17-1281

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, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, AND NEW YORK 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"), the American Civil Liberties Union ("ACLU"), and the New York Civil Liberties Union ("NYCLU"), as *amici curiae* in support of the Plaintiff-Appellant, Alexina Simon, who appeals from the decision of the United States District Court, Eastern District of New York (Vitaliano, D.J.), dated March 30, 2017, granting defendants' motion for summary judgment on the ground of qualified immunity. The district court dismissed Simon's lawsuit claiming that defendants violated her constitutional rights by falsely imprisoning her for two days for custodial interrogation on the "authority" of a material witness warrant that required her immediate production in court. The district court held that the individually-named defendants were entitled to qualified immunity because it was not clearly established that such conduct was unlawful and because, unlawful or not, such violations of New York's material witness statute are "routine."

The district court erred in granting qualified immunity to the defendants, as no reasonable officer could have thought that the conduct here was constitutional. First, material witness warrants are granted to bring a witness into court—not for custodial interrogation. The defendants here never complied with this unambiguous requirement of the warrant, questioning Simon for hours over the course of two days, even after they knew they had arrested the wrong person.

Second, the unfortunate routineness of the practice for New York City police and prosecutors to hold material witnesses for hours of custodial interrogation, instead of bringing them forthwith to court, in no way renders this practice lawful. Indeed, in multiple instances, courts have condemned this practice of producing material witnesses to a District Attorney's Office and detaining them there, in violation of the New York Criminal Procedure Law's mandate that a material witness be produced before a court. Because the behavior of the defendants in this case was so clearly unreasonable that qualified immunity cannot apply, this Court should reverse the decision below.

RULE 29(a)(4) STATEMENT

Identity of Amici Curiae

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys nationwide to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts in cases that present issues of broad importance to criminal defendants,

criminal defense lawyers, and the criminal justice system as a whole.

The New York State Association of Criminal Defense Lawyers ("NYSACDL") is a not-for-profit corporation with a subscribed membership of more than 800 attorneys, including private practitioners, public defenders, and law professors, and is the largest private criminal bar association in New York. It is a recognized state affiliate of the NACDL and, like that organization, works on behalf of the criminal defense bar to ensure justice and due process for those accused and convicted of crimes.

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 1,000,000 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 official immunities for government officials' use of the federal material witness statute.

The New York Civil Liberties Union ("NYCLU"), the New York State affiliate of the ACLU, is a nonprofit, nonpartisan organization committed to the protection of civil rights and civil liberties. It has more than one hundred thousand members and for over sixty years has been involved in litigation and public policy on behalf of New Yorkers, fighting against discrimination and advocating for

individual rights and government accountability.

Interest in the Case

NACDL, NYSACDL, the ACLU and the NYCLU are interested in this case because of the dangerous precedent set by the district court that law enforcement authorities that engage in constitutionally-prohibited practices will be relieved from liability under civil rights law where the abuse is "routine," and because the abuse by New York's prosecutors and their agents of the due process protections underlying the State's material witness statute is, in fact, all too common. Such abuses threaten not just the Fourth Amendment rights of putative witnesses to be free from unreasonable seizure, but also the fair trial rights of criminal suspects and defendants to be free from unduly coerced, inherently unreliable testimony.

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 New York State Criminal Procedure Law Provisions

The subpoena and material witness process under the New York Criminal Procedure Law ("CPL") allows prosecutors to require the attendance of witnesses *in court*. A subpoena is the "process of court directing the person to whom it is addressed to attend and appear as a witness … in such court, on a designated date…" CPL § 610.10(2). A district attorney may issue "a subpoena of such court … for the attendance in such court or a grand jury thereof…" CPL § 610.20(2). A New York prosecutor has no lawful authority to subpoena a person to his *office*, but only to invoke the power of a court to compel a witness to appear at a court or grand jury proceeding. *People v. Natal*, 75 N.Y.2d 379, 385 (1990). It is a *violation* of New York law for a prosecutor or a police officer to misuse the court's subpoena power by compelling a witness to show up at his office for questioning, and officials are subject to civil liability for such misconduct. *Rodrigues v. City of New York*, 193 A.D.2d 79, 86 (1st Dep't 1993); *Drake v. City of Rochester*, 96 Misc.2d 86, 100, 408 N.Y.S.2d 847, 857 (Sup. Ct. Monroe Cty. 1978), *aff'd*, 74 A.D.2d 996 (4th Dep't 1980). *See also People v. Hamlin*, 58 A.D.2d 631, 632 (2d Dep't 1977) (condemning practice).

