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 FOR RESPONDENT

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STATEMENT

Respondent's core allegation is that petitioner authorized the systematic use of the material witness statute to detain and investigate suspects whom the government lacked probable cause to charge with a crime, and not to secure testimony from witnesses. Notably, petitioner does not dispute the plausibility of that allegation, and thus, does not contend that the allegation fails to satisfy the pleading requirements set forth in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). *See* Pet. Br. 43-44; Pet. (I) (raising *Iqbal* claim only as to petitioner's responsibility for the veracity of the affidavit, a claim that respondent is not pursuing).

A. The Complaint's Allegations.

1. Respondent is a U.S. citizen born in 1972 in Kansas. His parents, siblings and two children are also native-born U.S. citizens who have always resided in the United States. While attending the University of Idaho in the mid-1990s, respondent changed his name from Lavoni T. Kidd to Abdullah al-Kidd and converted to Islam. *See* J.A. 22-23 (First Amended Complaint (FAC) ¶¶ 39-40).

Following September 11, the government conducted surveillance of respondent as part of a broad "Idaho" probe. J.A. 23 (FAC ¶¶ 43-44). The surveillance logs from that investigation indicated no illegal activity by respondent, and he was not charged with a crime, then or since. J.A. 14, 23 (FAC ¶¶ 9, 44).

In March 2003, respondent was preparing to travel to Saudi Arabia to further his language and religious studies on a scholarship at a well-known university. While at the airport, respondent was arrested by FBI agents on a material witness warrant issued in Idaho in the case of Sami Al-Hussayen, who had been indicted for visa fraud and making false statements to the government, but was never convicted of those charges or any of the other subsequently added charges. J.A. 23-24, 29, 38-39 (FAC ¶¶ 42, 45-47, 65, 106).

2. The affidavit submitted by FBI agents in support of the warrant consisted of only two sentences directly pertaining to why the government believed it would be impracticable to secure respondent's testimony by subpoena:

> Kidd is scheduled to take a one-way, first class flight (costing approximately $5,000.00) to Saudi Arabia on Sunday, March 16, 2003, at approximately 6:00 EST. He is scheduled to fly from Dulles International Airport to JFK International Airport in New York and then to Saudi Arabia.

See J.A. 24 (FAC ¶ 49); *see also* J.A. 64 (affidavit). The government has since admitted that respondent actually had a round-trip ticket. Respondent also did not have a first-class ticket costing approximately $5,000, but rather a coach-class ticket costing less than $2,000. J.A. 16, 25 (FAC ¶¶ 14, 53).

The affidavit also failed to inform the magistrate judge that:

- respondent had voluntarily talked with the FBI on several occasions prior to his arrest and had never failed to show up to these pre-arranged meetings;

- respondent was a native-born citizen with significant ties to the United States and Idaho;

- prior to his arrest, respondent had not been contacted by the FBI for approximately six months;

- the FBI had never told respondent that he might be needed as a witness, that he could not travel abroad or even that he should inform the FBI if he did intend to travel abroad; and,

- respondent was never asked if he would be willing to testify, to voluntarily relinquish his passport or to otherwise postpone his trip to Saudi Arabia.

J.A. 16-17, 25-26 (FAC ¶¶ 15, 54).

The affidavit also did not claim that the government had attempted to locate respondent prior to seeking the arrest warrant or that respondent had been uncooperative. Notably, another witness in the Al-Hussayen case was permitted simply to relinquish his passport and postpone his trip to Saudi Arabia. J.A. 26-27 (FAC ¶¶ 54(f), 57).

In addition, although the affidavit stated that respondent's testimony was "crucial," it never explained what specific information respondent

possessed that was germane to the charges against Al-Hussayen. The affidavit contained largely irrelevant information and statements attempting to cast respondent in a suspicious light. J.A. 27-28 (FAC ¶ 58). Among other things, the affidavit stated that respondent had received payments from Al-Hussayen and Al-Hussayen's associates. In fact, the FBI agents requesting the warrant knew, or reasonably should have known, that respondent had worked for the same charitable organization as Al-Hussayen and had received a salary for his work. J.A. 28 (FAC ¶ 60).

3. The FBI agents who arrested respondent at the airport did not provide him with a copy of the warrant indicating that he was being detained as a witness, nor did they provide him with *Miranda* warnings or counsel. Instead, they handcuffed him and walked him through the airport in front of staring onlookers. J.A. 29-30 (FAC ¶¶ 66-67). They then interrogated respondent (without counsel) at an airport police station for 1-2 hours on a variety of topics, including his *own* religious beliefs, conversion to Islam and past travels. J.A. 30 (FAC ¶ 68).

The next day, respondent was brought before a magistrate judge in Virginia, but was not appointed counsel. Respondent explained that he had always cooperated with the FBI, would continue to cooperate and did not understand why the FBI had arrested him given his prior cooperation. The magistrate judge stated that although respondent was entitled to a release hearing in Virginia, he might be better

served going to Idaho for the hearing, at which point the government attorney assured respondent that he would be brought to Idaho as quickly as possible. Acting without counsel, respondent followed the magistrate judge's suggestion and agreed to have the hearing in Idaho. J.A. 32-33 (FAC ¶¶ 77, 78).

Respondent spent the next fifteen nights in jails in Virginia, Oklahoma and Idaho, where he was placed in high-security wings with convicted criminals, strip-searched and routinely shackled. J.A. 31, 33-35 (FAC ¶¶ 71, 83-87, 92-93). Respondent was eventually released from detention, but was required to live with his in-laws, report regularly to the government and remain within a four-state area. The government never called respondent as a witness at the trial (which did not commence for more than a year after his arrest). J.A. 38-39 (FAC ¶¶ 103-06). Even after trial, the government never moved to vacate the conditions of his supervision, forcing respondent to file a motion with the court in Idaho. J.A. 14, 38-39 (FAC ¶¶ 9, 103, 106-07).

4. As alleged in the complaint, respondent's arrest was part of a pattern of material witness arrests that occurred after September 11 pursuant to a nationwide policy instituted by petitioner. That policy used the material witness statute to detain and investigate suspects for whom the government lacked probable cause of wrongdoing, and not to secure testimony. J.A. 39-50 (FAC ¶¶ 109-41).

Only days after respondent's arrest, while he remained in detention, FBI Director Robert Mueller testified before Congress about the government's anti-terrorism efforts:

> I am pleased to report that our efforts have yielded major successes over the past 17 months. Over 212 suspected terrorists have been charged with crimes, 108 of whom have been convicted to date. Some are well-known – including Zacarias Moussaoui, John Walker Lindh and Richard Reid. But, let me give you just a few recent examples:
>
> . . . Khalid Shaikh Mohammed was located by Pakistani officials and is in custody of the US at an undisclosed location. Mr. Mohammed was a key planner and the mastermind of the September 11th attack. . . .
>
> . . . Abdullah al-Kidd, a US native and former University of Idaho football player, was arrested by the FBI at Dulles International Airport en route to Saudi Arabia. The FBI arrested three other men in the Idaho probe in recent weeks. And the FBI is examining links between the Idaho men and purported charities and individuals in six other jurisdictions across the country.

See Dep'ts of Commerce, Justice, and State, the Judiciary, and Related Agencies, Appropriations for 2004: Hearing Before a Subcomm. of the Comm. on Appropriations, 108th Cong. 91 (2003) (testimony of Robert S. Mueller, III, Director, FBI), http://www2.fbi.gov/congress/congress03/mueller032703.htm; J.A. 37 (FAC ¶ 100).

If the government had viewed respondent as a genuine witness, it is hard to imagine that his arrest would have generated so much attention so quickly within the highest ranks of the Justice Department, to the point where it was mentioned in congressional testimony only a few days after his arrest – and listed directly after the capture of the man who allegedly orchestrated the September 11 attacks.

Indeed, had the Justice Department actually viewed respondent as a witness, it is implausible that the FBI Director would even have *mentioned* respondent's arrest, much less cited it as one of the government's most noteworthy successes in combating terrorism since the September 11 attacks. And if respondent were indeed a genuine witness, the Director would presumably have mentioned that respondent was arrested on a material witness warrant, yet that central fact was entirely omitted from the Director's testimony.

Nor is Director Mueller's testimony the only evidence that respondent's arrest was part of a nationwide policy of using the material witness statute to arrest suspects. Petitioner himself, as well as numerous other high-ranking officials, routinely

made statements about how the material witness statute would be used to detain and investigate *suspects*.

In October 2001, for example, petitioner commented that the "[a]ggressive detention of lawbreakers and material witnesses is vital to preventing, disrupting or delaying new attacks" and that this policy would "form one part of the department's concentrated strategy to prevent terrorist attacks by taking suspected terrorists off the street[.]" J.A. 41 (FAC ¶ 117); *see also* J.A. 41 (FAC ¶ 116) (alleging that petitioner developed a policy in which the "FBI and DOJ would use the material witness statute to arrest and detain terrorism *suspects*").

Similarly, Michael Chertoff, the head of DOJ's Criminal Division in the years immediately following September 11, 2001, publicly highlighted the government's use of the material witness statute, saying, "It's an important *investigative* tool in the war on terrorism. . . . Bear in mind that you get not only testimony – you get fingerprints, you get hair samples – so there's all kinds of *evidence* you can get from a witness." J.A. 42-43 (FAC ¶ 121) (first emphasis added). In June 2003, David Nahmias, Counsel to the Assistant Attorney General, offered the Senate Judiciary Committee an example of how DOJ used the material witness statute in a case involving an "alleged terrorist": "[W]e got enough information to at least make him a material witness

and then to charge him criminally." J.A. 43-44 (FAC ¶ 124) (emphasis added).

