No.

In the Supreme Court of the United States

JOHN ASHCROFT, PETITIONER

v.

ABDULLAH AL-KIDD

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

PETITION FOR A WRIT OF CERTIORARI

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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 a policy implemented by the former Attorney General of using the material witness statute as a "pretext" to investigate and preventively detain terrorism suspects. In addition, respondent alleged that the affidavit submitted in support of the warrant for his arrest contained false statements. The questions presented are:

1. Whether the court of appeals erred in denying petitioner absolute immunity from the pretext claim.

2. 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.

3. Whether the former Attorney General may be held liable for the alleged false statements in the affidavit supporting the material witness warrant, even though the complaint does not allege that he either participated in the preparation of the affidavit or implemented any policy encouraging such alleged misconduct.

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The Acting Solicitor General, on behalf of former Attorney General John Ashcroft, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

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 The unpublished opinion of the district court is available at 2006 WL 5429570.

JURISDICTION

The judgment of the court of appeals was entered on September 4, 2009. A petition for rehearing was denied

on March 18, 2010. (App., *infra*, 106a). On June 7, 2010, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including July 16, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The material witness statute, 18 U.S.C. 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 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.

The Fourth Amendment to the United States Constitution provides:

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

STATEMENT

1. a. In the months after the terrorist attacks of September 11, 2001, the Federal Bureau of Investigation (FBI) conducted an anti-terrorism investigation in Idaho. As a result of that investigation, on February 13, 2003, a grand jury sitting in the District of Idaho returned an indictment charging an individual named Sami

Omar Al-Hussayen with multiple false-statements and visa-fraud offenses.[1] The charges against Al-Hussayen centered on allegations that he had falsely stated in his applications for a student visa in 2000 and 2002 that he was entering the United States solely for the purpose of pursuing a course of academic study, when in fact he was spending much of his time providing technical support to the Islamic Assembly of North America (IANA), an organization that disseminated radical Islamic ideology and sought to recruit others to engage in acts of violence and terrorism. Indictment ¶¶ 15-17, 3:03-cr-00048-EJL Docket Entry No. 1 (D. Idaho Feb. 13, 2003). The indictment also alleged that Al-Hussayen moved significant sums through his bank account—approximately $300,000 in excess of his student fees—that were used "to pay operating expenses of the IANA, including salaries of IANA employees." *Id.* at ¶¶ 23-24.

As part of the same investigation, the FBI conducted surveillance of respondent and learned that he had a number of ties to Al-Hussayen. One month after Al-Hussayen was indicted, the FBI also learned that respondent had booked an airplane ticket to Saudi Arabia. At that point, on March 14, 2003, the United States Attorney's Office for the District of Idaho, which was prosecuting Al-Hussayen, applied to the magistrate judge for a warrant for respondent's arrest under the material witness statute, 18 U.S.C. 3144. App., *infra*, 3a-4a, 66a. In the warrant application, prosecutors asserted that respondent's testimony was "material to both the prosecution and the defendant" in the Al-Hussayen case and that there was a risk that respondent would be un-

[1] Superseding indictments later added three counts of conspiracy to provide material support to terrorist organizations.

available "unless the Court detains or imposes restrictions on the travel of said material witness." Application for Arrest Warrant of Material Witness at 2, 3:03-cr-00048-EJL Docket entry No. 34 (D. Idaho Mar. 17, 2003).

The application was supported by a sworn affidavit of FBI Special Agent Scott Mace. Aff. of Scott Mace in Supp. of Warrant Application, 3:03-cr-00048-EJL Docket entry No. 34 (D. Idaho Mar. 17, 2003). In the affidavit, Mace stated that respondent had been involved with Al-Hussayen in several respects: he had received "payments from [Al-Hussayen] and his associates in excess of $20,000.00" and had met with Al-Hussayen's associates and IANA officials shortly after returning from a trip to Yemen. *Id.* at ¶ 6. Based on that information, Mace stated that respondent "is believed to be in possession of information germane to this matter which will be crucial to the prosecution." *Id.* at ¶ 8. Mace further stated that respondent "is scheduled to take a one-way, first class flight (costing approximately $5,000.00) to Saudi Arabia on Sunday, March 16, 2003, at approximately 6:00 EST." *Id.* at ¶ 7. The affidavit concluded by stating that "if [respondent] travels to Saudi Arabia, the United States Government will be unable to secure his presence at trial via subpoena." *Id.* at ¶ 8.

The magistrate judge granted the government's application, issued an arrest warrant, and ordered that respondent be brought before the court "for the purpose of setting the methods and conditions of release." Order, 3:03-cr-00048-EJL Docket entry No. 35 (D. Idaho March 17, 2003). Two days later, on March 16, 2003, FBI agents arrested respondent at Dulles International Airport as he prepared to board his scheduled flight to Saudi Arabia. First Amended Compl. ¶¶ 47, 65, 1:05-cv-

00093-EJL Docket Entry No. 40 (D. Idaho Nov. 18, 2005) (Compl.). Respondent was detained briefly at the Alexandria Detention Center in Virginia before he was sent to the Ada County Jail in Boise, Idaho, via a federal transfer facility in Oklahoma. *Id.* at ¶ 70.

b. On March 25, 2003, respondent appeared with counsel before the Idaho magistrate judge who had issued the arrest warrant. At a second hearing on March 31, 2003, the government proposed that respondent be released from custody subject to certain conditions. Compl. ¶¶ 9, 102, 103. The court agreed, releasing respondent that day to the custody of his wife in Nevada on condition that he continue to reside with her, surrender his passport, and agree to limit his travel to Nevada and three neighboring states. *Ibid.* In total, respondent spent 15 in detention. *Id.* at ¶ 6.

Al-Hussayen's trial ended on June 10, 2004 when the jury acquitted him on some charges and failed to reach a verdict on others. Respondent was not called to testify. Compl. ¶ 10. After the trial concluded, the district court granted respondent's motion to terminate the conditions of his release. *Id.* at ¶ 107.

