No. _____

In The
Supreme Court of the United States

J.T.H.; H.D.H.,

Petitioners,

v.

SPRING COOK,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The circuits have split over whether to allow First Amendment claims for retaliatory investigations. The Ninth Circuit allows them. The Fifth Circuit does not. The Seventh and Tenth Circuits used to allow them. The Third, Eleventh, and now Eighth Circuits say that the right to be free from retaliatory investigation is not clearly established, and thus do not allow them.

This Court's footnote in *Hartman* v. *Moore*, 547 U.S. 250, 262 n.9 (2006), is driving much of the circuit confusion. At least five circuits, including the Seventh and Tenth, now believe that the footnote casts doubt on whether retaliatory investigations can exist as distinct constitutional violations.

The question presented is:

Whether investigations—even when they lack probable cause—are so categorically different from other retaliatory acts that they cannot be the basis for retaliation claims.

PARTIES TO THE PROCEEDING

Petitioners are plaintiffs J.T.H. and H.D.H. Respondent is defendant Spring Cook, Scott County director and circuit manager for the Children's Division of Missouri Department of Social Services.

RELATED PROCEEDINGS

U.S. District Court for the Eastern District of Missouri:

J.T.H and H.D.H. v. *Missouri Department of Social Services, Children's Division, et al.*,
No. 1:20-CV-222 (June 4, 2021)

U.S. Court of Appeals for the Eighth Circuit:

J.T.H and H.D.H. v. *Missouri Department of Social Services, Children's Division, et al.*,
No. 21-2433 (July 1, 2022)

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PETITION FOR A WRIT OF CERTIORARI

The First Amendment prohibits not only direct limitations on speech, but also adverse government actions in response to an individual's speech. *Hartman* v. *Moore*, 547 U.S. 250, 256 (2006). Forms of retaliation are generally "easy to identify," *Houston Cmty. Coll. Sys.* v. *Wilson*, 142 S. Ct. 1253, 1260 (2022), particularly when "the governmental defendant * * * utiliz[es] the legal system" to do things like arrest or prosecute the plaintiff, or even issue parking tickets, *DeMartini* v. *Town of Gulf Stream*, 942 F.3d 1277, 1289 (11th Cir. 2019); see also *Wilson*, 142 S. Ct. at 1260 (identifying arrests, prosecutions, and dismissals as among common retaliatory actions); *Garcia* v. *City of Trenton*, 348 F.3d 726, 729 (8th Cir. 2003) (same with parking tickets).

There is nonetheless a circuit split on whether retaliatory investigations, unlike other types of retaliatory conduct, can be the basis for suit, especially when, as in the case below, they lack probable cause. In the Ninth Circuit, the answer is yes. In the Fifth Circuit, the answer is no. In the Seventh and Tenth Circuits, the answer *used to be* yes, since, just like the Ninth, those circuits believed that "[a]ny form of official retaliation for exercising one's freedom of speech, including prosecution, threatened prosecution, bad faith investigation, and legal harassment, constitutes an infringement of that freedom." *Lackey* v. *County of Bernalillo*, 166 F.3d 1221, at *3 (10th Cir. 1999) (table). In the Third, Eleventh, and now Eighth Circuits, the answer is that the right to be free from retaliatory investigations is not clearly established, and thus no.

The circuit mess is largely due to a footnote from this Court's decision in *Hartman*, which noted that nothing in that opinion resolved "[w]hether the expense or other adverse consequences of a retaliatory investigation would ever justify recognizing * * * an investigation as a distinct constitutional violation." 547 U.S. at 262 n.9. Some lower courts have seized on that language as evidence of uncertainty in the law, which means qualified immunity bars any claim for retaliatory investigation. Others disagree and continue to recognize investigation alongside other retaliation claims.

This Court must grant review in order to fix this circuit split and alleviate the confusion among the circuits that developed after *Hartman*.

OPINIONS BELOW

The opinion of the circuit court, Pet. App. 1a, is reported as *J.T.H & H.D.H.* v. *Missouri Department of Social Services, Children's Division, et al.,* 39 F.4th 489 (8th Cir. 2022). The opinion of the district court, Pet. App.10a, is not reported but is available electronically as *J.T.H & H.D.H.* v. *Missouri Department of Social Services, Children's Division, et al.*, 2021 WL 2291133 (E.D. Mo. June 4, 2021).

