UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

LAWYERS' COMMITTEE FOR 9/11 INQUIRY, INC. et al.,	)	
Plaintiffs,	)	
v.	)	**Case No. 1:19-cv-08312-PGG**
WILLIAM P. BARR, ATTORNEY GENERAL OF THE UNITED STATES, et al.	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

Mick G. Harrison, Esq. (Pro Hac Vice)
520 S. Walnut Street, #1147
Bloomington, IN 47402
Phone: 812-361-6220
Fax: 812-233-3135
E-mail: mickharrisonesq@gmail.com

John L. O'Kelly, Esq. (7147)
127 Bengeyfield Drive
East Williston, New York 11596
Phone 516-248-3338
Fax- 516-742-0203
E-mail: jokelly@optonline.net

Counsel for Plaintiffs

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Plaintiffs Lawyers' Committee for 9/11 Inquiry, Inc. ("Lawyers' Committee"), Architects and Engineers for 9/11 Truth ("AE"), Jeanne Evans, Christopher Gioia, Diana Hetzel, Robert McIlvaine, Michael O'Kelly, and Richard Gage (collectively, "Plaintiffs") hereby respectfully submit their Memorandum in Opposition to the Motion to Dismiss Plaintiffs First Amended Complaint filed by Defendants William P. Barr, Attorney General of the United States, Geoffrey S. Berman, United States Attorney for the Southern District of New York, and the United States Department of Justice ("Defendants").

I. PRELIMINARY STATEMENT

Defendants assert in their Memorandum of Law in Support of Defendants' Motion to Dismiss (Def. Memo.) that "Plaintiffs bring this action in an effort to compel Defendants pursuant to a writ of mandamus and the Administrative Procedure Act ("APA") to present certain information to a federal grand jury pursuant to 18 U.S.C. § 3332(a) ("Section 3332") and to release grand jury material related to any such presentation." This statement while accurate as far as it goes, does not go far enough. Plaintiffs also, conspicuously enough, also bring a claim under the First Amendment. *See* First Amended Complaint (FAC), Dkt. 20, Count II.

Contrary to Defendants' assertion that Plaintiffs' claims are not cognizable, Plaintiffs First Amended Complaint, as explained herein, does state valid claims under the Federal Mandamus Statute 28 U.S.C. § 1361, under the APA, under the First Amendment, and under common law. For the reasons stated herein, Defendants' Motion to Dismiss should be denied.

II. STANDING AND BACKGROUND FACTS

Plaintiffs hereby incorporate their allegations in the FAC and the nine exhibits to the FAC. See Dkt. 20, 20-1, 20-2, 20-3, 20-4, 20-5, 20-6, 20-7, 20-8, and 20-9. On April 10, 2018, the Lawyers' Committee for 9/11 Inquiry, Inc., a non-profit organization, delivered to the United

States Attorney for the Southern District of New York their fifty-four page "Petition To Report Federal Crimes Concerning 9/11 To Special Grand Jury or in the Alternative to Grand Jury Pursuant to the United States Constitution and 18 U.S.C. § 3332(a)" (hereafter "Petition") along with the extensive scientific and eye-witness testimony exhibits referenced in the Petition. In the Petition and cover letter the Lawyers' Committee requested that the United States Attorney (USA) present the information in the Petition to a federal special grand jury pursuant to the USA's duty to do so under 18 U.S.C. § 3332(a).

As noted in the Petition, the City of New York has issued over 2,700 death certificates related to the attacks on the World Trade Center on 9/11. In addition to the murder of over 2,000 innocent civilians, hundreds of First Responders were also murdered on 9/11 while selflessly attempting to save others. Many more First Responders have died subsequent to 9/11 as a result of their exposure to toxic and corrosive air contaminants at Ground Zero while participating in heroic rescue and recovery work. A number of FBI agents have also been reported to have died as a result of such exposures. Plaintiffs' Amended Petition presented to the USA extensive evidence that the World Trade Center Twin Towers (WTC1 and WTC2) and WTC Building 7 (WTC7) collapsed on 9/11 due to the detonation of pre-planted explosives and/or incendiaries.

On July 30, 2018, the Lawyers' Committee delivered to the USA their fifty-eight page "First Amended Petition To Report Federal Crimes Concerning 9/11 …" (hereafter "Amended Petition") (see Dkt. 20-8), and incorporated by reference in that Amended Petition the extensive scientific and eye-witness testimony exhibits referenced in the original Petition that had already been submitted to the USA on April 10, 2018. In the Amended Petition, the Lawyers' Committee concludes that the scientific, video, and eye-witness evidence taken together is conclusive that explosive and/or incendiary devices that had been pre-placed at the WTC were detonated causing

the collapse of the World Trade Center Twin Towers on 9/11, substantially increasing the tragic loss of life from the 9/11 terrorist attacks. In the Amended Petition and cover letter, the Lawyers' Committee requested that the United States Attorney present the information in the Amended Petition concerning alleged federal crimes to a federal special grand jury pursuant to the USA's duty to do so under 18 U.S.C. § 3332(a). A special grand jury has the power not only to investigate and indict, which if exercised would promote the Lawyers' Committee's goal of accountability, but also to issue public reports regarding any government malfeasance discovered during the investigation, which would promote the Lawyers' Committee's goal of transparency.

On November 7, 2018, the USA's Office sent the Lawyers' Committee a letter stating that the USA had received and reviewed the Lawyers' Committee's submissions and would comply with 18 U.S.C. § 3332(a). No details regarding what actions the USA would take were provided. The Plaintiffs have not received any further written communications from the USA. The Executive Director and Litigation Director for the Lawyers' Committee did communicate with the USA's Office by telephone in June of 2019 and asked Assistant USA Michael Ferrara if he could provide the status of the USA's action on the Lawyers' Committee's Amended Petition. AUSA Ferrara stated that, because of the secrecy requirements of Fed. R. Crim. P. 6(e), he could not provide any information beyond the letter previously provided by the AUSA stating that the USA would comply with 18 U.S.C. § 3332(a). Dkt. 20 ¶¶ 12-16, 54-55; Dkt. 20-1.

