No. 10-98

IN THE

# Supreme Court of the United States

JOHN ASHCROFT,

*Petitioner*,

—v.—

ABDULLAH AL-KIDD,

*Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## BRIEF IN OPPOSITION


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## COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. In Question 2(a), the petition states that the issue is whether there is liability for "executing a valid material witness warrant." Respondent takes issue with that statement in two respects.

*First*, this case concerns the *procurement* of a warrant in Idaho pursuant to petitioner's policy. Unlike the two FBI agents who sought the warrant, the agents who *executed* the warrant and arrested respondent in Virginia are not defendants.

*Second*, respondent does not concede that the warrant was "valid." Even assuming that the material witness statute's materiality and impracticability requirements were met (18 U.S.C. 3144), the position of respondent (and the Ninth Circuit) is that both the Fourth Amendment *and* the statute itself prohibit a material witness arrest for the purpose of investigating a suspect, rather than for securing testimony.

2. Respondent will not pursue the claims in Question 3 of the petition if certiorari is granted. Similarly, if the petition is denied, respondent will abandon the claims in Question 3 in any further proceedings in the district court or Ninth Circuit.

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The opinion of the court of appeals (Pet. App. 1a-105a) is reported at 580 F.3d 949. The opinions concurring in, and dissenting from, the denial of rehearing en banc (Pet. App. 106a-132a) are reported at 598 F.3d 1129. The unpublished opinion of the district court is available at 2006 WL 5429570.

## JURISDICTION

The petition invokes this Court's jurisdiction under 28 U.S.C. 1254(1).

## STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The material witness statute, 18 U.S.C. 3144, provides in full:

> If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142 of this title. No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by

> deposition, and if further detention is not necessary to prevent a failure of justice. Release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.

The Fourth Amendment to the United States Constitution provides:

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

## INTRODUCTION

The Fourth Amendment generally prohibits an arrest absent probable cause to believe there has been a violation of the law. *See Brinegar v. United States*, 338 U.S. 160, 175 (1949) ("probable cause is a reasonable ground for belief of guilt") (citations and quotation marks omitted). The federal material witness statute, however, authorizes the government to arrest a wholly innocent individual for the purpose of obtaining needed testimony that might otherwise be unavailable. The statute thus requires a showing before a magistrate that an individual has information "material" to a criminal proceeding and that it "may become impracticable" to secure the testimony by subpoena. 18 U.S.C. 3144. This case involves a gross abuse of the government's narrow power under the statute.

The complaint alleges that in the aftermath of September 11, 2001, dozens of individuals, including many United States citizens like respondent al-Kidd, were arrested as material witnesses pursuant to a policy adopted and implemented by petitioner Ashcroft. These individuals were often detained for weeks or even months, under harsh conditions. Moreover, as witnesses, they were not entitled to *Miranda* warnings under the government's reading of the law. Thus, they could, and were, routinely interrogated without counsel present.

The impetus for arresting these individuals was not to secure their testimony for a criminal proceeding. Rather, these were individuals whom

the government viewed as suspects and wished to detain and investigate. But because the government lacked probable cause to arrest these individuals on criminal charges, it had them arrested as material witnesses, thereby circumventing the Fourth Amendment's traditional probable cause standard and distorting the basic purpose of the material witness statute.

Indeed, the modern statute itself provides that the government should seek to depose a witness rather than unreasonably prolonging the period of confinement. *See* 18 U.S.C. 3144. The deposition requirement strongly reinforces that the statute's purpose is to provide the government with a means of securing needed testimony, and not to permit the government to detain and investigate *suspects* without regard to the traditional Fourth Amendment standard.

## STATEMENT

On a motion to dismiss, all non-conclusory factual allegations are presumed true. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-50 (2009). The allegations set forth below are taken virtually verbatim from the First Amended Complaint ("FAC").

### A. Mr. al-Kidd's Arrest and Detention.

The respondent, Abdullah al-Kidd, is a 37-year-old African-American man born in 1972 in Kansas and raised near Seattle, Washington. His mother, father, siblings and two children are native-

born U.S. citizens who have always resided in the United States. Mr. al-Kidd graduated from the University of Idaho, where he was a well-known player on the football team. While he was attending college, he changed his name from Lavoni T. Kidd to Abdullah al-Kidd, and converted to Islam. FAC ¶¶ 39-40.

Following September 11, the government began a broad terrorism investigation in Idaho. As part of this investigation, the Federal Bureau of Investigation (FBI) conducted surveillance of Mr. al-Kidd and his then-wife (also a native-born U.S. citizen). The surveillance logs from that investigation indicated no illegal activity, and indeed, Mr. al-Kidd was never charged with a crime. FAC ¶¶ 9, 44.

In addition, on several occasions, the FBI asked to meet with Mr. al-Kidd. Respondent met with the FBI and answered questions for hours. At no time did he fail to appear for one of these requested meetings. FAC ¶¶ 15, 54(c).

