No. 10-98

IN THE

Supreme Court of the United States

JOHN D. ASHCROFT,
Petitioner,
v.

ABDULLAH AL-KIDD,
Respondent.

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

BRIEF OF WILLIAM P. BARR, BENJAMIN R. CIVILETTI, EDWIN MEESE III, MICHAEL B. MUKASEY, DICK THORNBURGH, AND WASHINGTON LEGAL FOUNDATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302
rsamp@wlf.org

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QUESTIONS PRESENTED

Respondent was arrested on a material witness warrant issued by a federal magistrate judge under 18 U.S.C. § 3144 in connection with a pending prosecution. He later filed a *Bivens* action against Petitioner, the former Attorney General of the United States, seeking damages for his arrest. Respondent alleged that his arrest resulted from the former Attorney General's alleged policy of using the material witness statute as a "pretext" to investigate and preventively detain terrorism suspects. The Petition presents two questions; *amici curiae* address the following question only:

Whether the court of appeals erred in denying Petitioner qualified immunity from the pretext claim based on the conclusions that (a) the Fourth Amendment prohibits an officer from executing a valid material witness warrant with the subjective intent of conducting further investigation or preventively detaining the subject; and (b) this Fourth Amendment rule was clearly established at the time of Respondent's arrest.

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INTERESTS OF *AMICI CURIAE*

The *amici curiae* are five former Attorneys General of the United States and a public interest law firm.[1] They believe that the qualified immunity doctrine provides important legal protections to federal government officials; it allows officials to perform their duties without the distracting prospect of having to defend damages claims filed against them in their personal capacity. They are concerned that the decision below restricts that doctrine to such an extent that government officials will be unable to win pre-discovery dismissal of constitutional claims. *Amici* also filed a brief in support of the petition for a writ of certiorari in this case.

Although this brief does not address the absolute immunity issue, *amici* fully support Petitioner's argument that the Complaint should also be dismissed on grounds of absolute immunity. They deem it vital that government officials be granted immunity from suit whenever they are carrying out prosecutorial functions.

The Honorable William P. Barr served as Attorney General of the United States from 1991 to 1993. He also served as Assistant Attorney General for the Office of Legal Counsel from 1989 to 1990 and Deputy Attorney General from 1990 to 1991.

The Honorable Benjamin R. Civiletti served as

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of this brief; letters of consent have been lodged with the clerk.

Attorney General of the United States from 1979 to 1981. He also served as Assistant Attorney General for the Criminal Division from 1977 to 1978 and as Deputy Attorney General from 1978 to 1979.

The Honorable Edwin Meese III served as Attorney General of the United States from 1985 to 1988. He also served as Counselor to President Ronald Reagan from 1981 to 1985.

The Honorable Michael B. Mukasey served as Attorney General of the United States from 2007 to 2009. From 1988 to 2006, he served as a federal judge on the U.S. District Court for the Southern District of New York, serving as Chief Judge from 2000 to 2006.

The Honorable Dick Thornburgh served as Attorney General of the United States from 1988 to 1991. He also served as Assistant Attorney General for the Criminal Division from 1975 to 1977 and Governor of Pennsylvania from 1979 to 1987.

The Washington Legal Foundation is a public interest law and policy center with supporters in all 50 States. It regularly appears in this and other federal courts to support the litigation immunity rights of public officials.

STATEMENT OF THE CASE

The material witness statute, 18 U.S.C. § 3144, permits a judicial officer to order an individual's arrest, provided that a party's affidavit makes two showings: (1) the person's testimony is material to a criminal proceeding; and (2) it may become impractical to secure

the person's presence at the criminal proceeding by subpoena.[2]

Respondent Abdullah Al-Kidd is an American citizen who was detained for a period of 15 days in March 2003 pursuant to the material witness statute. As the court of appeals recognized, Al-Kidd's constitutional claim acknowledges that an impartial magistrate judge determined that prosecutors made both of the requisite showings under § 3144. Pet. App. 14a (stating that the complaint concedes that Al-Kidd's circumstances "may have met the facial statutory requirements of § 3144."). Indeed, it is largely uncontested that: (1) Al-Kidd had numerous ties to Omar Al-Hussayen, a citizen of Saudi Arabia who, at the time of Al-Kidd's arrest, was under indictment for multiple false statements and visa-fraud offenses; and (2) Al-Kidd was arrested at Dulles International Airport as he was preparing to fly to Saudi Arabia for an extended period of study, and thus federal prosecutors might have had difficulty procuring his presence at Al-Hussayen's trial through use of a subpoena.

In March 2005, Al-Kidd filed suit against numerous federal government officials, including Petitioner John Ashcroft (who was serving as Attorney

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[2] Section 3144 provides in relevant part:

> 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 impractical 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.

General at the time of Al-Kidd's arrest), seeking to recover damages for alleged violation of his rights under § 3144 and the Fourth Amendment.[3]

Only one aspect of Al-Kidd's claims is relevant to issues now before the Court. Al-Kidd asserted that, in response to the September 11, 2001, terrorist attacks, Ashcroft and the Justice Department developed a policy of aggressive, "pretextual" use of the material witness statute in connection with terrorism investigations. The policy allegedly entailed using the statute to investigate and detain terrorism suspects whom the government lacked probable cause to charge criminally. While those arrested might well have met § 3144's prerequisites, the alleged policy authorized arrests even where prosecutors had little thought of calling the individual as a witness in ongoing proceedings and the primary motivation for the arrest was to investigate and detain the individual. Al-Kidd alleged that his arrest entailed just such "pretextual" use of the material witness statute. He alleged that his arrest violated the Fourth Amendment because it was primarily motivated by a desire to investigate him as a terrorism suspect, even though prosecutors lacked probable cause to believe that he had committed a crime.

