No. 22-

IN THE

Supreme Court of the United States

THE LAWYERS' COMMITTEE FOR 9/11 INQUIRY, INC., *et al.*,

Petitioners,

v.

MERRICK GARLAND, ATTORNEY GENERAL OF THE UNITED STATES, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. Did the United States Court of Appeals for the Second Circuit Act Contrary to the Constitution and in Conflict with Decisions of the Supreme Court When It Held that 9/11 Victim Family Members, 9/11 First Responders, and Two U.S. Non-Profit Organizations Needed to Assert Additional Harm Beyond a Violation of a Constitutional Right to Have Article III Standing to Seek Judicial Remedies?

B. Did the United States Court of Appeals for the Second Circuit Act Contrary to the Constitution and in Conflict with Decisions of the Supreme Court When It Held that Federal Grand Juries Were Not Entities of the Federal Government to which the First Amendment Right to Petition Applies?

C. Did the United States Court of Appeals for the Second Circuit Undermine the Constitutional Independence of the Grand Jury When It Refused to Enforce the Mandatory Duty Imposed Explicitly by Congress and Implicitly by the Constitution on United States Attorneys to Relay Citizen Reports of Federal Crimes to a Grand Jury, and Left to the Complete Discretion of the Department of Justice What a Grand Jury Is Allowed to See and Consider?

D. Did the United States Court of Appeals for the Second Circuit Create a Clear Split Among the Federal Circuits When It decided to Not Adopt the Ninth Circuit's Rule that Ministerial Records of a Federal Grand Jury May Be Made Available to the Public?

LIST OF PARTIES

Petitioners, who were Plaintiffs-Appellants below, are: The Lawyers' Committee for 9/11 Inquiry, Inc., Architects & Engineers for 9/11 Truth, Robert McILvaine, Richard Gage, Christopher Gioia, Diana Hetzel, Michael J. O'Kelly, and Jeanne Evans.

The Respondents, who were Defendants-Appellees below, are: Merrick Garland, Attorney General of the United States; Damian Williams, United States Attorney for the Southern District of New York; and the United States Department of Justice.

CORPORATE DISCLOSURE STATEMENT

The Lawyers' Committee for 9/11 Inquiry, Inc. and Architects & Engineers for 9/11 Truth are not-for-profit corporations which do not have stockholders. All other Petitioners are individuals.

LIST OF PRIOR DIRECTLY RELATED PROCEEDINGS

The United States Court of Appeals for the Second Circuit, in *Lawyers' Committee for 9/11 Inquiry, et al. v. Merrick B. Garland, Attorney General of the United States, et al.,* Case No. 21-1338-cv, issued its Opinion and its Judgment, affirming the District Court's decision dismissing Plaintiffs-Appellants claims, on August 5, 2022. *See* App. 1a-19a.

The United States District Court for the Southern District of New York, in *Lawyers' Committee for 9/11 Inquiry, et al. v. William P. Barr, Attorney General of the United States, et al.*, Case No. 1:19-cv-8312-PGG, issued its Order dismissing Petitioners-Plaintiffs-Appellants' claims for lack of standing, on March 24, 2021. *See* App. 20a-53a.

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The United States Court of Appeals for the Second Circuit's Opinion, affirming the District Court's decision dismissing Plaintiffs-Appellants claims, was issued on August 5, 2022. *See* App. 1a-19a.

The United States District Court for the Southern District of New York's Order dismissing Plaintiffs-Appellants' claims for lack of standing, was issued on March 24, 2021, see App. 20a-53a, and is published at *Laws. Comm. for 9/11 Inquiry, Inc. v. Barr*, No. 1:19-Civ-8312 (PGG), 2021 WL 1143618 (S.D.N.Y. Mar. 24, 2021).

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Second Circuit issued its opinion, affirming the District Court's decision, on August 5, 2022. Petitioners filed the instant Petition on November 3, 2022, within 90 days of the August 5, 2022 decision of the Court of Appeals.

28 U.S.C. § 1254(1) is the statutory provision which confers on this Court jurisdiction to review on a W*rit of Certiorari* the judgment and orders of the United States Court of Appeals for the Second Circuit in question in this case.

No special notifications pursuant to Rule 29.4(b) or (c) are required.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. III, § 2, cl. 1. *See* App. 54a.

U.S. Const., Amend. 1. *See* App. 54a.

U.S. Const. Amendment V. *See* App. 55a.

18 U.S.C. § 3332(a). *See* App. 55a.

Fed. R. Crim. P. 6(e). *See* App. 55a-57a.

STATEMENT OF THE CASE

A. Jurisdiction of the District Court

The federal statutes that provide jurisdiction to the District Court are 28 U.S.C. § 1331 (federal question); 28 U.S.C. §1346(a)(2) (United States as defendant); and 28 U.S.C. § 1361 (mandamus).

Plaintiffs' action below included a claim under the federal mandamus statute, 28 U.S.C. § 1361, and a claim under the Administrative Procedures Act (APA), 5 U.S.C. §§ 702, 706, each seeking to compel the United States Attorney for the Southern District of New York and the Department of Justice (DOJ) to comply with their mandatory duty pursuant to 18 U.S.C. § 3332(a) to submit Plaintiffs' Petition to Report Federal Crimes to a Federal Special Grand Jury. First Amended Complaint (FAC), Court of Appeals Joint Appendix (CA JA), 12a. Plaintiffs' action below also included a third claim, brought under the First Amendment, Count II, that the Federal

Defendants violated Plaintiffs' Right to Petition under the First Amendment when Defendants refused to deliver to the federal special grand jury Plaintiffs' Petition to Report Federal Crimes. *Id.* Plaintiffs' action below also included a fourth "claim," Count I, which was a request to the District Court to release certain federal grand jury records. *Id.*

The basic underlying facts supporting the District Court's jurisdiction to hear these federal claims are that on April 10, 2018, the Lawyers' Committee for 9/11 Inquiry, Inc. (Lawyers' Committee), and the other Plaintiffs along with numerous other petitioners, after several months of research, investigation, and analysis, including the receipt of extensive testimony from scientists, architects, and engineers, submitted to the Office of the United States Attorney for the Southern District of New York a Petition, with accompanying evidentiary exhibits. The Petition was submitted in order to report, and to provide factual information and evidence, to the United States Attorney and, via the United States Attorney, to the federal special grand jury, regarding certain federal crimes committed on September 11, 2001 (9/11) and in the months prior at the World Trade Center (WTC). FAC, CA JA 12a.

The Plaintiffs-Appellants, who were also petitioners, include some family members of victims of the 9/11 attacks and some 9/11 Ground Zero Responders (firefighters). FAC, CA JA 12a. On July 30, 2018, the Lawyers' Committee on behalf of all petitioners delivered to the Office of the United States Attorney their First Amended Petition which incorporated by reference the evidentiary exhibits referenced in the prior-filed original Petition. CA JA 97a. The Lawyers' Committee requested that the United States Attorney present the information in the

Amended Petition to a federal special grand jury pursuant to 18 U.S.C. § 3332(a). *Id*.

The United States Attorney has, to date, refused to confirm that either Plaintiffs' full Petition or the full Amended Petition were delivered to the federal special grand jury, and has refused to disclose any information or records regarding any grand jury proceedings related to Plaintiffs' Petition or Amended Petition. A fair reading of the Federal Defendants' filings in the District Court and Second Circuit proceedings below indicates that the Federal Defendants have not submitted Plaintiffs' full Petition or full Amended Petition (and exhibits) to any federal special grand jury.

B. Jurisdiction of the Court of Appeals

The Court of Appeals had appellate jurisdiction pursuant to 28 U.S.C. § 1291. Petitioners appealed to the United States Court of Appeals for the Second Circuit from the United States District Court for the Southern District of New York's final Order, and the associated Judgment, both entered on March 24, 2021, which dismissed all of Petitioners' claims in the action. Plaintiffs timely filed their Notice of Appeal within 60 days, on May 23, 2021. CA JA 74a.

C. Relevant Procedural History

On September 10, 2019, Plaintiffs filed their original Complaint in this action. On March 20, 2020, Plaintiffs filed their First Amended Complaint. CA JA 12a. The FAC asserted claims under, *inter alia*, the APA, the federal mandamus statute, the First Amendment, and

Fed. R. Crim. P. 6(e). *Id.* In this action the Plaintiffs petitioned the District Court pursuant to, *inter alia*, the First Amendment of the United States Constitution to release certain grand jury records, to enjoin an apparent continuing violation by the United States Attorney's Office of Plaintiffs' Right to Petition for Redress under the First Amendment of the United States Constitution, and to compel officers of the United States to perform a non-discretionary duty under 18 U.S.C. § 3332(a) pursuant to the federal mandamus statute, 28 U.S.C. § 1361, and the APA, 5 U.S.C. §§ 702, 706. *Id.*

On May 8, 2020, the Federal Defendants filed a Motion to Dismiss the FAC. This motion was briefed, and on March 24, 2021, the District Court granted the Defendants' Motion to Dismiss and dismissed with prejudice all counts of the Amended Complaint. Appendix to the instant Petition for Certiorari (App.) 20a-53a. On May 23, 2021, Plaintiffs filed their Notice of Appeal of the District Court's Order and the associated Judgment. Due to an ECF error regarding identification of the order being appealed, a corrected Notice of Appeal was filed on May 24, 2021. CA JA 74a.