Plaintiffs Lawyers' Committee and AE have also submitted the evidence referenced in their Amended Petition to the State Department's "Rewards for Justice" (RFJ) program. On August 30, 2019, the Lawyers' Committee filed its application with the State Department under the RFJ Program for a reward or bounty (for information leading to the arrest of persons engaged in terrorism) (https://rewardsforjustice.net). *See* Amended Complaint, Dkt. 20 ¶¶ 61-65.

III. ARGUMENT

A. Legal Standards Applicable to Motions to Dismiss

Plaintiffs agree with Defendants' statement in their Memorandum (p. 4 Section I) of the legal standards governing motions to dismiss under Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(b)(6). However, Defendants do not point out that Defendants in their Motion to Dismiss and Memorandum have not articulated any basis under Fed. R. Civ. P. 12(b)(1) or Under Fed. R. Civ. P. 12(b)(6) for dismissing Plaintiffs' Count I request to the Court for release of grand jury records, either on standing grounds or on the basis of failure to state a claim. Thus Count I, in Plaintiffs' view, is not the proper subject of a Rule 12 motion to dismiss and instead should be decided on its merits after properly noticed and briefed summary judgment motions (or after a trial or evidentiary hearing).

B. The Duty Imposed by 18 U.S.C. § 3332(a) and Its Applicability to Plaintiffs' Claims

Defendants assert in their Memorandum that "To support their claims for relief, Plaintiffs rely on 18 U.S.C. § 3332(a)." Def.s Memo. at p. 10, Section II. While it is true that 18 U.S.C. § 3332(a) is the basis of Count III of Plaintiffs' FAC, it is not the basis of Count I or of Count II, and is not the sole basis of Count IV. Plaintiffs' Count I, which is a request for disclosure of grand jury records made to the Court for disclosure by the Court of records owned by and controlled by the Court, is not based on 18 U.S.C. § 3332(a).

Plaintiffs' Count II, a request for injunctive relief to end Defendants' obstruction of Plaintiffs' First Amendment right to petition the grand jury, is not based on 18 U.S.C. § 3332(a). Plaintiffs do reference 18 U.S.C. § 3332(a) in Count II but only to provide the context for the dispute underlying Count II. The right alleged violated in Count II is the right to petition for redress under the First Amendment. Plaintiffs' right to enforce that First Amendment right in the

federal courts is provided by the APA, 5 U.S.C. §§ 702, 706 and the First Amendment itself.

Plaintiffs' Count IV, is a request for mandamus and other relief under the APA. This count is based only in part on the mandatory duty imposed on Defendants by 18 U.S.C. § 3332(a). Count IV seeks mandatory injunctive relief to end Defendants' obstruction of Plaintiffs' First Amendment right to petition the grand jury and is also based on the APA provision allowing for judicial review and a judicial remedy for arbitrary and capricious agency action.

Defendants also assert that "Section 3332(a), 'which is part of the Organized Crime Control Act of 1970, was designed to encourage citizens to report organized crime and to guard against the possibility of government corruption.'" Def.s Memo. at 10, citing *Banks v. Buchanan*, 336 Fed App'x 122, 123 (3d Cir. 2009).[1] This cryptic reference hardly does the history and purpose of 18 U.S.C. § 3332(a) justice. This Court had an opportunity in an earlier case to address the history and purpose of 18 U.S.C. § 3332(a). *See In re Grand Jury Application*, 617 F.Supp. 199, 201-206 (S.D.N.Y. 1985), discussed in more detail *infra*. This decision is the most on point of all the cases Defendants' reference regarding the 18 U.S.C. § 3332(a) issues raised in the instant case, a decision made by this very Court, yet Defendants wish to dismiss this key decision with the waive of a hand as a "significant outlier." *See* Def.s Memo. at 8.

But this Court got it right in *In re Grand Jury Application*, 617 F.Supp. 199, 201-206 (S.D.N.Y. 1985). This Court's discussion of the legislative history of 18 U.S.C. § 3332(a) makes clear that prior to the statute there was a long-recognized and respected right of citizens to report crimes directly to a grand jury and that the enactment of 18 U.S.C. § 3332(a) was intended to preserve the right of citizens to have their information about federal crimes reported to grand

[1] "[Special] grand juries are not restricted to investigating only organized crime activities." *United States v. Koliboski,* 732 F.2d 1328, 1330 (7th Cir. 1984).

juries, it just modified the procedural mechanism for doing so (having the USA receive the information from the citizen and then pass that information on to the grand jury). *Id.*

C. Plaintiffs Have Standing

1. Count I May Not Be Dismissed on Standing Grounds

The Plaintiffs in their FAC request, under the common law, under Fed. R. Crim. P. 6(e), and as a First Amendment Petition, that the District Court release to Plaintiffs all substantive and ministerial records of any federal grand jury with which the U.S. Attorney has communicated regarding Plaintiffs' aforementioned Petition and/or Amended Petition and/or regarding the evidence submitted by Plaintiffs to the U.S. Attorney in conjunction with their Petition and Amended Petition, or such subset of such records as the law may allow to be released. The Plaintiffs do not request disclosure of any grand jury records that the Court determines might endanger any witness or member of the grand jury.

Even when grand-jury materials are in the custody of government attorneys, they remain the records of the courts, and courts have the authority to decide whether such records should be made public. *See, e.g., In re Special Grand Jury (for Anchorage, Alaska),* 674 F.2d 778 (1982). Plaintiffs have a common law right and a First Amendment right to petition the court for access to these grand jury related records, in addition to the right to request disclosure of grand jury records pursuant to Fed. R. Crim. P. 6(e). *Id.* The public has a general right to inspect and copy public records and documents, including judicial records and documents, pursuant to federal common law and pursuant to the First Amendment of the United States Constitution. *Id.*

The district court has common-law supervisory authority over the grand jury. *Id.* The district court's limited inherent power to supervise a grand jury includes the power to unseal grand-jury materials when appropriate. *Id.* The district court has continuing common-law

authority over matters pertaining to a grand jury, including any application to unseal grand-jury materials, in addition to authority to rule on disclosure of grand jury records pursuant to Federal Rule of Criminal Procedure 6(e). *Id*.