Mary Jo White, the U.S. Attorney for the Southern District of New York in the years immediately preceding and following September 11, 2001, summed up the policy: "Some of the criticism that has been leveled at [DOJ for its post-9/11 use of the material witness statute] is not wholly unjustified. . . . Does it really sort out to being in one sense preventative detention? Yes, it does, but with safeguards." J.A. 42 (FAC ¶ 120).

As importantly, the circumstances surrounding the arrest and detention of these supposed witnesses underscore that those arrested were actually considered suspects, and not genuine witnesses. Like respondent, many of these "material witnesses" – by one account nearly 50 percent – were never called to testify. J.A. 45 (FAC ¶ 128). The government also refused to grant many post-9/11 material witnesses immunity for their testimony, although that traditionally has been a standard procedure for eliciting testimony from a witness. *Id*.

Once arrested, these material witnesses, including respondent, were routinely held in high-security conditions. J.A. 45-46 (FAC ¶¶ 129-30). Moreover, by DOJ's own estimates, the government detained about half of the witnesses it arrested in terrorism investigations for more than thirty days, an astounding length of time given that the statute itself directs the government to take depositions of witnesses so that innocent individuals are not

detained for unreasonably long periods. J.A. 47 (FAC ¶ 133). And even after being released from detention, many material witnesses were subjected to restrictive release conditions – and yet still were never called to testify, as was the case with respondent. J.A. 47 (FAC ¶ 134).

Exacerbating all of these abuses was the Justice Department's attempt to shield from public view the circumstances surrounding its use of the material witness statute. Records of material witness proceedings were routinely sealed, and the government kept secret the most basic information about its witnesses even in the face of direct congressional inquiry. J.A. 48 (FAC ¶ 135). *See* Br. of *Amicus Curiae* Human Rights Watch (detailing the material witness arrests after September 11); J.A. 44-48 (FAC ¶¶ 125-36).

B. Decisions Below.

The district court concluded that petitioner was not entitled to absolute or qualified immunity, J.A. 90-116, and the court of appeals affirmed that ruling in relevant part. Pet. App. 1a-105a. The court of appeals denied absolute immunity on the ground that petitioner's material witness policy was investigative, not prosecutorial, under this Court's functional test. Pet. App. 14a-27a (citing, *e.g.*, *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993)). The court also held that petitioner was not entitled to qualified immunity if he used the material witness statute as a cover to detain and investigate suspects without probable cause to believe that they had

committed a crime. As the court of appeals explained, the government lacks the

> power to arrest and detain or restrict American citizens for months on end, in sometimes primitive conditions, not because there is evidence that they have committed a crime, but merely because the government wishes to investigate them for possible wrongdoing, or to prevent them from having contact with others in the outside world.

Pet. App. 63a; *see generally id.* at 40a-47a.

Judge Bea dissented in relevant part, arguing that petitioner was entitled to either absolute or qualified immunity. Pet. App. 64a-105a. The Ninth Circuit denied en banc review, with both concurring and dissenting opinions. Pet. App. 106a-132a.

SUMMARY OF ARGUMENT

1. Petitioner is not entitled to qualified immunity for misusing the material witness statute to detain and investigate suspects, rather than to secure testimony. A full-scale arrest is generally constitutional under the Fourth Amendment only if it is supported by probable cause to believe that a crime has been committed. The material witness statute represents a narrow exception to that general rule and constitutionally can be justified only if it is limited to securing testimony. Contrary to petitioner's argument, therefore, a demonstrated

purpose to misuse the statute as a form of preventive detention is directly relevant to the Fourth Amendment analysis.

Petitioner errs in relying on *Whren v. United States*, 517 U.S. 806 (1996), for the proposition that even the purposeful misuse of the material witness statute as a form of preventive detention is beyond Fourth Amendment scrutiny. In fact, *Whren* itself expressly affirmed that "purpose" is relevant in Fourth Amendment cases where, as here, probable cause of wrongdoing is lacking. *Id.* at 811-12. Nor is petitioner correct that the court of appeals rendered the material witness statute unconstitutional as applied to respondent. Consistent with the Fourth Amendment, the statute itself authorizes arrests only for the limited purpose of securing testimony. It does not permit material witness arrests to detain and investigate suspects whom the government lacks probable cause to arrest for a crime.

Critically, moreover, respondent does not contend that the government violates the Fourth Amendment in the type of dual motive case hypothesized by petitioner, where the prosecutor may genuinely be seeking the testimony of a witness but also may view the witness as a suspect who someday may be indicted. Here, respondent contends that the government would not have arrested him *but for* its interest in him as a criminal suspect, as evidenced by his prior cooperation, Director Mueller's testimony and the many other allegations in the complaint.

Finally, a reasonable official acting in 2003 would have known that he could not use the material witness statute to detain and investigate suspects. Petitioner is thus not entitled to qualified immunity.

2. Under this Court's functional immunity test, *see Kalina v. Fletcher*, 522 U.S. 118 (1997), petitioner is also not entitled to the extraordinary protection of absolute immunity for three reasons. *First*, petitioner cannot meet his burden of demonstrating a common-law tradition of immunity for seeking a material witness warrant. *Second*, even if prosecutors were *generally* entitled to absolute immunity for seeking a material witness warrant, that protection is not available where the warrant is sought to investigate the witness himself, a classic police function that receives qualified, not absolute, immunity. *Third*, and most narrowly, because absolute immunity does not cover the submission of an affidavit, and because the FBI agents who submitted an affidavit in this case did so pursuant to petitioner's directive, petitioner is not entitled to absolute immunity for directing the FBI to take that action, even if the line prosecutors were entitled to absolute immunity for filing the legal motion accompanying the affidavit.

ARGUMENT

The government arrested and jailed respondent for fifteen nights, during which time he was strip-searched, routinely shackled and housed with hardened criminals. All of this occurred even

though there was no claim that respondent had violated any law (or was a threat to himself or others).

Petitioner contends that the government's interest in securing testimony is sufficiently important to justify jailing a U.S. citizen without any allegation that he engaged in wrongdoing or presented a threat. Yet, in direct contradiction, petitioner also takes the position that the government's purpose in locking up respondent is *entirely* irrelevant under both the Fourth Amendment and the statute itself. Petitioner thus contends that although the government's non-punitive interest in securing testimony provides the justification for arresting an innocent, cooperative and non-threatening citizen, respondent's arrest was lawful even if the sole purpose for the arrest was to preventively detain and investigate respondent. That is an untenable position.

This Court has never permitted the government to use a civil scheme or non-punitive justification for jailing people as a ruse to circumvent the constitutional protections afforded criminal suspects. The Court should not take that unprecedented step in this case.

I. PETITIONER IS NOT ENTITLED TO QUALIFIED IMMUNITY.

A. Petitioner's Policy Of Using The Material Witness Statute To Detain And Investigate Criminal Suspects Without Probable Cause Of Wrongdoing Violated The Fourth Amendment.

The "usual rule" governing arrests is well settled: an arrest requires not just probable cause, but probable cause "to believe that a *violation of law has occurred*." *Whren v. United States*, 517 U.S. 806, 811, 818 (1996) (emphasis added). *See Brinegar v. United States*, 338 U.S. 160, 175 (1949) ("The substance of all the definitions of probable cause is a reasonable ground for *belief of guilt*") (emphasis added) (internal quotation marks omitted).

In *Dunaway v. New York*, 442 U.S. 200 (1979), the Court confronted a challenge to this fundamental Fourth Amendment rule. There, the government acknowledged that it could not arrest someone for *prosecution* unless it had probable cause of a violation of the law, but argued that it should be permitted to make an arrest for the purpose of engaging in *further investigation* based on the lower standard of "reasonable suspicion." *Id.* at 207, 211.

The Court flatly rejected that proposition, stressing that "centuries of precedent" demonstrate that the Fourth Amendment was designed precisely to prevent the police from arresting and

investigating individuals based on mere suspicion, even if that suspicion might be deemed reasonable. *Id*. at 214, 216. As the Court noted: "Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed arrests or investigatory detentions." *Id*. at 214-15 (internal quotation marks omitted).

The Court, of course, has been willing to permit some lesser showing of individualized suspicion to satisfy the Fourth Amendment where the seizure is relatively minimal, as in *Terry* stops. *See*, *e.g.*, *Terry v. Ohio*, 392 U.S. 1, 27 (1968) (requiring only reasonable suspicion to justify a brief investigatory stop and frisk); *Dunaway*, 442 U.S. at 209-10 (noting that *Terry* "departed from [the] traditional Fourth Amendment" rule because the seizure there was "so substantially less intrusive" than a full-scale arrest). But the Court has never – in the history of the Fourth Amendment – created an exception where the seizure involves a *full-scale custodial arrest*.

A full-scale material witness arrest does not come within the *Terry* exception for minimally intrusive seizures. Nor does the statute satisfy the usual Fourth Amendment rule governing arrests given that it permits full-scale arrests without probable cause to believe there has been a violation of the law.

This Court has never squarely addressed whether the material witness statute is consistent

with the Fourth Amendment. But, if the statute is constitutional, it can only be because the *purpose* of an arrest under the statute is to secure testimony, and not to investigate the witness himself. Otherwise, the statute would allow the government to circumvent *Dunaway* and the bedrock Fourth Amendment principle barring a full-scale arrest absent probable cause of wrongdoing. The purpose for which the statute is used is thus not only relevant, but an indispensable feature of its constitutionality.

1. Petitioner's Reliance On *Whren* Is Misplaced.

Petitioner contends that the principle set forth in *Whren* supports his position that governmental purpose is wholly irrelevant in the material witness context. But, in fact, *Whren* supports respondent's argument.

a. In *Whren*, 517 U.S. at 810, the defendant conceded that there was probable cause to believe that he had committed a traffic offense, but argued that the stop was a pretext for uncovering evidence of other crimes. The Court rejected the relevance of the police officer's subjective motivation, but in doing so specifically stated that its analysis applied to the "run-of-the-mine case." *Id.* at 819; *see also id.* at 813 ("Subjective intentions play no role in *ordinary*, probable-cause Fourth Amendment analysis.") (emphasis added).

