

No. 10-98

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**In the Supreme Court of the United States**

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JOHN ASHCROFT, PETITIONER

*v.*

ABDULLAH AL-KIDD

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

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**REPLY BRIEF FOR PETITIONER**

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## REPLY BRIEF FOR PETITIONER

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The court of appeals held that petitioner, the former Attorney General of the United States, may be subjected to litigation, and potentially to personal damages liability, 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 several legal errors. Respondent's efforts to defend the court's decision are unavailing.

As to both absolute immunity and qualified immunity, respondent's arguments rest on his claim that the prosecutors who sought a material-witness warrant had an improper subjective motive. Accepting his position would require this Court to adopt some test for identifying a proscribed motivation or purpose. While the court of appeals attempted to identify the prosecutor's "im-

mediate purpose,” respondent now proposes that a subjective interest in investigation or preventive detention must not be a “but for” cause of seeking the warrant. That test for evaluating subjective prosecutorial motivations is impractical and confusing—so much so that, in articulating it, respondent appears to have conceded away a key premise of his theory of liability in this case.

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). Even the court below recognized that, as a general matter, seeking a material-witness warrant is a prosecutorial function that is protected by absolute immunity. For the first time in the course of this litigation, however, respondent argues that seeking a material-witness warrant is not subject to absolute immunity because there was no common-law tradition of immunity for such warrants. Respondent’s claims about the common law are incorrect, and in any event, this Court has not held that immunity attaches only to judicial or prosecutorial actions expressly held by a common-law court to have been the subject of immunity. Rather, this Court has held that absolute immunity attaches to any activity “intimately associated with the judicial phase of the criminal process,” which seeking a material-witness warrant undoubtedly is. *Id.* at 430.

Respondent’s efforts to defend the reasoning of the court of appeals fare no better. In arguing that immunity ceases to apply if the prosecutor has an investigatory motive, respondent ignores cases establishing that subjective intent is irrelevant to the functional test for immunity. Respondent’s theory also produces the startling result that a prosecutor would be entitled to abso-

lute immunity for seeking a material-witness warrant with malicious or vexatious motives, but not for seeking such a warrant with an intent to further a criminal investigation.

Even if petitioner were not entitled to absolute immunity, he is entitled to qualified immunity. The court of appeals believed that a detention based on a facially valid material-witness warrant violates the Fourth Amendment if the prosecutor has an investigative purpose. Respondent's arguments in defense of that conclusion are foreclosed by the 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.*, *Whren v. United States*, 517 U.S. 806, 808-810 (1996). Respondent goes beyond the court of appeals in arguing that the material-witness statute itself requires consideration of the prosecutor's subjective purpose, but that suggestion finds no support in the text of the statute. Finally, even if respondent's arrest did violate the Fourth Amendment, petitioner would still be entitled to qualified immunity because respondent has identified no source of law that clearly established the constitutional rule he now invokes.

#### **I. PETITIONER IS ENTITLED TO ABSOLUTE IMMUNITY**

As explained in the opening brief (at 17-18), it is well established that prosecutors are entitled to absolute immunity from claims arising from the decision to obtain a material-witness warrant. The court of appeals did not take issue with that proposition but instead held that immunity is unavailable if the prosecutor's "immediate purpose" is to investigate the suspect. Pet. App. 25a (emphasis omitted). Respondent, while distancing himself from the court's "immediate purpose" language,

argues for the same result. In his view, application of the functional test for absolute immunity means that the availability of immunity can vary depending upon the prosecutor's alleged motivation. That is not the law.

A. As an initial matter, respondent argues (Br. 46-52) that absolute immunity is inappropriate for a different reason: there is "no common-law tradition" of immunity for seeking a material-witness warrant. Respondent disclaimed that argument before the court of appeals and mentioned it only obliquely in his brief in opposition. Resp. C.A. Br. 31 ("[I]f the purpose of the material witness warrant in plaintiff's case were genuinely to secure his testimony against Al-Hussayen, then a prosecutor could argue that it served a prosecutorial function."); Br. in Opp. 28-31. It therefore is not properly before the Court. See *Ortiz v. Jordan*, 131 S. Ct. 884, 892 n.6 (2011).

