No. 06-36059

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ABDULLAH AL-KIDD,

Plaintiff-Appellee,

vs.

JOHN ASHCROFT,

Defendant-Appellant,

and

ALBERTO GONZALES, ET AL.,

Defendants.

On Appeal from the United States District Court
for the District of Idaho
The Honorable Edward J. Lodge, Presiding Judge
Case No. 1:05-cv-00093-EJL

BRIEF OF *AMICI CURIAE* FORMER FEDERAL PROSECUTORS AND OTHERS IN SUPPORT OF PLAINTIFF-APPELLEE AND IN SUPPORT OF AFFIRMANCE

JEFFREY L. BLEICH
PAUL J. KATZ
MUNGER, TOLLES & OLSON LLP
560 Mission Street, 27th Floor
San Francisco, California 94105
Telephone: (415) 512-4000
Facsimile: (415) 512-4077

CARL H. LOEWENSON, JR.
ALISON M. TUCHER
ELIZABETH O. GILL
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, California 94105
Telephone: (415) 268-7000
Facsimile: (415) 268-7522

Attorneys for Amici Curiae
[Names of Individual *Amici* Are Listed in the Appendix To This Brief]

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST OF *AMICI CURIAE* 1

INTRODUCTION 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 5

I. THE FEDERAL MATERIAL WITNESS STATUTE WAS UNCONSTITUTIONALLY APPLIED TO PLAINTIFF AL-KIDD. 5

A. Federal Prosecutors Understand that Constitutional Limits Must Inform Application of the Federal Material Witness Statute. 5

B. Al-Kidd Was Arrested and Detained Without Regard to Constitutional Constraints. 10

1. Al-Kidd's Arrest Without Probable Cause Violated His Fourth Amendment Rights. 10

2. The Conditions of al-Kidd's Detention Violated His Fifth Amendment Substantive Due Process Rights. 13

II. APPELLANT'S POLICY AND PRACTICE OF AGGRESSIVELY APPLYING THE FEDERAL MATERIAL WITNESS STATUTE AGAINST TERRORISM SUSPECTS LED TO THE FORESEEABLE CONSTITUTIONAL VIOLATIONS AT ISSUE IN THIS CASE 16

A. Appellant's Policy Directed the Use of the Federal Material Witness Statute to Arrest and Detain Terrorism Suspects When No Probable Cause Existed to Charge Those Individuals as Criminal Suspects. 16

B. It Was Foreseeable that Appellant's Policy Would Lead to a Practice of Unconstitutional Application of the Federal Material Witness Statute. 20

III. THE ATTORNEY GENERAL IS NOT ENTITLED TO IMMUNITY. 23

A. Appellant Is Not Entitled to Absolute Prosecutorial Immunity. 23

B. Appellant Is Not Entitled to Qualified Immunity. 27

IV. CONCLUSION 30

CERTIFICATE OF COMPLIANCE 31

APPENDIX OF *AMICI CURIAE* 32

TABLE OF AUTHORITIES

CASES

Application of Cochran,
434 F. Supp. 1207 (D. Neb. 1977) 7

Arnsberg v. United States,
757 F.2d 971 (9th Cir. 1984) 10

Bacon v. United States,
449 F.2d 933 (9th Cir. 1971) 7, 8

Bell v. Wolfish,
441 U.S. 520 (1979) 14

Ferguson v. City of Charleston,
532 U.S. 67 (2001) 27 n.14

Franks v. Delaware,
438 U.S. 154 (1978) ..... 11 & n.5

Genzler v. Longanbach,
410 F.3d 630 (9th Cir. 2005) 27 n.14

Goldstein v. City of Long Beach,
No. 06-55537, 2007 WL 914228
(9th Cir. Mar. 28, 2007) 26

Herb Hallman Chevrolet, Inc. v. Nash-Holmes,
169 F.3d 636 (9th Cir. 1999) 25-26

Hurtado v. United States,
410 U.S. 578 (1973) 8 n.1

Hydrick v. Hunter,
466 F.3d 676 (9th Cir. 2006) 28

Imbler v. Pachtman,
424 U.S. 409 (1976) 25

In re Application of the United States for Material Witness Warrant,
214 F. Supp. 2d 356 (S.D.N.Y. 2002) 13 n.7

Johnson v. Duffy,
588 F.2d 740 (9th Cir. 1976) 28

Jones v. Blanas,
393 F.3d 918 (9th Cir. 2004) 14, 15

KRL v. Moore,
384 F.3d 1105 (9th Cir. 2005) 25, 26

Malley v. Briggs,
475 U.S. 335 (1986) 11

Mitchell v. Forsyth,
472 U.S. 511 (1985) 24, 25

Perkins v. Click,
148 F. Supp. 2d 1177 (D.N.M. 2001) 8

Phillips v. Hust,
477 F.3d 1070 (9th Cir. 2007) 29 n.15

Sanders v. Kennedy,
794 F.2d 478 (9th Cir. 1986) 283

Torres-Ruiz v. U.S. Dist. Court,
120 F.3d 933 (9th Cir. 1997) 6 n.1

United States v. Awadallah,
202 F. Supp. 2d 55 (S.D.N.Y. 2002) 13

United States v. Awadallah,
349 F.3d 42 (2d Cir. 2003) ..... *passim*

United States v. Scott,
450 F.3d 863 (9th Cir. 2006) 27 n.14

United States v. Stein,
435 F. Supp. 2d 330 (S.D.N.Y. 2006) 28

Youngberg v. Romeo,
457 U.S. 307 (1982) 14, 15

STATUTES AND RULES

18 U.S.C.
§ 3142 5
§ 3144 ..... 5, 6, 22

Bail Reform Act of 1984, Pub. L. No. 98-473,
98 Stat. 1837 (1984) 5

OTHER AUTHORITIES

Naftali Bendavid, *Material Witness Arrests Under Fire: Dozens Detained in War on Terror*,
Chi. Trib., Dec. 24, 2001 ..... 21 n.11, 22 n.12

Steve Fainaru & Margot Williams, *Material Witness Law Has Many in Limbo: Nearly Half Held in War on Terror Haven't Testified*, Wash. Post, Nov. 24, 2002 ..... 21 n.11

Adam Liptak, *For Post-9/11 Material Witnesses, It Is Terror of a Different Kind*, N.Y. Times, Aug. 19, 2004 ..... 21 n.11

Martha Mendoza, *1 Man Still Locked Up in US from 9/11 Terror Sweeps*, Associated Press, Oct. 15, 2006 ..... 21 n.11

Scot Paltrow & Laurie P. Cohen, *Government Won't Disclose Why It Detains 200 People in Terror Probe*,
Wall St. J., Sept. 27, 2001 ..... 20 n.10