The Court stressed that where there is probable cause that the law has been violated, and the police have thus satisfied the "traditional" probable cause standard for an arrest, a defendant cannot complain about the motivations that may have led the police to enforce the laws. *Id*. at 813, 819. Critically, however, the Court also stated that purpose *is* relevant in cases involving the absence of traditional Fourth Amendment probable cause.

The Court noted, for example, that an inventory search of an impounded car is permitted in the absence of probable cause that the vehicle contains evidence of a crime because the *purpose* of the search is, among other things, "to protect against false claims of loss or damage" – and not to seek incriminating evidence for prosecution. *Id*. at 811 & n.1. As a result, the Court noted that it has looked at the purpose behind inventory searches to ensure that they are not a "ruse" to "discover incriminating evidence." *Id*. at 811 (quoting *Florida v. Wells*, 495 U.S. 1, 4 (1990)).

The Court likewise noted that administrative searches are permitted without probable cause of a violation of the law because the purpose of the search is not to uncover evidence of a crime for prosecution, but to enforce a "regulatory" scheme. Consequently, the Court explained that, as with inventory searches, it has looked at the purpose behind an administrative search to ensure that it is not "a 'pretext' for obtaining evidence of . . . [a] violation of

. . . penal laws." *Id.* at 811 (quoting *New York v. Burger*, 482 U.S. 691, 716-17 n.27 (1987)).

As *Whren* stated in distinguishing the traffic stop at issue there from the inventory and administrative cases:

> [O]nly an undiscerning reader would regard these cases as endorsing the principle that ulterior motives can invalidate police conduct that is justifiable on the basis of probable cause to believe that a violation of law has occurred. In each case we were addressing the validity of a search conducted in the *absence* of probable cause. Our quoted statements simply explain that the exemption from the need for probable cause (and warrant), which is accorded to searches made for the purpose of inventory or administrative regulation, is not accorded to searches that are *not* made for those purposes.

Id. at 811-12 (emphasis in original).

Whren thus makes clear that the government cannot claim that it is exempt from the traditional probable cause requirement based on the *purpose* of the arrest, while simultaneously arguing that its reasons for making the arrest are irrelevant. If material witness arrests are constitutional, it is only because the purpose of such arrests is not to discover

incriminating evidence about the witness, but to secure his testimony. Thus, as with inventory and administrative searches, the "exemption" from the traditional probable cause standard is based specifically on the premise that the government is not seeking to investigate or prosecute the person subject to the search or seizure. And because the constitutionality of a material witness arrest is based on that premise, the government cannot claim that purpose is irrelevant.

In short, *Whren* and this case are entirely different. In *Whren*, the government satisfied the traditional probable cause standard, and the Court held only that the officer's subjective motivations would not invalidate a stop that otherwise satisfied the Fourth Amendment. Here, in contrast, a material witness arrest does not satisfy the Fourth Amendment unless the objective components of the statute are satisfied *and* the purpose of the arrest is valid. Thus, in the material witness context, the purpose underlying the arrest is not being used to invalidate an otherwise constitutional arrest based on probable cause of wrongdoing, but rather, is a necessary part of the initial inquiry into whether the arrest is constitutional in the first place.

b. Since *Whren*, moreover, the Court has reaffirmed, in a variety of Fourth Amendment contexts, that purpose is relevant where the government undertakes a seizure in the absence of traditional probable cause. The common thread in these cases is that the Court has excused the

government from the traditional probable cause requirement because the *purpose* of the seizure was not to detain the individuals for prosecution, but rather to pursue some distinct non-punitive objective. Accordingly, in these cases the Court has made clear that the government cannot seek an exemption from the traditional probable cause standard based on the purpose of the seizure, but then simultaneously insist that the purpose of the seizure is irrelevant.

A comparison of the Court's decisions in *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), and *Illinois v. Lidster*, 540 U.S. 419 (2004), is illustrative. In *Edmond*, 531 U.S. at 41-42, the Court invalidated a drug roadblock in which police stopped vehicles without probable cause to believe the driver had committed a violation of the law. The Court noted that because the roadblock's "primary purpose was to detect evidence of ordinary criminal wrongdoing," the City was not entitled to an exemption from the traditional probable cause requirement: "[W]e decline to approve a program whose primary purpose is ultimately indistinguishable from the general interest in crime control." *Id.* at 44.

In contrast, in *Lidster*, the Court upheld a roadblock whose basic objective features were indistinguishable from the one it had invalidated in *Edmond*. The difference was the purpose of the two roadblocks. The goal of the *Lidster* roadblock was to determine whether drivers had information about a hit-and-run accident that had occurred the prior

week on the same road, 540 U.S. at 422, while the purpose of the *Edmond* roadblock was to find incriminating evidence about the drivers themselves. 531 U.S. at 35. As the *Lidster* Court stated about the roadblock in that case:

> The stop's primary law enforcement purpose was *not* to determine whether a vehicle's occupants were committing a crime, but to ask vehicle occupants, as members of the public, for their help in providing information about a crime in all likelihood committed by others. The police expected the information elicited to help them apprehend, not the vehicle's occupants, but other individuals.

Lidster, 540 U.S. at 423 (emphasis in original). The *Lidster* Court noted that the *Edmond* stops, in contrast, were "justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that *any given motorist has committed some crime*." *Id.* (quoting *Edmond*, 531 U.S. at 44) (emphasis added in *Lidster*).

The same basic principle has also guided the Court in numerous other cases, both before and after *Whren*. *See*, *e.g.*, *Ferguson v. City of Charleston*, 532 U.S. 67, 83 (2001) (invalidating a public hospital's program of drug testing pregnant women without probable cause that any particular woman was using drugs, because the hospital was working in conjunction with the police "to generate evidence *for*

law enforcement purposes" against the mothers); *id.* at 88 (Kennedy, J., concurring in the judgment) (explaining that the Court has relaxed the ordinary probable cause rule only on the "explicit assumption that the evidence obtained in the search is not intended to be used for law enforcement purposes" – *i.e.*, for investigation and possible prosecution); *Michigan v. Clifford*, 464 U.S. 287, 297-98 (1984) (plurality opinion) (allowing search of home destroyed by fire with an administrative warrant for the purpose of determining the fire's cause, but requiring a criminal warrant based on traditional probable cause if the purpose of the search is to gather "evidence of the crime of arson"); *Camara v. Mun. Court of the City & County of San Francisco*, 387 U.S. 523, 535-38 (1967) (permitting administrative housing inspections without traditional probable cause because the purpose of the searches was to enforce a regulatory scheme, and not to obtain evidence for possible prosecution). *Cf. Kansas v. Hendricks*, 521 U.S. 346 (1997) (rejecting due process, *ex post facto* and double jeopardy challenges to civil confinement law, noting that the statute's purpose was non-punitive); *id.* at 371-73 (Kennedy, J., concurring) (stressing that "[i]f the object or purpose of the Kansas law had been to provide treatment but the treatment provisions were adopted as a sham or mere pretext, there would have been an indication of the forbidden purpose to punish").

Here also, the government cannot employ a statute designed to secure testimony as a pretext to

investigate and potentially prosecute witnesses. For decades, this Court has finely calibrated the constitutional rights of criminal suspects, including the Fourth Amendment right not to be arrested absent probable cause of wrongdoing. The government should not be permitted to evade this longstanding constitutional jurisprudence through the misuse of a statute designed for a wholly different and limited purpose. And, tellingly, the only two circuits that have addressed petitioner's material witness policy have concluded 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." *United States v. Awadallah*, 349 F.3d 42, 59 (2d Cir. 2003); Pet. App. 1a, 40a (Ninth Circuit decision in this case).

2. The Statute Itself Precludes Its Use To Investigate Suspects.

Petitioner erroneously contends that purpose is not only irrelevant under the Fourth Amendment, but also under the statute. According to petitioner, a material witness arrest does not violate the statute as long as the government satisfies the objective criteria of materiality and impracticability – even if the government's sole purpose is to detain and investigate the witness. Petitioner thus maintains that the court of appeals rendered the statute unconstitutional as applied to cases where these objective criteria are satisfied. Pet. Br. 35-38.

Petitioner's statutory analysis, like his Fourth Amendment analysis, does not confront the implications of his position. If petitioner's categorical position were correct, then the government could have submitted a warrant application in respondent's case that included all of the same objective facts regarding materiality and impracticability, but also candidly informed the magistrate judge that the government (i) had no intention of using respondent's testimony in a criminal proceeding, (ii) lacked probable cause to believe that respondent had violated the law and (iii) nonetheless wished to arrest and detain respondent for the sole purpose of investigating him for possible criminal wrongdoing. That is an implausible reading of the statute and an untenable Fourth Amendment position. Yet it is the logical extension of petitioner's argument.

Indeed, the implications of petitioner's position go beyond the *Bivens* claim in this case. If purpose were wholly irrelevant, then an injunctive action on behalf of a still-detained witness would necessarily fail as long as there had been a showing of materiality and impracticability – even if there were clear proof that the government was not seeking the witness's testimony and had arrested him solely for purposes of interrogation. That would mean that supposed witnesses could remain in detention for weeks, or even months, pending the outcome of the government's investigation – and, indeed, that is precisely what occurred under

petitioner's policy throughout the country. *See* J.A. 47 (FAC ¶ 133).

