No. 10-98

In the Supreme Court of the United States

JOHN D. ASHCROFT, PETITIONER

v.

ABDULLAH AL-KIDD

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

REPLY BRIEF FOR PETITIONER

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The court of appeals erred in holding that a former Attorney General of the United States could be subject to burdensome litigation based on the conduct of his subordinates in seeking and obtaining a warrant for respondent's arrest as a material witness. Its decision conflicts with decisions of this Court and other courts of appeals, effectively invalidates an Act of Congress, and, if permitted to stand, would severely damage important law-enforcement interests. This Court's review is therefore warranted.

Respondent contends (Br. in Opp. 23) that this Court's review is unnecessary because petitioner can seek review at a later time if he is ultimately found liable. That argument overlooks that one of the key purposes of immunity is to protect against the burdens of litigation, including discovery and trial. See *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985) (noting that qualified immunity is an "*immunity from suit*"); *Imbler* v. *Pachtman*, 424 U.S. 409, 423 (1976). More-

over, the consequences of at least three aspects of the decision below are sufficiently serious as to call for immediate correction by this Court.

First, the court of appeals denied petitioner absolute immunity from claims that he instructed his subordinates to seek a material witness warrant. In the court's view, petitioner's absolute immunity was defeated because respondent alleged that the "immediate purpose" of the warrant was "investigative." Respondent attempts to defend the court's reasoning on this issue, but his efforts are unsuccessful. The "immediate purpose" test has no support in precedent or logic; it conflicts with the decisions of other courts of appeals; and it threatens to undermine the policy objectives of the absolute-immunity doctrine by exposing prosecutors to suit when they exercise core advocacy functions.

Second, the court of appeals held that the Fourth Amendment prohibits the use of valid material witness warrants as a "pretext" for further investigation of a suspect. That holding is inconsistent with this Court's precedent recognizing that an officer's subjective intent is irrelevant to the validity of an arrest. It also leads to the conclusion that the material witness statute, 18 U.S.C. 3144, is unconstitutional as applied to this case. And it would severely limit prosecutors' ability and willingness to use the material witness statute in circumstances that frequently arise. Respondent argues that the court did not invalidate the statute but merely construed it not to apply here, but that interpretation finds no support in the court's opinion. Nor is there any basis for respondent's argument that the court's unprecedented decision was sufficiently "clearly established" to impose personal liability upon petitioner.

Third, the court of appeals ruled that the former Attorney General may be held responsible for alleged misstatements in an affidavit filed by subordinate officials. That

conclusion rests on a theory of vast supervisory liability that is directly contrary to this Court's decision in *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937 (2009), and respondent no longer attempts to defend it. Instead, he promises (Br. in Opp. i) to abandon his claims based on that theory in any further proceedings. That erroneous aspect of the decision below is nevertheless significant and should not be allowed to stand. Respondent's abandonment of his claims has mooted that issue, and therefore, even if the Court does not grant plenary review, it should vacate that aspect of the court of appeals' decision. See *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950).

A. The Court Of Appeals Erred In Holding That Petitioner Is Not Entitled To Absolute Immunity

As explained in the petition (at 14-20), the court of appeals erred in denying petitioner absolute immunity for respondent's claim that he implemented a policy of using the material witness statute to investigate or preventatively detain terrorism suspects. If allowed to stand, that holding would frustrate the purposes of prosecutorial immunity and discourage the vigorous exercise of important governmental functions. Respondent's efforts to defend the court's reasoning are unavailing.

1. Respondent does not dispute that absolute immunity operates when an official, including the Attorney General, performs actions that are "intimately associated with the judicial phase of the criminal process." *Imbler* v. *Pachtman*, 424 U.S. 409, 430 (1976). Nor does he dispute that seeking a material witness warrant is just such an action. Indeed, as respondent acknowledges (Br. in Opp. 30), courts have recognized that absolute immunity applies when a prosecutor seeks a material witness warrant. See, *e.g.*, *Betts* v. *Richard*, 726 F.2d 79, 81 (2d Cir. 1984); *Daniels* v. *Kieser*, 586

F.2d 64, 68-69 (7th Cir. 1978), cert. denied, 441 U.S. 931 (1979).

Instead, respondent attempts to defend the court of appeals' conclusion that while absolute immunity generally applies to the decision to seek a material witness warrant, such immunity is unavailable if a plaintiff alleges that the prosecutor's "immediate purpose" is "to investigate or preemptively detain a suspect." Pet. App. 25a. He asserts (Br. in Opp. 29) that the court of appeals merely applied "the Court's functional test" for determining when an activity is prosecutorial and therefore covered by absolute immunity. But that is not what the court of appeals actually did. Rather, it replaced the simple legal inquiry into the nature of the function being performed with a complicated factual inquiry into the subjective motives of the prosecutor. Under its rule, courts must examine the prosecutor's motive in order to determine whether the act in question is "prosecutorial." See Pet. App. 25a. Respondent's contention to the contrary is based upon an artificial distinction between the supposed "purpose" behind the act (which respondent believes can be considered) and the "motive" behind the act (which cannot). But neither respondent nor the court of appeals offered any basis for drawing that distinction.

