No. 10-98

In the Supreme Court of the United States

JOHN ASHCROFT, PETITIONER

v.

ABDULLAH AL-KIDD

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

BRIEF FOR 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 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.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-105a) is reported at 580 F.3d 949. Opinions concurring in and dissenting from the denial of rehearing en banc (Pet. App. 106a-132a) are reported at 598 F.3d 1129. The opinion of the district court (J.A. 90-116) is not published in the Federal Supplement but 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 (Pet. App. 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, and the petition was filed on that date. The

petition was granted on October 18, 2010. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

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 person or things to be seized.

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

> If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142 of this title. No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice. Release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.

STATEMENT

1. In the wake of the terrorist attacks of September 11, 2001, the Federal Bureau of Investigation (FBI) conducted anti-terrorism investigations across the globe, including in Idaho. In February 2003, a grand jury sitting in the District of Idaho returned an indictment charging Sami Omar Al-Hussayen, a citizen of Saudi Arabia, with multiple false-statement 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 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. J.A. 68-76. 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." J.A. 76.

During its investigation, the FBI learned that respondent 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, 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. J.A. 59-60. In the war-

[1] Later, superseding indictments added three counts of conspiracy to provide material support to terrorist organizations.

rant application, prosecutors averred 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 unavailable "unless the Court detains or imposes restrictions on the travel of said material witness." J.A. 60.

The application was supported by an affidavit of FBI Special Agent Scott Mace. J.A. 61-65. In the affidavit, Mace stated that respondent 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. J.A. 63. 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." J.A. 64. Mace further stated that respondent "is scheduled to take a one-way, first class flight (costing approximately $5,000) to Saudi Arabia on Sunday, March 16, 2003, at approximately 6:00 EST." *Ibid.* 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." *Ibid.*

On March 14, 2003, 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 Mar. 17, 2003). Two days later, on March 16, FBI agents arrested respondent at Dulles International Airport as he prepared to board his flight to Saudi Arabia. J.A. 29. The next day, respondent appeared before a magistrate judge in the Eastern District of Virginia and agreed to be transferred to Idaho. J.A. 32. He

was then detained briefly at the Alexandria Detention Center in Virginia before being sent to the Ada County Jail in Boise, Idaho, via a federal transfer facility in Oklahoma. J.A. 30.

b. Nine days later, on March 25, respondent appeared with counsel before the Idaho magistrate judge who had issued the arrest warrant. J.A. 35-36. At a second hearing on March 31, the government proposed that respondent be released from custody subject to certain conditions. J.A. 38. The court agreed, releasing respondent that day to the custody of his wife on condition that he continue to reside with her in Nevada, surrender his passport, and limit his travel to Nevada and three other states. *Ibid.* In total, respondent spent 15 days in detention. J.A. 13.

Al-Hussayen's trial ended in June 2004, when the jury acquitted him on some charges and failed to reach a verdict on others. Respondent did not testify at the trial. J.A. 14. After the trial concluded, the district court granted respondent's motion to terminate the conditions of his release. J.A. 39.

2. In March 2005, respondent sued the United States and several government officials, including petitioner, the former Attorney General of the United States. The complaint sought damages for alleged violations of, *inter alia*, the material-witness statute and the Fourth Amendment. J.A. 51-52.[2]

Respondent's complaint rested on two factual assertions. First, respondent claimed that, in response to the September 11, 2001, terrorist attacks, petitioner imple-

[2] Respondent also sought damages based on the conditions of his confinement during the 15 days he was in custody. J.A. 52-54. The court of appeals ordered that claim dismissed, Pet. App. 59a, and it is not at issue here.

mented 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 said that he was arrested as a result of this alleged policy, which he contended violated the Fourth Amendment. J.A. 39-50. Second, respondent alleged that the affidavit submitted in support of the material-witness warrant contained deliberately false statements. Respondent did not take issue with the statements in the affidavit that he knew Al-Hussayen, that he had met with Al-Hussayen and IANA officials, that he received payments from Al-Hussayen and his associates exceeding $20,000, or that he had been about to leave for Saudi Arabia. But he alleged that, contrary to the 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. J.A. 25. Respondent also claimed that the affidavit omitted material information, including that he was a United States citizen and that he had previously cooperated with the FBI investigation. *Ibid.*

Petitioner and the other individual defendants moved to dismiss on grounds of personal jurisdiction, official immunity, and inadequate pleading. The district court denied the motions, J.A. 90-116, and petitioner filed an interlocutory appeal.[3]

3. A divided panel of the court of appeals affirmed in relevant part. Pet. App. 1a-105a.

a. The court of appeals held that petitioner was not entitled to absolute immunity on respondent's claims that petitioner implemented a policy of using the

[3] The other defendants did not join petitioner's interlocutory appeal, and respondent has continued to litigate his claims against them in the district court.

material-witness statute as a pretext to detain terrorism suspects for investigative or preventive purposes. Pet. App. 14a-27a. The court acknowledged that prosecutors are entitled to absolute immunity "when they engage in activities 'intimately associated with the judicial phase of the criminal process,'" *id.* at 14a (quoting *Imbler* v. *Pachtman*, 424 U.S. 409, 430 (1976)), and that "absolute immunity ordinarily attaches to the decision to seek a material witness warrant," *id.* at 18a. The court stated, however, that whether such immunity attaches in any particular case depends on "the prosecutor's *mission* and *purpose*." *Id.* at 23a. In particular, the court held that absolute immunity does not apply if the prosecutor's "immediate purpose" in seeking the material witness warrant is "to investigate or preemptively detain a suspect." *Id.* at 25a (emphasis omitted). 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.

The court of appeals next rejected petitioner's claim of qualified immunity. 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 immediate motivation is to conduct further investigation or preventively detain a suspect. Pet. App. 30a-40a. The court rejected the argument that *Whren* v. *United States*, 517 U.S. 806 (1996), forecloses an 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.'" Pet. App. 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. Pet. App. 36a-38a. The court 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 of appeals also held that the illegality of that policy was clearly established at the time of respondent's arrest. Pet. App. 40a-47a. The court 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* "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." *Id.* at 43a. The court stated 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)).