2. In March 2005, respondent sued the United States and a number of government officials, including petitioner, seeking damages for alleged violations of, *inter alia*, the material witness statute and the Fourth Amendment. Compl., 1:05-cv-00093-EJL Docket entry No. 1 (D. Idaho Mar. 15, 2005).

Respondent's complaint rested on two factual assertions. First, respondent claimed that, in response to the September 11, 2001, terrorist attacks, petitioner implemented a policy of using the material witness statute as a pretextual tool to investigate and detain terrorism suspects whom the government lacked probable cause to

charge criminally. Respondent alleged that he was arrested as a result of this alleged policy, which he contended violated the Fourth Amendment. Compl. ¶ 108-141. Second, respondent alleged that the Mace affidavit submitted in support of the material witness warrant contained deliberately false statements. In particular, respondent averred that, contrary to the Mace affidavit, his airplane ticket to Saudi Arabia was not a one-way first-class ticket costing $5000, but instead a round-trip coach ticket costing $1700. *Id.* at ¶ 53. Respondent also alleged that the affidavit omitted material information, including that he was a United States citizen and that he had previously cooperated with the FBI investigation. *Id.* at ¶ 54.[2]

Petitioner and the other individual defendants moved to dismiss on grounds of personal jurisdiction, official immunity, and inadequate pleading. Mot. to Dismiss, 1:05-cv-00093-EJL Docket entry No. 47 (D. Idaho Jan. 23, 2006). The district court denied the motions, and petitioner filed an interlocutory appeal.

3. A divided panel of the court of appeals affirmed in relevant part. App., *infra*, 1a-64a.

a. The court first held that petitioner was not entitled to absolute immunity on respondent's claims that petitioner implemented a policy of using the material witness statute as a pretext to detain terrorism suspects for investigative or preventive purposes. The panel acknowledged that "absolute immunity ordinarily attaches to the decision to seek a material witness warrant," App., *infra*, 19a, but it reasoned that whether such im-

[2] The complaint also sought damages based on the alleged conditions of respondent's confinement during the 15 days he was in custody. See Compl. ¶¶ 154, 157, 160. The court of appeals ordered that claim dismissed, App., *infra*, 59a, and it is not at issue here.

munity attaches in any particular case depends on "the prosecutor's *mission* and *purpose*" in obtaining such a warrant. *Id.* at 23a; see *id.* at 20a (concluding that, under a "functional approach" to absolute immunity, the court was required to "take into account the goal of performing an action to determine function").

Based on that reasoning, the court concluded that the act of seeking a material witness warrant is not protected by absolute immunity if the prosecutor's "immediate purpose" is investigation or preventive detention. App., *infra*, 20a. Concluding that respondent had alleged sufficient facts "to render plausible the allegation of an investigatory function," the court held that absolute immunity did not apply. *Id.* at 26a.

b. The court next rejected petitioner's qualified immunity defense. The court reasoned that, even if all the requirements of the material witness statute are satisfied and a judge issues a valid arrest warrant, the Fourth Amendment prohibits a seizure based on that warrant when the prosecutor's true motivation is to conduct further investigation or preventively detain a suspect. See App., *infra*, 30a-40a. The court rejected petitioner's contention that *Whren* v. *United States*, 517 U.S. 806, 813 (1996), forecloses inquiry into subjective purpose or "pretext" in determining the validity of an arrest. In the court's view, "*Whren* rejected only the proposition that 'ulterior motives can invalidate police conduct that is justifiable on the basis of probable cause to *believe that a violation of law has occurred*.'" App., *infra*, 32a (quoting *Whren*, 517 U.S. at 811). Because material witness arrests are not based on suspected wrongdoing, the court reasoned, the relevant precedent was instead *City of Indianapolis* v. *Edmond*, 531 U.S. 32 (2000), in which this Court held that the Fourth

Amendment prohibits motor vehicle checkpoints designed to interdict drugs. App., *infra*, 36a-38a. The panel concluded that *Edmond* permits inquiry into "programmatic purpose" to assess "the validity of Fourth Amendment intrusions undertaken pursuant to a general scheme without individualized suspicion." *Id.* at 36a (quoting *Edmond*, 531 U.S. at 45-46). The court therefore held that respondent had stated a valid Fourth Amendment claim in alleging that his arrest resulted from petitioner's policy of using the material witness pretextually.

The court also concluded that the illegality of that policy was clearly established at the time of respondent's arrest. App., *infra*, 46a. The majority acknowledged that "[i]n March 2003, no case had squarely confronted the question of whether misuse of the material witness statute to investigate suspects violates the Constitution." *Id.* at 41a. Nevertheless, the majority reasoned that *Edmond* and *Illinois* v. *Lidster*, 540 U.S. 419, 422 (2004) (upholding police checkpoints designed to obtain more information about a particular accident from the motoring public), "put [petitioner] on notice that the material witness detentions—involving a far more severe seizure than a mere traffic stop—would be similarly subject to an inquiry into programmatic purpose." App., *infra*, 43a. The majority also concluded that the impermissibility of the alleged "pretext" policy was further established by "the history and purposes of the Fourth Amendment," *ibid.*, "the definition of probable cause," *id.* at 42a, and "dicta in a footnote of a district court opinion" from a different circuit. *Id.* at 46a (citing *United States* v. *Awadallah*, 202 F. Supp. 2d 55, 77 n.28 (S.D.N.Y. 2002), rev'd on other grounds, 349

F.3d 42 (2d Cir. 2003), cert. denied, 543 U.S. 1056 (2005)).

c. Finally, the court held that respondent had adequately alleged petitioner's responsibility for the false statements in the affidavit supporting the material witness warrant application. App., *infra*, 47a-56a. Rejecting petitioner's contention that this aspect of the complaint failed the pleading standards set forth in *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937 (2009), the court concluded that petitioner could be held liable for "setting in motion a series of acts by others * * * which [he] knew or reasonably should have known would cause others to inflict constitutional injury" and for "acquiescence in the constitutional deprivation by subordinates." App., *infra*, 30a. Respondent's allegations, the court reasoned, supported liability "on the basis of [petitioner's] *knowing failure* to act in the light of even unauthorized abuses," *id.* at 52a, and "plausibly suggest that [petitioner] purposely instructed his subordinates to bypass the plain reading of the statute." *Id.* at 53a.