A material witness order may be obtained by a party, including the district attorney, to compel a witness to appear in court at a designated time so that the

court may determine whether he should be adjudged a material witness. CPL § 620.30(2)(a). Upon a showing to the court's satisfaction of reasonable cause to believe the person would not appear in court in response to a subpoena, the court may issue a warrant directing a police officer "to take such prospective witness into custody … *and to bring him before the court forthwith* in order that a proceeding may be conducted to determine whether he is to be adjudged a material witness." CPL § 620.30(2)(b) (emphasis added).

The prospective witness has the right to a "prompt hearing" and "possesses all the rights, and is entitled to all the court instructions, with respect to right to counsel … which … accrue to a defendant arraigned upon a felony complaint…" CPL § 620.40(1). The court may not adjudge him a material witness, or issue a material witness order fixing bail, unless the District Attorney proves by a preponderance of the evidence that the witness possesses information material to the proceeding and will not be amenable to subpoena. CPL § 620.50(2).

Statement of Relevant Facts

The district court properly recognized that, on summary judgment review, the court must view the facts in the light most favorable to the plaintiff and draw all reasonable inference from such facts in the plaintiff's favor. Doing so here, the court found that, on August 11, 2008, one of the defendants, Assistant District Attorney ("ADA") Francis Longobardi, obtained a material witness warrant

directing police to bring Alexina Simon to court for a material witness proceeding that day at 10 a.m. Executing that warrant, two Queens D.A. investigators, defendants Douglas Lee, a detective, and Evelyn Alegre, a sergeant, took Ms. Simon into their custody. However, rather than bring her before a judge, as the warrant required, they brought her to an office, and later to the courthouse, then back to the office. There, the defendants detained her for two days of questioning. Even when she was in the courthouse, they never brought her before a judge.

What the defendants were trying to accomplish is a matter of factual dispute. ADA Longobardi claims he determined within "five minutes" they had the wrong person and told the investigators to release her. The investigators claim the ADA told them to take her to their office and question her there. Either the defendants were trying to determine if Ms. Simon was the correct person – the person who had refused a subpoena – or, having concluded the correct person was really her daughter, they were trying to determine, over hours of additional questioning, whether she had material knowledge in her own right.

Whatever the defendants were trying to accomplish, Ms. Simon was confined in a small room and ordered to remain there, where she was subjected to hostile questioning and never free to leave. The defendants told her she was required to return the next day, and then, taking no chances, again arrested her in her home and held her for a second, full day of sporadic questioning. At the end of

the second day, they issued her a subpoena to appear *earlier that day* before the grand jury. By this time, any grand jury session, assuming one really was scheduled, had ended.

Ms. Simon brought an action against officers Alegre and Lee, ADA Longobardi, and the City of New York, seeking to recover damages for her unlawful arrest and detention. *See* Compl., Dkt. 1, *Simon v. City of New York*, No. 09-cv-01302 (ENV)(RER) (E.D.N.Y., filed Mar. 27, 2009). On the defendants' initial motion for summary judgment on a partially developed factual record, the district court held that the defendants had absolute and qualified immunity for obtaining and relying upon the material witness warrant, and dismissed the lawsuit. On appeal, this Court reversed. The Court held that the defendants were not entitled to absolute prosecutorial immunity because their conduct in *executing* the warrant was investigative, not prosecutorial, but declined to decide the issue of qualified immunity without further discovery, and remanded the matter to the lower court. *See Simon v. City of New York,* 727 F.3d 167 (2d Cir. 2013). The Court carefully distinguished between the functions of *applying* for a warrant, which is prosecutorial, and *executing* the warrant, which is a police or investigative function. The Court observed that, "[f]ar from" taking a quasi-judicial action related to criminal process, the defendants "were actively *avoiding* the court-ordered material witness hearing," contrary to New York law. *Id.* at 173 (emphasis

in original) (internal citation omitted). Their detention of Ms. Simon for two days of intermittent questioning, "rather than bringing her before the court to have her status settled, … fell outside the protection of the warrant." *Id*.