Finally, the court held that respondent had adequately alleged petitioner's responsibility for the false statements in the affidavit supporting the warrant application, rejecting petitioner's contention that this aspect of the complaint failed to satisfy the pleading standards set forth in *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937 (2009). Pet. App. 47a-56a.

b. Judge Bea dissented in relevant part. Pet. App. 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 emphasized that this Court "has 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. 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 the law was clearly established. *Id.* at 84a-86a.

Although Judge Bea deemed it unnecessary to reach the issue, he concluded that petitioner was also 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. Pet. App. 92a-104a. Judge Bea argued that the majority's inquiry

into the prosecutor's "immediate purpose" conflicted with 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.

On the claims alleging false statements in Special Agent Mace's 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." Pet. App. 87a (quoting *Iqbal*, 129 S. Ct. at 1948) (brackets in original). 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.

4. The court of appeals denied a petition for rehearing en banc. Pet. App. 106a.

a. Judge O'Scannlain dissented, joined by seven other judges. Pet. App. 122a-131a. The dissenting judges argued 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." *Id.* at 126a. They 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 statute unconstitutional, at least as applied to [respondent]." *Id.* at 125a. In the view of the dissenting judges, 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.

b. Judge Gould dissented. Pet. App. 131a-132a. He expressed the concern that "[i]f an Attorney General of the United States can be held liable and subject to monetary damages primarily because of actions of law enforcement subordinates," then "it will become more difficult to persuade a person of great talent and integrity to leave his or her current occupation in order to hold the nation's highest law office." *Id.* at 132a.

SUMMARY OF ARGUMENT

The court of appeals held that petitioner, the former Attorney General of the United States, may be subjected to burdensome litigation, and potentially to personal liability for damages, based on an arrest that was authorized by a material-witness warrant issued by a federal magistrate judge pursuant to an Act of Congress. In reaching that conclusion, the court committed a series of fundamental legal errors.

I. This Court has held that a prosecutor is absolutely immune from suits for damages "when he acts within the scope of his prosecutorial duties." *Imbler* v. *Pachtman*, 424 U.S. 409, 420 (1976). Courts have uniformly recognized that seeking a material-witness warrant is a prosecutorial function that is protected by absolute immunity. The court of appeals in this case did not take issue with that general rule, but it held that the decision to seek such a warrant is undeserving of absolute immunity if a plaintiff alleges that the prosecutor's true purpose was to investigate or detain the person subject to the warrant. That holding is inconsistent with longstanding and uniform case law precluding examination of a prosecutor's motives in determining whether absolute immunity applies. Because improper purpose is "easy to allege and hard to disprove," *Hartman* v.

Moore, 547 U.S. 250, 257 (2006) (internal quotation marks omitted), the court's decision would substantially undermine the purpose of the absolute-immunity doctrine, subjecting prosecutors to burdensome litigation and discovery whenever plaintiffs allege an investigatory purpose.

II. Even if petitioner were not entitled to absolute immunity, the judgment below should be reversed for the independent reason that petitioner is entitled to qualified immunity.

The court of appeals held that the use of a valid material-witness warrant violates the Fourth Amendment if the prosecutor who seeks the warrant has an investigative purpose. That holding is inconsistent with repeated decisions of this Court establishing that the Fourth Amendment prescribes an objective inquiry under which an officer's subjective purpose is irrelevant. See, *e.g.*, *Devenpeck* v. *Alford*, 543 U.S. 146, 153 (2004); *Whren* v. *United States*, 517 U.S. 806, 808-810 (1996). The court declined to follow those decisions, instead relying on *City of Indianapolis* v. *Edmond*, 531 U.S. 32 (2000), a case about suspicionless motor-vehicle checkpoints. Unlike the checkpoint seizures at issue in *Edmond*, however, a material-witness arrest is conducted on the basis of an individualized warrant issued by a neutral magistrate and subject to ongoing review.

The effect of the decision below is to invalidate the material-witness statute as it applies to the circumstances of this case. That holding is entirely unprecedented. The material-witness statute is based on a long-standing common-law practice that was codified in 1789 by the first Congress of the United States. All 50 States have adopted similar statutes, and until this decision, the constitutionality of those statutes "apparently has

never been doubted." *Barry* v. *United States ex rel. Cunningham*, 279 U.S. 597, 617 (1929). The court of appeals' erroneous Fourth Amendment ruling opens up virtually every material-witness warrant sought by a prosecutor to challenges—both when the warrant is issued and, after the fact, through damage actions—based on claims that the prosecutor has a investigatory or security motive.

The court of appeals compounded its error by concluding that its novel Fourth Amendment holding, supported principally by dicta in a footnote of a subsequently reversed district court decision, was sufficiently clearly established to impose personal monetary liability upon petitioner. In light of the absence of any precedent supporting the court's holding, it could hardly have been "clear to a reasonable officer" that the conduct alleged in this case was unlawful. *Saucier* v. *Katz*, 533 U.S. 194, 202 (2001).

III. The court of appeals further erred in holding that petitioner could be held liable based on alleged misstatements made by his subordinates. The court's decision was based on a theory of supervisory liability that is directly contrary to *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937 (2009), and which respondent has not attempted to defend. Br. in Opp. i. Because respondent's concession has mooted the issue, if the court of appeals' judgment is not reversed on grounds of immunity, that aspect of the court's decision should be vacated under *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950).

ARGUMENT

I. PETITIONER IS ENTITLED TO ABSOLUTE IMMUNITY FROM RESPONDENT'S CLAIM THAT HE SOUGHT A MATERIAL-WITNESS WARRANT FOR AN IMPROPER PURPOSE

A. Prosecutors Are Entitled To Absolute Immunity For Carrying Out Their Prosecutorial Functions

1. In *Imbler* v. *Pachtman*, 424 U.S. 409 (1976), this Court held that a prosecutor is absolutely immune from suits for damages "when he acts within the scope of his prosecutorial duties." *Id.* at 420. That immunity is based on a "well settled" common-law rule of prosecutorial immunity, *id.* at 424, and it rests on "the same considerations that underlie the common-law immunities of judges and grand jurors acting within the scope of their duties," *id.* at 422-423. Those considerations "include 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, thereby "prevent[ing] 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.

