No. 10-98

IN THE

Supreme Court of the United States

JOHN ASHCROFT,

Petitioner,

v.

ABDULLAH AL-KIDD,

Respondent.

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

BRIEF OF LEGAL SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST[1]

Amici curiae are professors of criminal procedure, civil rights, and constitutional law. They teach, study, and write about the official immunity doctrines. *Amici* have a particular interest and expertise in the doctrine of absolute immunity, the subject of the first question presented by the petition in this case. Specifically:

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[1] The parties have consented to the filing of this brief. No counsel for a party has authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

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Amici do not represent the views of their universities and join this brief solely on their own behalf.

SUMMARY OF ARGUMENT

Petitioner is not entitled to absolute immunity from suit over his policy of using material witness warrants as pretexts to investigate and detain terrorism suspects. Nothing about this case justifies a departure from this Court's well-established presumption that qualified – rather than absolute – immunity adequately protects public officials while preserving for victims of civil rights violations a remedy for legitimate constitutional grievances. Petitioner therefore bears a heavy burden of showing that the need for the marginal additional protections made available by absolute immunity justifies the foreclosure of any remedy for violations of an individual plaintiff's constitutional rights.

Since its decision in *Imbler v. Pachtman*, 424 U.S. 409 (1976), this Court has made clear that prosecutors are entitled to absolute immunity from suit only for actions that are so closely associated with the judicial process that the need to prohibit suits to preserve the independence of the judiciary justifies the resulting infringement on individual rights. In its analysis, this Court has examined both whether immunity was available at common law and whether the function served by the activity at issue is so closely related to the judicial process that the need to ensure that public officials pursue their duties without undue interference outweighs the need to provide judicial remedies for civil rights abuses. In this case, none of these factors counsels in favor of extending absolute immunity to petitioner for his material witness policy.

First, extending absolute immunity to a prosecutor's use of a material witness warrant finds no support in the common law. Petitioner does not even attempt to establish a common law tradition of prosecutorial immunity for detaining criminal suspects for investigation or preventative detention without probable cause.

Second, the use of a material witness warrant as a pretext to detain a suspect for questioning is an "investigative," rather than "quasi-judicial," function and is therefore entitled only to qualified immunity. This Court has extended absolute immunity to prosecutors only to the extent that their actions are integral to the judicial process. In making this determination, this Court can and should look at all objective indicia of the function performed by the challenged action. In this case, the circumstances of respondent's detention – its proximity (or lack thereof) to the trial at which he was purportedly needed to testify, the Government's failure to actually call him as a witness, the substance of the Government's interrogations, the length of his detention, and the manner in which he was treated – all lead to the conclusion that the Government relied on the material witness warrant to fulfill an investigative function.

Additionally, petitioner fails to show that the policy considerations underlying this Court's absolute immunity doctrine counsel in favor of absolute immunity for the pretextual use of a material witness warrant. The threat to individual liberty inherent in providing public officials with absolute immunity from civil rights actions is exacerbated in cases, like this one, involving a policy that allows investigative

detentions without probable cause and deprives those subjected to it of the safeguards they would enjoy as either bona fide witnesses or criminal defendants. Nor is absolute immunity justified by the need to insulate the judicial system from the specter of officials' personal liability: qualified immunity can shield government officials such as petitioner from meritless litigation, without chilling the ability of law enforcement agents and prosecutors to respond to genuine threats against the United States.

ARGUMENT

I. Qualified, Rather Than Absolute, Immunity Is The Correct Framework For Reviewing Executive Decision-Making.

This Court has long assumed that "qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties." *Burns v. Reed*, 500 U.S. 478, 486-87 (1991). Accordingly, a public official seeking absolute immunity bears the substantial burden of showing that the "public interest in encouraging the vigorous exercise of official authority" outweighs the interest in holding "liable the official who knows or should know he is acting outside the law." *Butz v. Economou*, 438 U.S. 478, 506 (1978).

A. Qualified Immunity Provides Ample Protection For Discretionary Decision-Making.

"In most cases, qualified immunity is sufficient to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official

authority." *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993) (citation and quotation marks omitted).

Qualified immunity shields conduct that, as an objective matter, "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *see also Burns*, 500 U.S. at 495 n.8. As this Court has emphasized, this standard protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). By allowing civil rights plaintiffs to seek damages for willful and egregious statutory or constitutional violations but precluding suits involving "close calls," qualified immunity strikes the right balance between policies of preserving the exercise of discretion by public decision-makers while discouraging abuses of authority.