JURISDICTION

The Eighth Circuit entered its decision below on July 1, 2022. Justice Kavanaugh granted a 60-day extension of the period for filing this petition on August 15, 2022. Petitioners timely file this petition and invoke this Court's jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution prohibits any law "abridging the freedom of speech, or of the press."

* * *

Section 1983 of Title 42 of the United States Code provides:

> Every person who, under color of [law] of any State * * * subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law[.]

STATEMENT

1. In May 2018, a 15-year-old boy was sexually assaulted by Brandon Cook, a deputy in the Scott County, Missouri, Sherriff's Department.[1] Pet. App. 2a. A few months after the assault, the boy's parents, petitioners, threatened to sue Brandon Cook's employer, Scott County, for its role in the assault. *Id*. at 3a; 58a. The father was also employed by Scott County as a sheriff's deputy. *Id*. at 2a; *id*. at 55a.

Only weeks after that threat, the parents found themselves the subject of an intrusive investigation

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[1] Facts are taken from the complaint, Pet. App. 53a–94a; the trial court opinion, Pet. App. 10a–52a; and the Eighth Circuit opinion, Pet. App. 1a–9a.

for child neglect by a child-welfare investigator in Scott County, respondent Spring Cook. *Id.* at 2a.

The parents first discovered they were under investigation when Cook arrived, unannounced, at the parents' home on November 7, 2018, accompanied by a juvenile officer and state highway patrol troopers. *Id.* at 58a. Cook interviewed their abused son, and, at her insistence, that evening the boy was interviewed at the facility of a nonprofit organization that works with the county to respond to incidents of sexual abuse. *Id.* at 59a. Cook came to the family home again on November 9, 10, and 13 to conduct more interviews with the boy and his siblings. *Id.* at 59a.

Cook's investigation was highly traumatic for the family. At one point, the boy was referred for an inspection of his genitals and rectum for evidence; his cellphone was taken; and he was told that he could be charged with a sex crime. *Id.* at 59a; 61a. Cook also threatened the father with a revocation of his peace-officer license. *Id.* at 2a.

Once they were represented by counsel, the parents refused Cook further home visits and unsuccessfully asked her to recuse herself, given Cook's close employment relationship with Brandon Cook and given that the father also worked for the same sheriff's department. *Id.* at 2a; 60a.

2. In January 2019, Cook issued a preliminary finding of child neglect against the parents because: (1) Brandon Cook had sexually assaulted their son; (2) a martial-arts instructor had engaged in a sexual relationship with the boy until the parents discovered Facebook messages between the two and confronted the instructor; and (3) the boy, with the consent of the

parents, went on an age-appropriate date with another teenage boy at a shopping mall. *Id.* at 61a–63a. In essence, Cook found the parents guilty of neglect because they permitted their child to have access to a cellphone, the internet, and a car. *Id.* at 44a; 63a. If the finding had become final, the parents would have been placed on Missouri's Child Abuse and Neglect Registry, which would have made it impossible for them to obtain future employment. *Id.* at 3a; 67a.

By contrast, neither the deputy juvenile officer nor the highway patrol troopers—all present during the original home visit—ever found probable cause of parental neglect. *Id.* at 66a. The juvenile officer conducted an independent investigation and made an independent written determination of "no evidence." *Ibid.* In addition, when the parents finally got the state Child Abuse and Neglect Review Board to review Cook's findings, which she herself had made final by reviewing them,[2] these findings were summarily reversed. *Id.* at 3a. The board concluded that Cook's findings of "neglect were unsubstantiated." *Ibid.*; 71a–72a; 74a. After all this, the FBI, too—based on an anonymous tip with nearly identical language to the one used by Cook in her preliminary findings—looked into the allegations of the parents' child abuse, again finding no probable cause for continuing its investigation. *Id.* at 76a.

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[2] To challenge a preliminary finding of neglect, parents must request a formal administrative review. Pet. App. 3a. The first step of the review is performed at a circuit level, with a circuit manager deciding whether to make the findings final. *Ibid.* Because Cook, in addition to being a child-welfare investigator, was also the circuit manager, she reviewed her owns findings, despite the parents' request that she recuse herself. *Ibid*; *id.* at 43a.