The matter was briefed to the United States Court of Appeals for the Second Circuit, and oral argument was held before the Second Circuit on January 21, 2022. On August 5, 2022, the Second Circuit issued its Opinion and its Judgment, affirming the District Court's decision dismissing Plaintiffs-Appellants claims. App. 1a-19a.

D. Material Facts

On April 10, 2018, the Lawyers' Committee, and the other Plaintiffs, after several months of investigation and analysis, including the receipt of extensive testimony from scientists, architects, and engineers, submitted to the United States Attorney for the Southern District of New York a Petition, with accompanying evidentiary exhibits. The Petition, and the later submitted Amended Petition, CA JA 74a, were submitted to report, and to provide factual information and evidence, to the United States Attorney and a federal special grand jury regarding certain federal crimes committed on September 11, 2001 (9/11) and in the months prior at the World Trade Center (WTC). CA JA 97a-154a.

The Plaintiffs-Appellants, who were also petitioners, include some family members of victims of the 9/11 attacks and some 9/11 Ground Zero Responders (firefighters). FAC, CA JA 12a, 19a-26a, FAC Declarations 85a-96a. On July 30, 2018, the Lawyers' Committee on behalf of all petitioners delivered to the United States Attorney their First Amended Petition which incorporated by reference the evidentiary exhibits referenced in the original Petition. CA JA 97a. The Lawyers' Committee requested that the United States Attorney present the information in the Amended Petition to a federal special grand jury pursuant to 18 U.S.C. § 3332(a). *Id.*

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 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. FAC, CA JA 16a-17a.

The scientific and eyewitness evidence presented in the Amended Petition, 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, CA JA 97a-154a, substantially increasing the tragic loss of life from the 9/11 terrorist attacks. *Id*.

The evidence presented in the Petition and Amended Petition included: a) A report in a peer-reviewed scientific journal of independent scientific laboratory analysis of WTC building collapse dust samples showing the presence of high-tech explosives and/or incendiaries; b) Testimony of numerous 9/11 First Responders that they heard sounds of explosions and saw explosions on 9/11 at the WTC; c) Expert analysis of WTC 9/11 seismic evidence; and d) Expert testimony and scientific analysis by numerous architects, engineers, physicists, and chemists regarding extreme temperatures observed at the WTC on 9/11 and other technical facts which demonstrate conclusively that the WTC Twin Towers and WTC Building 7 were brought down by use of explosives and incendiaries on 9/11. CA JA 97a-154a.

The Department of Justice has recognized the existence of the duty imposed by 18 U.S.C. § 3332(a).

> It is incumbent upon any such government attorney to whom it is reported that a Federal offense was committed within the district, if the source of information so requests, to refer the information to the special grand jury, naming the source and apprising the jury of the attorney's action or recommendation regarding the information.

U.S. Attorneys' Manual, Criminal Resource Manual, § 158.

On November 7, 2018, the U.S. Attorney's Office sent the Lawyers' Committee a letter stating that the U.S. Attorney had received and reviewed the Lawyers' Committee's submissions and would comply with 18 U.S.C. § 3332(a). FAC, CA JA 12a, 31a. Upon inquiry some months later, the United States Attorney's Office stated that, because of the secrecy requirements of Fed. R. Crim. P. 6(e), it could not provide any information beyond the letter previously provided. FAC, CA JA 32a. No evidence was provided or has subsequently been found that the Federal Defendants have actually submitted Plaintiffs' full Petition, full Amended Petition, and/or the evidentiary exhibits thereto, any portion thereof, or the Plaintiffs' names and contact information, to a federal special grand jury as required by 18 U.S.C. § 3332(a).

Plaintiffs requested in their First Amended Complaint, *inter alia*, that the District Court order the U.S. Attorney or Clerk of Court to disclose to Plaintiffs certain grand jury records, including ministerial records of the grand jury, and in the event no disclosure is made or such disclosure as is made does not demonstrate that the

United States Attorney has provided Plaintiffs' Amended Petition and exhibits and supplements to a special grand jury, Order the Defendants to inform a federal special grand jury of the alleged federal offenses identified and described in Plaintiffs' Amended Petition and provide to such special grand jury Plaintiffs' Amended Petition and all supplements thereto including all the evidentiary exhibits referenced therein. Plaintiffs requested in the alternative, that the Court itself provide Plaintiffs' Amended Petition and exhibits directly to a federal special grand jury. CA JA 12a, 46a-47a.

The First Amended Complaint was filed with several exhibits that were incorporated for the purpose of elaborating on facts related to the Plaintiffs' standing. Those exhibits included the Amended Petition submitted to the U.S. Attorney, CA JA 97a-154a, as well as declarations from the individual plaintiffs and from officials of each organizational plaintiff, CA JA 78a-96a.

Surviving 9/11 Responders Plaintiff former Fire Commissioner Christopher Gioia was 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. FAC Declarations, CA JA 87a-89a. On 9/11, several of former Commissioner Gioia's good friends and brother firemen were killed in the line of duty with the F.D.N.Y while operating at the WTC. CA JA 87a-89a. Plaintiff Diana Hetzel is the widow of Fire Fighter Thomas J. Hetzel, Ladder #13, who perished during the collapse of WTC 1 on 9/11. CA JA 22a-24a, 90a. 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. FAC,

CA JA 24a-25a, FAC Declaration, CA JA 93a-94a. The perpetrators of these 9/11 crimes involving the use of explosives have not been arrested or prosecuted, and they have yet to be investigated by any official government body including any federal grand jury.

The Defendants' refusal to provide to a grand jury the Plaintiffs' Amended Petition and incorporated evidence has prevented the grand jury from evaluating that evidence. Because that evidence is scientifically dispositive, it should lead to either 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 would result in a better public understanding of the events of 9/11 and possibly disclosure of criminal conduct or government malfeasance not previously known by the public, providing a more complete picture of what happened on 9/11. This would assist the family members of the 9/11 victims in coming to closure regarding this tragedy.

Plaintiff Richard Gage has special interests as a professional architect. FAC, CA JA 18a, FAC Declaration CA JA 84a. 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. FAC, CA JA 18a.

The organizational plaintiffs here also have special interests given their unique nonprofit missions. Both organizations are dedicated to investigation and public education regarding the tragic events of 9/11 and seek to promote transparency and accountability regarding the crimes of 9/11. There is a reasonable probability, given the strength of the scientific and eyewitness evidence in Plaintiffs' Amended Petition and evidentiary exhibits, that at minimum the grand jury would be able to conclude that these terrible federal crimes involving use of explosives and incendiaries actually did occur.

Such a grand jury finding, in itself, could serve as a deterrent to a repetition of such crimes using explosives because the perpetrators, 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 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. It would significantly promote the nonprofit missions of both organizational plaintiffs to prevent, through submission of their Amended Petition to the federal special grand jury, a recurrence of such horrible crimes.

As long as the perpetrators remain at large, and their modus operandi remains undiscovered and unacknowledged by federal law enforcement (and those who manage high-rise and other large buildings), there remains a real risk that the horrible crimes of 9/11 involving use of explosives and incendiaries could be repeated. Plaintiffs' efforts via their Amended Petition,

CA JA 97a-154a, and public education efforts seek to prevent future terrorist crimes from being committed, including against them.

ARGUMENT ON REASONS FOR ALLOWANCE OF THE WRIT

A. The United States Court of Appeals for the Second Circuit Effectively Rescinded the Bill of Rights When, Acting Contrary to the Constitution and in Conflict with Decisions of the Supreme Court, It Held that 9/11 Victim Family Members, 9/11 First Responders, and Two U.S. Non-Profit Organizations Needed to Assert Additional Harm Beyond a Violation of a Constitutional Right to Have Article III Standing to Seek Judicial Remedies

The Second Circuit below held, in regard to Petitioners' standing to bring their First Amendment claim, that:

> It is not the case, however, that any person who claims a violation of his constitutional right may pursue a case against the violator. Rather, he must still demonstrate Article III standing, including that he suffered an actual injury. [Footnote omitted] Plaintiffs here fail to establish that they have been constitutionally injured.

Second Circuit Opinion, App. 11a.

The Court of Appeals below erred, as did the District Court, as a matter of law in concluding that all Plaintiffs lacked Article III standing to pursue their claim in Count II of the FAC that the Federal Defendants violated their

First Amendment Right to Petition the Special Federal Grand Jury. The basic error of the Court of Appeals, in affirming the District Court's decision to dismiss the FAC for lack of standing, was failing to recognize that the obstruction by the Federal Defendants of Plaintiffs' right under the First Amendment of the Constitution to have their full First Amended Petition and evidentiary exhibits *delivered* to the government entity for which it was intended, the federal special grand jury, caused constitutional injury sufficient to provide standing.

