No. 10-98

IN THE

Supreme Court of the United States

JOHN D. ASHCROFT,
Petitioner,
v.

ABDULLAH AL-KIDD,
Respondent.

On Petition for 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

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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 Petition presents three questions; *amici curiae* address the following two questions only:

1. 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.

2. 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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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 distraction 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.

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 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

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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. More than ten days prior to the due date, counsel for *amici* provided counsel for Respondent Al-Kidd with notice of intent to file. All parties have consented to the filing of this brief; letters of consent have been lodged with the clerk.

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]

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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,

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 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] Two of Al-Kidd's

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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.

[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

claims are relevant to this petition.

First, 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 to be arrested may 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.

Second, Al-Kidd asserted that FBI agents Scott Mace and Michael Gneckow included 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 asserted that many of the defendants, including Ashcroft, should be held liable for the allegedly false statements and material omissions. He asserted that

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Division), and the two FBI agents who prepared the affidavit in support of the warrant application.

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.[4]

The individual defendants filed motions to dismiss the complaint. 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

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[4] Al-Kidd also asserted that the conditions of his 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. This third claim is not at issue here.

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 43s.

The appeals court also rejected Ashcroft's assertion that he was entitled to dismissal of the deliberate-false-statement claim. *Id.* at 47a-56a. The court held that Al-Kidd need not allege that Ashcroft "actually instructed" his subordinates to submit an affidavit containing false statements. *Id.* at 52. Rather, the complaint was sufficient to withstand a motion to dismiss because it alleged facts showing "Ashcroft's knowing failure to act in the light of even unauthorized abuses." *Id.* at 52a.

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 asserted that the Court's decision in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), barred imposing liability on Ashcroft on the basis of his subordinates' allegedly false statements, in the absence of allegations that Ashcroft acted affirmatively to encourage such false statements. *Id.* at 86a-92a. 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.

REASONS FOR GRANTING THE PETITION

The petition raises issues of exceptional importance. 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. Review is warranted to determine whether such disruptions are required under the terms of the qualified immunity doctrine, particularly 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 nonetheless violate the Fourth Amendment 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" requirement 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).

Review is also warranted because the appeals court decision effectively declares the material witness statute unconstitutional, at least as applied to Al-Kidd. 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.

Review is also warranted of the appeals court's decision to allow Al-Kidd to proceed with his deliberate-false-statement claim against Ashcroft. That claim is based on a supervisory liability theory of the sort rejected by this Court in *Iqbal*. There is no allegation that Ashcroft had any specific knowledge of Al-Kidd or the alleged decision of an FBI agent to include false statements in his affidavit. In allowing the claim to go forward, the Ninth Circuit relied on allegations that Ashcroft was aware of abuses of the material witness statute and knowingly "fail[ed] to act." Pet. App. 52a. But *Iqbal* held squarely that a government supervisory employee "do[es] not answer for the torts of [his]

servants" in a *Bivens* action but rather "is only liable for his or her own misconduct." *Iqbal*, 129 S. Ct. at 1949. Establishing such misconduct entails showing a "purpose" to violate constitutional rights, not mere "knowledge" of others' violations. *Id.* Moreover, allegations that Ashcroft encouraged "pretextual" use of the material witness statute cannot serve as a predicate for deliberate-false-statement liability. Even if one accepts the Ninth Circuit's conclusion that "pretextual" use of § 3144 violates the Fourth Amendment, it is simply not plausible to assert that encouraging "pretextual" use causes FBI agents to include false statements in their material witness affidavits.

I. REVIEW IS WARRANTED BECAUSE 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.

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); *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); *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); *Vance v. Rumsfeld*, 694 F. Supp. 2d 957 (N.D. Ill. 2010) (similar claims by individuals detained in Iraq); *Turkmen v. Ashcroft*, 589 F.3d 542 (2d Cir. 2009) (suit against Attorney General and FBI Director regarding treatment of individuals held for immigration violations in connection with 9/11 investigation); *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*, 177 L. Ed. 2d 349 (2010). Review is warranted to provide clear guidance to the lower federal courts regarding when the qualified immunity doctrine requires early dismissal of damage claims against senior government officials.

