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)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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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"), by their attorney Geoffrey S. Berman, submit this memorandum of law in support of their motion to dismiss the Amended Complaint ("Am. Cmpl.") of 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") pursuant to Federal Rules of Civil Procedure ("FRCP") 12(b)(1) and 12(b)(6).

PRELIMINARY STATEMENT

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. Specifically, Plaintiffs seek to compel Defendants to present to the grand jury the "extensive scientific and eye-witness evidence that explosives were used to destroy three WTC buildings on 9/11." Am. Cmpl. at ¶ 54. According to the Amended Complaint, the "evidence taken together is conclusive that explosive and/or incendiary devices that had been pre-placed at the WTC were detonated causing the complete collapse of the World Trade Center Twin Towers on 9/11 . . . the evidence permits no other conclusion—as a matter of science, as a matter of logic, and as a matter of law." *Id*. at ¶ 55. For the reasons discussed herein, Plaintiffs' claims are not cognizable and must be dismissed.

BACKGROUND

I. Parties

Plaintiff Lawyers' Committee is a Pennsylvania non-profit corporation with a mission "to promote transparency and accountability regarding the tragic events of September 11, 2001 (9/11)." Am. Cmpl. at ¶ 12. "The Lawyers' Committee believes that the family members of the victims of the tragic crimes of 9/11 have a compelling right to know the full truth of what happened to their loved ones on 9/11, and that Congress and the Department of Justice, in order to do their jobs, have a compelling need to know." *Id*. The Lawyers' Committee purports to have a "special interest" in having this information presented to a grand jury because doing so "would promote both of the primary goals in the Lawyers' Committee's non-profit mission: transparency and accountability regarding the tragic events of 9/11." *Id*. at ¶ 13. Plaintiff Richard Gage is "an experienced architect who has played a leading role in the independent multi-year investigation of the cause of the collapse of the WTC towers and WTC Building 7 on 9/11. Mr. Gage is the founder and President of the non-profit organization Architects & Engineers for 9/11 Truth." *Id*. at ¶ 17. Architects and Engineers for 9/11 Truth is "an organization of architects, engineers, and other interested individuals dedicated to establishing the truth about the events of September 11, 2001 . . . At the heart of AE's work is the deeply held conviction . . . that establishing the truth is essential to achieving justice for the nearly 3,000 people murdered on 9/11 and their families." *Id*. at ¶¶ 19-20. Additionally, multiple individuals who allege to have been personally affected by the events of 9/11 have joined this action as Plaintiffs. *Id*. at ¶¶ 23-46.

II. Plaintiffs' Petition

On April 10, 2018, "the Lawyers' Committee delivered to the Office of 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, as well as a cover letter." *Id*. at ¶ 14. In the Petition, it was requested that the "United States Attorney present the information in the Petition concerning alleged federal crimes to a federal special grand jury pursuant to the United States Attorney's duty to do so under 18 U.S.C. § 3332(a)." *Id*. Then, "[o]n July 30, 2018, the Lawyers' Committee delivered to the Office of the United States Attorney for the Southern District of New York their fifty-eight page 'First Amended Petition' . . . 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 United States Attorney's Office on April 10, 2018." *Id* at ¶ 16. The Amended Petition was based on "several months of research, investigation, and analysis, including the receipt of extensive testimony from scientists, architects, and engineers . . . The Petition was submitted in order to report, and to provide factual information and evidence, to the United States Attorney regarding certain federal crimes that have been committed within the Southern District of New York on September 11, 2001 . . . related to the attacks on the World Trade Center." *Id*. at ¶ 50. Plaintiffs point "out that given the nature of these crimes, they were not committed by a single person acting alone but rather by several persons acting in concert. *Id*. at ¶ 57.

On November 7, 2018, "[t]he U.S. Attorney's Office sent the Lawyers' Committee a letter stating that the U.S. Attorney would comply with 18 U.S.C. § 3332(a) . . . No details regarding what actions the U.S. Attorney would take were provided." *Id*. at ¶ 59. When a representative of the Lawyers' Committee telephoned the United States Attorney's Office in June of 2019, he was told that "because of the secrecy requirements of Fed. R. Crim. P 6(e), he [the Assistant United

States Attorney] could not provide any information beyond the letter previously provided by the AUSA stating that the U.S. Attorney would comply with 18 U.S.C. § 3332(a)." *Id*. at ¶ 60.

Plaintiffs also note that they have "submitted the evidence referenced in their original Petition and Amended Petition to the State Department's 'Rewards for Justice' (RFJ) program . . . On August 30, 2019, the Lawyers' Committee filed its application for such a reward with the U.S. State Department under the RFJ Program." *Id*. at ¶ 61. According to the Amended Complaint, the RFJ is a program that provides rewards to individuals who assist in the arrest or conviction of terrorists. *Id*. at ¶¶ 62-65.

ARGUMENT

I. Legal Standards

On a Rule 12(b)(6) motion, the Court must accept all well-pleaded allegations contained in the complaint as true and draw all reasonable inferences in plaintiff's favor. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007). Plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. Mere "conclusions of law or unwarranted deductions of fact" need not be accepted as true. *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 771 (2d Cir. 1994) (internal citation and quotation omitted). "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

On a Rule 12(b)(1) motion, "'[a] case is properly dismissed for lack of subject matter jurisdiction . . . when the [Court] lacks the statutory or constitutional power to adjudicate it.'" *Luckett v. Bure*, 290 F.3d 493, 496 (2d Cir. 2002) (quoting *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000)). "In resolving the question of jurisdiction, the district court can refer to

evidence outside the pleadings and the plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists." *Id*. at 496-97.

