UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LAWYERS' COMMITTEE FOR 9/11 INQUIRY, INC., *et al.*, Plaintiffs, v. ATTORNEY GENERAL WILLIAM BARR, *et al.*, Defendants.	19 Civ. 8312 (PGG)

REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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PRELIMINARY STATEMENT

In their opposition ("Plaintiffs' Opposition" or "Pl. Opp."), Plaintiffs fail to overcome the fundamental defects in their claims identified in Defendants' memorandum of law in support of their motion to dismiss ("Motion to Dismiss" or "Defs. Mem."). Plaintiffs seek to have the United States Attorney's Office ("USAO") present their "Amended Petition," which claims to set forth evidence that explosives were used to destroy the World Trade Center on 9/11, to a grand jury, and Plaintiffs further seek the resulting grand jury materials. To the extent the USAO has not presented the Amended Petition to a grand jury, Plaintiffs do not have a basis to compel it to do so, and they do not have a right to any grand jury materials.

ARGUMENT

I. Plaintiffs Are Not Entitled to the Grand Jury Materials They Seek

Plaintiffs seek to have the USAO present the Amended Petition to a grand jury and to release to Plaintiffs materials relating to the proceedings before that grand jury. Plaintiffs appear to be under the misimpression that Defendants' motion to dismiss the claim regarding the release of grand jury materials is not based upon Plaintiffs' failure to state a claim. *See* Pl. Opp. at 13. To the contrary, as Defendants argued in their Motion to Dismiss, *see* Defs. Mem. at 21-22, Plaintiffs indeed fail to state a claim for the release of the materials that they seek.

As set forth in Defendants' Motion to Dismiss, grand jury materials may only be released under very discrete circumstances that are either specifically articulated by Federal Rule of Criminal Procedure 6(e) or pursuant to the special circumstances exception recognized by the Second Circuit. *See* Defs. Mem. at 20-25. Neither Rule 6(e) nor the special circumstances exception warrant the release of these records. *See id.* Accordingly, Plaintiffs fail to state a claim because even accepting the allegations in Plaintiffs' Amended Complaint as true, they do not

warrant the release of these records. In other words, when a statute only provides relief under discrete scenarios, as is the case here, if plaintiff fails to allege that one of those scenarios applies, then the plaintiff has failed to state a claim.

Plaintiffs also argue that a distinction should be drawn between substantive and ministerial records of the grand jury when determining whether release is warranted. *See* Pl. Opp. at 11. Plaintiffs provide no support for this distinction, other than saying that the Second Circuit has yet to decide the question. Defendants, on the other hand, cited multiple cases in this Circuit where courts have specifically rejected such a distinction. *See* Defs. Mem. at 22. Plaintiffs' proposed outcome is also contrary to the principle articulated by the Supreme Court in *United States v. Sells Engineering*, 463 U.S. 418, 425 (1983), when it stated, "[b]oth Congress and [the Supreme Court] have consistently stood ready to defend [grand jury secrecy] against unwarranted intrusion. In the absence of a clear indication in a *statute or Rule*, we must always be reluctant to conclude that a breach of this secrecy has been authorized." *Id*. (emphasis added). Here, there is no statute or rule that distinguishes between ministerial and substantive records—and there is good reason for that, as demonstrated by the instant case. Plaintiffs claim that the secrecy presumption should not be invoked to simply determine whether the Amended Petition has been submitted to a grand jury. *See* Pl. Mem. at 12. However, assuming the allegations in Plaintiffs' Amended Petition are true, confirming that the Amended Petition has been presented to the grand jury would alert at large terrorists to the fact that the USAO has evidence implicating their roles in the 9/11 attacks. Surely this implicates the concerns grand jury secrecy is meant to protect.

The Court should also reject Plaintiffs' argument that they have a particularized need for these records because they had a different case dismissed on standing grounds that is now on appeal. *See Lawyers' Comm. For 9/11 Inquiry, Inc. v. Wray*, 424 F. Supp. 3d 26 (D.D.C. 2020).

In that case, the court rejected Plaintiffs' argument that they had standing to compel the FBI to conduct an investigation into 9/11 due to the reward that they may receive for bringing terrorists to justice because such a reward was too speculative. *Id*. at 34. Plaintiffs argue that if they knew that a grand jury was actively investigating their Amended Petition, then the likelihood that they would receive such a reward would be less speculative, thus potentially altering the conclusion of the court in this other case. The existence of such a grand jury investigation, however, would do nothing to alter *Wray*'s conclusion that the reward would, still, be wildly speculative. In *Wray*, the court concluded that, regardless of the FBI's potential investigation into the matter, a reward was still entirely speculative. *See id*.; *see also* Defs. Mem. at 11-12. The same reasoning would apply if a grand jury was investigating the matter.