Ministerial records related to a grand jury should not be subject to any grand jury secrecy restrictions imposed by Rule 6(e), at least if properly redacted to protect the identity of grand jurors and witnesses. *Id*. Defendants rely on *United States v. Chambers*, 2019 WL 1014850 (D. Connecticut March 4, 2019) for the proposition that grand jury ministerial records require the same secrecy as proceedings before the grand jury. The Second Circuit has yet to decide this question. *See Chambers* at *2. Plaintiffs believe that the district court decisions holding that the same secrecy protections apply to ministerial records as to records of testimony and evidence submitted in proceedings before the grand jury itself are decided in error and that the law should make a distinction between ministerial records and records of substantive grand jury proceedings in terms of secrecy. Whichever position this Court takes on this question, this is a merits issue not a standing issue or failure to state a claim issue subject to a Rule 12 motion to dismiss.

There are a number of factors for the courts to consider in determining whether to disclose grand jury records. *See, e.g., In re Grand Jury Subpoena*, 103 F.3d 234, 237 (2d Cir. 1996), *In re Special Grand Jury* (for Anchorage, Alaska), 674 F.2d 778, 781-82 (9th Cir. 1982), but these regard active grand jury proceedings. The need for secrecy may be largely reduced where grand jury proceedings are not active. *See, e.g., In re Grand Jury Subpoena*, 103 F.3d 234, 237, 240 (2d Cir. 1996). Defendants should therefore be able to disclose to Plaintiffs the fact that the Amended Petition has not been submitted to any grand jury, which disclosure would be sufficient to establish that Plaintiffs' mandamus claims are not moot (and would moot Plaintiffs' Count I disclosure claim). Even where a proceeding falls under Rule 6(e), the presumption of

secrecy is rebuttable. *In re Grand Jury Subpoena*, 103 F.3d 234, 239 (2d Cir. 1996). That secrecy presumption should not be invoked at all, and therefore need not be rebutted by Plaintiffs, simply to find out the Amended Petition has not been submitted to a grand jury. A fair reading of the Defendants Memorandum reflects that it has not. *See* Def.s Memo. at 17 (pdf at 23).

On the other hand, if Plaintiffs' Amended Petition *has been* submitted to a grand jury, Plaintiffs can make a showing of a particularized need for disclosure of sufficient ministerial records to show that the grand jury inquiry into Plaintiffs' Amended Petition is active. Plaintiff Lawyers' Committee recently had an action dismissed by the U.S. District Court for the District of Columbia (now on appeal) on standing grounds. That action sought to compel the FBI and DOJ to comply with a 2013-2014 Congressional mandate to perform an independent evaluation of all evidence related to 9/11 not assessed by the original 9/11 Commission (in 2004). In rejecting one of Plaintiffs' standing arguments, relating to Plaintiffs' application for a reward under the Department of State's RFJ program, the District Court there held that it was "speculative" that Plaintiffs might receive such an award. *See Lawyers' Committee for 9/11 Inquiry, Inc. v. Wray*, 2020 WL 42845, at *6 (D.D.C. 2020).

The Defendants make the same "speculative" argument in their Motion to Dismiss. However, the extensive scientific and First Responder eye-witness evidence submitted in Plaintiffs' Amended Petition and to the RFJ program is not speculative but dispositive in proving terrorism crimes. The existence of a grand jury inquiry into that dispositive evidence, given the duties imposed by law on grand juries, creates a non-speculative scenario where Plaintiffs would have a reasonable probability of receiving a RFJ reward. The fact that such an outcome is not certain does not make it speculative. There is certainly no harm to the government's interests in making a limited disclosure that a grand jury proceeding on the Amended Petition, which has

been given to the grand jury, is active, given that Defendants gave Plaintiffs a public letter stating that they would comply with 28 U.S.C. § 3332(a), and Plaintiffs' Amended Petition has been posted for some time on the Lawyers' Committee's website. Such a disclosure would be important for Plaintiffs' ability to demonstrate their standing in the case now on appeal before the United States Court of Appeals for the District of Columbia Circuit (Case 20-5051).

It is important to note that the discussion in Defendants Memorandum regarding Plaintiffs' request for disclosure of grand jury records goes to the merits of Plaintiffs' Count I claim only and does not state either a standing objection or a failure to state a claim objection to Plaintiffs' request, i.e Defendants do not present a valid Rule 12 motion to dismiss Count I. Therefore, Count I should not be dismissed and should be decided on its merits on properly noticed and briefed summary judgment motions or after trial or an evidentiary hearing.

It is not clear that Defendants would have standing or would otherwise be entitled to make a motion to dismiss Plaintiffs' Count I First Amendment and Federal Common Law Petition to the Court for these Court-controlled records. This is not a dispute between the USA and Plaintiffs that the Court must resolve, but simply a request to the Court regarding court-controlled records. There should be no question that Plaintiffs have standing to litigate a dispute, even if this was such, regarding a request for grand jury records, just as citizens have standing to sue under the Freedom of Information Act (FOIA).[2] The only issue concerns the merits.

The Supreme Court has recognized a general right to inspect and copy public records and that the interest necessary to support the issuance of an order compelling access may be simply a citizen's (or the media's) desire to keep a watchful eye on the workings of government. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597-98 (1978). The "importance of public access

[2] *See, e.g., Akins v. FEC*, 101 F.3d 731, 736 (D.C. Cir. 1996).

to judicial records and documents cannot be belittled." *In re Special Grand Jury (for Anchorage, Alaska)*, 674 F.2d 778, 780-81, 784 (9th Cir. 1982).