II. Section 3332(a)

To support their claims for relief, Plaintiffs rely on 18 U.S.C. § 3332(a). This provision states:

> It shall be the duty of each such grand jury impaneled within any judicial district to inquire into offenses against the criminal laws of the United States alleged to have been committed within that district. 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. Any such attorney receiving information concerning such an alleged offense from any other person shall, if requested by such other person, inform the grand jury of such alleged offense, the identity of such other person, and such attorney's action or recommendation.

As explained by the Third Circuit Court of Appeals, 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." *Banks v. Buchanan*, 336 Fed App'x 122, 123 (3d Cir. 2009).

III. Plaintiffs Lack Standing

Whether it be pursuant to the APA or the mandamus statute, Plaintiffs lacks standing to pursue the relief they seek requiring the United States Attorney's Office ("USAO") to present information to the grand jury. As the Supreme Court has explained, "the irreducible constitutional minimum of standing contains three elements." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (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*. (internal citations and quotations omitted).

It has been "consistently [held] that a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution." *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973). Indeed, "in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Id*.; *see also Ostrowski v. Mehltretter*, 20 Fed. App'x 87, 91 (2d Cir. 2001).

Through their Amended Petition, Plaintiffs seek to compel the USAO to present evidence to a federal grand jury that would inculpate others (unnamed terrorists) in federal crimes and lead to their criminal prosecutions. As private citizens, however, Plaintiffs have no legally recognized interest that would give them standing to seek the presentation to a federal grand jury of evidence that could lead to the criminal prosecution of others. *See, e.g.*, *Linda R.S.*, 410 U.S. at 619. In other words, for Article III standing purposes, Plaintiffs are not harmed if terrorists are not prosecuted by the USAO.

For this reason, courts have consistently concluded that plaintiffs lack standing to enforce Section 3332(a). For example, the Second Circuit, in *Zaleski v. Burns*, 606 F.3d 51 (2d Cir. 2010), concluded that the plaintiff did not have standing to invoke Section 3332(a) because he never formally requested the USAO to present information to the grand jury, which the court interpreted as a necessary triggering act. The court also specifically noted that "even had he done so [asked the USAO to present information to the grand jury], it is not clear based on the facts available to us that he would have standing. Without more, the denial of his § 3332(a) right is insufficient." *Id*. at 52. The court made this determination despite the fact that plaintiff, a convicted felon, argued that his conviction was the result of a conspiracy to deprive him of his constitutional rights and he

wanted information related to this conspiracy presented to the grand jury. The court nonetheless stated that "an indictment of the alleged conspirators will not likely redress his asserted injury." *Id*. at 53. Here, as discussed in greater detail below, any injury Plaintiffs can assert is certainly more attenuated than that of a criminal defendant alleging that he was unlawfully prosecuted.

Courts across the country have similarly concluded that plaintiffs lack standing when attempting to enforce Section 3332(a). *See Morales v. U.S. Dist. Ct. for South. Dist. of Florida*, 580 Fed App'x 881, 886 n.6 (11th Cir. 2014) ("[Plaintiff's] petition still fails to allege 'injury in fact.'"); *Lundy v. United States*, No. 07-cv-1008 (JBM), 2007 WL 4556702, at *2 (C.D. Ill. Dec. 21, 2007) (concluding plaintiff lacked standing to enforce Section 3332(a)); *Taitz v. Colvin*, No. 13-cv-1878 (ELH), 2014 WL 1918714, at *14 (D. Md. May 13, 2014) (same); *Arnett v. Unknown*, No. 11-cv-5896 (JAK), 2011 WL 4346329, at *6 (C.D. Cal. Aug. 23, 2011) (same), *report and recommendation adopted by*, 2011 WL 4344103 (C.D. Cal. Sept. 15, 2011); *Speight v. Meehan*, No. 08-cv-3235 (JED), 2008 WL 5188784, at *4 (E.D. Pa. Dec. 9, 2008) (same); *Bain v. Vermont Dist. Ct.*, No. 06-cv-214 (JGM), 2007 WL 4412032, at *5 (D. Vt. Dec. 14, 2007) (same); *Banks*, 336 Fed. App'x at 123 (same); *Wagner v. Howard*, No. 04-5113, 2004 WL 1326601, at *1 (D.C. Cir. June 14, 2004) (same); *Hawkins v. Lynch*, 626 Fed. App'x 1, 2 (D.C. Cir. 2015) (same).

Insofar as Plaintiffs attempt to assert that the denial of their right pursuant to Section 3332(a) is, on its own, sufficient to amount to an injury, that theory has also been squarely rejected by courts. In *Sargeant v. Dixon*, 130 F.3d 1067, 1070 (D.C. Cir. 1997), the D.C. Circuit specifically rejected the argument that the "interest merely in 'being heard'" was an "end in itself." *Id*. Rather, the court concluded that if the plaintiff had "an interest in 'being heard' by the grand jury that is at all relevant to the grand jury's mission, it can only be because he has an ulterior

interest in seeing certain persons prosecuted . . . Indeed, there is nowhere in our legal system a recognized interest merely in 'being heard' as an end in itself." *Id*.

