11-5386

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ALEXINA SIMON,

Plaintiff-Appellant,

-v-

CITY OF NEW YORK, ADA FRANCIS LONGOBARDI,
DETECTIVE EVELYN ALEGRE and
DETECTIVE DOUGLAS LEE,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR *AMICI CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND AMERICAN CIVIL LIBERTIES UNION FOUNDATION IN SUPPORT OF PLAINTIFF-APPELLANT ALEXINA SIMON

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This brief is filed on behalf of the National Association of Criminal Defense Lawyers ("NACDL"), the New York State Association of Criminal Defense Lawyers ("NYSACDL"), and the American Civil Liberties Union Foundation ("ACLU") as *amici curiae* in support of the Plaintiff-Appellant, Alexina Simon, who appeals from a district court's December 16, 2011 decision denying her motion for reconsideration of the court's prior order granting the defendants summary judgment. The court held that defendants were entitled to absolute and qualified immunity on federal and state claims that they falsely imprisoned her for two days for custodial interrogation, in violation of New York's material witness statute and a court's material witness warrant.

RULE 29(c) STATEMENT

Identity of Amici Curiae

NACDL is a nonprofit organization with a direct national membership of more than 12,800 attorneys, in addition to more than 35,000 affiliate members, from all 50 states. Founded in 1958, NACDL is the only professional association that represents public defenders and private criminal defense lawyers at the

national level. NYSACDL, the recognized New York State affiliate of NACDL since 1986, is a not-for-profit corporation with a subscribed membership of more than 660 attorneys, including private practitioners, public defenders, and law professors. NACDL and NYSACDL regularly file amicus curiae briefs in cases of significant public interest or of professional concern to the criminal defense bar.

The ACLU is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members, dedicated to defending and preserving the individual rights and liberties guaranteed by the Constitution and the laws of the United States. The ACLU has been involved in numerous cases interpreting the scope of official immunities, and litigated *Ashcroft v. al-Kidd*, 131 S. Ct. 2074 (2011), which raised the issue of absolute and qualified immunity for government officials' use of the federal material witness statute.

Interest in the Case

NACDL, NYSACDL, and the ACLU are interested in this case because the defendants' conduct directly threatens the rights of individuals held as material witnesses to prompt arraignment, representation by counsel, and an independent

judicial determination of their status. Defendants' conduct also endangers the rights of criminal defendants by potentially coercing false testimony from vulnerable individuals held indefinitely, without any judicial oversight or legal representation, for custodial interrogation. Absolute or qualified immunity for such official misconduct would deny aggrieved individuals any compensation or other remedy for their constitutional injuries and would encourage law enforcement authorities to continue such practices.

Source of Authority to File

All parties consent to the filing of this brief.

Authorship of Brief

No party's counsel authored the undersigned brief in whole or in part. No party, party's counsel, or person other than *amici* contributed money to fund preparation or submission of the brief.

STATEMENT OF THE CASE

Relevant Criminal Procedure Law Provisions

Article 620 of the New York Criminal Procedure Law sets forth New York State's material witness procedures. Under Article 620, courts may issue a material witness order when a felony complaint is pending, CPL 620.20(4). A proceeding to adjudge a person a material witness is initiated by an *ex parte* application setting forth reasonable cause to believe that the individual possesses material information and will not be responsive to a subpoena to appear in court (or before a grand jury). CPL 620.20(1), 620.30(1). If the court is satisfied by the application, it may order the witness to appear at a designated time for a material witness hearing or, if convinced that the witness would not respond to such an order, it may "issue a warrant *addressed to a police officer*, directing such officer to take such prospective witness into custody ... and to *bring him before the court forthwith*" for a hearing "to determine whether he is to be adjudged a material witness." CPL 620.30(b) (emphasis added).

Thus, New York's statute does not permit a material witness to be detained for interrogation or any other purpose before there has been an adversarial hearing before a court. Instead, the witness must be brought to court "forthwith" for a material witness hearing, at which the witness must be formally arraigned on the application and given "all the rights" of a felony defendant, including counsel and release on reasonable bail, either pending a full hearing or after such a hearing. CPL 620.40. The applicant bears the burden of proof that the individual is a material witness and will not comply with a subpoena, and the witness has the right to testify and to present witnesses. CPL 620.50.