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 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*, 129 S. Ct. 808, 818 (2009). *Amici* submit that review of the second prong – whether the asserted right was "clearly

established" – is particularly warranted in this case.

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 nonetheless violate the Fourth Amendment 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 is sufficient to meet the "clearly established" requirement, then it will be exceedingly difficult for a government official to demonstrate that any Fourth Amendment rule is *not* clearly established. Indeed, it would call into question the constitutionality of the material witness statute itself, which throughout American history has been used to detain individuals who the government has no reason believe have committed a criminal offense. Moreover, this Court has recognized numerous exceptions to the general rule 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., Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995) (upholding random

drug testing of student-athletes); *Treasury Employees v. von Raab*, 489 U.S. 656 (1989) (upholding random drug testing of Customs employees); *Skinner v. Railway 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); *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). The appeals court made no effort to explain why those decisions do not undercut its "clearly established" determination in this case.

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 officers, 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.

More importantly, *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 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 all government uses of the statute have been "pretextual" in nature. Rather, he asserts that use of the statute was "pretextual" *in his particular case*.

Accordingly, nothing in *Edmond* would have put government officials on notice that the Fourth Amendment authorized courts to "look behind" the decision to seek a material witness warrant for Al-Kidd, to determine whether its "primary purpose" in seeking the warrant was valid. Indeed, in *every* Fourth Amendment case in which this Court has been asked to "look behind" an objectively reasonable government action to determine whether the government action was improperly motivated, it has declined to do so. *See, e.g., Whren*, 517 U.S. at 813; *Bond v. United States*, 529 U.S. 334, 338 n.2 (2000); *Scott v. United States*, 436 U.S. 128, 136 (1978) ("Subjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional."). Under those circumstance, the Ninth Circuit's determination that case law "clearly established" that the alleged "pretextual" use of § 3144 in Al-Kidd's case violated the Fourth Amendment sharply conflicts with

this Court's qualified immunity case law. *See, e.g., Malley v. Briggs*, 475 U.S. 335, 341 (1986) (qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law."). Review is warranted to resolve that conflict, without regard to whether one agrees with the appeals court's ultimate determination that the Fourth Amendment prohibits "pretextual" use of the material witness statute.

The Ninth Circuit's "clearly established" determination is also problematic because it took place at such a high level of generality. 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. Pet. App. 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). Review is warranted to determine whether federal officials in 2003, based on then-existing case law, could reasonably have anticipated that their decision to arrest Al-Kidd could give rise to an award of damages against them in a Fourth Amendment lawsuit.

II. THE DECISION BELOW UNDERMINES EFFECTIVE USE OF THE MATERIAL WITNESS STATUTE

Review is also warranted because the appeals court decision effectively declares the material witness statute unconstitutional, at least as applied to Al-Kidd. Pet. App. 125a-126a (O'Scannlain, J., dissenting from denial of rehearing *en banc*). That the decision below "invalidate[s] a statute passed by the First Congress and retained by every subsequent Congress," *id.* at 126a, is by itself sufficient reason to grant review.

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").[5] Federal prosecutors have made extensive use of § 3144 and its predecessors for many decades; recent critics are wrong in suggesting that there has been a sharp upswing in material witness warrants in the past decade.[6]

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[5] 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).

[6] Citing data from the Administrative Office of the United States Courts, a Congressional Research Service report concluded

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

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

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 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, the decision below 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. Review is warranted to determine whether that undesirable result is really mandated by the Fourth Amendment.