This obstruction of Plaintiffs' Right to Petition was an injury in fact, and an invasion of a legally protected interest which is concrete and particularized, actual and not conjectural or hypothetical. This injury was directly caused by the Federal Defendants' refusal to deliver Plaintiffs' Amended Petition to the grand jury, and this injury would be directly remedied by a ruling in favor of Plaintiffs' request for injunctive relief in Count II. Therefore, all the requirements for Article III standing were satisfied, and the Court of Appeals and the District Court erred in concluding otherwise.

To hold otherwise, as the Second Circuit did here, is to confuse standing requirements, the gatekeeper for the right of access to the courts, itself a fundamental First Amendment right, with the legal requirements for prevailing on the merits of a constitutional claim. To demonstrate standing to assert a claim in court at the motion to dismiss stage, a plaintiff does not have to demonstrate that the plaintiff has a winning case.

Without the ability to access the courts to draw attention to alleged constitutional violations, "all of

us-prisoners and free citizens alike would be deprived of the first-and often the only-'line of defense' against constitutional violations." *Lewis v. Casey*, 518 U.S. 343 (1996), Justice Stevens dissenting, *citing Bounds v. Smith*, 430 U. S. 817, 828 (1977); *Wolff v. McDonnell*, 418 U. S. 539, 579 (1974); *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971).

The constitutional violation here is a bright line black-and-white violation involving complete obstruction by DOJ of delivery of Petitioners' Petition and evidentiary exhibits to the grand jury. This is not a case such as in *Bounds* where judgments had to be made about whether a federal official's alleged pattern of conduct was sufficiently egregious to constitute a constitutional violation.

The Supreme Court has found in a number of cases that constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights. *Laird v. Tatum*, 408 U.S. 1 (1972), *citing Baird v. State Bar of Arizona*, 401 U.S. 1 (1971); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Lamont v. Postmaster General*, 381 U.S. 301 (1965); *Baggett v. Bullitt, 377 U.S. 360* (1964). The reasoning in these cases supports Plaintiffs' position here.

The DOJ here is adopting a rule *sub silentio*, (thus to circumvent the notice and comment provisions of the APA), that it has the authority to block at its whim delivery of a citizen petition to a grand jury notwithstanding both the citizen's First Amendment Right to Petition and a statutory duty imposed by Congress that such petitions reporting federal crimes *must* be relayed to the grand

jury. Here, that *de facto* rule has already been applied to block delivery of Plaintiffs Petition to the grand jury to the detriment of Plaintiffs' ability to exercise their Right to Petition.

If governmental action has a chilling effect on the exercise of a First Amendment right, then an injury has been stated sufficient to satisfy the first prong of the standing analysis. *The Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 521–523 (9th Cir.1989).

In *Lamont*, the Supreme Court held:

> We conclude that the **Act as construed and applied is unconstitutional because it requires an official act (viz., returning the reply card) as a limitation on the unfettered exercise of the addressees First Amendment rights.**

Lamont at 1495-96 (emphasis added).

A plaintiff has suffered an injury in fact if he (1) has an "intention to engage in a course of conduct arguably affected with a constitutional interest," (2) his intended future conduct is "arguably ... proscribed by [the policy in question]," and (3) "the threat of future enforcement of the [challenged policies] is substantial." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 161–64 (2014). Even government action that merely chills a citizen's speech under the First Amendment is constitutional harm sufficient to satisfy the Article III injury-in-fact requirement for standing.

> This court has repeatedly held, in the pre-enforcement context, that "[c]hilling a plaintiff's speech is a constitutional harm adequate to satisfy the injury-in-fact requirement." *Houston Chronicle v. City of League City*, 488 F.3d 613, 618 (5th Cir. 2007). *See also Freedom Path, Inc. v. I.R.S.*, 913 F.3d 503, 507 (5th Cir. 2019) (same); *Fairchild v. Liberty ISD*, 597 F.3d 747, 754–55 (5th Cir. 2010) (same); *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 660 (5th Cir. 2006) (same) ("As the district court noted, '[t]he First Amendment challenge has unique standing issues because of the chilling effect, self-censorship, and in fact the very special nature of political speech itself.' ").6 It is not hard to sustain standing for a pre-enforcement challenge in the highly sensitive area of public regulations governing bedrock political speech.

Speech First, Incorporated v. Fenves, 979 F.3d 319, 330-31 (5th Cir. 2020).

Here, the DOJ is not simply making Plaintiffs' exercise of their First Amendment rights more burdensome or costly, or threatening an obstruction in the future, but is outright blocking that exercise completely in the moment. The right Plaintiffs seek to enforce via Count II is a constitutionally based right to petition government entities. The U.S. Attorney's obstruction of this right creates standing on the part of Plaintiffs to enforce it.

> **"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). In the instant case, it is the Constitution itself that creates the legal right, via the First Amendment, the invasion of which constitutes legal harm and creates standing.

The requirements of Article III standing as discussed by the Supreme Court in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), are satisfied by Plaintiffs here in regard to their First Amendment claim in Count II of the FAC. 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 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 and gatekeeper of Plaintiffs' Amended Petition to the grand jury, in this case blocking the delivery of the full Amended Petition and exhibits to a government entity Plaintiffs intended to petition.

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 court decision 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.

Plaintiffs have not sought a court order requiring Defendants to prosecute the crimes reported. The FAC Count II simply seeks an order to require Defendants to stop obstructing Plaintiffs' right to petition the grand jury and 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 own judgment and perform its own duties as the independent constitutionally created federal government entity that it is in regard to the reported federal crimes.

To hold that the courts or Congress may impose standing requirements or other procedural barriers that would prevent citizens from having any access to the courts to enforce constitutional rights, as the Second Circuit and District Court have done below, creates a

serious constitutional problem. Denying any judicial forum for a colorable constitutional claim presents a "serious constitutional question." *See, e.g., Webster v. Doe*, 486 U.S. 592, 603 (1988) (*quoting Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 n.12 (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.")

> 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.")

See Sierra Club v. Trump, 929 F.3d 670, 698-99 (9th Cir. 2019). *And see, Navajo Nation v. Dep't of the Interior,* 876 F.3d 1144, 1170 (9th Cir. 2017) (explaining that certain constitutional challenges to agency action are "not grounded in the APA").

Even in circumstances where jurisdiction is otherwise deemed to 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). Here, the DOJ's refusal to honor its mandatory duties under both 18 U.S.C. § 3332(a) and the First Amendment constitutes such blatantly lawless agency action.

The District Court's and Second Circuit's condonation below of such DOJ misconduct, and the holdings of the

lower courts here to the effect that Plaintiffs lack standing, and therefore are not entitled to access to the courts for a remedy of a clear violation of their First Amendment rights represent such extreme departures from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's supervisory power.

Neither the courts nor Congress may elevate their own authority to the point where, via court-created standing to sue limitations, constitutional rights and protections are turned into nullities by eliminating citizens' access to the courts to enforce such rights. Contrary to the Second Circuit's decision below, in situations such as here, where agency officials blatantly obstruct the exercise of First Amendment rights, the citizen whose right to petition was obstructed will always have standing to sue to enforce that right, and the federal courts will always have jurisdiction to decide that plaintiff's claim.

In addition to the Second Circuit's error in holding that Plaintiffs lacked standing to pursue their First Amendment claim regarding obstruction by DOJ of the *delivery* of Plaintiffs' Petition to the grand jury, there is the additional equally important question of whether Plaintiffs had a right not only to have their Petition delivered, but also a right to receive a response from the petitioned governmental entity. Although the Supreme Court has decided this issue in the past in the negative, see *Smith v. Arkansas State Highway Employees*, 441 U.S. 463, 463–64 & n. 1 (1979), as discussed below it is time for that position to be reconsidered.

The Supreme Court's interpretation of the Constitution has been informed by the understanding that:

> The provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, **but by considering their origin and the line of their growth**.

We the People Foundation, Inc. v. U.S., 485 F.3d 140, 145 (D.C. Cir. 2007) (emphasis added), Rodgers, J. concurring, quoting *Konigsberg v. State Bar of California*, 366 U.S. 36, 50 n. 10 (1961) (quoting *Gompers v. United States*, 233 U.S. 604, 610 (1914)).

Judge Rodgers, noting with approval the appellants' argument in *We the People Foundation* that the long history of petitioning and the importance of the practice in England, the American Colonies, and the United States until the 1830's suggested that the right to petition was commonly understood at the time the First Amendment was proposed and ratified to include duties of consideration and response, cited to Julie M. Spanbauer, *The First Amendment Right to Petition Government for a Redress of Grievances: Cut From a Different Cloth,* 21 HASTINGS CONST. L.Q. 15, 22–33 (1993); Norman B. Smith, *"Shall Make No Law Abridging ...": An Analysis of the Neglected, but Nearly Absolute, Right of Petition*, 54 U. CIN. L. REV. 1153, 1154–68, 1170–75 (1986) as reflecting a developing academic consensus regarding the right to a government response to a petition. *Id*. at 147.