While Plaintiffs' Amended Complaint cites to *In re Grand Jury App.*, 617 F. Supp. 199 (S.D.N.Y. 1985), to support their claim, this case is a significant outlier. As the Eleventh Circuit has noted, "[Plaintiff], leaning heavily on a non-binding 1985 district court decision, *In re Grand Jury App.*, 617 F.Supp. 199 (S.D.N.Y.1985) . . . all other courts to decide this question as to § 3332(a) appear to have held there is no such private right of action under these facts." *Morales*, 580 Fed App'x at 886, n.6. The *In re Grand Jury* court acknowledged that it had identified only one opinion that "even indirectly deals with the issue presented in this case." *In re Grand Jury*, 617 F. Supp. 199 at 202. This Court now has the benefit of the many other courts—both district and circuit courts—that have weighed in on the issue and come to a contrary conclusion. In fact, Defendants' research has not identified a single other case that has found standing when a plaintiff was attempting to enforce Section 3332(a). Moreover, since this opinion was issued in 1985, the Supreme Court has decided *Lujan*, which made clear what was required for standing to exist.

As the Court explained in *Lujan*, Congress cannot, through statute, confer standing on a litigant who does not otherwise have Article III standing. As the *Lujan* court stated:

> To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed,' Art. II, § 3. It would enable the courts, with the permission of Congress, to assume a position of authority over the governmental acts of another and co-equal department, and to become virtually continuing monitors of the wisdom and soundness of Executive action. We have always rejected that vision of our role.

Lujan, 504 U.S. at 577 (internal citations and quotations omitted). Of course, Congress can create statutes to elevate the status of legally cognizable, concrete, injuries that were previously without

a remedy. What it cannot do is bypass the fundamentals of Article III standing by enacting a statute that allows a person to sue who does not have an injury. *See id*. at 578. By way of example, Congress undoubtedly could pass Title VII of the Civil Rights Act and permit suit by employees who have been subjected to discrimination. Of course, Title VII is the vehicle that provides the avenue by which employees can enter federal court to seek redress for a concrete injury that these employees had suffered. By contrast, as the court concluded in *Lujan* and as is the case here, a statute cannot confer standing where the litigant is unable to demonstrate that he has suffered a cognizable injury. As described above, courts have consistently concluded that plaintiffs seeking to enforce Section 3332(a) have not suffered any cognizable injury. *See Zaleski*, 606 F.3d at 52 ("[w]ithout more, the denial of his § 3332(a) right is insufficient").

Likely cognizant of these standing issues, Plaintiffs' Amended Complaint appears to premise standing on several grounds. First, that that they have "a special interest in the United States Attorney reporting the evidence submitted in their Amended Petition to a special federal grand jury. Examination of this evidence by a special grand jury would promote both of the primary goals in the Lawyers' Committee's non-profit mission: transparency and accountability regarding the tragic events of 9/11." Am. Cmpl. at ¶ 13; *see also id*. at ¶¶ 19, 42. Second, that the presentation of this information could result in Plaintiffs' receiving a monetary award for bringing terrorists to justice. *Id*. at ¶¶ 61-65. Third, Plaintiff's Amended Complaint also adds several individuals as Plaintiffs who were affected in various ways by the 9/11 attacks. *Id*. at ¶¶ 23-46. Fourth, Plaintiff's claim that one bullet point on a flyer from a Columbus, Ohio police department defames them and, presumably, a grand jury investigation could vindicate them. *Id*. at ¶¶ 66-68. None of these allegations are sufficient to confer standing on Plaintiffs.

A. Plaintiffs' Alleged Special Interest

The Supreme Court has, time and again, rejected the notion that an organization's "special interest" in a subject is sufficient to confer standing. For example, in *Sierra Club v. Morton*, 405 U.S. 727, 739-40 (1972), the Supreme Court concluded that Plaintiff lacked standing and stated:

> a mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' . . . The Sierra Club is a large and long-established organization, with a historic commitment to the cause of protecting our Nation's natural heritage from man's depredations. But if a 'special interest' in this subject were enough to entitle the Sierra Club to commence this litigation, there would appear to be no objective basis upon which to disallow a suit by any other bona fide 'special interest' organization however small or short-lived. And if any group with a bona fide 'special interest' could initiate such litigation, it is difficult to perceive why any individual citizen with the same bona fide special interest would not also be entitled to do so.

This concept was reiterated in *Lujan* where the Supreme Court stated that, to have standing, the organizational plaintiff had to show that one of its members would be directly injured by the challenged government action "apart from their special interest in the subject." *Lujan*, 504 U.S. at 563 (internal citation and quotation omitted).

Plaintiffs contend that they have a special interest in the investigation of the incidents surrounding 9/11 and, therefore, have standing. However, this is indistinguishable from the plaintiffs in *Sierra Club* where the court did not question that the organization had "a historic commitment to" the preservation of the country's natural environment. *Sierra Club*, 405 U.S. at 739. Similarly, in *Lujan*, the plaintiffs were "organizations dedicated to wildlife conservation and other environmental causes" that were challenging regulations issued by the Secretary of the Interior that affected endangered species. *Lujan*, 504 U.S. at 559. Thus, even accepting that Plaintiffs have a legitimate, special interest in the investigation of 9/11, such an interest is insufficient to confer standing.