The Court in *Imbler* acknowledged that absolute immunity may "leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty." 424 U.S. at 427. But the Court expressed agreement with Judge Learned Hand, who observed that it is "in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their

duty to the constant dread of retaliation." *Id.* at 428 (quoting *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950)). The Court also noted that there are other checks on prosecutorial misconduct, including both punishment under criminal law and professional discipline. *Id.* at 429; see *Mitchell* v. *Forsyth*, 472 U.S. 511, 522-523 (1985) ("[T]he judicial process is largely self-correcting; procedural rules, appeals, and the possibility of collateral challenges obviate the need for damages actions to prevent unjust results.").

2. The Court in *Imbler* recognized that a prosecutor's duties are not limited to advocacy in court but also "involve actions preliminary to the initiation of the prosecution and actions apart from the courtroom." 424 U.S. at 431 n.33. In determining which actions by a prosecutor are protected by absolute immunity, the Court has taken a "functional approach," *Burns* v. *Reed*, 500 U.S. 478, 486 (1991), under which it "looks to 'the nature of the function performed, not the identity of the actor who performed it.'" *Buckley* v. *Fitzsimmons*, 509 U.S. 259, 269 (1993) (quoting *Forrester* v. *White*, 484 U.S. 219, 229 (1988)).

Absolute immunity protects prosecutors from liability whenever they are performing "the traditional functions of an advocate," *Kalina* v. *Fletcher*, 522 U.S. 118, 131 (1997), or are engaged in acts that are "intimately associated with the judicial phase of the criminal process," *Imbler*, 424 U.S. at 430. It therefore extends not only to the decision to initiate a prosecution by filing charging documents with the court, *Kalina*, 522 U.S. at 128-129, but also to any "duties of the prosecutor in his role as advocate for the State," *Buckley*, 509 U.S. at 272 (quoting *Imbler*, 424 U.S. at 431 n.33). Those duties

"include the professional evaluation of the evidence assembled by the police and appropriate preparation for its presentation at trial or before a grand jury after a decision to seek an indictment has been made." *Id.* at 273 (citation omitted). They also include making decisions about "whether to present a case to a grand jury, whether to file an information, whether and when to prosecute, whether to dismiss an indictment against particular defendants, which witnesses to call, and what other evidence to present." *Imbler*, 424 U.S. at 431 n.33.

The "functional" test for absolute immunity is an objective one: the prosecutor's subjective motive or intent is irrelevant in determining the nature of the function performed. See *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."). Indeed, anything other than an objective standard would effectively defeat absolute immunity. As the Court has observed in the analogous context of legislative immunity, "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.'" *Bogan* v. *Scott-Harris*, 523 U.S. 44, 54-55 (1998) (quoting *Tenney* v. *Brandhove*, 341 U.S. 367, 377 (1951)) (brackets in original). For similar reasons, absolute judicial immunity cannot "be affected by the motives with which * * * judicial acts are performed." *Cleavinger* v. *Saxner*, 474 U.S. 193, 199-200 (1985) (quoting *Bradley* v. *Fisher*, 80 U.S. (13 Wall.) 335 (1872)). The same principle applies to prosecutorial immunity. See *Butz* v. *Economou*, 438 U.S. 478, 509-510 (1978).

B. Seeking A Material-Witness Warrant Is A Prosecutorial Function

Seeking and obtaining a material-witness warrant is a core prosecutorial act, and a prosecutor is absolutely immune from any claims based on that act. A prosecutor's decision that the testimony of a particular witness is necessary to an ongoing criminal proceeding falls squarely within the prosecutor's "traditional functions as an advocate." *Imbler*, 424 U.S. at 431 n.33. As this Court has observed, those functions include deciding "which witnesses to call." *Ibid.*

Nor can it be doubted that seeking and obtaining a material-witness warrant from a judicial officer in the context of a criminal proceeding is "intimately associated with the judicial phase of the criminal process." *Imbler*, 424 U.S. at 430; see *Burns*, 500 U.S. at 487 (applying absolute immunity to a prosecutor's "participation in a probable-cause hearing, which led to the issuance of a search warrant"). An application for a material-witness warrant requires an affidavit showing that "the testimony of a person is material in a criminal proceeding," and the warrant itself is issued by "a judicial officer" presiding over that criminal proceeding. 18 U.S.C. 3144. Thus, a prosecutor's decision to seek such a warrant occurs in the context of a specific proceeding, and it requires a showing that the warrant is germane to those proceedings. It is therefore not surprising that (apart from the prior rulings in this case) the federal courts have uniformly held that a prosecutor's decision to seek a material-witness arrest warrant is protected by absolute immunity. See, *e.g.*, *Betts* v. *Richard*, 726 F.2d 79, 81 (2d Cir. 1984); *Daniels* v. *Keiser*, 586 F.2d 64, 68-69 (7th Cir. 1978), cert. denied, 441 U.S. 931

(1979); cf. *White* v. *Gerbitz*, 860 F.2d 661, 665 n.4 (6th Cir. 1988), cert. denied, 489 U.S. 1028 (1989).

C. Petitioner Is Entitled To Absolute Immunity For Claims Based On An Alleged Policy Governing Material-Witness Warrants

In light of the principles explained above, there can be little doubt that the actions of the Assistant United States Attorney in deciding to seek a material-witness warrant for respondent, preparing the warrant application, and presenting it to the court were covered by absolute immunity. Indeed, respondent did not even attempt to name the lead prosecutor as a defendant in this action. As the former Attorney General of the United States, petitioner is entitled, at the very least, to the same immunity as the Assistant United States Attorney.