"A material witness warrant," the Court explained, "secures a witness's presence at a trial or grand jury proceedings; it does not authorize a person's arrest for purposes of subjecting that person to extrajudicial interrogation by a prosecutor." *Id.* "Under New York law, as under federal law, a prosecutor has no power to subpoena a witness to appear outside of judicial proceedings to answer questions from the prosecution or the police." *Id.* at 173-74. At most, a prosecutor may question a witness for "*a brief period* before presentation to determine whether, in the prosecutor's judgment, the witness's testimony should still be pursued or *whether the witness should be released without further action*." *Id.* at 173 (emphasis added).

On remand, following the completion of discovery, the court again granted summary judgment to the defendants. The court defined the issue as whether a custodian may detain for further investigative questioning a person arrested pursuant to a material witness warrant after the custodian learns that the person held is not the person for whom the warrant was sought. Summ. J. Mem. & Order, p. 9, Dkt. 134, *Simon v. City of New York*, No. 09-cv-01302 (ENV)(RER) (E.D.N.Y. filed Mar. 30, 2017) (hereinafter "SJ Decision"). Absent any case law

on this precise question, the court reasoned, there was no clearly-established law making it unreasonable for the officers to detain plaintiff, for up to 16 hours, where they "still believed her to have information potentially material to the investigation." *Id.* at 14.

Based upon nothing more than the court's speculation that Ms. Simon might have learned information material to the investigation from her daughter, the court found that "reasonable officers could disagree over whether probable cause existed to process plaintiff as a material witness…" *Id.* at 15. The court did not address that plaintiff, in fact, was not "process[ed] as a material witness" – she wasn't brought before the court for the requisite hearing – but instead the defendants, on their own "authority," detained her for a total of 18 hours over two days.

The court further held that the defendants' conduct was reasonable due to "the routine procedures that have grown up around the execution of material witness warrants in the absence of contrary case law guidance." *Id.* The court relied on the defendants' proffer, in their Rule 56.1 Statement, that "it is the informal practice of New York City prosecutors and officers to 'first see if the person…will cooperate' before formally executing [a material witness warrant]," *id.* at 15 (citing Defendants' 56.1 Statement), and held it was not unreasonable for the defendants to follow such "professional norms," *id.* at 14. *See id.* at 17

(holding it reasonable in the absence of "particular guidance from case law" for the defendants to follow "very common standard practice in such cases").

Finally, the court in a footnote acknowledged the statement in this Court's prior opinion that a material witness warrant "does not authorize a person's arrest and prolonged detention for purposes of investigative interrogation by the police or a prosecutor." *Id.* at 15 n.10 (quoting *Simon,* 727 F.3d at 173-74). However, it then discounted its significance because "[p]owerfully, the Second Circuit cites no federal authority for this declaration of law…" SJ Decision 15 n.10.

SUMMARY OF THE ARGUMENT

There need not be a case directly on point to defeat a claim of qualified immunity. Indeed, constitutional principles may make the unlawful nature of police action so obvious that no reasonable officer could believe otherwise. This is such a case.

It is basic under the Fourth Amendment that police may not execute a warrant in violation of its terms or in an unreasonable manner, continue to detain the subject of an arrest warrant once they learn it was issued by mistake, or hold indefinitely for custodial interrogation an individual for whom they lack probable cause. Such Fourth Amendment protections apply even more strongly to material witnesses, who have committed no crime, than to criminal suspects. No reasonable police officer or prosecutor mindful of these clearly established constitutional

principles could have believed it was lawful to detain Alexina Simon for two days of custodial interrogation after arresting her on a material witness warrant that required them to produce her before a court forthwith and, on top of that, learning that they had obtained the warrant against her by mistake.

The district court's second rationale for dismissing this lawsuit – that the practice of holding material witnesses for lengthy periods of time without bringing them before the court for judicial proceedings is "common" – is an even poorer rationale for granting qualified immunity. The Supreme Court has carved out no exception to liability under § 1983 for constitutional violations that happen to be widespread. Indeed, to deter future violations, § 1983 liability must be imposed *especially* where an illegal practice is "common." Section 1983 was enacted following the Civil War precisely in order to give private citizens a remedy against *routine* abuses of power by public officials. Today, the routine abuse of the material witness process not only violates the Fourth Amendment rights of the prospective witnesses, but also leads to wrongful convictions of criminal defendants based upon unreliable, coerced testimony.