B. Plaintiffs' Potential Reward

Plaintiffs next attempt to premise standing on the fact that, on August 30, 2019, they submitted an application to the United States Department of State for an award under the RFJ program. According to the Amended Complaint, the "RFJ is the U.S. Department of State's Counter-Terrorism Rewards Program . . . Under this program, the Secretary of State may authorize rewards for information that leads to the arrest or conviction of anyone who plans, commits, or attempts international terrorist acts." *Id*. at ¶ 63. Plaintiffs claim that, "[s]ince its inception, RFJ has paid more than $125 million to over 80 individuals . . . Reward payment amounts are based on a number of factors, including, but not limited to, the threat posed by a given terrorist, the severity of the danger or injury to U.S. persons or property, and the value of information provided . . . Anyone who provides actionable information that will help favorably resolve acts of international terrorism against the U.S. . . . may potentially be eligible for a reward." *Id*. at ¶¶ 64-65.

However, as Plaintiffs' Amended Complaint makes plain, any such reward is hypothetical and highly speculative. Their own description of the RFJ states that the people who provide information "may potentially be eligible for a reward" and that the Secretary of state "may authorize" such a reward. *Id*. at ¶¶ 63, 65.

This same argument was rejected by another court in assessing standing in a lawsuit brought by the Lawyers' Committee. *See Lawyers' Comm. For 9/11 Inquiry, Inc. v. Wray*, No. 19-cv-00824 (TNM), 2020 WL 42845, at *6-7 (D.D.C. Jan. 3, 2020). In that case, also pursuant to the APA and the mandamus statute, the Lawyers' Committee sought "an order requiring the FBI to evaluate and report on certain evidence related to the terrorist attacks of September 11, 2001." *Id*. at *1. These claims were rejected and the complaint was dismissed for lack of standing. As part of its analysis, the court had to determine whether the Lawyers' Committee had standing,

and the court concluded that it did not. Specifically, the court stated, "[a]s Plaintiffs see it, the reward application confers standing because it gives them a financial interest in the outcome of this lawsuit. They rely on a case where a court mused—in *dictum*—that 'a person who would be entitled to a bounty if a prosecution were initiated might well have standing.'" *Id*. at *6 (quoting *Sargeant v. Dixon*, 130 F.3d 1067, 1070 (D.C. Cir. 1997)). The court rejected this argument finding that, first, "[i]t must be likely, as opposed to merely speculative, that a favorable decision will provide redress. And courts do not lightly speculate on how 'independent actors' not before them might exercise their broad discretion." *Id*. (quoting *Lujan*, 504 U.S. at 562). As to the speculative nature of any reward, the court noted that "[s]etting aside the chances that this report would lead to the arrest or conviction of a terrorist, just consider how much leeway the Secretary of State has. The decision to pay a reward lies in his 'sole discretion.' 22 U.S.C. § 2708(b). And this decision 'shall not be subject to judicial review.' *Id*. § 2708(j); *see Heard v. U.S. Dep't of State*, No. 08-02123, 2010 WL 3700184, at *4 (D.D.C. Sept. 17, 2010). So the Secretary is an independent actor who exercises broad discretion unreviewable by this Court or any court." *Id*.

Indeed, in this case, in order for a reward to even potentially be provided, Defendants would have to present Plaintiffs' evidence to a grand jury, the grand jury would have to evaluate the evidence and conclude that a crime had been committed, the government would have to initiate a prosecution, the terrorist would then have to be apprehended and convicted, and then it would have to be determined whether Plaintiffs' information in relation to this sequence of events merited a reward. This type of conjecture "goes beyond the limit, however, and into pure speculation and fantasy," and is insufficient to confer standing. *Lujan*, 504 U.S. at 567. Moreover, as a practical matter, such a theory of standing would effectively amount to any member of the general public having an injury when the government does not act on a piece of information provided by an

individual in connection with a crime that offers a reward. Such a broad sweeping conferral of jurisdiction militates against Plaintiffs having standing. *See Lujan*, 504 U.S. at 575 ("[I]t is not sufficient that he has merely a general interest common to all members of the public.").

In *Sargeant*, 130 F.3d at 1070, the court did state, in *dictum* and citing *Lujan*, that plaintiff lacked "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."

However, after both *Lujan* and *Sargeant*, the Supreme Court has squarely rejected that a bounty itself is sufficient to confer standing. *See Vermont Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772-73 (2000). In evaluating the standing of a *qui tam* relator, the Supreme Court in *Vermont Agency* concluded:

> There is no doubt, of course, that as to this portion of the recovery—the bounty he will receive if the suit is successful—a *qui tam* relator has a concrete private interest in the outcome of the suit. But the same might be said of someone who has placed a wager upon the outcome. An interest unrelated to injury in fact is insufficient to give a plaintiff standing. The interest must consist of obtaining compensation for, or preventing, the violation of a legally protected right. A *qui tam* relator has suffered no such invasion—indeed, the right he seeks to vindicate does not even fully materialize until the litigation is completed and the relator prevails . . . As 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.

Id. (internal quotations and citations omitted). In other words, the Supreme Court specifically rejected the argument that a plaintiff's potential bounty that could result from a litigation was sufficient to confer standing. Rather, the Supreme Court found a *qui tam* relator to have standing as the assignee of the government's claims in a suit pursuant to the False Claims Act. No analogous situation is presented here. Rather Plaintiffs attempt to premise standing upon a hypothetical bounty, which they cannot do. Additionally, Plaintiffs' speculative bounty is no more

than "an interest that is merely a byproduct of the suit itself," which cannot give rise to standing according to *Vermont Agency*.