The statute and Fourth Amendment are entirely consistent in this regard: both prohibit the government from arresting an innocent witness for the purpose of investigating the witness himself, rather than securing his testimony. The original 1789 statute, enacted contemporaneously with the Fourth Amendment, could be used solely for securing testimony from a non-cooperative witness. And there is absolutely no evidence to suggest that Congress's subsequent amendments to the statute were meant to transform it into a preventive detention and investigation tool.

a. The settled rule for hundreds of years in both England and colonial America was that a cooperative witness could not be jailed. *See*, *e.g.*, Marian Statutes, 1 & 2 Phil. & Mar. ch. 13 (1554); 2 & 3 Phil. & Mar. ch. 10 (1555). The first federal material witness statute in the United States was enacted as part of the First Judiciary Act of 1789. *See* First Judiciary Act, ch. 20, § 33, 1 Stat. 73, 91 (1789). Like the material witness laws that existed in England and during the colonial period, the 1789 provision was exceedingly limited and authorized imprisonment *only* where a witness refused to promise to testify – to give "recognizance."

The 1789 statute thus functioned like a civil contempt statute. Unlike the current federal statute, it did not permit a witness to be jailed based solely on an *ex parte* determination that it might become

impracticable to secure his presence at trial. Rather, the 1789 statute simply provided that a witness could be ordered to promise to appear and testify. As long as he agreed to do so, he could not be detained; in fact, the statute did not even authorize the magistrate to require a bond or surety from the witness. 1 Stat. at 91.

And because a witness could not be jailed unless he literally refused to promise to testify, the statute could not be used in the pretextual manner alleged here. The very operation of the statute precluded its use as a mechanism for investigative detention – the witness could avoid jail simply by agreeing to testify.

b. Congress subsequently revised the material witness statute (and also enacted companion laws) on several occasions before passage of the current statute in 1984. But none of the revisions reveal *any* indication that Congress intended to turn the law into a detention and investigation tool.

Among other things, Congress expanded the laws to cover certain territories (*e.g.*, Alaska) and to address specific subject-matter areas (such as the availability of witnesses in admiralty cases). As with the original 1789 statute, these laws provided only limited authority to jail witnesses, with the focus continuing to be on ensuring that uncooperative witnesses – those who affirmatively refused even to promise to testify – could be jailed. *See*, *e.g.*, Act of Apr. 4, 1800, ch. 19, §§ 14-15, 2 Stat. 19, 25-26 (bankruptcy); Act of Aug. 23, 1842, ch. 188, § 2, 5

Stat. 516, 517 (admiralty cases); Act of Aug. 8, 1846, ch. 98, § 7, 9 Stat. 72, 73-74; Act of Mar. 2, 1867, ch. 176, § 26, 14 Stat. 517, 529 (bankruptcy); 1 Rev. Stat. 166-67 §§ 878-79, 881 (1878) (non-substantive codification of existing laws); Edmunds-Tucker Act, ch. 397, § 2, 24 Stat. 635, 635 (1887) (polygamy, bigamy and other cohabitation offenses); Alaska Criminal Code, ch. 429, §§ 326-29, 30 Stat. 1253, 1321 (1899) (Alaska); 28 U.S.C. §§ 656-57, 659-60 (1925) (corresponds to Act effective Dec. 7, 1925, ch. 17, §§ 656-57, 659-60, 44 Stat. xiii, cmxlii) (non-substantive organization of existing laws into the U.S. code); Act of June 17, 1935, ch. 266, § 802, 49 Stat. 385, 385 (District of Columbia); Bail Reform Act of 1966, Pub. L. No. 89-465, sec. 3(a), 80 Stat. 214, 216 (codified at 18 U.S.C. § 3149) (repealed 1984).[1]

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[1] Citing *Barry v. United States ex rel. Cunningham*, 279 U.S. 597 (1929), and *New York v. O'Neill*, 359 U.S. 1 (1959), petitioner contends that the Court has assumed the constitutionality of prior federal and state statutes. Pet. Br. 36-37. But the statutes at issue in those cases were far more limited than the current statute. *See Barry,* 279 U.S. at 617 (discussing, in dicta, former 28 U.S.C. § 659 (1925), which did not permit a witness to be detained if he was willing to provide a recognizance, and even required that the witness be "necessary" to the proceeding).

In *O'Neill*, 359 U.S. 1, the Court rejected a challenge to a Florida statute allowing for compulsory process against witnesses located in Florida who were needed to testify in other states, because the Court assumed that "Florida undoubtedly could have held respondent within Florida if he had been a material witness in a criminal proceeding within that State." *Id.* at 7. Notably, Florida's material witness statute at the time

c. The current version of the statute, 18 U.S.C. 3144, likewise reveals no indication that Congress intended to alter course after 200 years and to allow the statute to be used for the purpose of arresting and investigating suspects. The statute's text provides that a warrant may issue only where "the testimony of a person is material *in a criminal proceeding*" and it may become "impracticable to secure *the presence of the person* by subpoena" in that criminal proceeding. 18 U.S.C. 3144 (emphasis added). These textual requirements belie petitioner's contention that the government need not intend actually to secure testimony for a criminal proceeding and can simply be seeking to investigate the witness himself.

Indeed, if petitioner's reading of the materiality and impracticability requirements were correct, then the government could inform a magistrate judge, under oath, that it believed it

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permitted the imprisonment of a witness only for refusal or inability to provide a recognizance and/or security for his appearance. And if the witness was unable to provide a security, the statute required that he be detained no more than three days to allow for his conditional examination. *See* Fl. Comp. Gen. Laws §§ 8663(39)-(41) (Supp. 1940). The same is true of Florida's statute today. *See* Fl. Stat. Ann. §§ 902.15, 902.17. In fact, by respondent's count, at least 30 of the state material witness statutes currently in force require some form of non-compliance by the witness before detention is authorized. *See*, *e.g.*, Ill. Comp. Stat. Ann. ch. 725, § 5/109-3; Mass. Gen. Laws Ann. ch. 276, §§ 45-52. *See also* Charles Doyle, CRS REPORT FOR CONGRESS: ARREST AND DETENTION OF MATERIAL WITNESSES 15 (2005) (listing all state statutes).

would be impracticable to secure the witness's "presence" at the proceeding – even if the government had no intention to call the witness at any such proceeding. That is not a commonsense interpretation of the statute's materiality and impracticability requirements.

Petitioner's reading of the materiality and impracticability requirements would also undermine the integrity of the warrant application proceedings. In ordering the arrest of an innocent person pursuant to the statute, magistrate judges plainly assume, and should have the right to assume, that they are doing so only because the government genuinely believes it may need the testimony.

The statute's emphasis on taking depositions to ensure a witness's prompt release reinforces that its purpose is to secure testimony, and not to investigate suspects. 18 U.S.C. 3144 (a witness may not "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"); *ibid.* (stating that release "may be delayed for a reasonable period of time *until the deposition of the witness can be taken*") (emphasis added). Like the provision's other textual requirements, the deposition requirements would make little sense if Congress intended for the statute to be used as a tool for preventive detention and investigation. *See Holloway v. United States*, 526 U.S. 1, 9 (1999) (interpreting a provision's text in

light of Congress's overall "purpose" and the objectives of the "statute as a whole"). *See also* S. Rep. 98-225, at 28 n.90, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3211 (noting that "[o]f course a material witness is not to be detained on the basis of dangerousness").

In sum, Congress has been consistent throughout the past two centuries. In the tradition of English and colonial laws, the 1789 statute was not intended for anything other than securing testimony. Subsequent amendments did not alter that critical limitation.

3. Petitioner Violated The Fourth Amendment If Respondent Would Not Have Been Arrested *But For* The Government's Interest In Preventively Detaining And Investigating Him As A Suspect.

a. Petitioner argues that an investigatory purpose is not necessarily illegitimate because prosecutors will often genuinely want the witness's testimony and believe it cannot be secured absent a material witness warrant, but also may view the witness as a suspect and may therefore not have ruled out the possibility that the witness will someday be charged with a crime if evidence of wrongdoing emerges. But this case does not present the type of dual motive arrest hypothesized by petitioner, and respondent does not contend that the prosecutor in that scenario would violate either the Fourth Amendment or the statute.

Respondent's position is that the Fourth Amendment and statute are violated where the government would not have sought the warrant *but for* its interest in detaining and investigating the witness himself. And respondent's allegations are consistent with that legal position. *See*, *e.g.*, J.A. 40 (FAC ¶ 112) ("Defendants' purpose in arresting and detaining Mr. al-Kidd was not to secure his testimony, but to preventively hold and investigate him for possible criminal wrongdoing"); J.A. 52 (FAC ¶ 154) (Mr. al-Kidd "was arrested for the unlawful purpose of detaining him preventively and/or for further investigation, and not because his testimony was needed").

The touchstone, under both the statute and the Constitution, is whether the government's interest in the testimony would have prompted it to seek the warrant, regardless of any interest the government may have had in detaining and investigating the witness. If that is the case, then the investigative interest was not a *but for* cause and no liability would attach. *Cf. Hartman v. Moore*, 547 U.S. 250, 256 (2006) (applying *but for* test in case alleging that postal inspectors unlawfully induced prosecutor to pursue criminal charges in retaliation for protected speech, stating that respondent could prevail only if the prosecution would not have been brought absent the illegitimate motives).

This basic requirement ensures that the government is not abusing the integrity of the criminal process by misusing the statute to detain

and investigate a suspect absent probable cause to charge the suspect with a crime. Of course, the government may ultimately choose, for a variety of legitimate reasons, not to call a material witness at trial. Similarly, the government may ultimately choose to indict someone whom it initially and legitimately arrested as a witness. But both of those scenarios are very different from the situation alleged here, where respondent contends that he would not have been arrested in the first place but for the FBI's interest in detaining and investigating him.

b. Given this "but for" standard, and the small number of material witness arrests each year, petitioner's contention that there will be an avalanche of suits is overblown. Pet. Br. 24-27. In support of that contention, petitioner's *amici* observe that there were approximately 4,000 material witness hearings annually between 2002 and 2004. Br. of *Amici Curiae* William P. Barr *et al.* 25 n.11. But *amici* fail to note that material witness arrests occur overwhelmingly in immigration cases, where the non-citizen is *already* subject to custody and the material witness warrant is sought only for the purpose of delaying deportation to allow the non-citizen to testify against his smuggler. In 2003, for instance, the year of respondent's arrest, approximately 92 percent of all material witness arrests were in immigration cases. *See* Pet. App. 32a n.16 (citing Justice Department statistics).