ARGUMENT

A. It Was Clearly Established That Defendants Were Required To Comply With The Warrant's Express Terms And Could Not Continue To Detain A Person Arrested Pursuant To The Warrant By Mistake

Basic, clearly-established constitutional principles preclude any New York prosecutor or police officer from holding a reasonable belief that, in executing a material witness warrant requiring them to bring the witness before the court *forthwith* for judicial proceedings, they may ignore the terms of the warrant and detain the witness for two full days of custodial interrogation. Moreover, the idea that they may do this following a realization that they obtained the warrant by mistake is even less tenable. A person arrested pursuant to a warrant that was obtained by mistake cannot possibly have *less* rights under the Fourth Amendment than a person who was correctly arrested.

Qualified immunity will not apply where "in the light of pre-existing law the unlawfulness [is] apparent." *Anderson v. Creighton,* 483 U.S. 635, 640 (1987). "[O]utrageous conduct obviously will be unconstitutional, this being the reason, as Judge Posner has said, that '[t]he easiest cases don't even arise.'" *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 377 (2009) (citation omitted). *See Garcia v. Does*, 779 F.3d 84, 92 (2d Cir. 2015) (qualified immunity does not apply where "preexisting law clearly foreshadows a particular ruling on the issue").

Here, any reasonable police officer and prosecutor knows the following, fundamental constitutional principles:

First, "it is self-evident that a seizure pursuant to an arrest warrant must conform to the terms of the warrant." *Miller v. Kennebec Co.*, 219 F.3d 8, 11 (1st Cir. 2000). In *Miller*, the First Circuit denied qualified immunity to a police officer who arrested a man on a warrant requiring his production in court "immediately" but instead lodged him for a weekend in a county jail. *Id.* *See also Horton v. California*, 496 U.S. 128, 139-40 (1990) (disallowing search beyond scope of warrant); *United States v. Matias*, 836 F.2d 744, 747 (2d Cir. 1988) (police executing warrant are "confined to the terms and limitations of the warrant authorizing it"). Relatedly, a warrant must be executed in a reasonable manner. *See Los Angeles Cty., California v. Rettele*, 550 U.S. 609, 614 (2007) (unreasonable to use excessive force while executing search warrant); *United States v. Ramirez*, 523 U.S. 65, 71 (1998) (violative of Fourth Amendment to unreasonably execute an otherwise valid warrant); *Wilson v. Steinhoff*, 718 F.2d 550, 552 (2d Cir. 1983) (allowing civil suit for excessive force in executing a warrant).

Second, a police officer who learns that a warrant has been obtained by mistake, or that there no longer is reasonable cause under the warrant to hold a person in custody, must release the individual being held under the warrant's

authority. *See West v. Cabell*, 153 U.S. 78 (1894) (permitting lawsuit against an officer who arrested an individual not named in the warrant after the officer realized the warrant mistakenly named the wrong person); *Russo v. City of Bridgeport*, 479 F.3d 196, 207 (2d Cir. 2007) (recognizing, and finding as clearly established for qualified immunity purposes, a constitutional right "to be free from continued detention after it was or should have been known that the detainee was entitled to release" because he was arrested by mistake) (internal quotation marks and citation omitted). *See also United States v. Leon*, 468 U.S. 897, 923 (1984) (no reasonable officer may rely on a warrant he knows is invalidly issued); *Berg v. Cty. of Allegheny*, 219 F.3d 261, 270 (3d Cir. 2000) (an "erroneously issued warrant cannot provide probable cause for an arrest"). This rule was so clearly established 20 years ago that, in *Lowth v. Town of Cheektowaga*, 82 F.3d 563, 571-73 (2d Cir. 1996) (as amended), this Court allowed a lawsuit against police officers who proceeded with initiating a prosecution after the probable cause that had justified their initial arrest of the plaintiff dissipated.