John Riley, *Held Without Charge: Material Witness Law Puts Detainees in Legal Limbo*,
Newsday, Sept. 18, 2002 ..... 21 n.11

Marisa Taylor, *FBI Reaches Out to Muslims: The Agency is Trying to Regain the Trust of the Nation's Muslim and Arab Communities, After its Post 9/11 Tactics. But Mistrust and Skepticism Persist*, Star Trib., Dec. 16, 2006 ..... 9 n.5

Witness to Abuse: Human Rights Abuses Under the Material Witness Law since September 11, Human Rights Watch Vol. 17, No. 2 (June 2005) 20 n.10

Office of the Inspector General, Department of Justice, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks*, (April 2003) 16 n.8

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici curiae, identified in the Appendix, are former federal prosecutors and others who have worked prominently on issues related to the prosecution of federal crimes. We submit this brief *amici curiae*, with the consent of the parties, in support of Plaintiff-Appellee Abdullah al-Kidd's opposition to Defendant-Appellant John Ashcroft's appeal and affirmance of the District Court's denial of Appellant's motion to dismiss.

Collectively, *amici* have had decades of experience in federal criminal prosecution, including prosecution of domestic and international terrorism. All but four *amici* are former federal prosecutors, some of whom worked in the U.S. Department of Justice, and the other four *amici* are former presidents of the American Bar Association. *Amici* are therefore familiar with both the protocols and historical practices of the Department of Justice regarding the detention and treatment of material witnesses by federal prosecutors. *Amici* submit this brief to ensure a fair presentation of the practical issues presented by this matter.

INTRODUCTION

Based on personal experience, *amici* have a unique appreciation of the value of the federal material witness statute. If used properly, the statute is an indispensable law enforcement tool, permitting prosecutors to secure essential testimony when material witnesses are unwilling to testify. Yet *amici* are also

aware of the dangers inherent in arresting and detaining individuals who are, in the eyes of the law, innocent. Great care must be taken to ensure that persons arrested and detained as material witnesses are treated throughout any arrest and detention as witnesses, unless and until probable cause exists to classify them otherwise.

Under the Department of Justice's explicit policy of using the federal material witness statute as a means of preventively arresting and detaining terrorism suspects, the critical distinction between material witnesses and criminal suspects has been blurred, and care has not been taken to ensure the protection of the particular constitutional rights of material witnesses. Because constitutional violations under this policy were foreseeable—if not expected—Appellant is not entitled to immunity, and the district court properly denied his motion to dismiss on immunity grounds.

SUMMARY OF THE ARGUMENT

While the language of the federal material witness statute is broad, federal prosecutors understand that constitutional limitations must guide the application of the statute. The arrest and detention of an individual as a material witness is no less an invasion of that individual's constitutional security and liberty interests than an arrest and detention on a criminal charge. Thus, the arrest of a material witness must be based on probable cause that the witness's testimony is material and that it

would be impracticable to secure it by subpoena, and the conditions of a material witness's detention must be commensurate with his status as a witness.

In the case of Plaintiff-Appellee Abdullah al-Kidd, the material witness statute was not applied within these constitutional bounds: according to his complaint—the allegations of which are deemed to be true for this appeal—al-Kidd's arrest lacked probable cause because he was not an unwilling witness or a flight risk, and the harsh conditions of al-Kidd's detention amounted to punishment in violation of his due process rights.

Al-Kidd's legal action was properly allowed to proceed against Appellant, former Attorney General John Ashcroft, because the unconstitutional application of the statute in al-Kidd's case was not an aberrance, attributable to individual error by a federal prosecutor. Rather, it and the numerous other reported abuses of the federal material witness statute were the foreseeable consequences of an explicit policy regarding the application of the federal material witness statute, implemented by then-Attorney General Ashcroft. As part of a larger national security policy of preventively arresting and detaining terrorism suspects, Appellant instructed federal prosecutors, as well as the FBI and others, to use the federal material witness statute to arrest and detain persons purportedly connected to terrorism. This policy was expressly designed to secure indefinite detention of persons whom the government lacked probable cause to arrest and detain as

criminal suspects, through "aggressive" application of the material witness statute. Fidelity to the specific legal requirements for detaining a person as a material witness were not addressed in these policy statements. Moreover, once detained, persons arrested as material witnesses in the anti-terrorism effort were treated not like witnesses, but like the most dangerous of criminal suspects.

Because the constitutional violations alleged by al-Kidd constituted foreseeable harm arising from Appellant's national security policy, Appellant is not immune from al-Kidd's suit. Appellant is not entitled to absolute prosecutorial immunity as his policy was implemented pursuant to his investigatory and national security functions, not pursuant to a pure prosecutorial function. Nor is Appellant entitled to qualified immunity, as his policy led to foreseeable violations of clearly established constitutional rights. *Amici* do not address the question of the district court's jurisdiction.

Amici therefore request that this Court affirm the decision of the district court denying Appellant's motion to dismiss on immunity grounds.

ARGUMENT

I. THE FEDERAL MATERIAL WITNESS STATUTE WAS UNCONSTITUTIONALLY APPLIED TO PLAINTIFF AL-KIDD.

A. Federal Prosecutors Understand that Constitutional Limits Must Inform Application of the Federal Material Witness Statute.

Federal prosecutors have broad latitude in investigating criminal activity, which may include detaining persons who are believed to have material information relating to a crime. But that latitude is not, and should not be, absolute. The federal material witness statute imposes specific statutory limits on the arrest and detention of material witnesses, and is itself limited by the constitutional constraints applicable to any arrest and detention.

The federal material witness statute was enacted in its current form as part of the Bail Reform Act of 1984. *See* Pub. L. No. 98-473, 98 Stat. 1837, 1976-81 (1984). The statute, as codified at 18 U.S.C. § 3144 and entitled "release or detention of a material witness," provides:

> 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.

18 U.S.C. § 3144. The statute contains some limitations on the detention of material witnesses—it forbids detention when testimony could be obtained by deposition, when detention is not necessary to prevent a failure of justice,[1] or where an unreasonable period of time has passed without testimony being taken.[2] The statute itself, however, provides little guidance on the standards necessary to ensure compliance with constitutional limits, such as the probable cause necessary to arrest a material witness or the permissible conditions of detention.