In March 2003, Mr. al-Kidd 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 ticket counter at Dulles Airport in Virginia, Mr. al-Kidd was arrested by agents of the FBI on a material witness warrant issued in Idaho in the case of Sami Al-Hussayen, who previously had been indicted by an Idaho grand jury

for visa fraud and making false statements to the government. FAC ¶¶ 15, 42, 45-47, 65.[1]

The FBI agents did not give Mr. al-Kidd a copy of the warrant indicating that he was supposedly being arrested as a witness, and instead handcuffed him and walked him through the airport in front of staring onlookers. At the time of his arrest, Mr. al-Kidd was wearing religious clothing, making it clear that he was a Muslim man whom the government was arresting in an airport after September 11, adding to the already extensive and unnecessary humiliation. FAC ¶¶ 66-67.

The agents also did not provide Mr. al-Kidd with *Miranda* warnings or counsel. Instead, they brought him to a police sub-station in the airport and interrogated him (without counsel) for 1-2 hours on a variety of topics, including Mr. al-Kidd's *own* religious beliefs, conversion to Islam and his past travels. They also informed him that by cooperating he might still be able to take his flight to Saudi Arabia – a statement seemingly at odds with the government's previous representation to an Idaho Magistrate that Mr. al-Kidd's arrest as a material witness was necessary because he had "crucial" information for the upcoming Idaho trial of Sami Al-Hussayen. FAC ¶¶ 46, 66, 68.

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[1] The jury was unable to reach a verdict on these two charges. Al-Hussayen was also ultimately charged with providing material support but was acquitted on those more serious charges. The government did not retry Al-Hussayen on any of the charges.

Mr. al-Kidd spent the next 15 nights in jails in Virginia, Oklahoma and Idaho, under severe conditions. At each facility, he was placed in a high-security wing of the jail and mingled with charged or convicted criminals. In two of the three facilities, he was humiliatingly strip-searched. FAC ¶¶ 70-75, 83-87, 92-93, 95; *see, e.g.*, *Al-Kidd v. Sugrue*, No. CIV-06-1133-R, 2007 WL 2446750, at *8 (W.D. Okla. Aug. 23, 2007) (holding that Mr. al-Kidd's clearly established Fourth Amendment rights were violated because the warden "could not have reasonably believed in 2003" that strip-searches and body cavity inspections of "a material witness detainee such as the Plaintiff . . . did not violate the law").

When transferred between facilities, Mr. al-Kidd was treated as if he were a dangerous terrorist, and not a witness. Among other things, he was placed on a "Con Air" flight with hardened criminals and was routinely placed in full shackles like the other prisoners: his feet were chained together and his hands were cuffed to a belly chain that prevented any movement of his arms. FAC ¶¶ 71, 83-85, 92.

Mr. al-Kidd was eventually released from detention under strict conditions. Among other things, he was limited to a four-state area, required to live with his in-laws, and to report regularly to the government. More than fourteen months later, the trial for which Mr. al-Kidd's testimony was supposedly needed ended without conviction on a single count. Mr. al-Kidd was never called as a witness. Even at that point the government did not

immediately move to vacate the conditions of supervision, forcing Mr. al-Kidd to file a motion with the court in Idaho. FAC ¶¶ 9, 103, 106-07.

**B. The Material Witness Warrant.**

The affidavit submitted in support of the material witness warrant consisted of only three sentences directly pertaining to whether Mr. al-Kidd's testimony could be secured voluntarily or by subpoena, without the need for arrest:

> 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.
>
> * * *
>
> It is believed that if Al-Kidd travels to Saudi Arabia, the United States Government will be unable to secure his presence at trial via subpoena.

*See* FAC ¶ 49.[2] These statements turned out to be false. In fact, the government has since admitted that Mr. al-Kidd had a round-trip ticket, and not a one-way ticket as alleged in the affidavit (an

[2] The warrant application is an addendum to the First Amended Complaint. First Amended Compl. 1:05-cv-00093-EJL Docket Entry No. 40 (D. Idaho Nov. 18, 2005).

admission made only after Mr. al-Kidd had spent more than two weeks in detention). Furthermore, Mr. al-Kidd did not have a first-class ticket costing approximately $5,000, as alleged, but rather a coach-class ticket costing less than $2,000. FAC ¶¶ 14, 53.[3]

In addition to the false statements, the affidavit also failed to inform the magistrate of numerous material facts, including that:

- Mr. al-Kidd was not a Saudi national returning to his home country, but rather a native-born citizen with significant ties to the United States and Idaho (including that his family members were native-born U.S. citizens living in this country and that he had attended the University of Idaho);

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[3] One of the *amicus* briefs contends that the false statements are thin, suggesting that the affidavit's reference to a one-way ticket could just as easily have been understood as a reference to a roundtrip ticket with an open-ended return. Brief of William P. Barr et al. as *Amici Curiae* in Support of Petitioner at 22 n.7. But if that is truly what the government meant when it stated respondent had a "one-way" ticket, it chose an especially odd way to express it. Moreover, the harm done by that false statement is magnified when viewed in context. As the magistrate who received the affidavit surely knew, the 19 hijackers responsible for the September 11 attacks apparently had one-way, first-class tickets. Finally, and importantly, there can be no suggestion that the nature of the ticket was largely inconsequential, since the government's affidavit made that the central focus of the warrant application; in fact, as already noted, there was little else in the application pertaining to the impracticability of securing Mr. al-Kidd's testimony by subpoena.