2. Plaintiffs Have Standing to Bring Count II

Plaintiffs have a right under the First Amendment not only to petition the Court and to petition the DOJ, but also to petition a federal grand jury for redress. The fact that federal procedural law currently states, or appears to state, that citizens should not communicate their information regarding federal crimes directly to a grand jury,[3] but rather effect such communications through a USA, does not alter or eliminate Plaintiffs' constitutional right under the First Amendment to petition a federal grand jury for redress. Plaintiffs submitted their Petition and Amended Petition not only as a petition for redress to DOJ, but also as a petition for redress under the First Amendment to the grand jury itself, as a government entity.

Plaintiffs can only infer from the complete refusal by the U.S. Attorney to disclose even the minimum information needed to show Plaintiffs that their Amended Petition was relayed to a grand jury that the U.S. Attorney has failed to submit the Lawyers' Committee's Amended Petition to any grand jury. The Defendants' recent statements in their Memorandum supporting their Motion to Dismiss support this conclusion. *See* Def.s Memo. at 17 (pdf at 23).

Such a failure constitutes not only a failure to perform the mandatory duties imposed by 18 U.S.C. § 3332(a), but also constitutes a violation of Plaintiffs' First Amendment Right to

[3] "Such alleged offenses may be brought to the attention of the grand jury by the court or by any attorney appearing on behalf of the United States for the presentation of evidence." 18 U.S.C. § 3332(a). "Whoever attempts to influence the action or decision of any grand or petit juror of any court of the United States upon any issue or matter pending before such juror, or before the jury of which he is a member, or pertaining to his duties, by writing or sending to him any written communication, in relation to such issue or matter, shall be fined under this title or imprisoned not more than six months, or both. Nothing in this section shall be construed to prohibit the communication of a request to appear before the grand jury." 18 U.S.C. § 1504.

Petition (the grand jury). The Plaintiffs, and all citizens, may, or may not, have a right under law to get an answer from the Grand Jury (or any other government entity petitioned), but Plaintiffs like all citizens certainly have the right to have their petition for redress *delivered* to the government entity from which they seek redress. Neither the Congress nor the USA may obstruct the *delivery* of a citizen petition to a grand jury. The USA obstructed Plaintiffs' right to petition the grand jury for redress in violation of the First Amendment by refusing to relay Plaintiffs' Amended Petition and incorporated evidentiary exhibits to a grand jury.

The First Amendment, like some statutes, creates a right (the right to petition a governmental entity for redress of grievances) the invasion of which creates standing.

> **"Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute."** ... 18 U.S.C. § 3332(a) creates a duty on the part of the United States Attorney that runs to the plaintiffs, and the breach of that duty gives the plaintiffs standing to seek its enforcement.[footnote omitted]

In re Grand Jury Application, 617 F.Supp. 199, 201 (S.D.N.Y. 1985). *And see, In Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n. 3 (1973); *Warth v. Seldin*, 422 U.S. 490, 500 (1975); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 212 (1972) (White, J., concurring); *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1, 6 (1968).

The Defendants assert that nowhere in the American legal system is there recognition of an interest in being heard as an end in itself. Plaintiffs beg to differ. As the case law just cited and the First Amendment make clear, the Plaintiffs do have a right to petition government entities whether or not the government entity responds favorably or at all to the petition. The right Plaintiffs seek to enforce via Count II is a constitutionally based procedural right to petition government entities. The USA's obstruction of this right creates standing on the part of Plaintiffs to enforce it. The Supreme Court's decision in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-

61 (1992), relied on by Defendants, is not to the contrary. Under *Lujan*, plaintiff must first have suffered an "injury in fact," an invasion of a legally protected interest which is concrete and particularized and actual or imminent. Here the concrete and individualized actual harm suffered by Plaintiffs is the denial of their right to petition their government under the First Amendment.

Under *Lujan*, the second requirement is that there must be a causal connection between the injury and the conduct complained of, i.e. the injury has to be fairly traceable to the challenged action of the defendant. Here, the challenged action of the Defendants is the Defendants' refusal to provide Plaintiffs' Amended Petition and incorporated evidence of federal crimes to the special grand jury. It is that very action which, on its face, obstructs Plaintiffs' constitutional right to petition the grand jury because Defendants are serving as an unconstitutional censor of Plaintiffs' Amended Petition to the grand jury, in this case blocking the *delivery* of the Amended Petition to a government entity Plaintiffs intended to petition.

And, finally, under *Lujan*, the third requirement is that it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. In the instant case, for Count II, it is absolutely certain that a favorable decision from this Court requiring the Defendants to *deliver* Plaintiffs' Amended Petition and incorporated evidence to the special grand jury will redress the injury at issue, which is simply the obstruction by Defendants of such delivery. It is important to note that Plaintiffs have not sought a court order requiring Defendants to *prosecute* the crimes reported in the Plaintiffs' Amended Petition to the grand jury, although Defendants seem to want to convince the Court otherwise. The FAC Count II smply seeks an order to require Defendants to stop obstructing Plaintiffs' right to petition the grand jury under the First Amendment and common law and to simply *deliver* Plaintiffs' Amended Petition and incorporated evidence to the grand jury, so that the grand jury will at least have the opportunity

to exercise its discretion and perform its own duties regarding the reported federal crimes.

To hold that the courts or Congress could impose non-constitutional standing requirements or other procedural barriers that would prevent citizens from having any access to the courts to enforce constitutional rights would create a "serious constitutional problem." *See Juliana v. United States*, 947 F.3d 1159 (2020).

> Because denying "any judicial forum for a colorable constitutional claim" presents a "serious constitutional question," Congress's intent through a statute to do so must be clear. *See Webster v. Doe*, 486 U.S. 592, 603, 108 S.Ct. 2047, 100 L.Ed.2d 632 (1988) (quoting *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 n.12, 106 S.Ct. 2133, 90 L.Ed.2d 623 (1986)); *see also Allen v. Milas*, 896 F.3d 1094, 1108 (9th Cir. 2018) ("After *Webster*, we have assumed that the courts will be open to review of constitutional claims, even if they are closed to other claims."). Nothing in the APA evinces such an intent.[5] Whatever the merits of the plaintiffs' claims, they may proceed independently of the review procedures mandated by the APA. *See Sierra Club*, 929 F.3d at 698–99 ("Any constitutional challenge that Plaintiffs may advance under the APA would exist regardless of whether they could also assert an APA claim .... [C]laims challenging agency actions—particularly constitutional claims—may exist wholly apart from the APA."); *Navajo Nation*, 876 F.3d at 1170 (explaining that certain constitutional challenges to agency action are "not grounded in the APA").

