No. 10-98

IN THE

Morris Tyler Moot Court of Appeals at Yale

JOHN ASHCROFT,
Petitioner,

v.

ABDULLAH AL-KIDD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR PETITIONER

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QUESTIONS PRESENTED[1]

Two questions are presented for this Court's consideration:

1. Whether a former government official is entitled to absolute immunity from a claim that he used the material witness statute, 18 U.S.C. § 3144, as a "pretext" to preventively detain terrorism suspects.
2. Whether the former government official is entitled to qualified immunity from the same "pretext" claim on the grounds that (a) the Fourth Amendment does not prevent an officer from executing a valid material witness arrest warrant with the subjective intent of conducting further investigation or preventively detaining the subject; or (b) this Fourth Amendment rule was not clearly established at the time of respondent's arrest.

[1] The petitioner in this action is John Ashcroft, former Attorney General of the United States, in his personal capacity. The respondent is Abdullah al-Kidd, a private citizen.

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The opinion of the panel of the court of appeals, with its accompanying dissent, is published at 580 F.3d 949. The concurrences and dissents in the denial of the petition to rehear en banc are published at 598 F.3d 1129. The district court's ruling is unpublished.

STATEMENT OF JURISDICTION

The panel decision of the court of appeals was filed on September 4, 2009. Rehearing en banc was denied on March 18, 2010. The petition for writ of certiorari was filed on July 16, 2010 and granted on October 18, 2010. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (2006).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourth Amendment to the United States Constitution and the federal material witness statute, which are reproduced in the Appendix.

STATEMENT OF THE CASE

A. Background and Context

On September 11, 2001, the United States was subject to one of the most shocking acts of terrorism that the world has ever seen. Nearly 3,000 victims were killed as terrorists flew three hijacked planes into the World Trade Center towers and the Pentagon, and crashed a fourth plane in Somerset County, Pennsylvania.

On that same day, President George W. Bush promised to direct "the full resources of our intelligence and law enforcement communities" to bring to justice those responsible. George W. Bush, *Statement by the President*, Sept. 11, 2001, *available at* http://www.opm.gov/guidance/09-11-01GWB.htm. But there was an even more important task for our government: to prevent similar attacks from happening again. As President Bush said, "[t]he U.S. government has no more important mission than protecting the homeland from future

terrorist attacks." Preface, *National Strategy for Homeland Security*, Office of Homeland Security, July 16, 2002. The responsibility of protecting the nation fell upon the country's intelligence and law enforcement agencies, and particularly upon the Department of Justice ("DOJ"). The DOJ is responsible for prosecuting criminal lawsuits for the United States and incorporates the Federal Bureau of Investigation ("FBI"). *See* 28 U.S.C. §§ 501, 531.

The DOJ, headed at that time by petitioner in his capacity as Attorney General, resolved to use all of its law-enforcement capabilities to capture, detain, and prosecute criminals. Six days after the 9/11 attacks, petitioner published a memorandum, entitled the "Anti-Terrorism Plan," instructing U.S. Attorneys to "use every available law enforcement tool" against persons who "participate in, or lend support to, terrorist activities." *The September 11 Detainees*, U.S. Department of Justice, Office of the Inspector General, April 2003, at 1 [hereinafter *OIG Report*]. In a speech the following month, petitioner stressed the DOJ's intent to pursue terrorist suspects with powers granted to it by statute and within the constraints of the Constitution. "We will use all our weapons within the law and under the Constitution to protect life and enhance security for America." *Id*. at 12. Petitioner likened the policy of "aggressive arrest and detention tactics" to that used by the DOJ in fighting crime in the 1960s: "Robert Kennedy's Justice Department, it is said, would arrest mobsters for 'spitting on the sidewalk' if it would help in the battle against organized crime." *Id.*

On October 31, 2001, petitioner announced the creation of a "Foreign Terrorist Tracking Force" and stated that the DOJ would "employ aggressive detention of lawbreakers and material witnesses" in an attempt to prevent the country from being used as a base for terrorist activities by criminals from abroad. *Department of Justice Press Briefing*, Oct. 31, 2001, *available at* http://www.justice.gov/archive/ag/speeches/2001/agcrisisremarks10_31.htm. It was as part of this vigorous law enforcement effort that respondent was detained.

B. Respondent's Arrest and Detention

On February 13, 2003, Sami Omar al-Hussayen, a Saudi national and graduate student at the University of Idaho, was indicted on four counts of making a false statement to the United States and seven counts of visa fraud. *See* Indictment, *United States v. Al-Hussayen*, No. 3:03-CR-00048-EJL, Feb. 13, 2003, ECF No. 1.[2] On being granted a visa, al-Hussayen declared under oath that he intended to stay in the United States "solely for the purpose of pursuing [his] course of studies," yet he was suspected of carrying out various web-based business activities related to a non-profit organization known as the Islamic Assembly of North America. *Id.* ¶¶ 1, 15-28.

The law-enforcement authorities were aware that respondent was involved with al-Hussayen. Am. Compl. at ¶¶ 15, 54(c), and at 47, 51.[3] About the time of al-Hussayen's indictment, they had also learned that respondent was soon to leave the country for Saudi Arabia. *Id.* at 51. Respondent's departure would have hindered the ability of prosecutors to obtain respondent's testimony in al-Hussayen's prosecution, given the "the high cost and the elaborate and numerous steps required for a federal prosecutor to depose a witness in a foreign country." *Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure*, Sept. 2009, at 22 [hereinafter *Rules Report*], *available at* http://www.tnwd.uscourts.gov/pdf/news/Combined_ST_Report_Sept_2009.pdf.[4] On March 14, 2001, the DOJ requested a court to "detain[] or impose[] restrictions on [respondent's]

[2] Prosecutors later filed two superseding indictments against al-Hussayen on January 9, 2004, and March 4, 2004, adding three new terrorism-related charges: "Conspiracy to Provide Material Support or Resources to Terrorists," "Providing and Concealing Material Support and Resources to Terrorists" and "Conspiracy to Provide Material Support and Resources to a Designated Foreign Terrorist Organization." Superseding Indictment, ECF No. 378; Second Superseding Indictment, ECF No. 486.

[3] Since this case is before the Court on a motion to dismiss, petitioner, for the purposes of this statement of the case, takes all of the factual allegations in respondent's complaints as true. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2007).

[4] In 2002, this Court declined to approve and transmit to Congress proposed changes to Federal Rule of Criminal Procedure 26 to make it easier to obtain the testimony of a witness abroad by use of video-conferencing. *Id.* The DOJ was thus keenly aware that if respondent left for Saudi Arabia—a country with which the United States does not even have an extradition treaty, *see* 18 U.S.C. § 3181 (2006)—his involvement at al-Hussayen's trial might have been very hard to secure.

travel," on the grounds that respondent's testimony was "material" to al-Hussayen's prosecution. *Id*. at 48. This request was supported by an affidavit written by Special Agent Scott Mace, on the basis of information supplied by his colleague James Gneckow, which stated that respondent had met with al-Hussayen and received payments from him and "his associates in excess of $20,000.00." *Id*. at 50. Furthermore, Agent Mace swore that respondent was due to take a flight to Saudi Arabia in two days' time and stated that "[i]t is believed that if Al-Kidd travels to Saudi Arabia, the United States Government will be unable to secure his presence at trial via subpoena." *Id*. Although respondent challenges some information in the affidavit relating to the details of his plane ticket, he concedes that he had indeed received large payments from al-Hussayen and that he was leaving the country to undertake a course of study at a Saudi university. *Id*. ¶¶ 42, 60.

Magistrate Judge Thomas Williams issued a material witness arrest warrant for respondent on March 14, 2003. Am. Compl. ¶ 47. Respondent was arrested two days later, on March 16, as he was about to leave the country from Dulles Airport in Virginia. *Id*. ¶ 65. He was held for sixteen days until his release on March 31, *id*. ¶ 103, during which time he was questioned about various matters, including his associations with al-Hussayen, *id*. ¶¶ 68, 101. During those sixteen days, respondent received three judicial hearings. *Id*. ¶¶ 77, 94.

Respondent's first hearing was on the second day of his detention, on March 17. *Id*. ¶ 77. At that hearing, Magistrate Judge Liam O'Grady asked respondent whether he would prefer to have a full detention hearing swiftly in Virginia, or be transferred to Idaho, "where people were more familiar with his case." *Id*. Respondent opted to be transferred. *Id*. The second hearing took place on March 25, immediately upon respondent's arrival in Idaho. *Id* ¶ 94. Both the prosecutor and respondent's public defender requested a continuance, with the result that respondent was not released immediately. *Id*. The third hearing took place on

March 31, whereupon respondent was released with conditions placed on his living arrangements and movement. Am. Compl. ¶ 103.

During this time, the investigation into al-Hussayen continued. The probe of al-Hussayen's activities was of such significance that FBI Director Robert Mueller mentioned it in testimony before the House. *Testimony of Robert S. Mueller, III, Director, FBI, Before the House Appropriations Committee, Subcommittee on the Departments of Commerce, Justice, and State, the Judiciary and Related Agencies*, March 27, 2003 [hereinafter *Mueller House Testimony*]. Director Mueller later repeated his remarks to the Senate. *Testimony of Robert S. Mueller, III, Director, FBI, Before the U.S. Senate, Subcommittee of the Committee of Appropriations*, April 10, 2003 [hereinafter *Mueller Senate Testimony*]. Although Director Mueller referred to respondent by name in his testimony, he did not describe him as a "suspected terrorist" and referred to him only in relation to the "Idaho probe" concerning "purported charities." *Id*.

Before al-Hussayen's trial began, in March 2004, respondent successfully petitioned the court to relax the conditions on his living arrangements. Am. Compl. ¶ 105. In June of that year, al-Hussayen's trial ended, without the prosecutors calling on respondent to testify, and the court duly dismissed respondent as a material witness. Am Compl. ¶¶ 106-107.

C. Proceedings Below

Respondent filed an administrative complaint against the FBI in March 2005, pursuant to the Federal Tort Claims Act (codified at 28 U.S.C. §§ 1346(b), 2680). Respondent claimed $3.5 million for damages suffered in connection with his arrest as a material witness. Am. Compl. at 52. At the same time he filed suit in the District of Idaho to recover damages against all those officials he alleged to have been involved in his detention. Compl. at 1. These included petitioner in his individual capacity as former U.S. Attorney General; then-Attorney General Alberto Gonzales in his official capacity; Director Mueller in

his official capacity; the wardens of the detention centers in Virginia, Oklahoma, and Idaho where respondent had been held, in their individual capacities; Agents Gneckow and Mace in their individual capacities; and various other individuals and institutions alleged to have acted tortiously in his confinement. Compl. ¶¶ 6-20. Respondent alleged that his arrest and post-detention release conditions violated the terms of the material witness statute (18 U.S.C. § 3144), the Fourth Amendment and the Fifth Amendment. *Id.* ¶¶ 102-07.[5] He made further claims against all non-federal defendants under 42 U.S.C. § 1983 and sought to have his name removed from law-enforcement databases in accordance with common law and 28 U.S.C. § 534. *Id.* ¶¶ 108-22.

Respondent's initial complaint was wholly lacking in factual allegations linking petitioner to the alleged torts. *See* Compl. Respondent then filed an amended complaint in November 2005. Am. Compl. at 1. This new complaint contained a section dedicated to "Defendant Ashcroft and the Post-9/11 Material Witness Policies and Practices," through which respondent sought to hold petitioner liable for the alleged torts. *Id.* ¶¶ 108-41. It also contained theories—missing in the first complaint—of how exactly petitioner was alleged to have violated the Constitution.