In enacting the material witness statute, Congress could not, and did not claim to, insulate federal prosecutors from their sworn duty to uphold the Constitution in every aspect of their professional service to this country. As this Court recognized nearly 40 years ago, mere statutory compliance with the provisions of the federal material witness statute does not "insulate the procedure

---

[1] Even when a material witness is likely to flee the jurisdiction, a deposition may substitute for live testimony. *See, e.g., Torres-Ruiz v. U.S. Dist. Court*, 120 F.3d 933, 935-36 (9th Cir. 1997

[2] *See United States v. Awadallah*, 349 F.3d 42, 60-62 (2d Cir. 2003) (holding that detention under the federal material witness statute may not be "unreasonably prolonged": "While § 3144 contains no express time limit, the statute and related rules require close institutional attention to the propriety and duration of detentions.").

by which a material witness is taken into custody from the command of the Fourth Amendment." *Bacon v. United States*, 449 F.2d 933, 942 (9th Cir. 1971).[3] Indeed, such a rule would require concluding, first, that Congress can and did fail to perform its own duty to uphold the Constitution, and, second, that Congress sought to accomplish the perverse goal of granting fewer and weaker constitutional protections to those arrested as material witnesses than to those suspected of committing actual crimes.

No court has so held. Instead, courts have concluded that persons identified as material witnesses are entitled to constitutional protections that are *at least* as robust as those to which actual criminal suspects are entitled. *See, e.g.*, *Application of Cochran*, 434 F. Supp. 1207, 1213-14 (D. Neb. 1977) ("The material witness is an innocent citizen whose right to the full enjoyment of liberty is threatened solely because of his potential usefulness as a witness for the government . . . . The material witness' interest of liberty can command no less protection than the conditional liberty interest of the parolee."); *Bacon*, 449 F.2d at 943-44 (refusing to "discard[] the requirement that probable cause be shown for the arrest and detention of a material witness" because "[t]he arrest and detention

---

[3] Contrary to Appellant's contentions, the fact that the *statutory* requirements may have been met does not alter the *constitutional* analysis. (*See, e.g.*, Brief for Appellant ("Br.") at 15 ("There is no constitutional violation in detaining a material witness if the standards of 18 U.S.C. § 3144 are satisfied[.]").

to which Bacon was subjected is just as much of an invasion of the security of her person as if she had been arrested on a criminal charge."); *Perkins v. Click*, 148 F. Supp. 2d 1177, 1183 (D.N.M. 2001) ("the arrest and detention of a potential witness is just as much an invasion of the person's security as if she had been arrested on a criminal charge").

Specifically, in reading constitutional or other limitations into material witness provisions, courts have required that individuals arrested and detained as material witnesses be treated commensurate with their status as *witnesses*.[4] This Court and every other federal court to consider the question, therefore, has imposed a probable cause requirement on the arrest of material witnesses, particular to the language of the material witness statute: "Before a material witness arrest warrant may issue, the judicial officer must have probable cause to believe (1) 'that the testimony of the person is material' and (2) 'that it may become impracticable to secure his presence by subpoena.'" *Bacon*, 449 F.2d at 943. Similarly, due process constraints on detention must be tailored to reflect the civil status of the detainee as a witness. *See Cochran*, 434 F. Supp. at 1212-17.

---

[4] The Supreme Court has held that an incarcerated material witness "is in the same position as a nonincarcerated witness" for the purpose of witness compensation during trial. *Hurtado v. United States*, 410 U.S. 578, 587 (1973).

Prosecutors fully appreciate the law enforcement value of the federal material witness statute, which give them an indispensable tool in ensuring that those whose testimony is required in a criminal prosecution are available for trial. Prosecutors also understand, however, that material witness statutes are applied in connection with the arrest and detention of persons who themselves are not suspected of having violated any law and who are consequently at greatest risk of abuse. Effective prosecutions do not require, nor can they tolerate, a system in which the persons who are relied upon to assist the government in prosecuting crimes are subjected to violations of their constitutional rights in the process.[5]

In sum, federal prosecutors are familiar with the constitutional limitations applicable to any arrest and detention, and they understand that they must apply these protections particularly rigorously to the arrest and detention of material witnesses. This is not only legally mandated; it is an essential means of ensuring respect for and cooperation with the government.

---

[5] That such abuses jeopardize the prosecutions that the arrest and detention of a material witness was meant to facilitate is borne out by articles that describe the mistrust of federal law enforcement officials by persons who could have information relevant to terrorism prosecution. *See, e.g.*, Marisa Taylor, *FBI Reaches Out to Muslims: The Agency is Trying to Regain the Trust of the Nation's Muslim and Arab Communities, After its Post 9/11 Tactics. But Mistrust and Skepticism Persist*, Star Trib., Dec. 16, 2006, at 4A. As a general matter, it is counterproductive in eliciting useful testimony to misapply legal standards and otherwise demonstrate indifference to the rights of those persons whose testimony is sought.

B. Al-Kidd Was Arrested and Detained Without Regard to Constitutional Constraints.

1. Al-Kidd's Arrest Without Probable Cause Violated His Fourth Amendment Rights.

On the facts alleged in his complaint, al-Kidd's arrest lacked the probable cause necessary for the arrest of a material witness to comport with the Fourth Amendment right against unreasonable seizure.

The affidavit prepared in support of al-Kidd's arrest failed to set forth "sufficient facts . . . to give the judicial officer probable cause to believe that it may be impracticable to secure the presence of the witness by subpoena. Mere assertion will not do." *Bacon*, 449 F.2d at 943. Courts have upheld material witness warrants only where significant recalcitrance on the part of the witness to testify has been demonstrated. For example, this Court concluded in *Arnsberg* that facts showing no more than a witness's apparent unwillingness to testify—IRS agents attempted and failed to serve the witness with a subpoena on several occasions—were "insufficient to provide probable cause for believing that Arnsberg's attendance could not be secured by subpoena" because they did not show that "Arnsberg was a fugitive or that he would be likely to flee the jurisdiction." *Arnsberg v. United States*, 757 F.2d 971, 976-77 (9th Cir. 1984).

Here, the affidavit presented no evidence that al-Kidd was reluctant to testify, or that any FBI agent had ever attempted to contact al-Kidd about

testifying. (First Amended Complaint ("FAC"), Ex. A.) The only evidence in the affidavit regarding the impracticability of securing al-Kidd's testimony by subpoena was an incorrect statement that al-Kidd was scheduled to take a one-way, first-class flight to Saudi Arabia. (FAC ¶ 13, Ex. A.) Even if this statement had been true (it was not), the affidavit failed to include the critical facts, such as whether al-Kidd would have been willing to make arrangements to testify. *See Malley v. Briggs*, 475 U.S. 335 (1986) (an official is liable under § 1983 for a Fourth Amendment violation if his application for an arrest warrant does not provide on its face an objectively reasonable basis for probable cause).