Other aspects of Al-Kidd's claims are not relevant to issues before the Court. First, Al-Kidd asserted that FBI agents Scott Mace and Michael Gneckow included

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[3] Other defendants included FBI Director Robert Mueller, Michael Chertoff (who in March 2003 was serving as Assistant Attorney General in charge of the Justice Department's Criminal Division), and the two FBI agents who prepared the affidavit in support of the warrant application.

deliberately false statements in the affidavit submitted in support of the request for the material witness arrest warrant, and deliberately omitted material information. Al-Kidd initially asserted that many of the defendants, including Ashcroft, should be held liable for the allegedly false statements and material omissions. He asserted that the defendants' actions violated his Fourth Amendment rights (as well as his rights under § 3144) not to be detained on a warrant based on an agent's deliberate or reckless misrepresentations or omissions. The Ninth Circuit upheld Al-Kidd's right to proceed against Ashcroft based on the deliberate-false-statement claim. Pet. App. 47a-56a. However, in his response to the Petition, Al-Kidd stated that he has abandoned the claim with respect to Ashcroft, Respondent Cert. Br. at 21, and the Court did not grant review of the issue (Question 3 of the Petition).

Second, Al-Kidd asserted that the conditions of his 15-day confinement violated his constitutional rights. The Ninth Circuit held that the conditions-of-confinement claim should be dismissed with respect to Ashcroft because the complaint did not adequately plead his direct involvement in the issue. Pet. App. 59a. Al-Kidd did not seek review of that holding.

The individual defendants responded to the complaint by filing motions to dismiss. All of the motions were denied. Only Ashcroft filed an interlocutory appeal from the denial; the appeal asserted that dismissal was warranted on grounds of absolute and qualified immunity.

A divided Ninth Circuit panel affirmed. Pet. App. 1a-64a. The appeals court held that the complaint

concerned Ashcroft's performance of an investigatory function and that absolute immunity claims could be asserted by prosecutors only when they engage in activities associated with the judicial phase of the criminal process, not when (as alleged here) they are undertaking investigations. *Id.* at 14a-27a.

The appeals court also rejected Ashcroft's assertion that the qualified immunity doctrine required dismissal of the Fourth Amendment "pretextual use" claim. *Id.* at 30a-47a. The court held that Ashcroft could be subject to Fourth Amendment liability under a theory that he "set in motion a policy and/or practice" that caused Justice Department personnel to arrest individuals under the material witness statute where their real purpose in doing so was to hold the individuals preventively or to investigate further. *Id.* at 30a. The court cited *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), for the proposition that a government program violates the Fourth Amendment if: (1) its primary purpose is to conduct criminal investigations; and (2) it entails the seizure of individuals without probable cause to believe that they have committed a criminal offense. *Id.* at 36a-39a.

The appeals court held that qualified immunity was unwarranted because the unconstitutionality of Ashcroft's actions was "clearly established" at the time of Al-Kidd's arrest. Pet. App. 40a-47a. Although it conceded that in March 2003 "no case had squarely confronted" the constitutionality of "pretextual" use of the material witness statute, *id.* at 41a, the court held that *Edmond* and similar cases "put Ashcroft on notice" that "investigatory programmatic purpose would invalidate a scheme of searches and seizures without

probable case." *Id.* at 43a.

Judge Bea dissented from all aspects of the majority decision discussed above. *Id.* at 64a-105a. He asserted that Ashcroft was entitled to qualified immunity on the "pretextual use" claim because: (1) under the Fourth Amendment, an arresting officer's "subjective intentions are irrelevant so long as the officer's conduct is objectively justified," and Al-Kidd did not dispute that the objective criteria set forth in § 3144 were satisfied in his case, *id.* at 70a-71a; and (2) even if Al-Kidd's arrest on a pretextual material witness warrant violated his Fourth Amendment rights, such rights were not "clearly established" in March 2003. *Id.* at 84a. He also disagreed with most aspects of the majority's holding that Ashcroft was not entitled to absolute immunity. *Id.* at 92a-104a.

In March 2010, the appeals court denied Ashcroft's petition for rehearing en banc. *Id.* at 106a. Judge O'Scannlain, joined by seven other judges, issued an opinion dissenting from the denial. *Id.* at 122a-131a.

SUMMARY OF ARGUMENT

Qualified immunity not only provides government officials with a defense to liability, it also is "an entitlement not to stand trial or face *the other burdens of litigation.*" *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (emphasis added). The Court has made clear that the "driving force" behind creation of the qualified immunity doctrine was a desire to ensure that "'insubstantial claims' [will] be resolved prior to discovery." *Anderson v. Creighton*, 483 U.S. 635, 640 n.2 (1987). Yet the decision below calls into question

the ability of high-level Executive Branch officials ever to prevail on a qualified immunity defense raised at the pleadings stage of a *Bivens* action. As former senior Executive Branch officials, the individual *amici curiae* are concerned about the disruptive effects of such discovery, and they fear that the decision below may deter Attorneys General from exercising the full range of their lawful authority to protect the security of the United States. The qualified immunity doctrine was designed to prevent such disruptions, especially when (as here) the challenged actions involve sensitive national security issues.