Petitioner moved to dismiss the claim against him on the grounds that the court lacked personal jurisdiction, and that since he had absolute and qualified immunity, respondent had failed to state a claim on which relief could be granted. *See Al-Kidd v. Gonzales (Al-Kidd I)*, No. CV:05-093-S-EJL (D. Idaho Sept. 27, 2006); Fed. R. Civ. P. 12(b)(2), 12(b)(6).[6] The court held that the amended complaint alleged facts such that petitioner could be held liable on a theory of supervisory liability,[7] and so petitioner had "sufficient contacts with the forum

[5] Although respondent did not state this in his initial complaint, these constitutional claims were brought pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 404 U.S. 388 (1971).
[6] Petitioner was joined in the motion by Agents Mace and Gneckow and Warden Callahan. App. 3a.
[7] The court justified this holding through an analysis of then-current federal court precedent. This Court had not yet handed down its decision in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

state [Idaho] to meet the specific personal jurisdiction requirements." *Id.* at *5. The court further held that petitioner was not entitled to absolute or qualified immunity. *Id.* at *12, *19.

Petitioner filed an interlocutory appeal. *Al-Kidd v. Ashcroft (Al-Kidd II)*, 580 F.3d 949 (9th Cir. 2009). The Ninth Circuit reviewed *de novo* petitioner's claims of absolute and qualified immunity and also examined respondent's various claims against petitioner. A divided panel held first that petitioner was not entitled to absolute immunity to any of the claims. *Id.* at 963. The panel next rejected, on a 2-1 majority, petitioner's claim to qualified immunity against the charge that he should be liable since respondent's arrest violated the Fourth Amendment. *Id.* at 973.[8] The divided panel then held that petitioner was not entitled to qualified immunity against the claim that he had breached the terms of the material witness statute because the affidavit in support the application for respondent's arrest warrant "included false statements or material omissions that were made intentionally or recklessly." *Id.* The panel was however unanimous in rejecting respondent's claim that petitioner violated the Fifth Amendment by setting "harsh conditions" for his confinement. *Id.* at 979.

The petition for rehearing en banc was denied, with one judge concurring and eight judges dissenting. *Al-Kidd v. Ashcroft (Al-Kidd III)*, 598 F.3d 1129 (9th Cir. 2010). Petitioner then sought a writ of certiorari from this Court to review the ruling that he was not entitled to absolute or qualified immunity on the Fourth Amendment claim and that he could be held liable for the allegedly defective affidavit for the arrest warrant. In his Brief in Opposition, respondent unequivocally stated that he would no longer pursue his claims against petitioner with respect to the allegedly false statements in the warrant affidavit. Br. in Opp. i. This effectively mooted the question of whether petitioner had violated the terms of the material witness statute. Respondent did not pledge to drop his Fourth Amendment claim against petitioner. This Court granted certiorari to determine whether petitioner was entitled

[8] The Ninth Circuit did not distinguish between the various different theories that respondent put forward as to why his Fourth Amendment rights had been violated. *See* Am. Compl. ¶ 154.

to absolute or qualified immunity to respondent's Fourth Amendment claim. *Al-Kidd v. Ashcroft (Al-Kidd IV)*, --- S. Ct. ----, 2010 WL 2812283 (U.S. Oct 18, 2010).

SUMMARY OF ARGUMENT

Petitioner is entitled to both absolute and qualified immunity to respondent's complaint that he violated the Fourth Amendment. Although the circuit court made various legal errors in depriving petitioner of absolute and qualified immunity, one fundamental mistake pervaded its analysis: it believed that it was appropriate to conduct an inquiry into petitioner's subjective intent.

Petitioner is entitled to absolute immunity because he was acting as a prosecutor throughout respondent's arrest and detention. The doctrine of absolute immunity is rooted in common law, where it was traditionally afforded to judges. It was then extended to cover some actions carried out by prosecutors. This Court has held that when a prosecutor is carrying out her core prosecutorial tasks—as an advocate, rather than an investigator or administrator—she is entitled to absolute immunity. Absolute immunity applies to *acts*, not to *persons*. To determine which of a prosecutor's acts qualify for absolute immunity, this Court has adopted a "functional approach."

The circuit court completely failed to follow the functional approach. It first ignored a wide variety of precedent that holds that the arrest of a material witness to assist with the prosecution of an indicted suspect is indeed a prosecutorial function to which absolute immunity attaches. Instead, it attempted to probe petitioner's intent and determine whether respondent was detained so that he could assist with a prosecution, or whether he was actually detained so that the FBI could investigate him as a suspect in his own right.

This inquiry into petitioner's intent flatly contradicted precedent not only from other circuit courts, but from the Ninth Circuit itself, which has held that a prosecutor's subjective intent plays no role whatsoever in determining whether the official is entitled to absolute

immunity. Nevertheless, the circuit court continued in its path and, relying on dicta in *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993), created a new judicial test to assist in its inquiry: it held it could look into petitioner's "immediate purpose."

This "immediate purpose" test fundamentally misunderstands *Buckley*. Contrary to the court's holding, *Buckley* does not mandate, or even permit, an attempt to divine a prosecutor's inner motivation. Furthermore, the precedent cited by the circuit court to buttress its new test is not supportive. Yet even under the new test, petitioner should still have been granted absolute immunity because his immediate purpose in obtaining the material witness warrant for respondent was to prosecute a criminal defendant. This is shown by the fact that the application for the warrant stated that respondent's testimony was "material" to the prosecution of al-Hussayen, Am. Compl. at 48. As the dissent noted, "when a prosecutor brings any prosecution, the prosecutor's 'immediate purpose' is, of course, to bring a prosecution," *Al-Kidd II*, 580 F.3d at 999 (Bea, J. dissenting). The circuit court erred not only in creating a new test, but also in applying it.

The court's inquiry should therefore have found that petitioner was acting as a prosecutor and is entitled to absolute immunity. There should have been no need for the court to reach the qualified immunity inquiry, which is the "default" immunity for public officials. However, the court proceeded to strip petitioner of qualified immunity as well.

This Court has laid down a two-part test for qualified immunity: a plaintiff can only overcome an official's defense of qualified immunity if her constitutional right was violated, and this right was "clearly established" at the time of the violation. With respect to the first prong of the test, the circuit court held that respondent's right under the Fourth Amendment was violated because he was arrested under a "pretextual" use of the material witness statute. This holding was erroneous, and only possible because the court made the same mistake as it did in its analysis of absolute immunity: it attempted to divine petitioner's subjective intent.

This Court has consistently held that it is not permitted to inquire into subjective intent in determining whether officials are entitled to qualified immunity from allegations of violations of the Fourth Amendment. If the circuit court had heeded this precedent, it would have held that respondent was arrested under an appropriate use of the statute, and would have granted respondent qualified immunity.

The circuit court also erred in the second stage of the inquiry. It held that it was "clearly established" that respondent could not be detained under what it termed a "pretextual" use of the material witness statute. However, even accepting *arguendo* that respondent's arrest under § 3144 was "pretextual," the circuit court failed to show that the prohibition on such a use of the material witness statute was indeed "clearly established" at the time of respondent's arrest. Rather, a wide variety of case law shows that so-called "pretextual arrests" were permitted at the time of respondent's arrest. Therefore, respondent is entitled to qualified immunity.

Finally, petitioner would still be entitled to immunity even if the circuit court had not made the mistakes noted above. First, respondent failed to allege sufficient facts to show that petitioner was not acting in a "prosecutorial" role during his arrest and so petitioner cannot be deprived of absolute immunity. Second, respondent did not demonstrate that petitioner was personally involved in the alleged constitutional violations, which he is obliged to do to overcome petitioner's defense of qualified immunity. Consequently, there are many reasons for this Court to overturn the decision below.

ARGUMENT

A. PETITIONER IS ENTITLED TO ABSOLUTE IMMUNITY BECAUSE HE WAS ACTING IN HIS ROLE AS A PROSECUTOR WHEN RESPONDENT WAS ARRESTED.

The court of appeals denied petitioner of absolute immunity for his role in respondent's arrest because it misconstrued this Court's case law and ignored its own and other circuits' precedents. Its ruling was flawed as a matter of both law and policy.

1. *The Court Of Appeals Misinterpreted Case Law In Determining That Petitioner Is Not Entitled To Absolute Immunity.*

This Court, in order to determine whether a prosecutor is entitled to absolute immunity, has consistently adopted a "functional analysis." *See*, *e.g.*, *Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1983). This analysis looks at the actions performed by the prosecutor to determine whether they are indeed "quasi-judicial," or "prosecutorial." *Imbler v. Pachtman*, 424 U.S. 409, 420 (1976) (citing *Pierson v. Ray*, 386 U.S. 547 (1967)). The motives or intent of a prosecutor play no part in this functional analysis. However, the court of appeals overturned its own precedent, and ignored case law from other circuit courts, in order to attempt to inquire into petitioner's "intent" as a part of its analysis.

The use of prosecutorial intent in the functional analysis is patently mistaken. Additionally, the circuit court compounded its errors by creating a new "immediate purpose" test as a way of determining petitioner's intent. This test was based on an erroneous interpretation of this Court's precedent. Furthermore, even if this test was appropriate, the court should have drawn from it the opposite conclusion to the one that it did.

a. An Officer's Request For The Detention Of A Material Witness Is A Prosecutorial Function And So Is Covered By Absolute Immunity.

It is settled law that a prosecutor does not necessarily enjoy absolute immunity for every action she performs. *See Buckley*, 509 U.S. at 269. Instead, this Court has directed that the particular function of the official which gave rise to the claim against her is dispositive of

whether or not she is entitled to absolute immunity. *Id.* In order for an official to claim absolute immunity, it is necessary for that official to locate a source of the claimed immunity in the common law. *See, e.g.*, *Imbler*, 424 U.S. at 421.[9] It is thus the "nature of the function performed, not the identity of the actor who performed it" that is determinative in deciding whether absolute immunity attaches to a prosecutor's actions. *Buckley*, 509 U.S. at 269 (1993) (quoting *Forrester v. White*, 484 U.S. 219, 229 (1988)). Although it has been "quite sparing" in recognizing absolute immunity claims, *Burns v. Reed*, 500 U.S. 478, 487 (1991), this Court has also recognized that there are strong reasons to apply absolute immunity in certain contexts, *id.* at 484. *See also Briscoe v. LaHue*, 460 U.S. 325 (1983) (providing absolute immunity to witnesses for trial testimony); *Pierson v. Ray*, 386 U.S. 547 (1967) (providing absolute immunity to judges within their jurisdiction); *Tenney v. Brandhove*, 341 U.S. 367 (1951) (providing absolute immunity to state legislators for legislative acts).

In *Imbler*, the Court held that judges enjoy absolute immunity for "acts committed within their judicial jurisdiction." 424 U.S. at 418 (citing *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872)). Prosecutors can likewise receive absolute immunity when acting "within the scope of their prosecutorial duties." *Id.* at 420. Otherwise, prosecutors would be overburdened by lawsuits and would suffer "unique and intolerable burdens" in defending themselves because they "frequently act[] under serious constraints of time and even information" and inevitably make "many decisions that could engender colorable claims of constitutional deprivation." *Id.* at 425-26. Therefore, as long as a prosecutor is acting as an "advocate" whose "activities [a]re intimately associated with the judicial phase of the criminal process," she is entitled to absolute immunity. *Id.* at 431.