Judge Rodgers noted that based on the historical background of the Petition Clause, "most scholars agree

that the right to petition includes a right to some sort of considered response." *Id.*, quoting James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government,* 91 NW. U.L. REV. 899, 905 n. 22 (1997); and citing David C. Frederick, *John Quincy Adams, Slavery, and the Right of Petition,* 9 LAW & HIST. L. REV. 113, 141 (1991); Spanbauer, *supra,* at 40–42; Stephen A. Higginson, Note, *A Short History of the Right to Petition,* 96 YALE L.J. 142, 155–56 (1986); Note, *A Petition Clause Analysis of Suits Against the Government: Implications for Rule 11 Sanctions,* 106 HARV. L. REV. 1111, 1116–17, 1119–20 (1993); *see also* Akhil Reed Amar, *The Bill of Rights as a Constitution,* 100 YALE L.J. 1131, 1156 (1991) (lending credence to Higginson's argument that the Petition Clause implies a duty to respond). *Id.*

Judge Rodgers, in noting this emerging consensus of scholars, made the following observations regarding whether the Supreme Court might revisit this important question:

> Of course, this court cannot know whether the traditional historical analysis would have resonance with the Supreme Court in a Petition Clause claim such as appellants have brought. It remains to be seen whether the Supreme Court would agree to entertain the issue, much less whether it would agree with appellants and "most scholars" that the historical evidence provides insight into the First Congress's understanding of what was meant by the right to petition and reevaluate its precedent,

> or conversely reject that analysis in light of other considerations, such as the nature of our constitutional government. No doubt it would present an interesting question. For now it suffices to observe that appellants' emphasis on contemporary historical understanding and practices is consistent with the Supreme Court's traditional interpretative approach to the First Amendment.

We the People Foundation, Inc. v. U.S., 485 F.3d 140, 149 (D.C. Cir. 2007), Rodgers, J. concurring.

For all of the foregoing reasons, in order to rescue the Bill of Rights from the steep and slippery slope atop which the Second Circuit has placed those fundamental rights, this Court should grant certiorari, reverse the Second Circuit's decision, and hold that Plaintiffs have standing to pursue their First Amendment claim.

B. The United States Court of Appeals for the Second Circuit Acted Contrary to the Constitution and in Conflict with Decisions of the Supreme Court When, for the First Time in the History of the Constitution, it Created a Loophole in the First Amendment Right to Petition, Holding that Federal Grand Juries Are Not Entities of the Federal Government to which the First Amendment Right to Petition Applies

The First Amendment to the Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; **or**

the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. Amend. I (emphasis added). The Second Circuit below, in dismissing Petitioners' First Amendment claim, concluded that:

> The "First Amendment right to petition the Government for a redress of grievances does not inherently include a right to communicate directly with the grand jury." [Footnote omitted]

Second Circuit Opinion, App.11.

But, as the Supreme Court has held, the federal grand jury is an entity of the federal government, separate and independent from all of the other branches. *See U.S. v. Williams*, 504 U.S. 36 (1992) (quoted *infra*). The First Amendment right to petition has always been held to apply equally to *all* entities and branches of the federal government.

> "In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. …" [citations omitted] … The same philosophy governs the approach of citizens or groups of them to administrative agencies (which are both creatures of the legislature, and arms of the executive) and to courts, the third branch of Government. **Certainly the right to petition extends to *all* departments of the Government.**

California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972) (emphasis added). *Also see, Gearhart v. Thorne*, 768 F.2d 1072, 1073 (9th Cir. 1985).

> The First Amendment's Petition Clause protects "the right of the people ... to petition the Government for a redress of grievances." U.S. Const. amend. I; see generally *Borough of Duryea v. Guarnieri*, ––– U.S. ––––, 131 S.Ct. 2488, 2498–2500, 180 L.Ed.2d 408 (2011) (summarizing scope and history of Petition Clause). When "a person petitions the government" in good faith, "the First Amendment prohibits any sanction on that action." *Nader v. Democratic National Committee*, 567 F.3d 692, 696 (D.C. Cir. 2009).

Venetian Casino Resort, L.L.C. v. N.L.R.B., 793 F.3d 85, 89 (D.C. Cir. 2015).

The right of citizens to petition government has a long-honored tradition in both British and American law, as this Court has explained.

> The right to petition traces its origins to Magna Carta, … The Magna Carta itself was King John's answer to a petition from the barons. Id., at 30–38. Later, the Petition of Right of 1628 drew upon centuries of tradition and Magna Carta as a model for the Parliament to issue a plea, or even a demand, that the Crown refrain from certain actions. 3 Car. 1, ch. 1 (1627), 5 Statutes of the Realm 23. The Petition of Right stated four principal grievances: taxation without consent of Parliament; arbitrary

imprisonment; quartering or billeting of soldiers; and the imposition of martial law. After its passage by both Houses of Parliament, the Petition received the King's assent and became part of the law of England… The Petition of Right occupies a place in English constitutional history superseded in importance, perhaps, only by Magna Carta itself and the Declaration of Right of 1689.

The following years saw use of mass petitions to address matters of public concern. See 8 D. Hume, History of England from the Invasion of Julius Caesar to the Revolution in 1688, p. 122 (1763) ("Tumultuous petitioning ... was an admirable expedient ... for spreading discontent, and for uniting the nation in any popular clamour"). In 1680, for instance, more than 15,000 persons signed a petition regarding the summoning and dissolution of Parliament, "one of the major political issues agitating the nation." Knights, London's 'Monster' Petition, 36 Historical Journal 39, 40–43 (1993). Nine years later, the Declaration of Right listed the illegal acts of the sovereign and set forth certain rights of the King's subjects, one of which was the right to petition the sovereign. It stated that "it is the Right of the Subjects to petition the King, and all Commitments and Prosecutions for such Petitioning are Illegal." 1 W. & M., ch. 2, 6 Statutes of the Realm 143; see also L. Schwoerer, The Declaration of Rights, 1689, pp. 69–71(1981).

The Declaration of Independence of 1776 arose in the same tradition. After listing other specific grievances and wrongs, it complained, "In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury." The Declaration of Independence ¶ 30.

After independence, petitions on matters of public concern continued to be an essential part of contemporary debates in this country's early history. … During the ratification debates, Antifederalists circulated petitions urging delegates not to adopt the Constitution absent modification by a bill of rights. …

Petitions to the National Legislature also played a central part in the legislative debate on the subject of slavery in the years before the Civil War. See W. Miller, Arguing About Slavery (1995). Petitions allowed participation in democratic governance even by groups excluded from the franchise. See Mark, The Vestigial Constitution: The History and Significance of the Right to Petition, 66 Ford. L.Rev. 2153, 2182 (1998). For instance, petitions by women seeking the vote had a role in the early woman's suffrage movement. See Cogan & Ginzberg, 1846 Petition for Woman's Suffrage, New York State Constitutional Convention, 22 Signs 427, 437–438 (1997). The right to petition is in some sense the source of other fundamental rights, for petitions have provided a vital means

> for citizens to request recognition of new rights and to assert existing rights against the sovereign.1
>
> Petitions to the courts and similar bodies can likewise address matters of great public import. In the context of the civil rights movement, litigation provided a means for "the distinctive contribution of a minority group to the ideas and beliefs of our society." NAACP v. Button, 371 U.S. 415, 431, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963).
>
> Individuals may also "engag[e] in litigation as a vehicle for effective political expression and association, as well as a means of communicating useful information to the public." In re Primus, 436 U.S. 412, 431, 98 S.Ct. 1893, 56 L.Ed.2d 417 (1978). Litigation on matters of public concern may facilitate the informed public participation that is a cornerstone of democratic society. It also allows individuals to pursue desired ends by direct appeal to government officials charged with applying the law.

Borough of Duryea, Pa. v. Guarnieri, 564 U.S. 379, 395–97 (2011).

The grand jury has never been carved out of the First Amendment in regard to the right to petition and should not be. Petitioners respectfully request that this Court grant certiorari and reverse the Second Circuit decision below because it effectively carves the grand jury out of the scope of the First Amendment's right to petition the government.

C. The United States Court of Appeals for the Second Circuit Not Only Undermined, But Effectively Eliminated, the Constitutional Independence of the Grand Jury When It Refused to Enforce the Mandatory Duty Imposed Explicitly by Congress, and Implicitly by the Constitution, on Every United States Attorney to Relay Citizen Reports of Federal Crimes to a Grand Jury, and Left to the Complete Discretion of the Department of Justice What a Grand Jury Is Allowed to See and Consider

The Second Circuit below, in dismissing Petitioners' First Amendment claim, concluded that:

> [T]he presentation of evidence to a grand jury to initiate a federal prosecution "is an executive function within the exclusive prerogative of the Attorney General" and the U.S. Attorneys. [Footnote omitted] These prosecutors have wide discretion as to how to carry out the prosecutorial function. [Footnote omitted] Therefore, whether evidence is submitted to a grand jury is at the discretion of the prosecuting attorney.

Second Circuit Opinion, App. 11a-12a. In so holding, the second Circuit disregarded this Court's longstanding position on the independence of the grand jury and its right to obtain and receive evidence during its investigation as it sees fit, with or without the blessing of a prosecutor.