1. This Court has held that "supervisory prosecutors are immune in a suit directly attacking their actions related to an individual trial." *Van de Kamp* v. *Goldstein*, 129 S. Ct. 855, 862 (2009). In *Goldstein*, a criminal defendant sought damages against a district attorney for allegedly failing to train and supervise his deputies to ensure that they would disclose impeachment material to defense counsel, as required by *Giglio* v. *United States*, 405 U.S. 150 (1972). 129 S. Ct. at 861. Even though the claim concerned "the office's administrative procedures," the Court held that "the prosecutors involved in such supervision or training * * * enjoy absolute immunity." *Id.* at 861-862. The Court reasoned that the administrative tasks at issue were "directly connected to the conduct of a trial," and it observed that "an individual prosecutor's error in the plaintiff's specific criminal trial constitutes an essential element of the plaintiff's claim." *Id.* at 862.

Under *Goldstein*, an attorney setting policies or providing instructions about a prosecutorial act is entitled to absolute immunity. A plaintiff cannot defeat absolute immunity simply by alleging the existence of a broad policy concerning a prosecutorial action, otherwise plaintiffs could plead around such immunity in a variety of cases. As *Goldstein* makes clear, even if the claim involves "*general* methods of supervision and training," that "does not preclude an intimate connection between prosecutorial activity and the trial process." 129 S. Ct. at 862-863. Instead, managerial acts or general policies that involve the conduct of trials are covered by absolute immunity when they are "directly connected to the prosecutor's basic trial advocacy duties." *Id.* at 863.

Respondent's claims in this case are based on an alleged policy developed by petitioner that was "directly connected with the conduct of a trial," 129 S. Ct. at 862 —that is, to the quintessentially prosecutorial function of seeking material-witness warrants. See J.A. 39 (alleging that petitioner "routinely used the material witness statute in numerous new, unlawful ways," including "to arrest and hold individuals" the government wished to investigate); J.A. 41 (alleging that petitioner developed a policy to "use the material witness statute to arrest and detain terrorism *suspects*"); J.A. 48-49 (alleging that petitioner "was a principal architect of, authorized and set into motion, these policies and practices regarding the material witness statute, and had responsibility for their implementation and administration"). Under *Goldstein*, those claims—no less than any claims challenging an individual prosecutor's decision to seek a material-witness warrant in an individual case—are barred by absolute immunity.

2. Respondent argued below that, even if a prosecutor generally would be absolutely immune for seeking a material-witness warrant, petitioner is not entitled to absolute immunity because he was not only the Nation's chief prosecutor but also its chief law-enforcement officer, with authority over the FBI. Resp. C.A. Br. 25-27. That argument lacks merit because the absolute-immunity analysis focuses on "the nature of the function performed, not the identity of the actor who performed it." *Kalina*, 522 U.S. at 127. The function at issue here is inherently prosecutorial, and thus any additional duties the Attorney General has are of no moment.

In any event, the complaint makes clear that it was the Assistant United States Attorney, and not the FBI, who submitted the application for a material-witness warrant in this case. J.A. 23-24. Although law-enforcement officials assist prosecutors in obtaining material-witness warrants—for instance, by gathering facts and preparing supporting affidavits—it is the prosecutor who ultimately decides whether to seek such a warrant, and it is that act that provides the basis for petitioner's claim. That quintessentially prosecutorial function does not lose its prosecutorial character merely because law-enforcement officers also play a role in the process.[4]

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[4] This Court has drawn a distinction for absolute-immunity purposes between prosecutors, who are subject to specialized discipline, and law-enforcement officials. See *Malley* v. *Briggs*, 475 U.S. 335, 343 n.5 (1986) ("The organized bar's development and enforcement of professional standards for prosecutors also lessen the danger that absolute immunity will become a shield for prosecutorial misconduct. * * * [A] prosecutor stands perhaps unique * * * in his amenability to professional discipline by an association of his peers. The absence of a comparatively well developed and pervasive mechanism for controlling police misconduct weighs against allowing absolute immunity for the officer.") (internal quotation marks and citation omitted).

D. The Court Of Appeals Erred In Denying Absolute Immunity On The Basis Of The Alleged Purpose Of The Prosecutor In Seeking A Material-Witness Warrant

The court of appeals did not question the proposition that seeking a material-witness warrant generally falls within the category of prosecutorial actions to which absolute immunity applies. Instead, the court minted its own novel exception to the immunity rule, holding that a prosecutor loses immunity for seeking a material-witness warrant if the "immediate purpose" of the warrant is not to secure a person's presence for a criminal proceeding, but "to investigate or preemptively detain a suspect." Pet. App. 25a. The court's "immediate purpose" analysis effectively replaces the simple legal inquiry into the "nature of the function being performed," *Buckley*, 509 U.S. at 269, with a complicated factual inquiry into the subjective "purposes" of the prosecutor. That approach not only conflicts with bedrock immunity principles; it also frustrates the purposes of absolute immunity by exposing prosecutors to suit for decisions about trial strategy.

1. The "immediate purpose" exception created by the court of appeals is contrary to this Court's precedent. As explained above, see p. 16, *supra*, it is well established that the scope of absolute immunity does not turn on motive or intent. Consistent with that principle, no other court of appeals has adopted the "immediate purpose" approach of the court below, and several courts of appeals have expressly rejected the suggestion that a prosecutor's intent has any relevance to 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 immu-

nity."); *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 stated that the cases eschewing inquiry into a prosecutor's intent have involved "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 was exercising "*investigative* or *national security* functions." Pet. App. 19a. But there is no basis for the court's apparent view that inquiry into the motives of the prosecutor is permissible for some purposes but not for others. Under the decision below, a prosecutor who sought a material-witness warrant for retaliatory reasons, or even out of racial animus, would receive absolute immunity because his conduct would not be "investigative." But a prosecutor who performed exactly the same function, in precisely the same circumstances and at the same stage of the proceedings, would receive no such protection if he acted with the intent to further an ongoing criminal investigation. That perverse result finds no support in law or logic.