C. Individuals Connected to the Events of 9/11

Plaintiffs' Amended Complaint adds five individuals connected to the events of 9/11 in various ways. Several of these people lost friends or family members on 9/11. *See* Am. Cmpl. at ¶¶ 23, 28, 33, 37. One individual who responded to the scene on 9/11 has developed respiratory problems. *Id*. at ¶¶ 43-46. While the allegations in the Amended Complaint seek to establish that these people were gravely affected by the events of 9/11, that does not confer standing upon them to compel the U.S. Attorney to present their Amended Petition to the grand jury. As discussed previously, it is a generally recognized principle that crime victims do not have standing to challenge prosecution decisions made by the Government. *See supra* at 6. When describing the interests asserted by these individuals, the Amended Complaint repeatedly makes reference to seeking "justice" for the victims of 9/11. *See* Am. Cmpl. at ¶¶ 20, 31, 46. However, this interest is common to all victims of crimes—a group that courts have consistently found not to have standing. *See Linda R.S.*, 410 U.S. at 619; *Ostrowski*, 20 Fed. App'x at 90; *Rogers v. Borkowsky*, 756 Fed. App'x 105, 106 (2d Cir. 2019). For example, in *Zaleski*, 606 F.3d at 52, the person seeking to compel the USAO to present information to the grand jury alleged to be the victim of a crime, yet the court nonetheless determined that he did not have standing. Perhaps most similar to the instant case, in *Morales*, the plaintiff seeking to have information presented to the grand jury was the brother of a man killed when the Cuban government shot down two civilian aircrafts. The plaintiff sought to have information presented to the grand jury that implicated Fidel and Raul

Castro in these events.[1] *Morales*, 580 Fed. App'x at 883. That court concluded, "although Morales has an interest in the prosecution of those responsible for his brother's death, a private citizen's interest in the U.S. Attorney's criminal prosecution of another person is not a judicially cognizable interest for standing purposes." *Id*. at 887. The same is true here. Assuming that each of these individuals are indeed pursuing justice for victims and "closure" for themselves, that is true for all crime victims. Nonetheless, courts have repeatedly held such people do not have standing to challenge investigation and prosecution decisions.

D. Columbus Ohio Police Department Flyer

Lastly, Plaintiffs contend that the Department of Justice has funded a local police department who issued a flyer indicating that a warning sign of a potential terrorist is someone who professes "conspiracy theories about Westerners (e.g. the CIA arranged for 9/11 to legitimize the invasion of foreign lands)." Dkt. No. 20-9 at 1. Notably, this flyer does not specifically identify any Plaintiff in this action. Plaintiffs contend that this undercuts their ability to recruit volunteers and solicit financial support. Am. Cmpl. at ¶¶ 66-67. Again, the alleged harm is far too attenuated from the scope of this action for standing purposes. Further, the likelihood that this action could remedy any such harm is highly speculative. Specifically, for such an alleged reputational harm to be remedied, a multitude of steps would have to occur. *See supra* at 12-13. Accordingly, this cannot serve as a basis to confer standing upon Plaintiffs.[2]

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[1] In *Morales*, plaintiff's theory that Fidel Castro was responsible for these events was based on an act of Congress that stated as much as well as Fidel Castro's statement that he took responsibility for the events. *Morales*, 580 Fed. App'x at 882-83.

[2] While the above arguments focus on Plaintiffs' lack of Article III standing to enforce Section 3332(a), the same analysis applies to any claim premised on the APA or First Amendment. To the extent Plaintiffs are attempting to use the First Amendment or the APA to compel agency action allegedly unlawfully withheld (specifically the presentation of the Amended Petition to a grand jury), they would still have to satisfy "the irreducible constitutional minimum of standing." *Lujan*, 504 U.S. at 560. For the reasons discussed above, they have not done so.

IV. Section 3332(a) Does Not Confer a Private Right of Action

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. The central inquiry in assessing whether a statute creates a private right of action is whether Congress intended to create one. *See Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). The party seeking to imply a private right of action bears the burden to show that Congress intended to make one available. *See Suter v. Artist M.*, 503 U.S. 347, 363 (1992). In making this determination, "[t]he judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." *Sandoval*, 532 U.S. at 286.

Here, nothing in the text or structure of Section 3332(a) indicates that Congress intended to create a private right of action. Indeed, the statute does not contemplate any judicial relief or enforcement mechanism for noncompliance with Section 3332(a), and is entirely silent as to the issue of both a private remedy and standing to pursue judicial enforcement. In stark contrast, when Congress has intended to create a private right of action and confer standing to pursue a judicial remedy, it has done so with clear, explicit, unequivocal language. *See, e.g.*, 15 U.S.C. § 15(a) ("[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . ."). There is no such explicit right created by Section 3332, and there is nothing in the text or structure of Section 3332 to support inferring the existence of one.