Juliana v. United States, 947 F.3d 1159, 1167-68 (2020). Even if Congress has otherwise provided that jurisdiction will be lacking, the courts retain jurisdiction to review and strike down blatantly lawless agency action. *See Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667 (1986); *Leedom v. Kyne*, 358 U.S. 184 (1958). Consequently, neither the courts nor Congress may elevate their own authority to the point where, via Congress-created or court-created "prudential" or other rules of standing to sue, constitutional rights and protections are turned into nullities by eliminating citizens' access to the courts to enforce such constitutional rights, particularly in situations such as here where agency officials blatantly ignore the requirements of the Constitution and federal statutory rights and duties.

3. Plaintiffs Have Standing to Bring Count III

In order to grant a request for mandamus a court must find that three requirements are satisfied: (1) a clear right in the plaintiff to the relief sought; (2) a plainly defined and peremptory duty on the part of the defendant to do the act in question; and (3) no other adequate remedy available. *Lovallo v. Froehlke*, 468 F.2d 340, 343 (2d Cir. 1972), cert. denied, 411 U.S. 918 (1973); *In re Grand Jury Application*, 617 F.Supp. 199 (S.D.N.Y. 1985).

As this Court has held in regard to the first requirement, 18 U.S.C. § 3332(a) establishes a clear right in citizens who, like the Plaintiffs here, provided information to the USA regarding federal crimes. That right is, to have the USA provide their information regarding such crimes to a special grand jury. *In re Grand Jury Application*, 617 F.Supp. 199, 201, 206 (S.D.N.Y. 1985). The breach of such a statutory (or constitutional) right or duty, as noted *supra* in regard to the First Amendment right to petition the government, creates standing to enforce it.

> **18 U.S.C. § 3332(a) creates a duty on the part of the United States Attorney that runs to the plaintiffs, and the breach of that duty gives the plaintiffs standing to seek its enforcement**. … 18 U.S.C. § 3332(a) creates a right in every person to have information known by them concerning organized crime to be presented to the grand jury.

Id. (emphasis added). This Court has also held that the second requirement for mandamus relief, a plainly defined and peremptory duty on the part of the defendant, is established by 18 U.S.C. § 3332(a). This Court has held that:

> 18 U.S.C. § 3332(a) creates a duty on the part of the United States Attorney that runs to the plaintiffs … **Thus both the language of 18 U.S.C. § 3332(a) and its legislative history indicate that Congress intended to remove the prosecutor's discretion in deciding whether to present information to the grand jury**.

In re Grand Jury Application, 617 F.Supp. 199, 201, 206 (S.D.N.Y. 1985) (emphasis added).

The USA has, on information and belief, unlawfully withheld, in violation of his clear duty pursuant to 18 U.S.C. § 3332(a), Plaintiffs' Amended Petition from the special grand jury.

Consequently, Plaintiffs have standing to seek a writ of mandamus and order from this Court mandating that the USA provide Plaintiffs' Amended Petition to a special grand jury.

Again, the Supreme Court's decision in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), relied on by Defendants, is not to the contrary. Under *Lujan,* as noted *supra,* Plaintiffs must first be shown to have suffered an "injury in fact" an invasion of a legally protected interest which is concrete and particularized and actual or imminent. Here the concrete and individualized actual harm suffered by Plaintiffs is, similar to the harm explained *supra* regarding Count II, the refusal of Defendants to honor a legal right or duty to *deliver* Plaintiffs' Amended Petition and incorporated evidence to the special grand jury. In the case of Count III, as distinguished from Count II, this harm is Defendants' breach of their mandatory duty under 18 U.S.C. § 3332(a) to simply deliver Plaintiffs Amended Petition to the special grand jury, which constitutes an invasion of Plaintiffs' legally protected interest under the common law, under the Constitution, and under 18 U.S.C. § 3332(a) to have their Amended Petition delivered to the special grand jury. The distinction for Count II, as compared to Count III, is that for Count II the invasion of a legally protected interest (the harm) was caused by Defendants' violation of Plaintiffs' rights to petition the grand jury under the First Amendment.

Under *Lujan,* the second requirement is that there must be a causal connection between the injury and the conduct complained of, i.e. the injury has to be fairly traceable to the challenged action of the defendant. Here, the challenged action of the Defendants, as for Count II, is the Defendants' refusal to provide Plaintiffs' Amended Petition and incorporated evidence of federal crimes to the special grand jury. The rights at issue are procedural and the harm is effected by the Defendants blocking deliver of Plaintiffs' Amended Petition to the special grand jury, and this harm is legally cognizable, even if the grand jury would not return an indictment or

if the grand jury did return an indictment but the USA refused to prosecute it.

And, finally, under *Lujan*, as for Count II discussed *supra*, the third requirement is that it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable court decision. As for Count II, it is absolutely certain that a favorable decision from this Court requiring the Defendants to *deliver* Plaintiffs' Amended Petition and incorporated evidence to the special grand jury will redress the injury at issue in Count III, given that the invasion of a legally protected interest here involves violation of a procedural right clearly established under a federal statute (that evolved to refine a long recognized right of citizens to report crimes to grand juries that pre-existed 18 U.S.C. § 3332(a) under the common law and the Constitution).

Defendants in their Memorandum assert that the Second Circuit decision in *Zaleski v. Burns*, 606 F.3d 51, 52 (2d Cir. 2010) supports their lack of standing argument. But in *Zaleski*, the *pro se* plaintiff there was found to lack standing because he sought *direct* access to the grand jury *and* had never asked the USA to submit his information to a grand jury, a "fatal" standing omission. These facts are completely distinguishable. Here, Plaintiffs seek only indirect access to the grand jury (via the USA), and have explicitly requested the USA, in their Amended Petition and cover letter, to submit their Amended Petition and evidence to the special grand jury.