There are thus only a few hundred cases in the entire country each year in which a suit could even be imaginable (*i.e.*, non-immigration cases where the government did not already have custody over the individual). And of these few hundred, the actual number of potentially viable cases is minuscule in light of the hurdle presented by respondent's proposed standard of liability, as well as basic pleading requirements.

Under respondent's proposed standard, a prosecutor could be sued only if the witness could plausibly allege that his arrest would not have been sought *but for* the prosecutor's interest in preventively detaining and investigating him as a suspect. Given that burden, prosecutors would be forced to defend their actions only in the most egregious cases, where it could be plausibly alleged that they deliberately chose to use the statute as an investigative tool.

Indeed, the very cases cited by petitioner show that it will not be easy to plead this standard and subject prosecutors to burdensome discovery. *See* Pet. Br. 17-18. As these cases show, a material witness arrest will ordinarily be one where the purpose is clearly to secure testimony. *See*, *e.g.*, *Betts v. Richard*, 726 F.2d 79, 81 (2d Cir. 1984) (noting that prosecutor's "main witness" failed to appear on day of trial); *Daniels v. Kieser*, 586 F.2d 64, 66, 69 (7th Cir. 1978) (warrant issued after trial had commenced; noting that prosecutor "was attempting to secure Daniels's presence at the

resumption of trial" and that Daniels "subsequently testified"). The witnesses in *Betts* and *Daniels* would not have been able to plausibly allege that their arrests were for investigative purposes – much less prove that their arrests would not have occurred but for the government's interest in preventively detaining and investigating them.

Nor should it be surprising that few witnesses would ever be able to plead the requisite allegations. Notwithstanding petitioner's attempt to portray this case as involving a straightforward and conventional use of the statute, the allegation here is that petitioner and the Justice Department deliberately and systematically used the statute for reasons other than securing testimony, and did so with respect to an individual who, among other things, had cooperated previously, had never been told he might be needed as a witness and had never been told to advise the government if he intended to travel. Effectively, the government is seeking permission to transform the statute into a preventive detention and investigation law.

c. *Amici* Barr *et al.* contend that the material witness statute is a critical tool in fighting terrorism and observe that a few "high-profile convicted terrorists . . . initially were held on a temporary basis as material witnesses." Br. 25 n.10. Petitioner similarly notes that Terry Nichols was first arrested as a material witness. Pet. Br. 39. However, respondent's "but for" test would not have precluded the use of the material witness statute in those cases

as long as the prosecutors genuinely were seeking testimony, even if the prosecutors *also* viewed the witnesses as suspects who might eventually be indicted.

Insofar as petitioner and his *amici* are arguing that those material witness arrests should be deemed lawful simply because they led to criminal convictions, that position is extraordinary. Overwhelmingly, the "witnesses" held pursuant to petitioner's policy were not charged with a crime, much less convicted, and many (like respondent) were not even called to testify, all underscoring the dangerous nature of a preventive detention and investigation scheme. *See* Br. of *Amicus Curiae* Human Rights Watch.

More fundamentally, the material witness statute was not enacted as a tool for preventive detention and investigation, and the Justice Department may not *unilaterally* turn it into one. *See* Br. of *Amicus Curiae* The Constitution Project (noting that Congress declined to pass a preventive detention statute after September 11 despite the Justice Department's insistence that such a statute was necessary).

4. <u>Courts Are Not Precluded From Ensuring That The Statute Is Used Properly</u>.

Petitioner alternatively contends that even if purpose is relevant, the courts still may not examine the purpose for which a material witness arrest was

made. Petitioner, however, has not cited a single decision where this Court concluded that the legality of an arrest or detention depended on its use for a particular purpose, but nonetheless held that the courts were precluded from ensuring that the government acted pursuant to that legally required purpose.

a. Petitioner argues that because material witness arrests are made pursuant to warrants, there is no need for a check on the statute's abuse. Pet. Br. 33-35. But this Court long ago made clear that a warrant procedure does not insulate improper Fourth Amendment activity from scrutiny. In *Malley v. Briggs*, 475 U.S. 335, 344 n.7, 346 n.9 (1986), the Court held that a police officer could be sued for damages if he submitted a facially insufficient affidavit in support of an arrest warrant, and specifically rejected the argument that the magistrate judge's decision to issue the warrant insulated the police officer's Fourth Amendment violation.

Likewise, in *Franks v. Delaware*, 438 U.S. 154 (1978), the Court held that police officers violate the Fourth Amendment where they intentionally or recklessly submit an affidavit in support of a search warrant that contains materially false statements. In doing so, the Court observed that because a hearing before a magistrate judge will be *ex parte*, it will "not always . . . suffice to discourage lawless or reckless misconduct." *Id.* at 169. The Court stressed that it is difficult for magistrate judges to uncover

omissions and hidden agendas because they cannot "make an extended independent examination of the affiant or other witnesses." *Ibid.*

Here, to provide any meaningful check on conduct like petitioner's, the magistrate judge would not only have had to uncover the specific omissions and false statements in the affidavit submitted in this case, but also would have had to assess those omissions and false statements against the backdrop of a nationwide practice in which witnesses routinely were being held as suspects. No magistrate judge, in an *ex parte* hearing, could have been expected to uncover a nationwide policy directing DOJ officials to use the statute in a pretextual manner.

b. Petitioner also emphasizes that a material witness arrest may only be made where specific objective criteria are satisfied (*i.e.*, materiality and impracticability). Pet. Br. 33 (arguing that in roadblock cases, such as *Edmond*, the seizures lacked an "individualized basis"). But that does not distinguish this case from others in which the Court has examined purpose under the Fourth Amendment. *See*, *e.g.*, *Ferguson*, 532 U.S. at 71 n.4, 81-82 (examining purpose notwithstanding that those searched had to fall within one or more of nine specific criteria); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 609-11, 620-21 (1989) (examining purpose notwithstanding that railroad employees could be searched only if they were involved in certain types of train accidents or violated specific safety rules).

Furthermore, the statute's objective criteria – the materiality and impracticability requirements – do not meaningfully constrain the government from misusing the statute. As an initial matter, the statute's text does not even require a showing of probable cause to satisfy those objective requirements. *See* 18 U.S.C. 3144 ("If it *appears* from an affidavit . . . that the testimony . . . is material . . . and if it is *shown* that it may become impracticable to secure the presence of the person by subpoena . . . ."") (emphasis added). More fundamentally, satisfying the two objective criteria does not remotely eliminate the possibility that the warrant is being sought to detain and investigate the witness himself, rather than to secure his testimony.

In fact, according to petitioner, the very individuals most likely to satisfy the materiality and impracticability criteria – criminal suspects – are those whom the government is most likely to wish to detain and investigate. Pet. Br. 38 (arguing that a *suspect* will be especially likely to have material information about his alleged accomplices and to be a flight risk). Thus, under petitioner's own reasoning, the statute's objective requirements will be most easily met in precisely those cases where there is a danger that the statute is being misused as a tool to detain and investigate suspects whom the government lacks probable cause to arrest on criminal charges.

c. Finally, petitioner argues that the court of appeals erred in analogizing this case to *Edmond*,

531 U.S. 32, because that case involved an inquiry into purpose at a "programmatic" level, while this case involves a policy implementing a statutory scheme. Pet. Br. 35. As an initial matter, *Edmond* did not state that the Court would look at purpose only in the context of a "program," much less purport to provide an exhaustive catalogue of the ways in which an impermissible purpose can be detected. And the Court's Fourth Amendment cases have in fact examined purpose in a variety of contexts. *See*, *e.g.*, *O'Connor v. Ortega*, 480 U.S. 709, 727 (1987) (plurality opinion) (remanding to determine hospital officials' "actual justification" for conducting a search of an employee's office); *City of Ontario, California v. Quon*, 130 S. Ct. 2619, 2631 (2010) (holding that police chief's intent in searching an employee's text messages established a legitimate work-related rationale for the search); *Colorado v. Bertine*, 479 U.S. 367, 372 (1987) (holding that respondent failed to show that individual officers conducting an inventory search had a pretextual motive); *Clifford*, 464 U.S. at 294 (plurality opinion) (fire investigators must meet different standards depending upon the purpose of the search).

In any event, petitioner is incorrect that this case is wholly unlike *Edmond*. In *Edmond*, 531 U.S. at 48, the Court stated that it would not examine the motivations of "individual officers acting at the scene," but did assess the purpose of the roadblock at a programmatic level. The Court's concern in *Edmond* about examining the motives of police officers making instantaneous, on-the-ground

decisions is not present here. Rather, the district court is being asked to determine the purpose of a systemic, deliberate policy, a task that courts routinely undertake. *See*, *e.g.*, *id.* at 46-47 (examining purpose under Fourth Amendment, and noting that courts "routinely" examine purpose "in many areas of constitutional jurisprudence as a means of sifting abusive governmental conduct from that which is lawful").

Petitioner argues, however, that only the statute itself, and not his policy, should be viewed as the "program." Petitioner thus contends that because the statute's purpose is to secure testimony, there is no constitutional infirmity. Pet. Br. 35. But petitioner cannot hide behind the statute's purpose while simultaneously adopting a policy that deliberately and systematically flouts the purpose of the statute.