An analysis of the text and structure of the statute creating special grand juries further supports the above conclusion. Title I, Section 101 of the Organized Crime Control Act of 1970 enacted 18 U.S.C. §§ 3331-3334, and thereby created special grand juries and established their

functions, powers, and duties. In these statutory provisions, Congress also assigned various detailed duties and powers to the courts in connection with the administration of special grand juries. *See* 18 U.S.C. §§ 3331(a), 3332(a), 3332(b), 3333(b), 3333(c)(1), 3333(c)(2), 3333(d), 3333(e). In those circumstances in which Congress deemed it appropriate, Congress also created a method for applying to the courts for judicial action concerning special grand jury matters. *See* 18 U.S.C. §§ 3331(b) (permitting grand jury to apply for continuance of its term), 3333(c)(2) (permitting for extensions of time related to answer to grand jury reports).

Nowhere, however, does the statute set forth any mechanism or avenue for anyone to seek assistance from the courts to compel the government to present information to a special grand jury. In light of the many ways Congress provided for judicial intervention as to special grand juries, the absence of any provision creating an avenue to seek the relief Plaintiffs request indicates that Congress simply did not intend for there to be any private right of action under Section 3332(a). *See, e.g.*, *Morales*, 580 Fed. App'x at 886, n.6 (no private right of action under Section 3332(a)) (collecting cases); *Justice v. Carpenter*, No. 19-3106 (SAC), 2019 WL 4450666, at * 3 (D. Kan. Sept. 17, 2019) (same) (collecting cases). Accordingly, even if Plaintiffs could demonstrate an injury to satisfy Article III standing, they would still need an avenue to proceed to federal court. Section 3332(a) cannot provide that avenue given it does not create a private right of action.[3]

[3] Plaintiffs attempt to construe their avenue for relief as their right to petition their government via the First Amendment. *See* Am. Cmpl. at ¶¶ 84-91. Plaintiffs seemingly acknowledge that their mechanism to petition the grand jury is through Section 3332(a) and the USAO. *Id*. at ¶ 91 ("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))."). However, even assuming that such a right to petition a grand jury exists under the First Amendment, for the reasons discussed herein, Section 3332(a) and the APA do not provide Plaintiffs with a basis to sue to the USAO to enforce any such right.

V. Plaintiffs Fail to State a Claim Under the APA or the Mandamus Statute for the Relief They Seek

Even if Plaintiffs did have standing, they are not entitled to the relief they seek. In their Amended Complaint, Plaintiffs have two very specific requests for relief. As delineated in "Count III" of their Amended Complaint under the mandamus statute, Plaintiffs seek "a writ of mandamus and order from this Court mandating that the United States Attorney provide Plaintiffs' Amended Petition to a special grand jury and inform the special grand jury of the Plaintiffs' identity." Am. Cmpl. at ¶ 98. As to "Count IV" under the APA, Plaintiffs seek "an order from this Court mandating the United States Attorney to provide Plaintiffs' Amended Petition and Exhibits to a special grand jury and inform the special grand jury of the Plaintiffs' identity." *Id*. at ¶ 102. However, Section 3332(a) only requires three things: (1) that the grand jury be informed of the alleged offense; (2) the identity of the person providing the information; and (3) the government attorney's recommendation as to this information.

Section 3332(a) does not mandate that the USAO present certain evidence (or any evidence at all), such as Plaintiffs' Amended Petition, to the grand jury. Nevertheless, Plaintiffs are advocating for the proposition that Section 3332(a) requires the United States Attorney for the Southern District of New York to present any and all evidence provided to him by any member of the public to a grand jury. This is an untenable position that would have far-reaching consequences. Under Plaintiffs' regime, any person could continually bombard the USAO with "evidence" of alleged crimes and this evidence, regardless of its volume, scope, or veracity, would have to be presented to a grand jury. To say this has potential for abuse is an understatement. As courts have noted, Section 3332(a) is already infringing on prosecutorial discretion—something that has historically been recognized as a highly discretionary function of the executive branch. *See Stimac v. Wieking*, 785 F. Supp. 2d 847, 851-52 (N.D. Cal. 2011) ("I am unconvinced that the

right to force a prosecutor to bring evidence before the grand jury is absolute . . . Prosecutorial resources are limited . . . I conclude that prosecutorial discretion precludes the claims [plaintiff] raises against the U.S. Attorneys."). There is simply no basis for reading the statute in the broad manner suggested by Plaintiffs.

Because presenting evidence to a grand jury is a highly discretionary act, the USAO cannot be compelled, under either the APA or the mandamus statute, to do so. Critical to the ability to compel agency action under either statute is the need for the sought action to be ministerial in nature, rather than discretionary. As to Plaintiffs' requested relief pursuant to the mandamus statute, "the power of a district court to compel official action by mandatory order is limited to nondiscretionary, plainly defined, and purely ministerial duties." *Defeo v. Lapin*, No. 08-cv-7513 (RWS), 2009 WL 1788056, at *5 (S.D.N.Y. June 22, 2009) (citing *Work v. Rives*, 267 U.S. 175, 177 (1925)). Similarly, under the APA, relief is available "only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) (emphasis in original); *see also Sharkey v. Quarantillo*, 541 F.3d 75, 89 n.13 (2d Cir. 2008). Even then, a court may only "compel an agency to perform a ministerial or non-discretionary act, or to take action upon a matter, without directing *how* it shall act." *Norton*, 542 U.S. at 64 (emphasis in the original) (internal citation and quotation omitted). The principal purpose of these limitations on compelling agency action "is to protect agencies from undue judicial interference with their lawful discretion . . ." *Id*. at 66.