Respondent repeats the error of the court of appeals (Pet. App. 19a-20a) in claiming (Br. in Opp. 29) to find support for the court's "immediate purpose" test in *Buckley* v. *Fitzsimmons*, 509 U.S. 259 (1993). The Court in *Buckley* did not endorse evaluation of the *prosecutor's* immediate purpose. Instead, that case involved the question whether a prosecutor's analysis of crime-scene evidence—normally an investigatory function—was nonetheless prosecutorial. This Court held that the subsequent convening of a grand jury did not make the prosecutor's alleged fabrication of evidence a prosecutorial act. The Court noted that the prose-

cutor's conduct occurred before the grand jury had convened, and that the "immediate purpose" *of the grand jury* was to investigate the crime and not to return an incitement against the suspect. *Id.* at 275. Nothing in *Buckley* suggests that an individual prosecutor's "immediate purpose" for performing an act that is unquestionably prosecutorial in nature can convert the act into an investigatory one.

2. As explained in the petition (at 19-20), the decision below would permit mere allegations of a prosecutor's improper purpose to defeat absolute immunity. Because bad motive is "easy to allege and hard to disprove," *Hartman* v. *Moore*, 547 U.S. 250, 257 (2006) (internal quotation marks omitted), the court of appeals' holding would undermine the protection of absolute immunity by subjecting prosecutors to burdensome discovery of their motives. Respondent asserts (Br. in Opp. 25) that the uncertainty for prosecutors created by the court's opinion is based upon "exaggerated" speculation, but in fact the court's immediate-purpose standard leaves prosecutors subject to potential claims of improper purpose for every act they take. For example, as noted in the petition (at 20), a prosecutor may face accusations that the real reason he charged a defendant with a crime was to induce his cooperation in an ongoing investigation, and not to actually secure a conviction. Respondent's brief echoes the court of appeals' response to such legitimate fears, suggesting that somehow the prosecutor's "immediate purpose" in that situation is not investigatory. Respondent all but concedes (Br. in Opp. 27) that this reasoning lacks any logical foundation, arguing that even if "many of the analytical lines drawn by the Ninth Circuit lack a principled basis," the "relevant point is that the court of appeals *did* draw those lines." But precisely because those lines are unsupported by any principle, they will provide no reassurance to officials who face the prospect of litigation

over the exercise of routine prosecutorial functions that they undertake each day.

Before this case, no court had adopted the approach of the court below. Indeed, contrary to respondent's suggestion that there is no circuit conflict (Br. in Opp. 22), at least two other courts of appeals have expressly rejected the proposition that a prosecutor's intent is relevant to absolute immunity analysis. See, *e.g.*, *Bernard* v. *County of Suffolk*, 356 F.3d 495, 504 (2d Cir. 2004) (The "fact that improper motives may influence" a prosecutor's exercise of discretion "cannot deprive him of absolute immunity."); *Austin Mun. Sec., Inc.* v. *National Ass'n of Sec. Dealers*, 757 F.2d 676, 685 (5th Cir. 1985) ("[T]he intent with which * * * defendants operate is irrelevant to the absolute immunity issue."). The conflict with those decisions warrants this Court's review.

B. The Court Of Appeals Erred In Holding That Petitioner Is Not Entitled To Qualified Immunity

The court of appeals further erred in holding that petitioner is not entitled to qualified immunity, and its decision effectively invalidates the material witness statute. See William P. Barr, et al. Amicus Br. 18-21. Respondent attempts both to defend the decision and to minimize its significance, but his arguments are not persuasive.

1. Like the court of appeals, respondent asserts (Br. in Opp. 32) that the arrest of a material witness comports with the Fourth Amendment only if the arrest has a particular objective: "not to investigate and/or prosecute the individual, but to secure testimony for someone else's criminal proceeding." That assertion is directly contrary to this Court's decision in *Whren* v. *United States*, 517 U.S. 806 (1996), which made clear that the Fourth Amendment establishes an objective standard under which an officer's motives are

irrelevant. See *id.* at 813 ("[W]e have been unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers.").

Respondent attempts (Br. in Opp. 32) to distinguish *Whren* on the ground that the case involved an arrest based on probable cause to believe that the arrestee had committed a criminal offense. That argument overlooks that respondent's detention was also based on an individualized determination of probable cause—that is, a finding by a neutral magistrate that there was probable cause that respondent had information important to an ongoing criminal proceeding.