III. THE DECISION BELOW CONFLICTS WITH *IQBAL* BY IMPOSING SUPERVISORY LIABILITY WITH RESPECT TO THE DELIBERATE-FALSE-STATEMENT CLAIM

Review is also warranted of the appeals court's decision to allow Al-Kidd to proceed with his deliberate-false-statement claim against Ashcroft. That claim is based on a supervisory liability theory of the sort rejected by this Court in *Iqbal*.

The plaintiff in *Iqbal* asserted that the Attorney General and FBI Director could be held personally liable for his injuries, based in part on claims that they had inadequately supervised the government employees who had violated his rights. In rejecting that assertion, the Court made clear that federal officials may be held personally liable for their own misdeeds only, not those of their subordinates:

> Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*. . . . Because vicarious liability is inapplicable to *Bivens* and § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution.

Iqbal, 129 S. Ct. at 1948.

Al-Kidd alleges that two FBI agents included false information in the affidavit submitted in support of his material witness warrant (the "Mace Affidavit").[7] All parties agree that a lawsuit may legitimately challenge

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[7] *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.

the validity of searches and seizures conducted pursuant to a warrant if the affidavit in support of the warrant included false statements or material omissions that were made intentionally or recklessly. Pet. App. 48a (citing *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978)). But the complaint includes no allegations that Ashcroft took any steps to encourage the FBI agents or anyone else to include false statements in the Mace Affidavit. In the absence of such allegations, the Ninth Circuit's holding that the deliberate-false-statement claim states a cause of action against Ashcroft conflicts sharply with *Iqbal*'s limitations on supervisory liability.

The Ninth Circuit stated that allegations that Ashcroft encouraged "pretextual" use of § 3144 are sufficient to warrant allowing Al-Kidd to proceed against Ashcroft on the deliberate-false-statement claim. Pet. App. 51a. But the appeals court failed to explain any possible causal relationship. None of the factual allegations asserted by Al-Kidd to support his "pretextual" use claim against Ashcroft can plausibly be viewed as evidence that he encouraged his subordinates to file false affidavits. In the absence of any plausible explanation of a causal relationship, *Iqbal* requires dismissal of the deliberate-false-statement claim under Fed.R.Civ.P. 8(a). 129 S. Ct. at 1950.

The appeals court stated that Ashcroft could be held liable for the acts of the FBI agents on the basis of allegations that he had notice of "abuses occurring under the material witness statute after September 11, 2001," thereby creating a duty on Ashcroft's part to take "affirmative acts to supervise and correct the

actions of his subordinates." Pet. App. 54a.[8] That holding conflicts sharply with *Iqbal*, which prohibits imposition of supervisory liability in the absence of a showing of "purpose" to violate constitutional rights, not mere "knowledge" of others' violations. *Iqbal*, 129 S. Ct. at 1949.

Review is also warranted to allow the Court an opportunity to provide clearer guidance regarding the quantum of evidence necessary to establish supervisory liability. While the Court in *Iqbal* made clear that supervisors may not be held liable absent evidence that they themselves – and not just their subordinates – engaged in misconduct, the Court did not spell out in detail what constitutes the requisite misconduct. One standard that *amici* suggest the Court consider adopting is the D.C. Circuit's standard set forth in *Int'l Action Ctr.*: "A supervisor who merely fails to detect and prevent a subordinate's misconduct . . . cannot be liable for that misconduct. The supervisor must know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what they might see." 365 F.3d at 28. That standard stands in sharp contrast to the one employed by the Ninth Circuit, which allowed claims to proceed against Ashcroft based on little more than his failure to detect affidavit falsification by others.

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[8] In support of its "notice" allegations, the appeals court cited an April 2003 report from DOJ's Office of Inspector General. *Id.* In fact, that report did "not examine . . . use of material witness warrants." OIG, Dep't of Justice, *The September 11 Detainees*, 4, *available at* http://www.fas.org/irp/agency/doj/oig/detainees.pdf.

CONCLUSION

Amici curiae request that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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