2. The court of appeals premised its "immediate purpose" test on language in *Buckley*, Pet. App. 19a-20a, but that case does not support the court's approach. In *Buckley*, this Court held that prosecutors were not entitled to absolute immunity against claims that, in analyzing crime-scene evidence, they "conspired to manufacture false evidence" implicating the defendant. 509 U.S. at 272. The Court observed that "[t]here is a difference between the advocate's role in evaluating evidence and

interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand." *Id.* at 273. The Court noted that the prosecutors' "mission at the time" they allegedly fabricated evidence "was entirely investigative in character." *Id.* at 274. The Court further explained that the subsequent convening of a grand jury did not make the prosecutor's alleged fabrication of evidence a prosecutorial act. *Id.* at 275. In reaching that conclusion, the Court emphasized that the grand jury was empaneled "well after the alleged fabrication of false evidence," adding that the "immediate purpose" of the grand jury 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." *Ibid.*

The court of appeals seized on this Court's statements about the *Buckley* prosecutors' "mission" and the "immediate purpose" of the grand jury, but it disregarded the context in which those statements were made. This Court emphasized in *Buckley* that its 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 they had probable cause to arrest and whether judicial proceedings were pending at the time. 509 U.S. at 274 (emphasis added). Nothing in *Buckley* suggests that it is appropriate for a court to examine the state of mind of individual prosecutors to discern whether, although they were engaged in conduct that is a core part of the advocacy function, their true intent in doing so was "investigative."

3. The approach taken by the court of appeals would seriously undermine the purposes of absolute prosecutorial immunity. That immunity rests on important public-policy considerations, 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." *Imbler*, 424 U.S. at 423. Moreover, allowing liability to be based on a prosecutor's actions in early phases of a criminal case could have dangerous ramifications for later phases of the case. As the Court has recognized, "[e]xposing the prosecutor to liability for the initial phase of his prosecutorial work could interfere with his exercise of independent judgment at every phase of his work, since the prosecutor might come to see later decisions in terms of their effect on his potential liability." *Malley* v. *Briggs*, 475 U.S. 335, 343 (1986). For example, a prosecutor may forgo seeking a material-witness warrant, and potentially lose an important witness in a case, out of concern that seeking such a warrant may expose him or his supervisors to suit and potentially to liability. Likewise, a prosecutor who sought a material-witness warrant may feel compelled to call that witness at trial, even if developments that occur at trial make the witness's testimony unnecessary. In that scenario, the prosecutor could be concerned that failure to call the witness would lead to an adverse inference that the arrest under the warrant was pretextual and that the true basis for the arrest was an investigatory or security purpose.

To protect against vexatious litigation and harassment, absolute immunity protects prosecutors not just from liability but also from the burdens of defending a

lawsuit. As Judge Bea recognized, however, making the availability of immunity turn on the prosecutor's intent would require "precisely the kind of expensive discovery and litigation [that] immunity was designed to avoid." Pet. App. 103a (dissenting opinion); see *Bogan*, 523 U.S. at 54-55 ("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*, 341 U.S. at 377). Improper purpose, after all, is "easy to allege and hard to disprove." *Hartman* v. *Moore*, 547 U.S. 250, 257 (2006) (internal quotation marks omitted).

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). Moreover, "there often is no clear end to the relevant evidence"—an inquiry "may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues." *Id.* at 817. Such questions "rarely can be decided by summary judgment." *Id.* at 816.

Such observations apply with even greater force to a supervisory prosecutor such as the Attorney General, who is called upon to make countless policy choices con-

cerning the initiation and conduct of prosecutions.[5] Permitting courts to examine the "immediate purpose" behind the policy decisions related to prosecution would allow litigants to haul the Attorney General into court for every such decision. This Court has already recognized that prosecutors are ripe targets for such lawsuits, and these concerns are heightened for the Attorney General. See *Goldstein*, 129 S. Ct. at 860 (noting "the frequency with which criminal defendants bring * * * suits [against prosecutors], and the substantial danger of liability, even to the honest prosecutor") (internal quotation marks and citation omitted).

Significantly, the rationale of the decision below is not limited to the decision to seek a material-witness warrant. For example, prosecutors routinely bring charges against lower-level offenders in circumstances where defendants could allege that their "immediate purpose" is not to proceed with a prosecution but to obtain information about more valuable suspects or to enlist the defendant in investigative efforts. Under the decision below, such motives would expose the prosecutor to suit on claims seeking damages for vindictive or retaliatory prosecution. The court of appeals acknowledged that consequence of its reasoning but simply declared that "while a prosecutor who files charges may hope, eventually, that the petty crook will implicate his boss, the *immediate* purpose of filing charges is to *begin a prosecution*—the better to pressure the defendant into providing information." Pet. App. 25a. But that *ipse dixit* has no principle behind it, as Judge Bea ob-

[5] In Fiscal Year 2010, the Department of Justice opened or received approximately 160,000 matters for criminal investigation involving nearly 200,000 individuals and entities. Federal prosecutors filed nearly 70,000 criminal cases against approximately 90,000 defendants.

served. *Id.* at 103a (dissenting opinion) ("[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]?"). Identifying the "immediate purpose" of a prosecutorial action is both impossible and unnecessary—the prosecutor's purposes, whether "immediate" or not, have no role in the objective, functional test for absolute immunity.

II. EVEN IF PETITIONER WERE NOT ENTITLED TO ABSOLUTE IMMUNITY, QUALIFIED IMMUNITY WOULD BAR RESPONDENT'S CLAIM

A. Qualified Immunity Protects Officers Unless Their Conduct Violated Clearly Established Constitutional Rights

This Court has been acutely sensitive to "the necessity of permitting officials to perform their official functions free from the threat of suits for personal liability." *Scheuer* v. *Rhodes*, 416 U.S. 232, 239 (1974). Accordingly, government officials performing discretionary functions enjoy qualified immunity and are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). If "officers of reasonable competence" could have disagreed about whether the alleged action violated the plaintiff's constitutional or statutory rights, "immunity should be recognized." *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986).

Qualified immunity is not merely a defense to liability; it protects officials from the entirety of the litigation process. *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985). Personal-liability lawsuits against government officials exact "substantial social costs," including "the expenses

of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Harlow*, 457 U.S. at 814. To minimize those costs, this Court has repeatedly emphasized that a claim of qualified immunity must be resolved at the earliest possible stage of the litigation and that "discovery should not be allowed" until it is determined that the plaintiff has properly stated a claim for the violation of a clearly established right. *Id.* at 818; *Behrens* v. *Pelletier*, 516 U.S. 299, 308 (1996).