> "[R]ooted in long centuries of Anglo American history," *Hannah* v. *Larche*, 363 U.S. 420, 490 (1960) (Frankfurter, J., concurring in result),

the grand jury is mentioned in the Bill of Rights, but not in the body of the Constitution. It has not been textually assigned, therefore, to any of the branches described in the first three Articles. It " `is a constitutional fixture in its own right.' " *United States* v. *Chanen*, 549 F. 2d 1306, 1312 (CA9) (quoting *Nixon* v. *Sirica*, 159 U.S. App. D.C. 58, 70, n. 54, 487 F. 2d 700, 712, n. 54 (1973)), cert. denied, 434 U.S. 825 (1977). In fact the whole theory of its function is that it belongs to no branch of the institutional government, serving as a kind of buffer or referee between the Government and the people. See *Stirone* v. *United States*, 361 U.S. 212, 218 (1960); *Hale* v. *Henkel*, 201 U.S. 43, 61 (1906); G. Edwards, The Grand Jury 28-32 (1906). Although the grand jury normally operates, of course, in the courthouse and under judicial auspices, its institutional relationship with the judicial branch has traditionally been, so to speak, at arm's length. Judges' direct involvement in the functioning of the grand jury has generally been confined to the constitutive one of calling the grand jurors together and administering their oaths of office. See *United States* v. *Calandra*, 414 U.S. 338, 343 (1974); Fed. Rule Crim. Proc. 6(a).

The grand jury's functional independence from the judicial branch is evident both in the scope of its power to investigate criminal wrongdoing, and in the manner in which that power is exercised. "Unlike [a] [c]ourt, whose jurisdiction is predicated upon a specific case

or controversy, the grand jury `can investigate merely on suspicion that the law is being violated, or even because it wants assurance that it is not.' " *United States* v. *R. Enterprises*, 498 U. S. ___, ___ (1991) (slip op. 4) (quoting *United States* v. *Morton Salt Co.*, 338 U.S. 632, 642-643 (1950)). It need not identify the offender it suspects, or even "the precise nature of the offense" it is investigating. *Blair* v. *United States*, 250 U.S. 273, 282 (1919). The grand jury requires no authorization from its constituting court to initiate an investigation, see *Hale*, *supra*, at 59-60, 65, nor does the prosecutor require leave of court to seek a grand jury indictment. And in its day to day functioning, the grand jury generally operates without the interference of a presiding judge. See *Calandra*, *supra*, at 343. It swears in its own witnesses, Fed. Rule Crim. Proc. 6(c), and deliberates in total secrecy, see *United States* v. *Sells Engineering, Inc.*, 463 U. S., at 424-425.

True, the grand jury cannot compel the appearance of witnesses and the production of evidence, and must appeal to the court when such compulsion is required. See, *e. g.*, *Brown* v. *United States*, 359 U.S. 41, 49 (1959). And the court will refuse to lend its assistance when the compulsion the grand jury seeks would override rights accorded by the Constitution, see, *e. g.*, *Gravel* v. *United States*, 408 U.S. 606 (1972) (grand jury subpoena effectively qualified by order limiting questioning so as to preserve Speech or Debate Clause immunity),

> or even testimonial privileges recognized by the common law, see *In re Grand Jury Investigation of Hugle*, 754 F. 2d 863 (CA9 1985) (same with respect to privilege for confidential marital communications) (opinion of Kennedy, J.). Even in this setting, however, we have insisted that the grand jury remain "free to pursue its investigations unhindered by external influence or supervision so long as it does not trench upon the legitimate rights of any witness called before it." *United States* v. *Dionisio*, 410 U.S. 1, 17-18 (1973). Recognizing this tradition of independence, we have said that the Fifth Amendment's "constitutional guarantee *presupposes* an investigative body `acting independently of either prosecuting attorney *or judge*'. . . ." *Id.*, at 16 (emphasis added) (quoting *Stirone*, *supra*, at 218).

U.S. v. Williams, 504 U.S. 36 (1992).

If allowed to stand, the Second Circuit decision below will eviscerate the constitutional independence of the federal grand jury, relegating the grand jury to simply doing the bidding of the prosecutor, in direct conflict with this Court's long-standing precedents and the intentions of the Constitution's framers. Petitioners respectfully request that this Court grant certiorari and reverse the Second Circuit decision below to preserve the constitutionally established independence of the grand jury.

D. The United States Court of Appeals for the Second Circuit Created a Clear Split Among the Federal Circuits When It decided to Reject the Ninth Circuit's Rule that Ministerial Records of a Federal Grand Jury May Be Made Available to the Public

The Court of Appeals also erred in denying *in toto* Plaintiffs' request that certain grand jury records be released. The Plaintiffs argued that at least records disclosing the fact that Defendants have submitted, or have *not* submitted, Plaintiffs' Amended Petition to the grand jury should be releasable without causing any intrusion into the secrecy of grand jury proceedings (since there would have been none). The Plaintiffs also argued that ministerial records should not be protected by grand jury secrecy rules, as the Ninth Circuit has held.

The Supreme Court has recognized a general right to inspect and copy public records and that the interest necessary to support 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 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).

As the Second Circuit has recognized, "there are certain 'special circumstances' in which release of grand jury records is appropriate even outside of the boundaries of [Rule 6(e)]." *In re Petition of Craig*, 131 F.3d 99, 102 (2d Cir. 1997). Here such "special circumstances" that justify a release of grand jury material outside the strictures of

Rule 6(e) include that the need for secrecy may be largely reduced where grand jury proceedings are not active. Here, given that the U.S. Attorney with virtual certainty, given the government's filings below, has not presented Plaintiffs' Amended Petition to a grand jury, there is no justification for the secrecy presumption to be invoked at all.

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 required to disclose to Plaintiffs the fact, if true, that Plaintiffs' full Amended Petition and evidentiary exhibits have not been submitted to any grand jury.

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.

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 (9th Cir.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*.

The Ninth Circuit has adopted the rule that 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*. In *In re Special Grand Jury (for Anchorage, Alaska)*, 674 F.2d 778 (9th Cir. 1982) the Ninth Circuit narrowly construed Rule 6(e) to apply *only* to "grand jury testimony, votes of the jurors on substantive questions, and similar records," and recognized a right of public access to ministerial grand jury records. *Id*. at 781.

The Second Circuit decision below clearly created, or exacerbated, a split among the federal circuits on this question when it rejected the Ninth Circuit's position on

this important question of the public's right to access federal grand jury ministerial records. Petitioners respectfully request this Court grant certiorari and resolve this split among the Courts of Appeals and adopt the Ninth Circuit's rule that federal grand jury ministerial records are not required to be kept secret from the public. This Court should also hold that the federal Defendants have an obligation to disclose to Petitioners the simple fact that their full Amended Petition and evidentiary exhibits either were, or were not, submitted to the grand jury. This disclosure would cause no more of an intrusion into grand jury secrecy than does the currently allowed disclosures by grand jury witnesses of their own testimony.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Supreme Court of the United States grant this Petition for Writ of Certiorari and clarify the applicable law for the nation's courts on these important questions regarding citizens' Article III standing to seek judicial remedies for violations of their constitutional rights, citizens' First Amendment right to petition all entities of the federal government, the independence of the federal grand jury, and the public's right to access ministerial records of federal grand juries.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED AUGUST 5, 2022

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 21-1338-cv

LAWYERS' COMMITTEE FOR 9/11 INQUIRY, INC., RICHARD GAGE, CHRISTOPHER GIOIA, DIANA HETZEL, ARCHITECTS & ENGINEERS FOR 9/11 TRUTH, MICHAEL O'KELLY, JEANNE EVANS, ROBERT MCILVAINE,

Plaintiffs-Appellants,

v.

MERRICK B. GARLAND, ATTORNEY GENERAL OF THE UNITED STATES, DAMIAN WILLIAMS, UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF NEW YORK, UNITED STATES DEPARTMENT OF JUSTICE,

Defendants-Appellees.[*]

January 21, 2022, Argued
August 5, 2022, Decided

Appeal from the United States District Court
for the Southern District of New York.

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* The Clerk of Court is directed to amend the caption as set forth above.

Appendix A

Before: WALKER, SULLIVAN, and LEE, *Circuit Judges*.

Plaintiffs submitted a petition to the United States Attorney's Office for the Southern District of New York that contained information related to the September 11, 2001 attacks and requested that the Office present the petition to a grand jury. Over a year later, plaintiffs filed this lawsuit, requesting (1) disclosure of grand jury records related to the petition and (2) a court order compelling defendants to present their petition to a grand jury if they have not yet done so. The district court dismissed the lawsuit for lack of standing and for failure to state a claim. On appeal, plaintiffs challenge those findings. Because we find no merit to plaintiffs' challenges, we AFFIRM.

JOHN M. WALKER, JR., *Circuit Judge*:

Plaintiffs submitted a petition to the United States Attorney's Office for the Southern District of New York that contained information related to the September 11, 2001 attacks and requested that the Office present the petition to a grand jury. Over a year later, plaintiffs filed this lawsuit, requesting (1) disclosure of grand jury records related to the petition and (2) a court order compelling defendants to present their petition to a grand jury if they have not yet done so. The district court dismissed the lawsuit for lack of standing and for failure to state a claim. On appeal, plaintiffs challenge those findings. Because we find no merit to plaintiffs' challenges, we AFFIRM.