Moreover, if the affidavit is "corrected" to take into account material errors and omissions, it is clear that al-Kidd was not a flight risk and that securing his testimony by subpoena was not impracticable. *See, e.g., Franks v. Delaware*, 438 U.S. 154 (1978).[6] According to al-Kidd's complaint, the statement regarding his ticket to Saudi Arabia was erroneous: the ticket was not one-way, it was round-trip, and it was not first-class, it was coach. (FAC ¶ 14.) The affidavit also

---

[6] Under the *Franks* doctrine, the validity of a search warrant may be challenged if the affidavit in support of the warrant includes false statements or omissions that were made intentionally or recklessly. *See Franks*, 438 U.S. at 155-56; *see also Awadallah*, 349 F.3d at 64-65 (applying the *Franks* test to a material witness warrant). The question for courts is thus whether a "corrected" version of the affidavit—one that excludes the false statements and includes the facts that were omitted—would still establish probable cause. *See id.*

omitted facts that were highly relevant to the assessment of al-Kidd as a flight risk and to his willingness to testify, including the following: al-Kidd is a native-born United States citizen; his parents, wife, and child are also native-born United States citizens, who were and are living in this country; al-Kidd had willingly cooperated with the FBI in the past, voluntarily agreeing to prearranged meetings and answering extensive questions; the FBI had not contacted al-Kidd for six months, nor had they asked al-Kidd not to travel abroad; and al-Kidd had never been served with a subpoena nor even asked about his willingness to testify. (FAC ¶ 15.)

The degree to which the affidavit in this case apparently misstated the government's knowledge of, and relationship with, al-Kidd is alarming. Prior to preparing the affidavit in support of his arrest as a material witness, the FBI had conducted surveillance of al-Kidd (Br. at 5), and FBI agents had met with him on a number of occasions (FAC ¶ 15). On these facts, the FBI, as well as the prosecutor, would have known that al-Kidd had substantial ties to the United States, and that past interaction with him supported a conclusion that he was willing to cooperate—not that he was unwilling to testify or a flight risk. The

failure of the FBI agents to include any of this information should, at the very least, entitle al-Kidd to discovery on the topic.[7]

2. The Conditions of al-Kidd's Detention Violated His Fifth Amendment Substantive Due Process Rights.

The Due Process Clause prohibits the punishment of persons who have not been convicted of crimes. Al-Kidd's complaint, however, is replete with allegations of punitive detention conditions that did not comport with his civil status as a material witness. For instance, according to his complaint, al-Kidd was detained in the high-security wings of various federal prisons, alongside individuals charged or convicted of serious offenses (FAC ¶¶ 73-74, 95); he was only allowed out of his cell for one to two hours a day (FAC ¶¶ 74, 95); he was not allowed visitors (FAC ¶ 76); in one of the cells in which he was detained he was forced to sleep on the floor, next to a clogged toilet (FAC ¶ 72), and another cell in which he was detained was infested with ants and lit 24 hours a day (FAC ¶ 95); on one occasion, he was singled out from other prisoners and forced to remain naked in a holding cell in view of a female guard (FAC ¶ 86); when he was transferred between prisons, he was shackled—his hands and legs were handcuffed, and then

[7] In another case involving the post 9/11 arrest and detention of a material witness, the court became so angered at its "having been misled as the result of [governmental] misconduct" that it ordered *the government* to conduct an investigation into the issue. *In re Application of the United States for Material Witness Warrant*, 214 F. Supp. 2d 356, 362 (S.D.N.Y. 2002). In this case, al-Kidd seeks the right to investigate during pre-trial discovery.

linked to a chain around his waist (FAC ¶¶ 83, 92); and during one transfer his request was denied, unlike similar requests from other transferees, to have his handcuffs loosened (FAC ¶ 92).

Material witnesses are "entitled to more considerate treatment and conditions of confinement than criminals." *See Youngberg* v. *Romeo*, 457 U.S. 307, 321-22 (1982). "At a bare minimum, . . . [such witnesses] cannot be subjected to conditions that 'amount to punishment.'" *Jones v. Blanas*, 393 F.3d 918, 932 (9th Cir. 2004) (quoting *Bell v. Wolfish*, 441 U.S. 520, 536 (1979)). "[W]hen a civil detainee is confined in conditions identical to, similar to, or more restrictive than, those in which his criminal counterparts are held, [this Court] presume[s] that the detainee is being subjected to 'punishment.'" *Id.* In *Jones*, this Court found a presumption of punishment both when a civil detainee was placed in the general prison population subject to the "same conditions as criminal inmates," and when the detainee was later placed in a separate detention center with more restrictive conditions than those of the general prison population. *Id.* at 934. To rebut these presumptions on remand, the State could not rely on the "bare assertion" that it had complied with the "generalized statutory requirement[s]" for holding such civil detainees, because the detainee's detention appeared excessive in relation to the purposes of the statutory requirements, and could have been carried out via alternative and less harsh methods. *Id.*

Like the conditions of confinement of the civil detainee in *Jones*, al-Kidd's conditions of confinement were both similar to, and often more restrictive than, the conditions imposed on convicted criminals being held in the same facilities, and, as such, the conditions of al-Kidd's detention were presumptively punitive. Al-Kidd's transport and detention alongside charged and convicted prisoners, under procedures more unpleasant than those endured by his criminal counterparts, show he was "not afforded the 'more considerate' treatment to which he [was] constitutionally entitled as a civil detainee." *Jones*, 393 F.3d at 932 (quoting *Youngberg*, 457 U.S. at 331-32). Further, any "bare assertion" by Appellant that al-Kidd's detention complied with the requirements of the federal material witness statute is insufficient to rebut the presumption that al-Kidd's due process rights were violated because al-Kidd's alleged detention conditions were "excessive in relation to" the statute's purpose and "less harsh methods" were available to ensure his testimony at trial. *See id.* at 934-35 (citations omitted).

II. APPELLANT'S POLICY AND PRACTICE OF AGGRESSIVELY APPLYING THE FEDERAL MATERIAL WITNESS STATUTE AGAINST TERRORISM SUSPECTS LED TO THE FORESEEABLE CONSTITUTIONAL VIOLATIONS AT ISSUE IN THIS CASE.

A. Appellant's Policy Directed the Use of the Federal Material Witness Statute to Arrest and Detain Terrorism Suspects When No Probable Cause Existed to Charge Those Individuals as Criminal Suspects.