4. Judge Bea dissented in relevant part. App., *infra*, 64a-105a. He disagreed with the majority's conclusion that an arrest based on a valid material witness warrant violates the Fourth Amendment if the prosecutor's subjective intent is to conduct further investigation. *Id.* at 68a. Judge Bea noted that this Court and the Ninth Circuit had "repeatedly stated that under the Fourth Amendment, an officer's subjective intentions are irrelevant so long as the officer's conduct is objectively justified." *Id.* at 70a-71a. He noted the many "good reason[s] to eschew inquiry into the subjective motivations of individual officers," including that such an inquiry is "impossibly difficult" and would undermine the purposes of the qualified immunity defense. *Id.* at

73a-74a. In his view, the majority erred by "import[ing] the 'programmatic purpose' test" from cases testing "the constitutional validity of *warrantless* searches and seizures." *Id.* at 74a-75a. Judge Bea regarded those cases as having "no bearing * * * for the simple reason" that respondent "was arrested pursuant to a warrant issued by a neutral magistrate." *Id.* at 75a. Judge Bea also concluded that, even if the majority were correct in its Fourth Amendment analysis, it erred in concluding that such rights were clearly established. *Id.* at 84a-86a.

On the claims alleging false statements in the Mace affidavit, Judge Bea concluded that the "complaint simply does not state facts that plausibly establish that [petitioner] through [his] own actions, violated [respondent's] rights." App., *infra*, 87a (citation omitted). In particular, Judge Bea found nothing in respondent's allegations plausibly establishing that petitioner "knew of or encouraged his subordinates recklessly to disregard the truth in the preparation of supporting affidavits." *Id.* at 88a. At most, Judge Bea reasoned, respondent's allegations established that petitioner "encouraged prosecutors to use material witness warrants as a means to accomplish other law enforcement objectives," but that conclusion would support only respondent's claim that petitioner implemented a policy of using material witness warrants pretextually, not the distinct claim that petitioner bore responsibility for obtaining such warrants through false statements. *Id.* at 90a.

Finally, although Judge Bea deemed it unnecessary to reach the issue, he concluded that petitioner was entitled to absolute immunity from the pretext claim insofar as it was based on petitioner's supervision of the prosecutors who sought the material witness warrant. App., *infra*, 92a-104a. Judge Bea reasoned that the majority's

inquiry into the prosecutor's "immediate purpose" conflicted with Supreme Court and circuit precedent, lacked coherence as a doctrinal principle, and created perverse incentives for prosecutors to alter their decisions about trial strategy in order to avoid personal liability. See *id.* at 98a-104a.

5. The full court of appeals denied petitioner's request for rehearing en banc over the dissent of eight judges. Joined by seven other judges, Judge O'Scannlain wrote a lengthy dissent focusing on "two distinct but equally troubling legal errors" in the panel decision that together produced the "startling conclusion" that "a former Attorney General of the United States may be *personally liable* for promulgating a policy under which his subordinates took actions expressly authorized by law." App., *infra*, 122a, 125a.

First, Judge O'Scannlain concluded that, in denying petitioner qualified immunity on the pretext claim, the court had "distort[ed] the bedrock Fourth Amendment principle that an official's subjective reasons for making an arrest are constitutionally irrelevant." App., *infra,* 126a. He reasoned that *Edmond*'s "programmatic purpose" inquiry applies only in evaluating warrantless seizures and therefore is "totally inapplicable here." *Id.* at 127a. Judge O'Scannlain also observed that by holding that the Fourth Amendment prohibits an arrest that the material witness statute permits, the court had "effectively declar[ed] the material witness unconstitutional, at least as applied to [respondent]." *Id.* at 125a. In addition, Judge O'Scannlain argued that the court had "compound[ed] its error by holding that the right to be free from a detention under a pretextual material witness warrant was clearly established at the time of [respondent's] arrest." *Id.* at 128a. In Judge O'Scannlain's

view, "[t]he majority's assertion that three sentences of dicta in a footnote to a subsequently reversed district court opinion clearly establish a right that the majority expended nearly three-thousand words describing is truly astonishing." *Id.* at 129a.

Second, Judge O'Scannlain concluded that the court erred in holding "that [petitioner] may be held personally liable to [respondent] if his *subordinates* provided false testimony in support of their application for a material witness warrant." App., *infra*, 130a. He noted that there was no allegation that petitioner himself approved of such false testimony and that, by permitting a claim on the basis of the alleged misconduct of those whom petitioner supervised, the court reached "a result indisputably at odds with *Iqbal*." *Ibid.*

The court's errors, Judge O'Scannlain reasoned, will inflict "gratuitous damage * * * upon orderly federal law enforcement," App., *infra*, 123a, and "have far-reaching implications for how government officials perform their duties." *Id.* at 125a.

REASONS FOR GRANTING THE PETITION

The court of appeals committed a series of fundamental errors, the immediate effect of which is to expose the former Attorney General to burdensome litigation and potential damages for the conduct of his subordinates. Those substantial harms are compounded by the decision's long-term consequences, which will be to threaten the ability of prosecutors to discharge their duties without fear of personal liability, severely limit the usefulness of the material witness statute, and substantially chill officers in the exercise of important governmental functions. The court permitted the suit against petitioner to proceed even though the only activ-

ity in which he is alleged to have participated was authorized by an Act of Congress and approved by a federal magistrate judge. The Ninth Circuit's decision conflicts with decisions of this Court and, if permitted to stand, would severely damage law enforcement and proper governmental functioning. Accordingly, this Court's review is warranted on three discrete issues.