Moreover, even if there had been no policy directing the FBI agents and line prosecutors to seek respondent's arrest for investigative reasons, respondent's arrest under the material witness statute would still have been unconstitutional if its purpose was preventive detention and investigation. Petitioner cites *Brigham City v. Stuart*, 547 U.S. 398 (2006), Pet. Br. 31-32, but that case involved a scenario far removed from the careful and deliberative decision to seek a warrant. In *Brigham City*, the Court upheld a home search in which the police had traditional probable cause but lacked a warrant. In excusing the absence of the warrant, the

Court stressed the exigencies faced by the police officers in the heat of the moment, including not only an occupant who appeared "injured" and in need of emergency aid, 547 U.S. at 406, but also "*ongoing* violence." *Id.* at 405-06 (emphasis in original). Under these circumstances, the Court refused to examine the "individual officer's state of mind" to discern whether the entry was made principally "to assist the injured and prevent further violence" or instead to make an arrest. *Id.* at 404, 405.

Thus, not only did *Brigham City* involve a longstanding exception to the warrant requirement for searches (as opposed to an exception to the traditional probable cause standard for full-scale arrests), but it is also precisely the type of case in which the Court would have had to uncover the motivations of individual officers making immediate decisions on the ground. The decision to seek a warrant is very different from the type of decision faced by the police in *Brigham City*. Seeking a warrant is a deliberative process, far removed as a practical matter from uncovering the motivations of an officer reacting immediately to unfolding events. The decision to implement a policy of seeking material witness warrants to detain and investigate criminal suspects without probable cause of wrongdoing is even further removed from the exigencies faced by an individual officer in the field.

* * *

The material witness statute is designed for a singular purpose – to secure testimony. As a matter

of both the Fourth Amendment and statutory construction, the government must therefore adhere to that purpose. Otherwise, the government could circumvent the traditional rule barring custodial investigative arrests in the absence of probable cause of wrongdoing.

B. Petitioner Is Not Entitled To Qualified Immunity.

No court to address petitioner's policy has concluded that it would be lawful to use the material witness statute as a tool for preventive detention and investigation. *See Awadallah*, 349 F.3d at 59; *United States v. Awadallah*, 202 F. Supp. 2d 55, 77 n.28 (S.D.N.Y. 2002) ("Relying 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."), *rev'd on other grounds*, 349 F.3d 42 (2d Cir. 2003); Pet. App. 40a (Ninth Circuit opinion); J.A. 102, 111 (district court decision in this case).

Petitioner notes that only the district court decision in *Awadallah* was issued before respondent's arrest and that the decision in that case was overturned. Pet. Br. 41-42. Significantly, however, the Second Circuit did *not* disagree with the district court on the point relevant to this case. In fact, as previously noted, the Second Circuit in *Awadallah*, 349 F.3d at 59, expressly recognized 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."

In any event, respondent's qualified immunity argument is not based on the existence of pre-2003 case law directly addressing petitioner's policy. Rather, respondent's position is that a reasonable official would not have needed a court to tell him that he could not use the material witness statute for detaining and investigating suspects, rather than securing testimony.

Specifically, respondent's qualified immunity argument tracks the narrow scope of his position on the merits. As discussed above, respondent does not contend that the government violates the Fourth Amendment where there are dual motives for seeking the warrant, but only where a witness would not have been arrested *but for* the government's interest in detaining and investigating him. Thus, the precise immunity question in this case, properly defined, is the following:

> Would a reasonable official in 2003 have believed he could appear before a magistrate judge and present the al-Kidd warrant application but with two candid additions: (i) the government lacks probable cause to believe that al-Kidd has violated the law, but wishes to preventively detain and investigate him, and (ii) the government has no intention of using al-Kidd as a witness and would not be seeking a material

> witness warrant for al-Kidd but for its desire to detain and investigate him as a criminal suspect.

No official reasonably could have believed he could lawfully seek a warrant under those circumstances. Indeed, it would be unthinkable for any official – much less the Attorney General of the United States – to make those representations to a federal magistrate judge and believe he was acting constitutionally. *See*, *e.g.*, *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (noting that "officials can still be on notice that their conduct violates established law even in novel factual circumstances").

Petitioner's contention that he is entitled to qualified immunity is unresponsive to this precise question. Even if petitioner believed in 2003 that respondent's arrest was constitutional if undertaken with dual motives, he could not reasonably contend that the arrest would have been constitutional if the government would not have sought the warrant *but for* its interest in detaining and investigating respondent as a suspect.

II. PETITIONER IS NOT ENTITLED TO ABSOLUTE IMMUNITY.

Under the Court's functional test, *see Kalina v. Fletcher*, 522 U.S. 118 (1997), petitioner is not entitled to absolute immunity for several reasons. As an initial matter, there is no common-law tradition of immunity for seeking a material witness warrant. Moreover, even if prosecutors are generally

entitled to absolute immunity for seeking a material witness warrant, that protection is not available where the warrant is sought to investigate the witness. Finally, and most narrowly, because absolute immunity does not cover the submission of an affidavit to procure a warrant, and because the FBI agents who submitted an affidavit in this case did so pursuant to petitioner's directive, petitioner is not entitled to absolute immunity for his role in directing the actions of the FBI agents.

A. There Is No Common-Law Tradition Of Immunity For Procuring A Material Witness Warrant.

1. In assessing an official's claim to absolute immunity, the Court has stressed four points that are particularly relevant here. First, a "common-law tradition of absolute immunity" is a necessary (but not sufficient) requirement, and the official seeking such extraordinary protection bears the burden of demonstrating such a tradition. *Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993); *see also Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 432-34 (1993).

Second, the official must show that there was a common-law tradition of immunity for the *precise* function at issue. *See Buckley*, 509 U.S. at 269 (burden is on official to identify a tradition of immunity for a "given function"); *Malley*, 475 U.S. at 339-40 (requiring official to "point to a common-law counterpart to the privilege he asserts").

Third, in the absence of common-law cases dealing specifically with prosecutors, the Court looks to other actors in the common-law criminal justice system to determine whether they enjoyed immunity for performing the same function. In particular, the Court has considered whether a common-law tradition of immunity existed for private parties, who until the 1800s performed many of the functions now assigned to public prosecutors and other officials. *See Malley*, 475 U.S. at 340-41 & n.3 (examining immunity given to a "complaining witness" for seeking an arrest warrant); *see also Burns v. Reed*, 500 U.S. 478, 504 (1991) (Scalia, J., concurring in the judgment in part and dissenting in part).

Fourth, the official seeking absolute immunity cannot merely show an absence of cases holding an official liable for performing the function at issue, but rather must identify common-law decisions actually granting immunity. Thus, if there is no case-law at all – involving prosecutors or any other analogous common-law actors – then absolute immunity is unavailable. *See Antoine*, 508 U.S. at 434 (denying absolute immunity to court reporters for taking transcription because of an "absence of a common-law tradition involving court reporters themselves," and because "common-law judges," who did enjoy immunity, "performed [a] . . . significantly different" function); *see also Burns*, 500 U.S. at 492; *Mitchell v. Forsyth*, 472 U.S. 511, 521 (1985).

2. Petitioner has not satisfied his burden and, in fact, has presented no evidence of a common-law

tradition of immunity for procuring a material witness warrant. Pet. Br. 14-27; *see also* Pet. App. 17a (opinion below) (petitioner presented "no historical evidence").

Insofar as petitioner mentions the common law at all, it is only in his citations to *Imbler v. Pachtman*, 424 U.S. 409 (1976), where the Court concluded that prosecutors were historically entitled to immunity for the decision to initiate and pursue criminal charges, and held that such immunity covered the prosecutor's act of calling certain witnesses and eliciting false testimony from them at trial. Pet. Br. 14-16 (citing *Imbler*, 424 U.S. at 420-23, 431 n.33). But petitioner has failed to show that there was immunity for the specific function at issue here, which is not the discretion to decide which witnesses to call at trial, or the act of eliciting testimony from such witnesses in court, but the decision to seek a warrant for the *arrest* of an innocent witness – a function far removed from what was at issue in *Imbler*.

3. Even if petitioner had attempted to show a tradition of immunity for procuring a material witness warrant, he would not have been able to do so. The common law did not provide absolute immunity for procuring an arrest or search warrant, and certainly did not do so for one seeking a warrant to arrest an innocent and cooperative witness.

a. In *Malley*, 475 U.S. at 340-41 & n.3, the Court examined common-law history and held that one who seeks an *arrest* warrant is not entitled to

absolute immunity. Although *Malley* involved a police officer, the Court's historical analysis was not limited to police officers, *see id.* at 340 (concluding that "the generally accepted rule was that one who procured the issuance of an arrest warrant by submitting a complaint could be held liable"); moreover, the "identity of the actor" is irrelevant under this Court's immunity jurisprudence. *Kalina*, 522 U.S. at 127; *Burns*, 500 U.S. at 506 (Scalia, J., concurring in the judgment in part and dissenting in part) (emphasizing that *Malley* must govern even where the "defendant is a prosecutor"). *Cf. Kalina*, 522 U.S. at 129 (reaffirming *Malley* but granting prosecutor absolute immunity with respect to arrest warrant sought *in conjunction with* the prosecutor's filing of the "information" and other "charging documents" to initiate the case, a function that triggers absolute immunity).

b. The Court has not squarely addressed whether one who seeks a *search* warrant is entitled to absolute immunity and specifically reserved that question in *Burns*. *See* 500 U.S. at 487, 489 (granting prosecutor absolute immunity for appearance at hearing, stating that "we address only [the prosecutor's] participation in the search warrant hearing" and not his "motivation in seeking the search warrant" in the first place).

But, as Justice Scalia has noted, there was in fact no absolute immunity "for procuring a search warrant" at common law. *Id.* at 504 (Scalia, J., concurring in the judgment in part and dissenting in

part) (citing cases). And, indeed, although *Malley* involved an arrest warrant, the Court pointedly stated that "the distinction between a search warrant and an arrest warrant would not make a difference in the degree of immunity accorded the officer who applied for the warrant." 475 U.S. at 344 n.6; *see also id.* at 341 n.3.

c. Procuring a warrant for the arrest of a material witness was also not a function to which the common law extended absolute immunity. Respondent is not aware of a single pre-twentieth century case granting absolute immunity to someone sued for improperly procuring a material witness warrant. Indeed, there is evidence that private litigants and public officials could be sued for damages for wrongfully imprisoning a witness, although there are generally very few reported cases on point. *See Marsh v. Williams*, 1 How. (Miss.) 132 (1834).