- Mr. al-Kidd 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;

- prior to his arrest, Mr. al-Kidd had not heard from the FBI for approximately six months;

- the FBI had never told Mr. al-Kidd 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 finally,

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

FAC ¶¶15, 54.

Tellingly, the affidavit also did not state that the government had attempted to locate Mr. al-Kidd prior to seeking the arrest warrant. Indeed, the affidavit nowhere stated that the government had made any effort to determine whether some action short of an arrest might be practicable. In this regard, it is notable that another witness in the Al-Hussayen case was permitted simply to relinquish his passport and postpone his trip to Saudi Arabia. That witness, moreover, was not a U.S. citizen like Mr. al-Kidd, but a Saudi national returning home. FAC ¶¶ 54(f), 57.

In addition, although the affidavit stated that Mr. al-Kidd's testimony was "crucial" to the

government's case, it never precisely explained what information Mr. al-Kidd possessed that was germane to the charges against Al-Hussayen. Instead, the affidavit contained largely irrelevant information or statements attempting to cast Mr. al-Kidd in a suspicious light. FAC ¶ 58. Among other things, the affidavit stated that Mr. al-Kidd and his wife 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 Mr. al-Kidd worked for the same charitable Islamic organization as Mr. Al-Hussayen and received a salary for his work. FAC ¶¶ 58, 60.

The warrant application also perplexingly stated that Mr. al-Kidd had information critical for the *defense*. Yet the application was submitted *ex parte* by the government, without any suggestion that the government had consulted with defense counsel in making that unusual representation. FAC, Ex. A.

In short, the FBI simply blindsided a cooperative U.S. citizen months after it had last contacted him, without ever affording him the opportunity to testify voluntarily – all under the pretense that his testimony was critically needed for a future trial (a trial in which he was *never* called to testify).

### C. Petitioner's Material Witness Policy.

According to the complaint, Mr. al-Kidd's arrest was not an isolated incident occurring in one trial in

Idaho, but 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 as cover to detain and investigate suspects for whom the government lacked probable cause of wrongdoing.

That Mr. al-Kidd's arrest was not an isolated incident was evident from congressional testimony delivered by the FBI Director. Only days after Mr. al-Kidd's arrest, while respondent remained in detention, Director Mueller appeared before Congress and testified that the government had had a number of recent "successes" in combating terrorism and gave various examples. The first example was the capture of Khalid Shaikh Mohammed, alleged to be the "mastermind" of the September 11 attacks and now held at Guantanamo Bay. The next example was the arrest of Mr. al-Kidd. Director Mueller then listed three additional examples, all involving individuals who had been *charged* with terrorism-related offenses. Unbelievably, the Director's testimony did not mention that Mr. al-Kidd had been arrested only as a witness, and not on criminal charges. Instead, he stated:

> We are thoroughly committed to identifying and dismantling terrorist networks, and 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:
>
> In March, 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. . . .
>
> On March 16, 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 FBI's Fiscal Year (FY) 2004 Budget: Hearing Before the H. Subcomm. on the Dep'ts of Commerce, Justice, and State, the Judiciary and Related Agencies*, 108th Cong. (2003) (Mueller statement), http://www.fbi.gov/congress/congress03/mueller032703.htm; *see* FAC ¶ 100.

If Mr. al-Kidd had been viewed as a genuine witness, and not as a longstanding suspect, 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 mentioned directly after the capture of the man who allegedly orchestrated the September 11 attacks.

Indeed, had the Justice Department actually viewed Mr. al-Kidd as a genuine witness, and not a suspect, it is implausible that the FBI Director would even have *mentioned* respondent's arrest, much less cited it as one of the government's noteworthy "successes" in combating terrorism. And if Mr. al-Kidd was indeed a genuine *witness*, it is highly unlikely that that central fact would have been omitted from the Director's testimony.

Nor is Director Mueller's testimony the only evidence that Mr. al-Kidd'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 Justice Department officials, routinely made statements about how the material witness statute would be used to detain and investigate *suspects*.

On October 31, 2001, for example, petitioner commented on the government's new policies, stating at a press briefing 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 . . . ." FAC ¶ 117; *see id.* at ¶ 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*").

An internal DOJ document echoes this theme of using the material witness statute to arrest and hold suspects. The document, entitled "Maintaining Custody of Terrorism Suspects," includes the following statement: "If a person is legally present in this country, the person may be held only if federal or local law enforcement is pursuing criminal charges against him or pursuant to a material witness warrant." FAC ¶ 118.