The Court has consistently adhered to this principle. A prosecutor's participation in a probable cause hearing, her work in filing and preparing charging documents, and her

[9] *Imbler* involved a § 1983 suit, not a *Bivens* action like the instant case. However, this Court has ruled that it is "untenable to draw a distinction between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials." *Butz v. Economou*, 438 U.S. 478, 504 (1978).

supervision of procedures related to the presentation of evidence at trial are all immune from suit. *See Van de Kamp v. Goldstein*, 129 S. Ct. 855 (2009); *Kalina v. Fletcher*, 522 U.S. 118 (1997); *Burns v. Reed*, 500 U.S. 478 (1991). Similarly, detaining a material witness falls squarely within the role of a prosecutor as an advocate because it directly relates to the evaluation and preparation of evidence and testimony for a criminal trial, as circuit courts have held. In *Daniels v. Kieser*, the Seventh Circuit ruled that detaining a witness to "guarantee [her] presence at the trial through a material witness warrant" is an advocacy-related act. 586 F.2d 64, 68 (7th Cir. 1978). The Second Circuit concurred with this decision in *Betts v. Richard*, holding that "[a]bsolute immunity attaches" to "procuring the attendance of a witness for imminent trial." 726 F.2d 79, 81 (2d Cir. 1984). Additionally, the Sixth Circuit noted that *Imbler* "dictates that absolute immunity is appropriate" for material witness arrests because such detentions are "inextricably intertwined with the initiation and presentation" of a prosecution. *White ex rel. Swafford v. Gerbitz*, 860 F.2d 661, 665 n.4 (6th Cir. 1988). Respondent does not contest that "absolute immunity ordinarily attaches to the decision to seek a material witness warrant." *Al-Kidd II*, 580 F.3d at 959.

Respondent was detained as a material witness pursuant to an arrest warrant issued by a magistrate judge. Am. Compl. ¶ 47. If the circuit court had applied this Court's "functional analysis," it would have concluded that petitioner is entitled to absolute immunity for supervising the warrant application. However, the circuit court eschewed a straightforward application of the "functional analysis," and instead insisted on examining petitioner's intent and motives. In doing so, it contradicted other circuits and overturned its own precedent.

b. Courts Have Consistently Held That An Inquiry Into A Prosecutor's Intent Is Not Permitted.

The Ninth Circuit itself has held that no inquiry into a prosecutor's intent is permitted in determining whether she enjoys absolute immunity. In *Ashelman v. Pope*, 793 F.2d 1072 (9th Cir. 1986), the court held that a prosecutor was absolutely immune to a charge that he

conspired with a judge to deprive the plaintiff, then a prisoner, of the assistance of counsel and various facilities he needed to prepare his defense. The court stated flatly: "Intent should play no role in the immunity analysis." *Id.* at 1078. Despite this clear precedent, the court incorrectly stated that without an inquiry into subjective intent, the functional approach would devolve "into a formalistic taxonomy of acts that are inherently either prosecutorial or investigative, regardless of what each act is really serving to accomplish." *Al-Kidd II*, 580 F.3d at 962. No other court has cast such doubt on a straightforward application of "functional analysis."

Ashelman has been followed. In *Bernard v. County of Suffolk*, 356 F.3d 495 (2d Cir. 2004), the Second Circuit declined to import intent into the immunity analysis, in a case where the prosecutor was alleged to have pursued charges against political enemies. "[R]acially invidious or partisan prosecutions, pursued without probable cause, are reprehensible, but such motives do not necessarily remove conduct from the protection of absolute immunity." *Id.* at 504. The circuit court attempted to distinguish these cases on the grounds that they were not "attempts to distinguish between a prosecutor's *investigative* or *national security* functions and his *prosecutorial* functions, which is the question here." *Al-Kidd II*, 580 F.3d at 960. This distinction is bizarre. First, in both this case and those cited above, the prosecutor's contested action is the result of a secret intent hidden behind a legal justification. There is no principled reason for holding that courts may inquire into one kind of secret intent but not another, based on a plaintiff's allegation. Second, in the two cases above, prosecutors were alleged to have acted with malice to deprive defendants (later turned plaintiffs) of their rights. The Ninth Circuit would apparently have a rule whereby it would turn a blind eye to allegations of official malice, which inevitably harms the public interest, but it would zealously scrutinize any allegations that a prosecutor acted in an investigatorial role, which may advance the public interest. This conclusion is clearly illogical.

c. The Circuit Court Was Wrong To Hold That Buckley *Supports An Inquiry Into Prosecutors' Internal Motives.*

The court tried to justify its approach by relying on this Court's holding in *Buckley*. In *Buckley*, state prosecutors argued that they were entitled to absolute immunity in a § 1983 suit against allegations that they fabricated evidence against the plaintiff. This Court held that when the evidence was allegedly fabricated, "[t]heir mission at that time was entirely investigative in character." 509 U.S. at 274. What was dispositive for the Court was that it was only after the alleged fabrication of this evidence that the prosecutors empanelled a grand jury and the "immediate purpose" of the empanelment of the grand jury was not to indict the plaintiff but "to conduct a more thorough investigation of the crime." *Id.* at 275.

It is clear that *Buckley* cannot support the principle that courts may inquire into prosecutors' motives. Although the *Buckley* Court used words such as "mission" and "purpose" in its holding, it never examined the prosecutors' internal motivations. Rather, the dispute in *Buckley* centered on how an *external* event—the empanelment of the grand jury—should be characterized. The Court created a bright-line rule for making this characterization: "A prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested." *Id.* at 274.

The only possible characterization of the external event in this case—respondent's arrest—is that it was prosecutorial. First, petitioner certainly had "probable cause" to have someone arrested: at the time of respondent's arrest, al-Hussayen had been "indicted, arrested, arraigned, and was awaiting trial." *Al-Kidd II*, 580 F.3d at 998 (Bea, J. dissenting). Second, the very nature of the material witness statute dictates that petitioner must have been acting as a prosecutor. In order to obtain respondent's arrest warrant, U.S. Attorney Moss was required to submit an application to a neutral magistrate. This application stated that "[t]he testimony of the aforementioned material witness is material . . . to the prosecution . . . herein." Am. Compl. at 40. Under the terms of his oath to uphold the laws and the

Constitution, *see* 28 U.S.C. § 631, the magistrate judge who granted the warrant was only permitted to do so after being satisfied that the warrant application did indeed show that respondent had information material to al-Hussayen's prosecution *and* that there was "probable cause" for which he could issue the warrant.

Judges jealously guard their independence when asked to issue warrants to compel the appearance of witnesses. *See United States v. Awadallah*, 349 F.3d 49, 62 (2d Cir. 2003) ("The materiality determination called for by § 3144 lies within the district court's competence."); *Beaver v. Carey*, 462 F. Supp. 301, 303 (N.D. Ill. 1977) ("[J]udges alone determine materiality and necessity."). In *Malley v. Briggs*, 475 U.S. 335 (1986), this Court held that an officer cannot claim immunity by relying on the fact that an arrest warrant was issued by a judicial officer, if the request for the warrant is "unreasonable," *id.* at 345, but because of the posture of this case, *Malley* does not control.

This Court should hold that petitioner, insofar as he is responsible for respondent's warrant application, is only responsible for an application that was accurate, complete, and that satisfies the *Malley* standard for "reasonableness." Based on *Franks v. Delaware*, 438 U.S. 154 (1978), the circuit court refused to hold that petitioner was not liable for alleged inaccuracies or omissions in the affidavit leading to respondent's arrest warrant. *See Al-Kidd II*, 580 F.3d at 973-77. Petitioner sought review of this question before this Court. However, in his brief in opposition, respondent explicitly stated that he no longer seeks to hold petitioner liable for alleged inaccuracies or omissions in the warrant. Br. in Opp. i.[10] This effectively mooted the question, and this Court declined to grant certiorari to review it. However, the question of whether petitioner can be held *responsible* for the alleged inaccuracies and omissions nonetheless affects this Court's resolution of the two questions on

[10] Respondent wrote: "Respondent will not pursue the claims in Question 3 of the petition if certiorari is granted. Similarly, if the petition is denied, respondent will abandon the claims in Question 3 in any further proceedings in the district court or Ninth Circuit." Br. in Opp. i. The issue of whether petitioner could be held liable for the allegedly defective warrant was the third question on which petitioner sought this Court's review, after the questions relating to absolute and qualified immunity.

which it has granted certiorari, because the presence of an independent magistrate, acting on reliable information and in the causal chain between petitioner and respondent's arrest, is an important sign that petitioner was acting as a prosecutor. In this respect, the question remains important and it would be unjust for respondent to rely on a ruling below that, by his legal strategy, he has effectively mooted. This Court should therefore hold that the warrant application was "reasonable" under *Malley*, and rule that petitioner was acting as a prosecutor with respect to respondent's arrest.

d. The Circuit Court's Use Of The "Immediate Purpose" Test Should Be Rejected.

Notwithstanding its legal errors, the circuit court acknowledged that the inquiry into petitioner's intent was fraught with problems. "A wide-ranging investigation into . . . motives would likely prove unworkable." *Al-Kidd II*, 580 F.3d at 962. Therefore, the circuit court fashioned an "immediate purpose" test, relying on dictum in *Buckley*, to provide a method of carrying out its inquiry. *Id.* at 962-63. As noted above, *Buckley* does not support an inquiry into intent and the circuit court took the words "immediate purpose" completely out of context. However, even if this fundamental objection is set aside, there are two further reasons to reject the "immediate purpose" test. First, it is unsupported by the precedent that the circuit cited.[11] Second, even if the test is used, a sensible application of it leads to the *opposite* conclusion to the circuit court's holding.

The circuit court relied on two of its own cases to justify its "immediate purpose" test. In *KRL v. Moore*, prosecutors obtained a search warrant and indicted the plaintiff on criminal charges. 384 F.3d 1105 (9th Cir. 2004). The prosecutors later sought a second search warrant. In their affidavit for that warrant, the agents testified that they wished both to gather further evidence for the plaintiff's prosecution and to investigate a new suspected offense. *Id.* at 1109. The court held that the prosecutors were not entitled to absolute immunity insofar as

[11] The Court has used the "immediate purpose" test in the past, but only for "special needs" cases involving warrantless searches. *See Ferguson v. City of Charleston,* 532 U.S. 67 (2001).

the warrant sought information unconnected with the ongoing prosecution. *Id.* at 1113. However, the court granted the prosecutors absolute immunity for applying for the warrant to the extent that they were seeking evidence to present at trial. *Id.* at 1112.

The circuit court wrongly found that *KRL* supported its inquiry into "purpose." As in *Buckley*, it is clear that the question before the court was a straightforward functional analysis of the prosecutors' external actions, not an inquiry into their states of mind. The prosecutors had stated openly on the affidavit that some of their actions were prosecutorial and some were investigatorial, and the court granted them absolute and qualified immunity accordingly. As the dissent below noted, the court in *KRL* looked to the "purpose of the warrant, not of the prosecutor" because "[i]t does not take a mind-reader . . . [i]t merely requires reading the warrant." *Al-Kidd II*, 580 F.3d at 998 (Bea, J. dissenting). Furthermore, the *KRL* court specifically warned against using its ruling as precedent in a case such as this one: "We must emphasize that our result would not necessarily be the same had the prosecutors reviewed an arrest warrant, rather than a search warrant." *KRL*, 384 F.3d at 1114.

