No. 12-35957

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ABDULLAH AL-KIDD,

Plaintiff-Appellee,

v.

MICHAEL GNECKOW,

Defendant-Appellant.

On Appeal From the United States District Court
for the District of Idaho

BRIEF OF PLAINTIFF-APPELLEE ABDULLAH AL-KIDD

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CORPORATE DISCLOSURE STATEMENT

No corporations are involved in this case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution

Statutes

INTRODUCTION

Plaintiff Abdullah al-Kidd was arrested, detained, and publicly humiliated on the basis of an affidavit that Defendant crafted with reckless disregard for the role of the magistrate judge. Defendant's affidavit was misleadingly drafted and omitted facts that were well known to him at the time, including that Mr. al-Kidd was a native-born U.S. citizen with a wife, child and other family in the United States; that he had substantial ties to the area; that he had previously met with the FBI on multiple occasions and had voluntarily answered their questions; that he had never been told he might be needed as a witness in the future; that he had never been asked to remain in the country or notify the FBI if he intended to travel; and that he had not heard from the FBI in more than eight months since his last meeting with them. On these unchallenged facts, the district court held that Defendant was not entitled to qualified immunity, finding that the affidavit's numerous omissions and misleading statements were "clearly material," ER 25 (District Court Order Granting Summary Judgment, hereinafter "Order," 12), probable cause "certainly" did not exist to arrest Mr. al-Kidd under a corrected version of the affidavit, ER 19 (Order 6), and Defendant had acted with "reckless disregard for the truth in this case." ER 22 (Order 9).

As District Judge Lodge pointedly stated, the blatantly incomplete and misleading nature of the affidavit was "particularly troubling" because a magistrate

asked to rule on an ex parte application for a material witness warrant must "necessarily" rely on law enforcement to paint an accurate picture for the court. ER 20 (Order 7). Here, however, the court found that Defendant had "cast an incomplete picture of the individual and the surrounding circumstances such that the affidavit misrepresented the true nature of the situation and the Plaintiff himself." *Id*. Magistrate Williams, in his report and recommendation, was equally emphatic, finding that Defendant had "'cleansed'" the affidavit of facts that would have given the court an accurate and complete picture of the situation. ER 63 (Report and Recommendation, hereinafter "R&R," 26).

Moreover, as both Judge Lodge and Magistrate Williams stressed, it was not only that Defendant omitted *every* fact in favor of Mr. al-Kidd, but also that the remainder of the affidavit created a "misleading and highly suggestive picture" that incorrectly cast Mr. al-Kidd in a suspicious light. ER 22 (Order 9). In particular, Judge Lodge found that Defendant painted a wholly inaccurate picture of a possible Saudi national with no ties to the United States who was returning to the Middle East, rather than the accurate picture of "a United States citizen, who attended college in the United States, has a wife and children in the United States, and had previously cooperated with law enforcement in their investigation." ER 25 (Order 12); *see also* ER 60 (R&R 23). As Judge Lodge summarized, it was the "very nature of the omissions themselves as well as the manner in which the

warrant application was misleadingly drafted" that demonstrated a "reckless disregard for the truth." ER 22 (Order 9).

Defendant nonetheless contends that he did not act recklessly because an FBI agent would not necessarily have known that a magistrate would have wanted to know any of the omitted facts before deciding to authorize the arrest of an innocent, uncharged United States citizen. Defendant's argument defies common sense. The lawfulness of the arrest of an innocent witness turns on whether it would be impracticable to secure the witness's testimony by subpoena. The facts omitted by Defendant went *directly* to that issue. It is simply implausible for Defendant to argue that he could not have been expected to realize that a magistrate would want to know that Mr. al-Kidd was a cooperative U.S. citizen who had voluntarily spoken with the FBI on multiple occasions in the past, had not heard from the FBI in nearly a year, had never been asked not to travel or to advise the FBI should he plan to travel, and had not even been told that he might be needed as a witness at some point. Incredibly, the three-page affidavit did not even mention that the FBI had ever spoken with Mr. al-Kidd before.

As this Court made clear more than 40 years ago, a potential witness may not be arrested simply because he has the capability to evade a subpoena if he chooses to do so. After all, every person has some capacity to evade a subpoena. Rather, the question is whether there is any evidence suggesting he would "*likely*"

seek to evade a subpoena. *Bacon v. United States*, 449 F.2d 933, 944 (9th Cir. 1971) (emphasis in original). That view of the material witness statute makes sense and is compelled by the Fourth Amendment. Any other interpretation would mean that innocent citizens could be arrested even where they have done nothing wrong, have given no indication that they would not cooperate with a subpoena in the future, and have had no opportunity to conform their actions to the law.

That untenable view of the statute, which this Court has soundly rejected, is precisely what Defendant is urging here. Mr. al-Kidd was not charged with a crime and had absolutely no reason to believe he should postpone or cancel his long-planned trip to study on a scholarship at a Saudi university. He had met voluntarily with FBI agents in the past, each time they had asked him to, and had never been told he might be needed as a witness. Yet without any warning, he was blindsided and humiliated when FBI agents handcuffed, arrested, and led him away, despite his having done nothing wrong or uncooperative. Defendant has not offered—and cannot offer—a remotely legitimate reason why a U.S. government agent would withhold all of these facts from a magistrate who needed a complete picture of the situation before taking the extraordinary step of arresting an innocent, uncharged United States citizen.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this interlocutory appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES

Whether the district court correctly granted Plaintiff summary judgment where Defendant acted recklessly and intentionally in drafting a misleading and incomplete affidavit that omitted numerous material facts, including that Mr. al-Kidd was a cooperative U.S. citizen who had never been informed he might be needed as a witness or told that he should contact the FBI if he intended to travel.

STATEMENT OF CASE

A. Factual Background

1. Mr. al-Kidd's Arrest and Detention

Abdullah al-Kidd is an African-American U.S. citizen who was born in 1972 in Wichita, Kansas. SER 3 (Plaintiff's Statement of Undisputed Material Facts In Support of His Motion For Summary Judgment, hereinafter "Pl. Facts," ¶1).[1] His mother, father, sister, and children are all U.S. citizens who live in the United States. *Id.* Mr. al-Kidd graduated from the University of Idaho, where he played on the football team. *Id.* ¶2. While attending college, he converted to Islam and

[1] The designation "SER" refers to Plaintiff's Supplemental Excerpts of Record.

changed his name from Lavoni T. Kidd to Abdullah al-Kidd. *Id.*; *see also* ER 43, 60 (R&R 6, 23).[2]

Beginning in 2001, the FBI began investigating Mr. al-Kidd as part of a broader investigation into Muslims in Idaho. ER 63-64 (R&R 26-27). As part of this investigation, the FBI conducted surveillance of Mr. al-Kidd and his then-wife, also a U.S. citizen. SER 3 (Pl. Facts ¶3) (not disputed by Defendant, *see* SER 14-15). The FBI's surveillance logs indicated no illegal activity, and Mr. al-Kidd was never charged with a crime. *Id.*

On two occasions in the summer of 2002, FBI agents asked to meet with Mr. al-Kidd for voluntary interviews. ER 42 (R&R 5). Both times, Mr. al-Kidd agreed, *id.*, meeting with FBI agents in his mother's home, answering their questions at length, and "volunteer[ing] a lot of information." ER 346 (Cleary Depo. 174); SER 4 (Pl. Facts ¶8) (not disputed by Defendant, *see* SER 15). Mr. al-Kidd never failed to appear for these voluntary meetings. SER 4 (Pl. Facts ¶8). The FBI never told al-Kidd that his testimony might be needed, never forbade him to travel, and never asked that he alert the FBI if he intended to travel; in fact, Mr. al-Kidd had heard nothing from the FBI for eight months at the time of his arrest. ER 62 (R&R 25).

[2] The district court expressly "incorporate[d]" Magistrate Williams's findings of fact. ER 15 (Order 2).

In April 2002—long before Sami Al-Hussayen, a University of Idaho student, was indicted by an Idaho grand jury for visa fraud and making false statements to the government—Mr. al-Kidd began making plans to travel to Saudi Arabia to further his language and religious studies. ER 47 (R&R 10). Nearly a year later, in early February 2003, Mr. al-Kidd learned that he had received a scholarship at a Saudi university, and he began applying for a visa and making preparations for his trip. SER 5 (Pl. Facts ¶13) (not disputed by Defendant, *see* SER 16). On March 6, 2003, he purchased a roundtrip ticket to Saudi Arabia with an unscheduled return date, planning to return home on semester breaks. ER 47, 63 (R&R 10, 26). He was scheduled to leave on March 16, 2003. But while checking in for his flight at Dulles Airport in Virginia, Mr. al-Kidd was suddenly arrested by FBI agents. He was not charged with any wrongdoing; instead, he was arrested as a material witness in the Al-Hussayen case.

The FBI agents took Mr. al-Kidd to a room in the airport and interrogated him without counsel on a variety of topics, including his own religious beliefs, opinions on various Islamic organizations, and past travels. SER 5 (Pl. Facts ¶15) (not disputed by Defendant, *see* SER 16). They never offered him the opportunity to postpone his flight, surrender his passport, or otherwise provide assurances that he would be available to testify. Instead, they placed Mr. al-Kidd in jail. Mr. al-Kidd spent the next 15 days in harsh conditions in jails in Virginia, Oklahoma, and

Idaho.[3] While he was incarcerated in Idaho, Defendant and another FBI agent subjected him to additional questioning. SER 7 (Pl. Facts ¶21) (not disputed by Defendant, *see* SER 16); *see also* ER 431–32 (Gneckow Depo. 187, 189).