Less than two months after the September 11, 2001 terrorist attacks, the Department of Justice, at the direction of Appellant, former Attorney General John Ashcroft, implemented a new national security policy regarding the arrest and detention of terrorism suspects. Pursuant to the policy, federal prosecutors, FBI agents, and others under the Attorney General's authority were instructed to use existing federal laws, including the federal material witness statute, "aggressively" in order to "prevent future terrorism by arresting and detaining violators who have been identified as persons who participate in, or lend support to, terrorist activities." (FAC ¶ 114.)[8]

Appellant explicitly and publicly acknowledged this policy of preventively arresting and detaining terrorism suspects, as well as the role of the federal material witness statute within that policy. In an October 2001 speech, Appellant

---

[8] Office of the Inspector General, Department of Justice, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks,* at 12 (April 2003) ("OIG Report").

explained that "[i]t has been and will be the policy of this Department of Justice to use . . . aggressive arrest and detention tactics in the war on terror. . . . Our single objective is to prevent terrorist attacks by taking suspected terrorists off the street." (FAC ¶ 114 (quoting Attorney General John Ashcroft, Prepared Remarks for US Mayors Conference (Oct. 25, 2001)).) In a speech a few days later, Appellant reiterated his "aggressive arrest and detention" language, and described its rationale: "[a]ggressive detention of lawbreakers *and material witnesses* is vital to preventing, disrupting, or delaying new attacks." (FAC ¶ 117 (quoting Attorney General John Ashcroft Outlines Foreign Terrorist Tracking Task Force (Oct. 31, 2001) (emphasis added)).)

Thus, under Appellant's policy, the federal material witness statute functions not as a method of securing testimony for a criminal prosecution, but as one component of a broader national security strategy of preventively detaining and investigating all "persons who participate in, or lend support to, terrorist activities." OIG Report at 12. Effectively, then, the statute functions as an alternative means of arresting and detaining terrorism suspects when the government lacks probable cause to charge those individuals as criminal suspects.

As *amici* well know, officials within the Department of Justice are trained to respect the priorities of the Department's leadership and those who occupy supervisory positions in the Department's chain of command. Persons holding

such supervisory positions also made explicit, public, and well-publicized statements directing the use of the federal material witness statute as an alternative means of arresting and detaining terrorism suspects.[9] For example, Alberto Gonzales, then-White House Counsel, described the process by which the government evaluates a terrorism suspect as follows:

> 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 (citing February 2004 statement to the ABA Committee on Law and National Security) (emphasis added).)

The role of the statute as an alternative means of arresting and detaining terrorism suspects has also been confirmed by official measurements: the FBI reports in its results in the "war on terror" arrests and detentions pursuant to material witness warrants. During al-Kidd's detention, FBI Director Robert

---

[9] (*See, e.g.*, FAC ¶ 124 (In June 2003, David Nahmias, Counsel to the Assistant Attorney General, Criminal Division, described to the Senate Judiciary Committee how the Department of Justice would track down a hypothetical 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.").)

Mueller listed him as an example of the government's progress in the "war on terror" in testimony before Congress, along with "Khalid Shaikh Mohammed, the supposed mastermind of the September 11 attacks," and "individuals who had been criminally charged with terrorism-related offenses." (FAC ¶ 100; *see also* FAC ¶ 122 (in April 2002, Mueller stated in a speech to the Commonwealth Club of California that "a number of suspects were detained on federal, state, or local charges; on immigration violations; or *on material witness warrants*").)

Using a material witness statute as an alternative means of arresting and detaining persons who are suspected of crimes, but for whom the government lacks probable cause to arrest for those crimes, is, in our experience, unprecedented. In the course of a prosecution, it may be the case that a person identified as a material witness, or even arrested and detained as a material witness, becomes a criminal suspect. But *amici* have never invoked material witness statutes for the sole purpose of achieving the same end as the arrest and detention of criminal suspects: putting the suspects behind bars. To the extent that the use of the federal material witness statute to this end is a fundamental and explicit component of Appellant's policy of preventively arresting and detaining terrorism suspects, it is new.

B. It Was Foreseeable that Appellant's Policy Would Lead to a Practice of Unconstitutional Application of the Federal Material Witness Statute.

Events subsequent to Appellant's announced policy demonstrate both that there was a direct causal link between Appellant's preventative arrest and detention policy and the reported abuses of the material witness statute, and that this link was reasonably foreseeable.

Published reports indicate that almost immediately after Appellant announced his new policy, there was a wave of arrests and detentions under the material witness statute.[10] Common to these arrests and detentions was that the detained material witnesses—like al-Kidd—were treated as though they were terrorism suspects, as opposed to mere witnesses. The witnesses were arrested with little or no evidence that they were flight risks (see Section I.A above); they were detained for significant periods of time—al-Kidd was detained for 15 days (FAC ¶ 6), but many were detained for more than 30 days; they were interrogated during their detentions about subjects unrelated to any specific criminal

---

[10] *See, e.g.*, Scot Paltrow & Laurie P. Cohen, *Government Won't Disclose Why It Detains 200 People in Terror Probe*, Wall St. J., Sept. 27, 2001, at B1 ("[m]ore than 200 people have been taken into custody as material witnesses"). The government has refused to reveal how many individuals it has arrested as material witnesses pursuant to its post-9/11 policy, but human rights groups have concluded that at least 70 material witness arrests were made under the post-9/11 policy. *See Witness to Abuse: Human Rights Abuses Under the Material Witness Law since September 11*, Human Rights Watch Vol. 17, No. 2, at 15 (June 2005) ("HRW Report").

prosecution; they were detained in high-security facilities where they were subjected to the same treatment as the worst of criminal suspects (see Section I.B above); they were released only with stringent conditions imposed (al-Kidd was released into his wife's custody, and he was restricted to traveling to four states (FAC ¶ 9)); and they were often not subsequently asked by the government to provide testimony (al-Kidd was never asked to testify (FAC ¶ 9)).[11]

The use of the material witness statute as an alternative means of arresting and detaining terrorism suspects resulted in the treatment of those persons arrested and detained not as witnesses but as *suspects*. The constitutional limits on the material witness statute require that material witnesses be arrested, detained, and treated as *witnesses*: to the extent that certain witnesses consistently were not treated in this manner, that abusive application of the statute was a foreseeable effect of Appellant's policy.

---

[11] (FAC ¶¶ 135-136); *see generally* HRW Report, *supra* n.15. Numerous reports and articles have also addressed this treatment, including the following: Robyn Blumner, *FBI Abuses Witness Detention*, St. Petersburg Times, Oct. 14, 2001; Naftali Bendavid, *Material Witness Arrests Under Fire: Dozens Detained in War on Terror*, Chi. Trib., Dec. 24, 2001, at 1; John Riley, *Held Without Charge: Material Witness Law Puts Detainees in Legal Limbo*, Newsday, Sept. 18, 2002, at A6; Steve Fainaru & Margot Williams, *Material Witness Law Has Many in Limbo: Nearly Half Held in War on Terror Haven't Testified*, Wash. Post, Nov. 24, 2002, at A1; Adam Liptak, *For Post-9/11 Material Witnesses, It Is Terror of a Different Kind*, N.Y. Times, Aug. 19, 2004, at 1; Martha Mendoza, *1 Man Still Locked Up in US from 9/11 Terror Sweeps*, Associated Press, Oct. 15, 2006.