Statement of Facts

As set forth in Ms. Simon's opening brief, she seeks to recover for her false imprisonment on August 11 and 12, 2008, at the Queens County District Attorney's Office, following the issuance of a material witness warrant for her arrest. The warrant had been issued based upon the *ex parte* application of an Assistant District Attorney, defendant Longobardi, representing that Simon had been uncooperative in his office's investigation of a felony complaint charging

Shantell McKinnies with making a fraudulent report and insurance claim concerning McKinnies's vehicle. Based on Longobardi's application, the state court issued a warrant commanding "any police officer in the State of New York" "forthwith to take the above-named ALEXINA SIMON into custody . . . and bring her before this Court in order that a proceeding may be conducted to determine whether she is to be adjudged a material witness." JA 630. The warrant further specified that the hearing was to take place "at the Queens County Courthouse in the City of New York on August 11, 2008 at 10:00 in the forenoon." *Id.*

However, at 10 a.m. on August 11, the defendant officers arrested Simon and took her, not to court, but to ADA Longobardi's office, where the defendants, including Longobardi, interrogated her until 8 p.m. She was then allowed to go home, but was told she was still "under arrest." The next day, the defendant officers arrested her at her home at 9 a.m. and brought her back for further custodial interrogation, which lasted until 6:30 p.m., when she was finally released. Shortly before releasing her, ADA Longobardi caused her to be served with a subpoena commanding her to appear as a witness before a grand jury on Monday,

August 11, and Tuesday, August 12, at 9:30 a.m. JA 744. By the time this subpoena was served, it was already after business hours on August 12.[1]

Simon was never brought before any court for a material witness hearing. The district court held that defendants have absolute and qualified immunity for obtaining and relying upon the material witness warrant, but did not address plaintiff's principal claim that defendants had no immunity for *executing* the warrant unlawfully and contrary to its terms. Specifically, the district court never explained why defendants would be entitled to immunity for blatantly ignoring the clear command to bring the witness to a hearing, and instead arresting and interrogating her for two days in the DA's office.

SUMMARY OF THE ARGUMENT

I. The district court's decision incorrectly focuses on whether the prosecutor had absolute immunity for *applying* for the material witness warrant. In

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[1] It is not clear whether a grand jury was ever empanelled with respect to this matter on August 11 or 12, 2008, or at any other time. *Compare* Plaintiff's Counterstatement of Disputed Facts, JA 775-76 ¶ 68 and JA 780 ¶ 94 (alleging no grand jury was convened or empaneled) *with* Defendants' Response, JA 815 ¶ 68 and JA 822 ¶ 94 (denying this but citing no contrary evidence).

fact, Simon's principal claim is that the *execution* of the warrant caused her injury. There does not appear to be any case holding that a prosecutor enjoys absolute immunity for unlawfully executing a material witness warrant. *Flagler v. Trainor*, 663 F.3d 543 (2d Cir. 2011), recognizes absolute immunity solely for the function of *applying* for a warrant.

Under the Supreme Court's functional analysis, a prosecutor should not be absolutely immune for unlawfully *executing* a material witness warrant. The execution of a warrant, as opposed to the application for it, is a classic police function. New York's statutory scheme authorizes the court to direct "any police officer" to take a material witness into custody and to bring him to court "forthwith." Case law holds that prosecutors do not have absolute immunity for executing a traditional criminal arrest warrant. There is even less reason to accord them such immunity when they unlawfully execute a warrant authorizing only the arrest and immediate transportation to court of a mere witness.

It also would be inappropriate to recognize absolute immunity where the prosecutor, and the detective-investigators acting jointly with him, violated the

terms of the warrant and the authorizing statute by detaining the witness for two days for interrogation and never taking her to court. A prosecutor does not enjoy absolute immunity for violating the terms of a court order or exceeding his authority, as the prosecutor did here.[2] It was the court's function to determine, at a full-fledged adversarial hearing, whether the witness had material information and needed to be detained to compel her appearance in the grand jury. The prosecutor does not have absolute immunity for circumventing this judicial inquiry and instead detaining Simon to conduct his own unauthorized interrogation.

Finally, it would be inappropriate to recognize absolute immunity for the execution of material witness warrants in the absence of any common-law tradition of immunity for such a function at the time of the Civil Rights Act's enactment in 1871. It is the defendant's burden to demonstrate that the function in question was protected by absolute immunity at the time of Section 1983's passage. Not only did defendants fail to show a common-law tradition of immunity—a necessary

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[2] *See al-Kidd v. Ashcroft*, 580 F.3d 949, 963 (9th Cir. 2009) (holding that "when a prosecutor seeks a material witness warrant in order to investigate or preemptively detain a suspect," he is not entitled to absolute immunity), *rev'd on other grounds sub nom Ashcroft v. al-Kidd*, 131 S. Ct. 2074 (2011).

precondition to immunity under Section 1983—but there is also no public policy reason to shield prosecutors from liability for using the material witness process as a coercive investigative tool. Aggrieved material witnesses should not be denied their only remedy when prosecutors deliberately violate their constitutional rights.

II. Even if the relevant function for an absolute immunity analysis was, as the district court assumed, the prosecutor's *procurement*, as opposed to *execution*, of the material witness warrant, such procurement should not be accorded absolute immunity. This Court's recent decision in *Flagler v. Trainor* held that absolute immunity applies when a prosecutor obtains a material witness warrant, shortly before trial, by swearing to allegedly false facts. If this Court believes that *Flagler* controls here, *amici* request that *Flagler* be reconsidered *en banc*. *Flagler* is at odds with the Supreme Court's well-established test for absolute immunity, the unique history of material witness statutes, and the complete lack of any historical tradition of immunity for the act of obtaining a material witness's arrest at common law.