In any event, respondent's new argument is foreclosed by *Imbler v. Pachtman*, 424 U.S. 409 (1976). In that case, the Court, relying "in part on common-law precedent, and perhaps even more importantly on the policy considerations underlying that precedent," *Kalina v. Fletcher*, 522 U.S. 118, 123-124 (1997), recognized that a prosecutor's absolute immunity "is based upon the same considerations that underlie the common-law immunities of judges and grand jurors acting within the scope of their duties." *Imbler*, 424 U.S. at 422-423. The Court therefore held that a prosecutor's immunity extends to *all* activities "intimately associated with the judicial phase of the criminal process." *Id.* at 430. The Court explained that those activities include deciding "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.” *Id.* at 431 n.33 (emphasis added). If the prosecutor is acting as “an officer of the court,” he is protected by absolute immunity. *Ibid.*

Under this Court’s cases, absolute immunity does not turn on a showing that each specific action taken by a prosecutor (or a judge) was expressly held by a common-law court to have been the subject of immunity. The question, instead, is whether the function at issue is one “intimately associated with the judicial phase of the criminal process.” *Imbler*, 424 U.S. at 430; see *Kalina*, 522 U.S. at 135 (Scalia, J., concurring) (noting that “the ‘functional categories’ approach to immunity questions \* \* \* make[s] faithful adherence to the common law embodied in [Section] 1983 very difficult,” but concluding that “both *Imbler* and the ‘functional’ approach are so deeply embedded \* \* \* that, for reasons of *stare decisis*, I would not abandon them now”). Asking a court to issue a material-witness warrant in conjunction with an ongoing criminal proceeding plainly falls into that category. See Pet. Br. 17-18.

In any event, respondent fails to establish that prosecutors did not have common-law immunity for seeking or issuing material-witness warrants. The only cases respondent cites to support his assertion (Br. 51) are ones in which *private parties* were sued for damages for procuring the unlawful arrest of witnesses. See *Bates v. Kitchel*, 125 N.W. 684 (Mich. 1910); *Lovick v. Atlantic Coast Line R. Co.*, 40 S.E. 191 (N.C. 1901); cf. *Yaselli v. Goff*, 12 F.2d 396, 403-404 (2d Cir. 1926) (discussing considerations underlying immunity of *public* prosecutors), *aff’d*, 275 U.S. 503 (1927). While the court in *Bates* observed that the judicial officers involved in arresting the plaintiff were not immune from liability, it did so be-

cause those officers were “clearly acting outside of their jurisdiction.” 125 N.W. at 686. Indeed, respondent and his amici rely upon numerous cases in which officers were held not to be immune for acts outside of the court’s jurisdiction. See, e.g., *Marsh v. Williams*, 2 Miss. (1 Howard) 132 (1834); *Clarke v. May*, 68 Mass. (2 Gray) 410, 412 (1854). Those cases have no application here because an act taken without jurisdiction would not be subject to immunity in any event. Cf. *Imbler*, 424 U.S. at 423 n.20 (“The immunity of a judge for acts *within his jurisdiction* has roots extending to the earliest days of common law.”) (emphasis added).

Respondent emphasizes (Br. 48-49) that the common law generally did not provide absolute immunity for procuring an arrest or search warrant. As he acknowledges, however, the cases upon which he relies explicitly distinguished warrants sought in conjunction with the prosecution of an ongoing criminal case. See, e.g., *Kalina*, 522 U.S. at 129 (absolute immunity for arrest warrant sought in conjunction with the prosecutor’s filing of an information and other charging documents to initiate a case). In particular, respondent’s reliance on *Malley v. Briggs*, 475 U.S. 335 (1986), is misplaced because in that case the Court distinguished between a law-enforcement officer seeking an arrest warrant and a prosecutor requesting an indictment, explaining that seeking a warrant, “while a vital part of the administration of criminal justice, is further removed from the judicial phase of criminal proceedings than the act of a prosecutor in seeking an indictment.” *Id.* at 342-343. As explained in the opening brief (at 17), seeking a material-witness warrant is a central part of “the judicial phase of criminal proceedings.” *Id.* at 342. It is therefore subject to the rule of absolute immunity.

B. Respondent argues (Br. 52) that, even if seeking a material-witness warrant is generally a prosecutorial function to which absolute immunity would attach, immunity is unavailable when a prosecutor “deliberately use[s]” the warrant to investigate or detain a suspect. He purports to base that conclusion on this Court’s functional test for evaluating absolute immunity, but his argument confuses function with purpose. This Court has held that prosecutors are absolutely immune from civil liability when they are performing “the traditional functions of an advocate,” *Kalima*, 522 U.S. at 131, and, as explained in the opening brief (at 16), the prosecutor’s subjective purpose is irrelevant in determining the nature of the function performed. See *Yaselli*, 12 F.3d at 403 (“[N]o public officer is responsible in a civil suit for a judicial determination, \* \* \* however malicious the motive which has produced it.”).