Third, it is clearly established that police have sharply limited Fourth Amendment authority to seize and detain a person for custodial interrogation. A mere "witness" obviously must have *at least* as great, if not greater, Fourth Amendment protection than a criminal suspect. That follows *a fortiori* from *Dunaway v. New York*, 442 U.S. 200 (1979). In that case, the police lacked

probable cause but asserted that "the seizure of petitioner did not amount to an arrest and was therefore permissible under the Fourth Amendment because the police had a 'reasonable suspicion' that petitioner possessed 'intimate knowledge about a serious and unsolved crime.'" *Id.* at 207. The Supreme Court rejected that view, explaining that an arrest, whether it is called by another name or effectuated for investigatory purposes, requires probable cause. *Id.* at 214-15 (internal quotation marks omitted).

The New York Legislature recognized this principle when it enacted the Criminal Procedure Law in 1971. Under that comprehensive statute, police may arrest a criminal suspect upon probable cause, but police and prosecutors lack authority to summon a mere witness to their office, or to "arrest" such an individual, for interrogation. At most, they may compel a witness to appear in court to give testimony either by issuing a subpoena or, if the witness appears not amenable to a subpoena, obtaining a material witness warrant authorizing them to bring the witness "forthwith" before a judge for a hearing. It is for *the court*, not a prosecutor or police officer, to determine whether the circumstances warrant further detaining a witness to assure her appearance in court to give testimony.

Indeed, the Legislature employed different language in describing the obligations of arresting officers who detain material witnesses as opposed to criminal suspects. Whereas an officer who arrests a *suspect* must take that

individual before a court to be arraigned "without unnecessary delay," CPL § 120.90, a material witness detained pursuant to a material witness arrest warrant must be taken before a court for arraignment "forthwith," CPL § 620.30(2)(b). "When different terms are used in various parts of a statute or rule, it is reasonable to assume that a distinction between them is intended." *Orens v. Novello*, 99 N.Y.2d 180, 187 (2002) (quoting *Matter of Albano v. Kirby*, 36 N.Y.2d 526, 530 (1975)). The plain meaning of "forthwith" is "immediately" and "without delay." *Forthwith*, *Oxford Online Dictionary*, https://en.oxforddictionaries.com/definition/forthwith (last visited Jul. 28, 2017); *Merriam-Webster Online Dictionary*, https://www.merriam-webster.com/dictionary/forthwith (last visited Jul. 28, 2017).

Here, the defendants plainly understood, as all reasonable law enforcement officials would, that they had no inherent authority to take into their custody for interrogation, and to detain for that purpose for two days, a mere prospective witness. Thus, initially, they didn't simply arrest Ms. Simon as a material witness and hold her for interrogation; rather, they followed the CPL and applied for a material witness warrant. They knew, as any reasonable law enforcement officer would know, that it was solely on the authority of such a warrant that they had the power to arrest her. But, rather than comply with the limitation of the warrant requiring them to bring Ms. Simon before a judge for a 10 a.m. hearing that day to

determine whether she really had material information – an inquiry that would have led to her quick release because the mistaken identity would have been discovered by the judge – they instead held her in their custody for two days. This plainly violated the terms of the warrant, which the Fourth Amendment clearly required them to obey.

That the defendants may have elected to continue detaining Ms. Simon after learning that she was the wrong person, and that they had obtained the warrant by mistake, only made their behavior more flagrantly illegal. They were not entitled to detain Ms. Simon without bringing her to court forthwith; they certainly were not permitted to hold her for two additional days, in *violation* of the terms of warrant, once they realized that they had inadvertently misled the issuing judge and obtained the warrant by mistake. To the contrary, they were required to immediately release her or, at the very least, execute the warrant according to its terms and take her immediately before the court so that the latter could determine whether to release her, which the court obviously would have done. This would have been easy to do: ADA Longobardi testified that he interviewed Ms. Simon outside the issuing judge's courtroom.