Particularly troubling is the Ninth Circuit's holding that the unconstitutionality of Ashcroft's conduct was "clearly established" at the time of Al-Kidd's arrest in March 2003. The appeals court conceded that it could point to no reported decision holding that an objectively valid material witness warrant could violate the Fourth Amendment merely because the prosecutor's primary motivation was preventive detention or to investigate the defendant. Its "clearly established" conclusion was based on little more than a generalized assertion that Ashcroft should have known in 2003 that the Fourth Amendment prohibits unreasonable searches and seizures. Pet. App. 43a ("[T]he history and purposes of the Fourth Amendment were known well before 2003.") But if courts permit the "clearly established" require-ment to be viewed at that high level of generality, the qualified immunity doctrine will be robbed of much of its vitality. As Judge O'Scannlain stated in his dissent, "If [awareness of Fourth Amendment history] is sufficient clearly to establish how the Fourth Amendment applies in a particular setting, then how can *any* Fourth

Amendment rule ever *not* be 'clearly established?'" *Id.* at 128a (emphasis in original).

Moreover, the appeals court decision effectively declares the material witness statute unconstitutional, at least as applied to Al-Kidd. Given the centuries-long pedigree of that statute, there is little historical support for the assertion that the drafters of the Fourth Amendment intended to prevent the detention of witnesses for whom the government lacks sufficient evidence of wrongdoing. The material witness statute is an extremely important tool in enforcing the criminal law. The appeals court decision inevitably will cause prosecutors to be more reluctant to make use of the statute out of fear that such use could lead to a lawsuit requesting a monetary judgment against the prosecutors in their personal capacities. Ironically, reduced use of the material witness statute could work to the detriment of those under investigation; § 3144 includes provisions that afford far greater procedural protections to individuals than do alternative tools available to federal authorities.

ARGUMENT

I. THE DECISION BELOW THREATENS THE ABILITY OF FEDERAL OFFICIALS TO PREVAIL AT THE PLEADINGS STAGE ON A QUALIFIED IMMUNITY DEFENSE

The Court has long recognized that significant burdens are imposed on government officials when they are required to defend damages claims filed against them in their individual capacities for actions taken in connection with their employment. As the Court

explained in *Harlow*:

> Each such suit [against high-level government officials] almost invariably results in these officials and their colleagues being subjected to extensive discovery into traditionally protected areas, such as their deliberations preparatory to the formulation of government policy and their intimate thought processes and communications at the presidential and cabinet levels. Such discover[y] is wide-ranging, time-consuming, and not without considerable cost to the officials involved.

Harlow v. Fitzgerald, 457 U.S. 800, 817 n.29 (1982).

The burdens can be particularly pronounced among officials working on national security matters, where the high level of public passion can result in increased levels of litigation. As Justice Stevens explained:

> The passions aroused by matters of national security and foreign policy and the high profile of Cabinet officers with functions in that area make them "easily identifiable [targets] for suits for civil damages." *Nixon v. Fitzgerald*, 457 U.S. [731,] 753 [(1982)]. Persons of wisdom and honor will hesitate to answer the President's call to serve in these vital positions if they fear that vexatious and politically motivated litigation associated with their public decisions will squander their time and reputation, and sap their personal financial resources when they leave office. The multitude of lawsuits filed against

> high officials in recent years only confirms the rationality of this anxiety. The availability of qualified immunity is hardly comforting when it took 13 years for the federal courts to determine that the plaintiff's claim in this case was without merit.

Mitchell, 472 U.S. at 541-42 (Stevens, J., concurring in the judgment).

Events proved Justice Stevens prescient. Lawsuits seeking damages from senior Executive Branch officials for actions they took regarding national security matters proliferated throughout the administrations of Presidents Bill Clinton and George W. Bush. In many instances, federal courts denied motions urging dismissal based on qualified immunity claims, and the officials involved were required to devote years to fending off the claims for damages. *See, e.g., Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) (suit against Attorney General and FBI Director regarding detention of aliens arrested in connection with 9/11 investigation); *Turkmen v. Ashcroft*, 589 F.3d 542 (2d Cir. 2009) (same); *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009) (suit against Attorney General, Secretary of Homeland Security, and FBI Director regarding rendition to Syria of citizen of Syria and Canada), *cert. denied*, 130 S. Ct. 2d 3409 (2010); *Rasul v. Myers*, 563 F.3d 527 (D.C. Cir. 2008) (suit against Secretary of Defense regarding treatment of enemy combatants held at Guantanamo Bay, Cuba), *cert. denied*, 130 S. Ct. 1030 (2010); *Gonzalez v. Reno*, 325 F.3d 1228 (11th Cir. 2003) (suit against Attorney General arising from execution of an arrest warrant for six-year-old Elian Gonzalez); *Vance v. Rumsfeld*, 694 F. Supp. 2d 957 (N.D. Ill. 2010) (suit against Secretary of

Defense regarding treatment of enemy combatants in Iraq). The proliferation of such suits is a strong indication that, as currently understood by the lower federal courts, the qualified immunity doctrine is not serving to provide government officials with the protections against litigation burdens that this Court intended to provide.