The policies underlying qualified immunity are particularly implicated, and vigorous application of qualified immunity is particularly important, when actions are brought against Cabinet-rank officials. The already substantial costs of subjecting a government official to suit for the performance of his duties are amplified when the official's position includes the important responsibility of presiding over a federal agency. See *Robertson* v. *Sichel*, 127 U.S. 507, 515 (1888) ("Competent persons could not be found to fill positions of the kind, if they knew they would be held liable for all the torts and wrongs committed by a large body of subordinates."); Pet. App. 132a (Gould, J., dissenting from the denial of rehearing en banc). That is especially true when, as in this case, the officials are required to respond to national crises that require applying the law to novel factual situations.

In determining whether an official has qualified immunity, the usual first step is to inquire "whether the plaintiff has asserted a violation of a constitutional right at all." *Siegert* v. *Gilley*, 500 U.S. 226, 232 (1991). If the plaintiff has asserted a constitutional violation, the inquiry then focuses on the "objective legal reasonableness" of the defendants' conduct in light of clearly estab-

lished law. *Harlow*, 457 U.S. at 819. As we next show, the court of appeals erred at both stages of that analysis.[6]

B. An Arrest Based On A Material-Witness Warrant Does Not Violate The Constitution, Whatever The Subjective Motives Of The Prosecutor

The court of appeals held that an arrest based on a material-witness warrant violates the Fourth Amendment where the warrant is not being used for its "stated purpose," but for the purpose of investigating the individual subject to the warrant. Pet. App. 40a. In the court's view, the existence of an investigatory motive, by itself, invalidates an otherwise-valid material-witness warrant. That conclusion is inconsistent with numerous decisions of this Court establishing that the validity of

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[6] There is no mandatory sequence for considering the two components of the qualified-immunity analysis, and therefore this Court could reverse the judgment of the court of appeals either on the ground that respondent failed to allege a violation of his Fourth Amendment rights or on the ground that any rights that were violated were not clearly established. See *Pearson* v. *Callahan*, 129 S. Ct. 808, 818 (2009). Nevertheless, addressing the first question—that is, whether respondent has alleged a constitutional violation—is appropriate here because it would "promote[] the development of constitutional precedent * * * with respect to [a] question[] that do[es] not frequently arise in cases in which a qualified immunity defense is unavailable." *Ibid.* It is particularly important here that this Court address the first step of the qualified-immunity inquiry, since a ruling that petitioner is immune because the law was not "clearly established" at the time of the alleged events, if it left the constitutional ruling of the court of appeals otherwise intact, could have significant adverse consequences. As we discuss below, see pp. 38-40, *infra*, the court of appeals' constitutional decision opens every material witness warrant sought by a prosecutor to challenges based on claims that the prosecutor has an investigatory or security motive.

a seizure under the Fourth Amendment is not affected by the subjective motives of the officer conducting it. If allowed to stand, it would seriously undermine the purposes of the material-witness statute.

1. The court of appeals did not question the facial constitutionality of the material-witness statute, Pet. App. 31a-32a, and with good reason. The authority to arrest material witnesses was "the long established rule in English Law, in effect when the United States became a nation." *Bacon* v. *United States*, 449 F.2d 933, 938-939 (9th Cir. 1971). The First Congress provided such authority in the Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 91, and "[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). All 50 States have enacted similar statutes. *Bacon*, 449 F.2d at 939.

The court of appeals instead held that even a facially valid material-witness warrant violates the Fourth Amendment if the prosecutor intended to investigate the witness on suspicion of a crime. Significantly, the court did not suggest that the warrant issued in this case somehow failed to comply with 18 U.S.C. 3144. And although respondent alleged that petitioner adopted a policy directing Department of Justice officials to seek material-witness warrants "as a pretext to arrest and hold individuals whom the government lacked probable cause to charge with a crime but nonetheless wished to detain preventively and/or to investigate for possible criminal wrongdoing (*i.e.*, to arrest 'suspects')," J.A. 39-40, his complaint contained no allegation that petitioner directed or encouraged officials to seek material-witness warrants in cases where the statutory requirements for the issuance of such warrants were not satisfied.

Respondent did allege that the affidavit submitted in his case contained false statements and omissions. J.A. 25. But he did not allege that petitioner had any involvement in the preparation or submission of that affidavit, or that petitioner directed, participated in, or even knew of the decision to seek a material-witness warrant for him. Accordingly, he failed to provide "sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face'" based on a theory that petitioner, "through [his] own individual actions, has violated the Constitution." *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937, 1948-1949 (2009) (quoting *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 570 (2007)); see Pet. App. 90a (Bea, J., dissenting) ("[N]one of the allegations contain facts that plausibly establish [petitioner's] knowledge that his subordinates were obtaining material witness warrants on the basis of deliberately or recklessly false evidence or on facially invalid warrants."). And in his brief in opposition in this Court, petitioner expressly abandoned any claims against petitioner based on alleged false statements or omissions in the warrant affidavit. Br. in Opp. i. Petitioner's only remaining claim, therefore, is that an arrest based on a *valid* material-witness warrant—that is, a warrant that complies with the requirements of Section 3144—violates the Fourth Amendment if the prosecutor who seeks the warrant does so for the purpose of investigating or preventively detaining the individual subject to the warrant.

2. In holding that petitioner had established a violation of the Fourth Amendment, the court of appeals disregarded this Court's repeated decisions establishing that "[a]n action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, 'as long as the circumstances, viewed *objec-*

tively, justify [the] action.'" *Brigham City* v. *Stuart*, 547 U.S. 398, 404 (2006) (quoting *Scott* v. *United States*, 436 U.S. 128, 138 (1978); see *Bond* v. *United States*, 529 U.S. 334, 338 n.2 (2000) ("[T]he subjective intent of the law enforcement officer is irrelevant in determining whether that officer's actions violate the Fourth Amendment."); *Graham* v. *Connor*, 490 U.S. 386, 397 (1989). In *Whren* v. *United States*, 517 U.S. 806 (1996), for example, this Court held that officers did not violate the Fourth Amendment when they stopped the defendant's vehicle for a traffic violation, even though they allegedly conducted the stop "as [a] pretext[] for pursuing other investigatory agendas," *id.* at 811. The Court observed that it has "been unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers," *id.* at 813, noting that "[n]ot only have we never held, outside the context of inventory search or administrative inspection * * * that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment; but we have repeatedly held and asserted the contrary," *id.* at 812.