The absence of cases is not surprising. Generally, state and federal witnesses during that period could be imprisoned only after they had disobeyed a summons or subpoena or affirmatively refused to give their "recognizance," or promise to appear and testify. *See supra* Section I.A.2 (discussing federal statutes); *see also Comfort v. Kittle*, 81 Iowa 179 (1890) (granting habeas because court lacked authority to require witness to furnish sureties in addition to his recognizance); *Bickley v. Commonwealth*, 2 J.J. Marsh. 572, 1829 WL 1449 (Ky. App. 1829) (setting aside order of commitment

for same reason); *United States v. Caldwell*, 25 F. Cas. 238, 238 (C.C.D. Penn. 1795) (attachment may issue against witnesses "only [if] . . . the subpoena has been actually served" and disobeyed). As a result, there was far less likelihood of a witness suing.

Thus, in the 1800s, Congress and state legislatures would not even have recognized the modern federal statutory scheme, where a cooperative witness can be arrested and detained based solely on an *ex parte* showing that it may become "impracticable" to secure the witness's testimony by subpoena. They certainly would not have assumed that there would be *complete immunity* for improperly seeking the arrest of an innocent, cooperative witness.

And notably, at the turn of the twentieth century, when there were a few more suits against private parties for procuring the improper arrest of witnesses, the courts still did *not* grant absolute immunity. *See Bates v. Kitchel*, 160 Mich. 402 (1910) (holding that a witness who was wrongfully imprisoned for failing to give a recognizance could sue the criminal defendant who sought his testimony); *Bates v. Kitchel*, 166 Mich. 695 (1911) (affirming award of damages to the plaintiff); *Lovick v. Atl. Coast Line R.R.*, 129 N.C. 427 (1901) (holding that railroad company was liable for its role in procuring the unlawful arrest of a witness).

In sum, there is no evidence of a tradition of immunity for procuring a material witness warrant

(or a search or arrest warrant). But even if the Court deemed the historical record silent or ambiguous on the question, absolute immunity must be denied because petitioner has failed to carry his burden.

B. Prosecutors Are Not Entitled To Absolute Immunity For Using The Statute To Investigate Suspects.

Even assuming *arguendo* that line prosecutors generally should be afforded absolute immunity for seeking a material witness warrant, they are not entitled to such protection where they deliberately use the statute to detain and investigate suspects. And because a line prosecutor would not be entitled to absolute immunity for using the statute for investigative purposes, petitioner also should not be entitled to such protection for his policy directing prosecutors to use the statute in that manner.

1. "[O]ne of the unquestioned goals" of the Court's immunity cases is "ensuring parity in treatment among state actors engaged in identical functions." *Buckley*, 509 U.S. at 288 (Kennedy, J., concurring in part and dissenting in part); *see Forrester v. White*, 484 U.S. 219, 229 (1988); *Burns*, 500 U.S. at 494-95. Thus, because police officers do not receive absolute immunity when performing investigative functions, prosecutors are likewise not entitled to absolute immunity where they engage in such activities. *See Buckley*, 509 U.S. at 274 (prosecutor's participation in investigative witness interviews and the fabrication of evidence); *Burns*, 500 U.S. at 482, 496 (prosecutor's advice to police

regarding the legality of questioning and arrest); *Mitchell*, 472 U.S. at 520-24 (Attorney General's investigative wiretaps).

Here, respondent alleges that the purpose of his arrest was to investigate him. Petitioner does not dispute the plausibility of that allegation. Nor does petitioner dispute that investigating a suspect to determine whether there is probable cause to charge him with a crime is a traditional police-type function for which absolute immunity is unwarranted. *Buckley*, 509 U.S at 273 (absolute immunity is unavailable where prosecutor is seeking "probable cause to recommend that a suspect be arrested").

Petitioner nonetheless contends that absolute immunity is required because respondent's arrest was made pursuant to a warrant, the *act* of seeking the warrant is prosecutorial, and the Court is prohibited from examining the function for which the warrant was *actually* sought. Pet. Br. 21-27. Thus, petitioner contends that the use of the statute in this case provides a complete shield – even though he does not dispute that the statute may indeed have been used for an investigative function in this instance.

Petitioner's argument is inconsistent with this Court's case law and with the very premise of the functional approach to absolute immunity. Indeed, if petitioner's argument were adopted, the district courts and courts of appeals would have the burden of rigidly classifying every legal act as inherently

prosecutorial or investigative, regardless of the circumstances.

2. The Court's decision in *Buckley* is instructive. There, prosecutors were sued for their role in interviewing witnesses to manufacture false evidence for use at trial. 509 U.S. at 272-76. The Court denied absolute immunity, rejecting the prosecutor's categorical position that interviewing witnesses and "obtaining, reviewing, and evaluating evidence" are "always protected by absolute immunity." *Id.* at 276 n.7 (internal quotation marks omitted). But, conversely, the Court did not suggest that the act of interviewing witnesses was always investigative.

Rather, the issue was "whether the prosecutors ha[d] carried their burden of establishing that they were functioning" in their prosecutorial role when conducting the particular interviews in that case. *Id.* at 274. The Court accordingly engaged in a "careful examination of the allegations concerning the conduct of the prosecutors" and concluded that the prosecutor's "mission at that time was entirely investigative in character," noting, among other things, that the interviews occurred well before there was probable cause to arrest anyone for the crime. *Ibid.*; *see id.* at 274 n.5 (rejecting bright-line rule that all actions by a prosecutor receive absolute immunity once probable cause is established; noting that even post-probable cause, a prosecutor might engage in non-immune

"investigative work") (internal quotation marks and citation omitted).

Justice Kennedy, dissenting on this issue, concluded that the prosecutors were entitled to absolute immunity for their role in the interviews. *Id.* at 282 (Kennedy, J., concurring in part and dissenting in part). Critically, however, he agreed with the majority that the same act can serve different functions, but disagreed that the prosecutors in that case were engaged in investigation.

In the dissent's view, although the police in that case were interviewing the witnesses for investigative reasons, the prosecutors were doing so to further trial-type prosecutorial functions: "Two actors can take part in similar conduct . . . while doing so for different reasons and to advance different functions. . . . The conduct is the same but the functions distinct." *Id.* at 289. Like the majority, the dissent recognized that there might be cases that presented close calls, but believed that district courts would be able to make those assessments by paying "careful attention to subtle details" in the case. *Ibid.* As the dissent noted, the "precise reason" for adopting a "functional" approach to immunity was to avoid the necessity of rigid categories in which an act was always either prosecutorial or investigative. *Ibid.*

Petitioner dismisses *Buckley* on the ground that the Court looked at "objective factors" in assessing the "'*conduct* of the prosecutors'" in that

case. Pet. Br. 23 (quoting *Buckley*, 509 U.S. at 274, emphasis supplied by petitioner). But that argument concedes respondent's central point: that the same act can serve different functions depending on the circumstances.

Moreover, there is plenty of similarly objective evidence in this case, including the allegations that the FBI conducted surveillance of respondent; that the warrant was sought even though respondent never failed to attend a single meeting with the FBI; that respondent was never asked if he would testify or be willing to relinquish his passport; that respondent was never deposed or called to testify – despite the year-long period between his arrest and the trial; that petitioner and other high-ranking officials made statements about the post-September 11 use of the material witness statute; and that the FBI Director pointed to respondent's arrest as one of the United States' major successes in the war on terrorism. J.A. 37 (FAC ¶ 100).

Here, Judge Lodge – who also presided in the underlying *Al-Hussayen* trial and at respondent's release hearing – concluded that these allegations pointed toward an investigative function. There is no reason why district courts are incapable of making this type of determination. *Buckley*, 509 U.S. at 290 (Kennedy, J., concurring in part and dissenting in part) (expressing "confidence" that district courts can make individualized functional inquiries "with some accuracy").

Indeed, courts have long understood that this Court's immunity jurisprudence requires careful attention to the circumstances of each case to determine the precise function in which a prosecutor was engaged. *See*, *e.g.*, *Rivera v. Leal*, 359 F.3d 1350, 1354 (11th Cir. 2004) (examining prosecutor's actions and rejecting contention that they were investigatory because "[t]here is no indication that [the prosecutor] was trying to establish probable cause to arrest [plaintiff]"); *Cousin v. Small*, 325 F.3d 627, 635 (5th Cir. 2003) (examining prosecutor's actions in witness interview and concluding that "[t]he interview was intended to secure evidence that would be used in the presentation of the state's case at the pending trial of an already identified suspect, not to identify a suspect or establish probable cause"); *Pachaly v. City of Lynchburg*, 897 F.2d 723, 727 (4th Cir. 1990) (affirming summary judgment because there was no "evidence" showing that the prosecutor's post-indictment search was for the investigative function of obtaining evidence of *other* crimes).

Thus, contrary to petitioner's contention, the court of appeals in this case did not invent its own immunity test. Pet. Br. 21; *see* Pet. App. 23a-24a (explicitly applying "functional" test and rejecting petitioner's contention that all legal acts are "inherently either prosecutorial or investigative"). Nor is the court of appeals' decision inconsistent with the circuit decisions cited by petitioner in which prosecutors were granted absolute immunity for seeking material witness warrants. Pet. Br. 17-18. None of those cases involved an allegation that the

prosecutor was using the statute for investigative purposes; in each case it was indisputable that the prosecutor was genuinely seeking testimony and believed it could not be secured without the witness's arrest. *See*, *e.g.*, *Betts*, 726 F.2d at 81 (arrest came only after primary witness failed to appear on day of trial); *Daniels,* 586 F.2d at 66, 69 (prosecutor "was attempting to secure Daniels's presence at the resumption of trial").