II. Presentment of Plaintiffs' Amended Petition to a Grand Jury

Plaintiffs' Amended Complaint and Plaintiffs' Opposition catalog a number of speculative and attenuated harms insufficient to confer standing as to their claim that Defendants must present their Amended Petition to the grand jury, such as the special interest they have to further the goals of their organizations, *see* Am. Cmpl. at ¶¶ 13, 19, 42, their potential monetary reward for capturing terrorists, *see id*. at ¶¶ 61-65, the effect that 9/11 had on the individual Plaintiffs, *see id*. at ¶¶ 23-46, or that a flyer from a Columbus, Ohio police department defames them and, presumably, a grand jury investigation could vindicate them. *Id*. at ¶¶ 66-68. In addition to these alleged harms, Plaintiffs claim that the failure to present the Amended Petition to the grand jury also amounts to a violation of their First Amendment right to petition their government, thus amounting to a harm sufficient to confer standing. None of these harms is sufficient for Plaintiffs to establish standing.

A. Alleged Harms Unrelated to the First Amendment

Plaintiffs claim that Defendants' failure to abide by Section 3332(a) and present their Amended Petition to the grand jury confers standing upon them to pursue their APA and mandamus claims. Pl. Opp. at 19, 21. The Second Circuit in *Zaleski*, like the many other cases cited by Defendants, specifically rejected that a violation of Section 3332(a), on its own, is sufficient to confer standing. *See Zaleski v. Burns*, 606 F.3d 51, 52 (2d Cir. 2010) ("Without more, the denial of his § 3332(a) right is insufficient."); *see also* Defs. Mem. at 6-8 (collecting cases).[1] In other words, in order to have standing, Plaintiffs must have suffered a harm above and beyond the mere failure to present the Amended Petition to the grand jury. Accordingly, Plaintiffs must, despite any alleged statutory violation, satisfy the three requirements articulated in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "First, the plaintiff must have suffered an injury in fact–an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical." *Id*. (internal citations and quotations omitted). "Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant." *Id*. (internal citations and quotations omitted). Third, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id* at 561. (internal citations and quotations omitted).[2]

[1] "Even if holding that [plaintiff] lacks standing meant that no one could initiate judicial enforcement of § 3332, however, it would not follow that [plaintiff] (or anyone else) must have standing after all. Rather, in such circumstance we would infer that the subject matter is committed to the surveillance of Congress, and ultimately to the political process." *Sargeant v. Dixon*, 130 F.3d 1067, 1070 (D.C. Cir. 1997).

[2] Defendants are not attempting to impose "non-constitutional standing requirements." Pl. Opp. at 17. Rather, the requirements of Article III (i.e. constitutional standing) are those set forth in *Lujan*.

For the same reasons discussed in Defendants' Motion to Dismiss, Plaintiffs' alleged injuries, *see supra* at 3, do not satisfy the criteria set forth in *Lujan*. *See* Defs. Mem. at 10-15. For example, it is entirely speculative that a person living in the New York area will be the victim of a future terrorist attack and that presenting the Amended Petition to a grand jury would prevent such an attack. *See* Pl. Opp. at 23. Similarly, health complications arising from 9/11 are not injuries traceable to Defendants' alleged failure to present the Amended Petition to a grand jury. *Id*. at 22. It is also completely speculative that presenting the Amended Petition to a grand jury would result in changes to building codes that would have any impact on how Plaintiff Gage constructs buildings. *Id*. at 26.

As to their potential reward for bringing terrorists to justice, Plaintiffs' attempt to distinguish *Vermont Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772-73 (2000), is entirely unpersuasive. *See* Pl. Opp. at 25. There, in rejecting that the relator's share of a recovery in a *qui tam* action was sufficient to confer standing, the Supreme Court stated, "[a]s we have held in another context, however, an interest that is merely a byproduct of the suit itself cannot give rise to a cognizable injury in fact for Article III standing purposes." *Vermont Agency*, 529 U.S. at 773. Plaintiffs argue that this case is somehow distinguishable because Plaintiffs are attempting to "prevent future terrorist crimes." Pl. Opp. at 25. That is irrelevant to their argument that a reward gives them standing to sue and, in any event, is an argument that similarly applies to a *qui tam* relator that is attempting to prevent financial fraud against the government. In short, Plaintiffs have failed to assert any injury sufficient to give them standing under *Lujan*.