A. The Qualified Immunity Doctrine Was Crafted to Reduce the Burden on Government Officials of Defending Against Damages Claims

In an effort to reduce the litigation burden of government officials, the Court has crafted a qualified immunity doctrine designed to provide government officials with not only a defense to liability but also an "immunity from suit." *Mitchell*, 472 U.S. at 526. The "driving force" behind creation of the doctrine was a desire to ensure that "insubstantial claims [will] be resolved prior to discovery." *Anderson*, 483 U.S. at 640 n.2. *See also Saucier v. Katz*, 533 U.S. 194, 200 (2001) ("Where the defendant seeks qualified immunity, a ruling on that issue should be made early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive."); *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) ("[W]e repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation.").

Qualified immunity shields a government official from liability in an individual capacity so long as the official has not violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. To overcome the

defense of qualified immunity the plaintiff must show: (1) the facts, viewed in the light most favorable to the plaintiff, demonstrate the deprivation of a statutory or constitutional right; and (2) the right was clearly established at the time of the deprivation. *Saucier*, 533 U.S. at 199. Court are "permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson v. Callahan*, 555 U.S. 223, ___, 129 S. Ct. 808, 818 (2009). *Amici* submit that the Ninth Circuit's error is particularly clear with respect to the second prong – whether the asserted right was "clearly established" – and thus urge the Court to focus on that aspect of the decision below.

B. Under the Ninth Circuit's Ruling, Virtually Every Alleged Violation Will Be Deemed "Clearly Established"

The Ninth Circuit conceded that it could point to no reported decision whose holding directly supported its conclusion: that an objectively valid material witness warrant could violate the Fourth Amendment merely because the prosecutor's primary motivation was preventive detention or to investigate the defendant. In determining that it was "clearly established" that such "pretextual" use of § 3144 violated the Fourth Amendment, the appeals court could point to little more than the lengthy Fourth Amendment history of requiring the government (in most instances) to have probable cause to believe that an individual has committed a criminal offense before arresting the individual. Pet. Ap. 42a-45a.

If that history were sufficient to meet the "clearly established" requirement, then it would be exceedingly difficult for a government official to demonstrate that any Fourth Amendment rule is not clearly established. Indeed, it would suggest that the unconstitutionality of the material witness statute itself is "clearly established," even though that statute has been used throughout American history to detain individuals who the government has no reason to believe have committed a criminal offense.[4]

Moreover, the Ninth Circuit's "clearly established" finding is undercut by the numerous decisions of this Court that have recognized exceptions to the general proposition that "[a] search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing." *Edmond*, 531 U.S. at 37. *See, e.g., City of Ontario v. Quon*, 130 S. Ct. 2619 (2010) (upholding suspicionless searches of government employee pager messages, to determine the efficacy of monthly limits on the number of free messages); *Illinois v. Lidster*, 540 U.S. 419 (2004) (upholding suspicionless seizure of motorists at highway checkpoint for purpose of obtaining information about a recent crime); *Bd. of Education v. Earls*, 536 U.S. 822 (2002) (upholding random drug testing of students involved in extra-curricular activities as a means of preventing drug

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[4] *See* Pet. App. 126a (O'Scannlain, J., dissenting from the denial of rehearing *en banc*) ("The federal material witness statute has existed since 1789, *Bacon v. United States*, 449 F.2d 933, 938 (9th Cir. 1971), every state has adopted a version of the statute, *id.* at 939, and (at least until now), '[t]he constitutionality of th[e] statute apparently has never been doubted,' *Barry v. United States ex rel. Cunningham*, 279 U.S. 597 (1929).").

abuse); *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995) (upholding random drug testing of student-athletes); *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990) (upholding suspicionless seizures of motorists at highway sobriety checkpoints designed to remove drunk drivers from the road); *Treasury Employees v. von Raab*, 489 U.S. 656 (1989) (upholding random drug testing of Customs employees); *Skinner v. Ry. Labor Executives' Assn.*, 489 U.S. 602 (1989) (upholding drug testing of railway employees involved in train accidents); *New York v. Burger*, 482 U.S. 691, 702-04 (1987)(upholding warrantless administrative inspections of "closely regulated" businesses). The appeals court made no effort to explain why those decisions do not undercut its "clearly established" determination in this case.

The "clearly established" determination is also undercut by the numerous Ninth Circuit judges who disagreed not only with that determination but also with the panel's determination that Petitioner's alleged policy violated the Fourth Amendment. Judge Bea dissented from the majority's determination that the Fourth Amendment prohibits "pretextual" use of the material witness statute, Pet. App. 70a-84a, and eight members of the appeals court expressed a similar disagreement in their opinion dissenting from denial of rehearing *en banc*. *Id*. at 125a-128a. This Court has repeatedly cited the existence of a division of opinion among federal judges as evidence that a constitutional doctrine is not "well established." For example, in upholding the qualified immunity claims of police officers who violated Fourth Amendment rights by permitting a newspaper reporter to join them in executing the search of a residence, the Court deemed it highly significant that, following the

events giving rise to the lawsuit, a circuit split developed regarding the propriety of such media ride-alongs. *Wilson v. Layne*, 526 U.S. 603, 618 (1999) ("If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy."). *See also Pearson*, 129 S. Ct. at 823; *Morse v. Frederick*, 551 U.S. 393, 430 (2007) (Breyer, J., concurring in judgment in part and dissenting in part) (urging dismissal of constitutional claims against school administrator on grounds of qualified immunity and arguing, "[T]he fact that this Court divides on the constitutional question (and that the majority reverses the Ninth Circuit constitutional determination) strongly suggests that the answer as to how to apply prior law to these facts was unclear."). The fact that eight appeals court judges believed that Al-Kidd had not alleged a constitutional violation similarly suggests that any constitutional violation in this case was not clearly established.