Appendix A

BACKGROUND

Plaintiffs believe that the collapse of the World Trade Center's twin towers on September 11, 2001 was caused not by the impact of terrorist-flown airplanes or burning jet fuel, but by explosives planted in the basements or lobbies of the towers. And they want a grand jury to investigate the event under that theory. Plaintiffs include a nonprofit corporation, Lawyers' Committee for 9/11 Inquiry, Inc., as well as an architect, his non-profit Architects & Engineers for 9/11 Truth ("AE"), a firefighter who was involved in the recovery efforts at the World Trade Center, and family members of those who died because of the September 11 attacks.

On April 10, 2018, the Lawyers' Committee delivered to the United States Attorney's Office for the Southern District of New York a "Petition [t]o Report Federal Crimes Concerning 9/11 [t]o Special Grand Jury or in the Alternative to Grand Jury Pursuant to the United States Constitution and 18 U.S.C. § 3332(a)."[1] The petition included "extensive scientific and eye-witness testimony" concerning the events of September 11.[2] On July 30, the Lawyers' Committee delivered its First Amended Petition to the U.S. Attorney's Office ("the Petition") and requested that the U.S. Attorney present the information contained in the Petition to a special federal grand jury. On August 30, 2019, the Lawyers' Committee submitted the same information to the U.S. State Department's "Rewards

1. Joint App'x 16a.

2. Joint App'x 16a.

for Justice" program, which "offers rewards or bounties for information leading to the arrest of persons engaged in terrorism."[3]

In September 2019, plaintiffs filed this lawsuit in district court against the U.S. Attorney General and the U.S. Attorney for the Southern District of New York. Plaintiffs sought to compel defendants to disclose what information from the Petition, if any, they have shown to a grand jury (Count 1); they also sought to compel defendants, if they had not already done so, to present the Petition to a grand jury, arguing that defendants' failure to do so was a violation of the First Amendment (Count 2) and that plaintiffs were entitled to the above court order pursuant to the Federal Mandamus Statute[4] (Count 3) and the Administrative Procedure Act[5] ("APA") (Count 4). On March 24, 2021, the district court (Gardephe, *J.*) granted defendants' motion to dismiss the complaint. The district court held that plaintiffs did not have standing to compel defendants to present their Petition to a grand jury and that plaintiffs failed to state a claim when seeking to force defendants to release information presented to a grand jury. This appeal followed.

3. Joint App'x 32a-33a.

4. 28 U.S.C. § 1361.

5. 5 U.S.C. §§ 702, 706(1).

Appendix A

DISCUSSION

On appeal, plaintiffs argue that (1) they have standing to pursue an order compelling defendants to submit their Petition to a grand jury and (2) the district court erred in denying their request that certain grand jury records be released. Neither argument has merit.

I. Plaintiffs lack standing to seek an order compelling defendants to submit their Petition to a grand jury.

We review *de novo* the dismissal of a complaint under Federal Rule of Civil Procedure 12(b)(1) for lack of standing.[6]

A. The Federal Mandamus Statute and the APA

Plaintiffs allege that then-U.S. Attorney Audrey Strauss unlawfully denied their request to deliver the Petition to a grand jury in violation of her duty pursuant to 18 U.S.C. § 3332(a). Section 3332(a) states:

> It shall be the duty of each such grand jury impaneled within any such judicial district to inquire into offenses against the criminal laws of the United States . . . . 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

6. *Chabad Lubavitch of Litchfield Cnty., Inc. v. Litchfield Historic Dist. Comm'n*, 768 F.3d 183, 191 (2d Cir. 2014).

> 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.

Counts 3 and 4 of the complaint request mandamus relief pursuant to the Federal Mandamus Statute and to compel agency action under the APA, respectively.[7] But we need not reach whether such provisions provide relief because plaintiffs lack constitutional standing.

To demonstrate Article III standing, a plaintiff must show that he 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."[8] We have previously held that a plaintiff lacked standing because he suffered no injury in fact based on the purported withholding of information from a grand jury under § 3332(a) by a U.S. Attorney.

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7. The mandamus statute provides judicial relief to compel an officer of the United States "to perform a duty owed to a plaintiff," *Binder & Binder PC v. Barnhart*, 399 F.3d 128, 133 (2d Cir. 2005) (quoting 28 U.S.C. § 1361) (emphasis omitted); the APA similarly empowers a court to "compel agency action unlawfully withheld," *Sharkey v. Quarantillo*, 541 F.3d 75, 83 (2d Cir. 2008) (quoting 5 U.S.C. § 706(1)).

8. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (internal citations and quotation marks omitted).

In *Zaleski v. Burns*, a petitioner sought to present allegations to a grand jury pursuant to § 3332(a) that there existed a conspiracy to deny criminal defendants their constitutional rights.[9] We noted that, while it was not clear from the record whether the petitioner made a request to the U.S. Attorney's Office to present his information to a grand jury, even if he had done so, there was no standing given the absence of injury, because "[w]ithout more, the denial of his § 3332(a) right [was] insufficient" to confer standing.[10] And as other circuits have held, the denial of one's ability to "giv[e] information" to a grand jury is not an injury for standing purposes.[11] Accordingly, plaintiffs have not alleged an injury sufficient to support standing based on the U.S. Attorney's alleged failure to deliver the Petition to a grand jury in violation of § 3332(a).[12]

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9. 606 F.3d 51, 52 (2d Cir. 2010) (per curiam).

10. *Id.*

11. *Sargeant v. Dixon*, 130 F.3d 1067, 1070, 327 U.S. App. D.C. 274 (D.C. Cir. 1997) (holding that a plaintiff lacked standing to enforce § 3332(a) because he failed to identify a cognizable injury). In addition to the D.C. Circuit, the Eleventh and Third Circuits have also held that private plaintiffs lack standing to force a presentation of their evidence to a grand jury under § 3332(a). *See Morales v. U.S. Dist. Ct. for the S. Dist. of Fla.*, 580 F. App'x 881, 886 (11th Cir. 2014); *Banks v. Buchanan*, 336 F. App'x 122, 123-24 (3d Cir. 2009).

12. *In re Grand Jury Application*, 617 F. Supp. 199 (S.D.N.Y. 1985), which found that § 3332(a) could confer standing on a private party to seek its enforcement in that case, is a district court opinion not binding on this court and, in any event, has been subsequently abrogated by *Zaleski*.

Plaintiffs assert various other theories to support standing. None have merit. To start, they posit that they are injured because they are unable to get the reward promised by the State Department's Rewards for Justice Program: presumably, plaintiffs believe if their Petition were provided to a grand jury, the jury would return an indictment and they would then be entitled to the reward for information leading to the arrest of persons engaged in terrorism. But "a claimant needs more than an interest in the bounty he will receive if the suit is successful" to demonstrate standing.[13]

Next, plaintiffs contend that the Lawyers' Committee and AE have organizational standing. An organization can demonstrate standing if it shows that a defendant's actions have caused a "concrete and demonstrable injury to [its] activities—with the consequent drain on [its] resources."[14] The Lawyers' Committee's mission is "to promote transparency and accountability regarding the tragic events of September 11,"[15] and the mission of AE is to "establish the truth about the events of" September

13. *Donoghue v. Bulldog Invs. Gen. P'ship*, 696 F.3d 170, 178 (2d Cir. 2012) (internal quotation marks omitted); *see also Vermont Agency of Nat. Res. v. United States*, 529 U.S. 765, 772-73, 120 S. Ct. 1858, 146 L. Ed. 2d 836 (2000) (noting that the bounty a *qui tam* relator would receive if a suit was successful was merely a "byproduct of the suit itself," which could not "give rise to a cognizable injury for Article III standing purposes" (internal quotation marks omitted)).

14. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379, 102 S. Ct. 1114, 71 L. Ed. 2d 214 (1982).

15. Joint App'x 15a.

11.[16] Plaintiffs argue that if defendants had submitted their Petition to a grand jury, they "would not have had to expend thousands of hours and tens of thousands of dollars in on-going investigations and litigation."[17] But because the very mission of the plaintiff organizations is to investigate the September 11 attacks and it is likely that they had completed that investigation at the time they requested that the evidence be turned over to the grand jury, they have not identified how defendants imposed additional costs on that activity. We also recently rejected plaintiffs' theory based on litigation costs, noting that "an organization's decision to embark on categorically *new* activities in response to action by a putative defendant will not ordinarily suffice to show an injury for standing purposes."[18] Thus plaintiffs cannot allege that the money they spent on litigation *after* submitting their Petition confers standing.

Finally, plaintiffs cannot demonstrate standing by asserting that they seek to get the federal government to investigate and prosecute the crimes alleged in their Petition. It is well settled that "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another."[19] In addition, the "prospect that prosecution will, at least in the future, result in [what

16. Appellants' Br. at 47 (internal quotation marks omitted).

17. Appellants' Br. at 49.

18. *Conn. Parents Union v. Russell-Tucker*, 8 F.4th 167, 174 (2d Cir. 2021) (emphasis added).