Shortly after Mr. al-Kidd's arrest, FBI Director Robert Mueller testified before two congressional committees that Mr. al-Kidd's arrest—along with that of Khalid Shaikh Mohammed, the alleged "mastermind" of the September 11th attacks—was a "major success[]" in the government's anti-terrorism efforts. SER 6 (Pl. Facts ¶17). Director Mueller never mentioned that Plaintiff was arrested as a witness, and the government has never been able to explain why Director Mueller's testimony highlighted Mr. al-Kidd in this way. *Id.* (not disputed by Defendant, *see* SER 16).

Over AUSA Lindquist's initial objection, *see* SER 11 (Pl. Facts ¶43), the district court in Idaho eventually released Mr. al-Kidd under strict conditions.[4] He

[3] Mr. al-Kidd was subjected to severe conditions of confinement. In at least one facility he was placed in a high-security wing; in two of the three facilities, he was humiliatingly strip-searched. SER 6 (Pl. Facts ¶¶18-20) (not disputed by Defendant, *see* SER 16). *See also al-Kidd v. Sugrue*, No. 06-1133, 2007 WL 2446750, at *1 (W.D. Okla. Aug. 23, 2007) (describing repeated strip searches and body cavity searches to which Mr. al-Kidd was subjected). When transferred between facilities, Mr. al-Kidd was treated as if he were a dangerous terrorist, and not a witness. He was routinely placed in full shackles, with his feet chained together and his hands cuffed to a belly chain that prevented any movement of his arms. *Id.* (describing shackling during transport).

was ordered to live with his in-laws, forbidden to travel outside a four-state area, and required to report to a probation officer and submit to home visits. ER 51 (R&R 14). Mr. al-Kidd lived under these conditions for more than a year, until the trial for which his testimony was supposedly needed ended without conviction on a single count. ER 191 (*U.S. v. Al-Hussayen*, No. 03-cr-00048, Dkt. 680); ER 44 (R&R 7 n.6).[5] He was never called as a witness. Even when the trial concluded, the government did not move to vacate the conditions of supervision, forcing Mr. al-Kidd to file a motion with the court to release him. SER 12 (Pl. Facts ¶47).

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[4] When Mr. al-Kidd was first brought before a judge in Virginia, he was not afforded counsel, as the statute requires. *See* 18 U.S.C. § 3142(f)(2). The judge stated that "the fastest way for you to get to Idaho and see the people that can . . . discuss why you were arrested" would be to "waive your right to a hearing here today" and consent to a transfer to Idaho. SER 11 (Pl. Facts ¶42). Although the government attorney represented that the transfer would occur "as quickly as possible," the government delayed transferring Mr. al-Kidd until March 24. *Id.* When he was finally transferred to Idaho, Mr. al-Kidd was provided with a federal public defender, who represented him at the above-mentioned release hearing. *See* ER 50 (R&R 13); ER 182 (*U.S. v. Al-Hussayen*, No. 03-cr-00048, Dkt. 41).

[5] Ten months after Mr. al-Kidd's arrest, the government obtained a superseding indictment charging Al-Hussayen with terrorism-related crimes in addition to the original visa fraud and false statement charges. ER 51 (R&R 14). The jury acquitted Al-Hussayen on these new terrorism-related charges, and failed to reach a verdict on the original charges. ER 44 (R&R 7 n.6).

2. The Material Witness Warrant

The affidavit prepared by Defendant in support of Mr. al-Kidd's arrest asserted that al-Kidd had information "'crucial'" to the Al-Hussayen prosecution and that, if he was not arrested, "'the United States Government will be unable to secure his presence at trial via subpoena.'" ER 31 (Order 18). Yet the affidavit failed to mention the fact most obviously relevant to these assertions: that Mr. al-Kidd had voluntarily met with the FBI to answer questions in the past, and had never failed to show up to any of these pre-arranged meetings.

The affidavit also omitted numerous other facts that would have been central to the magistrate's assessment of impracticability, including that: Mr. al-Kidd is a native-born U.S. citizen with significant ties to the United States and Idaho, he had a U.S. citizen wife, child, and other U.S. citizen family members living in this country; the FBI had never told Mr. al-Kidd that he might be needed as a witness, that he could not travel abroad, or that he should inform the FBI if he intended to travel abroad; and Mr. al-Kidd had not heard from the FBI for more than eight months prior to the warrant application. ER 16-17 (Order 3-4); *see also* ER 174-76 (affidavit).[6]

[6] Defendant attempts to justify the FBI's eight-month silence and its failure to tell Mr. al-Kidd that his testimony might be needed by pointing to an innocuous quotation from Mr. al-Kidd in an article in the Seattle Post-Intelligencer. Def. Br. 8. But, regardless of the reason, the central point is that Mr. al-Kidd had not heard

The affidavit also did not state whether the FBI had attempted to contact Mr. al-Kidd prior to seeking the arrest warrant, even though, in fact, the FBI knew how to contact him and had done so in the past. ER 64 (R&R 27).[7] Nor did the affidavit state whether the FBI had made any attempt to find out the reason for Mr. al-Kidd's travel, which he had been planning for more than a year. The affidavit also stated that al-Kidd "and/or" his then-wife "received payments from Sami Omar Al-Hussayen and his associates in excess of $20,000," ER 175 (affidavit), omitting the fact that these payments were al-Kidd's salary for his work with a

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from the FBI for eight months and had never been told he might be needed as a witness or that he should contact the FBI if he intended to travel. In any event, the FBI's investigation was hardly a secret in Idaho, and indeed, the reporter talked with multiple people, including law enforcement officials. ER 144-47. Defendant admitted the FBI never asked Mr. al-Kidd not to talk to the press or to keep their meetings secret. SER 4 (Pl. Facts ¶10) (not disputed by Defendant, *see* SER 16). Nor does Defendant now claim that Mr. al-Kidd revealed any sensitive information. If anything, that Mr. al-Kidd spoke to the press (identifying himself as "a former University of Idaho football player" and "an American who converted to Islam nine years ago . . . who now lives in the Seattle area," ER 145) only further undercuts Defendant's misleading portrayal of Mr. al-Kidd as someone who wished to evade detection. Perhaps for this reason, the affidavit contained no mention of the article that Defendant now claims to have been worried about.

[7] Defendant's statement in his opening brief that he "attempted to contact plaintiff at his Washington home" is not supported by the record. Def. Br. 13. Gneckow testified only that he had possibly "ask[ed] someone to do a drive-by" or "mak[e] a phone call" to determine whether Mr. al-Kidd was home. ER 405–06 (Gneckow Depo. 143–44). As Magistrate Williams found, Gneckow "could not recall the specific effort made to locate al-Kidd." ER 64 (R&R 27). Notably, the affidavit contained no such statement, and discovery produced no evidence of such an occurrence. And, as noted below, Defendant cannot seek to supplement the affidavit after the fact to shore up probable cause. *See infra* at 27.

Muslim organization with which Al-Hussayen was affiliated—a fact that Gneckow knew was likely true prior to submitting the affidavit, but which he chose to omit. ER 64 (R&R 27).

In addition to these omissions, Gneckow's affidavit also contained false statements. It stated that Mr. al-Kidd was "scheduled to take a one-way, first class flight (costing approximately $5,000.00) to Saudi Arabia on Sunday, March 16, 2003," ER 176 (affidavit), when in fact, Mr. al-Kidd had a coach-class, roundtrip ticket with an open return date, costing $1,700. ER 16 (Order 3); SER 7 (Pl. Facts ¶25). Gneckow had learned of Mr. al-Kidd's travel plans from an immigration officer, Agent Alvarez, and he was aware that Alvarez was uncertain about the date of Mr. al-Kidd's flight. ER 47, 64-65 (R&R 10, 27-28). Despite that red flag, Gneckow "asked [Alvarez] no questions about al-Kidd's itinerary," ER 64 (R&R 27), and did not ask to see the paperwork himself. SER 8 (Pl. Facts ¶29). Instead, Gneckow "took [it] upon [him]self" to verify the information by calling an FBI agent at Dulles Airport, *id.*—yet even while he had the Dulles agent on the phone, Gneckow never attempted to "confirm any details about the ticket price or type of ticket." ER 65 (R&R 28). He included these incorrect statements in the affidavit anyway.

B. Procedural History

Mr. al-Kidd's complaint alleged a Fourth Amendment violation against Agent Gneckow under both a *Malley* and a *Franks* theory. Under *Malley v. Briggs*, 475 U.S. 335 (1986), the Court examines whether the affidavit facially lacked probable cause. Under *Franks v. Delaware*, 438 U.S. 154 (1978), the Court asks whether a "corrected" affidavit—one where all material reckless or intentional omissions are added to the affidavit and all material reckless and intentional false statements are corrected—would have lacked probable cause. After the district court denied Defendant's motion to dismiss, *see al-Kidd v. Gonzales*, No. 05-093, 2006 WL 5429570 (D. Id. Sept. 27, 2006), the parties engaged in extensive discovery. The parties subsequently filed cross-motions for summary judgment. The district court granted Plaintiff summary judgment on his *Franks* theory and concluded that it was unnecessary therefore to reach the *Malley* claim. ER 28 (Order 15). Defendant appealed to this Court.[8]

[8] Mr. al-Kidd's case has previously been before this Court, but only as to another defendant, John Ashcroft. The suit against Ashcroft alleged that the former Attorney General had implemented a policy to use the material witness statute as a pretext to preventively detain and investigate suspects, rather than for the statute's intended purpose of securing testimony. This Court affirmed the district court's denial of Ashcroft's motion to dismiss, *al-Kidd v. Ashcroft*, 580 F.3d 949 (9th Cir. 2009), *pet'n for reh'g denied*, 598 F.3d 1129 (9th Cir. 2010), but the Supreme Court reversed, finding that Ashcroft's subjective motivation could not be taken into account under the Fourth Amendment. *Ashcroft v. al-Kidd*, 131 S. Ct. 2074 (2011).