III. The district court also held that the defendants had qualified immunity for procuring the warrant, but did not reach the central issue of whether they are immune for *executing* it unlawfully by bringing Simon to the DA's office for a custodial interrogation. Defendants are not entitled to qualified immunity for this act. It was clearly established that arresting a witness and detaining her in direct violation of the terms of the arrest warrant and governing statute, without bringing her to court for an adjudication that she was in fact a material witness, was without legal justification and in violation of the Fourth Amendment. No reasonable prosecutor or police officer could have believed otherwise.

ARGUMENT

I. A PROSECUTOR'S *EXECUTION* OF A MATERIAL WITNESS WARRANT DOES NOT RECEIVE ABSOLUTE IMMUNITY.

A. The Legal Framework

Section 1983 on its face does not recognize any defense of official immunity. *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993). Courts have no "license" to establish immunities to § 1983 actions for reasons of "public policy," but may only recognize existing common-law immunities that Congress, when it

enacted the statute in 1871, is deemed to have incorporated. *Id.* (citation omitted). Courts are therefore "quite sparing" in granting absolute immunity. *Burns v. Reed*, 500 U.S. 478, 487 (1991) (internal quotation marks omitted); *see also Blouin ex rel. Estate of Pouliot v. Spitzer*, 356 F.3d 348, 356 (2d Cir. 2004) (absolute immunity is a "rare and exceptional" protection) (citation omitted).

An official seeking absolute immunity "bears the burden of showing that such immunity is justified for the function in question." *Buckley*, 509 U.S. at 269 (citation omitted). The defendant must establish not only a historical tradition of immunity, but also that immunity will not undermine the purposes of § 1983. *Malley v. Briggs*, 475 U.S. 335, 339-40 (1986). The Supreme Court has cautioned that absolute immunity may be especially inappropriate where there are no other checks on official abuse, such as a case "when in the end the suspect is not prosecuted." *Buckley*, 509 U.S. at 271.

Prosecutors are shielded by absolute immunity only when they are performing functions that are truly advocative and "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman*, 424 U.S. 409, 430

(1976). In *Imbler*, the Court held that the functions of "initiating a prosecution and . . . presenting the State's case" in court are protected by absolute immunity. *Id.* at 431 & n.33. In contrast, for functions that "cast [a prosecutor] in the role of an administrator or investigative officer rather than that of advocate," *id.* at 430-31, the Supreme Court has denied absolute immunity. Prosecutors are liable for such functions as swearing to factual allegations in support of a warrant application (but not for submitting the application in court), *see Kalina v. Fletcher*, 522 U.S. 118, 129-31 (1997); offering legal advice to the police about the permissibility of investigative techniques and whether they had probable cause to arrest a suspect (but not for appearing in court and presenting evidence in support of a search warrant), *see Burns*, 500 U.S. at 492-96; and developing false evidence during the investigation of a case (but not for presenting such evidence at trial), *see Buckley*, 509 U.S. at 271-76. When a prosecutor performs investigatory or administrative duties, he loses the shield of absolute immunity.

In *Flagler v. Trainor*, 663 F.3d 543 (2d Cir. 2011), this Court held a prosecutor absolutely immune for submitting a false application for a material

witness warrant to compel a witness to testify at trial. The Court reasoned that the function of applying for such a court order under New York law is reserved exclusively for a prosecutor. At the same time, the Court recognized that the prosecutor's involvement in accessing the same witness's voicemail without her consent, and in persuading another individual to secretly record the witness's telephone calls, were investigative acts as to which absolute immunity did not apply, even though they were in preparation for the same trial. Critically, neither in *Flagler* nor in any other case has this Court reached the question presented here: whether absolute immunity applies to the *execution* of a material witness warrant.[3]

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[3] Defendants contended below that in *Betts v. Richard*, 726 F.2d 79 (2d Cir. 1984), the witness was held overnight before being produced in court for a material witness hearing, and thus this Court must have intended absolute immunity to apply to post-arrest detentions of witnesses. *See* JA 888. However, this issue was not addressed by the *Betts* Court; all the Court considered was whether the prosecutor had immunity for causing the warrant to be issued. *See* 726 F.2d at 81. Moreover, there is an obvious factual distinction between this case and *Betts*. In *Betts*, the witness was arrested during the evening after having failed to appear in court and held overnight until court was again in session, *id.* at 80, whereas Ms. Simon was arrested at 10 a.m., at the very time that her material witness hearing had been scheduled by the court—but she was taken instead to a prosecutor's office for interrogation.

B. The Execution Of A Material Witness Warrant Is An Investigative or Administrative Function, For Which Prosecutors Do Not Enjoy Absolute Immunity.