In addition to the high substantive bar that must be met to overcome qualified immunity, stringent procedural requirements also protect public officials from vexatious litigation. At the pleading stage, for example, a defendant will be entitled to qualified immunity – thereby allowing frivolous claims to be dismissed prior to discovery – unless a *Bivens* plaintiff can make a plausible claim that the defendant has committed a clear constitutional violation. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 558-60 (2007). Indeed, pleading requirements alone have proven effective in precluding suit against public officials such as petitioner. *See, e.g., Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). Moreover, even if a suit against a government official survives a motion to dismiss on

qualified immunity grounds, the defendant may immediately appeal that judgment. *Behrens v. Pelletier*, 516 U.S. 299, 306 (1996). During this delay, civil rights defendants will not be subject to discovery. *Iqbal*, 129 S. Ct. at 1953-54.

Thus, qualified immunity by itself is ordinarily sufficient to "satisf[y] one of the principal concerns underlying . . . absolute immunity[,]" namely to "avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment," *Burns*, 500 U.S. at 495 n.8 (citations omitted); *see Mitchell v. Forsyth*, 472 U.S. 511, 524 (1985) ("We do not believe that the security of the Republic will be threatened if its Attorney General is given incentives to abide by clearly established law.").

B. The Social Cost Of Absolute Immunity Is High.

Absolute immunity is the uncommon exception in U.S. law both because it is rarely needed to effectively protect official decision-making and because its costs to individuals and society are high.

1. Because qualified immunity already protects all but egregiously incompetent conduct or willful violations of the law, extending absolute immunity to any particular category of conduct risks immunizing egregious abuses of constitutionally protected rights from judicial scrutiny. Indeed, the Court's prior absolute immunity decisions illustrate the high social costs, and frequent injustice, that absolute immunity in other contexts can cause. For example, in *Stump v. Sparkman*, 435 U.S. 349 (1978), this Court held that absolute immunity precluded a suit against a

judge despite undisputed allegations that he ordered the surgical sterilization of a fifteen-year-old girl without her knowledge or consent. Likewise, in *Mireles v. Waco*, 502 U.S. 9 (1991), absolute immunity barred a suit arising out of an incident in which a judge ordered police officers "to forcibly and with excessive force seize and bring" to the courtroom a public defender who was tardy for a hearing. *Id*. at 10 (citation and quotation marks omitted).

The risks of leaving constitutional violations unremedied may have especially severe consequences in *Bivens* actions, which – as this Court has long recognized – serve as an important last line of defense for individual liberties. For a citizen who has already suffered constitutional injury at the hands of a federal official, "[t]he barrier of sovereign immunity is frequently impenetrable[,]" and "[i]njunctive or declaratory relief is useless . . . . 'For people in Bivens' shoes, it is damages or nothing.'" *Butz*, 438 U.S. at 504-05 (quoting *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring)).

The risks and social costs of extending absolute immunity to prosecutors are just as great. For example, in *Rose v. Bartle*, 871 F.2d 331 (3d Cir. 1999), absolute immunity precluded a suit against a prosecutor accused of conspiring with local politicians to bring malicious charges and run an elected sheriff out of office. Absolute prosecutorial immunity not only may create grave injustices to particular victims of unconstitutional prosecutorial conduct, but it may also even *distort* the judicial process it aims to uphold. For example, in *Burns*, 500 U.S. at 492, this Court held that the need to protect prosecutorial

discretion justified absolute immunity for a prosecutor who concealed from a judge material information regarding a suspect's confession.

To be sure, in such cases the Court has determined that the cost of absolute immunity was justified by tradition and the countervailing need to protect the free functioning of the judicial system. But the Court has not ignored the social costs of absolute immunity and has, in fact, taken care not to extend the tradition of absolute judicial immunity to all aspects of a prosecutor's activities related to preparing for, and bringing, a case to trial. Thus, prosecutors do not receive absolute immunity against allegations either that they have fabricated evidence, *Buckley*, 509 U.S. at 275, or that they have submitted false sworn affidavits, *Kalina v. Fletcher*, 522 U.S. 118, 129-30 (1997).

Thus, although the Court has extended absolute immunity to some prosecutorial conduct, it has done so cautiously, recognizing that ordinarily qualified immunity is sufficient to ensure zealous execution of prosecutor's important public duties, just as it does for other law enforcement officers.