The court attempted to add substance to its new "immediate purpose" test by holding that it would be satisfied in cases where there was a demonstrated "close temporal and circumstantial connection between trial and seeking the arrest." *Al-Kidd II*, 580 F.3d at 961. The court held that this standard was supported by *Genzler v. Longanbach*, 410 F.3d 630 (9th Cir. 2005), but *Genzler* provides no more support for the "immediate purpose" test than does *KRL*. In *Genzler*, the court determined that prosecutors conducting interviews in a homicide investigation were not entitled to absolute immunity because they held the interviews before probable cause was established. *See Genzler*, 410 F.3d at 640-41. This holding simply reiterated the rule this Court established in *Buckley*: "A prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested."

Buckley, 509 U.S. at 274. The circuit court stretched *Genzler* beyond *Buckley*'s limits when it asserted that *Genzler* supported its unprecedented "immediate purpose" inquiry.

Other cases mentioned by the circuit court also fail to show convincing support for its "close temporal and circumstantial connection" standard. The court cited *Daniels v. Kieser*, 586 F.2d 64 (7th Cir. 1978), in which the prosecutor was granted absolute immunity for the arrest of a witness after the trial had already begun. The *Daniels* court held that "[b]ecause defendant was attempting to secure Daniels' presence at the resumption of the trial, we must consider that he was acting as an advocate . . . ." *Id.* at 69. Similarly, the court cited *Betts v. Richards*, 726 F.2d 79 (2d. Cir 1984), in which the Second Circuit held that absolute immunity attached to a prosecutor's function of securing a witness's presence for a trial that it described in dicta as "imminent." *Id.* at 81. Yet *Daniels* and *Betts* do not support the conclusion drawn by the circuit court.

First, it is entirely clear from the language of § 3144—and its underlying rationale—that it does not make a difference whether a witness is arrested to ensure her attendance at the start or the resumption of a trial. The court ignored the fact that the authorities requested that respondent's movements be restricted or that he be detained so that he might testify at al-Hussayen's trial. Second, respondent was arrested shortly before leaving the country in order to study for an unspecified period of time at a Saudi university. This clearly could have raised concerns that he would not be available to testify at al-Hussayen's trial, and demonstrates why the court's standard of a "close temporal and circumstantial connection between trial and seeking the arrest" is completely inapposite. What matters in the material witness context is not the time between trial and arrest, as the court held, but *the time between the arrest and the moment when the witness will cease to be available for testimony.* Respondent's absence in Saudi Arabia would certainly have made him practicably unavailable, given "the high cost and the elaborate and numerous steps required for a federal

prosecutor to depose a witness in a foreign country." *Rules Report* at 22. Therefore, if the "immediate purpose" test is accepted as valid, petitioner was clearly acting with a prosecutorial intent by ensuring respondent's availability at al-Hussayen's trial at the closest possible moment to the trial, and should be granted absolute immunity.

2. *The Benefits Of Granting Petitioner Absolute Immunity Clearly Outweigh Any Disadvantages.*

Petitioner's claim to absolute immunity is not only founded in case law and precedent; policy reasons also dictate that he should be granted absolute immunity. Although there are reasons why this Court should be discriminating in granting absolute immunity, the balance of factors is overwhelmingly in petitioner's favor.

a. Policy Considerations Require That Petitioner Receive Absolute Immunity.

The justification for petitioner's absolute immunity is firmly rooted in public policy. In *Imbler*, this Court noted that prosecutorial absolute immunity is a derivative of the absolute immunity accorded judicial officers at common law. 424 U.S. at 422-23. The reason for the absolute immunity of judges is to "prevent them being harassed by vexatious actions." *Bradley v. Fisher*, 80 U.S. 335, 349 (1871) (internal quotations omitted). Extending this reasoning to prosecutors, the Court has stressed that the "public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages." *Imbler*, 424 U.S. at 424.

The problem prosecutors face if deprived of absolute immunity is not merely one of ex post harassment, however. They will also suffer ex ante. Even if lawsuits are ultimately unsuccessful, the potential harassing effect of litigation will be enough to change prosecutors' behavior. "Absolute immunity is designed to free the judicial process from the harassment and intimidation associated with litigation." *Burns*, 500 U.S. at 494. Attorneys will find it vastly more difficult to be "zealous advocate[s]" if they are forced to consider their own well-

being in decisions about the evaluation and presentation of evidence and testimony at a trial. *ABA Model Rules of Professional Conduct*, 2009, Preamble ¶ 8. This Court has also recognized, in the parallel context of judicial immunity, that the "resulting timidity would be hard to detect or control." *Forrester*, 484 U.S. at 227.

The circuit court's proposed "immediate purpose" in particular would constrain prosecutorial decision-making. The test only applies after an action, so personal liability would cause prosecutors to face perverse incentives. They might adopt less effective trial strategies in order to ensure that, in hindsight, their purpose appeared as "prosecutorial" as possible or they might avoid certain beneficial actions altogether out of fear of liability. Prosecutors might attempt to reduce the time between arrest and trial by either delaying warrant applications until too late or by bringing the accused to trial before the case was fully prepared. Prosecutors might even allow criminals to go unprosecuted to avoid liability or bring a case to trial simply to gain the protection of absolute immunity. "The efficient, and just, performance of the prosecutorial function would be chilled if Government attorneys were forced to worry that their choice of trial strategy and tactics could subject them to monetary liability."[12] *Taylor v. Kavanagh*, 640 F.2d 450, 452 (2d Cir. 1981).

There is no doubt that material witness arrests are a necessary part of our judicial system. Our adversary system depends on the reliable presentation of relevant testimony to ensure just and fair results, as the Court recognized in *Stein v. New York*, 346 U.S. 156 (1953). "The duty to disclose knowledge of crime rests upon all citizens. It is so vital that one known to be innocent may be detained, in the absence of bail, as a material witness." *Id.* at 184. The idea that a witness should be obligated to impart the knowledge she has of a

[12] The threat to prosecutor's decision-making is not lessened by the possibility of reimbursement by the government since, although petitioner *may* be reimbursed for legal costs, there is no guarantee. *See Falkowski v. EEOC*, 719 F.2d 470, 472-76 (D.C. Cir. 1983) (arising after the government denied reimbursement to a former employee in an action related to her former employment), *vacated sub nom. U.S. Dep't of Justice v. Falkowski*, 471 U.S. 1001 (1985); *Turner v. Schultz,* 187 F. Supp. 2d 1288, 1290 (D. Colo. 2002) (same). Additionally, the determination of whether or not to reimburse is completely under the discretion of the current Attorney General and is unreviewable. *Falkowski v. EEOC*, 764 F.2d 907, 911 (D.C. Cir. 1985).

crime is so important to our justice system that it was adopted by the First Congress at the founding of the Republic and has continued in force to its most recent incarnation in 18 U.S.C. § 3144. *See* Roberto Iraola, *Terrorism, Grand Juries, and the Federal Material Witness Statute*, 34 St. Mary's L.J. 401, 405-09 (2003). Without this power, many crimes may go unpunished for lack of the testimony of otherwise accessible material witnesses, or, on the other hand, many public defenders may not receive the testimony they need to ensure that innocent defendants are not wrongfully punished. *See, e.g.*, Wesley MacNeil Oliver, *The Rise and Fall of Material Witness Detention in Nineteenth Century New York*, 1 N.Y.U. J.L. & LIBERTY 727, 780 (2005) (discussing problems in New York after the state repealed its material witness statute). A prosecutor must be able to act as freely with respect to securing a material witness's testimony as with any other kind of prosecutorial action.

Petitioner's claim to absolute immunity is further strengthened by the fact that the Attorney General sets prosecutorial policy. This policymaking role opens him to an even wider variety of potential litigants. Policymakers "face[] the risk of recrimination from the potentially larger number of parties prosecuted in accordance with the agency directive." *Haynesworth v. Miller*, 820 F.2d 1245, 1269-70 (D.C. Cir. 1987). *See also Dellums v. Powell*, 660 F.2d 802, 811 n.13 (D.C. Cir. 1981) (Wright, J.) (holding that the Attorney General is absolutely immune for his "general instructions" that are "causally responsible for the initiation of prosecutions). The same public policy reasons apply even more strongly to petitioner in his role as both prosecutor and legal policymaker.

b. Granting Petitioner Absolute Immunity Will Not Lead To A Failure Of Justice.

Courts have consistently held that the benefit of protecting officials with immunity outweighs the risk that wrongful actions will be protected. "[I]t is better to make the rule of law so large that an innocent counsel shall never be troubled, although by making it so large counsel are included who have been guilty of malice and misconduct." *Yaselli v. Goff*, 12

F.2d 396 (2d Cir. 1926), *aff'd mem.*, 275 U.S. 503 (1927) (per curiam). As Judge Learned Hand wrote, in finding absolute immunity for two successive U.S. Attorneys General, "it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation." *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949).

Furthermore, concerns about leaving wrongs unredressed are, in this case, misplaced. Respondent named many defendants in his complaint who can make good the wrongs claims to have suffered, including the United States, and even added "John Does 1-25." Am. Compl. at 1-2. Immunity for petitioner will not entail that "the laws furnish no remedy for the violation of a vested legal right," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

Nor is there any risk that the material witness statute will be abused in the future. Under the Federal Rules of Criminal Procedure, a government attorney must report biweekly to a magistrate, listing material witnesses detained for more than ten days and stating why they "should not be released with or without a deposition being taken." Fed. R. Crim. P. 46(h)(2). In ruling on an application for a material witness arrest warrant, a magistrate must treat the arrestee "in accordance with the provisions of section 3142 of this title." 18 U.S.C. § 3144. Detention is a last resort, to be used after release on recognizance or bond. *See* 18 U.S.C. § 3142 (2006). Furthermore, in *Imbler*, the Court listed several "checks [that] undermine the argument that the imposition of civil liability is the only way to insure that prosecutors are mindful of the constitutional rights of persons accused of crime." 424 U.S. at 429. These checks are very public: they include criminal sanctions, contempt of court, professional discipline by associations of peers, and general censure.

The public nature of the restraints on the Attorney General's actions furnishes another reason why he should be granted absolute immunity. In *Mitchell v. Forsyth*, 472 U.S. 511 (1985), this Court held by a 4-3 majority that an Attorney General's "national security" tasks

are not protected by absolute immunity because they are "carried out in secret," *id.* at 522, which means that "it is far more likely actual abuses will go uncovered" than that vexatious litigation will burden prosecutors. *Id.* This reasoning is not appropriate here. *Mitchell* concerned the authorization for wiretaps, which are by definition kept secret from their targets. Respondent's arrest was certainly no secret to him, nor would it be secret from any detained material witness. Therefore, the rationale for *Mitchell* does not obtain in this case.

Granting petitioner absolute immunity would benefit "the broader public interest." *Imbler*, 424 U.S. at 427. Anything less would weaken the "ultimate fairness of the operation of the system itself." *Id.*

B. ALTERNATIVELY, PETITIONER IS ENTITLED TO QUALIFIED IMMUNITY BECAUSE HIS ACTION DID NOT VIOLATE THE CONSTITUTION AND RESPONDENT'S RIGHT WAS NOT CLEARLY ESTABLISHED.