3. Once they cleared their names, the parents sued Cook for investigating them to chill their speech.[3] In their complaint, the parents alleged every element of a retaliatory investigation claim, including a lack of probable cause for Cook's investigation. *Id.* at 81a–84a. The district court held that the parents had stated a plausible claim of retaliation, citing the following facts to support that holding:

- Cook opened her investigation just seven weeks after the parents made allegations against Scott County;
- Cook shared a last name and social media friendship with Brandon Cook;
- Cook twice refused to recuse herself, despite a custom and practice of doing so under such circumstances;
- Cook threatened the father with "getting" his professional license;
- Unlike Cook, the juvenile officer found "no evidence" to support a finding of parental neglect;
- Unlike Cook, the highway patrol found no probable cause to charge the parents with neglect;
- Cook's findings were overturned by the administrative board;

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[3] The parents' complaint contained additional claims and defendants. They are not relevant to the question presented here, which deals solely with the Eighth Circuit's holding that Cook's investigatory actions in retaliation for the parents' speech are shielded by qualified immunity. All of the other claims and defendants were dismissed, Pet. App. 52a, and the parents are not challenging that, making this case a clean vehicle. See also Part III, *infra*, at 18–20.

- Cook contacted the FBI after the administrative board's decision; and
- Unlike Cook, the FBI found no probable cause and closed its investigation.

Id. at 43a–44a.

Moreover, the district court denied Cook qualified immunity.[4] First, according to the court, the parents "have plausibly alleged a First Amendment retaliation claim," *id.* at 44a, 47a, including that by threatening to file a lawsuit against the government, "they engaged in a constitutionally protected activity," *id.* at 41a; that "Cook's preliminary finding of parental neglect was sufficiently adverse to chill a person of ordinary firmness," *id.* at 42a; that the parents "have plausibly alleged the required causal connection between their protected activity and Cook's decision to investigate and make a preliminary finding of child neglect," *id.* at 43a; and that the parents "sufficiently alleged lack of probable cause," *id.* at 44a.

Second, the court concluded that this unconstitutional retaliation was clearly established: "The question * * * is whether a reasonable official might have believed that it was permissible to make findings of child neglect in retaliation for parents making claims against county officials related to the sexual abuse of their child. Under clear Eighth Circuit precedent, the answer is no." *Id.* at 49a (citing *Goff* v. *Burton*, 7 F.3d 734, 736 (8th Cir. 1993); *Naucke* v. *City of Park Hills*,

[4] Cook also invoked absolute immunity for her investigatory actions, which was denied by both the district court and the court of appeals. Pet. App. 46a; *id.* at 5a–6a; but see Pet. App. 9a (absolute immunity granted for actions during the administrative review process) (unchallenged by the parents in this petition).

284 F.3d, 923, 927–928 (8th Cir. 2002); *United States* v. *Catlett*, 584 F.2d 864, 867 (8th Cir. 1978); *Garcia* v. *City of Trenton*, 348 F.3d 726, 729 (8th Cir. 2003)).

4. Cook appealed the qualified immunity determination to the Eighth Circuit, which reversed because "the complaint falls short of establishing that Cook violated a clearly established right." *Id*. at 7a. In the court's view, "[e]ven assuming that the facts in the complaint are true," the constitutional question is not "beyond debate." *Ibid.* (citing *Kisela* v. *Hughes*, 138 S. Ct. 1148, 1152 (2018)). "After all, we have never recognized a retaliatory-investigation claim of this kind." *Ibid*. Neglecting to mention the Ninth Circuit, which treats retaliatory investigations as actionable, the court stated that "other courts around the country * * * have either rejected the possibility outright or concluded, like we do today, that the law is still in flux." *Ibid.* (citing *Villarreal* v. *City of Laredo*, 17 F.4th 532, 542 n.1 (5th Cir. 2021); *Lincoln* v. *Maketa*, 880 F.3d 533, 540 (10th Cir. 2018); *Archer* v. *Chisholm*, 870 F.3d 603, 620 (7th Cir. 2017); *Rehberg* v. *Paulk*, 611 F.3d 828, 850–851 (11th Cir. 2010)).

Lincoln, *Archer*, and *Rehberg* all cite *Hartman* as the reason they now doubt the viability of retaliatory investigation claims. See *Lincoln*, 880 F.3d at 540; *Archer*, 870 F.3d at 620; *Rehberg*, 611 F.3d at 850.