C. The District Court's Decision

1. The parties' cross-motions for summary judgment were considered by Magistrate Williams, the same magistrate judge who originally issued Mr. al-Kidd's material witness arrest warrant based on Defendant's affidavit. After careful consideration of the record, Magistrate Williams issued a lengthy report and recommendation finding that Mr. al-Kidd was entitled to summary judgment against Agent Gneckow on his *Franks* theory and that it was unnecessary to reach the *Malley* argument. Applying *Franks*, Magistrate Williams held that the affidavit was misleadingly drafted and omitted numerous material facts, that Gneckow had been reckless in preparing the affidavit, and that there was no excuse for Defendant's omission of important facts, like Mr. al-Kidd's citizenship, family ties, and past cooperation. ER 62-63 (R&R 25-26).

In dismissing the claims against Ashcroft, however, the Supreme Court specifically noted that it was not ruling on the claims against the other defendants (including whether there was probable cause for al-Kidd's arrest). *Id.* at 2083 n.3. The Court also did not rule on whether the material witness statute could be used pretextually as a means of arresting criminal suspects, but simply held that the Fourth Amendment did not permit a challenge of this type. *Id.* at 2085-86 (Kennedy, J., concurring). Finally, although the issues were not before them, several Justices wrote separately to note that the circumstances surrounding Mr. al-Kidd's arrest and detention raised serious and troubling questions. *See, e.g.*, *id.* at 2090 ("[N]othing in the majority's opinion today should be read as placing this Court's imprimatur on the actions taken by the Government against al-Kidd.") (Sotomayor, J., concurring); *id.* at 2089 (Ginsburg, J., concurring).

Magistrate Williams also noted the "highly suggestive" way that Gneckow characterized many of the facts he *did* include in the affidavit. ER 60 (R&R 23). For example, because the affidavit "identified al-Kidd by his Muslim name . . . , referring to him as 'also known as' Lavoni T. Kidd," and omitted "any information about al-Kidd's family background" or citizenship, the affidavit was "suggestive of foreign birth . . . [and] cast suspicion, without further explanation, that al-Kidd had possibly changed his name once he was in the United States to a more 'American' sounding name for some nefarious purpose." *Id*. Further, "Gneckow chose to characterize the money al-Kidd received as 'payments,' not salary, 'in excess of $20,000,'" even though he knew at the time that it likely constituted salary. ER 64 (R&R 27). Considering the affidavit as a whole, Magistrate Williams found that it was "highly suggestive that al-Kidd was a Saudi national involved with suspected terrorists, with no ties to the United States, fleeing the country within one month of the [A]l-Hussayen indictment." *Id.*

In addition, although it was not central to his ruling, Magistrate Williams also concluded that Gneckow had been reckless in falsely stating that Mr. al-Kidd had a one-way, first class ticket costing $5,000, rather than a $1,700 coach-class, roundtrip ticket with an open-ended return. ER 65 (R&R 28). Specifically, he concluded that because Gneckow was aware that there was confusion over the ticket details, he should have checked these facts before including them in the

affidavit and presenting them as true—something he easily could have done when he called the FBI agent at Dulles. *Id.*

2. Judge Lodge adopted and affirmed the report and recommendation, finding that Gneckow's affidavit had created a "misleading and highly suggestive picture of the facts and circumstances" surrounding the case. ER 22 (Order 9).[9] He noted that without the omitted facts, the affidavit made it "appear" as though "Plaintiff was a citizen of Saudi Arabia" who was "fleeing the country." ER 19 (Order 6). Judge Lodge thus "agreed" with the Report that the omitted facts "were material and necessary to the probable cause finding and their omission was reckless." *Id*.

Separately, Judge Lodge held that although the statements about the plane ticket were incorrect, Defendant had not been reckless in making those false statements, reasoning that Defendant had no obligation to question the information he received from Agent Alvarez. ER 21 (Order 8). Judge Lodge did not, however, explain why Defendant's failure to confirm the ticket details—or at least to disclose the uncertainty to the magistrate—was not reckless given that Gneckow was on notice about Agent Alvarez's confusion, a point emphasized by Magistrate

[9] Judge Lodge expressly "agree[d] with and incorporate[d]" virtually all of Magistrate Williams's analysis. ER 22 (Order 9, adopting R&R 23-28).

Williams. *See infra* Section II.A (discussing Gneckow's false statements about the plane ticket as an alternative ground for affirmance).[10]

SUMMARY OF ARGUMENT

1. Both Judge Lodge and Magistrate Williams correctly concluded that Plaintiff is entitled to summary judgment under *Franks* based on Defendant's misleading statements and numerous material omissions from the affidavit. The affidavit omitted a host of obviously material facts known to Defendant at the time, including that Mr. al-Kidd was a U.S. citizen with family ties in the United States, that he had cooperated with the FBI in the past, and that he had never been asked not to travel or to alert the FBI if he intended to travel. The affidavit also failed to mention that Mr. al-Kidd had heard nothing from the FBI in eight months, and that the FBI had never told him he might be needed as a witness at some point in the future.

That Mr. al-Kidd was leaving for Saudi Arabia does not alter that conclusion. Mr. al-Kidd had no reason to believe the FBI preferred he not travel. Thus, there was nothing about his travel that made it "likely" that he would disobey a subpoena if served—which is the test under this Court's longstanding material witness case law. *Bacon v. United States*, 449 F.2d 933, 944 (9th Cir.

[10] Like Magistrate Williams, Judge Lodge also did not reach plaintiff's *Malley* argument. ER 28 (Order 15).

1971). Here, there was not a single fact suggesting that Mr. al-Kidd—a cooperative U.S. citizen—would be likely to avoid testifying. Nor has Defendant explained why the FBI could not simply have asked Mr. al-Kidd to surrender his passport—a step it took with another witness in the Al-Hussayen case who was scheduled to fly to Saudi Arabia, and who, unlike Mr. al-Kidd, *was* in fact a Saudi national returning home. *See* Section I.

2. There are two alternative grounds on which this Court can affirm the district court. The first is that the incorrect facts about the plane ticket were recklessly included in the affidavit. The second is that plaintiff is entitled to summary judgment under a *Malley* theory.

(a) Magistrate Williams concluded that, in addition to all the other problems with the affidavit, Defendant was reckless in including false statements about the plane ticket (*i.e.*, that Mr. al-Kidd had an expensive one-way, first class ticket, rather than an open-ended, roundtrip coach ticket). Judge Lodge concluded, however, that Defendant had not been reckless in making those false statements, and therefore granted Plaintiff summary judgment without factoring into his analysis the false statements about the plane ticket.

Judge Lodge was clearly correct in concluding that the false statements about the ticket were not necessary to award plaintiff summary judgment. But if this Court should disagree with that conclusion, it should review Judge Lodge's

conclusion that Defendant was not reckless in providing false statements about the plane ticket. Plaintiff does not contend that agents must always verify the accuracy of information supplied by other agents. But here, as Magistrate Williams emphasized, Defendant *knew* there was confusion about the ticket's details and was thus on notice that he needed to follow up. ER 64-65 (R&R 27-28). *See* Section II.A.

(b) This Court can also affirm on Plaintiff's *Malley* theory, which the district court found unnecessary to reach. On its face, the affidavit contained only two sentences addressing why it would have been impracticable to secure Mr. al-Kidd's testimony by subpoena, which averred only that Mr. al-Kidd was leaving in a few days on a one-way, expensive first-class ticket. That information is plainly insufficient to show that it was "likely" Mr. al-Kidd would seek to avoid testifying. *Bacon*, 449 F.2d at 944. The affidavit was thus insufficient on its face. *See* Section II.B.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY GRANTED PLAINTIFF SUMMARY JUDGMENT IN LIGHT OF DEFENDANT'S RECKLESSLY MISLEADING AND INCOMPLETE AFFIDAVIT.

There is a well-established two-step test for Fourth Amendment *Franks* claims. First, the Court determines whether "the warrant affidavit contained misrepresentations or omissions material to the finding of probable cause," such

that a "corrected" affidavit—an affidavit that includes all material omissions and excludes all materially misleading or false statements—would not have established probable cause. *Bravo v. City of Santa Maria*, 665 F.3d 1076, 1083 (9th Cir. 2011). Second, if the Court concludes that probable cause would have been lacking under the corrected affidavit, it then determines whether "the misrepresentations or omissions were made intentionally or with reckless disregard for the truth." *Id.* If so, the shield of qualified immunity is lost, because "no reasonable officer could believe that it is constitutional to act dishonestly or recklessly with regard to the basis for probable cause in seeking a warrant." *Butler v. Elle*, 281 F.3d 1014, 1024 (9th Cir. 2002) (per curiam). *See also Ewing v. City of Stockton*, 588 F.3d 1218, 1223–24 (9th Cir. 2009); *Liston v. County of Riverside*, 120 F.3d 965, 972-73 (9th Cir. 1997).

A. Defendant's Affidavit Omitted Numerous Material Facts.

1. The material witness statute grants the government an extraordinary power, allowing the arrest and jailing of an innocent and uncharged person. Not surprisingly, therefore, this Court has placed strict limits on its use. The touchstone is that a witness may not be arrested unless there is probable cause to believe he is *likely* to seek to avoid a subpoena. It is not sufficient that an individual could—if he chose—successfully avoid a subpoena. Nor is it sufficient for the government to speculate that an individual may wish to avoid a subpoena.