19. *In re Att'y Disciplinary Appeal*, 650 F.3d 202, 204 (2d Cir. 2011) (per curiam) (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 619, 93 S. Ct. 1146, 35 L. Ed. 2d 536 (1973)).

plaintiffs want] can, at best, be termed only speculative" and thus insufficient to establish standing.[20]

Accordingly, plaintiffs fail to establish standing to pursue an order compelling defendants to deliver their Petition to a grand jury under the Federal Mandamus Statute or the APA.

B. First Amendment

Plaintiffs claim, in Count 2 of the complaint, that defendants violated plaintiffs' First Amendment right to petition by refusing to submit their Petition to a grand jury. The district court also dismissed this claim for lack of constitutional standing. The First Amendment prevents the government from prohibiting "the right of the people . . . to petition the government for a redress of grievances."[21] Plaintiffs contend that they have the right "to have their petition for redress *delivered* to the government entity from which they seek redress."[22] They argue that "[i]n situations such as here, where agency officials blatantly obstruct the exercise of First Amendment rights, the citizen whose right to petition was obstructed will always have standing to sue to enforce their First Amendment right."[23]

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20. *Linda R.S.*, 410 U.S. at 618.

21. U.S. Const. amend. I.

22. Joint App'x 41a.

23. Appellants' Br. at 34.

It is not the case, however, that any person who claims a violation of his constitutional right may pursue a case against the violator. Rather, he must still demonstrate Article III standing, including that he suffered an actual injury.[24] Plaintiffs here fail to establish that they have been constitutionally injured. The "First Amendment right to petition the Government for a redress of grievances does not inherently include a right to communicate directly with the grand jury."[25] That is so because the presentation of evidence to a grand jury to initiate a federal prosecution "is an executive function within the exclusive prerogative of the Attorney General" and the U.S. Attorneys.[26] These prosecutors have wide discretion as to how to carry out the prosecutorial function.[27] Therefore, whether evidence

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24. *Lewis v. Casey*, 518 U.S. 343, 349, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996).

25. *Sibley v. Obama*, 866 F. Supp. 2d 17, 22 (D.D.C. 2012) (internal citation and quotation marks omitted), *summarily aff'd*, No. 12-5198, 2012 U.S. App. LEXIS 25050, 2012 WL 6603088 (D.C. Cir. Dec. 6, 2012); *see also In re New Haven Grand Jury*, 604 F. Supp. 453, 457 n.8 (D. Conn. 1985) (Cabranes, J.) ("[T]he 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 . . . ."); *Gratton v. Cochran*, Nos. 19-5176/5555, 2020 U.S. App. LEXIS 59, 2020 WL 2765775, at *2 (6th Cir. Jan. 2, 2020) (noting that petitioner "fail[ed] to cite any authority supporting a First Amendment right to present evidence to a grand jury" in a case in which the petitioner sought to compel an Assistant U.S. Attorney to initiate a grand jury investigation).

26. *In re Persico*, 522 F.2d 41, 54 (2d Cir. 1975) (internal quotation marks omitted).

27. *Bordenkircher v. Hayes*, 434 U.S. 357, 364, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978) ("In our system, so long as the prosecutor

is submitted to a grand jury is at the discretion of the prosecuting attorney. To hold otherwise would allow every person who submits any information to a U.S. Attorney's office the ability to bring an action to force the U.S. Attorney to submit his materials to a grand jury. "The danger in permitting private persons to use the grand jury for their own purposes is obvious enough."[28] Such an outcome would defeat the role of the U.S. Attorney as the exclusive source of federal prosecutions. Unsurprisingly, plaintiffs have identified no caselaw in support of this result. Moreover, to the extent that plaintiffs assert a general right to be heard, the Supreme Court has made clear that the First Amendment "does not impose any affirmative obligation on the government to listen [or] to respond" to a citizen's speech.[29]

Plaintiffs' attempt to analogize their case to *Morello v. James* [30] is unavailing. That case concerned the unconstitutional denial of a prisoner's right of access to the *courts*, which is well-established as grounded

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has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.").

28. *In re Persico*, 522 F.2d at 58-59.

29. *Smith v. Ark. State Highway Emps., Local 1315*, 441 U.S. 463, 465, 99 S. Ct. 1826, 60 L. Ed. 2d 360 (1979) (per curiam).

30. 810 F.2d 344 (2d Cir. 1987).

in the First Amendment.[31] *Franco v. Kelly*,[32] another case upon which they rely, similarly held that a prisoner had a First Amendment right to submit his complaints to a state administrative agency.[33] In neither *Morello* nor *Franco*, however, did plaintiffs seek to compel the government entity receiving the complaining document to do something further. Here, the First Amendment right was satisfied when plaintiffs presented their Petition to the U.S. Attorney. The First Amendment does not encompass the right to force a U.S. Attorney to present whatever materials a member of the public chooses to a grand jury. Accordingly, plaintiffs have failed to show a cognizable injury under the First Amendment to establish standing to pursue Count 2.

II. The district court did not abuse its discretion in refusing to order the release of any materials that may have been submitted to a grand jury in connection with the Petition.

The complaint also requested that the district court unseal "all substantive and ministerial records of any federal grand jury with which the U.S. Attorney has communicated regarding [p]laintiffs' [Petitions]," or any subset of those records that the district court deemed appropriate to disclose[34] In the alternative, plaintiffs

31. *Id.* at 346.

32. 854 F.2d 584 (2d Cir. 1988).

33. *Id.* at 589-90.

34. Joint App'x 36a.

requested the release of "all ministerial records" regarding any grand jury that had received information related to plaintiffs' Petitions.[35] The district court denied both requests. A district court's decision as to whether disclosure of grand jury materials is appropriate will be overturned only if the court has abused its discretion.[36]

Plaintiffs first argue that they have the right to request disclosure of any grand jury records pursuant to Federal Rule of Criminal Procedure 6(e)(3). That rule delineates certain circumstances when disclosure of grand jury materials is appropriate, such as at the request of the government, at the request of a criminal defendant, or "preliminarily to or in connection with a judicial proceeding."[37] Because plaintiffs' requests plainly do not fall into any of these exceptions, they cannot seek the documents under Rule 6(e)(3).

Plaintiffs nevertheless rely upon prior cases in which this court "has recognized that there are certain special circumstances in which release of grand jury records is appropriate even outside of the boundaries of [Rule 6(e)]."[38] To determine whether such "special circumstances" exist courts consider a non-exhaustive list of factors, including:

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35. Joint App'x 37a.

36. *In re Grand Jury Subpoena*, 103 F.3d 234, 239 (2d Cir. 1996).

37. Fed. R. Crim. P. 6(e)(3)(E).

38. *In re Petition of Craig*, 131 F.3d 99, 103 (2d Cir. 1997) (internal quotation marks omitted).

> (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.[39]

The burden is on the requester to demonstrate that disclosure is appropriate, and "the baseline presumption [is] against disclosure."[40]

The district court did not abuse its discretion in finding that these factors weighed against disclosure here. First, "the government's position should be paid considerable heed,"[41] and the government opposes release here.

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39. *Id.* at 106.

40. *Id.* at 104; *see also Douglas Oil Co. v. Petrol Stops Nw.*, 441 U.S. 211, 218, 99 S. Ct. 1667, 60 L. Ed. 2d 156 (1979) (noting that "the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings").

41. *In re Petition of Craig*, 131 F.3d at 106.

Next, the timing of the requests weighs in favor of non-disclosure. "[T]he continued existence and vulnerability of" the "principal parties involved in the investigations, as well as that of their immediate families," is a "factor that a court should consider."[42] Here, a significant number of people involved in or related to someone involved in the September 11 attacks are still alive, and, as the events occurred just twenty years ago, it is likely that witnesses are still alive, too.[43] In this case, therefore, secrecy is still a concern. "[T]he passage of time erodes many of the justifications for continued secrecy,"[44] but the passage of time in this case is not so extended as to weigh in favor of releasing any records. Moreover, the fact that plaintiffs are not a party to the grand jury proceeding weighs against disclosure.[45] Finally, "the extent to which the grand jury material in a particular case has been made public is clearly relevant because even partial previous disclosure often undercuts many of the reasons for secrecy."[46] Here, the materials desired by plaintiffs (showing whether a grand jury proceeding has been convened and, if so, what has transpired) have never been made public, further

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42. *Id.* at 107.

43. *Id.* (noting that a district court did not abuse its discretion in declining to disclose grand jury records involving witnesses who were still alive).

44. *Id.*

45. Accordingly, contrary to plaintiffs' argument, the disclosure that plaintiffs asked for is different in kind from the disclosure allowed under Rule 6(e) for the release of grand jury witnesses' own testimony.

46. *In re Petition of Craig*, 131 F.3d at 107.

weighing against disclosure.[47] In sum, the district court's finding that no special circumstances existed to justify the disclosure of the requested records was well within its discretion.