First, the court denied petitioner absolute immunity from claims that he instructed his subordinates to seek a material witness warrant—ordinarily deemed an integral part of a prosecutor's advocacy function—because respondent alleged that the "immediate purpose" of the warrant was "investigative." The Ninth Circuit's newly minted "immediate purpose" test conflicts with the longstanding principle that absolute immunity applies regardless of a prosecutor's intent. It would also undermine the policy objectives of the absolute immunity doctrine and expose prosecutors to suit when they exercise other core advocacy functions.

Second, the court of appeals held that the Fourth Amendment prohibits the use of valid material witness warrants as a "pretext" for further investigation of a suspect. That holding is inconsistent with this Court's precedent recognizing that an officer's subjective intent does not render an arrest invalid under the Fourth Amendment. See *Devenpeck* v. *Alford*, 543 U.S. 146, 153 (2004); *Whren* v. *United States*, 517 U.S. 806, 808-810 (1996). The court compounded that error by holding that its unprecedented decision (supported primarily by dicta in a footnote of a subsequently reversed district court decision from different circuit) was sufficiently "clearly established" to impose personal liability upon the former Attorney General. Together, these holdings would severely limit prosecutors' ability and willingness

to use the material witness statute in commonly arising circumstances.

Third, the court of appeals ruled that the former Attorney General may be held responsible for alleged misstatements or omissions in the affidavit of an FBI agent filed in support of the warrant for respondent's arrest as a material witness. In reaching that conclusion, the Ninth Circuit adopted a theory of supervisory liability that is directly contrary to this Court's decision in *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937 (2009).

A. The Ninth Circuit's Denial Of Absolute Immunity Conflicts With Decisions Of This Court And Undermines The Purposes For Which Such Immunity Exists

The court of appeals held that petitioner was not entitled to dismissal of the pretext claim on absolute immunity grounds because, according to the complaint, respondent's arrest was motivated by the "immediate purpose" of conducting further investigation. That analysis conflicts with decisions of this Court and other courts of appeals. If permitted to stand, it would frustrate the purposes of prosecutorial immunity and chill the exercise of important government functions. This Court's review is warranted.

1. a. The court of appeals erred in denying petitioner absolute immunity on the claim that he implemented a policy of using the material witness statute to investigate or preventively detain terrorism suspects. Absolute immunity protects prosecutors from suit for acts that constitute "the traditional functions of an advocate," *Kalina* v. *Fletcher*, 522 U.S. 118, 131 (1997), and that are "intimately associated with the judicial phase of the criminal process," *Imbler* v. *Pachtman*, 424 U.S. 409, 430 (1976). As a number of courts have concluded, seek-

ing a material witness warrant in a pending prosecution is part of an advocate's traditional function. See *id.* at 431 n.33 (stating that the prosecutor's role as advocate includes "which witnesses to call"); *Daniels* v. *Kieser*, 586 F.2d 64, 68-69 (7th Cir. 1978) (decision to seek a material witness warrant to secure the presence of a witness at trial is subject to absolute immunity), cert. denied, 441 U.S. 931 (1979); *Betts* v. *Richard*, 726 F.2d 79, 81 (2d Cir. 1984) (state prosecutor's action in obtaining a *capias* to secure the presence of a witness at trial subject to absolute immunity); *Walden* v. *Wishengrad*, 745 F.2d 149, 151-153 (2d Cir. 1984) (attorney representing state Department of Social Services in parental termination proceedings has absolute immunity for seeking arrest warrant to compel witness to appear).

Thus, even assuming the truth of respondent's allegations, petitioner's act of instructing prosecutors under his supervision to obtain material witness warrants in certain circumstances is conduct protected by absolute immunity. See *Van de Kamp* v. *Goldstein*, 129 S. Ct. 855, 861-862 (2009) (holding that supervisors are entitled to absolute immunity for training, instructing, and supervising line prosecutors on matters that are intimately associated with the judicial phase of the criminal process).

b. The court acknowledged that absolute immunity generally applies to the decision to seek a material witness warrant, but it held that such immunity is unavailable when the prosecutor's "immediate purpose" is "to investigate or preemptively detain a suspect." App., *infra*, 25a. That conclusion conflicts with the principle, well established in this Court's decisions, that the applicability of official immunity does not turn on motive or intent. See, *e.g.*, *Cleavinger* v. *Saxner,* 474 U.S. 193,

199-200 (1985) (judicial immunity cannot "be affected by the motives with which their judicial acts are performed" (quoting *Bradley* v. *Fisher*, 80 U.S. (13 Wall.) 335 (1872)); *Doe* v. *McMillan*, 412 U.S. 306, 319 (1973) ("Judges, like executive officers with discretionary functions, have been held absolutely immune regardless of their motive or good faith.").

Consistent with that principle, no court of appeals has adopted the Ninth Circuit's "immediate purpose" approach, and several courts of appeals have rejected the notion that the prosecutor's intent informs the absolute immunity analysis. See, *e.g., Bernard* v. *County of Suffolk*, 356 F.3d 495, 504 (2d Cir. 2004) (the "fact that improper motives may influence" a prosecutor's exercise of discretion "cannot deprive him of absolute immunity"); *Austin Mun. Sec., Inc.* v. *National Ass'n of Sec. Dealers*, 757 F.2d 676, 685 (5th Cir. 1985) ("[T]he intent with which * * * defendants operate is irrelevant to the absolute immunity issue."); *Ashelman* v. *Pope*, 793 F.2d 1072, 1078 (9th Cir. 1986) (en banc) ("Intent should play no role in the immunity analysis.").