There must be specific, demonstrable facts showing that the individual is likely to try and avoid the subpoena. Indeed, if the government could lock up innocent witnesses without facts indicating likely uncooperativeness, the statute would violate the most basic rule of our society: that individuals must have an opportunity to conform their actions to the law before losing their liberty.

The leading case in the Ninth Circuit is *Bacon v. United States*, 449 F.2d 933 (9th Cir. 1971), which makes unequivocally clear that the government may not presume an individual will disobey a subpoena simply because he has the means to do so. In *Bacon*, the Court ruled that the FBI had failed to establish probable cause of impracticability—despite the fact that the witness had "access to large sums of money," had "personal contact with fugitives from justice," and had actually fled to an "adjoining rooftop" when the FBI sought her arrest. *Id.* at 944-45. *Bacon* emphasized that the witness's access to large sums of money was "at best remotely relevant to her possible recalcitrance." *Id.* at 944. Even in conjunction with her personal contacts with fugitives, the money "at most tend[ed] to show that *if* Bacon wished to flee, she might be able to do so successfully. It does not support the conclusion that she would be *likely* to flee or go underground." *Id.* (emphasis in original). Without a "showing of past attempts by Bacon to evade judicial process" or other specific indications that she was likely to disobey a subpoena in the future, the statute's impracticability requirement was not met. *Id.*

Notably, the Court did not doubt that an "inference can be drawn that Bacon wished to avoid apprehension" because she fled when the FBI came to arrest her at her home. *Id.* at 944. But the Court refused to draw the "further inference" that the witness would not have complied with a subpoena, *id.*, explaining that the situation in which the witness found herself

> differs greatly from that in which Bacon would have found herself had she been served with a subpoena. She would then have had an opportunity to reflect on her obligation to obey the process, free from the fear of imminent arrest by pursuing officers.

Id. at 945.

In *Arnsberg v. United States*, 757 F.2d 971 (9th Cir. 1985), this Court applied *Bacon* to an even more extreme set of facts. There, the officers obtained a warrant only after having made *multiple* attempts to subpoena the witness—looking for him at work and his home, calling his friends, and twice leaving a subpoena with his employees—*after* the witness said he would not testify voluntarily without a subpoena. *Id.* at 974. The Court nonetheless concluded that the arrest was invalid, stating that the facts "only show a man somewhat obstinately insisting upon his right to refuse to appear before a grand jury until personally served." *Id.* at 976.

Thus, in both *Bacon* and *Arnsberg*, this Court refused to authorize the arrest of an innocent witness where the facts did not show it was *likely* that the witness

would refuse to comply with a subpoena if served. And this Court so held despite the fact that the witnesses in those cases demonstrated actual recalcitrance about testifying. In *Bacon,* the witness went so far as to evade contact with law enforcement by fleeing to an adjoining rooftop. *Bacon*, 449 F.2d at 944-45. And, in *Arnsberg*, the witness made it clear that he would not testify voluntarily and actually made it difficult for agents to serve him with a subpoena. *Arnsberg*, 757 F.2d at 974.

The Court's insistence that material witness arrests be based on a specific, individualized showing that the witness is not just capable but *likely* to disobey a subpoena stems from the Fourth Amendment's basic requirement that all seizures be "[]reasonable." U.S. Const. Amend. IV. *See al-Kidd*, 580 F.3d at 967-68 (recognizing that *Bacon*'s probable cause standard implements the Fourth Amendment's "'reasonable[ness]'" requirement) (citing *Bacon*, 449 F.2d at 943), *overruled on other grounds*, 131 S. Ct. 2074 (2011). Indeed, it is inconceivable that it would be reasonable under the Fourth Amendment to arrest and imprison an innocent, uncharged witness unless he has demonstrated by word or deed that he would likely refuse to comply with a subpoena.

2. A corrected affidavit in this case does not come close to satisfying the test set forth in *Bacon* and *Arnsberg*. The affidavit failed to inform the magistrate of "basic information" that was "obviously material" to the impracticability

determination, ER 22 (Order 9), including Mr. al-Kidd's U.S. citizenship, community connections, and family ties in the United States. It also failed to mention that Mr. al-Kidd had cooperated with the FBI in the past and had never failed to show up for their pre-arranged meetings; that the FBI had never told Mr. al-Kidd that he might be needed as a witness, that he could not travel abroad, or that he should inform the FBI if he intended to travel abroad; and that Mr. al-Kidd had not heard from the FBI for more than eight months prior to the warrant application. ER 16-17 (Order 3-4). It is undisputed that Gneckow knew all these facts at the time he drafted the affidavit. ER 22 (Order 9). By omitting these facts from the affidavit, Defendant was "reporting less than the total story," *United States v. Stanert*, 762 F.2d 775, 781 (9th Cir. 1985), *as amended*, 769 F.2d 1410 (9th Cir. 1985), leading the magistrate to infer that Mr. al-Kidd was a Saudi national returning home, with no ties to the United States and no history of cooperating with the FBI.

The misleading effect of these omissions was heightened by the inclusion of numerous cryptic, partial, and unexplained statements in the affidavit. Among other things, the affidavit suggested that Mr. al-Kidd used the alias Lavoni T. Kidd. ER 60 (R&R 23). But Mr. al-Kidd had legally changed his name years earlier when he converted to Islam while in college, and his birth name was not an alias. *Id.* As Magistrate Williams noted, the statement that Mr. al-Kidd used an alias

"cast suspicion" on him, suggesting that he was a foreign national who was using "a more 'American' sounding name for some nefarious purpose." *Id*. The affidavit also stated that Mr. al-Kidd had received "payments" in excess of $20,000 from Al-Hussayen. Yet "Gneckow knew that the $20,000 received by al-Kidd was likely salary payment, received in monthly increments over a period of time, for work related to al-Kidd's employment with al-Multaqa," a Muslim charitable organization in Idaho. ER 64 (R&R 27). As Magistrate Williams explained, because "Gneckow chose to characterize the money al-Kidd received as 'payments,' not salary," and because the Al-Hussayen indictment averred that Al-Hussayen "funded travel for others" in the past, the affidavit misleadingly suggested that Mr. al-Kidd might have been leaving the country at Al-Hussayen's "direction." *Id*. As Magistrate Williams emphasized, Gneckow claimed to have "ruled out al-Kidd as a suspect for criminal activity once he and others had determined that there was nothing worth investigating as far as the money flow was concerned." *Id*. Yet Defendant nevertheless chose to cast Mr. al-Kidd in a suspicious light.[11]

[11] In his brief, Defendant is still trying to taint Mr. al-Kidd by association, calling al-Multaqa "an Islamic charitable organization that supported violent jihad," Def. Br. 7, even though the district court made no such finding. Defendant cites the allegations in the Al-Hussayen indictment, but as noted above, the jury found that the government failed to prove those charges. *See supra* n.5. In any event, Mr. al-Kidd himself was never accused of any wrongdoing.

A corrected affidavit would have shown that Mr. al-Kidd was a cooperative U.S. citizen with strong U.S. ties who had never displayed any reluctance about testifying voluntarily or pursuant to a subpoena. And he certainly did not seek to evade law enforcement (like the witness in *Bacon* who fled to an adjoining rooftop), or inform authorities that he did not wish to testify (like the witness in *Arnsberg*). Judge Lodge was thus unquestionably correct in concluding that a corrected affidavit would "certainly" not have established probable cause to arrest Mr. al-Kidd, a cooperative and innocent U.S. citizen who was never even told he might be needed as a witness. ER 19 (Order 6).

Defendant does not even address *Arnsberg*, and relegates his discussion of *Bacon* to a footnote. Def. Br. 30 n.6. Defendant contends that Mr. al-Kidd's actions went beyond those of the witness in *Bacon*, because the witness in *Bacon* did not take steps to flee, while Mr. al-Kidd was going to Saudi Arabia. *Id.* But, in *Bacon*, the Court made clear that the witness *did* take steps to evade the FBI by fleeing to an adjoining rooftop. Moreover, Defendant's attempt to portray Mr. al-Kidd as "flee[ing]," *id.*, is baseless, as Magistrate Williams found that Mr. al-Kidd began planning his trip to Saudi Arabia in April 2002, nearly a year before Al-Hussayen's indictment became public. ER 47 (R&R 10). But, regardless of whether Defendant knew why Mr. al-Kidd was going to Saudi Arabia, or when he had planned his trip, the critical point is that Defendant had no affirmative

evidence whatsoever to suggest Mr. al-Kidd *was* fleeing (rather than traveling) or that he would not continue to be cooperative, as *Bacon* and *Arnsberg* require. In place of evidence, Defendant substituted innuendo, crafting an affidavit that "ma[de] it appear as if the Plaintiff was a citizen of Saudi Arabia, was involved with money transfers from a suspected terrorist, and was fleeing the country shortly after those he was involved with had been indicted and/or arrested." ER 19-20 (Order 6-7).

3. Defendant attempts to make more out of Mr. al-Kidd's travel plans by noting that Saudi Arabia lacks an extradition treaty with the United States. Def. Br. 12. But this fact was never mentioned in the affidavit. The absence of this fact in the affidavit suggests that Defendant was more focused on painting Mr. al-Kidd as someone possibly linked to nefarious activities in the Middle East than on the lack of an extradition treaty. But, regardless of the reason for the omission, Defendant cannot now resuscitate probable cause by adding new facts to the affidavit. *See Baldwin v. Placer County*, 418 F.3d 966, 971 (9th Cir. 2005) (in *Franks* case, government cannot rely on "evidence not cited in the warrant" to establish probable cause, for "what will sustain the warrant must already be within it").