4. Plaintiffs Have Standing to Bring Count IV

The APA provides for suits against federal officials for mandamus type relief.

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal

> officer or officers (by name or by title), and their successors in office, personally responsible for compliance … .

5 U.S.C. § 702 (emphasis added). In an action under the APA, "The reviewing court shall--(1) compel agency action unlawfully withheld or unreasonably delayed … ." 5 U.S.C. § 706. Plaintiffs are entitled to an order mandating the USA to provide the Amended Petition and Exhibits to a special grand jury in order to remedy Defendants' agency action unreasonably delayed and withheld and that is arbitrary and capricious.

Count IV to some extent overlaps with Counts II and III, and to that extent the standing analysis is the same as presented *supra* for those other two counts, and that analysis is incorporated herein by reference. That overlap involves reliance on the First Amendment right to petition a grand jury, as is also the case for Count II, and reliance on the statutory right under 18 U.S.C. § 3332(a) to have a citizen report of a crime submitted to a grand jury. There is also overlap among Counts II, III, and IV in that all three counts include the APA as at least one of the laws providing a right of action, a right for Plaintiffs to bring suit in federal court.

There is also one significant area where Count IV does not overlap with the prior counts. That is the claim presented in Count IV that Defendants' refusal to provide Plaintiffs' Amended Petition and incorporated evidence to the special grand jury or any grand jury is arbitrary and capricious, even if it was not also contrary to law. Should the Court have to reach this aspect of Count IV (i.e. should the Court find that Plaintiffs' did not have any procedural rights under 18 U.S.C. § 3332(a), the First Amendment, common law, or the constitutional provisions that adopted the grand jury as it existed at common law that were violated by Defendants' actions), then the additional standing facts and analysis presented below will be necessary to consider.

Surviving 9/11 First Responders Plaintiffs Commissioner Christopher Gioia and Fire Chief Michael O'Kelly were called upon to respond to the 9/11 attacks and assist with the

emergency response operations at Ground Zero during the days, weeks, and months following the day of the attacks. Fire Chief O'Kelly was injured by exposure to the toxic and caustic dust and air pollution at Ground Zero during these emergency response efforts and is receiving some benefits as a result of these injuries and Commissioner Gioia who was likewise exposed is eligible for such benefits but thankfully has not developed a 9/11 related illness. Both men lost close friends and colleagues when the WTC Towers collapsed on 9/11 after the aircraft attacks.

The facts documented in Plaintiffs' Amended Petition, which was attached to the FAC, are incorporated herein by reference. Those facts, taken as true (and which Plaintiffs are prepared to prove up if necessary in an evidentiary hearing or trial) reflect that not only were explosives and incendiaries used at the WTC on 9/11 to bring down WTC1, WTC2, and WTC7, but that those explosives and incendiaries were detonated while there were still hundreds of First Responders in the WTC Towers, resulting in hundreds of First Responders losing their lives during the collapse of these buildings. The perpetrators of those crimes involving the use of such explosives have not only not been arrested and prosecuted, they have yet to be investigated.

Plaintiffs Fire Commissioner Gioia and Fire Chief O'Kelly have been harmed by the Defendants failure to even submit Plaintiffs' Amended Petition and incorporated evidence to the special grand jury, even apart from the invasion of their legal and procedural rights under 18 U.S.C. § 3332(a), the First Amendment, common law, or the constitutional provisions that adopted the grand jury as it existed at common law. This is so because they have an interest in avoiding having themselves, their colleagues, and their family members being again put in danger of being killed and injured by terrorists, foreign or domestic, using explosives to destroy buildings during emergency response operations. Commissioner Gioia as an active Fire Commissioner remains at risk of being called upon together with his fire district colleagues to

respond should there be another major terrorist attack in the YC area involving fires and explosives. Likewise, Plaintiffs Diana Hetzel and Jeanne Evans, who reside or have family who reside in the New York City (NYC) area, are at greater risk than the general public from a repetition of such crimes as New York City is a prime target for terrorist attacks. New York City was not selected by the perpetrators of the 9/11 crimes by coincidence. NYC was, both in 1993 and in 2001, and remains a prime target for a terrorist attack because of its size, dense population, landmarks, and its being a center for business and news media.

The risk of a repetition of the horrendous crimes that occurred on 9/11 involving the destruction by use of explosives of high-rise buildings while those buildings were still occupied by civilians and First Responders is unfortunately not speculative. What has been done can be done, and these perpetrators are still at large. It is in the interest of Fire Commissioner Gioia and Fire Chief O'Kelly to have the grand jury examine the Amended Petition evidence, which is scientifically (and legally) dispositive. There is a reasonable probability, given the strength of this evidence and the grand jury's legal duties to act in good faith to basically turn over every stone to investigate a crime, that at minimum the grand jury would be able to conclude that these terrible federal crimes involving use of explosives that killed thousands of people actually did occur. This in itself could serve as a deterrent to a repetition of such crimes using explosives because the perpetrators, even if still at large, would know that their crime and their methodology had been discovered and that in the future law enforcement and those who operate and maintain large buildings will be more vigilant and on the alert for suspicious activity that could involve accessing such buildings to plant explosives. This is so even if the grand jury were unable to return an indictment of specific perpetrators (which is also reasonably possible).

It is not speculative that a court decision granting the relief sought by Plaintiffs would

redress harm to Plaintiffs caused by the Defendants failure to present the Amended Petition to the grand jury. Presentation of this evidence at minimum should allow the grand jury to determine whether the alleged federal crimes involving murder by use of explosives committed on 9/11 did in fact occur. Until the grand jury is allowed to see this evidence, Fire Commissioner Gioia, Fire Chief O'Kelly, and their colleagues and family members, as well as Plaintiffs Jeanne Evans and Diana Hetzel and their families, will remain at an increased risk of being victim of a similar crime being committed by the original perpetrators or by terrorists who believe they can get by with the same modus operandi.