To support its "clearly established" determination, the appeals court relied primarily on *Edmond*, which held that the Fourth Amendment prohibits a police force from randomly stopping cars at highway checkpoints for the purpose of detecting evidence of ordinary criminal wrongdoing (in that case, possession of unlawful drugs). 531 U.S. at 44. But given that the stops at issue in *Edmond* were undertaken at the sole discretion of police officials, it is difficult to discern why *Edmond* should have caused government officials to question the constitutionality of material witness arrests made pursuant to warrants issued by magistrate judges who determined that prosecutors met the objective criteria

set forth in § 3144.[5] When a judicial officer has determined that a search or seizure is warranted, there is good reason to conclude that the proposed government action does not violate the Constitution – because the officer has no vested interest in the outcome. As Justice Jackson observed:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Johnson v. United States, 333 U.S. 10, 13-14 (1948).

The Court has explained the "clearly established" requirement as follows:

> For a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified

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[5] The Ninth Circuit also misconstrued *Edmond*'s discussion regarding when it is proper for courts to examine the "programmatic purpose" of government conduct for the purpose of determining whether the scheme passes constitutional muster. Section II of this brief explains in more detail why *Edmond* does not support the appeals court's understanding of the Fourth Amendment.

> immunity unless the very action in question has previously been held unlawful; but it is to say that in light of preexisting law the unlawfulness must be apparent.

Hope v. Pelzer, 536 U.S. 730, 739 (2002) (quoting *Anderson*, 483 at 640). The Ninth Circuit did not contend that any pre-2003 appellate case law had held that "pretextual" use of the material witness statute violated the Fourth Amendment. It nonetheless asserted that *Edmond* and similar cases "put Ashcroft on notice" that "investigatory programmatic purpose would invalidate a scheme of searches and seizures without probable cause." Pet. App. 43a.

But regardless whether the Ninth Circuit's understanding of *Edmond* is accurate, it cannot plausibly be asserted that such an understanding should have been "apparent" to law enforcement officials in 2003. *Edmond* arose in a context (traffic stops) far removed from the material witness statute. While *Edmond* held that the suspicionless seizures at issue in that case violated the Fourth Amendment, the Court has upheld suspicionless seizures in numerous other contexts. The Ninth Circuit provided no plausible explanation why Justice Department officials should have anticipated that courts would deem *Edmond* – rather than one of those other cases – to be controlling. The qualified immunity defense is designed to protect "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs,* 475 U.S. 335, 341 (1986). In light of the state of Fourth Amendment law in 2003 (and in 2010), Petitioner Ashcroft cannot reasonably be deemed to fall into either category.

The Ninth Circuit also erred by approaching the "clearly established" requirement at a far too high level of generality. *See, e.g.,* Pet. App. 43a ("[T]he history and purposes of the Fourth Amendment were known well before 2003."). It cited no decisions finding a Fourth Amendment violation under similar circumstances but rather based its "clearly established" determination on the general Fourth Amendment rule that, in most instances, a search or seizure requires individualized suspicion of wrongdoing. *Id.* at 42a-45a. But as the D.C. Circuit has pointed out:

> It does no good to allege that police officers violated the right to free speech, and then conclude that the right to free speech has been "clearly established" in this country since 1791. Instead, courts must define the right to a degree that would allow officials "reasonably [to] anticipate when their conduct may give rise to liability for damages."

Int'l Action Ctr. v. United States, 365 F.3d 20, 25 (2004) (Roberts, J.) (quoting *Anderson*, 483 U.S. at 639). To apply the "clearly established" requirement at a high level of generality would allow Al-Kidd "to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violations of extremely abstract rights." *Anderson*, 438 U.S. at 639.

In sum, regardless whether Al-Kidd has adequately alleged a violation of his Fourth Amendment rights, *amici* respectfully submit that the Court should direct that the complaint be dismissed as to Petitioner Ashcroft because any such violation was not clearly established by pre-2003 court decisions.

II. AN ARREST IN COMPLIANCE WITH THE MATERIAL WITNESS STATUTE DOES NOT VIOLATE THE FOURTH AMENDMENT

The material witness statute, 18 U.S.C. § 3144, permits a judicial officer to order an individual's arrest, provided that a party's affidavit makes two showings: (1) the person's testimony is material to a criminal proceeding; and (2) it may become impractical to secure the person's presence at the criminal proceeding by subpoena. Al-Kidd acknowledges that federal law enforcement officials satisfied those two requirements, and that an impartial magistrate judge issued an arrest warrant based on those showings. Pet. App. 14a (Ninth Circuit determines that the complaint concedes that Al-Kidd's circumstances "may have met the facial statutory requirements of § 3144."). Thus, the issue before the Court is whether Ashcroft's alleged actions can be deemed a Fourth Amendment violation when those actions, Al-Kidd concedes, did not violate § 3144.[6]