B. First Amendment

In their Amended Complaint, "Plaintiffs respectfully request injunctive relief from the Court to end this obstruction and to require the U.S. Attorney to honor the Plaintiffs' rights to

petition the grand jury (through the U.S. Attorney pursuant to 18 U.S.C. § 3332(a))." Am. Cmpl. at ¶ 91. Plaintiffs appeared to contend in their Amended Complaint that they could use Section 3332(a) to enforce an alleged violation of their First Amendment right to petition the grand jury. For the reasons discussed above, Plaintiffs do not have standing to enforce Section 3332(a). However, to the extent Plaintiffs contend that they have a freestanding right under the First Amendment, independent of Section 3332(a), to have their Amended Petition presented to the grand jury, that argument is unavailing.

As an initial matter, the same standing concerns articulated above still apply. In *Zaleski*, the court concluded that "[w]ithout more, the denial of his § 3332(a) right is insufficient." *Zaleski*, 606 F.3d at 52. The same reasoning applies even though Plaintiffs try to frame their claim as one under the First Amendment (a reframing that was equally available to the court in *Zaleski*). Plaintiffs still must have suffered a concrete injury other than Defendants' mere failure to provide the Amended Petition to the grand jury. In other words, Plaintiffs, regardless of whether they are alleging a violation of Section 3332(a) or the First Amendment, must still satisfy the "the irreducible constitutional minimum of standing." *Lujan*, 504 U.S. at 560. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009) (rejecting argument that a procedural violation is sufficient to confer standing because "injury in fact is a hard floor of Article III jurisdiction"); *Whalen v. Vill. of Hoosick Falls*, No. 07-cv-0057, 2008 WL 2324132, at *1 (2d Cir. 2008) (rejecting argument that standing can be based on a constitutional procedural violation without an actual injury). For the reasons articulated above, the harms they asset are insufficient to confer standing.

Putting standing aside, Plaintiffs' attempt to repackage their claim under the First Amendment, as opposed to a statutory violation of Section 3332(a), should be rejected. While not specifically considered by these courts, the same potential First Amendment theory existed in the

many cases cited by Defendants in their Motion to Dismiss where courts, including the Second Circuit and District of Columbia Circuit, rejected attempts to bring suit based upon a defendant's alleged failure to present information to a grand jury pursuant to Section 3332(a). Nonetheless, all of these cases dismissed the claims brought by plaintiffs. Defs. Mem. at 6-8, 17.

In any event, there is no First Amendment right to directly petition the grand jury, as courts have consistently held. As Judge Cabranes stated in *In re New Haven Grand Jury*, 604 F. Supp. 453, 459 (D. Conn. 1985) (internal quotation and citation omitted):

> A rule that would permit anyone to communicate with a grand jury without the supervision or screening of the prosecutor or the court would compromise, if not utterly subvert, both of the historic functions of the grand jury, for it would facilitate the pursuit of vendettas and the gratification of private malice. A rule that would open the grand jury to the public without judicial or prosecutorial intervention is an invitation to anyone interested in trying to persuade a majority of the grand jury, by hook or by crook, to conduct investigations that a prosecutor has determined to be inappropriate or unavailing. The protection of society at large, as well as the preservation of the grand jury as an instrument of justice, requires that the court place limits on direct and unsupervised communications with the grand jury by disgruntled individuals who may have personal axes to grind.

The court went on to state that, "the commencement of a federal criminal case by submission of evidence to a grand jury is 'an executive function within the exclusive prerogative of the Attorney General' . . . Accordingly, a rule that would afford the general public unsupervised access to the grand jury is a rule calculated to empower the mischievous and the criminal and injure the innocent." *Id*. at 460 (quoting *In re Persico*, 522 F.2d 41, 54-55 (2d Cir.1975)). In considering whether there was a First Amendment right to petition a grand jury, the *New Haven* court concluded that "[n]othing in these cases suggests the existence of a First Amendment right of a complainant to communicate in writing, or otherwise, with a grand jury . . . Without precluding the possibility of some exceptional circumstances not now anticipated, the court simply does not find in the First Amendment or elsewhere a requirement that direct access to a grand jury must be

provided to a member of the public without the review and supervision of a prosecutor or a judge." *Id*. at 457 n.8.

Other Courts have similarly held that there is no First Amendment right for members of the public to communicate directly with a grand jury. For example, in *Baranoski v. U.S. Attn. Off.*, 215 Fed. App'x 155 (3d Cir. 2007), the plaintiff sought to communicate directly with a grand jury, including through reliance on Section 3332(a). The Third Circuit upheld dismissal of the complaint and stated that plaintiff did not "have a constitutional, statutory or common law right to independently communicate with a federal grand jury. The commencement of a federal criminal case by submission of evidence to a grand jury is 'an executive function within the exclusive prerogative of the Attorney General.'" *Id*. at 156 (quoting *In re Persico*, 522 F.2d at 54-55); *see also Sibley v. Obama*, 866 F. Supp. 2d 17, 22 (D.D.C. 2012) ("The First Amendment right . . . does not inherently include a right to communicate directly with the grand jury."); *In re Mayer*, No. 05-cv-33 (SRC), 2006 WL 20526, at *2 (D.N.J. Jan. 4, 2006) (rejecting claim that individuals have right to communicate with grand jury).