Even if this Court finds that the former Attorney General is not entitled to absolute immunity for his use of the material witness statute in this case, he remains entitled to qualified immunity.[13] Qualified immunity covers all acts of officialdom "across the board." *Anderson v. Creighton*, 483 U.S. 635, 642 (1987) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 821 (1982) (Brennan, J., concurring)).

In *Saucier v. Katz*, 533 U.S. 194 (2001), this Court laid down a two-step process for determining whether an official benefits from qualified immunity. First, it is necessary to determine whether "the officer's conduct violated a constitutional right." *Id.* at 201. Second, if the constitutional right was violated, it is next necessary to ask whether "the right was

[13] Petitioner discusses qualified immunity since this Court has granted certiorari to resolve the question presented. However, if this Court grants petitioner absolute immunity, there is no need for this Court also to determine whether he is entitled to qualified immunity. "The 'cardinal principle of judicial restraint' is that 'if it is not necessary to decide more, it is necessary not to decide more.'" *Morse v. Frederick*, 551 U.S. 393, 431 (2007) (Breyer, J., concurring in part and concurring in the judgment) (citing *PDK Labs, Inc. v. Drug Enforcement Admin.*, 362 F.3d 786 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in the judgment)).

clearly established." *Id.*[14] If either of these inquiries is answered in the negative, then the official is entitled to qualified immunity. The court of appeals found that petitioner's conduct both violated al-Kidd's constitutional right under the Fourth Amendment and that his right was clearly established, and accordingly held that petitioner was not entitled to qualified immunity. The court erred in both steps of its analysis.

1. *An Officer Does Not Violate The Fourth Amendment In Executing A Valid Material Witness Warrant With The Subjective Intent Of Conducting Further Investigation Or Preventively Detaining The Subject.*

The court of appeals held that respondent's Fourth Amendment right had been violated because he was detained under 18 U.S.C. § 3144 on a pretext: the law-enforcement authorities did not wish to ensure his presence as a witness at a trial, but wanted to investigate him further as a suspect in his own right. *Al-Kidd II*, 580 F.3d at 965-73. However, by inquiring into whether the FBI and DOJ had acted on a pretext, the lower court wrongly interpreted this Court's precedent.

In *Whren v. United States*, this Court held that in cases of "ordinary, probable-cause Fourth Amendment analysis" courts are not permitted to declare an arrest invalid because it was carried out on a "pretext." 517 U.S. 806, 813 (1996). Instead, the Court stated that what matters is whether the detainee is held on "probable cause" for *some* violation, whether or not the officer applying for the warrant had ulterior motives. *Id.* at 811.

The court of appeals held that *Whren* was inapplicable to the instant case. It then likened respondent's arrest to a seizure in a program of suspicion-less traffic stops that this Court enjoined in *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), and ruled that it was unconstitutional. This reasoning was flawed for several reasons. First, despite the court of appeals' efforts, *Whren* cannot be distinguished from this case and therefore the court was not

[14] In *Pearson v. Callahan*, 129 S. Ct. 808, 818 (2009), this Court receded from *Saucier* and held that courts have the discretion to consider the two prongs of the inquiry in either order. However, the Court also recognized that the "*Saucier* protocol . . . is often beneficial." *Id.*

permitted to consider the subjective intent of the officers who applied for respondent's arrest warrant. Second, *Edmond* does not endorse an inquiry into officers' subjective intent, and so cannot be used to hold petitioner's actions unconstitutional. Third, a wide range of other cases hold, like *Whren*, that courts should not seek to probe into subjective intent. Fourth, material witness arrest cases themselves support the proposition that it is improper to explore an officer's subjective intent.

Because the law does not support an inquiry into subjective intent, the court below should not have ruled that respondent's arrest was pretextual or that it violated his Fourth Amendment rights. Rather, it should have looked merely at the fact that respondent was arrested pursuant to a valid material arrest warrant issued by a magistrate under 18 U.S.C. § 3144, *see supra* A.1.c. Had the court confined its inquiry to this, it could not have concluded that respondent's rights were violated, unless it had held that the § 3144 was facially unconstitutional, which it declined to do. *See Al-Kidd III*, 598 F.3d at 1133 (M. Smith, J., concurring in denial of petition for rehearing en banc).

a. The Circuit Court Erred In Holding That Whren *Does Not Control This Case.*

In *Whren*, this Court unanimously affirmed the principle that "subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." 517 U.S. at 813. The circuit court found that the instant case was distinguishable because the arrest in this case was neither "ordinary" nor based on "probable cause." Both of these findings were mistaken.

In support of its claim that that respondent's arrest was not "ordinary," the court pointed to statistics comparing material witness detentions to other types of federal arrests. *Al-Kidd II*, 580 F.3d. at 966 n.16. It noted that in 2002-03, material witness arrests composed less than 4% of all federal arrests, and the vast majority of these were pursuant to warrants

sought by the Immigration and Naturalization Service. *Id.*[15] However, in *Whren* this Court did not attempt to define "ordinariness" with respect to how many instances of a certain type of arrest happened in a particular year.[16] Rather, the Court held that "ordinary" arrests are those that are not "inventory searches," carried out to secure property lawfully seized, or "administrative inspections," whereby business premises may be searched under a general regulatory scheme. *Whren*, 517 U.S. at 811. These two discrete categories, the Court explained, were specifically "exempt[ed] from the need for probable cause (and warrant)." *Id.*

In order to make its second finding—that respondent's arrest lacked "probable cause"—the circuit court was even freer with precedent. This Court in *Whren* made clear that, when speaking about searches and seizures that are not motivated by "probable cause," it was once again talking about "inventory searches" and "administrative inspections." *Id.* The Court stated that these were exempted from *Whren*'s prohibition against an inquiry into subjective intent because of the need to ensure that inventory inspections would not be a "ruse for general rummaging to discover incriminating evidence," *id.* (quoting *Florida v. Wells*, 495 U.S. 1, 4 (1990)) and that administrative inspections would not become a "'pretext' for obtaining evidence of . . . violation of . . . penal laws," *id.* (quoting *New York v. Burger*, 482 U.S. 691, 716-17, n.27 (1987)).

However, the circuit court improperly expanded the analysis in subjective intent cases to include material witness arrests. To support its argument, it cited *Beck v. Ohio*: "[Probable cause is] facts and circumstances . . . sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense." 379 U.S. 89, 91 (1964). The circuit court held that because respondent's arrest was not supported by "probable cause" according

[15] The INS frequently uses the material witness statute to detain illegal immigrants so that they can give evidence against alleged people-smugglers. *Id.*

[16] Indeed, the circuit court's reasoning leads to the paradox by which, the more the Attorney General uses § 3144 to detain witnesses, the more "ordinary" such arrests become and the less easy it is under the circuit court's reasoning to distinguish *Whren* and justify an investigation of officers' subjective intentions.

to this standard, the *Whren* prohibition on investigating the subjective intent behind "probable cause" did not apply. *Al-Kidd II*, 580 F.3d at 966-67.

The circuit court then went one step further by holding that *all* material witness arrests lack "probable cause" in the sense given by this Court in *Beck*: "material witness arrests are seizures without suspicion of wrongdoing." *Id.* at 968. Therefore, the court held that *Whren* should not apply to *any* material witness arrest. This flatly contradicted the court's own precedent, other federal courts' holdings, the judgments of this Court, and the Constitution.

In determining whether "probable cause" exists in the context of material witness arrest warrants, it is instructive to start with the reality that *warrants do issue*. The Constitution states that "no Warrants shall issue, but upon probable cause." U.S. Const. amend. IV. Therefore—unless all material witness arrest warrants issued since the passage of the First Judiciary Act in 1789 are unconstitutional—"probable cause" to issue these warrants must exist.[17] The circuit court refused to declare the material witness arrest statute unconstitutional. The only way in which the court was able to hold that § 3144 was *not* unconstitutional was to hold that all arrests effected pursuant to the statute were governed not by the Warrant Clause of the Fourth Amendment, but by the Reasonableness Clause. The court held that it "required that the elements of the material witness statute be shown by 'probable cause,' *not because that, in itself, satisfies the Fourth Amendment's 'probable cause' requirement*, but because permitting arrests only upon establishing the elements by that burden of proof was 'reasonable' under the Fourth Amendment." *Al-Kidd II*, 580 F.3d at 968 (emphasis added). In the history of this Republic, no one has ever argued that material witness warrants are not real warrants since they issue without "probable cause."[18]

[17] The First Judiciary Act of 1789 "codified the authority to require recognizance of material witnesses in criminal proceedings, and to imprison them upon failure to do so." Stacey M. Studnicki, *Material Witness Detention: Justice Served Or Denied?*, 40 Wayne L. Rev. 1533, 1536-37 (1994).

[18] Of course, warrants can be characterized as not being "real" warrants. *See* 4 William Blackstone, *Commentaries on the Laws of England* *288 (a general warrant "is therefore in fact no warrant at all: for it will

A far simpler and well-accepted explanation for "probable cause" in material witness arrest warrants was available in the Ninth Circuit's own precedent. In *Bacon v. United States*, the Ninth Circuit held that "[the predecessor to § 3144] provide[s] specific criteria for probable cause . . . [T]he judicial officer must have probable cause to believe (1) 'that the testimony of a person is material' and (2) 'that it may become impracticable to secure his presence by subpoena.'" 449 F.2d 933, 943 (1971) (quoting 18 U.S.C. § 3144). This standard of probable cause in the material witness context has been accepted consistently by circuit and district courts around the country. *See, e.g.*, *United States v. Awadallah*, 349 F.3d 42, 64 (2d Cir. 2003) (quoting the *Bacon* criteria of probable cause); *Arnsberg v. United States*, 757 F.2d 971, 976 (9th Cir. 1984) (citing *Bacon* approvingly); *United States v. Oliver*, 683 F.2d 224, 231 (7th Cir. 1982) (quoting *Bacon*); *United States v. Feingold*, 416 F. Supp. 627, 628 (E.D.N.Y. 1976) (same). The one time that this Court has had occasion to comment on *Bacon*, it in no way criticized this "probable cause" standard. *See Zurcher v. Stanford Daily*, 436 U.S. 547, 554 n.5 (1978).

This entirely logical definition of "probable cause" was strangely rejected by the panel. The circuit court cast aside its own precedent by stating that this statutory definition of probable cause did not accord with "subsequent Supreme Court reaffirmations of the traditional definition of probable cause." *Al-Kidd II*, 580 F.3d at 968. This "traditional definition," according to the majority, was one that included the concept of "guilt" and whether or not the arrestee was committing or was about to commit a "crime." *Id.* at 967. Even disregarding the logical definition of "probable cause" hitherto accepted by the courts mentioned above, the circuit court's narrow focus on the "traditional" definition still does not show that the warrant issued without "probable cause."

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not justify the officer who acts under it.") However, the circuit court did not classify respondent's warrant as anything less than real.

First, the "traditional" definition of "probable cause" that the circuit court stood by is more elusive than it admitted. "The probable cause standard is incapable of precise definition." *Maryland v. Pringle*, 540 U.S. 366, 371 (2003). Rather, it is a "fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules." *Illinois v. Gates*, 462 U.S. 213, 231 (1983). Therefore, it is hard to see why the circuit court insisted that "probable cause" should be reduced to a framework that involves guilt.