II. Absolute Immunity Does Not Extend To A Policy of Detaining U.S. Citizens Without Probable Cause For Investigative Or Preventative Purposes.

Given the small marginal benefits served by absolute immunity, this Court rarely has departed from its presumption that qualified, rather than absolute, immunity is sufficient to protect executive officials. It has instead honored the balance of competing policies struck by the common law: in

Section 1983 suits and *Bivens* actions, the Court has accorded absolute immunity to conduct that had historically been immune from suit. *E.g., Pierson v. Ray*, 386 U.S. 547 (1967). In light of that history, the Court has extended absolute immunity only to prosecutorial functions that are intimately connected to the judicial activities that received absolute immunity at common law. *Burns*, 500 U.S. at 490-92; *Buckley*, 509 U.S. at 268-70.

Against this background, petitioner is not entitled to absolute immunity for his policy of systematically using material witness warrants to investigate and detain without probable cause U.S. citizens suspected of terrorist activities. First, the common law reveals no tradition of absolute immunity for officials seeking the arrest of trial witnesses, much less pretextual arrests for preventative detention or investigation. Second, the objective evidence indicates that the function served by petitioner's challenged policy was the investigation of criminal suspects, a function that falls outside the scope of absolute prosecutorial immunity under this Court's precedents. Finally, the policy considerations that underlie the extension of absolute immunity in rare cases do not support providing petitioner an unprecedented immunity here.

A. Prosecutors Did Not Enjoy Absolute Immunity At Common Law For Securing The Arrest Of Material Witnesses, Much Less For Pretextual Arrests Of Suspects For Investigation Or Preventative Detention.

Creating defenses to liability is a legislative, not a judicial, function. Accordingly, this Court has never claimed any general authority to develop immunity doctrines as a matter of "freewheeling policy choice." *Wyatt v. Cole*, 504 U.S. 158, 170 (1992) (Kennedy, J., concurring); *see*, *e.g.*, *Tower v. Glover*, 467 U.S. 914, 922-23 (1984) ("We do not have a license to establish immunities . . . in the interests of what we judge to be sound public policy."). Instead, the Court has justified its recognition of legislatively unmentioned defenses to civil rights actions on the presumption that Congress intends to preserve traditional immunities accorded to relevant officials as they existed under the common law. *See*, *e.g.*, *Buckley*, 509 U.S. at 268; *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951). Petitioner identifies no common law tradition under which he could claim absolute immunity from the allegations in this case.

As of 1871,[2] courts recognized absolute immunity only for those activities inherent to the operation of

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[2] Because immunity questions ordinarily arise with respect to claims under 42 U.S.C. § 1983, the Court has examined the state of the common law in 1871, the year in which Section 1983 was enacted. *See*, *e.g.*, *Buckley*, 509 U.S. at 268. Although this case is brought pursuant to the cause of action recognized in

judicial proceedings. Thus, judges and grand jurors enjoyed absolute immunity from civil suits arising from their adjudicatory duties. *See, e.g., Imbler*, 424 U.S. at 423; *Bradley v. Fisher*, 80 U.S. 335, 347 (1871). Likewise, "all statements made in the course of a court proceeding were absolutely privileged against suits for defamation." *Burns*, 500 U.S. at 501 (Scalia, J., concurring in the judgment in part and dissenting in part) (citation omitted).

But while common law courts recognized judicial immunity as absolute, *Pierson*, 386 U.S. at 553-54, prosecutors did not enjoy similar protections, *Kalina*, 522 U.S. at 132 (Scalia, J., concurring). In 1871, the office of public prosecutor in its modern form was not common. *See id.* at 125 n.11. However, where it existed, and when others performed similar functions, prosecutors were entitled only to the qualified immunity extended to "official acts [of government servants] involving policy discretion but not consisting of adjudication." *Burns*, 500 U.S. at 500 (Scalia, J., concurring in the judgment in part and dissenting in part) (citation omitted).