As significantly, even assuming that Magistrate Williams was independently aware that Saudi Arabia lacked an extradition treaty with the United States, that

fact demonstrates at most that Mr. al-Kidd might have been able to technically resist returning if he *intended* to disobey a subpoena. It does not remotely show that Mr. al-Kidd was "likely" not to comply with a subpoena—the test under *Bacon*. *See* 449 F.2d at 944. This Court could not have been clearer in *Bacon* and *Arnsberg* that there must be demonstrable facts showing not only that a witness has the *capability* to evade a subpoena (which, of course, most people have some capacity to do), but also evidence that the witness is "likely" fail to comply with a subpoena. If the rule were otherwise, it would mean that an innocent and cooperative U.S. citizen could be arrested for merely traveling to a country without an extradition treaty or taking any other innocent action—all without ever knowing he was doing anything wrong.

Consider a case in which the government is investigating a financial institution for criminal fraud, focusing on a particular employee. Because the employee made phone calls to a coworker during the relevant timeframe, the government asks to speak to the coworker, who cooperates. The coworker then does not hear from the government for eight months and is never told he might be needed as a witness or that he should alert the government if he intends to travel. Soon after the employee is indicted, the coworker is scheduled to leave on a long-planned trip to China (with which the United States lacks an extradition treaty). And, because the coworker is planning to be in China working for several months,

he understandably buys an open-ended return ticket. In that situation, the government could not conceivably show up at the airport and haul the coworker away in handcuffs, without first asking him—an innocent U.S. citizen—to postpone his trip, surrender his passport, or provide other assurances that he would continue to cooperate. Yet that is precisely what Defendant asks this Court to allow here.

And, in this case, the government's failure to ask Mr. al-Kidd to postpone his trip and relinquish his passport is particularly glaring. As discovery revealed, the government chose *not* to arrest another potential witness in the Al-Hussayen trial, even though that witness was also preparing to travel to Saudi Arabia; instead, the government simply served him with a summons and asked him to postpone his travel and relinquish his passport. And, unlike Mr. al-Kidd, that witness *was* in fact a Saudi national returning home. SER 12 (Pl. Facts ¶45).

Indeed, Defendant conceded at his deposition that a "cooperative businessman" could not be arrested on a material witness warrant simply because he had a one-way ticket to Saudi Arabia. SER 23 (Gneckow Depo. 220); *see also* SER 9 (Pl. Facts ¶33); SER 17 (Defendant's response). In short, plans to travel abroad, even to a country lacking an extradition treaty, cannot possibly be

sufficient to arrest a cooperative U.S. citizen who has never been told not to travel or that his testimony might be needed in the future.[12]

4. Defendant argues that his omission of al-Kidd's citizenship, family ties, and past cooperation with the FBI are immaterial because those facts do not "prove" or "guarantee" that al-Kidd would have returned to testify. Def. Br. 23, 31, 33. That contention fails to take into account the government's other options for securing testimony, such as asking Mr. al-Kidd to postpone his trip or to surrender his passport (as it did with another witness). More fundamentally, Defendant seems to be suggesting that whenever there is any *possibility* that a witness can avoid a subpoena, the witness may be put in jail. But the relevant test is not whether there is a guarantee of the witness appearing, but rather, whether there is evidence suggesting that the witness is "likely" to disobey a subpoena. *Bacon*, 449 F.2d at 944. *Cf. Chism v. Washington State*, 661 F.3d 380, 391 (9th

[12] Moreover, the fact that there is no extradition treaty does not mean that a subpoena would be ineffective. There are severe consequences for a U.S. citizen located abroad who fails to comply with a subpoena. *See* 8 U.S.C. §§ 1783-84 (providing for subpoenas of U.S. nationals in foreign countries, and permitting courts to use their contempt powers and the seizure of assets to punish witnesses who fail to comply). Since al-Kidd is a U.S. citizen who had family ties in the United States and planned to return, these sanctions would have provided a strong reason for him to a obey a subpoena, even if he were not already inclined to cooperate.

Cir. 2011) (probable cause means a "'fair probability,'" not a mere "possibility") (internal citation omitted).

Defendant's reading of the statute would put an impossible burden on the witness, permitting arrest unless the government presents to a magistrate—at an ex parte hearing of which the witness is not even aware—facts *proving* that the witness certainly *would* show up to testify. If this were the test, *Bacon* would necessarily have been decided differently, since there was clearly no guarantee that the witness there would appear to testify given that she had already tried to evade the authorities on one occasion, and had the contacts and financial means to evade a subpoena if she chose to do so. 449 F.2d at 944-45. Yet the Court still found probable cause lacking, because there was no evidence showing that it was "*likely*" she would choose to avoid testifying if served. *Id*. (emphasis in original).[13]

5. Defendant also attempts to minimize the omission of Mr. al-Kidd's past cooperation by citing three out-of-circuit cases that "upheld arrests of witnesses

[13] *See also In re De Jesus Berrios*, 706 F.2d 355, 357-58 (1st Cir. 1983) ("[T]he arrest . . . was proper because it was made to secure testimony which was material and *could not be obtained by subpoena*.") (emphasis added); *Mayfield v. Gonzales*, No. 04-1427, 2005 WL 1801679, *9 (D. Or. July 28, 2005) (equating impracticability with "the likelihood that he *would not obey* a subpoena") (emphasis added); *cf. United States v. Pena-Gutierrez*, 222 F.3d 1080, 1088 (9th Cir. 2000) (holding that a deported Mexican citizen was not "unavailable as a witness" for purposes of the hearsay rule where the government knew his "address in Mexico" but made no attempt to contact him and "asserted no basis for believing that [he] would not respond to a request to return to the United States to testify").

despite prior cooperation with authorities." Def. Br. 34. But, in each of these cases, the witness had given some affirmative indication of his unwillingness to cooperate. *See United States v. Awadallah*, 349 F.3d 42, 46 (2d Cir. 2003) (noting doubts about whether witness was "cooperative" where, *inter alia*, he "explicitly revoked his consent" for the FBI to search his car and "refused to come in for the polygraph test until he had a lawyer"); *United States v. McVeigh*, 940 F. Supp. 1541, 1550 (D. Col. 1996) (noting that witness "had publicly renounced his citizenship"); *White by Swafford v. Gerbitz*, 892 F.2d 457, 459 (6th Cir. 1989) (noting witness's statement to officers that "he did not want to be a 'snitch' and did not want to testify about the incident in later court proceedings").

Here, in contrast, the district court specifically found that al-Kidd had cooperated with the FBI on every prior occasion, and it found not a single indication of past uncooperativeness. ER 19 (Order 6); ER 42, 64 (R&R 5, 27). Defendant does not directly contest this factual finding, but he attempts to undercut it by citing to his own deposition testimony that he believed Mr. al-Kidd was not "forthcoming" during his voluntary interviews. Def. Br. 7, 12. But Gneckow admittedly was not present at the interviews. SER 10 (Pl. Facts ¶34). And Agent Cleary, who conducted the interviews, testified that Mr. al-Kidd—who voluntarily agreed to be interviewed even though he was told "he didn't have to talk,"—was "cooperative" and "volunteered a lot of information." ER 345–56 (Cleary Depo.

173–75); SER 4 (Pl. Facts ¶8); SER 29 (Cleary Depo. 181). Defendant did not dispute these facts below. SER 16. His belated attempts to cast doubt on Mr. al-Kidd's cooperativeness now, and to avoid the district court's factual findings, are unavailing. In any case, even Defendant does not dispute that Mr. al-Kidd never declined a request for an interview or failed to show up to these pre-arranged meetings—the facts that are most directly relevant to whether he would have responded to a subpoena in the future and shown up for trial.

6. Defendant next argues that Mr. al-Kidd's U.S. family and community ties (including citizenship) are *categorically* irrelevant to the magistrate's determination of whether to issue an arrest warrant because these factors come into play only during the post-arrest release hearing described at 18 U.S.C. § 3142, the general bail statute. *See* Def. Br. 33. Thus, according to Defendant, the government may withhold information about a witness's family and community ties when asking a court to issue a warrant for his arrest, and only later, once the witness has been arrested and is seeking release, may the court consider this information.

Defendant cites no authority for this remarkable proposition, and there is none. To the contrary, courts have routinely recognized the relevance of community and family ties at the arrest stage, which of course is only logical since the central question at *both* the arrest and release hearing stages is whether the

witness is likely to flee. *See, e.g., Arnsberg v. United States*, 549 F. Supp. 55, 59 (D. Or. 1982) (finding the impracticability prong was not met because, among other things, witness "owned and managed two grocery stores and there was no evidence that he would flee these community ties") (internal citations omitted), *aff'd in relevant part*, 757 F.2d at 976-77 (agreeing that there was no showing of impracticability); *Perkins v. Click*, 148 F. Supp. 2d 1177, 1183 (D. N.M. 2001) (invalidating arrest under New Mexico's material witness statute where witness "lived in the Carlsbad area, had children and a business to care for, and made no indication to any officer that she would be a reluctant witness"); *Mayfield*, 2005 WL 1801679, *9 (denying motion to dismiss *Franks* claim where the corrected affidavit "provides no basis for a court to conclude that Mayfield, an attorney with roots in the community, would not obey a subpoena").

Defendant nonetheless contends that because Congress "mentioned" community and family ties as factors relevant to the release hearings described in 18 U.S.C. § 3142(g), it must have intended to *exclude* those factors from a magistrate's consideration at the arrest stage in 18 U.S.C. § 3144. Def. Br. 33. By Defendant's logic, however, *none* of the factors mentioned in § 3142(g)—including not only community and family ties, but also "the person's . . . past conduct . . . and record concerning appearance at court proceedings," 18 U.S.C. § 3142(g)(3)(A)—would be relevant to impracticability at the arrest stage. That is

obviously not the case. As *Bacon* logically recognized, a witness's past conduct and record concerning appearance at court proceedings are highly relevant. *Bacon*, 449 F.2d at 944 (impracticability requirement not met where, *inter alia*, government had not shown any "past attempts by Bacon to evade judicial process"). Any other interpretation of the statute would make little sense. Indeed, Defendant's attempt to limit the universe of facts a magistrate can consider when deciding whether to issue a warrant would perversely *ensure* that witnesses are arrested needlessly, and in violation of the Fourth Amendment's foundational "reasonableness" requirement.