Al-Kidd does not raise a facial challenge to the material witness statute. Pet. App. 31a. Rather, he contends that Justice Department officials violated the Fourth Amendment in attempting to apply the statute to him, because their use of the statute was pretextual. That is, Justice Department officials never intended to

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[6] In prior stages of the litigation, Al-Kidd asserted that Ashcroft had, indeed, violated § 3144. However, in response to the certiorari petition, Al-Kidd abandoned his claim that Ashcroft could be held accountable for allegedly false statements contained in the affidavit submitted in support of the request for a material witness warrant – thereby abandoning his § 3144 claim. Section IV below explains why that claim must be deemed to have been abandoned.

call him as a witness at the trial of Omar Al-Hussayan and arrested him based primarily on a desire to investigate him as a terrorism suspect (and could not have made a regular arrest because they lacked probable cause to believe that he had committed a crime).

The Ninth Circuit attempted to tie Ashcroft to the allegedly pretextual arrest by pointing to a number of his pre-2003 speeches. For example, the appeals court quoted an October 2001 speech in which Ashcroft stated, "Aggressive detention of lawbreakers and *material witnesses* is vital to preventing or disrupting new attacks." *Id*. at 7a. Importantly, neither the Ninth Circuit nor Al-Kidd asserts that Ashcroft ever suggested that prosecutors should seek material witness warrants even in cases in which the § 3144 criteria had not been met.

Moreover, although Al-Kidd asserts that prosecutors in *his* case sought a material witness warrant for the primary purpose of detaining a suspected terrorist, he does not allege that that was the sole use or even the primary use that prosecutors made of § 3144 during the relevant time period. Respondent Cert. Br. 17 (contending that "nearly fifty percent of those detained in connection with post-9/11 terrorism investigations were not called to testify" – meaning, of course, that a majority of those detained under § 3144 in connection with terrorism investigations *were* called to testify).

In light of those concessions, Al-Kidd cannot state a Fourth Amendment claim against Ashcroft. As the Ninth Circuit conceded, this Court has repeatedly avoided examining the subjective intentions of individual

law enforcement officers in determining whether a search or seizure violates the Fourth Amendment. "An action is reasonable under the Fourth Amendment, regardless of the individual officer's state of mind, as long as the circumstances, viewed *objectively*, justify the action." *Brigham City v. Stuart*, 547 U.S. 398, 404 (2006) (citations omitted).[7] Accordingly, in light of Al-Kidd's concession that the § 3144 criteria were met in this case, Ashcroft cannot be deemed to have violated Al-Kidd's Fourth Amendment rights even if, as alleged, local prosecutors never intended to call Al-Kidd as a witness.

Edmond is not to the contrary. *Edmond* explicitly recognized that, if a government official has a legitimate interest in detaining an individual, courts should not "look behind that interest to determine whether the government's primary purpose is valid," and that "subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." 531 U.S. at 45 (quoting *Whren v. United States*, 517 U.S. 806, 813 (1996)). *Edmond* recognized a limited exception to that general rule: where the government adopts a "general

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[7] In *Brigham City*, the Court held that so long as it was objectively reasonable for police officers to enter a house without a warrant (for the purpose of breaking up a fight and preventing injury), it was irrelevant for Fourth Amendment purposes that their primary motivation for entering was to make arrests. 547 U.S. at 404-06. Similarly, the Court held in *Devenpeck v. Alford*, 543 U.S. 146 (2004), that an arrest was "reasonable" and thus did not violate the Fourth Amendment so long as the known facts provided probable cause for the arrest – even though the defendant alleged that the arresting officer was improperly motivated. That is, he alleged that the only reason he was seized was the arresting officer's belief that the defendant had engaged in conduct that was not illegal. *Id.* at 153-55.

scheme" whereby searches or seizures are undertaken without individualized suspicion, courts may examine the scheme's "programmatic purpose" to determine whether the scheme passes Fourth Amendment muster. *Id.* But Al-Kidd is not asking the courts to undertake a "programmatic" review of federal government use of the material witness statute, because he makes no claim that more than a small fraction of government uses of the statute has been "pretextual" in nature. Rather, he asserts that use of the statute was "pretextual" *in his particular case*.[8]

At most, Al-Kidd is asserting that Ashcroft's policies made it more likely that local prosecutors would resort to "pretextual" use of the material witness statute. Even so, Al-Kidd cannot prevail on his Fourth Amendment claim without, at a minimum, demonstrating that local prosecutors *in his case* were acting pretextually. That sort of inquiry into the subjective motivation of individual law enforcement officers has been deemed irrelevant to Fourth Amendment analysis by *Whren*, *Devenpeck*, *Brigham City*, and a long line of decisions

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[8] Critics of the use of the material witness statute have alleged that federal prosecutors, in the course of investigating terrorists in the aftermath of the 9/11 attacks, invoked the material witness statute to detain as many as 70 individuals (almost all or whom were Muslim). *See, e.g.,* Human Rights Watch, *Witness to Abuse: Human Rights Abuses Under the Material Witness Law Since September 11* (2005), at 1. As noted, Al-Kidd concedes that, in a majority of those cases, the individual was called as a witness – thereby suggesting, in at least those cases, that prosecutors had sought a material witness warrant because they wanted to secure future testimony. And of course, those 70 cases represent no more than a tiny fraction of the thousands of occasions each year that the material witness statute is invoked by the federal government.

from this Court. *See generally*, Donald Q. Cochran, *Material Witness Detention in a Post-9/11 World: Mission Creep or Fresh Start*, 18 GEO. MASON L. REV. 1 (2010). And Al-Kidd cannot plausibly claim a causal connection between the Justice Department's "aggressive" § 3144 enforcement policies and his injuries without demonstrating at trial that local prosecutors were acting pretextually.