But even if the traditional definition of "probable cause" is accepted, material witness arrests still pass the test. The circuit court glossed over the fact that a material witness warrant is sought precisely because there is a risk that if it were not issued, a crime *would* be committed. Material witness arrest warrants issue if it "may become impracticable to secure the presence of the person by subpoena." 18 U.S.C. § 3144. The circuit court acknowledged that it is a crime to disobey a subpoena. *Al-Kidd II*, 580 F.3d at 967, n.17 (citing 18 U.S.C. § 401(3)).[19] Therefore, § 3144 warrants are still backed by "probable cause" even according to the "traditional" definition: the facts and circumstances "warrant a prudent person, or one of reasonable caution, in believing . . . that the suspect . . . is about to commit an offense." *Id.* (citing, with approval, *Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979)). It makes no difference that the subpoena is not issued at the time when the material witness arrest warrant is requested. This is because, but for the § 3144 warrant, the subpoena *would* be issued and as soon as it is issued, the officer would be justified in believing that the suspect is "about to commit an offense" by disobeying it. This logic was recognized by this Court in *Barry v. United States ex rel. Cunningham*, 279 U.S. 597 (1929), one of the few instances where this Court has considered material witness arrests. In reversing the appellate court that had invalidated a material witness warrant, the Court held that "[u]ndoubtedly . . . a court has

[19] Any person who fled in order to avoid testifying would also commit an offense under the Federal Fugitive Felon Act. 18 U.S.C. § 1073.

power in the exercise of a sound discretion to issue a warrant of arrest without a previous subpoena." *Id.* at 616.

Warrants issued pursuant to § 3144 are indeed real warrants, issued with "probable cause," and *Whren* cannot be distinguished in this case. Therefore, the subjective intent of petitioner in obtaining the warrant cannot be taken into consideration in determining whether or not the warrant was validly executed and respondent was lawfully detained.

b. Contrary To The Circuit Court's Holding, Use Of The Material Witness Statute In This Case Is Not Invalidated By Edmond.

The court of appeals held that § 3144 arrests, being a "program of seizures without probable cause," had to be examined in light of this Court's holding in *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000). *Al-Kidd II*, 580 F.3d at 968. In *Edmond*, this Court held that a city could not, pursuant to the Constitution, operate a program of checkpoints whose "primary purpose" was the "discovery and interdiction of illegal narcotics." 531 U.S. at 34. This was because the state's interest in operating the checkpoints was the "general interest in crime control", *id.* at 44 (quoting *Delaware v. Prouse*, 440 U.S. 648, 659, n.18 (1979)), rather than a specific purpose such as, for example, "policing the border" or "ensuring roadway safety," *id.* at 41 (referring to the Court's holdings in *Mich. Dept. of State Police v. Sitz*, 496 U. S. 444 (1990) and *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976)).

On the other hand, the circuit court noted that in *Illinois v. Lidster*, 540 U.S. 419 (2004), this Court upheld a motor checkpoint set up in order to collect information about a crime that happened in that specific location a week earlier. The "information-seeking" type of stop in *Lidster* was not of the kind ruled unconstitutional in *Edmond*. 540 U.S. at 424. On this basis, the court of appeals held that a "valid" use of § 3144—the detention of a witness in order to ensure his presence at trial—was "information-seeking" and hence approved by *Lidster*. *Al-Kidd II*, 530 F.3d at 968-70. An "invalid" use of § 3144—the detention of a witness for purposes not related to ensuring his presence at trial, which the circuit court

considered to be the case in this instance—was linked to the "general interest in crime control" and forbidden by *Edmond*. *Id*.

Although this analysis is elegant, *Edmond* cannot be used to strike down the use of the material witness statute in this case. The *Edmond* Court did not contemplate anything like the use of the material witness statute and carefully explained that its holding was limited in scope: "Nor does our opinion speak to other intrusions aimed primarily at purposes beyond the general interest in crime control." 531 U.S. at 48. Indeed, the *Edmond* Court's language indicates that the decision is *only* applicable to roadblocks and other checkpoints. "When law enforcement authorities pursue primarily general crime control purposes at checkpoints *such as here*, however, stops can only be justified by some quantum of individualized suspicion." 531 U.S. at 47 (emphasis added). It defies common sense and this Court's precedent to characterize a probe into potential terrorist activity—even one initially conducted by detaining suspects for violations of immigration laws—as part of the "general interest in crime control." *See, e.g.*, *Holder v. Humanitarian Law Project*, 129 S. Ct. 2705, 2725 (2010) ("[T]he Government's interest in combating terrorism is an urgent objective of the highest order."); *Boumediene v. Bush*, 553 U.S. 723 (2008) (noting that "terrorism in the modern age" poses "particular dangers").

This Court in *Lidster*, in a unanimous ruling, in fact gave explicit guidance on how *Edmond* is to be applied. "We must read [the phrase 'general interest in crime control'] and related general language in *Edmond* as we often read general language in judicial opinions—as referring in context to circumstances similar to the circumstances then before the Court and not referring to quite different circumstances that the Court was not then considering." 540 U.S. at 424. *Edmond* cannot be held to invalidate what the circuit court saw as an "improper" use of the material witness statute and *Lidster* cannot be used to uphold a "proper" use. *See Al-Kidd II*, 580 F.3d at 970 (citing *United States v. Awadallah*, 349 F.3d

42 (2d Cir. 2003)). However, none of the circuit court's analysis using these cases was necessary. Warrants issued pursuant to § 3144 are nothing more than "ordinary, probable-cause" Fourth Amendment seizures. *Whren*, 517 U.S. at 813.

c. Other Cases Than Whren *Show That The Circuit Court Should Not Have Considered Subjective Intent In Its Inquiry.*

Whren is far from being a lone voice in this Court's jurisprudence. The circuit court's holding that it was permitted to consider subjective intent is particularly surprising in view of a wide range of other cases that indicate that this kind of inquiry is foreclosed.

This Court's standard for determining qualified immunity is itself designed to avoid precisely such an inquiry. In *Harlow v. Fitzgerald*, this Court noted that it had historically held that qualified immunity depended on an officer's "permissible intentions"—but then went on to overturn this holding. 457 U.S. 800, 815 (1982) (quoting *Wood v. Strickland*, 420 U.S. 308, 322 (1975)). The Court held that the factfinding required for a subjective analysis was too intensive for the defense of qualified immunity, and instead chose to "defin[e] the limits of qualified immunity essentially in objective terms." *Id*. at 819. The circuit court completely ignored these origins of the immunity test.

If the court had only focused on this Court's Fourth Amendment jurisprudence, however, it should still have arrived at the correct result. In *Scott v. United States*, this Court said that an officer's "state of mind" is irrelevant to whether or not her action is permitted under the Fourth Amendment, and her deeds should be assessed against an "objective," external standard. 436 U.S. 128, 138 (1977) (quoting *Terry v. Ohio*, 391 U.S. 1, 22 (1968)). *Scott* was cited for this holding in *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983), where the Court declined to entertain the argument that coastguard officers, who stopped a ship under their powers to examine a vessel's documents in offshore waters, had acted unreasonably in then searching it for drugs. Nearly twenty years later, the rule against analyzing subjective intent in Fourth Amendment analysis had become so entrenched that in

Bond v. United States, 529 U.S. 334 (2000), the Court noted that *both* parties in the dispute "properly agree[d] that the subjective intent of the law enforcement officer is irrelevant in determining whether that officer's actions violate the Fourth Amendment." *Id.* at 338 n.2. *See also Devenpeck v. Alford*, 543 U.S. 146, 153 (2004) (finding that petitioners were entitled to qualified immunity against a charge of making an unlawful arrest on the grounds that "an arresting officer's state of mind . . . is irrelevant to the existence of probable cause"); *Arkansas v. Sullivan*, 532 U.S. 769, 771 (2001) (per curiam) (noting its "unwilling[ness] to entertain Fourth Amendment challenges based on the actual motivations of individual officers" (quoting *Whren*, 517 U.S. at 813)).

With the exception of *Villamonte-Marquez*, the circuit court did not attempt to distinguish any of these rulings. Its response to *Villamonte-Marquez* was to hold that it was limited to its facts—the stopping of ships in coastal waters. *Al-Kidd II*, 580 F.3d at 968, n.19. However, *Villamonte-Marquez* was cited approvingly in *Whren* itself, showing clearly that it *cannot* be limited to its facts. *See Whren*, 517 U.S. at 812. And while every case necessarily has a factual context, these cases have a clear theme, supported by a simple principle: "[E]venhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer." *Horton v. California*, 496 U. S. 128, 138 (1990). Therefore, this Court should reject the allegations that respondent was detained under a pretext, and take into consideration only the fact that he was detained pursuant to a valid warrant issued by a magistrate judge.

d. Courts Have Been Reluctant To Invalidate Uses Of The Material Witness Statute On Grounds Of Subjective Intent.

Further evidence that the subjective intent of officers should play no part in the analysis of their actions comes not from the cases noted above but from cases concerning the material witness statute itself. In *United States ex rel. Allen v. LaVallee*, 411 F.2d 241 (2d Cir. 1969), the plaintiff was arrested by police under a material witness statute after a tip from

a source who claimed to have seen him in the company of another man who struck a victim. *Id*. at 242.[20] The police interrogated him and after nine days in custody, the plaintiff confessed to the murder. After his conviction he petitioned for a writ of *habeas corpus*, arguing that he was improperly detained and his confession should therefore be suppressed. The judge denied the petition on the grounds that he was "in fact a 'material witness' and an eyewitness indicated that [he] did not strike the victim." *Id.* at 243.

LaVallee shows that the line between detaining a witness for testimony and holding him on suspicion of a crime can be blurred—and that when it is, use of the material witness statute is permitted. Subjective intent plays no role in the inquiry. Other cases lead to the same conclusion. In *In re de Jesus Berrios*, 706 F.2d 355 (1st Cir. 1983), the court held that the plaintiff's arrest under a material witness statute was not a "subterfuge," even though he argued that he was treated like a suspect by being asked to give a hair sample and appear in a line-up. *Id*. at 357. Another circuit later held, in the context of the Oklahoma City bombing, that a material witness who was later charged criminally had no grounds for relief from an alleged misuse of the material witness statute. *See In re Material Witness Arrest Warrant Nichols*, 77 F.3d 1277 (10th Cir. 1996).

Even courts that have cautioned against an expansive use of the material witness statute have not endorsed an inquiry into subjective intent. In *United States v. Awadallah*, the Second Circuit said that "it would be improper for the government to use § 3144 for other ends, such as the detention of persons suspected of criminal activity for which probable cause has not yet been established." 349 F.3d 42, 59 (2d Cir. 2003). However, this in no way conflicts with the long line of case law warning against an inquiry into subjective intent. In *Awadallah*, the question was once again one of "functional" analysis: both district and circuit courts agreed that the plaintiff had been arrested as a material witness to testify before a

[20] Plaintiff was arrested under New York's material witness statute, which was and is substantively identical to the federal statute at issue in this case. *See* N.Y. Crim. Proc. Law § 618 (McKinney 1970), *amended by* N.Y. Crim. Proc. Law § 620 (McKinney 2009).

grand jury, and the question before the court was whether a grand jury investigation was a "criminal proceeding" covered by § 3144. *Awadallah*, 349 F.3d at 49, 59. A wide array of precedent thus dictates that an inquiry into subjective intent is improper, and this Court should not entertain respondent's allegation that use of § 3144 as a "pretext" violated his constitutional right.