Like the court of appeals, Pet. App. 19a-20a, respondent relies (Br. 54-56) on *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993), but that case does not support his position. Respondent correctly observes (Br. 56) that “the same act can serve different functions depending on the circumstances,” but he fails to appreciate that the “circumstances” the Court examined in evaluating the acts in *Buckley* were objective factors such as whether the prosecutors had probable cause to arrest and whether judicial proceedings were pending at the time, not the subjective motives of the prosecutors. 509 U.S. at 274.

Respondent asserts (Br. 61) that “if the prosecutor in this case had simply detained respondent without a material witness warrant in order to investigate him, there would be no question that the prosecutor was engaged in investigative activity.” Cf. *Mitchell v. Forsyth*, 472 U.S. 511, 522 (1985) (holding that absolute immunity

does not protect an official who engages in warrantless wiretapping, in part because such an act is not “subject to other checks” such as those provided by “the judicial process”). But the fact remains that the prosecutor *did* seek a material-witness warrant from the court, in conjunction with an ongoing criminal trial. That is what made the act prosecutorial in character. Nothing in this Court’s cases suggests that the act can lose its prosecutorial character because of the motivation of the individual performing it. At bottom, the acts of deciding which witnesses may be required at a criminal trial, calling those witnesses, and seeking material-witness warrants or subpoenas to ensure their presence are all prosecutorial acts. While no personal damages action can be brought against a prosecutor regarding such matters, the “crucible of the judicial process,” *Burns v. Reed*, 500 U.S. 478, 496 (1991) (quoting *Imbler*, 424 U.S. 440) serves as a significant check against a prosecutor who abuses his or her authority in performing those prosecutorial functions.

C. Respondent has no persuasive answer to the observation that, under his rule, the same act would yield different immunity decisions based upon the underlying motivation of the prosecutor. Indeed, he does not appear to dispute (Br. 58) that a prosecutor who sought a material-witness warrant based on nothing more than spite, vindictiveness, or racial animus would receive absolute immunity because his conduct would not be “investigative.” But a prosecutor who sought such a warrant under exactly the same circumstances would receive no immunity if he acted with the intent to further an ongoing criminal investigation. Like the court of appeals, respondent offers no justification for that perverse result.

Respondent states (Br. 60) that the material-witness statute “is infrequently used,” but that is hardly a reason to subject prosecutors to a personal money-damages action, based on nothing more than allegations about their motives, in those cases where the statute provides an important prosecutorial tool. See *Hartman v. Moore*, 547 U.S. 250, 257 (2006) (noting that improper purpose is “easy to allege and hard to disprove”) (citation omitted). Nor does respondent address the point, explained in the opening brief (at 26), that the logic of the decision below (and of his position) is not limited to material-witness warrants. Prosecutors often 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 important suspects. Under respondent’s theory, such an allegation would strip the prosecutor of immunity and entitle the criminal defendant, at a minimum, to obtain discovery about the prosecutor’s motives.

D. Finally, respondent argues (Br. 62-65) that petitioner is not entitled to absolute immunity because, as Attorney General, he had authority over the FBI, and an FBI agent prepared an affidavit in support of the application for a material-witness warrant. But respondent’s claim is not based on the affidavit—although respondent alleged that the affidavit contained false statements and omissions, he has abandoned any effort to hold petitioner liable on that basis. Br. in Opp. i. Instead, an essential element of respondent’s claim is the submission of an application for a material-witness warrant by the prosecutor to the court. J.A. 39. As the official with responsibility for the exercise of that prosecutorial func-

tion, petitioner is entitled to absolute immunity. See *Van de Kamp v. Goldstein*, 129 S. Ct. 855, 862 (2009).

## II. PETITIONER IS ENTITLED TO QUALIFIED IMMUNITY

### A. Respondent's Arrest Did Not Violate The Fourth Amendment Or 18 U.S.C. 3144

Like the court of appeals, respondent does not question the facial validity of the material-witness statute. Instead, he argues that the Fourth Amendment prohibits the use of the statute where the prosecutor's subjective purpose is investigation or detention, and he goes beyond even the court of appeals in arguing that the statute itself prohibits its use in that context. Those arguments lack merit.