REASONS FOR GRANTING THE PETITION

This Court's decision in *Hartman* did not provide a blanket excuse to dismiss retaliatory investigation claims. Yet, the court below and the Third and Eleventh Circuits now look to *Hartman* as a pretext to do just that. In two additional circuits, the Seventh and

Tenth, the right to be free from retaliatory investigations—which existed prior to *Hartman*—is now in doubt. Only two circuits have been left unaffected by *Hartman*, and even they are split over the issue. In the Fifth Circuit, there is a blanket rule against recognizing retaliatory investigation claims, while in the Ninth Circuit, retaliatory investigations are not treated any differently than other forms of retaliation. Because *Hartman* has exacerbated a circuit split over the protections afforded by the First Amendment, it is important for this Court to weigh in: Is all retaliation prohibited, or are retaliatory investigations unworthy of constitutional scrutiny?

I. The Court's decision in *Hartman* introduced confusion into the lower courts' retaliatory investigations jurisprudence.

Hartman was an important decision because it clarified the standard for pleading and proving retaliatory animus in retaliatory prosecutions cases. Before *Hartman*, this Court did not require plaintiffs to show the lack of probable cause in order to establish a retaliatory prosecution claim. *Wayte* v. *United States*, 470 U.S. 598, 610–611 (1985). Since *Hartman*, plaintiffs must overcome this no-probable-cause burden. *Hartman*, 547 U.S. at 265–266.

In addition to making this much needed clarification to the retaliatory prosecutions jurisprudence, however, *Hartman* also—seemingly by accident—unsettled decades of retaliatory investigations jurisprudence, causing lower courts to reassess whether the precise nature of the retaliation at issue is dispositive for the purposes of qualified immunity.

Hartman concerned claims against criminal investigators "for inducing prosecution in retaliation for speech." 547 U.S. at 252. The plaintiff, the chief executive of a firm that developed multiline scanning technology for sorting mail, argued that postal service inspectors induced an assistant U.S. attorney to prosecute him because he testified in support of the technology they opposed and because he publicly criticized the postal service. *Id.* at 254. The inspectors, for their part, argued that, since the underlying criminal charges were supported by probable cause, they were shielded by qualified immunity. *Id.* at 255.

This Court agreed, using the causal complexities presented in retaliatory prosecution cases as a justification for its decision. In "ordinary retaliation claims * * * the government agent allegedly harboring the animus is also the individual allegedly taking the adverse action," the Court reasoned, but in retaliatory prosecution claims a retaliation action "will not be brought against the prosecutor, who is absolutely immune." Instead, "the defendant will be * * * an official * * * who may have influenced the prosecutorial decision but did not himself make it." *Id.* at 261–262. In such cases, a showing of subjective animus is not enough, and plaintiffs must plead and prove a lack of probable cause.

Importantly, by modifying the standard of proof in retaliatory prosecution cases, the Court did not announce a new right to be free from retaliatory prosecution: "the law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out." *Id.* at 256. Even actions "unexceptionable if taken on other

grounds" can be retaliatory if these grounds "are in fact insufficient to provoke the adverse consequences." *Ibid.*

And neither did the Court meaningfully weigh in on whether retaliatory investigations are actionable. It is true that in one footnote the Court stated that "[w]hether the expense or other adverse consequences of a retaliatory investigation would ever justify recognizing such an investigation as a distinct constitutional violation is not before us." *Id.* at 262 n.9. But it also acknowledged that "[a]n action could still be brought against a prosecutor for conduct taken in an investigatory capacity," presumably the very same conduct—retaliatory investigations—that the Court just said were not before it. *Id.* at 262 n.8.

In the end, the footnote created more problems than it solved, significantly affecting the ability of plaintiffs to overcome qualified immunity in retaliatory investigation cases. Only this Court can put to rest the confusion it created.

II. The circuits are split over the question presented.

A. The Ninth and Fifth Circuits have been at loggerheads since before *Hartman*.

The Ninth and Fifth Circuits disagree on whether investigation can be the basis for a First Amendment retaliation suit.

In the Ninth Circuit, investigations are not different from other forms of retaliation. Reasonable officers are fairly warned, therefore, that using investigations or any other means to punish speakers runs

afoul of "bedrock First Amendment principles and legal rules that this court and the Supreme Court have applied for decades, if not centuries." *White* v. *Lee*, 227 F.3d 1214, 1239 (9th Cir. 2000).