3. Petitioner argues that courts should not be permitted to pierce absolute immunity by looking at whether a prosecutor's actions were investigatory if they cannot do so even where the prosecutor acts for truly egregious reasons, such as for political motives. Pet. Br. 21-22. But, as discussed above, courts must be able to look at the nature of an action to make the *threshold* determination of whether the prosecutor was actually engaged in a prosecutorial function in the first place. Petitioner cannot turn the doctrine on its head and invoke the protection of absolute immunity before he has even made the threshold showing that he was engaged in a prosecutorial function.

Petitioner's reliance on *Van de Kamp v. Goldstein*, 129 S. Ct. 855 (2009), is likewise misplaced. Pet. Br. 18-19. In *Goldstein*, the Court held that a supervisor could not be denied absolute immunity for a policy if the only way in which the policy caused harm was through its implementation in individual cases and the individual actors who implemented the policy in each case *were* entitled to

absolute immunity. But the Court has long held that the converse is also true: a supervisor should not receive absolute immunity where the individuals acting at his direction are entitled only to qualified immunity for their conduct.

In *Burns*, 500 U.S 478, for example, the prosecutor did not direct (much less order) the police to take any action, but simply advised them that a search technique was lawful and that they likely had probable cause to arrest the suspect. Yet even under those circumstances, the Court held that the prosecutor should not have absolute immunity for "giving advice" if the police officers receive "only qualified immunity for following the advice." *Id*. at 495. Here, petitioner is alleged to have done more than provide advice. His policy directed and authorized the illegal actions.

4. More generally, petitioner contends that respondent's approach to absolute immunity is inconsistent with the objective test used in the qualified immunity analysis and will undermine the functioning of the judicial system. Pet. Br. 25. But the qualified immunity test does not mean that every case can be decided conclusively on the face of the complaint. Rather, where a purpose inquiry is required to resolve the merits of a case, factual development may be necessary, thereby preventing the qualified immunity question from being decided on a motion to dismiss. *See Crawford-El v. Britton*, 523 U.S. 574, 598-601 (1998) (explaining that where plaintiffs make specific, non-conclusory allegations

regarding defendant's unlawful motive, factual development may be necessary before immunity question can be resolved). Thus, under both the qualified immunity and absolute immunity tests, limited factual development may occasionally be necessary. But just as district courts can be trusted to distinguish plausible allegations from fanciful ones, *see Iqbal*, 129 S. Ct. 1937, so too can they "tailor discovery" to ensure the question is resolved at an early stage. *Crawford-El*, 523 U.S. at 598.

Nor will the functioning of the judicial system be undermined if prosecutors are not afforded absolute immunity in this case. Pet. Br. 24-27. As previously discussed, *see supra* at pp. 33-34, the material witness statute is infrequently used in non-immigration cases. And, even in the relatively few non-immigration cases where the statute is used, it will be rare that a witness could plausibly allege that he would not have been arrested "but for" the government's interest in detaining and investigating him.

Moreover, witnesses have far less protection than defendants under the judicial system. In granting prosecutors absolute immunity for certain functions, the Court has stressed that defendants will still have the full adversary judicial process to protect their rights. *Imbler*, 424 U.S. at 427, 430-31. In fact, in every one of this Court's cases in which absolute immunity was afforded to a prosecutor – from *Imbler* to *Goldstein* – the plaintiff was an individual who had been criminally charged and/or

prosecuted. *Cf. Mitchell*, 472 U.S. at 513-14 (denying absolute immunity to the Attorney General in case where the plaintiff was not himself the criminal defendant, but was affected by a wiretap aimed at a third party). The arrest of witnesses, however, takes place largely out of the public eye, and without the full protections afforded defendants.

In sum, absolute immunity is unwarranted in those rare cases where a witness can plausibly plead that he would not have been arrested but for the desire to detain and investigate him. Allowing such suits will not undermine "the functioning of the criminal justice system," *Imbler,* 424 U.S. at 426, but will have the salutary effect of deterring the deliberate use of the material witness statute as a preventive detention and investigation tool.

Indeed, if the prosecutor in this case had simply detained respondent without a material witness warrant in order to investigate him, there would be no question that the prosecutor was engaged in investigative activity. That the prosecutor used the material witness statute to achieve the same ends should not alter the immunity result. *Cf. Buckley*, 509 U.S. at 276 (stressing that a "prosecutor may not shield his investigative work . . . merely because, after a suspect is eventually arrested, indicted, and tried, that work may be retrospectively described as 'preparation' for a possible trial; every prosecutor might then shield himself from liability . . . by ensuring that they go to trial").

C. Petitioner Is Not Entitled To Greater Immunity Than The FBI Agents He Directed.

As shown above, petitioner is not entitled to absolute immunity because he directed the line prosecutors to use the statute as an investigative tool, and they in turn are not entitled to absolute immunity for doing so. But even apart from his role in directing the line prosecutors, petitioner also directed FBI agents to submit affidavits in support of material witness warrants – a distinct function that does not receive the protection of absolute immunity.

1. The complaint alleges that the FBI affidavit contained false statements and omissions. That claim is no longer at issue here. But the complaint also alleges that the FBI agents acted unlawfully by seeking the warrant to detain and investigate respondent and submitted the affidavit to further that end. J.A. 27 (FAC ¶ 56). Because the submission of an affidavit in support of a warrant does not receive absolute immunity, the agents understandably have requested only qualified immunity in this case. *See* J.A. 104-05 (district court decision); J.A. 9 (district court docket no. 55); *see also Malley*, 475 U.S. at 342-43 (police officer denied absolute immunity for submission of affidavit in support of arrest warrant); *Kalina*, 522 U.S. at 130-31 (prosecutor denied absolute immunity for submitting affidavit in support of arrest warrant).

The complaint further alleges that petitioner directed his unlawful material witness policy

through the Justice Department – including the FBI – and that this policy caused the unlawful arrest of respondent. J.A. 39-41, 48-49 (FAC ¶¶ 108-112, 114, 116, 137-40). Under this Court's cases, petitioner cannot claim greater immunity than the FBI agents acting at his direction. As the Court stated in *Burns*, 500 U.S at 495, it would be "incongruous to allow prosecutors to be absolutely immune from liability for giving advice to the police, but to allow police officers only qualified immunity for following the advice."

Indeed, like the FBI agents, FBI Director Mueller certainly could not have claimed absolute immunity had he adopted the policy at issue here and been named as a defendant in his personal capacity. If Director Mueller could not claim absolute immunity for adopting the policy and implementing it through his agents, petitioner likewise cannot do so for taking the very same action and implementing the policy through the very same law enforcement agents working for him.

2. Thus, even if petitioner were correct that seeking a material witness warrant is an act for which a prosecutor should enjoy absolute immunity, that immunity would not extend to cover the submission of an affidavit by the FBI agents. The agents and prosecutor were simply engaged in different functions – the prosecutor filed a motion for the warrant, while the FBI submitted factual material in the form of an affidavit. *See Kalina*, 522 U.S. at 131 (the submission of an affidavit is a

distinct "function" not entitled to absolute immunity).

Accordingly, even if the prosecutor had made the ultimate decision to seek the warrant, the FBI agents (acting pursuant to petitioner's policy) submitted an affidavit in court causing a warrant to issue. That action subjects them to liability, as *Malley* shows. *Cf. Hartman*, 547 U.S. at 265 (noting that law enforcement officers can be liable for "urging" a prosecutor to bring a retaliatory prosecution, even though the officers performed *no* role in court).

Insofar as petitioner is arguing that the FBI agents did not play a legally significant role in obtaining the warrant, that argument is both premature and erroneous. In *Malley*, 475 U.S. at 344 n.7, 346 n.9, the Court specifically rejected the argument that the police officer who sought the arrest warrant was shielded from liability by the magistrate judge's subsequent approval of the warrant application. If the actions of a *judge* do not shield a police officer, then the officers in this case are certainly not immunized by the fact that they operated in conjunction with a prosecutor.

Finally, petitioner contends that it makes no difference that the Attorney General is both the nation's chief prosecutor and law enforcement officer because the focus of the immunity analysis must be on the "function" the actor performed, and not his "identity." Pet. Br. 20. But that is precisely the point. Respondent's argument is not that the

Attorney General, in the abstract, performs prosecutorial and law enforcement functions, and that he can therefore be stripped of absolute immunity in every case based on his general responsibilities. Rather, respondent's argument is that *in this case* petitioner performed an investigative function by directing FBI officials to seek material witness warrants for investigative reasons.

This case is therefore similar to *Mitchell,* 472 U.S. at 520-24. There, the Court acknowledged that the Attorney General regularly performs law enforcement functions as well as prosecutorial functions. *Id.* at 520. But the Court concluded that he was not entitled to absolute immunity for authorizing the FBI to conduct investigatory wiretaps in *that* case – an act the district court held, after factfinding, was not prosecutorial, *id.* at 516, and that the Court concluded was also not covered by a "national security function" immunity. *Id.* at 521 (internal quotation marks omitted). Thus, as in *Mitchell*, petitioner is not entitled to absolute immunity for his role in directing the FBI to carry out a law enforcement activity.

In short, the FBI agents who submitted the affidavit are not entitled to absolute immunity. It would be "incongruous," *Burns*, 500 U.S. at 495, if petitioner were now to receive absolute immunity for his policy directing the agents.

* * *

Absolute immunity is an extraordinary protection, sparingly afforded by this Court. *Burns*, 500 U.S. at 486-87. Here, the complaint alleges that petitioner deliberately misused the material witness statute as a tool for preventive detention and investigation of a cooperative witness, bypassing the constraints normally imposed on arrests by the Fourth Amendment and effectively re-writing a federal statute without Congress's participation. As both the district court and court of appeals concluded, neither absolute nor qualified immunity is appropriate under these circumstances.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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