In the years after 1871, courts expanded the scope of absolute immunity to include some prosecutorial actions performed by public prosecutors. In *Griffith v. Slinkard*, 146 Ind. 117 (1896), the Indiana Supreme Court held that a district attorney – much like a grand jury – was absolutely immune from a suit alleging that he had

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Bivens, this Court has applied the same immunity standards under Section 1983 and *Bivens*. *Butz*, 438 U.S. at 504.

maliciously and without probable cause contrived to have the plaintiff indicted. And relying on this "common-law immunity that first came into existence 25 years after § 1983 was enacted," *Smith v. Wade*, 461 U.S. 30, 34 n.2 (1983), this Court summarily upheld a Second Circuit decision holding that the "reasons for granting immunity to judges, jurors, attorneys, and executive officers of the government apply to a public prosecutor . . . ." *Yaselli v. Goff*, 12 F.2d 396 (2d Cir. 1926), *aff'd*, 275 U.S. 503 (1927).

However, prosecutorial immunity did not evolve into a comprehensive shield against all lawsuits, even with respect to in-court activities. Instead, courts generally limited prosecutorial immunity to malicious prosecution and defamation actions. *Imbler*, 424 U.S. at 437-39 (White, J., concurring in the judgment). For example, there was not "any post-1871 tradition to support prosecutorial immunity in the obtaining of search warrants." *Burns*, 500 U.S. at 506 n.2 (Scalia, J., concurring in the judgment in part and dissenting in part). Nor was absolute immunity afforded to the performance of police functions, such as arrest or imprisonment, *Pierson*, 386 U.S. at 557, or to investigative or administrative activities for which other law enforcement officials would not be absolutely immune from suit, *see Burns*, 500 U.S. at 483 n.2; *see also Kalina*, 522 U.S. at 126.

Similarly, although the government's statutory authority to arrest and detain material witnesses dates back to 1789, *see* Resp. Br. 26-29, there was no tradition of holding the officials conducting such arrests absolutely immune from suit for false arrest. *See Malley*, 475 U.S. at 344-45 (holding that police

officer seeking an arrest warrant was not entitled to absolute immunity).

It should come as no surprise, then, that petitioner identifies (and *amici* are aware of) no common law authority affording absolute immunity to prosecutors for unlawfully securing the arrest of a material witness, or for pretextually detaining suspects, without probable cause, for investigation or preventative detention.

B. Law Enforcement Officials Do Not Engage In A Prosecutorial Function When Securing The Arrest Of A Suspect For Investigative Or Preventative Purposes.

Petitioner argues that even if there is no specific tradition of absolute immunity for prosecutors who unlawfully secure the arrest of a witness for investigation or preventative detention, his conduct nonetheless falls within the scope of "his prosecutorial duties," Petr. Br. 14 (quoting *Imbler*, 424 U.S. at 420), and therefore should be afforded absolute immunity. That argument fails as well. Even if the Court's "functional approach" could yield an immunity more expansive than that recognized at common law, it does not do so here.

As relevant here, this Court has extended absolute immunity to prosecutorial conduct that is "intimately associated with the judicial phase of the criminal process," when such an extension is necessary to support the common law's policy of protecting judicial independence. *Imbler*, 424 U.S. at 430. At the same time, the Court has refused to extend absolute immunity to prosecutors when they

perform investigatory or administrative functions that are not intimately associated with the judicial process. *Buckley*, 509 U.S. at 270 (citing *Imbler*, 424 U.S. at 431 n.33).

In this case, respondent alleges that he was detained on a material witness warrant not to ensure his availability as a witness at trial, but to facilitate the FBI's investigation of him as a suspect and to prevent him from engaging in acts of terrorism during a time in which the FBI had no probable cause to believe that he had engaged in prior unlawful acts or was about to engage in acts of terrorism. This Court has previously held that a prosecutor does not engage in prosecutorial functions subject to absolute immunity when he assists in a criminal investigation or undertakes national security functions. *See*, *e.g.*, *Burns*, 500 U.S. at 493; *Mitchell*, 472 U.S. at 524. Accordingly, there is little ground to dispute that if respondent had been detained pursuant to a statute that only authorized investigative or preventative detention, his claims would be subject to a defense of qualified, rather than absolute, immunity. *See*, *e.g.*, *Buckley*, 509 U.S. at 273-74; *Burns*, 500 U.S. at 492-96.

Petitioner nonetheless insists that he is entitled to greater protection because the actual statute he used is capable of both investigative and prosecutorial uses (*i.e.*, securing a witness for trial) and because courts may not inquire into the actual purpose of the warrant. Petr. Br. Part I. That argument cannot be squared with this Court's immunity decisions.

1. Immunity Hinges On A Particular Action's Function, Not Its Label.

Petitioner's insistence that every use of a material witness warrant must be considered prosecutorial runs counter to this Court's longstanding focus on function over labels, and on the practical realities of each case rather than on broad generalizations.