The court of appeals' reasons for ignoring this body of contrary precedent do not withstand scrutiny. The court premised its "immediate purpose" test on language in *Buckley* v. *Fitzsimmons*, 509 U.S. 259 (1993), but read in context, that language provides no support for the Ninth Circuit's approach. *Fitzsimmons* explained that the determination of the nature of the acts at issue turned on "[a] careful examination of the allegations concerning the conduct of the prosecutors," based on objective factors such as whether the prosecutors had probable cause to arrest and whether judicial proceedings were pending at the time. *Id.* at 274. In the course of that discussion, the Court noted that the "immediate

purpose" of the special grand jury in which prosecutors were alleged to have submitted fabricated evidence was "to conduct a more thorough investigation of the crime—not to return an indictment against a suspect whom there was already probable cause to arrest." *Id.* at 275. That discussion is entirely consistent with a focus on the objective circumstances surrounding a prosecutor's conduct to determine the applicability of absolute immunity. Contrary to the Ninth Circuit's conclusion, it does not amount to "an invitation to probe the minds of individual" prosecutors to discern whether, although they engaged in conduct that is a core part of the advocacy function, their true intent in doing so was "investigative." *City of Indianapolis* v. *Edmond*, 531 U.S. 32, 48 (2000).

The court also reasoned that cases eschewing inquiry into a prosecutor's intent "universally involve allegations that the otherwise prosecutorial action was secretly motivated by malice, spite, bad faith, or self-interest," whereas this case involved an attempt to discern whether a prosecutor is exercising "investigative or national security functions." App., *infra*, 19a. But there is no support for the court of appeals' view that inquiry into the motives of the prosecutor is permissible for some purposes but not for others. The court of appeals' decision would yield different immunity rulings for the same acts in the same circumstances depending upon the alleged motive of the prosecutor. Thus, under the decision below, a prosecutor who seeks a material witness warrant for retaliatory reasons, or simply out of racial animus, would receive absolute immunity because his conduct is not "investigative." But a prosecutor who performs exactly the same function, in precisely the same circumstances, and at the same stage of the pro-

ceedings, would receive no such protection if he acted with the intent to further an ongoing criminal investigation. That anomalous result finds no support in law or logic.

2. The Ninth Circuit's "immediate purpose" analysis not only conflicts with bedrock immunity principles but will also frustrate the purposes of absolute immunity and expose prosecutors to suit for decisions about trial strategy.

a. Absolute prosecutorial immunity rests on bedrock public-policy considerations, see *Imbler*, 424 U.S. at 422-423, including the "concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust." *Id.* at 423. Thus, "qualifying a prosecutor's immunity would disserve the broader public interest" because it "would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system." *Id.* at 427-428.

To achieve its purposes, absolute immunity protects prosecutors not just from liability but also from the burdens of defending a lawsuit. As the dissent recognized, however, the court's holding that the availability of immunity turns on the prosecutor's intent would require "precisely the kind of expensive discovery and litigation [that] immunity was designed to avoid." App., *infra*, 103a. Allegations of improper purpose are "easy to allege and hard to disprove." *Hartman* v. *Moore*, 547 U.S. 250, 257 (2006) (internal quotation marks omitted). The risks posed by such allegations are particularly acute in litigation against government officials. In the qualified

immunity context, this Court has explained that "'subjective' inquiries of th[e] kind" required by the decision below incur not only "the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service," but also "special costs" involved in investigating subjective motivation that are "peculiarly disruptive of effective government." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 816-817 (1982). These observations apply with equal if not greater force to absolute immunity.

Thus, by holding that allegations of an "investigative" purpose suffice to defeat a motion to dismiss based on absolute immunity, the decision below seriously undermines the purposes for which such immunity exists. Cf. *Bogan* v. *Scott-Harris*, 523 U.S. 44, 54-55 (1998) ("The privilege of absolute immunity 'would be of little value if [legislators] could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives.'") (quoting *Tenney* v. *Brandhove*, 341 U.S. 367, 377 (1951)).

b. The rationale of the decision below, by stripping prosecutors of absolute immunity, would expose them to suit for other core advocacy functions.

It is settled, for example, that decisions about whether and what charges to bring against a defendant are among the most basic functions of an advocate. But prosecutors routinely bring charges against lower-level offenders in circumstances where defendants could allege that their "immediate purpose" is both obtaining critical information about more valuable suspects and actively enlisting the defendant in investigative efforts,

not to proceed with a prosecution. Under the decision below, such motives would presumably expose the prosecutor to suit and entitle a defendant to discovery on claims seeking damages for vindictive or retaliatory prosecution.

The court of appeals acknowledged that defendants would likely invoke the "immediate purpose" exception to sue prosecutors for bringing criminal charges on the notion that the "real" purpose of charges was to pressure the defendant to cooperate in an ongoing investigation. The court simply declared, however, that a "prosecutor who files charges may hope, eventually, that the petty crook will implicate his boss," but "the *immediate* purpose of filing charges is to *begin a prosecution*—the better to pressure the defendant into providing information." App., *infra*, 25a. But that reasoning has no principle behind it, as the dissent recognized. *Id.* at 103a ("[W]hy isn't the prosecutor's 'immediate purpose' in this case to secure a witness's appearance at trial rather than to obtain evidence against [respondent]?"). The potential implications of the decision below for the scope of absolute immunity in a range of contexts thus warrants review by this Court.

B. The Qualified Immunity Analysis In The Decision Below Warrants This Court's Review

The court of appeals further held that petitioner is not entitled even to qualified immunity from suit on respondent's pretext claims. That decision was incorrect on multiple levels. The Ninth Circuit's conclusion that the Fourth Amendment prohibits a "pretextual" arrest on a valid material witness warrant not only conflicts with fundamental tenets of this Court's precedents but also effectively invalidates the material witness statute

as unconstitutional in the circumstances of this case. The court's conclusion that such a Fourth Amendment rule was clearly established, moreover, represents a serious misapplication of qualified immunity doctrine. The Ninth Circuit's rulings impinge on the exercise of important government functions and merit this Court's review.