In *White*, a San Francisco office of the U.S. Department of Housing and Urban Development (HUD) launched an eight-month investigation into three Berkley neighbors who opposed the conversion of a motel into low-income housing by filing a lawsuit against the housing developer in state court. *Id.* at 1221. Just like in the case below, the investigation was intrusive and involved HUD officials questioning the neighbors and directing them to produce various information and documents, ultimately recommending "finding that the neighbors had violated the Fair Housing Act." *Id.* at 1220. And just like in the case below, an overseeing body "ultimately concluded that no violation had occurred." *Ibid.*

But unlike the case below, the Ninth Circuit recognized the neighbors' retaliation claim because "in the First Amendment context, courts must 'look through forms to the substance' of government conduct." *Id.* at 1228 (citing *Bantam Books* v. *Sullivan*, 372 U.S. 58, 67 (1963)). Even if the investigation did not result in "criminal or civil sanctions," the retaliation claim was still actionable, since "[i]nformal measures, such as 'the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation,' can violate the First Amendment also." *Id.* at 1228. That was true even if officials "were required by the Fair Housing Act to investigate whether the neighbors had filed a lawsuit in state court with an unlawful discriminative motive." *Id.* at 1220; see also *id.* at 1231. As a result, defendants were not

entitled to qualified immunity, even though plaintiffs could not point to a prior case on point discussing whether investigations can constitute an actionable First Amendment claim. *Id.* at 1239.

This approach is irreconcilable with the one adopted by the Fifth Circuit, which has a per se rule that investigations do not "ris[e] to the level of actionable retaliation." *Colson* v. *Grohman*, 174 F.3d 498, 508 (5th Cir. 1999). Even if such investigations "may have * * * the effect of chilling * * * protected speech," when an investigation does not result in "any action being taken," it does not violate the First Amendment. *Id.* at 511. Thus, in *Colson*, the plaintiff who opposed a chief of police's proposed budget and was investigated as a result of it, could not sue for retaliation because the investigation resulted in neither an arrest nor an indictment. Similarly, in *Pierce* v. *Texas Department of Criminal Justice*, 37 F.3d 1146 (1994), the plaintiff could not sue for twice being investigated, since "[n]either investigation resulted in any action being taken against [her]." *Id.* at 1150.

This Court's decision in *Hartman* did not alter the disagreement between the Ninth and Fifth Circuits. The Ninth Circuit, to this day, continues to hold that "[i]nformal measures, such as 'the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation' can violate the First Amendment also." *Mulligan* v. *Nichols*, 835 F.3d 983, 989 n.5 (9th Cir. 2016); see also *Capp* v. *County of San Diego*, 940 F.3d 1046, 1059 (9th Cir. 2019) (taking the serious step of threatening to terminate a parent's custody of his children, when the official would not have taken this step absent her retaliatory intent, violates the First Amendment); *Sampson* v. *County of Los*

Angeles, 974 F.3d 1012, 1020–1021 (9th Cir. 2020) (same, only with regard to a court-appointed guardian). The Fifth Circuit, on the other hand, continues to "not recognize such a claim." *Villarreal* v. *City of Laredo*, 44 F.4th 363, 374 n.1 (5th Cir. 2022), vacated for rehearing on other grounds, 52 F.4th 265 (5th Cir. 2022) (stating that a journalist cannot sue for an investigation launched in retaliation for her reporting).

B. Until *Hartman*, both the Seventh and Tenth Circuits recognized a clearly established right to be free from retaliatory investigations.

Prior to this Court's dicta in *Hartman*, the Seventh and Tenth Circuits both recognized that investigations are just another form of punishment for protected speech and are therefore actionable under the First Amendment.

In *Johnson* v. *Collins*, for example, the Seventh Circuit held that qualified immunity did not prevent a father from suing two CPS caseworkers for investigating him in retaliation for a complaint he filed against them. 5 Fed. Appx. 479, 482–483, 485 (7th Cir. 2001). Just like in the case below, the investigations included multiple visits to the father's residence, threats to "play hard ball," and requests to complete a counseling program. *Id.* at 483. Just like in the case below, the defendants argued that they were entitled to qualified immunity. But unlike the case below, the Seventh Circuit ruled against the defendants, recognizing a First Amendment claim for investigations conducted in retaliation for protected speech. *Id.* at 485–486. "Because there is no justification for harassing people for exercising their constitutional rights,

the injury alleged * * * need not be great in order to be actionable." *Id.* at 486.