Here, the presentation of evidence to the grand jury is not a clear, plainly defined, ministerial duty. Rather, presenting evidence to a grand jury requires a substantial degree of

discretion.[4] *See, e.g.*, *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) ("This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion."); *United States v. White*, 972 F.2d 16, 18 (2d Cir. 1992) ("[T]he decision as to whether to prosecute generally rests within the broad discretion of the prosecutor."); *United States v. Chanen*, 549 F.2d 1306, 1312-13 (9th Cir. 1977) ("[I]nitiating a criminal case by presenting evidence before the grand jury qualifies as an executive function within the exclusive prerogative of the Attorney General.") (internal citations and quotations omitted). Such highly discretionary actions are beyond the scope of the APA and the mandamus statute.

VI. Release of Grand Jury Materials

Plaintiffs' request for the release of certain grand jury materials, to the extent they exist, must also be rejected. The Supreme Court has repeatedly emphasized the critical role played by the federal grand jury. It has noted that the grand jury serves the "dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions." *Branzburg v. Hayes*, 408 U.S. 665, 686-687 (1972); *see also, United States v. Sells Engineering*, 463 U.S. 418, 423-24 (1983). The proper functioning of the grand jury system depends upon the secrecy of the proceedings.[5] As the Supreme Court has explained:

[I]f preindictment proceedings were made public, many prospective witnesses

[4] For example, Plaintiffs' Amended Petition is 58 pages in length with dozens of exhibits setting forth "evidence" from many different sources. *See* Am. Cmpl. at ¶ 16. To present such evidence to a grand jury, the government would need to make numerous discretionary decisions, such as what witnesses and which pieces of evidence to present.

[5] In light of the grand jury secrecy issues discussed herein, Defendants take no position as to whether they have or have not presented the Amended Petition to a grand jury. Rather, Defendants' position is that, regardless, Plaintiffs' Amended Complaint must be dismissed for the reasons discussed.

> would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements. There also would be the risk that those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment. Finally, by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule.

Douglas Oil Co. of California v. Petrol Stops Northwest, 441 U.S. 211, 219 (1979); *see also Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 399-400 (1959). Given the important purposes underlying grand jury secrecy, "[b]oth Congress and [the Supreme Court] have consistently stood ready to defend it 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." *Sells Engineering*, 463 U.S. at 425 (emphasis added).

Here, there is no "statute or Rule," *id.*, that provides for unsealing the grand jury materials that Plaintiffs seek. Federal Rule of Criminal Procedure 6(e) imposes a flat prohibition on disclosure by non-witness participants to grand-jury proceedings, "[u]nless these rules provide otherwise." Fed. R. Crim. P. 6(e)(2)(B). Rule 6(e) identifies only five discrete circumstances in which a district court may order disclosure:

> The court may authorize disclosure—at a time, in a manner, and subject to any other conditions that it directs—of a grand-jury matter: (i) preliminarily to or in connection with a judicial proceeding; (ii) at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury; (iii) at the request of the government, when sought by a foreign court or prosecutor for use in an official criminal investigation; (iv) at the request of the government if it shows that the matter may disclose a violation of State, Indian tribal, or foreign criminal law, as long as the disclosure is to an appropriate state, state-subdivision, Indian tribal, or foreign government official for the purpose of enforcing that law; or (v) at the request of the government if it shows that the matter may disclose a violation of military criminal law under the Uniform Code of Military Justice, as long as the disclosure is to an appropriate military official for the purpose of enforcing that law.

Rule 6(e)(3)(E). None of these circumstances apply here. Plaintiffs are not defendants in a criminal action seeking dismissal of an indictment. These grand jury records are unconnected to another judicial proceeding. The other three are clearly inapplicable as the government opposes the relief Plaintiffs seek.

Plaintiffs appear to attempt to draw a distinction between substantive and ministerial records of the grand jury. *See* Am. Cmpl. at ¶¶ 81, 103. Rule 6(e) provides for no such distinction and, for that reason, courts in this circuit have routinely rejected the position advanced by Plaintiffs. *See, e.g.*, *United States v. Larson*, No. 07-cr-304 (HBS), 2012 WL 4112026, at *6-7 (W.D.N.Y. Sept. 18, 2012) (finding no distinction between ministerial and substantive grand jury records); *United States v. Reynolds*, No. 10-cr-32 (HBS), 2012 WL 5305183, at *11 (W.D.N.Y. Oct. 25, 2012) (same); *United States v. Smith*, 105 F. Supp. 3d 255, 260 (W.D.N.Y. 2015) (same); *United States v. Chambers*, No. 18-cr-79 (KAD), 2019 WL 1014850, at *2-3 (D. Conn. Mar. 4, 2019) (same); *United States v. Hollenbeck*, No. 15-cr-49 (JJM), 2015 WL 13746403, at *11 (W.D.N.Y. Dec. 15, 2015) (same); *United States v. Montague*, No. 14-cr-6136 (JWF), 2016 WL 11621620, at *4 (W.D.N.Y. May 17, 2016) (same).

As these above cases make clear, whether the records are substantive or ministerial in nature, Plaintiffs would still have to make a showing that they have a "particularized need" for the materials. "To determine whether disclosure is appropriate, courts apply a 'particularized need' test. This test requires a party seeking disclosure to show 'that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed.'" *United States v. Carneglia*, 675 Fed. App'x 84, 85-86 (2d Cir. 2017) (quoting *Douglas Oil*, 441 U.S. at 222-23, n.12). Here, Plaintiffs have not identified what injustice may occur in

another proceeding (such as when a criminal defendant challenges prosecutorial actions in the grand jury proceedings that led to indictment). Therefore, given there is no such need, the request by definition cannot be structured to cover only material so needed. Additionally, for the reasons discussed below, to the extent any such grand jury materials do exist, the need for secrecy is paramount.