In addition, the organizational plaintiffs here have special interests that provide them standing. See Declarations of David Meiswinkle and Richard Gage, Dkt. 20-1 and Dkt. 20-2. As noted *supra*, Plaintiffs Lawyers' Committee and AE submitted an application to the State Department's Rewards for Justice Program (RFJ) which was based on their Amended Petition and incorporated evidence. The United States Court of Appeals for the District of Columbia Circuit has recognized that an applicant for a bounty may have special standing to compel performance by the USA of the duty in 18 U.S.C. § 3332(a). "We emphasize that Mohwish lacks standing because he has failed to identify any cognizable injury, not because § 3332 is inherently unenforceable at the instance of a private litigant; for example, a person who would be entitled to a bounty if a prosecution were initiated might well have standing. *Cf. Lujan*, 504 U.S. at 573, 112 S.Ct. at 2143." *Sargeant v. Dixon*, 130 F.3d 1067, 1070 (D.C. Cir. 1997).

Contrary to Defendants view, it is not speculative to think that a grand jury faced with dispositive scientific evidence and considerable eye witness testimony regarding the use of explosives in the destruction of two high-rise buildings that killed more than three thousand people including hundreds of First Responders would investigate the evidence thoroughly and

return an indictment that the USA would in turn pursue to a conviction. The fact that these outcomes are not certainties do not make them speculative.

Also contrary to Defendants' view, the Supreme Court's decision in *Vermont Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772-73 (2000) does not undercut this standing argument. Defendants quote Vermont as requiring that "The [financial reward-related] interest must consist of obtaining compensation for, or preventing, the violation of a legally protected right." The Court in *Vermont* held that the reward available to a relator in a qui tam suit did not satisfy this requirement. However, qui tam lawsuits under the federal False Claims Act are distinguishable from the Plaintiffs situation here in having applied for a State Department RFJ reward based on evidence submitted regarding terrorist crimes. Here, Plaintiffs are not simply, or primarily, seeking to obtain some kind of financial windfall, they are seeking through their application to the RFJ program, just as through their grand jury petition, to get the federal government to investigate and prosecute the yet to be acknowledged 9/11 crimes that are capable of repetition, including against Plaintiffs, while the perpetrators remain at large and while their modus operandi remain undiscovered by the federal law enforcement (and those who manage large buildings). Thus, Plaintiffs here do seek to prevent future terrorist crimes from being committed, including against them.

In addition, the interests of the organizational plaintiffs here have been further harmed by the Defendants' failures to comply with the mandate under 18 U.S.C. § 3332(a) because of Defendant Department of Justice's (DOJ) actions to fund local and state terrorism programs that attempt to discredit the organizational plaintiffs via communications to citizens from state or local police agencies. Such communications funded by DOJ are highly suspect under the First Amendment. *See, e.g.*, Amended Complaint Exhibit 9, Columbus Ohio Police/DOJ flyer for

public distribution (funded by a grant from the DOJ), Dkt. 20-9. This DOJ funded police flyer reflects efforts to convince citizens that organizations that question the government's explanation for the 9/11 attacks in any manner that would suggest that "Westerners" could have been involved are to be treated as suspected terrorists. *Id*. (at page 1 middle column 6th bullet). Apart from being potentially defamatory, such communications funded by DOJ not only significantly undercut the ability of nonprofits such as the Lawyers' Committee and AE to recruit volunteers and receive financial support, i.e. survive as a nonprofit, but also substantially impede efforts of the organizational plaintiffs to educate the public regarding 9/11 evidence. Had the government Defendants here complied with the mandate under 18 U.S.C. § 3332(a) to present the evidence of use of controlled demolition at the WTC on 9/11 to a federal grand jury, then the organizational plaintiffs would be substantially vindicated and these DOJ funded attempts to defame and discredit them could be effectively countered. *See* Amended Complaint, Dkt. 20 ¶¶ 66-68.

Plaintiff Richard Gage, who is a professional architect, has special interests that support his standing as a Plaintiff here. Until a grand jury or the DOJ or another federal agency considers and acknowledges the dispositive scientific evidence presented in Plaintiffs' Amended Petition showing that WTC1, WTC2, & WTC7 were destroyed on 9/11 by use of explosives, not because of fires, he and his clients and colleagues will be forced to incur unnecessary expense and effort to design and construct (and fund) high-rise buildings to meet a perceived building vulnerability to fire that simply does not exist.

As noted *supra*, Plaintiff Robert McILvaine lost his son Bobby at the WTC on 9/11 as the result of the use of explosives to destroy the WTC Towers. The Defendants' refusal to provide a grand jury with the Amended Petition and incorporated evidence has prevented the grand jury from evaluating that evidence which is scientifically dispositive and which should lead to ether

an indictment or at minimum a public report acknowledging that explosives were used at the WTC on 9/11. Such an indictment or grand jury report is reasonably expected to result in a better public understanding of the events of 9/11 and possibly disclosure of criminal conduct or government malfeasance, misfeasance or non-feasance not previously known by the public. The resulting public disclosures will provide a more complete picture of the truth of what happened on 9/11, assisting the family members of the 9/11 victims, including Robert McIlvaine, in coming to closure regarding this tragedy. This is an important personal interest, shared only by the family members of the other 9/11 victims, and is distinct from the general public's interests.

D. The Mandatory Duty in 18 U.S.C. § 3332(a) May Be Enforced Pursuant to the Federal Mandamus Statute and the Administrative Procedures Act

Defendants in their Memorandum assert, erroneously, that "Even if Plaintiffs could establish they had a cognizable injury sufficient to satisfy Article III's standing requirements, they would still need to establish that a private right of action exists **under Section 3332(a)** in order to enforce it.." Def.s Memo. at 16 (emphasis added). This is simply an incorrect statement of federal law. A citizen with standing may bring an action pursuant to the APA seeking relief from an agency official's violation of a statutory or constitutional requirement, duty, or right. *See* 5 U.S.C. §§ 702, 706; *Juliana v. United States*, 947 F.3d 1159, 1167-68 (2020). Further, under the Federal Mandamus Statute, a citizen has a right to bring an action to compel performance by an agency official of a mandatory duty. 28 U.S.C. § 1361. Consequently, there is simply no need for 18 U.S.C. § 3332(a) itself to provide Plaintiffs with an implied right to sue, and Defendants' argument in this regard is both a red herring and a straw man.