1. The Ninth Circuit's Fourth Amendment ruling conflicts with decisions of this Court and invalidates an Act Of Congress

a. Contrary to the court of appeals' holding, an arrest based on a material witness warrant validly issued by a magistrate judge does not violate the Fourth Amendment because prosecutors were motivated to seek it for "investigative" purposes. A long line of this Court's cases holds that an officer's motives are irrelevant to the lawfulness of his or her conduct under the Fourth Amendment. In *Whren* v. *United States*, 517 U.S. 806, 813 (1996), this Court expressly rejected the contention that the Constitution prohibits the use of traffic offenses "as pretexts for pursuing other investigatory agendas," *id.* at 811, and held that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." *Id.* at 813. The Court reemphasized that conclusion in *Devenpeck* v. *Alford*, 543 U.S. 146 (2004), holding that an officer's "subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause." *Id.* at 153. Those decisions foreclose the court of appeals' holding that the subjective intent of the prosecutor renders unconstitutional an arrest based on a valid material witness warrant.

The court reasoned that the principle of *Whren* and *Devenpeck* does not apply here because those cases involved arrests based on "probable cause to *believe that a violation of law has occurred*." App., *infra*, 32a (quoting *Whren*, 517 U.S. at 811) (emphasis by the court). The court noted that, in contrast, "[a]n arrest of a material witness is not justified by probable cause because the two requirements of Section 3144 (materiality and impracticability) do not constitute the elements of a crime." *Id.* at 34a. The court thus concluded that because a material witness arrest is not supported by "probable cause to arrest," the applicable standard was supplied by cases involving warrantless searches at motor vehicle checkpoints, as to which "an inquiry into purpose at the programmatic level" is appropriate under *Edmond*, 531 U.S. at 46.

That conclusion is fundamentally flawed for two principal reasons. First, the "programmatic purpose" standard of *Edmond*, which was derived from generalized and warrantless searches of vehicles, does not apply in this context because a material witness arrest is conducted pursuant to a warrant issued by a neutral magistrate. As the dissent explained, "[t]he 'programmatic purpose' inquiry is necessary to test the validity of a special needs search precisely because such searches occur without the procedural protections of the warrant requirement and the magisterial supervision it entails." App., *infra*, 75a-76a. Second, the *Edmond* framework applies only to seizures that lack any individualized basis and may be justified, if at all, by the generalized interest that motivates the program pursuant to which they are conducted. Arrests based on a material witness warrant are objectively justified by the individualized probable-cause determination that the subject possesses

information important to an ongoing criminal proceeding. The court of appeals concluded that the concept of "probable cause" inherently relates only to suspected criminal wrongdoing, but for the reasons persuasively explained by the dissent, that conclusion "reflects a fundamental misunderstanding of the Fourth Amendment." *Id.* at 76a; see *id.* at 76a-82a.

Not only was the court's invocation of *Edmond* wrong, its application of the *Edmond* approach was wrong, too. The "program" at issue in *Edmond* was a police department practice of erecting random roadblocks intended to catch drug offenders. While this Court evaluated the purpose of that policy, it specifically "caution[ed] that the purpose inquiry in this context is to be conducted only at the programmatic level and is not an invitation to probe the minds of individual officers acting at the scene." 531 U.S. at 48. In other words, the Court approved of asking why the City had chosen to institute the program, but disapproved of asking why a particular officer on the scene conducted a seizure pursuant to it.

Here, the "program" at issue is the material witness statute, which Congress enacted to provide prosecutors with a means of ensuring that key witnesses would appear at trial. That "programmatic" purpose—Congress's purpose—is consistent with the Fourth Amendment, and neither the court of appeals nor respondent has argued otherwise. The court of appeals, however, went beyond such an inquiry into purpose "at the programmatic level" and concluded that respondent's arrest was invalid because the particular prosecutors who sought it were motivated by reasons other than those for which the statute was intended. That is equivalent to "prob[ing] the minds of individual officers acting

at the scene"—precisely what *Edmond* does not condone. *Edmond*, 531 U.S. at 48.

b. The effect of the court's Fourth Amendment ruling was to invalidate the material witness statute as applied to the circumstances of this case. Although the court never explicitly declared that result, the as-applied unconstitutionality of Section 3144 necessarily follows from the court's holding that the Fourth Amendment prohibits an arrest that the material witness statute permits. The panel did not hold that the material witness statute itself limits material witness arrests to those in which the prosecutor acts with a non-investigative purpose. Rather, as the dissent pointed out, the court held that "*even if* the material witness warrant on which he was detained was objectively valid and supported by probable cause, the prosecutor's subjective intention to use the material witness warrant to accomplish other, law-enforcement objectives renders the government's conduct unconstitutional." App., *infra*, 70a.[3]

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[3] In an opinion concurring in the denial of rehearing en banc, Judge Smith, writing only for himself, argued that "[t]he material witness statute [itself] does not authorize arrests like the one in this case" and therefore that the panel had not "address[ed] the validity" of the law. App., *infra*, 113a-114a (emphasis omitted). But Judge Smith did not explain why the statute prohibits such an arrest when a neutral magistrate issues a warrant concluding that all of the statutory criteria have been satisfied, and in any event, his arguments do not square with the court's decision. Unlike Judge Smith, the court characterized respondent's claims under Section 3144 as resting on the false statements contained in the supporting affidavit, not on the allegedly improper purposes for which the warrant was sought. See *id.* at 47a-48a (panel opinion) ("[Respondent] claims that, in his case, the Mace Affidavit fails to demonstrate probable cause for either the materiality of his testimony or the reasons it would be impracticable to secure that testimony by sub-

The material witness statute has been in existence since 1789. See *Bacon* v. *United States*, 449 F.2d 933, 938 (9th Cir. 1971). All 50 states have enacted an analogous law. Until now, "[t]he constitutionality of this statute apparently has never been doubted." *Barry* v. *United States ex rel. Cunningham*, 279 U.S. 597, 617 (1929); see *Hurtado* v. *United States*, 410 U.S. 578, 588 (1973). The Ninth Circuit's implicit invalidation of such a longstanding and important Act of Congress provides an additional reason for this Court to grant review. See, *e.g.*, *United States* v. *Williams*, 128 S. Ct. 1830 (2008); *Ashcroft* v. *ACLU*, 542 U.S. 656 (2004); *United States* v. *Morrison*, 529 U.S. 598 (2000).