The unlawful *execution* of a court-ordered warrant, including the unauthorized detention of a purported material witness for interrogation, as opposed to the *application* for the warrant, is a *police* function, as New York's material witness statute explicitly states. The defendants' actions in detaining Simon for two days for interrogation, instead of taking her to court as the warrant required, were obviously not prosecutorial, in that they were not "intimately associated with the judicial phase of the criminal process." *Imbler*, 424 U.S. at 430. On the contrary, the defendants were *avoiding* a court-ordered judicial proceeding. *Cf. Schneyder v. Smith*, 653 F.3d 313, 334 (3d Cir. 2011) (prosecutor was acting administratively when she failed to inform court that trial date had changed, thus causing material witness to remain in detention unnecessarily).

The case law is clear that prosecutors who participate in arrests or detentions do not function as advocates, but rather fulfill a police administrative or investigative function. *See Day v. Morgenthau*, 909 F.2d 75, 77-78 (2d Cir. 1990).

A prosecutor may have immunity for "procuring" an arrest warrant, but not for "executing" it. *Barr v. Abrams*, 810 F.2d 358, 362 (2d Cir. 1987); *see also Robinson v. Via*, 821 F.2d 913, 918 (2d Cir. 1987). As then-District Court Judge Lynch pointed out, "[p]articipating in an arrest *and detention* clearly is not part of the traditional advocacy functions of a prosecutor. If a police officer can be held liable for such conduct, there is no reason why a prosecutor who engages in the same activity should be held to be absolutely immune." *Hickey v. City of New York*, 2002 WL 1974058, at *3 (S.D.N.Y. Aug. 26, 2002) (emphasis added).[4]

In *Flagler*, this Court stated that the "applicant" for a material witness warrant on behalf of the State must be a *prosecutor*. *See Flagler*, 663 F.3d at 548; *but see infra* n.9. But, significantly, under New York's material witness statute, the issuing court, if it concludes there is reasonable cause to believe the

[4] If anything, a prosecutor who participates in the unlawful execution of a material witness warrant is deserving of less immunity than a prosecutor who participates in the unlawful execution of an arrest warrant, because a material witness must be brought before a court "forthwith." Indeed, here, the warrant set a precise time and date for the material witness hearing, leaving no room for any discretion on the part of the prosecutor. *Cf.* CPL 120.90(1) (generally requiring that an officer executing a traditional arrest warrant bring the suspect to court "without unnecessary delay").

prospective witness would not appear unless compelled, "may issue a warrant *addressed to a police officer*" to bring the witness to court. CPL § 620.30(2)(b) (emphasis added). The physical production of the witness in court is thus, by definition, a police function. So too, naturally, is the *failure* to produce the witness in court, as defendants did here. *Cf. Schneyder*, 653 F.3d at 332-34 (prosecutor's duty to monitor and inform court of material witnesses' detention status is administrative).

That the eventual *result* of the material witness process may be that the witness is compelled to testify in a judicial proceeding does not make the function for which absolute immunity is claimed here—the *execution* of the warrant—prosecutorial. *See Buckley*, 509 U.S. at 276. As the Supreme Court has pointed out, "[a]lmost any action by a prosecutor, including his or her direct participation in purely investigative activity, could be said to be in some way related to the ultimate decision whether to prosecute, but we have never indicated that absolute immunity is that expansive." *Burns*, 500 U.S. at 495.[5]

[5] While *amici* do not believe that the execution of a material witness warrant

Moreover, here, the terms of the warrant were explicit: It stated that the arresting officer must "bring [Simon] before this Court in order that a proceeding may be conducted" at a specific time and place. JA 630. A prosecutor does not enjoy absolute immunity for executing a material witness order in a manner that ignores or defies its terms or conditions. In *Schneyder v. Smith*, the Third Circuit recently reaffirmed its decision in *Odd v. Malone* and denied absolute immunity to a prosecutor who failed to comply with an order to inform the court of the status of a detained material witness. The Court stated that the prosecutor was not entitled to usurp the court's "oversight function" of determining whether to continue to detain the witness; how long to detain the witness was "not the prosecutor's prerogative." *Schneyder*, 653 F.3d at 334. Besides holding that the function of advising the issuing court of the status of a material witness was "administrative,"

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should ever be subject to absolute immunity, this is especially so where, as in this case, there has been no indictment, the arrest was on a mere felony complaint sworn to by a police officer, and the DA apparently was conducting an investigation into whether there was probable cause to obtain an indictment—an indictment he had not yet determined to seek. *See, e.g., Odd v. Malone*, 538 F.3d 202, 213 (3d Cir. 2008) ("pre-indictment ... actions are more likely administrative than advocative"); *Barbera v. Smith*, 836 F.2d 96, 100 (2d Cir. 1987) (no "bright line" rule).

the Third Circuit reasoned: "We can imagine few circumstances under which we would consider the act of disobeying a court order or directive to be advocative, and we are loath to grant a prosecutor absolute immunity for such disobedience." *Id.* at 332 (quoting *Odd*, 538 F.3d at 214). *See also Gagan v. Norton*, 35 F.3d 1473, 1476 (10th Cir. 1994) (denying immunity to prosecutor who "allegedly countermand[ed] a state court judge's order" to provide *pro se* litigant with transcripts).