Since its decision in *Imbler*, this Court has declined to establish bright-line rules to determine whether a prosecutor's action is sufficiently integral to the judicial process to be entitled to absolute immunity, noting that "[d]rawing a proper line between these functions may present difficult questions." 424 U.S. at 431 n.33. Indeed, the various hats – administrative, investigative, and prosecutorial – that a government lawyer wears can make it difficult to determine when "the prosecutor . . . functions as an administrator rather than as an officer of the court." *Id.* The inquiry is even more difficult with respect to the Attorney General of the United States, who also supervises all FBI investigations, 28 C.F.R. § 0.85a, and sets policy for the entire Department of Justice, 28 C.F.R. § 0.5.

Given this complexity, and the court-based origins of prosecutorial immunity, the Court has refused to declare that every action by a prosecutor qualifies for absolute immunity. For example, in *Mitchell*, 472 U.S. at 521, the Court held that the Attorney General was entitled only to qualified immunity to claims that he had violated constitutional rights by authorizing warrantless wiretaps when the purpose of the wiretaps was to gather national security information regarding

allegedly radical groups. *See also Buckley*, 509 U.S. at 271-78 (no absolute prosecutorial immunity for participation in investigation); *Burns*, 500 U.S. at 492-96 (prosecutor not entitled to absolute immunity when counseling police regarding investigation). Instead, the Court examines "the nature of the function performed, not the identity of the actor who performed it." *Kalina*, 522 U.S. at 127 (quoting *Forrester v. White*, 484 U.S. 219 (1988)).

The court has applied the same context-specific analysis when deciding whether any particular action qualifies as prosecutorial. For example, in *Kalina*, 522 U.S. at 129, the Court rejected the view that prosecutors are entitled to absolute immunity with respect to all court filings, holding instead that the prosecutor in that case enjoyed absolute immunity with respect to filings that were "part of the advocate's function," but not for other filings that could have been executed by an investigator. *Id*. at 130. Similarly, the courts of appeals frequently classify the same action as either prosecutorial or investigatory depending on the surrounding circumstances. For example, a search warrant may be prosecutorial if "the purpose for which [the prosecutors] sought the warrant . . . was not primarily investigative, but was to obtain and preserve the evidence." *Lomaz v. Hennosy*, 151 F.3d 493, 499 (6th Cir. 1998); *see also Pachaly v. City of Lynchburg*, 897 F.2d 723 (4th Cir. 1990). On the other hand, a search warrant may be investigative and thus a prosecutor will not be entitled to absolute immunity if it is used "to assist with a collateral investigation into new crimes." *KRL v. Moore*, 384

F.3d 1105, 1113 (9th Cir. 2004); *see also Mink v. Suthers*, 482 F.3d 1244 (10th Cir. 2007).

Like arrest or search warrants, material witness warrants can serve different functions. In its normal application, 18 U.S.C. § 3144 secures testimony for trial, a quasi-judicial function. However, as petitioner himself has publicly acknowledged, his policy of detaining suspects as material witnesses served an investigative and preventative function: "Aggressive detention of lawbreakers and material witnesses is vital to preventing, disrupting, or delaying new attacks" and "form[s] one part of the department's strategy to prevent terrorist attacks by taking suspected terrorists off the streets." *Attorney General Ashcroft Outlines Foreign Terrorist Tracking Task Force* (Oct. 31, 2001), *available at* http://www.justice.gov/archive/ag/speeches/2001/agcrisisremarks10_31.htm.

Rather than drawing a bright line based on a "formalistic taxonomy of acts that are inherently either prosecutorial or investigative," Pet. App. 23a-24a, this Court should continue to focus on what underlying function the challenged action served, regardless of its label.

2. Courts Need Not Turn A Blind Eye To The Objective Evidence That A Warrant's Actual Function Was Investigatory Or Preventative.

Petitioner next argues that even if the Court is unwilling to adopt a per se rule that every use of a material witness warrant is protected by absolute immunity, courts may not determine the function of a warrant by examining the subjective motives of those

who secured it. Petr. Br. 21. And that bar on consideration of subjective motive, petitioner argues, effectively precludes any challenge to the pretextual use of a material witness warrant (leading, by different route, to the same essential conclusion that every use of a material witness warrant is protected by absolute immunity). *Id*.