2. The court of appeals committed serious error in holding that the Fourth Amendment violation was clearly established

The court of appeals "compound[ed] its error" in concluding that respondent's arrest violated the Fourth Amendment by also "holding that the right to be free from a detention under a pretextual material witness warrant was clearly established." App., *infra*, 128a. The Ninth Circuit's incorrect denial of qualified immunity to a cabinet-level official warrants this Court's review.

a. The doctrine of qualified immunity "'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" *Hunter* v. *Bryant*, 502 U.S. 224, 229 (1991) (quoting *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986)). If at the

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poena. This allegation is the § 3144 claim: that, independent of the constitutionality of the use of § 3144 for investigatory purposes, al-Kidd's arrest failed to meet the statutory requirements set forth by Congress, and was therefore unlawful.").

time in question "officers of reasonable competence" could disagree on whether the alleged action violated the plaintiff's constitutional or statutory rights, "immunity should be recognized." *Malley*, 475 U.S. at 341.

"The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Brosseau* v. *Haugen*, 543 U.S. 194, 199 (2004) (per curiam) (quoting *Saucier* v. *Katz*, 533 U.S. 194, 201 (2001)). This inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Ibid.*; see *Wilson* v. *Layne*, 526 U.S. 603, 615 (1999) ("[T]he right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established.").

b. Under these standards, petitioner is plainly entitled to qualified immunity from suit on respondent's pretext claim. Even if the court of appeals were correct that the Fourth Amendment prohibited the execution of a material witness warrant when a prosecutor acted with investigative intent, that rule was not clearly established at the time of respondent's arrest. The court of appeals acknowledged that, in March 2003, no case had "squarely confronted the question of whether misuse of the material witness statute to investigate suspects violates the Constitution." App., *infra*, 41a. The only case the majority identified even remotely addressing the "specific context of [this] case," *Brosseau*, 543 U.S. at 198, was a district court decision that, in dicta in a footnote, warned that "[r]elying on the material witness statute to detain people * * * in order to prevent potential crimes is an illegitimate use of the statute." *United States* v. *Awadallah*, 202 F. Supp. 2d 55, 77 n.28

(S.D.N.Y. 2002), rev'd on other grounds, 349 F.3d 42 (2d Cir. 2003), cert. denied, 543 U.S. 1056 (2005). As the dissent to the denial of rehearing en banc stated, "[t]he majority's assertion that three sentences of dicta in a footnote to a subsequently reversed district court opinion clearly established a right that the majority expended nearly three-thousand words describing is truly astonishing." App., *infra*, 129a.

The other sources on which the court of appeals relied in deeming respondent's purported Fourth Amendment rights "clearly established" do not support that conclusion. As Judge O'Scannlain explained, the "history and purposes of the Fourth Amendment" and the "definition of probable cause" are far too general to clearly establish the illegality of respondent's arrest in the particular circumstances. App., *infra*, 128a ("If [these sources are] 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?'"). The court of appeals also reasoned that *Edmond* "should have been sufficient to put [petitioner] on notice that the material witness detentions," like administrative or special-needs searches, "would be similarly subject to an inquiry into programmatic purpose." *Id.* at 43a. But while the "programmatic purpose" test announced in cases such as *Edmond* may have been clearly established in the roadblock and administrative search contexts, it was not clearly established whether, much less how, that framework applied to arrests based on material witness warrants.

Indeed, at the time of respondent's arrest, at least one court of appeals had rejected the contention that an intent to investigate an individual as a suspect invalidates a material witness warrant. In *United States ex*

rel. Glinton v. *Denno*, 339 F.2d 872, 875 (2d Cir. 1964), cert. denied, 381 U.S. 929 (1965), a criminal defendant originally detained as a material witness argued that "it is irrelevant that the police complied with the technicalities of the material witness statute, because as the 'target' of the grand jury proceeding he could not have been summoned to testify, * * * and therefore could not be held as a witness." But as the court held, "[t]his argument has no merit." *Ibid.* The court deemed persuasive the decision in *People* v. *Perez*, 90 N.E. 2d 40, 46 (Ct. App. N.Y. 1949), in which the court upheld a situation almost identical to the practice alleged here: "While the police may have suspected defendant of the murder, they did not have enough evidence to hold him as a defendant until shortly before he confessed. His detention during that period was lawful because, in light of his admitted knowledge of many of the circumstances surrounding the murder, his commitment as a material witness was valid." *Ibid.*

3. The denial of qualified immunity on the pretext claim would significantly limit the use of the material witness statute

If permitted to stand, the decision below would seriously limit the circumstances in which prosecutors could invoke the material witness statute without fear of personal liability.

Individuals who have information critical to a prosecution often happen to be suspects in the underlying criminal investigation. And because such individuals face potential criminal exposure, they may become the subject of a material witness warrant if there is reason to believe they will flee the jurisdiction or refuse to respond to a subpoena. The decision below, however, sug-

gests that prosecutors will be subject to suit if they lack probable cause to charge such an individual but arrest him on a material witness warrant—even though that warrant is issued by a neutral judge based on an application that satisfies the requirements of 18 U.S.C. 3144.

The decision below therefore creates legal uncertainty in frequent applications of the material witness statute. To take one noteworthy example, federal agents initially detained Terry Nichols pursuant to a material witness warrant just days after the 1995 Oklahoma City bombing. See *United States* v. *McVeigh*, 940 F. Supp. 1541, 1548 (D. Colo. 1996). Although Nichols was implicated as a possible participant in the bombing because of his association with Timothy McVeigh, agents acknowledged that they lacked probable cause to hold Nichols in custody unless they arrested him as a material witness. *Ibid.* After further investigation following his arrest pursuant to the material witness statute, the government developed sufficient evidence to obtain a new arrest warrant on a criminal complaint alleging Nichols's direct involvement in the bombing. See *In re Material Witness Warrant*, 77 F.3d 1277, 1278-1279 (10th Cir. 1996). Under the reasoning of the decision below, Nichols would have had a cause of action for damages against (and presumably the right to seek discovery from) the prosecutors who obtained the material witness warrant based on an allegation that those officials pursued an investigative purpose.