The Court reaffirmed that principle in *Devenpeck* v. *Alford*, 543 U.S. 146 (2004), concluding 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. The Court held that, where probable cause supported an arrest of the defendant for impersonating a police officer, the fact that the arresting officer intended to arrest the defendant for tape recording a conversation (which was not in fact illegal) did not render the arrest unlawful. The Court explained that the "[s]ubjective intent of the arresting officer, however it is determined * * * is simply no basis for invalidating an arrest." *Id.* at 154-155.

The court of appeals stated that the rule articulated in *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*." Pet. App. 32a (quoting *Whren*, 517 U.S. at 811). The court reasoned that "[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 concluded that because a material-witness arrest is not supported by "suspicion of wrongdoing," the applicable Fourth Amendment 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 *City of Indianapolis* v. *Edmond*, 531 U.S. 32 (2000). Pet. App. 36a (quoting *Edmond*, 531 U.S. at 46).

That reasoning is doubly flawed. First, the "programmatic purpose" standard of *Edmond* applies only to seizures that lack *any* individualized basis, such as drug or alcohol checkpoints, and that may be justified, if at all, by the generalized interest that motivates the program under which they are conducted. Such searches are governed by different rules because they require "a constitutionally adequate substitute for a warrant." *New York* v. *Burger*, 482 U.S. 692, 710 (1987); see Pet. App. 75a-76a (Bea, J., dissenting) ("The '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.").

Unlike the roadblock seizures in *Edmond*, a material-witness arrest is conducted based on a warrant

issued by a neutral magistrate. A judicial officer evaluates the warrant application, together with the evidence, to determine whether the testimony of the witness is "material in a criminal proceeding" and whether "it may become impracticable to secure the presence of the [witness] by subpoena." 18 U.S.C. 3144. A judicial officer conducts a hearing at which the material witness may be heard. The court may set conditions of release and may revisit its rulings at any time to account for changed circumstances. *Ibid.* ("No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can be adequately secured by deposition, and if further detention is not necessary to prevent a failure of justice."); see 18 U.S.C. 3142(b) (mandating release "unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community").

Although a material-witness warrant does not require probable cause to believe that the subject of the warrant has committed a crime, it is hardly unique in that respect. See, *e.g.*, *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 554 (1978) (holding that a search can be justified on the basis of probable cause to believe that the premises contain evidence of a crime by a third party, even if the owner is not suspected of wrongdoing); *Maag* v. *Wessler*, 960 F.2d 773, 776 (9th Cir. 1992) (officer may arrest individual who appears to be a danger to himself as a result of mental illness). For present purposes, the relevant characteristic of a material-witness arrest is that it is supported by an individualized justification, making *Whren* fully applicable. See *United States* v. *Knights*, 534 U.S. 112, 122 (2001) (citing *Whren* for the

proposition that "there is no basis for examining official purpose" in evaluating a search of a probationer based only on reasonable suspicion).

Second, even if *Edmond* were relevant here, the court of appeals' application of the "programmatic purpose" test was nevertheless erroneous. The program at issue in *Edmond* was a police practice of erecting random roadblocks intended to catch drug offenders. In evaluating the purpose of that policy, this Court "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 Indianapolis had chosen to institute the program, but it did not approve of asking why a particular officer conducted a seizure under 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 suggested 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. 531 U.S. at 48.

3. Although the court of appeals did not explicitly acknowledge it, the effect of its Fourth Amendment holding was to invalidate the material-witness statute as

applied to the circumstances of this case. The court did not construe the material-witness statute to limit material-witness arrests to those in which the prosecutor acts with a non-investigative purpose. Rather, as Judge Bea 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." Pet. App. 70a (dissenting opinion).[7] The as-applied unconstitutionality of Section 3144 necessarily follows from the court's holding that the Fourth Amendment prohibits an arrest that the statute permits. But as discussed above, see p. 30, *supra*, the material-witness statute reflects a well-established common-law practice, and the statute itself has been in existence since 1789. Not only has the constitutionality of the statute "never been doubted," *Barry*, 279 U.S. at 617, but this Court has repeatedly rejected constitutional challenges to material-witness detentions.

In *New York* v. *O'Neill*, 359 U.S. 1 (1959), for example, this Court addressed Florida's Uniform Law to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings, a statute adopted in nearly every State, which enabled a judge of one State

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[7] 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. Pet. App. 113a-114a (emphasis omitted). But Judge Smith did not explain how the text of the statute prohibits such an arrest when a magistrate issues a warrant after determining that all of the statutory criteria have been satisfied.

to certify "the necessity of the appearance of [a] witness in a criminal prosecution or grand jury investigation," and enabled the State where that witness could be found to "take the witness into immediate custody" and "deliver the witness to an officer of the requesting State." *Id.* at 4-5. The Court held that the statute did not violate the Privileges and Immunities Clause, observing that "Florida undoubtedly could have held respondent within Florida if he had been a material witness in a criminal proceeding within that State." *Id.* at 7. The Court added that "[a] citizen cannot shirk his duty, no matter how inconvenienced thereby, to testify in criminal proceedings and grand jury investigations in a State where he is found. There is no constitutional provision granting him relief from this obligation to testify even though he must travel to another State to do so." *Id.* at 11; see *Stein* v. *New York*, 346 U.S. 156, 184 (1953) ("The duty to disclose knowledge of crime * * * is so vital that one known to be innocent may be detained, in the absence of bail, as a material witness."), overruled in part on other grounds, *Jackson* v. *Denno*, 378 U.S. 368 (1964).