2. *Even If This Court Rules That The Use Of The Material Witness Statute Was Pretextual And Violated Respondent's Fourth Amendment Rights, This Rule Was Not Clearly Established At The Time Of Respondent's Arrest.*

The circuit court also erred with its analysis in the second step of the *Saucier* inquiry. This step requires determining whether the rule whose existence was shown in the first step of the analysis was "clearly established" at the time of the alleged violation. *Saucier*, 533 U.S. at 200. The court of appeals based its erroneous holding that there was a "clearly established right" to be free from pretextual seizures under § 3144 on three grounds. First, it held that the definition of "probable cause" was "clearly established" and that this alone established that respondent's arrest under § 3144 would be unconstitutional. *Al-Kidd II*, 580 F.3d at 971. Second, it ruled that the "history and purposes" of the Fourth Amendment are well-known, and these made clear that respondent's arrest would violate the constitution. *Id.* at 971-72. Third, it noted that one district court had stated, in dicta in a footnote, that § 3144 should not be used as a means of preventive detention. *Id.* at 972-73.

However, all of these arguments were preempted. Overwhelming evidence that respondent did not have a "clearly established" right to be free of an allegedly "pretextual seizure" comes not from case law but *from the majority's own opinion*. In *Malley v. Briggs*, 475 U.S. 335 (1986), this Court discussed whether officers could be held immune if there was disagreement over the constitutionality of their conduct. "[D]efendants will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue; but if officers of reasonable competence could

disagree on this issue, immunity should be recognized." *Id.* at 341. It is quite clear that this case is one where "officers of reasonable competence could disagree." The majority wrote at length to try to prove that respondent had a constitutional right and yet still failed to convince one member of the panel. *Al-Kidd II*, 580 F.3d at 965-70. Eight judges on the Ninth Circuit bench also held that no right was violated. *See Al-Kidd III*, 598 F.3d at 1137. This shows that respondent's constitutional right was not clearly established at the time of his arrest.

Furthermore, none of the arguments put forward by the court of appeals shows that respondent's right was "clearly established." Whether a right is "clearly established" does not depend on whether a court has ruled directly on that issue: in *United States v. Lanier*, the Court noted that the officials should have a "reasonable warning that the conduct . . . at issue violated constitutional rights." 520 U.S. 259, 269 (1997). This Court in *Hope v. Pelzer* affirmed the *Lanier* standard, but noted that officials could "still be on notice that their conduct violates established law even in novel factual circumstances." 536 U.S. 730, 741 (2002). However, the circuit court stretched this doctrine past breaking point.

a. The Definition Of "Probable Cause" Did Not Give The Officials Involved In Respondent's Arrest A Fair And Clear Warning.

The court of appeals held that the very definition of "probable cause" was "clearly established" to involve evidence of guilt, as held by this Court in *Beck v. Ohio*. *Al-Kidd II*, 580 F.3d at 971. Therefore, it held that the officers involved in respondent' arrest had fair notice that their conduct was unconstitutional. This reasoning was flawed on two grounds.

First, as shown under the first prong of the *Saucier* inquiry, *supra* B.1.a, the definition of "probable cause" in this context was indeed "clearly established" as depending on the fulfillment of the statutory conditions of § 3144, *not* as involving evidence of wrongdoing. Second, the court of appeals' argument proves too much. If it is held that the "clearly established" definition of "probable cause" is sufficient to put law enforcement officials on notice that their actions may be unconstitutional, it is hard to see "how *any* Fourth

Amendment right can ever *not* be 'clearly established.'" *Al-Kidd III*, 598 F.3d at 1150 (O'Scannlain, J., dissenting from denial of petition for rehearing en banc). An officer facing a charge that she violated the Fourth Amendment's "probable cause" standard in the future will not be able to claim that the plaintiff's right was not clearly established, even if she has an array of case law on her side. Given this, the circuit court's ruling risks destroying the *Saucier* test entirely in Fourth Amendment cases.

b. The "History And Purposes" Of The Fourteenth Amendment Do Not Clearly Establish That Petitioners' Conduct Was Unconstitutional.

The circuit court was also mistaken in holding that the "history and purposes" of the Fourteenth Amendment could put the officials on "fair notice" that the conduct was unconstitutional. The circuit court rehearsed the history of the Fourth Amendment and noted that it "was, in large measure, a direct response to the so-called 'Wilkes cases.'" *Al-Kidd II*, 580 F.3d at 972. The court observed that in the Wilkes cases, messengers were sent around England with general warrants to arrest the "authors, printers and publishers" of a seditious journal. *Id*. (quoting *Stanford v. Texas*, 379 U.S. 476, 483 (1965)). The court then analogized these general warrants, which were ruled invalid in the Wilkes cases, to the respondent's arrest, and stated that these cases helped establish the principle that warrants could not be used to detain people "upon the executive's mere suspicion." *Id*.

This argument does not establish the unconstitutionality of the officials' conduct. Of course "[a]ll government officials are presumed to be aware of . . . the history and purposes of the Fourth Amendment." *Al-Kidd II*, 598 F.3d at 1140 (O'Scannlain, J., dissenting from denial of petition for rehearing en banc). However, this cannot mean that officials are expected to apply colonial-era history to their everyday decision-making in such a way that would be novel even to this Court. In *Stanford*, this Court rehearsed the history of the Wilkes cases to show that the warrant that was found unconstitutional "was of a kind which it was the purpose the Fourth Amendment to forbid—a general warrant." *Stanford*, 379 U.S. at 480.

The *Stanford* warrant, which authorized the search and seizure of "books, record, pamphlets, cards, receipts, lists, memoranda, pictures, recordings and other written instruments concerning the Communist Party of Texas" was considered to be "general" since it did not "particularly describe[e] the place to be searched, and the persons and things to be seized." U.S. Const. amend. IV. Any lesson that petitioner could be expected to draw from the Wilkes cases would have been understandably limited to the necessity of avoiding "general warrants"—warrants that, in any case, no magistrate should grant.

Moreover, aggressive use of the material witness statute is nothing new. Material witness statutes have "long been used to obtain prosecution evidence in ordinary cases of murder, robbery, prostitution, and other street crimes." Carolyn B. Ramsey, *In the Sweat Box: A Historical Perspective on the Detention of Material Witnesses*, 6 Ohio St. J. Crim. L. 681, 681 (2009). Federal courts have upheld uses of state material witness statutes that they have held to be "technically illegal." *See, e.g.*, *United States ex. rel Glinton v. Denno*, 339 F.2d 872, 876 (2d Cir. 1964), *cert. denied*, 381 U.S. 929 (1965) (upholding capital punishment order even though district attorney used material witness statute illegally). If respondent did have a right, it was certainly not "clearly established."

c. The District Court's Dicta In Awadallah *Do Not Establish The Unconstitutionality Of Petitioner's Actions.*

The circuit court placed substantial weight on the fact that a district court had in 2002 warned petitioner, then Attorney General, against the use of § 3144 as an investigatory tool. In *United States v. Awadallah*, the district court mentioned petitioner in a footnote and wrote that "[r]elying on the material witness statute to detain people who are presumed innocent under our Constitution in order to prevent potential crimes is an illegitimate use of the statute." *Awadallah*, 202 F.Supp.2d at 77, n.28. The circuit court curiously wrote that it was "difficult to imagine" what might have given petitioner "'fair[er] warning'" that his behavior was unconstitutional. *Al-Kidd II*, 580 F.3d at 972-73 (quoting *Hope*, 536 U.S. at 741). At the

same time, the court recognized the probative weakness of this pronouncement by noting that "[t]he statement was dicta in a footnote of a district court opinion." *Id.* at 972.

This footnote dictum cannot suffice as the "clear establishment" of the constitutional rule, even if it provides the "very high degree of prior factual particularity [that] may be necessary" to give a "fair warning." *Lanier*, 520 U.S. at 270 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). In *Sorrels v. McKee*, the Ninth Circuit held that *two* district court decisions were insufficient to make a right "clearly established." 290 F.3d 965, 970-71 (9th Cir. 2002). Government officials could not possibly be expected to know that this constituted "fair notice" and therefore, by definition, it could not be such "fair notice."

Furthermore, the implications of the circuit court's holding in this regard are remarkable. The court of appeals effectively ruled that it is necessary for the Attorney General to make immediate national policy changes in reaction to dicta in footnotes in district court opinions, or risk being held liable for violating previously unknown constitutional rights. The impact of this new policy will be to elevate dictum to holding and thereby force the United States to appeal judgments not on the basis of their holdings, but in order to challenge trivial language buried away in corners of documents. Not only would this result be highly damaging for the efficiency of the executive branch, it would also waste even more time on congested federal appellate dockets as the Government is forced to appeal ill-considered language that normally would be unobjectionable.

Even accepting *arguendo* that respondent's arrest was pretextual, the circuit court had no grounds for holding that respondent suffered a violation of a "clearly established" Fourth Amendment right. Therefore, petitioner should be granted qualified immunity.

C. RESPONDENT'S ALLEGATIONS DO NOT MEET THE STANDARD REQUIRED BY THIS COURT TO OVERCOME PETITIONER'S DEFENSES OF ABSOLUTE AND QUALIFIED IMMUNITY.

The circuit court acknowledged that respondent needed to make adequate allegations in his complaint to overcome petitioner's claims of absolute and qualified immunity. *Al-Kidd II*, 580 F.3d at 963-65. With regard to absolute immunity, the court noted that respondent could prevail only if he alleged sufficient facts to "render plausible" the allegation that his detention was part of an investigation rather than a prosecution. *Id.* at 963. The defense of qualified immunity, on the other hand, could be overcome only if respondent showed that petitioner was "personally involve[d]" in the violation of his constitutional right. *Id.* at 965. However, the court erred in finding that respondent's allegations plausibly showed that he was detained as part of an investigation, and it applied the wrong standard of "personal involvement" to its qualified immunity inquiry.

1. *Respondent Did Not Allege Facts That Show That He Was Detained As Part Of An Investigation And Therefore Cannot Overcome Petitioner's Defense Of Absolute Immunity.*

In its discussion of petitioner's absolute immunity, the court incorrectly held that respondent had alleged sufficient "objective indicia" to support his claim that his detention was part of an investigation rather than a prosecution. *Id.* at 964. None of the five "objective indicia" it noted can support this claim because they either require subjective interpretations that are precluded by established case law or are based on faulty conclusions. Factual allegations in a motion to dismiss must only be accepted if they are plausible. Allegations are not plausible if they have "more likely" explanations. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1951 (2009). Moreover, the deference granted to factual allegations does not apply to conclusions drawn from the facts. *See Iqbal*, 129 S. Ct. at 1950 ("[A] court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth."). The "indicia" are:

1. *There Was A Delay Between Respondent's Arrest And Al-Hussayen's Trial.* The court held that since al-Hussayen's trial began a year after respondent was arrested, respondent's detention could not have been part of petitioner's "prosecutorial function." However, petitioner did not violate the temporal connection between respondent's arrest and the trial because respondent was detained immediately before he left the country and it would have become impracticable to secure his testimony for trial. *See supra* A.1.d.
2. *Respondent Had Never Previously Been Requested To Appear As A Witness.* This allegation does not show that respondent was detained as part of an investigation. It is well established that a prosecutor has discretion in trial strategy, which necessarily includes determining when to request witness testimony. The "appropriate preparation for [evidence's] presentation at trial" falls within a prosecutor's "role as an advocate." *Buckley*, 509 U.S. at 273.
3. *The FBI Asked Respondent Investigative Questions While He Was In Custody.* If prosecutors are forced to avoid asking all questions to detained material witnesses that could be characterized as "investigative" in order to retain their absolute immunity, their ability to bring effective prosecutions will be greatly restricted. Under the circuit court's decision, prosecutors would be less likely to apply for material arrest warrants for individuals that they, rightly or wrongly, believe they may have reason to suspect later. Consequently, prosecutors will be more likely to "shade [their] decisions instead of exercising the independence of judgment required by [their] public trust." *Imbler*, 424 U.S. at 423. Furthermore, the allegedly "investigatory" questions noted in the Amended Complaint—about, for example, his conversion to Islam and his activities—are relevant because they can all be seen as helping the prosecutors understand respondent's links with al-Hussayen. *See* Am. Compl. ¶¶ 68 and 101. Prosecutors may also be compelled to

gather this information to provide to respondent, *see Giglio v. United States*, 405 U.S. 150 (1972), or to prepare for respondent's inevitable cross-examination by al-Hussayen.