Indeed, because the Ninth Circuit considered this Fourth Amendment principle "clearly established," prosecutors will likely avoid invoking the material witness statute in circumstances that could conceivably run afoul of the decision below. Thus, although the Ninth Circuit's analysis did not specify how it applies when the

prosecutor acts with mixed motives in seeking a material witness warrant, the fear of personal liability might dissuade prosecutors from obtaining such a warrant when they harbor any suspicion that the subject might be involved in criminal wrongdoing but do not yet have probable cause to bring criminal charges. The court of appeals' ruling will thus discourage prosecutors from employing the material witness statute in situations for which it was designed and in which the public interest favors its use.

C. The Court of Appeals Adopted Pleading Standards That Conflict With *Iqbal*

In addition to holding that petitioner lacked any type of immunity on the pretext claim, the court of appeals concluded that petitioner may be held responsible for alleged false statements and omissions in the affidavit submitted in support of the warrant to arrest respondent. That holding is inconsistent with this Court's decision in *Iqbal* and exposes a cabinet-level official to money damages for the conduct of his subordinates. This Court's review of that ruling is warranted.

a. *Iqbal* set forth two principles that govern this case. First, the Court explained that the Federal Rules of Civil Procedure require a plaintiff to provide "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" 129 S. Ct. at 1949 (quoting *Bell At. Corp.* v. *Twombly*, 550 U.S. 544, 570 (2007)); see *Crawford-El* v. *Britton*, 523 U.S. 574, 598 (1998) (District courts should "insist" that a respondent "'put forward specific, nonconclusory factual allegations' that establish * * * cognizable injury."). Second, the Court held that government officials may not be held responsible for the misconduct of their subordinates under broad theories of "supervisory liability." *Iqbal*,

129 S. Ct. at 1949. Instead, a supervisory official may be held liable under *Bivens* only if a respondent demonstrates that the supervisor "through [his or her] own individual actions, has violated the Constitution." *Id.* at 1948.

b. Contrary to the decision below, respondent's allegations do not satisfy the standards set forth in *Iqbal*. The complaint failed to plead any specific facts plausibly establishing that petitioner, the former Attorney General of the United States, through his own actions, participated in the making of allegedly false statements in the Mace affidavit. Instead, the complaint cites public statements by petitioner and other government officials declaring that the material witness statute was an "important investigative tool" that could be used to gather evidence and "tak[e] suspected terrorists off the street." App., *infra*, 7a, 24a (internal quotation marks omitted). But as the dissent recognized, those allegations at most "suggest [that petitioner] encouraged prosecutors to use valid material witness warrants as a means to accomplish other law-enforcement objectives." *Id.* at 89a-90a. They do not render plausible the conclusion on which the claim at issue rests—that petitioner required or encouraged the use of *false information* to obtain material witness warrants. Because respondent failed to allege that petitioner was either personally involved in that conduct or instituted a policy encouraging it, his claim amounts to an attempt to hold the former Attorney General liable for the alleged violation of Section 3144 by subordinate officials. *Iqbal* makes clear that such a broad claim of supervisory liability lacks merit.

Respondent also seeks damages on the allegation that petitioner "knew or reasonably should have known of the unlawful, excessive, and punitive manner in which

the federal material witness statute was being used in the aftermath of September 11, 2001," and that he was "legally responsible for taking any necessary corrective action in light of the mounting evidence of abuse." Compl. ¶¶ 137, 138. As an initial matter, those allegations are conclusory and therefore not entitled to the presumption of truth. *Iqbal*, 129 S. Ct. at 1949. But in any event, the mere assertion that petitioner knew of and acquiesced in false statements and omissions in applications filed by subordinates for material witness warrants would not by itself establish a constitutional violation. This Court has explained that the "factors necessary to establish a *Bivens* violation" by a supervisory official "will vary with the constitutional provision at issue." *Id.* at 1948. In *Iqbal*, for example, this Court held that the mere allegation that a supervisor knew about and acquiesced in purposeful discrimination by his subordinates failed to state a Fifth Amendment discrimination claim against the supervisor because "purpose rather than knowledge is required to impose *Bivens* liability * * * for unconstitutional discrimination." *Id.* at 1949. Similarly, here, the alleged constitutional violation requires proof that the officer acted deliberately or recklessly. See *Franks* v. *Delaware*, 438 U.S. 154, 164-172 (1978). An allegation that a supervisor knew of and acquiesced in such violations by subordinates does not meet this Court's rather stringent standard for establishing a constitutional violation.

c. Despite these deficiencies in the complaint, the court of appeals held that respondent's allegations were sufficient to state a supervisory liability claim against petitioner. That decision implicates the same concerns that animated the decision in *Iqbal*. There, this Court emphasized that supervisory officials "may not be held

accountable for the misdeeds of their agents" and that "each Government official, his or her title notwithstanding, is only liable for his or her own misconduct." 129 S. Ct. at 1949. The court of appeals nevertheless reasoned that petitioner could be held liable for "setting in motion a series of acts by others * * * which [he] knew or reasonably should have known would cause others to inflict constitutional injury" and for "acquiescence in the constitutional deprivation by subordinates." App., *infra*, 30a. *Iqbal* makes clear, however, that the proper inquiry is not whether the supervisor was somehow involved in a constitutional deprivation, but whether that supervisor, through his own individual actions, "violat-[ed] the Constitution." 129 S. Ct. at 1949. The court of appeals' decision, which imposed supervisory liability on a cabinet-level official in contravention of *Iqbal*, warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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