Petitioner's argument conflates the impermissible investigation of a prosecutor's motive with the determination of a warrant's function based on the objective evidence surrounding its use. This Court commonly looks at objective indicators of *function* to decide whether a defendant was acting as an adjunct to a trial or instead as an investigator detached from any imminent judicial proceeding. For example, in *Buckley*, this Court considered the timing of a prosecutor's action, declining to afford absolute immunity to "an advocate before he has probable cause to have anyone arrested." 509 U.S. at 274. Similarly, in *Burns*, this Court examined whether the challenged action occurred in court, reasoning that "appearing before a judge and presenting evidence in support of a motion for a search warrant . . . clearly involve the prosecutor's" role as an advocate. 500 U.S. at 491.

The timing and location of prosecutorial conduct are by no means dispositive, but rather form two aspects of the totality of the circumstances that must be considered in deciding whether the defendant's "activities were intimately associated with the judicial phase of the criminal process, and thus were functions to which the reasons for absolute immunity apply with full force." *Imbler*, 424 U.S. at 430. For example, in *Buckley*, the Court explained that "a

determination of probable cause does not guarantee a prosecutor absolute immunity from liability for all actions taken afterwards." 509 U.S. at 274 n.5. At the same time, "[e]ven before investigators are satisfied that probable cause exists or before an indictment is secured, a prosecutor might begin preparations to present testimony before a grand jury or at trial, to which absolute immunity must apply." *Id.* at 290 (Kennedy, J., concurring).[3]

Similarly, this Court has refused to find absolute immunity simply because the prosecutor's action took place in court. In *Kalina*, the prosecutor's in-court filings included a "certification" that summarized the evidence supporting the burglary charge and attested under the penalty of perjury to the truth of the facts set forth in the certification. 522 U.S. at 121. The Court nonetheless declined to hold that the prosecutor was absolutely immune from suit, explaining that because the prosecutor "performed an act that any competent witness might have performed," she was only entitled to qualified immunity. *Id*. at 129-30. At the same time, the mere fact that an action occurs outside of a courtroom does not automatically destroy a claim to absolute immunity. *See*, *e.g.*, *Van de Kamp v. Goldstein*, 129

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[3] *See also, e.g., Kalina*, 522 U.S. at 129 (granting absolute immunity for the filing of charging documents asking the court to find probable cause); *Goldstein*, 129 S. Ct. at 862-63 (difference between supervising an individual trial, conducted after probable cause, and providing general training to line attorneys divorced from the timeline of any particular trial "does not preclude an intimate connection between prosecutorial activity and the trial").

S. Ct. 855, 862-63 (2009); *Imbler*, 424 U.S. at 431 n.33 ("We recognize that the duties of the prosecutor in his role as advocate for the State involve actions . . . apart from the courtroom.").

Accordingly, this Court has examined a variety of objective circumstances to decide whether a prosecutor's action was "prosecutorial." *See, e.g., Goldstein*, 129 S. Ct. at 862 (noting that prosecutor had to use legal knowledge and was given wide discretion in performing task); *Buckley*, 509 U.S. at 272-74 (noting that prosecutor was working closely with police and prior to establishment of probable cause); *Kalina*, 522 U.S. at 130-31 (considering that prosecutor did not have to use professional legal judgment in attesting to the veracity of facts). Such an inquiry allows this Court to create the most complete picture of the action's relationship to the judicial process and thus to determine whether absolute immunity is justified by the policy balance between judicial efficiency and individual rights struck by the common law.[4]

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[4] Considering all of the relevant objective indicia does not create administrability problems for the courts. As in this case, the question of what function an official's actions served can be easily settled at the pleadings stage. Under *Twombly* and *Iqbal*, a plaintiff would need to plead enough facts to "raise a right to relief above a speculative level," *Twombly*, 550 U.S. at 555. This standard is sufficiently robust to alleviate any misplaced fear that a naked claim of pretext could open the door to extensive discovery.

3. The Objective Circumstances Surrounding Respondent's Detention Support The Court Of Appeals' Denial Of Absolute Immunity.

Petitioner has not met his burden of showing that the objective circumstances surrounding respondent's detention establish a prosecutorial use of the material witness warrant.