Similarly, pre-*Hartman*, the Tenth Circuit held that "[a]ny form of official retaliation for exercising one's freedom of speech, including prosecution, threatened prosecution, bad faith investigation, and legal harassment, constitutes an infringement on that freedom." *Lackey*, 166 F.3d 1221, at *1. In *Lackey*, the Tenth Circuit looked at whether qualified immunity was available to a task-force officer who caused the plaintiff to be investigated by the Albuquerque police. *Ibid.* The plaintiff created problems for the task-force officer's informant by "alerting families with small children" that the informant was a convicted child molester. *Ibid.* The investigation included two officers visiting the plaintiff at his home under the false pretense that they were "investigating a report of a laser sight being aimed in the area." *Id.* at *2. The officers asked the plaintiff if he had guns in addition to those they saw in plain view and then left without taking any actions. *Ibid.* While the court did grant qualified immunity to the task-force officer because the plaintiff "cannot demonstrate [the officer's] actions were motivated by an unconstitutional animus," *id.* at *4, it nonetheless "establish[ed] the cardinal principle that public officials may not retaliate against citizens" whether or not this retaliation takes the form of an investigation, *Pippin* v. *Elbert County*, 604 Fed. Appx. 636, 637 (2015) (discussing *Lackey*).

After *Hartman*, both holdings were thrown into doubt. In 2017, for example, the Seventh Circuit reasoned that despite its prior precedent, which was "long in the tooth," *Archer*, 870 F.3d at 620, the right to be free from retaliatory investigations was not

clearly established, especially given "the Supreme Court's observation in *Hartman v. Moore*," *id.* at 620 (quoting *Hartman*, 547 U.S. at 262 n.9). Similarly, in 2018, the Tenth Circuit stated that "[o]ur court has not settled" this question, noting that "[t]he Supreme Court has declined to consider whether a retaliatory criminal investigation entails a constitutional violation." *Lincoln*, 880 F.3d at 540 (citing *Hartman*).

C. After *Hartman*, qualified immunity bars retaliatory investigations in the Third, Eighth, and Eleventh Circuits.

The Third, Eighth, and Eleventh Circuits differ from the Fifth in that they don't have a per se rule that investigations can never amount to a First Amendment retaliation. Instead, they rely on the clearly established prong of qualified immunity to get rid of such cases. The footnote in *Hartman* drives much of this analysis, since, according to these courts, it means that only cases involving investigations can provide fair warning that retaliatory investigations are unconstitutional. This conclusion amounts to a functionally identical result to the per se rule in the Fifth Circuit: investigation, even when it is not supported by probable cause, cannot be the basis for suit.

In the Eleventh Circuit, for example, a critic of a hospital sued county officials who investigated him as a punishment for his speech and "as a favor to the hospital." *Rehberg*, 611 F.3d at 840. The court granted qualified immunity to the officials not because they hadn't violated the First Amendment, but because the critic's "right to be free from a retaliatory investigation is not clearly established." *Id.* at 850–851. Pointing to *Hartman*, the court stated that "[t]he Supreme

Court has never defined retaliatory investigation, standing alone, as a constitutional tort." *Id.* at 851.

Similarly, the Third Circuit gave qualified immunity to a mayor who caused an investigation into the propriety of a municipal job held by the plaintiff, in retaliation for the plaintiff's cooperation with a HUD investigation. *Sivella* v. *Township of Lyndhurst*, 2021 WL 3356934, at *1 (3rd Cir. Aug. 3, 2021). According to the court, the mayor was "entitled to qualified immunity because, at the time he requested the initiation of an investigation into no-show municipal jobs in 2013, it was not clearly established that * * * such an adverse action amounted to a First Amendment violation." *Id.* at *2. Again, the court did not hold that the mayor hadn't violated the First Amendment—just that it was not clearly established. "Since *Hartman*, no Supreme Court case has addressed the issue of whether the initiation of a retaliatory investigation can constitute a First Amendment violation." *Id.* at *3. "[A]n absence of relevant Supreme Court precedent strongly supports a finding that a particular right is *not* clearly established." *Ibid.*

Finally, in the case below, the Eighth Circuit followed the Third and Eleventh Circuits in stating that "we have never recognized a retaliatory-investigation claim of this kind." Pet. App. 7a. It is true that "as a general matter, the First Amendment prohibits government officials from subjecting an individual to retaliatory actions on the basis of constitutionally protected speech." *Id.* at 8a (cleaned up). But "the law is not clearly established enough to cover the specific context of the case: retaliatory investigation." *Ibid.* (cleaned up). Again, no constitutional advancement, only stagnation under the clearly established test.