E. Plaintiffs Adequately State Valid Claims in All Four Counts of the FAC

Defendants assert that Plaintiffs cannot state a claim under the Federal Mandamus Statute

28 U.S.C. § 1361, or under the APA (Counts III and IV) because in their view the federal prosecutors (the USA) have complete discretion as to what information they do or do not submit to a federal special grand jury. Def.s Memo. at 18-20. The Defendants' view was previously, and correctly, rejected by this Court, which gave a detailed history of 18 U.S.C. § 3332(a).

As Senator McClellan, one of the bill's co-sponsors, explained:

> The jury would not be limited by the charge of the court but would have the right to pursue any violation of the criminal law within its jurisdiction. **Citizens would be accorded the right to contact the jury, through the foreman, regarding any alleged criminal act.** Id.
>
> * * *
>
> (b) It shall be the duty of each grand jury impaneled within any judicial district to inquire into each offense against the criminal laws of the United States alleged to have been committed within that district which is **brought to the attention of the grand jury by the court or by any person.**
>
> (c) **No person shall be deprived of opportunity to communicate to the foreman of a grand jury any information concerning any such alleged offense or instance of misconduct.**
> Senate Hearings at 7.
>
> * * *
>
> In a memorandum submitted to the Senate committee by then Attorney General John Mitchell, the Justice Department voiced its support of Title I: …
>
> **This provision is a statutory recognition of existing case law holding that the inquisitorial powers of a grand jury are virtually unlimited and that the grand jury can initiate a case on its own** … . **This provision is apparently intended to make it clear that no violation of this section is committed by a person who merely communicates to the foreman of a grand jury any information regarding any offenses against the laws of the United States. This provision could well encourage wider public participation in the fight against organized crime and we, therefore, support it.**
> Senate Hearings at 366–67.
>
> * * *
>
> **Analysis of the language of the Act as it was finally enacted indicates that Congress intended the United States Attorney to be the channel through**

> **which ordinary citizens conveyed information about organized crime to the grand jury. To argue, as the government does (and as Judge Bork did in Nathan, *supra*), that the prosecutor has total discretion in deciding what information to present to the grand jury flies in the face of the Act's legislative history.**
>
> * * *
>
> **Thus both the language of 18 U.S.C. § 3332(a) and its legislative history indicate that Congress intended to remove the prosecutor's discretion in deciding whether to present information to the grand jury. He retains discretion with respect to how he acts and what he recommends concerning that information.**
>
> **18 U.S.C. § 3332(a) creates a right in every person to have information known by them concerning organized crime to be presented to the grand jury. It provides two ways for this to occur—either the court may bring it to the grand jury's attention or a United States attorney can.**
>
> **Since the United States Attorney has been requested to present certain information to the grand jury he must do so. I will not relieve him of a duty which Congress has seen fit to impose. 18 U.S.C. § 3332(a) imposes a "plainly defined and peremptory duty" on the part of the United States Attorney to present the plaintiffs' information concerning the alleged wrongdoing of the other defendants to the grand jury.**
>
> **The statute requires that the information proffered by plaintiffs, and the identity of plaintiffs, be brought to the attention of the grand jury.**

In re Grand Jury Application, 617 F.Supp. 199, 204 (S.D.N.Y. 1985) (emphasis added). The D.C. Circuit has also recognized that 18 U.S.C. § 3332(a) imposes a mandatory duty on the USA. *See Sargeant v. Dixon*, 130 F.3d 1067, 1069 (D.C. Cir. 1997).

Plaintiffs have stated a claim for mandamus relief under 28 U.S.C. §1361, and under the APA. There is no basis for dismissing Count III or Count IV for failure to state a claim. Defendants do not assert that Counts I and II fail to state a claim.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny Defendants' Motion to Dismiss.

Respectfully submitted,

/s/ Mick G. Harrison
Mick G. Harrison, Esq. (Pro Hac Vice)
520 S. Walnut Street, #1147
Bloomington, IN 47402
Phone: 812-361-6220
Fax: 812-233-3135
E-mail: mickharrisonesq@gmail.com

/s/ John O'Kelly
John L. O'Kelly, Esq. (7147)
127 Bengeyfield Drive
East Williston, New York 11596
Phone 516-248-3338
Fax- 516-742-0203
jokelly@optonline.net

Dated: April 24, 2020

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

LAWYERS' COMMITTEE FOR 9/11 INQUIRY, INC.; ARCHITECTS AND ENGINEERS FOR 9/11 TRUTH; JEANNE EVANS; RICHARD GAGE; COMISSIONER CHRISTOPHER GIOIA; DIANA HETZEL; ROBERT MCILVAINE; AND MICHAEL J. O'KELLY,	)	
Plaintiffs,	)	
v.	)	**Case No. 1:19-cv-08312-PGG**
WILLIAM P. BARR, ATTORNEY GENERAL OF THE UNITED STATES; UNITED STATES DEPARTMENT OF JUSTICE; AND GEOFFREY BERMAN, UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF NEW YORK.	)	
Defendants.	)	

CERTIFICATE OF SERVICE

I, the undersigned counsel, hereby certify that on April 24, 2020, I caused a copy of Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss the first amended complaint to be served on Defendants' counsel by e-mail at the following address: alexander.hogan@usdoj.gov.

/s/ Mick G. Harrison

Mick G. Harrison, Esq. (Pro Hac Vice)
520 S. Walnut Street, #1147
Bloomington, IN 47402
Phone: 812-361-6220
Fax: 812-233-3135
E-mail: mickharrisonesq@gmail.com