As the person with direct authority for oversight of the Department of Justice, Appellant would also have been expected to be aware of any reports of systematic abuse under the statute. Here, reports were widespread and public. Media coverage of the abuses, as well as commentary linking the new role of the statute to the abuses,[12] appeared as early as September 2001, and media attention to the issue did not diminish during Appellant's tenure. A report published in 2005 by Human Rights Watch and the American Civil Liberties Union and entitled "Witness to Abuse: Human Rights Abuses under the Material Witness Law since September 11" described abuses of the statute in detail. Further, federal courts raised concerns as to the treatment of individuals detained as material witnesses,[13] and the only court of appeal to squarely address the issue held 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 been

---

[12] *See, e.g.*, Bendavid, *supra* ("Federal investigators' freewheeling use of what had been a limited, precise law enforcement tool is drawing attention to the material witness statute, one of the few provisions in U.S. law that allows authorities to lock up someone not accused of a crime.").

[13] The 2002 district court opinion in the *Awadallah* case described in detail his arrest and detention as a "material witness"—including his incarceration in four prisons, in solitary confinement; his placement in shackles during transportation; and his being cut off from both family visits and telephone communication. *See United States v. Awadallah*, 202 F. Supp. 2d 55, 59-61 (S.D.N.Y. 2002), *rev'd*, 349 F.3d 42 (2d Cir. 2003). The court also noted that there was evidence supporting Awadallah's allegation of physical abuse in detention, though the court did not rule on the issue. *Id.*

established." *Awadallah*, 349 F.3d at 59. Thus, not only were abuses of the material witness statute foreseeable under Appellant's policy, but Appellant also knew or should have known about actual abuses of the statute.

Despite the widespread reporting of abuse under the statute, and despite the warnings of federal courts, Appellant did nothing to modify his directed use of the federal material witness statute as a means of preventively arresting and detaining terrorism suspects, nor did he instruct his subordinates to do so. Appellant is therefore properly imputed with knowledge of not only the risk of abuse, but also actual abuse, arising from his policy directive.

III. THE ATTORNEY GENERAL IS NOT ENTITLED TO IMMUNITY.

A. Appellant Is Not Entitled to Absolute Prosecutorial Immunity.

Appellant argues that he is entitled to absolute immunity because seeking material witness warrants is necessarily a prosecutorial function, and a policy related to the seeking of such warrants must also be by nature prosecutorial. (Br. at 17-27.) While seeking a material witness warrant may in some contexts be a prosecutorial function, the conduct of Appellant's at issue was not prosecutorial for at least two reasons, and Appellant is therefore not entitled to absolute immunity.

First, in developing and implementing the policy at issue in this case, Appellant was acting not as a traditional prosecutor, but in a broad executive

capacity distinct from his prosecutorial role. The Attorney General is the chief policymaker for many federal law enforcement entities and their respective agents—the Department of Justice and Assistant United States Attorneys ("AUSAs"), the FBI, and the Bureau of Prisons, among others—and thus, even more than most officials with prosecutorial duties, he engages in many activities outside his function as advocate for the State. Here, Appellant did not act in his prosecutorial capacity when he directed federal law enforcement agents to use the federal material witness statute preventively to arrest and detain terrorism suspects. Instead, Appellant promulgated this policy as part of a larger national security initiative, as discussed above, regardless of whether probable cause existed to believe that detaining an individual was necessary to ensure his material testimony at a government prosecution.

Over 20 years ago, the Supreme Court rejected United States Attorney General John Mitchell's argument that any action he took "in furtherance of national security" was too important and sensitive to be subject to suit. *Mitchell v. Forsyth*, 472 U.S. 511, 521 (1985). The case involved Mitchell's authorization of an FBI wiretap of individuals the government suspected of terrorism, and, after comparing Mitchell's conduct to actions taken in a prosecutorial capacity, the Court denied Mitchell's immunity claim, holding: "The danger that high federal officials will disregard constitutional rights in their zeal to protect the national

security is sufficiently real to counsel against affording such officials an absolute immunity." *Id.* at 523.

Appellant's issuance of the policy directive to use the federal material witness statute "to prevent terrorist attacks" (FAC ¶ 117) was no less a performance of a "national security function" than Mitchell's wiretap authorization. *Mitchell*, 472 U.S. at 521-23. Indeed, Appellant himself has characterized his preventative arrest and detention policy, a key component of which was use of the material witness statute against terrorism suspects, as a "step" taken by the Department of Justice "to enhance our ability to protect the United States from the threat of terrorist aliens." (FAC ¶ 117.) Under *Mitchell*, therefore, Appellant's action is outside the scope of absolute immunity.

Second, Appellant's policy of using the material witness statute to arrest and detain terrorism suspects, even when carried out by prosecutors, served an investigatory, not a prosecutorial, function. Prosecutors are entitled to absolute immunity only when they perform functions that are "'intimately associated with the judicial phase of the criminal process.'" *KRL v. Moore*, 384 F.3d 1105, 1110-11 (9th Cir. 2005) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976)). Prosecutors' performance of "investigative functions," however, does not entitle them to absolute immunity. *See id.* at 1112-13; *see also Herb Hallman Chevrolet,*

Inc. v. Nash-Holmes, 169 F.3d 636, 642 (9th Cir. 1999) ("A prosecutor may only shield his investigative work with qualified immunity.").

Appellant's policy directing prosecutors to use the federal material witness statute, in al-Kidd's case as well as the other cases, was investigatory in nature. *See Goldstein v. City of Long Beach*, No. 06-55537, 2007 WL 914228, at *5 (9th Cir. Mar. 28, 2007) (declaring that "the critical factor remains the nature of the challenged policy and whether it falls within a prosecutor's judicial function or, instead, is part of a prosecutor's exercise of administrative or investigative functions") (internal quotation omitted). As demonstrated by the evidence recited above—individuals were arrested as material witnesses long before any criminal proceeding took place (as was true of al-Kidd (FAC ¶ 106)); they were detained for significant periods of time, during which they were interrogated about subjects unrelated to any specific criminal prosecution; and the testimony for which they were arrested and detained was often never sought by deposition or in any criminal proceeding (as was also true of al-Kidd (FAC ¶ 106))—federal prosecutors were nowhere near the "judicial phase of the criminal process" when they sought material witness warrants under Appellant's policy. *See KRL*, 384 F.3d at 1113-14 (gathering evidence to uncover new crimes, collateral to an existing arrest, does not merit absolute immunity).