Similarly flawed is respondent's argument (Br. in Opp. 32-33) that, under *City of Indianapolis* v. *Edmond*, 531 U.S. 32 (2000)—a case involving vehicle checkpoints—a court must examine the "programmatic purpose" of the policy underlying his detention. As explained in the petition (at 22-23), *Edmond* applies only to seizures that, unlike the one at issue in this case, lack any individualized basis. Moreover, the Court in *Edmond* cautioned that an inquiry into programmatic purpose "is not an invitation to probe the minds of individual officers acting at the scene," 531 U.S. at 48—precisely what the court of appeals did here.

2. In holding that the Fourth Amendment prohibited an arrest that the material witness statute permitted, the court of appeals effectively invalidated the statute as applied to the circumstances of this case. Respondent attempts (Br. in Opp. 34) to resist that conclusion, arguing that the court of appeals actually construed the statute to prohibit detention "as a pretext for * * * investigating suspects." Although Judge Smith expressed that view in his concurrence in the denial of rehearing en banc, Pet. App. 113a-114a, the panel did not. Instead, it viewed the only statutory claim in the case as one based on false statements in the warrant affida-

vit. *Id.* at 47a-48a. The court's decision that respondent's detention was improper was expressly based on the Fourth Amendment. *Id.* at 40a ("To use a material witness statue pretextually, in order to investigate or preemptively detain suspects without probable cause, is to violate the Fourth Amendment.").

Respondent also contends (Br. in Opp. 22) that the Second Circuit has endorsed his interpretation of the material witness statute. He relies on *United States* v. *Awadallah*, 349 F.3d 42 (2003), cert. denied, 543 U.S. 1056 (2005), in which the court stated that it would be "improper" to use the statute for the purpose of "the detention of persons suspected of criminal activity for which probable cause has not yet been established." *Id.* at 59. That suggestion was dicta, and in any event the court did not state that such a purpose would invalidate an otherwise lawful use of the statute. To the contrary, the Second Circuit has previously rejected just such an argument. *United States ex rel. Glinton* v. *Denno*, 339 F.2d 872, 875 (1964), cert. denied, 381 U.S. 929 (1965). Nothing in *Awadallah* took issue with *Glinton*.

3. Even if the court of appeals were correct that the Fourth Amendment prohibited the execution of a material witness warrant when a prosecutor acted with investigative intent, the court erred in denying qualified immunity because that rule was not clearly established at the time of respondent's arrest. The court's error will increase the harmful effects of the decision below by discouraging prosecutors from using the material witness statute in any case where they suspect that the witness may also have committed a crime.

The court of appeals acknowledged—and respondent does not dispute (Br. in Opp. 35)—that as of the time of respondent's arrest, no case had "squarely confronted the question of whether misuse of the material witness statute

to investigate suspects violates the Constitution." Pet. App. 41a. Respondent argues (Br. in Opp. 36) that "[t]here was * * * no basis for believing" that the use of the material witness statute in this case was lawful. Even if that observation were accurate—which it is not—respondent's argument rests on an inversion of the appropriate qualified-immunity inquiry. 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.

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

As demonstrated in the petition (at 30-33), the court of appeals also erred in concluding that petitioner, the former Attorney General, 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 the holding of *Aschcroft* v. *Iqbal*, 129 S. Ct. 1937 (2009). Respondent makes no effort to defend the court of appeals' holding in this regard, nor does he dispute that the decision warrants review because it conflicts with *Iqbal*. Instead, he declares (Br. in Opp. i) that he "will not pursue the claims in Question 3" before this Court and "will abandon the claim in Question 3 in any further proceedings in the district court or Ninth Circuit."

Respondent's abandonment of his claim provides no basis for denying review on the other questions presented. If the Court does not grant plenary review to consider those questions, however, then because respondent has mooted the supervisory-liability issue, the proper course would be to vacate that aspect of the court of appeals' decision. See *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). That course would be particularly appropriate here because courts both inside and outside the Ninth Circuit have relied upon the decision below to allow claims to proceed based upon allegations that high-ranking government officials merely acquiesced in alleged constitutional violations. See, *e.g.*, *Vance* v. *Rumsfeld*, 694 F. Supp. 2d 957, 964-965 (N.D. Ill. 2010) (relying upon the decision below to hold that allegations that former Secretary of Defense was aware of abuses and acquiesced in them were sufficient to state a claim), appeal pending, No. 10-1687 (7th Cir.); *Collins* v. *Brewer*, No. 2:09-CV-02402, 2010 WL 2926131, at *10 (D. Ariz. July 23, 2010) (citing the decision below for the proposition that "direct, personal participation is not necessary to establish liability for a constitutional violation"). The "happenstance" of respondent's abandonment of the issue should not deprive the government of the ability to seek correction of the court's judgment. *Munsingwear*, 340 U.S. at 40.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted. If the Court does not grant plenary review, it should vacate the portion of the decision below addressing the third question presented. See *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950).

Respectfully submitted.

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SEPTEMBER 2010

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