In *Barry*, this Court upheld the Senate's authority to detain a material witness. Recognizing that "a court has power in the exercise of its sound discretion to issue a warrant of arrest without a previous subpoena, when there is good reason to believe that otherwise the witness will not be forthcoming," 279 U.S. at 616, the Court stated that "[t]he validity of acts of Congress authorizing courts to exercise the power in question * * * seems to be established," *id.* at 618; see *id.* at 617 ("Similar statutes exist in many of the states and have been enforced without question."). The Court concluded that the Senate "may exercise in its own right the incidental

power of compelling the attendance of witnesses." *Id.* at 619.

As those cases demonstrate, there is no constitutional violation in detaining a material witness if the standards of 18 U.S.C. 3144 are satisfied. The court of appeals' decision that a warrant issued under that statute may be invalidated on the basis of the motive of the prosecutor (or the prosecutor's supervisor) is therefore incorrect.

4. 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. Such individuals may become the subject of a material-witness warrant if there is reason to believe that, because they face potential criminal liability, they may flee the jurisdiction or refuse to respond to a subpoena. The reasoning of the court of appeals, however, suggests that such individuals would be able to contest the warrant by demanding an intrusive inquiry into the prosecutor's motive, making implementation of the material-witness statute more cumbersome and potentially delaying prosecutions. It also suggests 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. Indeed, the reasoning would produce the upside-down result that those who are potential suspects would have a greater ability to sue than those who are not.

The court of appeals' analysis thus creates legal uncertainty in frequent applications of the material-wit-

ness statute. To take one example, federal agents initially detained Terry Nichols based on 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 after his arrest under 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 court of appeals, however, Nichols could have challenged the material-witness warrant on the ground that the prosecutors who obtained it had an investigatory purpose, and he also would have had a cause of action for damages against (and presumably the right to seek discovery from) the prosecutors based on an allegation of such a purpose.

Although the court of appeals did not specify how its analysis applies when a prosecutor acts with mixed motives in seeking a material-witness warrant, the fear of personal liability may 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. That is especially so because prosecutors often do not know in advance whether a witness they believe to be material will in fact need to testify at trial. Thus, even prosecutors who have no investigatory purpose could be subject to hard-to-disprove allegations of such

a purpose if circumstances change and a material witness does not need to be called. The court's flawed Fourth Amendment analysis would therefore 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. Even If The Use Of A Material-Witness Warrant For Investigatory Purposes Violated The Constitution, Petitioner Would Be Entitled To Qualified Immunity

Even if the Fourth Amendment prohibited the use of material-witness warrants in cases where the prosecutor has the "immediate purpose" of investigating or detaining the witness, petitioner would be entitled to qualified immunity because that constitutional rule was not clearly established at the time of respondent's arrest. As this Court has explained, "[t]he 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)) (emphasis added). That inquiry "must be undertaken in light of the *specific context of the case*, not as a broad general proposition." *Ibid.* (emphasis added); accord *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."). Thus, "if officers of reasonable competence could disagree" about whether the challenged conduct was unlawful, "immunity should be recognized." *Malley*, 475 U.S. at 341. Under those standards, petitioner is entitled to qualified immunity on respondent's Fourth Amendment claim.

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," but the court was untroubled by the absence of cases supporting its conclusion. Pet. App. 41a. Instead, the court suggested that the lack of precedent was "due more to the obviousness of the illegality than the novelty of the legal issue." *Ibid.* (quoting *Moreno* v. *Baca*, 431 F.3d 633, 641 (9th Cir. 2005), cert. denied, 547 U.S. 1207 (2006)). But the "illegality" of petitioner's conduct was so far from "obvious" that eight judges on the court found no constitutional violation at all—a fact that, by itself, casts serious doubt on the court of appeals' decision. See *Wilson*, 526 U.S. at 618 (When "judges thus disagree on a constitutional question, it is unfair to subject [public employees] to money damages for picking the losing side of the controversy.").

The only case the court of appeals identified as even remotely addressing the "specific context of [this] case," *Brosseau*, 543 U.S. at 198, was a district court decision from another circuit that, in dicta in a footnote, suggested 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). The district court in that case did not specify in what sense such a use of the statute would be "illegitimate," and it did not state that it would be unconstitutional. More to the point, as Judge O'Scannlain observed in dissenting from the denial of rehearing en banc, the "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." Pet. App. 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," both of which the court invoked, Pet. App. 42a-43a, are far too general to establish the illegality of respondent's arrest in the particular circumstances of this case, *id.* at 128a (opinion dissenting from the denial of rehearing en banc) ("If [those 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 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 the Second Circuit held that "[t]his argument has no merit." *Ibid.* The court deemed persuasive the decision in *People* v. *Perez*, 90 N.E. 2d 40, 46 (N.Y. 1949), in which the court upheld a practice almost identical to that 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.* In light of that decision and the absence of any contrary precedent, it could hardly have been "clear to a reasonable officer" that the conduct alleged in this case was unlawful. *Saucier*, 533 U.S. at 202.

III. THIS COURT SHOULD VACATE THE PORTION OF THE DECISION BELOW ADDRESSING SUPERVISORY LIABILITY

As explained in the petition for a writ of certiorari (at 30-33), the court of appeals erred in concluding that petitioner can be held responsible for alleged false statements and omissions in the affidavit submitted by subordinate officials in support of the warrant to arrest respondent. The court's decision was based on a theory of supervisory liability that is directly contrary to this Court's decision in *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937 (2009). Respondent has not attempted to defend that aspect of the decision below, instead declaring (Br. in Opp. i) that he "will not pursue the claims in Question

3"—that is, the supervisory-liability question—before this Court and "will abandon the claim in Question 3 in any further proceedings in the district court or Ninth Circuit." In light of respondent's concession, that aspect of the decision below did not warrant plenary review, and this Court granted certiorari "limited to Questions 1 and 2 presented by the petition." Nevertheless, because respondent has mooted the supervisory-liability issue, that aspect of the court of appeals' decision should be vacated. See *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). Accordingly, if this Court does not reverse the judgment below on the basis of immunity, it should, at a minimum, vacate the portion of the court of appeals' decision addressing supervisory liability.

CONCLUSION

The judgment of the court of appeals should be reversed. In the alternative, the portion of the decision below addressing supervisory liability should be vacated. See *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950).

Respectfully submitted.

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