In sum, *Edmond*'s "programmatic purpose" exception does not support Al-Kidd's reliance on the subjective motivations of law enforcement officials as the basis for a Fourth Amendment challenge to an objectively valid use of the material witness statute. Al-Kidd does not challenge the entire material witness program, only its application in his case. Because it is undisputed that the objective criteria established by § 3144 were met in Al-Kidd's case, Ashcroft is entitled to dismissal of the Fourth Amendment claims.

III. THE NINTH CIRCUIT DECISION UNDERMINES EFFECTIVE USE OF THE MATERIAL WITNESS STATUTE

The Fourth Amendment prohibits searches and seizures that are "unreasonable." Determining the reasonableness of a government seizure requires a court to balance a number of competing factors: "the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." *Lidster*, 540 U.S. at 427. *Amici* submit that the Justice Department's "aggressive" use of the material witness statute was a reasonable response to the national

security concerns that arose in the aftermath of the 9/11 attacks.[9]

The importance of material witness statutes for effective law enforcement is attested by their adoption by the federal government and all 50 States. *See* Dan Stigell, *Counterterrorism and the Comparative Law of Investigative Detention*, 50 (Cambria Press, 2009) (describing material witness statute as "the most potent weapon in the U.S. counterterrorism arsenal").[10] Federal prosecutors have made extensive use of § 3144 and its predecessors for many decades; recent critics are wrong in suggesting a sharp upswing in material witness warrants during the past decade.[11]

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[9] In assessing reasonableness, it is important to note that Al-Kidd was released relatively quickly. The Court has held that while detention of those not serving a criminal sentence may pass constitutional muster if it is relatively brief, it becomes progressively less reasonable as the duration of detention increases. *Zadvydas v. Davis*, 533 U.S. 678, 696 (2001).

[10] Among the high-profile convicted terrorists who initially were held on a temporary basis as material witnesses were Terry Nichols (Oklahoma City bomber); Zacarias Moussaoui (a member of the 9/11 conspiracy); Earl James Ujaama and Mahar Hawash (Americans convicted of providing support to the Taliban); and Jose Padilla (American convicted of conspiracy to engage in terrorism overseas).

[11] Citing data from the Administrative Office of the United States Courts, a Congressional Research Service report concluded that federal magistrate judges conducted an average of 3,948 material witness hearings each year during FY 2002 through FY 2004. That number was down somewhat from past decades; for example, 6,865 hearings were conducted during FY 1981 and 8,221 were conducted during FY 1980. Charles Doyle, *Arrest and Detention of Material Witnesses*, CRS REPORT FOR CONGRESS, at 3

The appeals court decision inevitably will cause prosecutors to be more reluctant to make use of the statute out of fear that such use could lead to lawsuits requesting monetary judgments against the prosecutors in their personal capacities. A recent report on anti-terrorism prosecutions succinctly summarized the dilemma regularly faced by prosecutors:

> Many of the individuals who were arrested on material witness warrants after 9/11 were likely viewed as potential suspects in addition to being material witnesses. Indeed, in most complex criminal investigations, it often is not clear whether an individual is primarily a witness or primarily a suspect; often they are potentially both. In many cases, as may well have been the fact after the 9/11 attacks, the government may suspect an individual but also want that individual's testimony if he is willing to give it.

Richard B. Zabel and James J. Benjamin, Jr., *In Pursuit of Justice: Prosecuting Terrorism in the Federal Courts*, HUMAN RIGHTS FIRST (May 2008) at 70. If the Ninth Circuit decision stands, the prosecutor in a "mixed motive" case risks being held liable for damages if a jury later undertakes an examination of the prosecutor's subjective intent and determines that the predominant reason for a material witness arrest was the prosecutor's suspicion that the individual committed criminal acts. To avoid that risk, prosecutors are likely to avoid use of the material witness statute even if they believe that

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n.10 (Sept. 8, 2005) (available at www.au.af.mil/au/awc/awcgate/crs/rl33077.pdf).

detaining a witness is likely to yield valuable and otherwise-unavailable evidence for use at trial or before a grand jury.

Ironically, reduced use of the material witness statute could work to the detriment of those under investigation. If law enforcement officials are prohibited from making use of the material witness statute for a terrorism suspect, they will be forced to decide immediately among three options: (1) unconditional release; (2) charging a crime; or (3) designating the suspect an "enemy combatant." Requiring an immediate decision may not be in the best interests of either prosecutors or the suspect.

Given the potentially catastrophic consequences if law enforcement officials fail to act expeditiously on credible evidence regarding potential terrorist activity, they are unlikely to pursue the first option. The material witness statute provides an attractive alternative to the other two options – it allows prosecutors to protect the public safety as their investigation continues, while at the same time providing numerous procedural protections to individuals being detained. For example, they are entitled to a court-appointed lawyer and *must* be released following a deposition unless the court determines that release would result in a "failure of justice." Fed.R.Crim.P. 15(a)(2). District courts are charged with monitoring all material witness detentions to "eliminate unnecessary detention," and must receive from prosecutors every two weeks a report explaining why they believe that any ongoing detentions must continue. Fed.R.Crim.P. 46(a)(h)(1) & (2).