1. This Court has emphatically rejected the proposition that an officer's motive can invalidate an otherwise-lawful arrest. To the contrary, the Court has made clear its "unwilling[ness] to entertain Fourth Amendment challenges based on the actual motivations of individual officers." *Whren v. United States*, 517 U.S. 806, 813 (1996); see *Scott v. United States*, 436 U.S. 128, 138 (1978).

Respondent suggests (Br. 18-19) that this Court in *Whren* endorsed an inquiry into purpose, but that is incorrect. Rather, the Court merely acknowledged—and distinguished—cases permitting warrantless inventory searches and administrative inspections that were conducted in the absence of any probable cause or individualized suspicion, in which the Court had stated that the purpose of such searches was not to gather evidence for criminal cases. *Whren*, 517 U.S. at 811 (citing *Florida v. Wells*, 495 U.S. 1, 4 (1990), and *New York v. Burger*, 482 U.S. 691, 716 n.27 (1987)). Indeed, the Court emphasized that it had "*never* held, outside the context of in-

ventory search or administrative inspection (discussed above), 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 (emphasis added).

Respondent points out (Br. 20) that *Whren* itself involved a traffic stop based on probable cause. See 517 U.S. at 813. The rule established in *Whren*, however, was not limited to that context. Instead, *Whren* stands for the broader proposition that “the Fourth Amendment’s concern with ‘reasonableness’ allows certain actions to be taken in certain circumstances, *whatever* the subjective intent,” *id.* at 814, a proposition that this Court has applied in cases not involving seizures based on probable cause. For example, in assessing whether a tactile inspection of luggage constituted a search for Fourth Amendment purposes, the Court cited *Whren* for the proposition that “the subjective intent of the law enforcement officer is irrelevant in determining whether that officer’s actions violate the Fourth Amendment.” *Bond v. United States*, 529 U.S. 334, 338 n.2 (2000). Similarly, in *United States v. Knights*, 534 U.S. 112 (2001), the Court again relied on *Whren* to conclude that “there is no basis for examining official purpose” in evaluating a search of a probationer based only on reasonable suspicion. *Id.* at 122. And courts of appeals, including the court below, have recognized that subjective intentions are immaterial when analyzing whether officers had “reasonable suspicion” to justify a stop. See *United States v. Willis*, 431 F.3d 709, 716 n.6 (9th Cir. 2005) (“To the extent the magistrate judge \* \* \* [found] reasonable suspicion for a traffic stop lacking based on the officer’s subjective motivations, we reverse. The parsing of police motives \* \* \* is precisely what

*Whren* tells us we may not do.”); accord, e.g., *United States v. Winder*, 557 F.3d 1129, 1134 (10th Cir.), cert. denied, 129 S. Ct. 2881 (2009); *United States v. \$557,933.89, More or Less, in U.S. Funds*, 287 F.3d 66, 84 (2d Cir. 2002) (Sotomayor, J.) (“Determination of probable cause (or reasonable suspicion) is an objective assessment.”).

As explained in the opening brief (at 32), this Court has considered the purpose of law-enforcement activity only in the limited context of searches and seizures that lack an individualized basis, and that may be justified, if at all, by the generalized interest that motivates the program under which they are conducted. See *City of Indianapolis v. Edmond*, 531 U.S. 32, 45 (2000). Such activity is governed by different rules because it requires a “constitutionally adequate substitute for a warrant.” *Burger*, 482 U.S. at 710 (quoting *Donovan v. Dewey*, 452 U.S. 594, 603 (1981)). All of the cases cited by respondent (Br. 22-23) as supposedly establishing the appropriateness of considering purpose fall into that category. See *Edmond*, *supra* (suspicionless roadblocks); *Illinois v. Lidster*, 540 U.S. 419 (2004) (same); *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) (drug tests of pregnant women conducted without probable cause or reasonable suspicion); *Michigan v. Clifford*, 464 U.S. 287 (1984) (administrative searches); *Camara v. Municipal Court*, 387 U.S. 523 (1967) (same).