This conclusion is radically different from the one in the Ninth Circuit, where, in *White* v. *Lee*, the court stated that due to the "bedrock First Amendment principles and legal rules that this court and the Supreme Court have applied for decades, if not centuries * * * reasonable government officials would have known that they could not conduct an eight-month investigation" into residents who sued to stop the housing development from going forward. 227 F.3d at 1239; see also Part IIA, *supra*, at 11–14. Had the case below been brought in the Ninth Circuit—or in the Seventh or Tenth Circuits before *Hartman* was decided—it would have never been thrown out simply because it involves a claim for a retaliatory *investigation*. Given this disagreement between the circuits and the confusion created by *Hartman*, this Court's intervention is not only justified but badly needed.

III. This case is a good vehicle to resolve the circuit split.

If this Court resolves the circuit split in favor of the Ninth Circuit's holding that it is the substance and not the form of retaliation that drives the qualified immunity analysis, then the parents in this case would be able to proceed with their claim, which is still at the motion to dismiss stage.

First, in their complaint, the parents sufficiently showed that: (1) they engaged in protected speech by making allegations against the government with an intent to sue;[5] (2) as a consequence of this activity,

[5] *Cal. Motor Transp. Co.* v. *Trucking Unlimited*, 404 U.S. 508, 510 (1972) ("[T]he right of access to the courts is indeed but one aspect of the right of petition."); *Lozman* v. *City of Riviera*

they were subject to an intrusive retaliatory action—investigation—that adversely affected that protected speech; (3) Cook's retaliatory animus was the but-for cause of this investigation; (4) the investigation was not supported by probable cause; and (5) as a result of the investigation, the parents (and their family) suffered a significant injury. Pet. App. 39a; 81a–84a.

In addition, there was already precedent in the Eighth Circuit providing fair warning to every reasonable official that punishing someone for petitioning their government, even in a minor way, is a violation of the First Amendment. See, *e.g., Garcia* v. *City of Trenton*, 348 F.3d 726, 729 (8th Cir. 2003) (holding that the mayor could not "engage[] the punitive machinery of government in order to punish Ms. Garcia for her speaking out," even if this punishment was a retaliatory issuance of parking tickets made out for genuine violations of a time limit).

To the extent that probable cause could have made the claim more complicated,[6] it did not do so here

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Beach, 138 S. Ct. 1945, 1954 (2018) ("This Court has recognized the right to petition as one of the most precious of the liberties safeguarded by the Bill of Rights." (cleaned up)).

[6] Importantly, unlike *Hartman* or some of the cases in the circuit split, see, *e.g.*, *Lackey*, 166 F.3d 1221, at *3, and *Sivella*, 2021 WL 3356934, at *1, this is not an inducement case. As a result, the need for a no-probable-cause showing is not as important, though the parents still satisfied it. Here, the parents are not suing the county for inducing Cook to investigate. Instead, they are suing Cook for the acts she herself committed. In that sense, it is an "ordinary retaliation claim[]," where "the government agent allegedly harboring the animus is also the individual allegedly taking the adverse action," and causal complexities that drove the Court to require a no-probable-cause showing are not present. *Hartman*, 547 U.S. at 259, 261–262.

because the parents sufficiently pled the lack of probable cause. Pet. App. 43a–44a (the district court ruling that the parents sufficiently alleged the lack of probable cause); see also Pet. App. 83a (the parents stating in their complaint that no probable cause existed for Cook's investigation and pointing to (1) the juvenile officer's determination that "no evidence" supported a finding of parental neglect; (2) the highway patrol's finding of no probable cause to charge the parents with neglect; and (3) the FBI's finding of no probable cause).

But the court below did not grapple with all that, choosing instead to rely on the post-*Hartman* view that the precise nature of retaliation is dispositive for the purposes of qualified immunity. This is the opposite of the approach taken by the Ninth Circuit, which, instead of isolating precise facts of a First Amendment case, looks to the "bedrock First Amendment principles" and evaluates them against the substance of the alleged retaliatory conduct. *White*, 227 F.3d at 1239. Because the Ninth Circuit would have allowed the parents' claim to move forward, a reversal in this case would be outcome determinative, making this case a good vehicle for resolving the circuit split.