4. *Respondent Never Testified In The Prosecution Of Al-Hussayen.* The fact that respondent never testified is of no import because a prosecutor must be allowed to control her trial strategy. As Judge Easterbrook has noted, the "choice of witnesses to present is part of the prosecutorial function and cannot independently violate anyone's rights." *Redwood v. Dobson*, 476 F.3d 462, 466 (7th Cir. 2007).

5. *Petitioner's Subordinate Mentioned Respondent's Arrest Before Congress.* Although FBI Director Mueller mentioned respondent's name before Congress, he went on to state that respondent was in fact arrested in connection with *other* arrests in the Idaho area: "The FBI have arrested three other men in the Idaho probe in recent weeks." *See Mueller House Testimony*; *Mueller Senate Testimony*. Al-Hussayen was arrested and indicted approximately one month before respondent was arrested. Am. Compl. ¶¶ 45-46. Director Mueller did not imply that respondent was investigated pursuant to an investigation, rather than the prosecution of al-Hussayen, and his remarks can only be misinterpreted this way if they are taken out of context.

This Court should therefore reject the conclusions drawn from these factual allegations by the circuit court and, following the principles laid down in *Iqbal*, uphold petitioner's request for absolute immunity.

2. *Respondent Cannot Overcome Petitioner's Defense Of Qualified Immunity Since He Has Not Plausibly Alleged That Petitioner Acted With An Unconstitutional Purpose.*

With respect to qualified immunity, the circuit court observed that respondent had to allege sufficiently "defendant's personal involvement in the deprivation of the [constitutional] right," and that the inquiry into whether respondent had sufficiently alleged such a right is "a proper component of the qualified immunity inquiry." *Al-Kidd II*, 580 F.3d at 964. The court advanced four separate grounds for which petitioner could be held liable

for respondent's harm, including "reckless or callous indifference to the rights of others." *Id.* at 965 (citing *Larez v. City of Los Angeles,* 946 F.2d 630, 646 (9th Cir.1991) (internal citations omitted)). These grounds are no longer good law.

In *Iqbal*, this Court laid down a new standard for supervisory liability. The Court was clear that, while the "factors necessary to establish a *Bivens* violation will vary with the constitutional provision at issue," it is necessary that a supervisor must have purposefully acted herself to deny the plaintiff of constitutional rights. *Iqbal*, 129 S. Ct. at 1948. "Each government official . . . is only liable for his or her own misconduct. In the context of determining whether there is a violation of clearly established right to overcome qualified immunity, purpose rather than knowledge is required. . ." *Id.* at 1950.

None of the facts alleged in respondent's complaint demonstrate that petitioner acted with the "purpose," rather than "knowledge," to violate rights established in the Fourth Amendment. This Court has held that claims of constitutional violations must be not merely "conceivable" but "plausible." *Id.* at 1951 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 570 (2007)). For all of respondent's allegations of misconduct there is an "obvious alternative explanation" which prevents them from being considered plausible. *Id.* (citing *Twombly*, 550 U.S. at 567). Furthermore, the only allegations that implicate petitioner himself, rather than his subordinates or aides, fail completely to allege any "purpose."

Respondent's reference to petitioner's instruction in his "Anti-Terrorism Plan," published six days after 9/11, to "use every available law enforcement tool" against suspected offenders, shows no intent to violate respondent's constitutional rights. Am. Compl. ¶ 114. As respondent himself notes, this instruction was clearly aimed at "persons who participate in, or lend support to, terrorist activities." *Id.* Nor does petitioner's statement on Oct. 25, 2001 that the DOJ will use "aggressive arrest and detention tactics," *id.*, display any unconstitutional intent because petitioner qualified his statement by emphasizing that the

DOJ would use "use all [its] weapons *within the law and under the Constitution* to protect life and enhance security for America." *OIG Report* at 12 (emphasis added).

Petitioner's statement in a press briefing on Oct. 31, 2001 that the DOJ would employ "aggressive detention of lawbreakers and material witnesses," Am. Compl. ¶ 117, carries no more probative force. A statute may be used "aggressively" without any constitutional rights being violated. Furthermore, petitioner's press briefing was speaking about *aliens*. As the circuit court noted, illegal immigrants were far more commonly detained in 2002-03 than citizens under the material witness statute because their testimony was required in prosecutions against human-smugglers and they were at risk of absconding. *See Al-Kidd II*, 580 F.3d at 966 n.16.

All other allegations in respondent's Amended Complaint refer to documents or statements by other officials that do not show an unconstitutional purpose in petitioner's actions. *See* Am. Compl. ¶¶ 118-24. Therefore, under *Iqbal*, the complaint alleges no adequate allegations of a "violation of [a] clearly established right to overcome qualified immunity." *Iqbal*, 129 S. Ct. at 1949.

CONCLUSION

For the foregoing reasons, petitioner requests that this Court reverse the decision of the Ninth Circuit.

Respectfully submitted,

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November 29, 2010

APPENDIX

The Fourth Amendment to the United States Constitution is as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The federal material witness statute, passed in the Bail Reform Act of 1984, Pub.L. 98–473, Title II, ch. I, 98 Stat. 1976, and codified at 18 U.S.C. § 3144 (2006) is as follows:

> If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142 of this title. No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice. Release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.

The federal detention or release pending trial statute, passed in the Bail Reform Act of 1984, Pub.L. 98–473 Title II, ch. I, 98 Stat. 1976, and codified at 18 U.S.C. § 3142 (2006) is as follows, in pertinent part:

> (a) In general.--Upon the appearance before a judicial officer of a person charged with an offense, the judicial officer shall issue an order that, pending trial, the person be--
>
> (1) released on personal recognizance or upon execution of an unsecured appearance bond, under subsection (b) of this section;
>
> (2) released on a condition or combination of conditions under subsection (c) of this section;
>
> (3) temporarily detained to permit revocation of conditional release, deportation, or exclusion under subsection (d) of this section; or
>
> (4) detained under subsection (e) of this section.
>
> . . .
>
> (c) Release on conditions.--(1) If the judicial officer determines that the release described in subsection (b) of this section will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community, such judicial officer shall order the pretrial release of the person--
>
> (A) subject to the condition that the person not commit a Federal, State, or local crime during the period of release and subject to the condition that

the person cooperate in the collection of a DNA sample from the person if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. 14135a); and (B) subject to the least restrictive further condition, or combination of conditions, that such judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community, which may include the condition that the person--

(i) remain in the custody of a designated person, who agrees to assume supervision and to report any violation of a release condition to the court, if the designated person is able reasonably to assure the judicial officer that the person will appear as required and will not pose a danger to the safety of any other person or the community;

(ii) maintain employment, or, if unemployed, actively seek employment;

(iii) maintain or commence an educational program;

(iv) abide by specified restrictions on personal associations, place of abode, or travel;

(v) avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense;

(vi) report on a regular basis to a designated law enforcement agency, pretrial services agency, or other agency;

(vii) comply with a specified curfew;

(viii) refrain from possessing a firearm, destructive device, or other dangerous weapon;

(ix) refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance, as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), without a prescription by a licensed medical practitioner;

(x) undergo available medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose;

(xi) execute an agreement to forfeit upon failing to appear as required, property of a sufficient unencumbered value, including money, as is reasonably necessary to assure the appearance of the person as required, and shall provide the court with proof of ownership and the value of the property along with information regarding existing encumbrances as the judicial office may require;

(xii) execute a bail bond with solvent sureties; who will execute an agreement to forfeit in such amount as is reasonably necessary to assure appearance of the person as required and shall provide the court with information regarding the value of the assets and liabilities of the surety if other than an approved surety and the nature and extent of encumbrances against the surety's property; such surety shall have a net worth which shall have sufficient unencumbered value to pay the amount of the bail bond;

(xiii) return to custody for specified hours following release for employment, schooling, or other limited purposes; and

(xiv) satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community.

. . .

(2) The judicial officer may not impose a financial condition that results in the pretrial detention of the person.
(3) The judicial officer may at any time amend the order to impose additional or different conditions of release.

(d) Temporary detention to permit revocation of conditional release, deportation, or exclusion.--If the judicial officer determines that—

. . .

(2) such person may flee or pose a danger to any other person or the community;
such judicial officer shall order the detention of such person, for a period of not more than ten days, excluding Saturdays, Sundays, and holidays, and direct the attorney for the Government to notify the appropriate court, probation or parole official, or State or local law enforcement official, or the appropriate official of the Immigration and Naturalization Service. If the official fails or declines to take such person into custody during that period, such person shall be treated in accordance with the other provisions of this section, notwithstanding the applicability of other provisions of law governing release pending trial or deportation or exclusion proceedings. If temporary detention is sought under paragraph (1)(B) of this subsection, such person has the burden of proving to the court such person's United States citizenship or lawful admission for permanent residence.

(e) Detention.--(1) If, after a hearing pursuant to the provisions of subsection (f) of this section, the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, such judicial officer shall order the detention of the person before trial.

. . .

(f) Detention hearing.--The judicial officer shall hold a hearing to determine whether any condition or combination of conditions set forth in subsection (c) of this section will reasonably assure the appearance of such person as required and the safety of any other person and the community—

. . .

(2) Upon motion of the attorney for the Government or upon the judicial officer's own motion, in a case that involves--
(A) a serious risk that such person will flee; or
(B) a serious risk that such person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror.

The hearing shall be held immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance. Except for good cause, a continuance on motion of such person may not exceed five days (not including any intermediate Saturday, Sunday, or legal holiday), and a continuance on motion of the attorney for the Government may not exceed three days (not including any intermediate Saturday, Sunday, or legal holiday). During a continuance, such person shall be detained . . . At the hearing, such person has the right to be represented by counsel, and, if financially unable to obtain adequate representation, to have counsel appointed. The person shall be afforded an opportunity to testify, to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise. The rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the hearing. The facts the judicial officer uses to support a finding pursuant to subsection (e) that no condition or combination of conditions will reasonably assure the safety of any other person and the community shall be supported by clear and convincing evidence. The person may be detained pending completion of the hearing. The hearing may be reopened, before or after a determination by the judicial officer, at any time before trial if the judicial officer finds that information exists that was not known to the movant at the time of the hearing and that has a material bearing on the issue whether there are conditions of release that will reasonably assure the appearance of such person as required and the safety of any other person and the community.

(g) Factors to be considered.--The judicial officer shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, take into account the available information concerning--

. . .

(3) the history and characteristics of the person, including--
(A) the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and

. . .