Similarly, senior counsel in the Deputy Attorney General's Office remarked that the "Criminal Division is examining each of the cases [of terrorist suspects in INS custody] to determine whether the person can be detained on criminal charges or on a material witness warrant if the person is ordered released from INS custody." FAC ¶ 119. Michael Chertoff, the head of the DOJ's Criminal Division in the years immediately following September 11, 2001, publicly highlighted the DOJ'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." FAC ¶ 121 (quoting media interview, emphasis added).

FBI Director Mueller likewise touted the new material witness practice, stating in an April 2002 speech that "a number of *suspects* were detained on federal, state, or local charges; on immigration violations; or on *material witness* warrants." FAC ¶ 122 (emphasis added). On February 24, 2004, in a statement to the ABA then-White House Counsel Alberto Gonzales candidly described standard DOJ procedure for handling a terrorism suspect:

> In any case where it appears that a U.S. citizen captured within the United States may be an al Qaeda operative and thus may qualify as an enemy combatant, information on the individual is developed and numerous options are considered by the various relevant agencies (the Department of Defense, CIA and DOJ), including the potential for a criminal prosecution, detention as a *material witness*, and detention as an enemy combatant.

FAC ¶ 123 (emphasis added in complaint).

On June 25, 2003, David Nahmias, Counsel to the Assistant Attorney General, Criminal Division, offered the Senate Judiciary Committee an example of how the DOJ tracked down an alleged terrorist: "[W]e developed . . . clear evidence that he had contact with an Al Qaida terrorist operative connected to 9/11. And so in December he was approached again . . . and [when] we weren't able to clear things at that point, he was actually made a

material witness." Nahmias stated that "we got enough information to at least make him a material witness and then to charge him criminally." FAC ¶ 124.

Public statements by other top officials who worked closely with the Justice Department in the development of post-9/11 policies confirmed the new material witness policies and practices. 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." FAC ¶ 120 (quoting media interview).

As importantly, the circumstances surrounding the arrest and detention of these supposed witnesses reinforce the statements made by petitioner and others and confirms that those arrested were actually viewed as suspects, and not genuine witnesses. Numerous material witnesses who were detained to secure their supposedly important testimony were never in fact called to testify. By one account, nearly fifty percent of those detained in connection with post-9/11 terrorism investigations were not called to testify. Further confirming their actual status as suspects, the government refused to grant many post-9/11 material witnesses immunity for their testimony,

although this traditionally has been a standard procedure for eliciting testimony from a witness. FAC ¶ 128.

Some individuals were designated as material witnesses only after already being arrested on another ground, strongly indicating that the government was using material witness warrants as a means of prolonging a suspect's detention. Many other individuals were arrested and detained as material witnesses even though there was no reason to believe it would have been impracticable to secure their testimony voluntarily or by subpoena. FAC ¶ 127 (describing material witness arrested and detained for three days in solitary confinement after willingly and voluntarily allowing the FBI to search his business records and computers).

Once arrested, material witnesses were routinely held in high security detention conditions, highlighting their true status as terrorism suspects, rather than witnesses. FAC ¶¶ 129-30. *See also United States v. Awadallah*, 202 F. Supp. 2d 55, 61 (S.D.N.Y. 2002) ("It was also decided 'early on' that '[w]ith respect to all of the folks who were being brought in as material witnesses and under investigation for the World Trade Center attacks . . . that [the MCC] would record their movements with a hand-held camera,' a policy that the prison had previously used with the 'African Embassy bombers.'"), *rev'd on other grounds,* 349 F.3d 42 (2d Cir. 2003).

The Justice Department also unreasonably prolonged the period of detention for material witnesses – by DOJ's own estimates about half of the witnesses it arrested in terrorism investigations were detained 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. *See* FAC ¶ 133 (citing DOJ letter to Sensenbrenner and Conyers of the House Committee on the Judiciary, May 13, 2003). And even after being released from detention, many material witnesses were subjected to impermissibly restrictive release conditions – and yet were still never called to testify. FAC ¶ 134.

Exacerbating all of these abuses was the Justice Department's attempt to shield from public view the circumstances surrounding the arrest of material witnesses. Among other things, the Justice Department routinely requested that the records of material witness proceedings be sealed. The Justice Department also refused to make public the most basic information about the material witnesses it detained, including names or other identifying information, or the exact number of witnesses, even in the face of direct congressional inquiry. FAC ¶ 135.

**D. Procedural History**.

In light of these allegations, the district court (per Lodge, J.) properly held that petitioner was not entitled to immunity if the material statute was used as a cover to arrest suspects (the *pretext* claim). *Al-Kidd v. Gonzales*, No. 1:05-cv-00093-EJL-MHW, 2006 WL 5429570, at *7, *9 (D. Idaho Sept. 27, 2006) (stating that "[t]he development and practice of using the material witness statute to detain individuals while investigating possible criminal activity qualifies as police type investigative activity, not prosecutorial advocacy" and is not shielded by absolute or qualified immunity).