In contrast, those detained as enemy combatants have considerably fewer procedural rights. And those charged with a crime may well find that the initial charging decision – even in cases in which the existence of probable cause is in doubt – is not easily reversed. Granting prosecutors the option, in close cases, of holding a suspect temporarily under a material witness warrant provides prosecutors with breathing space and reduces the risk of a premature criminal charge or enemy combatant designation.

In sum, a decision affirming the Ninth Circuit will discourage use of the material witness statute – a development that will hamper criminal law enforcement without necessarily providing any corresponding benefit to criminal suspects.

IV. AL-KIDD HAS ABANDONED ANY CLAIMS AGAINST ASHCROFT BASED ON ALLEGED VIOLATIONS OF § 3144

The Ninth Circuit rejected Ashcroft's assertion that he was entitled to dismissal of the claim seeking to hold him personally liable for allegedly false statements included by FBI agents in the affidavit they submitted in support of the request for a material witness arrest warrant. The court held that Ashcroft could be held responsible for the false statements because, the Complaint alleged, he had inadequately supervised the work of the FBI agents. Pet. App. 52a. In response to the Petition, Al-Kidd stated that he had abandoned the deliberate-false-statement with respect to Ashcroft, Respondent Cert. Br. at 21, and the Court did not grant review of the issue.

By abandoning his deliberate-false-statement claim, Al-Kidd also abandoned his claim – asserted in the Complaint – that Ashcroft was liable for damages for violating § 3144. Al-Kidd's sole remaining claim against Ashcroft involves alleged violation of the Fourth Amendment. To guard against the possibility that Al-Kidd may nonetheless seek to reintroduce a § 3144 claim into the case, *amici* write briefly to explain why Al-Kidd has no remaining claims based on an alleged violation of § 3144.

The Ninth Circuit affixed the title, "The § 3144 Claim," to its discussion of Al-Kidd's deliberate-false-statement claim. Pet. App. 47a-56a. Al-Kidd broadly asserted that his arrest violated § 3144 because the affidavit of the FBI agents "fail[ed] to demonstrate probable cause for either the materiality of his testimony or the reasons it would be impracticable to secure that testimony by subpoena." *Id*. at 47a-48a. The court declined to permit a sweeping collateral challenge to a warrant that had been granted by a magistrate judge; rather, it made clear that Al-Kidd would be permitted to challenge the warrant only to the extent that he alleged that the affidavit supporting the warrant application contained false statements or material omissions:

> Although the arrest was conducted pursuant to a warrant issued by a magistrate judge, we allow challenges to the validity of searches and seizures conducted pursuant to a warrant if the affidavit in support of the warrant included false statements or materials that were made intentionally or recklessly.

Id. at 48a (citing *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978)). Al-Kidd did not seek review from the Ninth Circuit's decision limiting the scope of his § 3144 claim. That decision is binding on him and limits his § 3144 cause of action to a claim that Ashcroft and other defendants deliberately included false statements or material omissions in the affidavit.

Accordingly, now that Al-Kidd has abandoned his deliberate-false-statement claim against Ashcroft, no issues are before the Court regarding alleged violations of § 3144. The absence of any claim regarding § 3144 violations means that each of the following factual allegations are irrelevant to the issues to be decided by this Court: (1) allegations that the FBI agents included false statements in their affidavit in support of the material witness warrant;[12] (2) allegations that the affidavit failed to demonstrate the materiality of Al-Kidd's testimony to the Al-Hussayen trial; and (3)

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[12] *Amici* note that the allegations of falsity are rather thin. For example, Al-Kidd claims that that he purchased a round-trip ticket to Saudi Arabia, while the affidavit stated that "Kidd is scheduled to take a one-way, first-class flight" to Saudi Arabia. Pet. App. 4a. Those statements are not necessarily in conflict. The affidavit did not say that "Al-Kidd *purchased* a one-way ticket," nor is that the necessary implication of the affidavit. A far more logical interpretation is that the affiant intended to convey that Al-Kidd did not intend to return to the United States in the near future. That assertion was entirely accurate, given Al-Kidd's intention to remain in Saudi Arabia for an extended period of study. In his brief opposing the petition, Al-Kidd disputed our contention that the allegations of falsity are thin and asserted that the affidavit stated that he had used "a 'one-way' ticket." Respondent Cert. Br. at 9 n.3. As the affidavit excerpt quoted above indicates, that assertion is demonstrably false; the affidavit uses the word "flight," not "ticket."

allegations that the affidavit failed to demonstrate that it would be impracticable to obtain Al-Kidd's testimony by subpoena. Some or all of those factual allegations may be relevant to the claims that Al-Kidd is continuing to pursue against other defendants, but they are irrelevant to resolution of the Fourth Amendment claims he is asserting against Ashcroft.

CONCLUSION

Amici curiae request that the Court reverse the judgment of the court of appeals.

Respectfully submitted,

Daniel J. Popeo
Richard A. Samp
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302
rsamp@wlf.org

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