clearly established law, the Inspectors "should receive qualified immunity [if they] could reasonably have believed that [respondent's] prosecution was supported by probable cause." Pet. i; cf. Pet. App. 3a.

the burdens of a *witness* are not comparable to those of a *defendant*. And this Court has rejected similar efforts to circumvent qualified immunity's early resolution. *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937, 1953 (2009).

Respondent also errs in asserting (at 32) that his claim against the Inspectors must be tried regardless. No court has considered, much less rejected, the argument that arguable probable cause existed. The only judge to address the matter, Judge Kavanaugh, concluded the Inspectors "are entitled to qualified immunity." Pet. App. 3a. This Court's review thus could eliminate the need for trial and would, at a minimum, determine the proper standard for any trial that does occur. See E. Gressman, *et al.*, *Supreme Court Practice* 281-282 (9th ed. 2007). Respondent's approach, by contrast, may require *two* trials—one under the D.C. Circuit's current standard, and potentially a second if this Court grants review and agrees that arguable probable cause supports immunity. That is inimical to qualified immunity's goal of minimizing litigation burdens.

Respondent's allegation (at 33) of a "delay strategy" is unfounded. The first nine years of this case were marked by *respondent's* two appeals, Pet. App. 12a & n.3, 47a-48a, and his unsuccessful petition to this Court, *Moore* v. *Valder*, 531 U.S. 978 (2000).[7] Since then, the Inspectors have twice successfully obtained relief from this Court. *Hartman I*, 547 U.S. 250; Pet. App. 4a. The Inspectors have sought—and obtained—vindication of their positions, not delay. Just this week, moreover, *respondent* secured delay, persuading the district court to vacate the scheduled October 15 trial date. D.D.C. Order, No. 92-cv-2288 (Sept. 9, 2013). No one is happy about this case's

[7] Respondent took another appeal in 2009. See Pet. App. 15a.

longevity. But that underscores the need for immediate review that may finally "end this saga." Pet. App. 3a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2013