The Third Circuit's conclusion is consistent with the many cases holding that a prosecutor is not protected by absolute immunity where he acts outside his authority or jurisdiction. *See generally Barr*, 810 F.2d at 361. For example, while a prosecutor enjoys absolute immunity for the plea bargaining process, he is not immunized for assaulting a defendant to coerce a plea, *see Rouse v. Stacy*, 2012 WL 1314106, at *7 (6th Cir. Apr. 17, 2012) (unpub.), ordering him held under punitive or unlawful conditions, *see id.* (citing cases), or requiring him to execute a religious oath as a condition of dismissal, *see Doe v. Phillips*, 81 F.3d 1204, 1210-11 (2d Cir. 1996). A prosecutor who usurps the court's "prerogative" to determine

whether an individual truly is a material witness by detaining the individual for interrogation exceeds his authority or jurisdiction, and should not be immunized for such conduct.[6]

C. There Is No History Of Immunity For The Act Of Executing A Material Witness Warrant.

The absence of any historical tradition of immunity for the defendants' actions reinforces the conclusion that no absolute immunity is available here. A defendant seeking the protection of absolute immunity bears the burden of demonstrating a common-law tradition of immunity at the time of § 1983's passage in 1871. *See Buckley*, 509 U.S. at 269; *Malley*, 475 U.S. at 339-40. "The absence of historical or common-law support—either direct or by analogy—for

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[6] Nor is the prosecutor entitled to immunity from Simon's state law claims. "State substantive law governs the scope of immunity for state law claims," *In re World Trade Ctr. Disaster Site Litig.*, 521 F.3d 169, 181 (2d Cir. 2008), and under New York law, a prosecutor is not entitled to immunity for abusing court processes to interrogate witnesses where no grand jury has been convened, or for arresting a witness. *See, e.g.*, *Broughton v. City of New York*, 91 Misc. 2d 543, 546 (Civ. Ct., New York Co. 1977) (prosecutor not immune for using invalid court process to arrest a witness), *appeal dismissed*, 95 Misc. 2d 807 (1st Dep't App. Term 1978); *Rodrigues v. City of New York*, 193 A.D.2d 79, 86 (1st Dep't 1993) (no immunity for issuing improper grand jury subpoenas to compel witnesses to submit to office interrogation).

cloaking the challenged actions with absolute immunity is generally determinative." *Mangiafico v. Blumenthal*, 471 F.3d 391, 395 (2d Cir. 2006).

There is no common-law history of absolute immunity for detaining a material witness for interrogation. Neither the defendants nor the district court cited any pre-1871 cases holding prosecutors immune for unlawfully executing a material witness warrant, and *amici* are aware of none. To the contrary, common-law courts routinely held that prosecutorial actors[7] *were* liable for executing various types of warrants when they did so in a manner not authorized by the warrant's terms, or when the warrant itself did not comply with the governing statute's procedures. *See, e.g.*, *Pratt v. Hill*, 16 Barb. 303 (N.Y.S. 1853) (constable who executed arrest warrant was liable for detaining arrestee without first bringing him before the magistrate as the statute required); *Holley v. Mix*, 3 Wend. 350, 355 (N.Y.S. 1829) (constable and complainant were liable when they arrested plaintiff

[7] The office of public prosecutor in its modern form was not common in the 1800s. *See Kalina*, 522 U.S. at 124 n.11. For this reason, when weighing a claim of absolute immunity, courts consider how other actors—including justices of the peace, private prosecutors, and law enforcement officials—were treated at common law when performing prosecutorial functions. *See, e.g.*, *Imbler*, 424 U.S. at 421-24; *Malley*, 475 U.S. at 340-41.

on a warrant, rather than bringing plaintiff before the magistrate as ordered, and detained him and coerced him into paying ten dollars); *Percival v. Jones*, 2 Johns. Cas. 49 (N.Y. Sup. Ct. 1800) (justice of the peace was liable for issuing an arrest warrant contrary to the applicable statute). Given this history, the district court was without authority to extend absolute immunity to the defendants and to dismiss the plaintiff's lawsuit on that basis.

D. Public Policy Does Not Justify Expanding Absolute Immunity To The Function Of Executing A Material Witness Warrant.

Even if there were a common-law history of absolute immunity for executing material witness warrants, § 1983's "purposes nonetheless counsel against recognizing the same immunity in § 1983 actions." *Malley*, 475 U.S. at 340 (internal quotation marks omitted). The principal policy justifying prosecutorial immunity is to avoid deterring prosecutors from exercising their discretion in an independent manner, without fear of "vexatious litigation." *Burns*, 500 U.S. at 492. But a prosecutor executing a material witness warrant has no discretion to substitute himself for the judge and to interrogate the witness himself

until he, rather than the judge, determines that the witness is, or is not, "material" and would not comply with a subpoena.