The district court held that a reasonable police officer could have believed that Ms. Simon, as the mother of the person whom they believed really had material knowledge, might have acquired such knowledge from her daughter, and

that they were entitled for that reason to "*process plaintiff as a material witness*." SJ Decision 15 (emphasis added). This was speculation, unsupported by the record, that contradicted the principle that mere association doesn't establish probable cause. *See Ybarra v. Illinois*, 444 U.S. 85, 91 (1979); *United States v. Patrick*, 899 F.2d 169, 174 (2d Cir. 1990). But even more importantly, the defendants did *not* "process plaintiff as a material witness." They did not comply with the law requiring them to afford her a prompt judicial hearing, as required by the terms of the warrant and by New York criminal procedure. Nor did they seek a new warrant for the "correct" person. Instead, they detained her without any lawful authority for two days of illegal, custodial interrogation. No reasonable police officer could possibly have believed this was a lawful way to "process plaintiff as a material witness."

In *Stone v. Holzberger*, 807 F. Supp. 1325, 1339 (S.D. Ohio 1992), *aff'd*, 23 F3d 408 (6th Cir. 1994) (unpublished opinion), the court denied qualified immunity to an Ohio official who arrested the plaintiff as a material witness but failed to comply for five days with a state statute requiring presentment to a judge for a hearing before commitment to a detention facility. The court reasoned:

> If such actions are permitted, police officers could randomly arrest and detain innocent citizens … without ever demonstrating any reason for doing so. Clearly, such actions violate the Fourth Amendment. Therefore, Sheriff Holzberger violated Ms. Stone's Fourth Amendment rights by failing to present her to a

> magistrate promptly after her arrest. Because Sheriff Holzberger violated Ms. Stone's clearly established Fourth Amendment rights, he is not entitled to qualified immunity.

Id. at 1339.

In *Schneyder v. Smith*, 653 F.3d 313 (3d Cir. 2011), the court held that a prosecutor who, based upon a material witness order, properly secured the plaintiff's detention through trial, was not entitled to qualified immunity for failing to inform the court of changed circumstances undermining the basis for that detention, where the court had directed that it be kept so informed. While the court was "aware of no decision predating [the prosecutor's] actions that involved the sort of claim that Schneyder has raised here, [it was] nevertheless convinced that this is one of those exceedingly rare cases in which the existence of the plaintiff's constitutional right is so manifest that it is clearly established by broad rules and general principles." *Id.* at 330.

In Ms. Simon's case, the defendants' conduct – holding for two days a material witness contrary to the terms of the warrant (and who they knew was not even the right person) – was so obviously illegal that this case is in that category of "easiest cases" that typically "don't even arise." *Safford*, 557 U.S. at 377 (2009) (internal quotation marks and citation omitted). As the Supreme Court wrote nearly 50 years ago, "[i]nvestigatory seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention.

Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed 'arrests' or 'investigatory detentions.'" *Davis v. Mississippi*, 394 U.S. 721, 726-27 (1969) (emphasis added).

B. This Court Should Reject The Lower Court's Dangerous Holding That Law Enforcement Officials Who Engage In An Obviously Unlawful Practice Should Enjoy Immunity From Suit Because Such Violations Are 'Common'

The district court also fundamentally erred in holding that defendants were entitled to qualified immunity because their conduct, even if unlawful, was "routine" in New York. Under this rationale, the more often the police violate citizens' rights, the less likely they will be held accountable under federal civil rights law. That is particularly so where, as here, the district court did not even announce that the practice should be deemed illegal going forward.

There is simply no room under the doctrine of qualified immunity for the principle the district court applied. Under the caselaw, officials may not escape liability for unconstitutional actions merely because of their excuse that they acted in accordance with a widespread practice. *See, e.g.*, *Hope v. Pelzer*, 536 U.S. 730 (2002) (denying qualified immunity to corrections officers who handcuffed plaintiff to hitching post, even though it was a systematic practice in the department of corrections, because the illegality of the practice was "so obvious" that the officers were given "fair warning" their conduct violated the Constitution);

Hartline v. Gallo, 546 F.3d 95 (2d Cir. 2008) (denying qualified immunity to officers who strip searched plaintiff pursuant to unlawful police *policy*); *C.B. v. City of Sonora*, 769 F.3d 1005 (9th Cir. 2014) (denying qualified immunity to officers who arrested and handcuffed disabled elementary school student pursuant to police department policy because, "[e]ven without on-point case law," this obviously was excessive force); *see also Case v. City of New York*, 233 F. Supp. 3d 372 (S.D.N.Y. 2017) (denying qualified immunity where officers participated in unconstitutional mass arrest and detention of protesters pursuant to formal NYPD policies governing the issuance of summonses to and processing of political demonstrators); *McLennon v. City of New York*, 171 F. Supp. 3d 69 (E.D.N.Y 2016) (denying qualified immunity where plaintiff was arrested pursuant to police program of suspicion-less, step-out vehicle checkpoints).