Moreover, the Department of Justice has described its practice of aggressively applying the federal material witness statute as "an important *investigative* tool in the war on terrorism." (FAC ¶ 121); Steve Fainaru & Margot Williams, *Material Witness Law Has Many in Limbo*, Wash. Post, Nov. 24, 2002 (quoting Michael Chertoff, then head of the Department of Justice's Criminal Division) (emphasis added). Thus, even in his capacity as supervisor of the AUSAs who sought material witness warrants, including the AUSA who sought the material witness warrant against al-Kidd (at the behest of the FBI), Appellant is still not entitled to absolute immunity.[14]

B. Appellant Is Not Entitled to Qualified Immunity.

Appellant may be held liable for constitutional harms resulting from his preventive arrest and detention policy. An official is not entitled to qualified immunity for the foreseeable, unconstitutional effects of his supervisory conduct: "The requisite causal connection [for finding a supervisor liable under § 1983] can be established not only by some kind of direct personal participation in the

---

[14] Appellant's brief conflates "motive" and "function." (*See* Br. at 23-27.) The district court correctly divined the function of this policy from the facts surrounding the policy, *see Genzler v. Longanbach*, 410 F.3d 630, 638-43 (9th Cir. 2005), and did not purport to analyze Ashcroft's subjective mindset, *cf. United States v. Scott*, 450 F.3d 863, 869 (9th Cir. 2006) (distinguishing, in the "special needs" search context, between the prohibited inquiry into an officer's subjective mindset and the required inquiry into the government's programmatic purpose by "'consider[ing] all the available evidence'" (quoting *Ferguson v. City of Charleston*, 532 U.S. 67, 81 (2001)).

deprivation, but also by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury." *Johnson v. Duffy*, 588 F.2d 740, 743-44 (9th Cir. 1976); *see also Hydrick v. Hunter*, 466 F.3d 676, 689 (9th Cir. 2006). Supervisory liability may accrue when a supervisor implements a policy that leads to the foreseeable deprivation of constitutional rights. *Sanders v. Kennedy*, 794 F.2d 478, 482-83 (9th Cir. 1986).

Because al-Kidd's arrest and detention violated his clearly established constitutional rights and such violations were foreseeable effects of Appellant's policy, Appellant is not entitled to qualified immunity. The Department of Justice depends upon a chain of command, with the Attorney General at the top of the chain. His policies have a direct effect on the actions taken by federal law enforcement agents. When the Attorney General directs his subordinates to adopt particular procedures, it is therefore foreseeable that they will do so, even if those procedures improperly impinge on individuals' constitutional rights. *See United States v. Stein*, 435 F. Supp. 2d 330, 352-53 (S.D.N.Y. 2006) (concluding that the Deputy United States Attorney General's change in policy regarding how to decide whether to indict a corporation directly caused federal prosecutors to deprive executives of their due process right to a fair trial by pressuring their employer to cut off legal fees and expenses).

As discussed in Sections I and II above, the complaint alleges that Appellant developed and implemented a policy of using the federal material witness statute to preventively arrest and detain terrorism suspects and that the policy caused the unconstitutional application of the statute to Plaintiff al-Kidd. Al-Kidd was seized without the probable cause required for a legal arrest under the Fourth Amendment (FAC ¶¶ 48-64), and was subjected to punitive conditions in detention in violation of his Fifth Amendment due process rights (FAC ¶¶ 70-100)—both clearly established constitutional rights, as discussed in Section I.B above.[15] Because these alleged constitutional injuries were foreseeable effects of Appellant's policy, dismissal would be improper at this early stage.

---

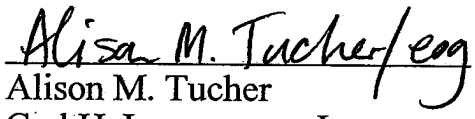
[15] Although Appellant's policy used the material witness statute in an unprecedented way, as explained in Part II.A, federal prosecutors are well aware of the constitutional limitations applicable to the arrest and detention of material witnesses, as explained in Part I.A. *See Phillips v. Hust*, 477 F.3d 1070, 1079-80 (9th Cir. 2007) (finding that an official is not entitled to qualified immunity simply because he violates a clearly established right in a way not specifically proscribed by prior case law).

IV. CONCLUSION

For these reasons, *amici* respectfully submit that this Court should affirm the decision of the district court denying Defendant-Appellant's motion to dismiss on immunity grounds.

Dated: June 13, 2007

Respectfully submitted,



Alison M. Tucher
Carl H. Loewenson, Jr.
Elizabeth O. Gill
Morrison & Foerster LLP
425 Market Street
San Francisco, CA 94105-2482
Telephone: (415) 268-6902
Facsimile: (415) 268-7522

and

Jeffrey L. Bleich
Paul J. Katz
Munger, Tolles & Olson LLP
560 Mission Street, 27th Floor
San Francisco, California 94105
Telephone: (415) 512-4000
Facsimile: (415) 512-4077

Attorneys for Amici Curiae

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, *Amici Curiae* hereby certify that the attached Brief is proportionately and has a typeface of 14 points. The brief, excluding this Certificate of Compliance, the cover page, the Table of Contents, the Table of Authorities, the Statement of Related Cases, the Corporate Disclosure Statement, and the Proof of Service, contains 6969 words based on a count by the word processing system at Morrison & Foerster LLP.

Dated: June 13, 2007

By: Alison M. Tucher /eog
Alison M. Tucher

Appendix of *Amici Curiae*

Talbot D'Alemberte served as President of the American Bar Association between 1991 and 1992, a position that involves extensive exposure to as well as formulation of criminal law policy.

Joel M. Cohen served as an Assistant U.S. Attorney in the Eastern District of New York between 1992 and 1999, and as a supervisor of that Office's Business/Securities Fraud Section between 1997 and 1999.

W. Thomas Dillard served as the United States Attorney for the Northern District of Florida between 1983 and 1987; he also served as an Assistant U.S. Attorney for the Eastern District of Tennessee between 1966 and 1975, and as that Office's Chief Assistant U.S. Attorney between 1978 and 1983 and Acting U.S. Attorney in 1981. Between 1976 and 1978, he served as a United States Magistrate Judge.

Miles Ehrlich served as a Trial Attorney in the Public Integrity Section, U.S. Department of Justice, between 1994 and 2000; he also served as an Assistant U.S. Attorney for the Northern District of California between 2000 and 2005, and as Chief of that Office's White Collar Crime Section between 2003 and 2005.