The unfortunate record in New York reflects that prosecutors have continually abused their authority by issuing illegal "office" subpoenas and using material witness warrants to compel witnesses to submit to coercive custodial interrogation at their offices.[8] A witness subjected to such abuse has no remedy

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[8]*See People v. Natal*, 75 N.Y.2d 379, 385 (1990) (holding office subpoena practice to be illegal); *People v. Hamlin*, 58 A.D.2d 631 (2d Dept. 1977) (condemning Queens DA's use of subpoena to compel witness to visit prosecutor's office for questioning); *Rodrigues*, 193 A.D.2d at 86 (condemning similar practice in New York County and upholding civil suit against absolute immunity challenge); *People v. Arocho*, 85 Misc. 2d 116, 117 (Sup. Ct., New York Co. 1976) (pursuant to DA's policy, trial subpoena used to compel witnesses to submit to interrogation when no court proceedings were scheduled); *People v. Boulet*, 88 Misc. 2d 353 (City Ct., Monroe Co. 1976) (grand jury subpoena used to compel interrogation at police station by ADA and police); *People v. Neptune*, 161 Misc. 2d 781 (Sup. Ct., Kings Co. 1994) (condemning Brooklyn DA's practice of issuing office subpoenas and directing office to cease this practice); *In the Matter of Subpoenas*, N.Y.L.J., Aug. 8, 2004 (Sup. Ct., New York Co. 2004) (McLaughlin, J.) (condemning Manhattan DAs continuing practice of deceiving recipients of grand jury and trial subpoenas into believing they were required to submit to office interrogation). *See also Redcross v. County of Rensselaer*, 511 F. Supp. 364 (N.D.N.Y. 1981) (denying absolute immunity for DA who detained plaintiff as a material witness without court order); *People v. Brian Bond*, Ind. No. 13991/91, Tr. of Proceedings dated June 5, 1998, reproduced in Appellant's Supp. Appx., N.Y. Ct. of Appeals,

besides a civil suit. The arrest of witnesses takes place largely out of the public eye. Because witnesses are not criminal defendants, and because material witness warrants are obtained *ex parte*, the usual checks on prosecutorial misconduct (such as suppression of evidence and post-conviction relief) are not available. *Cf. Imbler*, 424 U.S. at 427; *Mitchell v. Forsyth*, 472 U.S. 511, 522-23 (1985). Allowing Simon's claims to proceed will not undermine "the functioning of the criminal justice system," *Imbler*, 424 U.S. at 426, but will instead have the salutary

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pp. 363-69 (ADA testifies that using material witness warrants for interrogation was routine practice); Transcript of Hearing, Docket #61, pp. 120-21, *Collins v. Ercole*, 08-cv-1359 (E.D.N.Y. filed June 28, 2010) (finding that the chief of the Brooklyn's DA's homicide bureau secretly held a witness in custody for at least a week of coercive interrogation after obtaining a material witness warrant but never brought the witness to court; vacating murder conviction and dismissing indictment on other grounds); *People v. Bermudez*, 25 Misc. 3d 1226(A) (Sup. Ct., New York Co. 2009) (vacating a New York County murder conviction on collateral attack, and dismissing the indictment, in part because false testimony had been coerced from two witnesses who were unlawfully detained and interrogated at the prosecutor's office pursuant to a material witness warrant); *Quezada v. Smith*, 624 F.3d 514, 522 (2d Cir. 2010) (granting petitioner authorization to file a successive habeas petition based upon *Brady* claim that the Brooklyn DA's Office had coerced its star witness to testify falsely by unlawfully confining him); *see also* Affidavit in Opp'n, Docket #26, exhs. A-B, *Quezada v. Smith*, 08-cv-5088 (E.D.N.Y. filed Jan. 28, 2011) (in subsequent case, a secret material witness warrant and "hotel custody" receipts, the existence of which the People had previously denied, were produced).

effect of deterring the deliberate misuse of the New York material witness statute. It is to deter such flagrant abuses of governmental power that Congress created a private cause of action under Section 1983.

II. EVEN A PROSECUTOR'S *PROCUREMENT* OF A MATERIAL WITNESS WARRANT IS NOT ENTITLED TO ABSOLUTE IMMUNITY IN LIGHT OF THE UNIQUE HISTORICAL TRADITIONS OF THE MATERIAL WITNESS PROCESS.

Assuming *arguendo* that the relevant function here was the ADA's act of *procuring* the warrant, as the district court assumed, absolute immunity still would be unavailable. There is no common-law history of absolute immunity for procuring a material witness's arrest.

Amici are aware that *Flagler v. Trainor*, on which the district court in this case relied, held that a prosecutor was absolutely immune for making false statements in seeking a material witness order. *See* JA 898-915. *Flagler* is inapposite here because, as explained above, Simon's injuries were caused by the ADA's actions *after* the warrant was issued—*i.e.*, the execution, not the procurement, of the warrant. If the Court nevertheless chooses to reach the

procurement issue and views *Flagler* to be controlling, *amici* respectfully urge the Court to reconsider *Flagler's* absolute immunity holding *en banc*.[9] The parties in *Flagler* did not discuss, and the Court's decision did not examine, the state of the common law at the time of § 1983's enactment. *Betts v. Richard*, 726 F.2d 79 (2d Cir. 1984), cited by *Flagler*, also did not consider any historical evidence. Without the benefit of briefing on the question, the Court extended absolute immunity in the absence of any common-law history to support it.