The considerations that led the Court to examine purpose in those cases are not present here. A material-witness arrest is conducted based on a warrant issued by a neutral magistrate after individualized consideration, with significant procedural protections for the person subject to the warrant. A judicial officer must evaluate the warrant application, together with the evi-

dence, 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 also conducts a hearing at which the material witness may be heard with the assistance of court-appointed counsel. *Ibid.*; 18 U.S.C. 3142(f) (2006 & Supp. III 2009). The court may set conditions of release and may revisit its rulings at any time if circumstances change. 18 U.S.C. 3144; Fed. R. Crim. P. 46(h)(1) (requiring ongoing judicial supervision “[t]o eliminate unnecessary detention”); Fed. R. Crim. P. 46(h)(2) (requiring the government to provide biweekly reports on persons detained as material witnesses). Detention may continue only if the court “finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community.” 18 U.S.C. 3142(e)(1) (2006 & Supp. III 2009). And the witness “may request to be deposed”; if the court orders a deposition to be taken, it “may discharge the witness after the witness has signed under oath the deposition transcript.” Fed. R. Crim. P. 15(a)(2); see *Aguilar-Ayala v. Ruiz*, 973 F.2d 411, 413 (5th Cir. 1992).

The court’s determinations under Section 3144 establish the objective reasonableness of the detention, making the officer’s subjective motivations irrelevant. Respondent asserts (Br. 37) that “a warrant procedure does not insulate improper Fourth Amendment activity from scrutiny,” but that begs the question by assuming that there is something improper about conducting an arrest based on a valid warrant duly issued by a magistrate. The cases on which respondent relies establish only that an officer violates the Fourth Amendment

when he acts based on a facially insufficient warrant, see *Malley v. Briggs*, 475 U.S. 335 (1986), or a warrant obtained by submitting an affidavit that contains false statements, see *Franks v. Delaware*, 438 U.S. 154 (1978). This Court has never held that reliance on a *valid* warrant can violate the Fourth Amendment based on nothing more than a government official's subjective purposes.

In any event, even in the rare situations, such as *Edmond*, where the Court has considered law-enforcement purposes, it has cautioned that “the purpose inquiry \* \* \* 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.” *Edmond*, 531 U.S. at 48. In this context, therefore, the relevant purpose would be the purpose of the material-witness statute as a whole, but respondent makes no effort to show that there is anything improper about the purpose underlying Section 3144. Instead, he claims (Br. 41) that he is seeking “to determine the purpose of a systematic, deliberate policy” of using Section 3144 pretextually. That reasoning would turn *Whren* into little more than a pleading requirement, since it would be easy to allege that an officer who conducted an allegedly pretextual stop had adopted a “systematic, deliberate policy” of conducting such stops. Ultimately, accepting respondent's claim would require “prob[ing] the minds of individual officers”—something this Court has never permitted under the Fourth Amendment. *Edmond*, 531 U.S. at 48.

2. Although the court of appeals held that application of the material-witness statute in the circumstances of this case violated the Fourth Amendment, it did not suggest that the statute itself prohibited respondent's

arrest. See Pet. App. 40a; see also *id.* at 70a (Bea, J., dissenting). Respondent, however, contends (Br. 24-31) that Section 3144 precludes the use of a material-witness warrant for the subjective purpose of investigation or detention, even when the statute’s “objective criteria” are satisfied. Indeed, he asserts (Br. 25) that a contrary interpretation would represent “an implausible reading of the statute.” Respondent arrives at his reading of the statute with little discussion of the statutory language, which contains two requirements: that the testimony be material and that securing the presence of the witness be impracticable. 18 U.S.C. 3144. Those are objective criteria, and nothing in the statute calls for an inquiry into the motive or purpose of the prosecutor who seeks the warrant.

Rather than focus on the text of the statute, respondent attempts to demonstrate (Br. 27) that Congress did not intend “to turn the law into a detention and investigation tool.” Congress provided an objective standard for obtaining a material-witness warrant, however, and that standard, on its face, does not turn upon the prosecutor’s alleged motive. Cf. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) (“[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”).

According to respondent (Br. 25), if the statute did not require an inquiry into the prosecutor’s purpose, it would permit a person to be detained even if the government “informed the magistrate judge” that it “had no intention of using [his] testimony in a criminal proceeding.” In such a case, it would be likely that at least one of the objective requirements of the statute was not satisfied—for example, the testimony was not “mate-

rial,” or the witness’s detention was not “necessary to prevent a failure of justice,” 18 U.S.C. 3144—and the magistrate would therefore order release. But the subjective intent of the prosecutor would not be relevant to the magistrate’s inquiry. When the requirements specified in the statute are met, then Section 3144 permits a witness to be detained, regardless of the prosecutor’s motive in seeking detention.