7. Finally, Defendant contends that the Court should grant "substantial deference" to his decision to omit al-Kidd's citizenship and family ties from the affidavit. Def. Br. 33. It is well settled, however, that the materiality of omitted facts is a legal question subject to the Court's *de novo* review. *See*, *e.g.*, *Ewing*, 588 F.3d at 1226 n.10; *Butler*, 281 F.3d at 1024; *cf. Bacon*, 449 F.2d at 944 (holding that the testimony of an FBI agent, relaying a fellow law enforcement agent's conclusion as to impracticability, was insufficient to establish impracticability; insisting on specific facts that would allow the *court* to reach "the conclusion that Bacon would be *likely* to flee," rather than deferring to the agents' judgment); *Arnsberg*, 757 F.2d at 975 (holding that two law enforcement officials

failed to establish impracticability, despite consultation with an AUSA who "believed that the facts justified the issuance of a warrant").[14]

In any event, even if deference were generally appropriate in this context, it certainly is not under the circumstances of this case. Defendant argues that, in his experience, "'we have people that flee the country all the time that are U.S. citizens' and 'who leave [their] wife and family behind and never come back.'" Def. Br. 32. But these statements are no more than unsupported generalizations; they do not suggest any specific experience with material witnesses, let alone any individualized facts about Mr. al-Kidd. The fact that Defendant knew of other people who failed to show up at court despite family ties does nothing to create individualized suspicion that Mr. al-Kidd, a *cooperative* uncharged witness, would likely do so. *Cf. Bravo*, 665 F.3d at 1085 ("The generalized statements in the

[14] The two cases on which Defendant relies are inapposite, because they both deal with *warrantless* searches and seizures. *See United States v. Ortiz*, 422 U.S. 891 (1975) (searches at traffic checkpoints); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (roving vehicle patrols). In the warrant context, by contrast, it is well established that the court must make an independent determination of whether probable cause exists. *See, e.g., United States v. Underwood*, 725 F.3d 1076, 1081 (9th Cir. 2013) ("An affidavit must recite underlying facts so that the issuing judge can draw his or her *own* reasonable inferences and conclusions") (emphasis added); *United States v. Davis*, 714 F.2d 896, 900 (9th Cir. 1983) ("Unlike officers in the field, a magistrate is not entitled to rely on the judgment of law enforcement officials. He or she is expected to review the material submitted and make a detached, independent judgment as to the existence of probable cause."); *see also Wilson v. Russo*, 212 F.3d 781, 787 (3d Cir. 2000) ("[A] police officer cannot make unilateral decisions about the materiality of information.").

affidavit that it is 'common' for families of gang members to assist other members of the gang are insufficient to support probable cause to search the Bravos' home.").[15]

This Court insists on *individualized* reasons to believe the witness will not comply with a subpoena; generalizations about how people *might* behave are not enough. *See Bacon*, 449 F.2d at 944. The test is whether a witness is "likely" to disobey a subpoena, *id.*, not whether it is merely conceivable—which is all that Defendant's general experience speaks to.

* * *

The affidavit prepared by Defendant did not contain a single statement that Mr. al-Kidd had ever been uncooperative or was unlikely to obey a subpoena. And a corrected affidavit would have shown precisely the opposite. Defendant's suggestion that there was still probable cause to arrest Mr. al-Kidd under a corrected affidavit defies common sense and is flatly contradicted by Ninth Circuit precedent.

Neither this Court nor the Supreme Court has ever squarely ruled on whether the material witness statute is consistent with the Fourth Amendment. *See al-Kidd*,

[15] Moreover, Defendant's experience presumably deals mostly or exclusively with criminal defendants, not material witnesses. Defendant testified that he had never sought a material witness warrant before or since, had "[n]ever received any training on how to use [the] material witness law," and did not "know [at the time] . . . what the standard was." ER 395 (Gneckow Depo. 128).

580 F.3d at 965 ("The Supreme Court has never held that detention of innocent persons as material witnesses is permissible under the Fourth Amendment . . . ."); *al-Kidd*, 131 S. Ct. at 2086 (Kennedy, J., concurring) ("Given the difficulty of these issues, the Court is correct to address only the legal theory put before it, without further exploring when material witness arrests might be consistent with statutory and constitutional requirements."). But even assuming it is constitutional (an issue the district court did not reach, *see* ER 12–13), the statute cannot constitutionally be applied in the manner suggested by Defendant—where a cooperative U.S. citizen may simply be blindsided by government agents despite never having done anything to suggest that he would not comply with a subpoena.

B. Defendant Is Not Entitled To Qualified Immunity Because He Acted Recklessly And Intentionally In Submitting A Misleading And Incomplete Affidavit.

1. Defendant cannot argue that he was anything but reckless in drafting the affidavit that led to Mr. al-Kidd's arrest. Simply put, the affidavit omitted every single fact that was favorable to Mr. al-Kidd and included a host of misleading statements casting Mr. al-Kidd in a suspicious light. A reasonable officer could not possibly have thought that such a partial and misleading affidavit is what a magistrate would have wanted or expected from him. The district court thus correctly concluded that Defendant acted with reckless disregard for the truth in

omitting "basic information" that was "obviously material to the Magistrate Judge's probable cause determination." ER 22 (Order 9).

Under this Court's longstanding law, the Fourth Amendment is clearly violated when "police officers . . . mislead a magistrate . . . . [b]y reporting less than the total story," thereby "manipulat[ing] the inferences a magistrate will draw." *Stanert*, 762 F.2d at 781. "It is well established that a police officer may not deliberately omit facts that would otherwise negate a showing of probable cause." *Cameron v. Craig*, 713 F.3d 1012, 1019 (9th Cir. 2013). This includes those "facts required to prevent technically true statements in the affidavit from being misleading." *Stanert*, 762 F.2d at 781. Indeed, this Court has repeatedly stressed that allowing magistrates "to be misled in such a manner could denude the probable cause requirement of all real meaning." *Id.*; *see also, e.g.*, *Liston*, 120 F.3d at 973-75; *Bravo*, 665 F.3d at 1087-88; *cf. Wilson v. Russo*, 212 F.3d 781, 788 (3d Cir. 2000) ("[O]missions are made with reckless disregard if an officer withholds a fact in his ken that any reasonable person would have known . . . was the kind of thing the judge would wish to know.") (internal quotation marks omitted); *Peet v. City of Detroit*, 502 F.3d 557, 570 n.3 (6th Cir. 2007) (same); *United States v. Jacobs*, 986 F.2d 1231, 1234-35 (8th Cir. 1993) (same).

Defendant suggests that he did not act recklessly because it would not have been clear to an agent that *each piece* of omitted information was necessary to

include in the affidavit. Def. Br. 40. But that argument fails to account for the misleading manner in which the affidavit was drafted. More significantly, Defendant's attempt to isolate each piece of information is contrary to the approach mandated by this Court's decisions. It has long been established in *Franks* cases that the omissions must be viewed "cumulatively." *Stanert*, 762 F.2d at 782; *see also Chism*, 661 F.3d at 388 (considering evidence of recklessness, and noting, "[i]t is conspicuous that, *cumulatively*, the omissions purged the affidavit of any reference to the possibility that someone other than Todd Chism was responsible" for the crime) (emphasis added).

Magistrate Williams and Judge Lodge did not base their finding of recklessness on a few discrete omissions or misleading statements, but on the overwhelming evidence that Defendant omitted *every* material fact favorable to Mr. al-Kidd. ER 60 (R&R 23) (finding *Franks* violation based on "the affidavit as a whole"); ER 24 (Order 11) ("The recklessness found here is based on the type, nature, and number of misstatements and omissions in the warrant affidavit . . . ."); ER 24–25 (Order 11-12) (stressing that recklessness finding was based on totality of evidence, including "the length of the investigation concerning the matter in which the Plaintiff was sought to testify in, the circumstances of that investigation including the Plaintiff's cooperation, and the facts about Plaintiff known to law

enforcement at the time the warrant was submitted but not included in the warrant application").

Furthermore, as Judge Lodge noted, the "very nature" of the particular omissions was such that no reasonable officer could have believed he was justified in keeping them from a magistrate being asked to sanction the arrest of an innocent witness. ER 22 (Order 9). Indeed, from the affidavit, one would assume that the FBI had never even spoken with Mr. al-Kidd before—an omission that is all the more glaring because the affidavit included so many other extraneous (but suggestive) facts about Mr. al-Kidd, like Mr. al-Kidd's previous travel and the change of his name. ER 64, 60 (R&R 27, 23) (emphasizing that the affidavit was "crafted in such a way so as to cast doubt upon al-Kidd's motives for leaving the country").

Particularly in light of this Court's express recognition in *Bacon* that a material witness arrest requires a determination that the witness is *likely* to evade testifying, no reasonable officer could have believed that he had a right to withhold information about Mr. al-Kidd's past cooperation. *See Bacon*, 449 F.2d at 944. Nor could a reasonable officer have assumed that a magistrate would not have wanted to know that Plaintiff was a U.S. citizen with strong community and family

ties who had never been told he might be needed as a witness or that he should alert the FBI if he intended to travel.[16]

2. Defendant argues that it is "settled law in this Circuit" that an officer's consultation with a prosecutor serves to immunize him for submitting a materially misleading warrant. Def. Br. 25. As the district court correctly concluded, however, Defendant cannot "absolve" himself from liability for his material omissions by pointing to consultation with a prosecutor who "was in no better position than the Magistrate Judge to evaluate probable cause given he, like the Magistrate Judge, did not know the omitted material facts . . . ." ER 20 (Order 7).