As the Supreme Court has made clear, police and prosecutors are assumed to know the law governing their conduct, *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982), and qualified immunity is not available as a shield for those who are ignorant of, or deliberately choose to ignore, clearly-established constitutional principles. It simply cannot be that there is greater protection under qualified immunity the more frequently government actors violate individuals' rights. To find otherwise would immunize a huge swath of clearly unconstitutional conduct,

and consequently create perverse incentives for government actors to violate the law *en masse*.

Immunizing unconstitutional conduct because it is common would turn § 1983 on its head. Following the Civil War, Congress created a private right of action under § 1983 precisely because local officials in the South could not be trusted to enforce the Constitutional rights of freed slaves and the violations of their rights were rampant. *See D.C. v. Carter*, 409 U.S. 418, 426 (1973). Similarly, the ubiquity of the unlawful use of material witness warrants in New York City, despite the obvious unlawfulness of the practice, is a strong policy reason to *deny* qualified immunity.

A major purpose underlying § 1983 is to permit damage actions to deter official misconduct. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 268 (1981) (citing *Owen v. City of Independence*, 445 U.S. 622, 651 (1980), and *Robertson v. Wegmann*, 436 U.S. 584, 591 (1991)). Forgiving the misconduct because "everyone does it" encourages its replication. That is especially true when a district court, as here, dismisses the lawsuit without even ruling on the unlawfulness of the practice.

New York D.A.s have an unfortunate record of encouraging or at least acquiescing in the types of practices engaged in here. It is not just the Queens D.A.'s Office that has routinely misused the material witness statute. This should

be a concern, not only because it violates the rights of mere prospective witnesses who have committed no crime, but also because it increases the risk that false testimony will be coerced, which in turn leads to false convictions.

In the Jabbar Collins case, for instance, the Chief of the Rackets Bureau of the Brooklyn D.A.'s Office secretly arrested an uncooperative witness on a material witness warrant, without the defendant's knowledge. The witness was never brought before a judge for a hearing. Instead, the Chief of the Rackets Bureau threatened the witness with physical harm, and held him as a prisoner for two weeks, including one week in a hotel under the armed guard of the District Attorney's own detective-investigators, until the witness finally "agreed" to testify. *See Collins v. City of New York*, 923 F. Supp. 2d 462, 467 (E.D.N.Y. 2013). Civil discovery in that case revealed the existence in Brooklyn of a "hotel custody" program, under which witnesses picked up on material witness warrants were detained in locked hotel rooms, under the armed guard of the D.A.'s own police force, to ensure that they testified favorably for the prosecution. Mosi Secret, *Brooklyn Prosecutor's Office Is Accused of Detaining Trial Witnesses*, N.Y. Times, May 29, 2013, *available at* http://www.nytimes.com/2013/05/30/nyregion/brooklyn-prosecutors-office-accused-of-detaining-trial-witnesses.html. Although then-District Attorney Hynes' office initially denied this practice, Mr. Hynes admitted it when deposed under

oath. John Marzulli, *EXCLUSIVE: Ex-Brooklyn District Attorney Charles Hynes admits to detaining witnesses, a practice he denied last year*, N.Y. Daily News, Apr. 18, 2014, *available at* http://www.nydailynews.com/new-york/brooklyn/ex-brooklyn-da-admits-detaining-witnesses-article-1.1760513.