In this case, the totality of the facts pleaded by respondent indicates that the function of his detention was not quasi-judicial, but instead investigative. *See generally* Resp. Br. 3-6; Pet. App. 26a-27a. Although in another case the function of a material witness warrant may well be intimately bound up with a judicial proceeding, *see, e.g., Betts v. Richard*, 726 F.2d 79 (2d Cir. 1984); *Daniels v. Kieser*, 586 F.2d 64 (7th Cir. 1978), here respondent was seized more than a year before the trial for which he was nominally being held, First Amended Complaint (FAC) ¶ 106; was never actually called to testify in that trial, *id.*; faced lengthy interrogation regarding his personal conduct while in detention, *id.* ¶ 101; and was personally identified as a prisoner of the war on terror by the director of the FBI, *id.* ¶ 100. Petitioner's policy of using the material witness statute to detain respondent is no more entitled to absolute immunity than a prosecutor's collection of evidence against a possible suspect for whom he could not establish probable cause, *see Buckley*, 509 U.S. at 275-76, or an Attorney General's authorization of wiretaps to gather national security information, *see Mitchell*, 472 U.S. at 516, 521.

C. The Public Policy Considerations Underlying Common Law Immunities Do Not Justify Extending Absolute Immunity To Petitioner's Conduct In This Case.

Finally, affording petitioner absolute, rather than qualified, immunity would not serve the underlying purposes animating the common law's, and this Court's, recognition of absolute immunity. *See*, *e.g.*, *Buckley*, 509 U.S. at 269 (even if conduct was immunized at common law, Court will consider whether recognizing immunity is consistent with purposes of civil rights actions); *Malley*, 475 U.S. at 340 (same).

1. *Extending Absolute Immunity To Investigative Or Preventative Material Witness Arrests Poses A Dangerous Threat To Individual Liberty.*

By sheltering blatant official abuses, the additional protection accorded to governmental actors by absolute immunity carries a predictably high cost for the constitutional rights of citizens like respondent. *See supra* Part I.B. Compared with the areas in which this Court has already extended absolute judicial immunity to prosecutors – such as presenting evidence against criminal defendants apprehended after probable cause had already been established – the threat to constitutional rights significantly outweighs the government efficiency arguments that traditionally justify absolute immunity.

First, a policy of national security detentions is particularly likely to result in the abuse of individual

rights. Detaining a private citizen without probable cause, even on a reasonable suspicion of wrongdoing, violates that citizen's Fourth Amendment rights. *Dunaway v. New York*, 442 U.S. 200 (1979). The policy that petitioner is alleged to have designed and implemented allowed Justice Department officials to do just that. FAC ¶¶ 111, 113-16. The threat to individual liberty inherent in such a scheme is heightened by the veil of secrecy that naturally surrounds national security investigations. This Court has recognized that "[t]he danger that high federal officials will disregard constitutional rights in their zeal to protect the national security is sufficiently real to counsel against affording such officials an absolute immunity." *Mitchell*, 472 U.S. at 523.

Second, this Court has consistently held that an extension of absolute immunity is inappropriate when there is a lack of "other checks that help to prevent abuses of authority from going redressed." *Id.* at 522. Here, suspects detained under material witness warrants receive fewer protections than bona fide witnesses whose testimony the prosecution secures by subpoena. Those witnesses may seek to quash or modify the subpoena if the court deems compliance to be unreasonable or oppressive. Fed. R. Crim. P. 17(c)(2). Moreover, the court may hold such a witness in contempt only if he, "without adequate excuse, disobeys a subpoena." Fed. R. Crim. P. 17(g). By contrast, a prosecutor seeking a material witness warrant need only show that "the testimony of a person is material" to a proceeding and that "it may become impracticable to secure the presence of the person by subpoena." 18 U.S.C. § 3144. Prosecutors

are not required to provide material witnesses with an opportunity to comply with a subpoena; instead, as in respondent's case, the witness can merely be seized, handcuffed, and led to detention by FBI agents. FAC ¶¶ 5, 15-16.

At the same time, the detention of material witnesses is subject to less intensive judicial oversight than are the detention and prosecution of those forthrightly accused of committing a crime. Although detainees arrested pursuant to Section 3144 are nominally subject to the same release and detention requirements as defendants pending trials, *see generally* 18 U.S.C. § 3142, in practice petitioner's policy resulted in widespread denials of the statute's safeguards, *see* HUMAN RTS. WATCH, HUMAN RIGHTS ABUSES UNDER THE MATERIAL WITNESS LAW SINCE SEPTEMBER 11, at 47-58 (2005) (describing how many suspects detained under petitioner's policy did not appear promptly before a judge, were not provided with the reasons for their arrests, and were denied counsel). Here, respondent himself did not appear before a judge until he had already been interrogated and shipped in shackles to the Alexandria Detention Center, FAC ¶¶ 65-77; he was never informed why he was arrested, *id.* ¶ 13; and he did not receive counsel at his Virginia hearing, *id.* ¶ 77.