The cases Defendant cites themselves illustrate the gulf separating his obviously reckless conduct from situations where a prosecutor's review may be relevant. In *United States v. Freitas*, 856 F.2d 1425 (9th Cir. 1988), for instance,

[16] Defendant's reliance on *Crowe v. County of San Diego*, 608 F.3d 406 (9th Cir. 2010), and *Lombardi v. City of El-Cajon*, 117 F.3d 1117 (9th Cir. 1997), is thus misplaced. Def. Br. 39–40. Those cases stand for the uncontroversial proposition that when materiality is entirely uncertain, an officer might not be reckless in omitting a particular fact that is later determined to be material. The facts in Mr. al-Kidd's case bear no resemblance to the circumstances in *Crowe* and *Lombardi*.

Defendant also repeatedly states that Plaintiff must make a "substantial" showing of recklessness. But is doubtful that such a heightened showing is any longer necessary in light of *Crawford-El v. Britton*, 523 U.S. 574, 594–96 (1998) (rejecting creation of a heightened proof requirement in First Amendment civil rights case). *See also Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1124–26 (9th Cir. 2002). In any event, Plaintiff has clearly made far more than a substantial showing here.

the officers "not only noticed the potential defect in the warrant, they brought it to the attention of an Assistant U.S. Attorney and the magistrate, who both approved it." *Id.* at 1432. Unlike the full disclosure made by the officers in *Freitas*, Defendant's "consultation" with AUSA Lindquist was at best an empty exercise given that Lindquist "did not know the omitted material facts" and that Defendant withheld those facts from him. ER 20 (Order 7).[17]

Moreover, even if AUSA Lindquist had been made aware of all of the facts, his review could not have immunized Defendant. As this Court has recently made clear, an officer who materially misleads a magistrate cannot demonstrate good faith, regardless of who reviews the warrant. *See Underwood*, 725 F.3d at 1086–

[17] Defendant does not dispute that he failed to inform AUSA Lindquist of the omitted facts. Yet, in litigation, Defendant now claims that Lindquist may have known some of the facts on his own. To support that argument, Defendant points only to Lindquist's deposition testimony in which Lindquist says he "assumed" plaintiff was a U.S. citizen and that he was somehow aware that Mr. al-Kidd was married. Def. Br. 44. Defendant's selective use of deposition testimony cannot override the district court's factual finding that Lindquist *did not* know the omitted facts. ER 20 (Order 7). Moreover, even Defendant does not claim Lindquist knew *all* of the relevant omitted facts. *See, e.g.*, SER 33-34 (Lindquist Depo. 43-44) (Lindquist did not know at the time whether Mr. al-Kidd had previously "spoke[n] to the agents voluntarily" or whether he had "been cooperative or uncooperative"); ER 470 (Lindquist Depo. 81) (Lindquist did not know that the FBI had "[n]ever told Mr. al-Kidd he should not travel abroad").

87 (extrinsic evidence, including that officer consulted with prosecutor, is irrelevant where officer misleads magistrate).[18]

3. Defendant recognizes, as he must, that there is no separate qualified immunity inquiry in *Franks* cases. *See* Def. Br. 36. A defendant who is found to have acted recklessly cannot then claim qualified immunity because, as this Court has repeatedly explained, "no reasonable officer could believe that it is constitutional to act dishonestly or recklessly with regard to the basis for probable cause in seeking a warrant." *Butler*, 281 F.3d at 1024. *See also, e.g.*, *Chism*, 661 F.3d at 393 n.15 (in *Franks* cases, "our qualified immunity analysis at the summary judgment stage is swallowed by the question of reckless or intentional disregard for the truth"); *Mendocino Environmental Center v. Mendocino County*, 192 F.3d 1283, 1295 (9th Cir. 1999) ("[A] police officer who recklessly or knowingly . . . omits material information from a search warrant affidavit 'cannot

[18] In *United States v. Leon*, 468 U.S. 897, 923 (1984), the Supreme Court set forth four *per se* categories in which an officer can never be said to have acted in good faith, one of which is where "the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth." In these four circumstances, a prosecutor's review cannot therefore immunize the officer. Accordingly, where, as here, the affiant misleads the magistrate, the Court "need not inquire further and can conclude that the good faith exception . . . does not apply." *Underwood*, 725 F.3d at 1085 (quotation marks omitted); *id*. at 1086-87 (discussing Supreme Court's recent decision in *Messerschmidt* [*v. Millender*, 132 S. Ct. 1235 (2012)] and concluding it "did not change the law regarding *Leon*'s four per se situations that fail to satisfy good faith").

be said to have acted in an objectively reasonable manner, and the shield of qualified immunity is lost.'") (citation omitted); *Liston*, 120 F.3d at 973 n.8 (same).[19]

Yet, despite this settled law, Defendant argues that even if the *Franks* recklessness standard is met, he is entitled to qualified immunity because he "did not violate any clearly established law regarding the required contents of a material witness warrant affidavit." Def. Br. 38. But, as the Court has stated, once recklessness is found, that is the end of the matter in a *Franks* case, because the recklessness standard already gives defendants leeway for innocent mistakes. *See supra* at 44 (citing cases).

In any event, even if the "clearly established" test were applicable, Plaintiff easily satisfies it here in light of this Court's longstanding guidance with regard to material witness warrants. When asking a magistrate judge to authorize the arrest of an innocent, uncharged witness based on the likelihood that the witness will not be cooperative in the future, any reasonable officer would know that the witness's record of *past* cooperation is something the magistrate judge would want to know.

[19] *See also Lombardi*, 117 F.3d at 1126 ("[I]t is . . . objectively unreasonable for a law enforcement officer deliberately or recklessly to make material omissions."); *Crowe*, 608 F.3d at 435 (no qualified immunity is available where a plaintiff "demonstrate[s] that the police officer deliberately falsified information presented to the magistrate or recklessly disregarded the truth"); *Ewing*, 588 F.3d at 1228 n.16.

Defendant has never been able to explain why it was "reasonable" for him to submit an affidavit that omitted *any mention* of Mr. al-Kidd's voluntary interviews with the FBI when the *very point* of the affidavit was to determine whether Mr. al-Kidd would cooperate with a subpoena.

Moreover, Defendant not only contends (erroneously) that the Court should apply the clearly-established test, but also argues incorrectly that the proper inquiry is whether there is clearly established Ninth Circuit precedent addressing the *exact* factual circumstance presented here. Def. Br. 48. This Court has consistently held that "'[t]o determine that the law was clearly established, we need not look to a case with identical or even 'materially similar' facts.'" *Furnace v. Sullivan*, 705 F.3d 1021, 1028 (9th Cir. 2013) (citation omitted). *See also Moss v. U.S. Secret Service*, 711 F.3d 941, 963 (9th Cir. 2013) (rejecting defendants' argument that "because there are no cases with similar fact patterns, a reasonable agent could not have known that their conduct was unconstitutional"); *Torres v. City of Madera*, 648 F.3d 1119, 1128-29 (9th Cir. 2011) ("[W]e have never required a prior case on all fours prohibiting that particular manifestation of unconstitutional conduct to find a right clearly established. To the contrary, we have repeatedly stressed that officials can still have fair warning that their conduct violates established law even in novel factual circumstances.") (quotation marks and citations omitted). That

there need not be a case that is factually identical is of course logical, especially in the probable cause context, where cases are so fact-specific.

In short, there is no "clearly established" prong in *Franks* cases because the qualified immunity prong is subsumed within the recklessness inquiry. But even assuming there were a clearly established prong, Plaintiff easily satisfies it on these facts. *Bacon* and *Arnsberg*—as well as common sense—would put any officer on notice that he should not omit all of the relevant facts favorable to the witness, including that the witness was a cooperative U.S. citizen.

4. Finally, Defendant argues that, in *Franks* cases, summary judgment may be granted only to defendants, not to plaintiffs—so that "[e]ven if this Court were to conclude that Agent Gneckow is not entitled to summary judgment regarding plaintiff's Fourth Amendment claim against him, plaintiff would only be entitled to a trial on that claim, rather than summary judgment." Def. Br. 49. There is simply no support for such an asymmetrical rule. Where the material facts are not in dispute, as here, there is no reason why a *Franks* claim cannot be resolved in the plaintiff's favor on summary judgment. Any other rule would be plainly inefficient, forcing courts to undertake lengthy trials even where plaintiffs have shown that no genuine disputes of material fact remain.[20]

[20] The two cases Defendant cites for this novel proposition, *Hervey* and *Liston*, do not support his contention. Rather, they stand only for the common-

To be sure, questions of credibility must be left to the jury. But here, the district court found that Defendant acted recklessly not because it disbelieved his testimony, but because even taking his testimony as true, the undisputed facts in the record made recklessness the only conclusion a reasonable jury could reach. *Cf. S.E.C. v. Platforms Wireless Int'l Corp*., 617 F.3d 1072, 1094 (9th Cir. 2010) (affirming summary judgment for plaintiff where defendant acted with "recklessness" under the Securities Exchange Act; explaining that "if no reasonable person could deny that the statement was materially misleading, a defendant with knowledge of the relevant facts cannot manufacture a genuine issue of material fact merely by denying . . . what any reasonable person would have known"). Nor did the district court's finding of recklessness turn on subjective intent. *See Lombardi v. City of El-Cajon*, 117 F.3d 1117, 1118 (9th Cir. 1997) ("specific intent to deceive the issuing court" is not a necessary element of a *Franks* claim). Instead, Defendant's conceded knowledge of the omitted facts, coupled with the overwhelmingly misleading affidavit he presented to a magistrate, established Defendant's reckless disregard for the truth. ER 24–27 (Order 11-14).