IV. The circuit split is on an issue of exceptional importance.

The court below, as well as the Third, Fifth, and Eleventh Circuits, treats investigations as categorically different from other forms of First Amendment retaliation, effectively rejecting them as the basis for suit. As a result, in sixteen states across this nation, and potentially even more, see Part IIB, *supra*, at 14–

16, there is no accountability for silencing people by investigating them.

This situation is not likely to get any better until this Court weighs in on the issue and resolves the confusion it introduced in *Hartman*. Without the Court's intervention, *Hartman* seems to have frozen the law in this area. That is, before *Hartman*, there was a split on this substantive constitutional question, and after *Harman*, at least five courts have invoked qualified immunity and refused to engage with the constitutional question, causing the circuit split to ossify. See Parts IIB and IIC, *supra*, at 14–18. At least one court has said it's waiting for this Court's final word on the question before deciding anything further. See Part IIC, *supra*, at 17, discussing the Third Circuit's decision in *Sivella* v. *Township of Lyndhurst*.

In the meantime, investigations continue to be a very convenient and effective form of retaliation. Whether in the shape of a tax audit, a civil code investigation, or invasive regulatory inspections, they are easy to launch and can wreak havoc with people's lives and businesses. With CPS specifically, caseworkers "investigate the home lives of roughly 3.5 million children every year." Eli Hager, *CPS Workers Search Millions of Homes a Year. A Mom Who Resisted Paid a Price*, NBC News (Oct. 13, 2022) (citing statistics from the Department of Health and Human Services). Only "about 5% of them are ultimately found to have been physically or sexually abused." *Ibid*. Yet "[d]uring CPS investigations, caseworkers may inspect every corner of the home, interrogate family members about intimate details of their lives, strip-search children to look for evidence, and collect confidential information from schools, healthcare

providers, and social service programs." Dorothy Roberts, *Abolish Family Policing, Too*, Dissent (Summer 2021). In many cases, investigations alone are enough to destroy lives and reputations, which may never recover, regardless of the outcome of the investigation. Indeed, the parents brought this lawsuit because of the harm this unfounded investigation caused.

Investigation is an effective tool for intimidation outside the context of child protective services as well. For example, FBI investigators[7] can easily open a special type of an investigation called an assessment. "Assessments permit physical surveillance, database searches, interviews, racial and ethnic mapping" all "without any factual or criminal predicate" or probable cause. Michael German & Emily Hockett, Brennan Center for Justice, *Standards for Opening an FBI Investigation So Low They Make the Statistic Meaningless* (May 2, 2017). Between 2009 and 2011, for example, the FBI opened 82,325 assessments, only 3,315 of which had enough evidence to warrant an actual investigation. *Ibid*. Some of these were opened on political advocacy organizations based on nothing more than the agents themselves speculating about subjects potentially committing a crime. *Ibid*. Similarly, officials at the Commerce Department had an unfiltered investigative power that resulted in a systematic targeting and harassment of Chinese-Americans through "thousands of unauthorized

[7] Federal investigations are even more out of reach than state or local investigations. See *Egbert* v. *Boule*, 142 S. Ct. 1793, 1807 (2022) (holding that "there is no *Bivens* action for First Amendment retaliation"). Federal data are nonetheless very telling: It is incredibly easy to weaponize the investigative power of the government.

investigations into department employees, often for specious reasons." Catie Edmondson, *'Rogue' U.S. Agency Used Racial Profiling to Investigate Commerce Dept. Employees, Report Says*, N.Y. Times (July 16, 2021) (citing a report issued by U.S. Senate Committee on Commerce, Science, & Transportation).

The First Amendment is not worth much if people in power can weaponize government investigations to punish those whose speech they don't like. If speaking could result in an invasive or embarrassing investigation, speakers will simply stay silent. That is anathema to the purpose of the First Amendment. Every reasonable official should know that launching a baseless investigation in order to silence citizens is unconstitutional. By categorically excluding investigations from the First Amendment scrutiny, the court below utilized a dangerous mechanism to override First Amendment protections. This Court should grant certiorari and reverse.[8]

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[8] Petitioners' counsel, the Institute for Justice, also represents Anthony Novak in his recently filed petition for certiorari in *Novak* v. *City of Parma*, No. 22-293 (Sept. 26, 2022), on a similar issue involving retaliatory arrests.

CONCLUSION

The Court should grant this petition.

Respectfully submitted,

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