The Ninth Circuit properly affirmed that ruling on respondent's pretext claim, holding that petitioner was not entitled to absolute immunity because his policy was investigative, not prosecutorial, under this Court's functional test. Pet. App. 14a-27a. The court of appeals also rejected petitioner's argument that he was entitled to qualified immunity even if he used the material witness statute as a pretext to hold suspects for whom the government lacked sufficient evidence to charge with a crime. Pet. App. 40a-47a. As the court of appeals stated, the government does not have 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.

In addition to respondent's pretext claim, the court of appeals also addressed two additional issues. First, it held that petitioner could also be liable for the content of the affidavit submitted in support of Mr. al-Kidd's arrest (what the Ninth Circuit called the "Section 3144 Claim"). Pet. App. 47a-56a. As noted above, *supra* at i, that issue is no longer being pursued by respondent. The court of appeals also reversed the district court's ruling that petitioner could be held liable for the conditions of confinement under which Mr. al-Kidd was held. Pet. App. 56a-59a. Respondent has not sought further review of that holding.

Judge Bea dissented in relevant part. He would have afforded petitioner absolute and qualified immunity, on the principal ground that the court should not look behind petitioner's actions to examine the purpose of the material witness policy. Pet. App. 64a-105a.

The Ninth Circuit denied petitioner's request for en banc review, with 8 judges dissenting. Pet. App. 106a. Judge Smith wrote an opinion concurring in the denial of rehearing. Pet. App. 107a-122a. Judges O'Scannlain and Gould wrote dissenting opinions from the denial of en banc review. Pet. App. 122a-131a; 131a-132a.

## ARGUMENT

This case is before the Court on a motion to dismiss, without any factual record. There is also no circuit conflict. Petitioner nonetheless argues that the Court's immediate review is warranted because he will otherwise be subjected to the burdens of discovery and because the Ninth Circuit's ruling creates uncertainty for prosecutors performing their everyday duties. Petitioner further contends that the Ninth Circuit's decision was incorrect and that review is warranted for that reason as well. None of these arguments support granting the petition.

### I. THERE IS NO PRESSING NEED FOR THIS COURT'S REVIEW.

Petitioner does not contend that there is a circuit conflict on the issues presented by this case. Indeed, the courts that have addressed the issue have taken as a given that the government may not use its extraordinary power under the material witness statute as a cover to preventively detain and investigate suspects for whom it lacks probable cause of wrongdoing. *See United States v. Awadallah*, 349 F.3d 42, 59 (2d Cir. 2003) ("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*, 202 F. Supp. 2d 55, 77 (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; Pet. App. 40a (Ninth Circuit opinion) ("To use a material witness statute pretextually, in order to investigate or preemptively detain suspects without probable cause, is to violate the Fourth Amendment."); *Al-Kidd v. Gonzales*, 2006 WL 5429570, at *6, 9 (holding that al-Kidd had alleged a constitutional violation if the material witness statute was used as a pretext to arrest and investigate suspects).[4]

Petitioner also obviously does not contend that this is the last opportunity the Court will have to review the case. If petitioner is found liable in the district court, and the Ninth Circuit affirmed that ruling, he would be able to seek review of that judgment in this Court. Thus, even if the petition is denied, petitioner would not face liability without this Court having had an opportunity to review the case if it chooses to do so.

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[4] Petitioner suggests that the Second Circuit in *United States ex rel. Glinton v. Denno*, 339 F.2d 872 (2d Cir. 1964), previously upheld the pretextual use of the material witness statute. Pet. 27-28. But, in *Glinton*, the police *were* seeking the individual's testimony. 339 F.2d at 873 (material witness not held as a "ruse" to extract confession from him); *id.* at 875 (noting that individual "was certainly an important witness"). In any event, the Second Circuit itself clearly does not believe that it has ever sanctioned the government's position. As noted above, the Second Circuit in *Awadallah* pointedly stated that the government could not use the statute as a cover to arrest suspects. 349 F.3d at 59.

Moreover, if the Court concludes that review is warranted at a later stage of the proceedings, it would then have the benefit of a concrete factual record to sharpen (and potentially narrow) the issues. The government, for example, has argued that prosecutors seeking material witness warrants often have mixed motives and that the existence of mixed motives is not a violation of either the material witness statute or the Fourth Amendment. Pet. 28-30 (suggesting that a genuine witness may also be viewed as a potential suspect). But discovery about the nature of petitioner's policy may reveal that this is not a case involving mixed motives in the manner suggested by petitioner. Thus, insofar as this case requires the Court to draw difficult lines on the "mixed motive" issue – or any other issue – it is best resolved on a concrete factual record.

Petitioner argues, however, that the Court's immediate review is justified for two principal reasons. First, petitioner argues that immunity defenses are designed to shield government officials not only from liability, but also from the burdens of discovery, and that later review by this Court would come too late to shield him from discovery. Pet. 18-19. Yet, while the Court has made clear that officials denied immunity at the outset of a case are entitled to one layer of interlocutory appellate review in the courts of appeals, it has never to respondent's knowledge held that such officials are entitled to *this Court's* interlocutory review; otherwise this Court would be functioning as an error-correcting tribunal in every case in which immunity is denied at the

outset (even where, as here, both the district court and the court of appeals agreed that immunity was not warranted on the complaint's extensive allegations).