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sense proposition that a non-moving plaintiff may defeat a *defendant's* summary judgment motion by pointing to genuine questions of fact regarding what the defendant knew, and if such questions of fact remain, arguing that the matter must go to trial. *See Liston*, 120 F.3d at 975; *Hervey v. Estes*, 65 F.3d 784, 789 (9th Cir. 1995). Neither *Hervey* nor *Liston* cast doubt on whether a *Franks plaintiff* could be entitled to summary judgment; both cases simply involved appeals from the grant of defendants' motions.

II. THE DISTRICT COURT'S DECISION CAN BE AFFIRMED ON THE ALTERNATIVE GROUND THAT DEFENDANT RECKLESSLY INCLUDED FALSE STATEMENTS REGARDING THE PLANE TICKET, OR ON PLAINTIFF'S *MALLEY* THEORY.

A. False Statements Regarding The Plane Ticket

Magistrate Williams found that Defendant had been reckless in including the false statements about Mr. al-Kidd's plane ticket (*i.e.*, that Mr. al-Kidd had a one-way, $5,000 first-class ticket, rather than a round-trip, $1,700 coach ticket with an open-ended return date). ER 65 (R&R 28). The district court concluded, however, that Defendant had not been reckless in including those incorrect details and accordingly did not base its summary judgment ruling on those errors. ER 20-21 (Order 7-8). In Judge Lodge's view, Defendant had no obligation to verify information he learned from another agent. Instead, Judge Lodge awarded Plaintiff summary judgment based solely on the combination of Defendant's reckless omissions and his other recklessly misleading statements (those apart from the plane ticket's details). If, however, this Court disagrees with Judge Lodge's conclusion that the omissions and other misleading statements are enough to grant Plaintiff summary judgment, then it should address whether the false statements regarding the plane ticket were made recklessly, as Magistrate Williams concluded. *See Gordon v. Virtumundo, Inc.*, 575 F.3d 1040, 1047 (9th Cir. 2009)

(circuit court may affirm district court's grant of summary judgment on any ground supported by record).

Defendant contends that he was not reckless in failing to verify the facts reported by Agent Alvarez. While officers are generally "entitled to rely on information obtained from fellow law enforcement officers," Defendant in this case had a "duty to reasonably inquire or investigate" the information he received. *Mendocino*, 192 F.3d at 1293 n.16. That is because the information conveyed by Alvarez was admittedly uncertain, and "[c]onfirmation was readily available." *Beier v. City of Lewiston*, 354 F.3d 1058, 1071 (9th Cir. 2004).

When Defendant learned of Mr. al-Kidd's plane ticket from Agent Alvarez, he was aware that Alvarez had only partial information and that there was confusion surrounding the details of the ticket. Alvarez had not even figured out the date on which Mr. al-Kidd was flying. ER 426 (Gneckow Depo. 175). Thus, Defendant had reason to question the oral information he received from Alvarez—yet he did not ask Alvarez any "questions about al-Kidd's itinerary," ER 64 (R&R 27). Instead, Defendant "took [it] upon [him]self" to verify the information, SER 8 (Pl. Facts ¶29); ER 418 (Gneckow Depo. 166), "by contacting the FBI agent at Dulles airport." ER 65 (R&R 28). Yet Defendant never attempted to "confirm any details about the ticket price or type of ticket," even while he had the Dulles agent on the phone. ER 65 (R&R 28). Nor did he ever bother looking at Mr. al-Kidd's

flight information himself. Defendant still chose to include those unverified assertions about the ticket's class, cost, and one-way nature in the affidavit. That was reckless.

At the very least, the affidavit should have disclosed the uncertainty of the FBI's information about the nature of the ticket, which would have "put a reasonable magistrate on notice" that there was uncertainty about the details of Mr. al-Kidd's travel plans. *Liston*, 120 F.3d at 974; *accord Bravo*, 665 F.3d at 1086 (including fact that target of search warrant had been sentenced to prison "would have put the issuing judge on notice that [the target] could still be in custody," and "it is extremely doubtful that an issuing judge would simply have issued the warrant . . . without more information"); *Butler*, 281 F.3d at 1025 (affiant "failed to investigate th[e] possibility" that taxes had been paid by another means and "failed to inform the Magistrate of his incomplete search or of the possibility that the taxes had, in fact, been paid").

As this Court has emphasized, the failure to perform a reasonable investigation as to a material fact, and the failure to inform a magistrate of the limits of an investigation, are significant factors in a *Franks* case. *See Butler*, 281 F.3d at 1025–26; *Bravo*, 665 F.3d at 1087-88; *United States v. Davis*, 714 F.2d 896, 900 (9th Cir. 1983). Here, Magistrate Williams concluded:

> The bottom line is that Agent Gneckow assumed al-Kidd was a flight risk based on the first class, one-way ticket, even though he had no other concrete information upon which to cross-check his assumption. The failure to take a few additional steps in an otherwise extremely lengthy and thorough investigation spanning over three years was, in the Court's view, reckless.

ER 65 (R&R 28). If the omissions alone were not enough to establish liability, Defendant's failure to take minimal steps to shore up the concededly uncertain details of Plaintiff's plane ticket before presenting them to the magistrate establish his recklessness under *Franks*.[21]

B. Plaintiff's *Malley* Claim

The district court did not reach Plaintiff's *Malley* claim against Gneckow. If, however, the Court determines that it cannot affirm the district court's grant of summary judgment on the *Franks* theory, the *Malley* claim provides an alternative ground for affirmance.[22]

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[21] In addition to claiming he did not act recklessly, Defendant also now appears to suggest that the details of the plane ticket were inconsequential. Def. Br. 16. But Defendant obviously assumed they would have some effect on the Magistrate reviewing the application; why else would Defendant have chosen to include them as virtually the only facts related to flight risk?

[22] Judge Lodge did reach the *Malley* claim as to FBI agent Scott Mace, who physically submitted the affidavit but took no part in the investigation. Judge Lodge concluded that the affidavit did not establish "legal probable cause," but that Mace was entitled to qualified immunity under *Malley* because the affidavit on its face had at least some "indicia" of probable cause and Mace had limited involvement in the case. ER 32-35 (Order 19-22). The case against Mace remains

For the reasons already discussed, *supra* Section I.A., the affidavit on its face fell far short of establishing that it would be impracticable to secure Mr. al-Kidd's testimony by subpoena. Its only assertions pertaining to impracticability were that Mr. al-Kidd was taking a one-way trip to Saudi Arabia, and that he was flying first class on a ticket that cost $5000. Even taking these assertions as true, no reasonable officer could have viewed them as sufficient to establish impracticability in light of *Bacon* and *Arnsberg*, which—as discussed above—made clear that the government must establish more than that a witness would be *capable* of evading a subpoena; it must show the witness is *likely* to do so.

Here, Defendant did not give Magistrate Williams a single statement that Mr. al-Kidd had ever been uncooperative or had indicated any reluctance to testify. If the facts in *Bacon* and *Arnsberg* were not enough to establish impracticability, then surely the impracticability-related assertions made in the affidavit here—all of which boil down to the fact that Mr. al-Kidd was traveling abroad—plainly could not suffice. *Accord* Brief of Amici Curiae Former Federal Prosecutors, *al-Kidd v. Ashcroft*, No. 06-36059, 2007 WL 2786867, 10-11 (9th Cir. July 27, 2007) (faulting the affidavit on its face because it "presented no evidence that al-Kidd was reluctant to testify, or that any FBI agent had ever attempted to contact al-Kidd

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pending in district court because there is no final judgment under Fed. R. Civ. P. 54(b).

about testifying," and averred "only . . . that al-Kidd was scheduled to take a one-way, first-class flight to Saudi Arabia") (internal citations omitted).[23]

* * *

The record in this case overwhelmingly supports the district court's decision that (even apart from the false statements about the plane ticket) Defendant acted with reckless disregard for the truth in submitting a wholly incomplete and misleading affidavit. It is untenable for Defendant to argue that he was not reckless when he omitted *every single* fact that was favorable to Mr. al-Kidd. As Magistrate Williams put it, Defendant "cleansed" the affidavit of information that was obviously relevant to the court's decision whether to authorize the arrest of an innocent and cooperative United States citizen. ER 63 (R&R 26).

CONCLUSION

The district court's decision should be affirmed.

[23] Notably, at the Supreme Court, although the issue was not before them, three Justices specifically noted that "[t]he affidavit used to secure al-Kidd's detention was spare" on its face, questioning its sufficiency even without taking the false statements and omissions into account. *Al-Kidd*, 131 S. Ct. at 2088 n.2 (Ginsburg, J., concurring).

Respectfully submitted,

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**This brief has been prepared in part by a clinic operated by Yale Law School, but does not purport to present the school's institutional views, if any.*

STATEMENT OF RELATED CASES

Counsel is not aware of any related cases within the meaning of Ninth Circuit Rule 28-2.6, but Mr. al-Kidd's case has previously been before this Court with respect to a different defendant in the same litigation. *See al-Kidd v. Ashcroft*, 580 F.3d 949 (9th Cir. 2009), *rev'd*, 131 S. Ct. 2074 (2011).

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CERTIFICATE OF COMPLIANCE

I certify this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and (C) because this brief contains 13,736 words and has been prepared in a proportionally spaced typeface using Microsoft Word 14 point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 30, 2013.

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