Stephen P. Freccero served as an Assistant U.S. Attorney for the Northern District of California between 1989 and 1998, and as Special Attorney to Attorney General Janet Reno between 1996 and 1998.

Michael S. Greco served as President of the American Bar Association between 2005 and 2006, a position that involves extensive exposure to as well as formulation of criminal law policy.

Robert J. Grey, Jr. served as President of the American Bar Association between 2004 and 2005, a position that involves extensive exposure to as well as formulation of criminal law policy.

R. William Ide served as the President of the American Bar Association between 1993 and 1994, a position that involves extensive exposure to as well as formulation of criminal law policy.

Edward P. Lazarus served as an Assistant U.S. Attorney for the Central District of California between 1997 and 2000, and as a member of that Office's Criminal Appeals Section.

Carl H. Loewenson served as an Assistant U.S. Attorney for the Southern District of New York between 1985 and 1990.

Aaron R. Marcu served as an Assistant U.S. Attorney for the Southern District of New York between 1983 and 1989, and as that Office's Chief Appellate Attorney between 1986 and 1988, Chief of the Major Crimes Unit between 1988 and 1989, and Associate U.S. Attorney in 1989.

Nancy Northup served as an Assistant U.S. Attorney for the Southern District of New York between 1989 and 1996, and as that Office's Deputy Chief Appellate Attorney between 1994 and 1996.

Ismail Ramsey served as an Assistant U.S. Attorney for the Northern District of California between 1999 and 2003.

James K. Robinson served as the United States Attorney for the Eastern District of Michigan between 1977 and 1980, and as Assistant Attorney General in charge of the Criminal Division, U.S. Department of Justice, between 1998 and 2001.

Jonathan Shapiro served as an Assistant U.S. Attorney for the Central District of California between 1990 and 1998.

Neal R. Sonnett served as an Assistant U.S Attorney for the Southern District of Florida between 1967 and 1972, and as that Office's Chief of the Criminal Division between 1971 and 1972.

Bart H. Williams served as an Assistant U.S. Attorney for the Central District of California between 1991 and 1994.

CERTIFICATE OF SERVICE

I declare that I am employed with the law firm of Morrison & Foerster LLP, whose address is 425 Market Street, San Francisco, California 94105-2482. I am not a party to the within cause, and I am over the age of eighteen years.

I further declare that on June 13, 2007, I served a copy of:

BRIEF OF *AMICI CURIAE* FORMER FEDERAL PROSECUTORS AND OTHERS IN SUPPORT OF PLAINTIFF-APPELLEE AND IN SUPPORT OF AFFIRMANCE

☒ **BY FACSIMILE, [Fed. Rule Civ. Proc. rule 5(b)]** by sending a true copy from Morrison & Foerster LLP's facsimile transmission telephone number 415.268.7522 to the fax number(s) set forth below, or as stated on the attached service list. The transmission was reported as complete and without error. The transmission report was properly issued by the transmitting facsimile machine.

I am readily familiar with Morrison & Foerster LLP's practice for sending facsimile transmissions, and know that in the ordinary course of Morrison & Foerster LLP's business practice the document(s) described above will be transmitted by facsimile on the same date that it (they) is (are) placed at Morrison & Foerster LLP for transmission.

☒ **BY U.S. MAIL [Fed. Rule Civ. Proc. rule 5(b)]** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, addressed as follows, for collection and mailing at Morrison & Foerster LLP, 425 Market Street, San Francisco, California 94105-2482 in accordance with Morrison & Foerster LLP's ordinary business practices.

I am readily familiar with Morrison & Foerster LLP's practice for collection and processing of correspondence for mailing with the United States Postal Service, and know that in the ordinary course of Morrison & Foerster LLP's business practice the document(s) described above will be deposited with the United States Postal Service on the same date that it (they) is (are) placed at Morrison & Foerster LLP with postage thereon fully prepaid for collection and mailing.

Matthew M. Collette Appellate Staff Civil Division, Room 7212 Department of Justice Washington, D.C. 20530-0001 (202) 514-4214 (202) 514-9405 Fax *(by Facsimile and U.S. Mail)*	**Lucas Guttentag** **Robin Goldfaden** American Civil Liberties Union Foundation Immigrants' Rights Project 39 Drumm Street San Francisco, CA 94111 (415) 343-0770 (415) 395-0950 Fax *(by Facsimile and U.S. Mail)*

Robert M. Loeb Appellate Staff Civil Division, Room 7212 Department of Justice Washington, D.C. 20530-0001 (202) 514-4332 (202) 514-9405 Fax *(by Facsimile and U.S. Mail)*	**Jack Van Valkenburgh** American Civil Liberties Union Foundation of Idaho P.O. Box 1897 Boise, ID 83701 (208) 344-9750 (208) 344-7201 Fax *(by U.S. Mail)*
Peter D. Keisler Assistant Attorney General Department of Justice Washington, D.C. 20530-0001 *(by U.S. Mail)*	**R. Keith Roark** The Roark Law Firm, LLP 409 N. Main Street Hailey, ID 83333 (208) 788-2427 (208) 788-3918 Fax *(by U.S. Mail)*
Jonathan F. Cohn Deputy Assistant Attorney General Department of Justice Washington, D.C. 20530-0001 *(by U.S. Mail)*	**Michael J. Wishnie** Yale Law School P.O. Box 209090 New Haven, CT 06520 (203) 436-4780 (Cooperating Counsel for the ACLU) *(by U.S. Mail)*
C. Frederick Beckner III Deputy Assistant Attorney General Department of Justice Washington, D.C. 20530-0001 *(by U.S. Mail)*	**Cynthia Woolley** Law Offices of Cynthia J. Woolley, PLLC P.O. Box 6999 180 First St. West, Suite 107 Ketchum, ID 83340 (208) 725-5356 (208) 725-5569 Fax *(by U.S. Mail)*
Lee Gelernt **Alice Clapman** American Civil Liberties Union Foundation Immigrants' Rights Project 125 Broad Street, 18th Floor New York, NY 10004-2454 (212) 549-2660 (212) 549-2654 Fax (*by Facsimile and U.S. Mail*)	**Kathleen J. Elliott** **Teresa A. Hampton** Hampton & Elliott 912 North 8th Street Boise, ID 83302 (208) 384-5456 (208) 384-5476 Fax *(by U.S. Mail)*

I declare under penalty of perjury that the foregoing is true and correct.

Executed at San Francisco, California, this 13th day of June, 2007.

Ruby M. Lim
(typed)

(signature)