And Congress clearly did not believe that such a right to directly petition the grand jury existed. In enacting the statute allowing for the creation of special grand juries, Congress imposed a framework as to how they were to function. *See* 18 U.S.C. §§ 1331-1334. Consistent with traditional practice in the American legal system as highlighted above, Congress recognized that the prosecutor is the screening mechanism through which the public interacts with the grand jury, which is why Section 3332(a) requires the public to send information to prosecutors, rather than giving them direct access to the grand jury. *See Wright v. United States*, 732 F.2d 1048, 1055 n.6 (2d Cir. 1984) ("Would it have been unreasonable for the defendant—or others—to doubt that the

public officer, whose burden it was to screen the complaint for frivolousness and, if necessary, guide its destiny before the Grand Jury, would do so disinterestedly?") (internal quotation omitted).

Similarly in the context of grand juries, as Plaintiffs note, *see* Pl. Opp. at n.3, certain communications by the public with a grand jury are subject to criminal penalties. *See* 18 U.S.C. § 1504 ("Whoever attempts to influence the action or decision of any grand or petit juror . . . by writing . . . 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."). Clearly Congress, like the courts cited above, does not believe there is an unfettered right for the public to communicate with grand juries. Even the lone case identified by Plaintiffs finding that a member of the public has standing to compel the USAO to present information to a grand jury did not conclude that the public had the right to petition the grand jury directly. To the contrary, this court stated, "[a]nalysis of the language of the Act . . . 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." *In re Grand Jury Application*, 617 F. Supp. 199, 205 (S.D.N.Y. 1985).

Such a conclusion is warranted by the strong institutional concerns identified above in *New Haven*. Similarly, the court in *In re Mayer* noted that "[g]iving individuals direct access to the grand jury and removing the governmental prosecuting authorities from the process would undermine the prosecutor's screening authority and almost certainly increase the likelihood that wrongful indictments would be returned, thereby undermining the very rights of the accused that the Fifth Amendment seeks to protect." *In re Mayer*, 2006 WL 20526, at *2 n.3. Recognizing Plaintiffs' claim that they have a First Amendment right to directly communicate with the grand jury would fundamentally change how the criminal justice system operates. It would effectively

allow any citizen with any complaint access to the investigative powers of the grand jury. Such a result would be unprecedented and would lead to the undesirable outcomes highlighted above.[3]

Finally, even if the Court were to conclude that Plaintiffs have a First Amendment right to petition the grand jury, they do not have a constitutional right to have the USAO help them do so. Rather, in order to find that Plaintiffs have a right to directly petition the grand jury, the Court would have to reject the argument that the prosecutor serves as the interface between the public and the grand jury. If that is the case, then Plaintiffs would be able to pursue that right by directly communicating with the grand jury or, perhaps, through the court itself. It is only Section 3332(a) that, arguably, requires the USAO to convey the Amended Petition to the grand jury. Therefore, the analysis would, nonetheless, return to the fact that a violation of Section 3332(a), on its own without an otherwise cognizable injury, is insufficient for Plaintiffs to bring suit. In other words, the only right that Defendants could have been said to have violated derives from Section 3332(a), which, as stated by the Second Circuit in *Zaleski*, is not enough to confer standing.

CONCLUSION

Plaintiffs fail to state a claim that they are entitled to the grand jury records that they seek. As to the presentment of the Amended Petition to a grand jury, Plaintiffs have not articulated a harm sufficient to satisfy standing requirements. Additionally, Plaintiffs fail to state a claim that they have a First Amendment right to directly petition the grand jury. Accordingly, this case must be dismissed.

[3] Importantly, Plaintiffs have engaged in much petitioning as they have sent their Amended Petition to both the USAO, the Attorney General, and the President. *See* Am. Cmpl. at ¶ 58. They have, additionally, asked the FBI to investigate their theory of the 9/11 attacks. *See Lawyers' Comm. For 9/11 Inquiry*, 424 F. Supp. 3d at 28. And, as Plaintiffs note, they are not entitled to a response to such petitioning. *See* Pl. Opp at 15; *see also We the People Found, Inc. v. United States*, 485 F.3d 140, 144 (D.C. Cir. 2007) (holding that First Amendment "does not provide a right to a response to or official consideration of a petition").

Dated: May 8, 2020
New York, New York

Respectfully Submitted,

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