The district court will also be in a position to structure discovery to avoid unnecessarily burdening petitioner. *See Crawford-El v. Britton*, 523 U.S. 574, 598-600 (1998) (describing the "many options for the district judge" in structuring discovery for this purpose). And because this case involves a top-down policy decision operating throughout many levels of the Justice Department, the district court will be in a particularly good position to structure discovery in a sequenced manner, focusing initially on lower level officials.[5]

Petitioner's second argument is that immediate review is warranted because the Ninth Circuit's ruling creates uncertainty for prosecutors. According to petitioner, prosecutors operating within the Ninth Circuit will be deterred from zealously performing their duties and will invariably err on the side of caution rather than risk a civil suit. Pet. 28-30. Petitioner's speculation is exaggerated. The court of appeals took pains to ensure that the scope of its decision was narrow and not misunderstood.

For example, in response to Judge Bea's dissenting opinion, the court specifically stated that

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[5] Petitioner is of course the former Attorney General. Consequently, any discovery permitted by the district court will not interfere with the duties of a current office holder.

its decision was not intended to provide criminal defendants with a ready means of suing prosecutors simply by claiming that the purpose of the prosecution was investigative. Pet. App. 25a (emphasizing that absolute immunity is not lost merely because a prosecutor "may hope, eventually, that the petty crook will implicate his boss" if he is charged and prosecuted).

And with respect to material witness warrants (which in any event are rarely sought by prosecutors), the court of appeals tethered its ruling closely to the allegations of the complaint. *See* Pet. App. 25a-26a ("We emphasize that our holding here does not rest upon an unadorned assertion of secret, unprovable motive."); Pet. App. 27a (emphasizing the "objective indicia" that the material witness statute was used as a pretext to arrest suspects); *see generally* Pet. App. 26a-27a. [6]

[6] Among other things, the court of appeals emphasized that "Al-Kidd's arrest was sought a month *after* Al-Hussayen was indicted, and more than a year before trial began, temporally distant from the time any testimony would have been needed"; that the "FBI had previously investigated and interviewed al-Kidd, but had never suggested, let alone demanded, that he appear as a witness"; that the "FBI conducted lengthy interrogations with al-Kidd while in custody, including about matters apparently unrelated to Al-Hussayen's alleged visa violations"; and that "Al-Kidd *never actually* testified for the prosecution in Al-Hussayen's or any other case, despite his assurances that he would be willing to do so." Pet. App. 26a-27a (emphasis in original).

As the court of appeals stressed, the complaint alleged that petitioner created a *nationwide policy of deliberately misusing* the material statute as a cover to detain and investigate suspects. Nothing in the Ninth Circuit's opinion remotely suggests that a line prosecutor is now vulnerable when seeking a material witness warrant to obtain genuinely needed testimony from a recalcitrant witness.

Petitioner suggests that many of the analytical lines drawn by the Ninth Circuit lack a principled basis. *See*, *e.g.*, Pet. 20. But, for present purposes, the relevant point is that the court of appeals *did* draw those lines, thereby making clear that the type of lawsuits hypothesized by petitioner will not be permitted to go forward under the ruling in this case.

In short, there is no circuit conflict and the Court will have another opportunity to review this case should petitioner be found liable. There is no pressing need for this Court's review – especially without the benefit of a concrete factual record to narrow and sharpen the issues. And the fact-bound nature of the unique allegations in this case make this petition a poor vehicle to consider issues regarding the use of the material witness statute in routine criminal justice matters.

## II. THE NINTH CIRCUIT'S DECISION WAS CORRECT.

### A. The Court of Appeals Correctly Held that Petitioner Is Not Entitled to Absolute Immunity.

Absolute immunity is an extraordinary remedy because it shields even gross violations of clearly established constitutional rights. The Court has thus been "quite sparing" in affording prosecutors complete immunity from civil suit. *Burns v. Reed*, 500 U.S. 478, 487 (1991) (quoting *Forrester v. White*, 484 U.S. 219, 224 (1988)).

The "actions of a prosecutor are not absolutely immune merely because they are performed by a prosecutor." *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993); *see Van de Kamp v. Goldstein*, 129 S. Ct. 855 (2009). Rather, courts must first look to common-law history to determine whether a tradition of immunity exists, and if so, whether affording complete immunity is nonetheless unwarranted in light of considerations of public policy. *See Burns*, 500 U.S. at 497 (Scalia, J., concurring in the judgment in part and dissenting in part) (stating that, under the Court's absolute immunity test, a tradition of immunity is a "*necessary*" but not a "*sufficient* condition") (emphasis in original). In doing so, the courts must "examine 'the nature of the *function performed*, not the identity of the actor who performed it.'" *Kalina v. Fletcher*, 522 U.S. 118, 127 (1997) (citation omitted) (emphasis added).