In fact, procuring a warrant for the arrest of a material witness was not a function to which the common law extended absolute immunity. *Amici* are not aware of a single case in America before 1871 in which a prosecutor was sued for procuring a material witness warrant, much less a case where a court actually

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[9] Moreover, even if state law required the affidavit to come from the prosecutor, as *Flagler* assumed, state law cannot control because the "immunity claim raises a question of federal law." *Martinez v. California*, 444 U.S. 277, 284 n.8 (1980). A state cannot preclude § 1983 liability simply by transferring a police function to a prosecutor. Thus, *Flagler* erred in distinguishing *Kalina*, which held that a prosecutor's false statements in support of an arrest warrant application were not covered by absolute immunity because the prosecutor was acting as a "complaining witness." *Kalina*, 522 U.S. at 131.

granted absolute immunity to a prosecutor for that act.[10] *See* Brief of *Amici Curiae* Legal Scholars, *Ashcroft v. al-Kidd*, 131 S.Ct. 2074 (2011), 2011 WL 317146, *11 ("[T]he common law reveals no tradition of absolute immunity for officials seeking the arrest of trial witnesses"); *accord* Brief of *Amici* Legal Historians, *al-Kidd*, 2011 WL 317147, *31-35.[11] And the absence of an *affirmative* tradition of granting immunity is dispositive. *See Malley*, 475 U.S. at 339-40, 342; *Mangiafico*, 471 F.3d at 395.

At common law, state and federal statutes generally permitted witnesses to be imprisoned only *after* they had disobeyed a subpoena or refused to give their "recognizance," or promise to appear and testify. *See* Brief of Respondent, *Ashcroft v. al-Kidd*, 131 S.Ct. 2074 (2011), 2011 WL 314311, *26-*27, *50-*52; *see also* 2 N.Y. REV. STAT., pt. 4, ch. 2 tit. 2, §§ 21-22 (1829). As a result of

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[10] And in England, there is at least one case where a prosecutorial actor *was* held liable for arresting a witness. *See Evans v. Rees*, 113 Eng. Rep. 732 (K.B. 1840); *see also* Brief of *Amici Curiae* Legal History and Criminal Procedure Law Professors, *Ashcroft v. al-Kidd*, 131 S.Ct. 2074 (2011), 2011 WL 317147, *30.

[11] In *al-Kidd*, the Supreme Court declined to decide whether Ashcroft enjoyed absolute immunity for procuring the plaintiff's arrest as a material witness. *Al-Kidd*, 131 S. Ct. at 2085.

these strict limitations on courts' authority to detain witnesses, there was less likelihood of witnesses being wrongly arrested, and accordingly, there are few cases on point. What few cases are available, however, demonstrate that prosecutorial actors *could* be held liable for improperly procuring court orders against witnesses. Private litigants could be sued for malicious procurement of a subpoena, *Dishaw v. Wadleigh*, 44 N.Y.S. 207, 210 (N.Y. 1897), and justices of the peace could be sued for wrongly arresting witnesses who disobeyed subpoenas. *Chambers v. Oehler*, 104 Iowa 278 (Iowa 1897). *See* Brief of *Amici* Legal Historians, *al-Kidd*, 2011 WL 317147, *31-*35; *see also Bates v. Kitchel*, 160 Mich. 402 (Mich. 1910); *Lovick v. Atl. Coast Line R.R.*, 129 N.C. 427 (N.C. 1901). The presumption was that officials and private prosecutors who sought a witness's arrest were liable to suit if they acted unlawfully.

Given the absence of any tradition of immunity for procuring material witness warrants, extending absolute immunity under § 1983 would be contrary to Congress's intent. *See Malley*, 475 U.S. at 340-42. *Amici* therefore submit that if the Court believes procurement of a warrant is at issue, it should reconsider

Flagler en banc and reverse its expansion of absolute immunity, which is at odds with the common law and the Supreme Court's absolute immunity test.

III. QUALIFIED IMMUNITY DOES NOT SHIELD THE PROSECUTOR FROM LIABILITY FOR EXECUTING A MATERIAL WITNESS WARRANT UNLAWFULLY.

Qualified immunity shields conduct that, as an objective matter, "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). Conduct may be clearly established as unconstitutional "if decisions by this or other courts clearly foreshadow a particular ruling on the issue . . . ." *Scott v. Fischer*, 616 F.3d 100, 105 (2d Cir. 2010) (citations and quotations omitted). Moreover, "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

In this case, the district court did not find that the defendants had qualified immunity for their unlawful *execution* of the material witness warrant; the court overlooked the execution issue entirely, instead focusing on whether the

defendants were entitled to rely upon the court's determination that there was "reasonable cause" to *issue* the material witness warrant. *Simon v. City of New York*, 819 F. Supp.2d 145, 150-52 (E.D.N.Y. 2011). This Court may wish to remand to the district court to determine whether qualified immunity applies to defendants' *execution* of the warrant, or it may decide the question itself. In either case, qualified immunity does not apply.