**B. Respondent’s Standard For Evaluating A Prosecutor’s Purpose Offers No Basis For Imposing Liability On Petitioner**

As explained in the opening brief (at 38-40), the decision of the court of appeals, by requiring an intrusive, fact-intensive inquiry into purpose, would impede the use of the material-witness statute in cases in which the prosecutor wishes to ensure that a witness is available to testify but also seeks to investigate the witness for criminal wrongdoing. In response to that point, respondent concedes (Br. 31) that what he refers to as a “dual motive” arrest “would [not] violate either the Fourth Amendment or the statute.” That concession eliminates any basis for imposing liability on petitioner in this case. Respondent goes on, however, to propose—for the first time in this litigation—a new standard. According to respondent (Br. 32), the Fourth Amendment and the statute itself are violated if the government would not have sought the warrant “*but for*” the government’s interest in the individual as a criminal suspect. That test is unsupported by anything in Section 3144 or this Court’s Fourth Amendment cases, and it would be even less workable than the test employed by the court of appeals.

1. In explaining his theory of permissible and impermissible prosecutorial purposes, respondent appears to have conceded away a key premise of his theory of liability in this case. Although respondent claims that there is no violation of the Fourth Amendment or Section 3144 in a case of “dual motives”—that is, a case in which the prosecutor seeks the witness’s testimony and also has an investigatory interest in detaining the witness—the allegations in respondent’s complaint fail to establish that this is not such a case. To the contrary, the complaint is carefully crafted to avoid any allegation that petitioner’s alleged policy directed prosecutors to seek warrants in cases where there was no desire to obtain testimony. The complaint alleges that petitioner established a policy of seeking 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. It does not allege, however, that the object of the policy was to target individuals who were not *also* of interest as potential witnesses.

The complaint’s additional allegations concern what persons other than petitioner did while implementing the alleged policy, coupled with allegations that petitioner is liable as a supervisor for his failure to correct the “abuses” carried out by his subordinates. Only in that context does the complaint allege that the purpose of the warrants was not to secure testimony. For example, the complaint alleges that “Defendants’ purpose in arresting and detaining [respondent] was not to secure his testimony, but to preventively hold and investigate him for possible criminal wrongdoing.” J.A. 40. But respondent offered nothing to show that *petitioner* had

any involvement in—or even knowledge of—his arrest. See E.R. 52-53 (declaration of Assistant United States Attorney stating, “I did not receive any instruction or direction from any senior DOJ official located in Washington, DC regarding the decision to apply for a material witness warrant for [respondent’s] arrest.”).

The only other allegation in the complaint relevant to the lack of a need for respondent’s testimony again refers to the circumstances surrounding the arrest of respondent, and not to the policy allegedly adopted by the Attorney General. J.A. 52. As respondent made clear in his brief in the court of appeals, his claim that individuals (including respondent) were arrested under petitioner’s material-witness policy even though their testimony was not being sought was an attempt to impose supervisory liability upon petitioner. Resp. C.A. Br. 39-40. Respondent has since abandoned his claim of supervisory liability, see Br. in Opp. i, and in any event such a theory, resting solely on petitioner’s alleged acquiescence in the behavior of his subordinates, would not survive this Court’s decision in *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948-1949 (2009).

Indeed, any suggestion that petitioner’s policy included directions to seek material-witness warrants in the absence of a desire for testimony is belied by respondent’s own allegations. For instance, respondent cites (Br. 8) a statement from the Assistant Attorney General for the Criminal Division that the material-witness statute is “an important investigative tool in the war on terrorism.” J.A. 43. That statement goes on to say: “[Y]ou get not only testimony—you get fingerprints, you get hair samples—so there’s all kinds of *evidence* you can get from a witness.” *Ibid.* That statement suggests that the primary purpose of the material-witness warrants

was to obtain testimony, and the other “purposes” were viewed as secondary benefits. Accordingly, even under respondent’s understanding of his test, there was no violation of Section 3144 or the Fourth Amendment in this case.

2. Respondent’s description of his standard is internally contradictory, because if a “but for” test were applied in the way that “but for” causation is ordinarily understood, then it would prohibit the use of the material-witness statute even in many of the “dual motive” cases that respondent concedes are legitimate. As the Seventh Circuit has observed, “[b]ut for’ causation is a very weak sense of causation; in fact, it often falls short of the meaning of ‘cause’ in ordinary usage.” *United States v. Dyer*, 216 F.3d 568, 570 (2000). And a consideration can be a “but for” cause of a decision even if it is one of several motivating factors for that decision. See, e.g., *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct 2343, 2351 (2009). Accordingly, an interest in investigation or detention could easily be a “but for” cause of a material-witness arrest even in cases where prosecutors also “genuinely want the witness’s testimony.” Resp. Br. 31.