Third, there are no other adequate institutional checks on petitioner to police constitutional violations internally. As the highest-ranking official in the Department of Justice, petitioner is different from "most of the officials who are entitled to absolute immunity from liability for damages"; those officials are "subject to other checks that help to prevent abuses of authority from going unredressed."

Mitchell, 472 U.S. at 522. As this Court has already established, "[s]imilar built-in restraints on the Attorney General's activities in the name of national security . . . do not exist." *Id.* at 523.

2. There Is No Compelling Countervailing Need To Provide Prosecutors Absolute Immunity For Their Investigative Or Preventative Use Of Material Witness Warrants.

This Court has identified two concerns justifying absolute immunity protections for some actions, despite the threat to individual liberties. First, any lesser degree of protection would lead to "harassment by unfounded litigation [and] cause a deflection of the prosecutor's energies from his public duties." *Imbler*, 424 U.S. at 423. Second, the fear of personal liability would lead the prosecutor to "shade his decisions instead of exercising the independence of judgment required by his public trust." *Id.* Neither of these concerns is present when a federal official seeks a material witness warrant to interrogate a suspected terrorist about his own actions.

First, adhering to the general presumption in favor of qualified immunity will not produce a glut of frivolous lawsuits capable of distracting officials from their duties. *See Imbler*, 424 U.S. at 425 (considering frequency of possible lawsuits in assessing risk of vexatious litigation). This Court has acknowledged that investigative, national security work "does not subject an official to the same obvious risks of entanglement in vexatious litigation as does the carrying out of the judicial or 'quasi-judicial' tasks

that have been the primary wellsprings of absolute immunities." *Mitchell*, 472 U.S. at 521.

This Court's observation in *Mitchell* has been borne out here, where there is only a small pool of potential suits arising out of the pretexual use of material witness warrants. For example, in 2003, the year in which respondent was arrested, less than four percent of all federal arrestees were detained pursuant to a material witness warrant; the remaining 122,286 arrestees were expressly detained based on probable cause that they themselves had committed an offense. Bureau of Justice Statistics, U.S. Dep't of Justice, Compendium of Federal Justice Statistics 2003, *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/cfjs03.pdf. In this case specifically, approximately seventy men are believed to have been "arrested as material witnesses in connection with [the Department of Justice's] anti-terrorism investigations," HUMAN RTS. WATCH, *supra*, at 2, and the statute of limitations has likely run on many of those individuals' claims.

If anything, these figures may overestimate the number of potential suits that will reach discovery. To survive dismissal, an aggrieved detainee must allege sufficient factual indicia that his arrest was investigatory in function, *see Twombly*, 550 U.S. at 555; that hurdle in turn requires him to overcome the information and resource discrepancies likely to exist between any individual detainee and the defendant, who has at his disposal the Government's resources and legal representation.

Second, granting qualified immunity will not chill the conduct of either prosecutors or FBI agents in prosecuting criminal cases or protecting national

security. Even if the relatively small number of possible lawsuits could create a reasonable fear of liability, qualified immunity provides sufficient protection to officials to allow them to exercise independent judgment by precluding suits based on "bare allegations of malice." *Harlow*, 457 U.S. at 817. Only when an official has violated a constitutional right that was clearly established at the time of the violation will qualified immunity "subject government officials either to the costs of the trial or to the burdens of broad-reaching discovery." *Id.* at 817-18. Any protection that absolute immunity provides over and above qualified immunity for conscientious officials is thus marginal, and does not counterbalance the threat to individual liberties that expansion of absolute immunity creates.

Finally, to the extent the denial of absolute immunity may cause prosecutors to hesitate before misusing the material witness statute, "such reflection is desirable, because it reduces the likelihood" of the violation of fundamental constitutional rights, *Malley*, 475 U.S. at 343, and reinforces the rule of law in our democracy, even in the face of foreign threats to our security.

CONCLUSION

For the foregoing reasons, the rejection by the court of appeals of petitioner's absolute immunity defense should be affirmed.

Respectfully submitted,

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