In the case of Brian Bond, the same Office picked up a drug addict on a material witness warrant and, rather than bringing her to the court "forthwith," brought her to the D.A.'s Office, and then to a hotel, for many hours of interrogation. This witness was finally brought before a judge, after midnight, for a closed-door "hearing" in the judge's private office, without even speaking to her court-appointed attorney. *See* Appellant's Opening Brief, *People v. Bond*, 95 N.Y.2d 840 (2000), 2000 WL 34065288, at *18 (filed Mar. 21, 2000) (citing court records). By that time, she had agreed to "voluntarily" remain in the D.A.'s custody over the weekend and to testify she had seen the defendant commit the murder. *Id.* Years later, during post-conviction proceedings, it emerged that the prosecution had failed to disclose her statements to detectives the night of the murder – before she was coerced – that she hadn't seen it at all. *People v. Bond*, 95 N.Y.2d 840, 842 (2000). The New York Court of Appeals reversed the conviction for the *Brady* violation. *Id.*

In *People v. Ruddy Quezada*, unbeknownst to the defendant, detective investigators at the Brooklyn D.A.'s Office arrested Sixto Salcedo, the principal

witness in the prosecution's murder case, pursuant to a material witness order. Instead of bringing Salcedo to court for a hearing, the detective-investigators held him at a motel overnight, incommunicado, and threatened him with prison until he "agreed" to testify at trial the following day. *See* Stephanie Clifford, *1993 Murder Conviction Vacated; Brooklyn Prosecutor Says Evidence Was Withheld*, N.Y. Times, Aug. 31, 2015, *available at* https://www.nytimes.com/2015/09/01/nyregion/man-convicted-of-murder-in-1993-is-ordered-released-after-key-evidence-was-withheld.html?_r=0. Years after Quezada was convicted for murder based upon Salcedo's testimony, Salcedo recanted his testimony, alleging that it had been coerced. This Court granted Quezada authorization to file a successive habeas petition based upon this claim under *Brady*. *See Quezada v. Smith*, 624 F.3d 514, 522 (2d Cir. 2010). Facing a discovery order, the D.A.'s Office then revealed a material witness application and warrant, as well as receipts showing that Salcedo had been held in hotel custody, the existence of all of which the People previously had denied. *See* Affidavit in Opp'n, Docket #26, exhs. A-B, *Quezada v. Smith*, 08-cv-5088 (E.D.N.Y. filed Jan. 28, 2011). Finally, in 2015, 22 years after Quezada's conviction, the DA's Office asked that Quezada's conviction be vacated and the indictment dismissed.

Two homicide convictions have been overturned after New York County prosecutors used similar tactics. In *People v. Bermudez*, 906 N.Y.S.2d 774, 2009

WL 3823270 (N.Y. Sup. Ct. Nov. 9, 2009), a court vacated a murder conviction on collateral attack, and dismissed the indictment, in part because false testimony had been coerced from two witnesses. The court found that the witnesses, who were arrested on material witness warrants and brought to the D.A.'s Office instead of directly to court, had been threatened with jailtime unless they testified favorably for the prosecution. *Id.* at 33. Evidently this was a long-term practice. In *People v. Maynard*, 40 A.D.2d 779 (1st Dep't 1972), the conviction was reversed based upon evidence that the prosecutor had used a material witness warrant to coerce the testimony of prospective *defense* witnesses. The court found that the prosecutor had illegally brought the witnesses to his office for interrogation, caused them to be jailed on an extremely high bond, and had threatened the witnesses with longer jailtime and deportation, until they changed their testimony to favor the prosecution. *Id.* at 782-83.

These cases likely are the tip of the iceberg with respect to the unlawful detention and interrogation of witnesses by prosecutors who misuse the material witness statute. As the City has conceded in this case, the practice of using material witness warrants to detain and interrogate putative witnesses is common. This practice occurs behind closed doors, unmonitored by any judge or defense counsel. As with *Brady* violations, only law enforcement officials know the extent to which they use such abusive practices. The practice not only violates the Fourth

and Fourteenth Amendment rights of the individuals who are unlawfully detained and interrogated, but potentially endangers the fair trial and due process rights of the criminal suspects or defendants who are its targets. The government's compelling interest in fairly prosecuting those responsible for committing crimes will not be hindered if law enforcement personnel are required to comply with the material witness statute and held accountable in those cases, such as this, where they willfully violate its terms.

CONCLUSION

The Court should hold that the police and prosecutor defendants in this case do not enjoy qualified immunity for disobeying the express terms of a material witness warrant and the statute under which it was issued and subjecting a mere witness to two days of custodial interrogation without probable cause. This "common" practice should be declared illegal and those who engage in it should be subject to civil liability. The district court's judgment should be reversed and the matter remanded for further proceedings.

Respectfully submitted,

/s/

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