Depending on how it is applied, respondent’s proposed “but for” standard could require even more inquiry into motives than the purpose inquiry contemplated by the court of appeals, requiring courts to determine which of many possible motives was the “but for” cause of an action. Every material-witness warrant could be subject to an allegation of improper motive, either in a direct challenge to detention or in a later action for damages. Contrary to respondent’s suggestion (Br. 34), it is easy to make such an allegation, and a material witness who did so could subject the prosecutor to burdensome discovery, potentially undermining an on-

going investigation. The court would then have to conduct a factual inquiry into the prosecutor's motives to determine whether the prosecutor would have made the same decision in the absence of an investigatory motive. The prospect of such litigation would discourage prosecutors from employing the material-witness statute in situations, like those identified in the opening brief (at 38-40), for which it was designed and in which the public interest favors its use. See William P. Barr, et al. Amici Br. 24-28.

**C. At A Minimum, Respondent's Arrest Did Not Violate Clearly Established Law**

Even if the Fourth Amendment prohibited the use of a material-witness warrant in the circumstances of this case, petitioner would be entitled to qualified immunity because the constitutional rule now proposed by respondent was not clearly established at the time of his arrest in 2003. No source of law that existed in 2003—or, for that matter, at any time before the decisions of the courts below in this case—would have put petitioner on notice that detaining respondent based on a material-witness warrant issued by a federal magistrate judge could violate the Fourth Amendment. Indeed, even the decision of the court of appeals did not clearly establish the rule that respondent now advocates. The court held that a Fourth Amendment violation occurs only when the material-witness statute is used “for the purpose of criminal investigation,” Pet. App. 40a (emphasis omitted), but respondent contends that the Constitution prohibits any arrest that would not have occurred “but for [the government's] interest in detaining and investigating” the witness as a suspect, perhaps even if the princi-

pal purpose is not detention or investigation, Br. 45 (emphasis omitted).

Like the court of appeals, respondent cites (Br. 43) only one case to support his position: a district court decision in which the court stated, in dicta in a footnote, 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)); but see Pet. App. 129a (O’Scannlain, J., dissenting from denial of rehearing en banc). Indeed, respondent candidly admits (Br. 44) that his argument “is not based on the existence of pre-2003 case law.” He instead asserts that such case law is irrelevant here because a reasonable official “would not have needed a court to tell him” that seeking a material-witness warrant for investigative purposes violated the Constitution. He relies on *Hope v. Pelzer*, 536 U.S. 730 (2002), but that case does not support his position. Although the Court in *Hope* held that “officials can still be on notice that their conduct violates established law even in novel factual circumstances,” *id.* at 741, it also emphasized that “in the light of pre-existing law the unlawfulness must be apparent,” *id.* at 739 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). In this case, respondent’s position finds support in no pre-existing law, and the fact that nine judges below vigorously disagreed with it strongly indicates that the law was not clearly established. See *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2644 (2009).

Finally, respondent states (Br. 43) that no court “has concluded that it would be lawful to use the material witness statute as a tool for preventive detention and in-

vestigation.” Even if that observation were accurate—which it is not—it inverts the test for qualified immunity. As this Court has made clear, “[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, 202 (2001)) (emphasis added). Like the court of appeals, respondent has not come close to demonstrating that this demanding standard was satisfied.

In any event, the lawfulness of the arrest in this case was established by the Second Circuit’s decision in *United States ex rel. Glinton v. Denno*, 339 F.2d 872, 875 (1964), cert. denied, 381 U.S. 929 (1965). As explained in the opening brief (at 42-43), the court in *Denno* expressly rejected the contention that an investigatory motive invalidates a material-witness warrant that meets the objective requirements of the statute. That decision, which the Second Circuit did not question in *Awadallah*, demonstrates that a reasonable officer would not have understood that an investigatory motive invalidates an arrest based on an otherwise-valid material-witness warrant. Lacking a response to that precedent, respondent simply ignores it.

\* \* \* \* \*

For the foregoing reasons and those stated in the opening brief, 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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