To the extent Plaintiffs are attempting to rely on the "special circumstances," *see* Am. Cmpl. at ¶ 83, exception to Rule 6(e) recognized by the Second Circuit in *In re Biaggi*, 478 F.2d 489 (2d Cir. 1973), that is also unavailing. That case involved an appeal from a district court order granting the motion of the United States Attorney for the Southern District of New York to disclose the grand jury testimony of Mario Biaggi, then a member of the House of Representatives and a candidate in the Democratic primary for mayor of New York City. The motion resulted from Biaggi's public statement about what he had said (and not said) in the grand jury, and his own urging that the testimony be released. The Second Circuit ultimately recognized that "special circumstances" were present because both Biaggi and the government had waived any protections and benefits owing under Rule 6(e). In a later case that further opined on this "special circumstances" exception, the Second Circuit clarified that the exception is only warranted when the movant satisfied a "burden . . . *greater*" than the "particularized need" standard governing requests pursuant to one of Rule 6(e)'s enumerated exceptions and that courts must "apply extra vigilance" when considering a request outside the confines of Rule 6(e). *See In re Petition of Craig*, 131 F.3d 99, 104-106, n.10 (2d Cir. 1997) (emphasis added). The *Craig* court articulated a non-exhaustive list of factors "that a trial court might want to consider when confronted with these highly discretionary and fact-sensitive 'special circumstances' motions." Those factors include:

> (i) the identity of the party seeking disclosure; (ii) whether the defendant to the grand jury proceeding or the government opposes the disclosure; (iii) why disclosure is being sought in the particular case; (iv) what specific information is being sought for disclosure; (v) how long ago the grand jury proceedings took place; (vi) the current status of the principals of the grand jury proceedings and that of their families; (vii) the extent to which the desired material—either permissibly or impermissibly—has been previously made public; (viii) whether witnesses to the grand jury proceedings who might be affected by disclosure are still alive; and (ix) the additional need for maintaining secrecy in the particular case in question.

Id. at 106. Elaborating on these factors, the court observed that both the identity of the requestor and the position of the government should be accorded "great weight." *See id*. at 106.[6]

Here, the *Craig* factors weigh heavily in favor of non-disclosure. First, the government opposes disclosure. Second, as to "how long ago the grand jury proceedings took place," according to Plaintiffs' request of the government and their theory of the incidents surrounding 9/11, they are hoping that the grand jury proceedings are ongoing and that the grand jury is actively investigating serious criminal activity. Third, to the extent any such grand jury materials do exist, they have not been made public. Fourth, as stated, Plaintiffs hope that the grand jury investigation is ongoing, and, thus, any grand jury witnesses would still be alive. Fifth, and most importantly, to the extent any such grand jury proceeding currently exists, maintaining secrecy would be of the utmost concern. As an initial matter on this point, Plaintiffs simultaneously ask the Court to reach contradictory conclusion. First, that there are no secrecy issues related to any grand jury materials because eighteen years have elapsed since 2001, thus obviating any concerns that people

[6] Notably, while *Craig* reaffirmed the Second Circuit's earlier conclusion in *Biaggi* that special circumstances can justify disclosure, the court in *Craig* nonetheless affirmed the district court's decision to deny the release of the grand jury records. In *Craig*, the petitioner was a doctoral student seeking grand jury testimony from 1948 of Harry Dexter White—a former Assistant Secretary of the Treasury who was accused of being a communist spy. The district court did not authorize the release of the records despite the grand jury testimony at issue being approximately 50 years old.

implicated by indictments may escape. *See* Am. Cmpl. at ¶ 83(e). Yet, Plaintiffs also justify their standing to enforce Section 3332 on the ground that they could receive a bounty for the capture of terrorists. These two positions are incompatible. Put most basically, Plaintiffs believe that there are currently terrorists at large who are responsible for the 9/11 attacks and that an investigation is necessary to identify these people and bring them to justice. Accordingly, there is a clear need to maintain secrecy as to any potential grand jury proceeding.

This case is in distinct contrast to the types of cases where the "special circumstances" exception has been recognized. For example, in *In re Am. Historical Ass'n*, 49 F. Supp. 2d 274 (S.D.N.Y. 1999), the district court applied the holding of *Craig* in connection with grand jury records relating to the prosecution of Alger Hiss—a prosecution that occurred approximately 50 years earlier. Similarly, in *In re Petition of Nat'l Sec. Archive*, 104 F. Supp. 3d 625 (S.D.N.Y. 2015), grand jury materials relating to the prosecution of Julius and Ethel Rosenberg in the early 1950s were released. At issue here is not a historical prosecution. Rather, Plaintiffs maintain that a grand jury proceeding and prosecution are necessary in order to capture at large terrorists.

Accordingly, any grand jury materials that may exist should not be released because they do not fall within the ambit of Rule 6(e) and the special circumstances exception recognized by the Second Circuit is inapplicable.

CONCLUSION

For the reasons stated herein, Plaintiffs' Amended Complaint should be dismissed in its entirety with prejudice.

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New York, New York

Respectfully Submitted,

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