Under this functional approach, prosecutors have consistently been denied absolute immunity where they are engaging in police-type functions that are "investigative in character." *Buckley*, 509 U.S. at 274; *see Kalina*, 522 U.S. at 129-31 (denying absolute immunity where prosecutor submitted an affidavit attesting to facts); *Burns*, 500 U.S. at 482, 496 (denying absolute immunity where prosecutor advised police that they had probable cause to engage in the search).

The Ninth Circuit carefully applied the Court's functional test. Under that test, it correctly held that "when a prosecutor seeks a material witness warrant in order to investigate or preemptively detain a suspect, rather than to secure his testimony at another's trial," the prosecutor is not entitled to absolute immunity. Pet. App. 25a.

Petitioner contends, however, that the court of appeals erred by looking at the reasons underlying the material witness policy. Pet. 15-18. But, because "[m]any tools and tactics available to prosecutors can serve either an investigatory or advocacy-related function," Pet. App. 24a, the approach followed by the court of appeals is fully consistent with this Court's decisions. *See, e.g.*, *Buckley*, 509 U.S. at 274-75 (conducting a "careful examination of the allegations" in the complaint to determine whether the prosecutors' "mission" and "immediate purpose" at the time they reviewed the evidence and witnesses were "investigative in character"); *id.* at 289 (Kennedy, J., concurring in part and dissenting in

part) (applying the functional approach and observing that "[t]wo actors can take part in similar conduct and similar inquiries while doing so for different reasons and to advance different functions. . . . The conduct is the same but the functions distinct.").

The court of appeals thus explained that the "functional" test "has necessarily required us to look beyond the labels a prosecutor attaches to his or her actions and examine their underlying ends." Pet. App. 23a (discussing *Buckley*). Indeed, as the court of appeals further observed, petitioner's approach "would convert the Supreme Court's functional approach into a formalistic taxonomy of acts that are inherently either prosecutorial or investigative, regardless of what each act is really serving to accomplish." Pet. App. 23a-24a.

Although some courts have granted prosecutors absolute immunity for material witness warrants, *see, e.g.*, *Daniels v. Kieser*, 586 F.2d 64 (7th Cir. 1978), in those cases there was no allegation that the prosecutor was seeking to use the material witness laws to investigate the witness for possible criminal wrongdoing, *i.e.*, engaging in functions typically carried out by law enforcement. *See* Pet. App. 18a-19a, 22a (discussing cases).[7]

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[7] Petitioner also relies on cases in which courts have granted absolute immunity even where the prosecutor's motives may have been racist, political or otherwise egregious. *See* Pet. 16-17. Here, however, the court of appeals did not hold that the Court may look at the motive behind prosecutorial acts, but

In sum, the court of appeals faithfully applied this Court's functional test and properly declined to shield petitioner's policy from all constitutional scrutiny. In doing so, the court of appeals did not restrict the use of the material witness statute to detain recalcitrant witnesses for the purpose of testifying at criminal trials, let alone the daily work of prosecutors outside of the material witness context.

### B. The Ninth Circuit Correctly Held that Petitioner Was Not Entitled to Qualified Immunity.

The Ninth Circuit correctly held that petitioner's policy violated Mr. al-Kidd's clearly established Fourth Amendment rights. Moreover, the court's qualified immunity ruling, like its ruling on absolute immunity, was narrowly focused and does not limit the day-to-day conduct of prosecutors.

1. The arrest of a material witness is unquestionably a seizure within the Fourth Amendment and traditionally a seizure must be justified by probable cause. And as this Court has repeatedly explained, the standard definition of probable cause is a "reasonable ground for belief of guilt." Pet. App. 34a (quoting *Brinegar v. United States*, 338 U.S. 160, 175 (1949)); *id.* at 32a-34a (citing additional cases).

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rather, whether those acts were prosecutorial in the first place. Pet. App. 19a.

The material witness statute is an exception to that rule: it authorizes an arrest without reason to believe the individual has violated the law. Thus, insofar as the statute is constitutional, it is only because the objective of the arrest is not to investigate and/or prosecute the individual, but to secure testimony for someone else's criminal proceeding. The court of appeals was therefore correct in concluding that Mr. al-Kidd's arrest was unlawful to the extent its objective was to detain and investigate *him* — rather than to secure testimony for the Al-Hussayen trial.

Petitioner contends that the court of appeals erred by examining the purpose of the arrest, citing *Whren v. United States*, 517 U.S. 806 (1996), for the proposition that subjective motives are irrelevant under the Fourth Amendment. Pet. 21. But, as the Ninth Circuit explained, *Whren* (unlike the arrest of an innocent witness) involved probable cause that the arrestee had *violated the law*. Pet. App. 32a ("*Whren* rejected only the proposition 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*.'") (quoting *Whren*, 517 U.S. at 811; emphasis added by Ninth Circuit).