Even assuming it is constitutional to arrest an innocent person solely as a witness—an issue the Supreme Court has never decided, *see al-Kidd*, 131 S.Ct. at 2083; *id.* at 2086 (Kennedy, J., concurring)—the detention and prolonged interrogation of a witness at a prosecutor's office, in *violation* of the express terms of the statute and court order which purport to authorize her seizure, cannot be constitutionally reasonable under the Fourth Amendment. *See Schneyder*, 653 F.3d at 326. A search that exceeds the scope of a warrant is unconstitutional. *Horton v. California*, 496 U.S. 128, 140 (1990); *accord United States v. Voustianiouk*, 2012 WL 2849655, at *4 (2d Cir. July 12, 2012). "[T]he Fourth Amendment ... require[s] that police actions in execution of a warrant be related to

the objectives of the authorized intrusion." *Wilson v. Layne*, 526 U.S. 603, 611 (1999). Under New York law, an *ex parte* material witness order only authorizes the witness to be taken into custody so that she can be taken to the court "forthwith" for an adversarial proceeding to determine whether she is a material witness. Neither the statute nor the warrant authorized the two-day detention for interrogation at the prosecutor's office, without any judicial involvement, that occurred here. The police officers and prosecutor who committed these acts can hardly claim reliance upon a material witness exception to the Fourth Amendment's probable cause requirement when the statute and order they purported to execute did not authorize their conduct.

Indeed, long before the defendants' actions in this case, the Supreme Court held that the detention of a criminal suspect at a *police precinct* for custodial interrogation without probable cause violates the Fourth Amendment. *See Dunaway v. New York*, 442 U.S. 200, 216 (1979). *See also Hayes v. Florida*, 470 U.S. 811, 815 (1985) (noting prior cases holding "the involuntary removal of a suspect from his home" and "his detention . . . for investigative purposes" absent

probable cause violated the Fourth Amendment). Investigative custodial interrogations of non-suspects even more clearly violate the Fourth Amendment, *Davis v. Mississippi*, 394 U.S. 721, 726-27 (1969), especially where, as here, the New York statute and court order stated specifically and unequivocally that Ms. Simon should be brought to court immediately, not to a prosecutor's office.

Furthermore, defendants' conduct violated Simon's clearly established Fifth Amendment liberty interest under New York law to an immediate judicial determination of her status as a material witness. "State statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment." *Vitek v. Jones*, 445 U.S. 480, 488 (1980). *See, e.g.*, *Kentucky Dep't of Corr. v. Thompson*, 490 U.S. 454, 462 (1989); *Rodriguez v. McLoughlin*, 214 F.3d 328, 338 (2d Cir. 2000). In determining whether an individual's state-created liberty interest has been violated, the court must consider (1) whether a plaintiff possessed the protected liberty interest and, if so, (2) what process a plaintiff was due before he could be deprived of that interest. *Sealed v. Sealed*, 332 F.3d 51, 55 (2d Cir. 2003). New York's statutory scheme for material

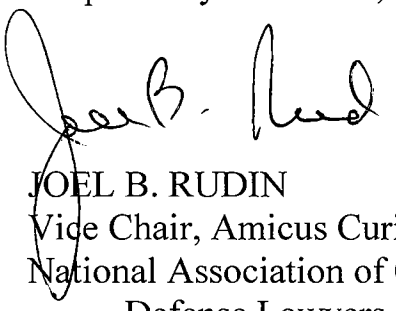
witnesses creates a right to prompt release unless the State meets its burden—at a judicial adversary hearing—of establishing reasonable cause to believe both that the witness possesses material information and that she would not respond to a subpoena at the time her attendance was sought. CPL 620.50(2). Even if the State meets this burden, the witness also has a right to request release on reasonable bail. *Id.* The defendants here, who invoked the material witness statute as a basis to detain Simon in the first place, obviously were aware that the same statute entitled Simon to immediate release unless they met their burden to establish their basis to continue to detain her.

CONCLUSION

The Court should hold that a prosecutor does not enjoy absolute immunity for disobeying the express terms of a material witness warrant and subjecting a mere witness to coercive custodial interrogation at the prosecutor's office instead of taking the witness "forthwith" to the court as the statute and the warrant itself commanded. The Court should either remand the case to the district court to

determine whether qualified immunity applies or, for the reasons stated above, hold that it does not.

Respectfully submitted,



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) ss.:
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I, Theresa Peters, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age:

On July 19, 2012

deponent served the within **Brief for *Amici Curiae* National Association of Criminal Defense Lawyers, New York State Association of Criminal Defense Lawyers, and American Civil Liberties Union Foundation in Support of Plaintiff-Appellant Alexina Simon** [with the Amended Cover]

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