The court of appeals further stressed that this case involves a *policy*. As the court of appeals properly recognized, the Court has declined to apply *Whren* in such cases and has looked to the "programmatic purpose" behind a policy. Pet. App.

39a ("we are not probing into the minds of individual officers at the scene; instead, we are inquiring into the programmatic purpose of a general policy"); *City of Indianapolis v. Edmond*, 531 U.S. 32, 45-47 (2000) (distinguishing *Whren* and examining "available evidence" in finding that checkpoint was used for impermissible general law enforcement purposes); *Ferguson v. City of Charleston*, 532 U.S. 67, 81-82 (2001); *see Whren*, 517 U.S. at 813 (refusing to examine subjective motivations of individual police officers).

Petitioner nonetheless contends that *Whren* should still control this case because a material witness warrant is issued by a magistrate on an individualized showing that the witness has material information that would otherwise be impracticable to secure. Pet. 22-23. But, as the Ninth Circuit stressed, the individualized showing necessary to obtain a material witness warrant bears no relation to the traditional probable-cause showing necessary for an arrest of a suspect. Pet. App. 32a-39a. And it has long been settled that a warrant issued by a magistrate may still violate the Fourth Amendment, and thus subject those who sought the warrant to civil liability. *See Malley v. Briggs*, 475 U.S. 335, 345-46 (1986). Moreover, magistrates will rarely if ever be able to discover a *hidden* government motive, much less a nationwide policy reflecting a programmatic purpose, at the time they issue the warrant (especially given that it is an *ex parte* proceeding). *Cf. Franks v. Delaware*, 438 U.S. 154 (1978).

Petitioner also contends that this case is different from *Edmond* because the "program" at issue here is the material witness statute, whereas in *Edmond* it was a "police department practice." Pet. 23. But the program at issue here is not the statute, but a policy that unconstitutionally perverts the intended use of the statute.

Indeed, the Ninth Circuit did not hold (contrary to petitioner's suggestion, Pet. 24-25) that the statute was unconstitutional, either on its face or as applied to Mr. al-Kidd. Rather, it held that *both* the Fourth Amendment and the statute itself prohibit the government from using its powers to arrest an innocent witness as a pretext for detaining and investigating suspects. Pet. App. 40a (stressing that the statute does not permit the arrest and detention of suspects "*for the purpose of criminal investigation*") (emphasis in Ninth Circuit opinion); *id*. ("Our holding does nothing to curb the use of the material witness statute for its stated purpose."); Pet. App. 113a (Smith, J., concurring in the denial of rehearing en banc) (emphasizing that the court did not hold that the statute is unconstitutional on its face or as applied to Mr. al-Kidd, but rather, that both the Fourth Amendment *and* the statute prohibit pretextual arrests of suspects, and are therefore coterminous in that regard).[8]

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[8] Thus, contrary to petitioner's statements (*see*, *e.g.*, Pet. (I), 7, 13, 20, 24, 29), the warrant in this case was not valid. Even assuming that the material witness statute's materiality and impracticability requirements were met, the position of

2. The court of appeals also properly concluded that "al-Kidd's right not to be arrested as a material witness in order to be investigated or preemptively detained was clearly established in 2003." Pet. App. 46a. As the court of appeals explained, although "no federal appellate court had yet squarely held that the federal material witness statute satisfied the requirements of the Fourth Amendment . . . [w]hat *obiter dicta* existed [in 2003] on material witness detention . . . clearly linked its justification only to the state's overriding need to compel testimony in criminal cases." Pet. App. 42a.[9]

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respondent and the Ninth Circuit is that both the Fourth Amendment and the statute prohibit a material witness arrest for the purpose of investigating a suspect, rather than for securing testimony. *See also supra* at i (counter-statement of questions presented).

[9] The court of appeals also observed that circuit decisions directly addressing petitioner's post September 11 policy would have been "almost impossible" by 2003 given the lengthy appellate process. Pet. App. 46a n.22. That is especially so where the government took steps to keep secret the nature of the policy. FAC ¶ 135. The court further noted that it was "unsurprising" that there were not more "published cases directly on point" given the extraordinary nature of petitioner's policy. Pet. App. 41a; *cf. Hope v. Pelzer*, 536 U.S. 730, 741 (2002) ("officials can still be on notice that their conduct violates established law even in novel factual circumstances"); *Groh v. Ramirez*, 540 U.S. 551, 565 & n.9 (2004) (finding law clearly established despite dissent by two Justices that there was no Fourth Amendment violation at all); *see id.* at 578 (Thomas, J., dissenting).

There was thus no basis for believing that the government could de-link its extraordinary power under the statute from the purpose of the statute – to secure testimony. And, as already noted, no court to address that question after September 11 has concluded that the pretextual use of the statute is permissible. *See supra* Section I; *Awadallah*, 349 F.3d at 59 ("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 short, petitioner's deliberate decision to authorize the pretextual arrest of witnesses was clearly unconstitutional at the time of Mr. al-Kidd's arrest. Thus, the district court and court of appeals properly denied petitioner immunity.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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