Plaintiffs argue lastly that "the law should make a distinction between ministerial records and records of substantive grand jury proceedings in terms of [the level of] secrecy" required, and that the records they request are ministerial.[48] The Ninth Circuit has adopted a more relaxed disclosure rule for what it termed as "ministerial" grand jury materials, including orders authorizing the extension of a grand jury, roll sheets reflecting composition and attendance of a grand jury, and the manner in which a grand jury was empaneled.[49] This court has not recognized such a ministerial-record exception to the rules surrounding disclosure of grand jury materials.[50]

We need not decide here whether there can ever be a relaxed standard under which courts evaluate whether to disclose "ministerial" grand jury records because it

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47. Plaintiffs obviously are not just requesting that the U.S. Attorney give back to them the Petition that they themselves sent in, the contents of which they are clearly familiar with, and which plaintiffs have already publicly posted. Appellants' Reply Br. at 18.

48. Appellants' Br. at 52-53.

49. *In re Special Grand Jury (for Anchorage, Alaska)*, 674 F.2d 778, 781-82 (9th Cir. 1982).

50. *See, e.g.*, *United States v. Chambers*, No. 3:18-cr-00079, 2019 U.S. Dist. LEXIS 33478, 2019 WL 1014850, at *2 (D. Conn. Mar. 4, 2019).

is clear that what plaintiffs have requested here is not in any sense "ministerial." We have previously found that "[t]he plain language of [Fed. R. Crim. P. 6(e)] shows that Congress intended for its confidentiality provisions to cover matters beyond those actually occurring before the grand jury: Rule 6(e)(6) provides that all records, orders, and subpoenas *relating to* grand jury proceedings be sealed, not only actual grand jury materials; similarly, Rule 6(e)(5) refers to matters *affecting* a grand jury proceeding, not simply the proceedings themselves."[51] Plaintiffs here request "records showing whether [their] Petition was submitted to the grand jury, or not."[52] But the evidence presented to a grand jury is one of the most substantive aspects of a grand jury proceeding.[53] Whether a grand jury is convened and, if so, what it has seen, certainly "relat[e] to" grand jury proceedings and thus are not subject to disclosure.[54] Plaintiffs are therefore not entitled to the information they request. If the court were to find otherwise, any private person submitting evidence to a U.S. Attorney's Office hoping for a grand jury investigation could demand updates on the progress of the Office's investigation and decision on whether to convene a grand jury. There is no support for such a result in any statute or the caselaw.

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51. *In re Grand Jury Subpoena*, 103 F.3d at 237.

52. Appellants' Br. at 27.

53. *See In re Grand Jury Subpoena*, 103 F.3d at 239 (noting that when "disclosure of the confidential information might disclose matters *occurring before the grand jury*, the information should be protected by Rule 6(e)" (emphasis added)).

54. *Id.* at 237.

Appendix A

CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the district court.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED MARCH 24, 2021

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

19 Civ. 8312 (PGG)

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,

Plaintiff,

- against-

WILLIAM P. BARR, ATTORNEY GENERAL OF THE UNITED STATES, GEOFFREY BERMAN, UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF NEW YORK, AND U.S. DEPARTMENT OF JUSTICE,

Defendants.

March 24, 2021, Decided
March 24, 2021, Filed

ORDER

Appendix B

PAUL G. GARDEPHE, U.S.D.J.:

In this action, Plaintiffs seek an order compelling the Attorney General of the United States and the United States Attorney for the Southern District of New York,[1] pursuant to either a writ of mandamus or the Administrative Procedure Act ("APA"), to present certain information to a federal grand jury, as provided in 18 U.S.C. § 3332(a). Plaintiffs also seek the release of certain grand jury records and injunctive relief for alleged violations of their First Amendment rights. (Am. Cmplt. (Dkt. No. 20))

Defendants move to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6). (Dkt. No. 28) For the reasons stated below, Defendants' motion will be granted.

BACKGROUND

Plaintiff Lawyers' Committee for 9/11 Inquiry ("Lawyers' Committee") is a nonprofit corporation committed to "promote transparency and accountability regarding the tragic events of September 11, 2001." (Am. Cmplt. (Dkt. No. 20) ¶ 12) The Lawyers' Committee believes that the destruction of three buildings at the World Trade Center ("WTC") on September 11, 2001

1. Merrick Garland is now the Attorney General of the United States, and he is automatically substituted as a defendant pursuant to Federal Rule of Civil Procedure 25(d). Audrey Strauss is the Acting United States Attorney for the Southern District of New York, and she is likewise automatically substituted as a defendant.

("9/11") was the result of the detonation of "pre-placed" "explosives and/or incendiaries." (*Id.* ¶¶ 54-55) According to the Lawyers' Committee, "as a matter of science, as a matter of logic, and as a matter of law," the evidence "is conclusive that explosive and/or incendiary devices that had been pre-placed at the WTC were detonated causing the complete collapse of the . . . Twin Towers on 9/11." (*Id.* ¶ 55) According to the Lawyers' Committee, "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 . . . ." (*Id.* ¶ 12)

On April 10, 2018, the Lawyers' Committee delivered a petition to the United States Attorney's Office for the Southern District of New York ("USAO") setting forth "factual information and evidence . . . regarding certain federal crimes . . . related to the attacks on the [WTC]." (*Id.* ¶¶ 14, 50) The Lawyers' Committee delivered an amended petition on July 30, 2018. (*Id.* ¶¶ 16, 54) Both petitions include information that the Lawyers' Committee believes supports its allegations. (*Id.* ¶¶ 15-16) In each petition, the Lawyers' Committee asks the United States Attorney to empanel a grand jury to consider this information, pursuant to 18 U.S.C. § 3332(a). (*Id.* ¶¶ 51-53, 56) In a November 7, 2018 letter, the USAO assured the Lawyers' Committee that the USAO would comply with its obligations under 18 U.S.C. § 3332(a). (*Id.* ¶ 59)

In June 2019, the Lawyers' Committee contacted the USAO to inquire about the status of the petitions. The USAO provided no further information to the Lawyers' Committee, citing the secrecy requirements of Federal Rule of Criminal Procedure Rule 6(e). (*Id.* ¶ 60)

Appendix B

On August 30, 2019, the Lawyers' Committee submitted the same information set forth in the petitions to the United States Department of State, as part of an application to the State Department's "Rewards for Justice" program, which is a Counter-Terrorism Rewards Program that "offers rewards or bounties for information leading to the arrest of persons engaged in terrorism." (*Id.* ¶¶ 61-63)

The Amended Complaint further alleges that the Department of Justice ("DOJ") funds "local and state terrorism programs that attempt to discredit" the Lawyers' Committee and Plaintiff Architects and Engineers for 9/11 Truth ("Architects") by circulating communications that try to "convince citizens that organizations that question the government's explanation for the 9/11 attacks . . . are to be treated as suspected terrorists." (*Id.* ¶ 66) Plaintiffs claim that these alleged DOJ-funded communications hamper their recruitment, fundraising, and communication efforts, and are "potentially defamatory." (*Id.* ¶¶ 67-68) In support of their claims, Plaintiffs have attached as an exhibit to the Amended Complaint a flyer issued by the Columbus, Ohio Division of Police, Homeland Security Section, Terrorism Early Warning Unit, entitled "Communities Against Terrorism." The flyer lists as an "[a]ttitude [i]ndicator[]" that citizens should "[c]onsider [s]uspicious" any "[c]onspiracy theories about Westerners (e.g. the CIA arranged for 9/11 to legitimize the invasion of foreign lands)." (Am. Cmplt., Ex. 9 (Ohio Police Flyer) (Dkt. No. 20-9) at 1).

Appendix B

Plaintiff Richard Gage is an architect who signed the Lawyers' Committee petition to the USAO. He is the founder and president of Plaintiff Architects & Engineers for 9/11 Truth, a non-profit organization whose mission is to "establish[] the truth about the events of September 11, 2001." (Am. Cmplt. (Dkt. No. 20) ¶¶ 17, 19) Architects "authorized the Lawyers' Committee to add its name as an organization to the list" of organizations that signed the petition to the USAO, and joined the Lawyers' Committee's Rewards for Justice application. (*Id.* ¶¶ 21-22)

Plaintiff Jeanne Evans' brother, Robert Evans, was an FDNY firefighter who died alongside members of Engine 33 and Ladder 9 responding to the WTC attack. (*Id.* ¶ 23) Plaintiff Diana Hetzel's husband, Thomas J. Hetzel, was a firefighter with Ladder 13, who died inside the North Tower. (*Id.* ¶¶ 33-34) Plaintiff Robert McIlvaine lost his son, Bobby McIlvaine, who was at the WTC for a banking conference on the morning of 9/11. (*Id.* ¶¶ 37-38)

Plaintiff Christopher Gioia, is the Fire Commissioner of the Franklin Square and Munson Fire Department, and was among the first responders on 9/11. (*Id.* ¶ 28) Several of Gioia's friends and co-workers from the Franklin Square and Munson Fire Department were killed on 9/11, and several others are battling cancer as a result of exposure to deadly toxins at the WTC site. (*Id.* ¶¶ 29-30) Plaintiff Michael J. O'Kelly was a member of the FDNY who spent a month at the WTC site engaged in rescue and recovery efforts. He subsequently developed respiratory problems, including asthma, from inhaling toxins at the WTC site. (*Id.* ¶¶ 43-45)

Evans, Gioia, and McIlvaine authorized the Lawyers' Committee to add their names to the petition sent to the USAO. (*Id.* ¶¶ 27, 32, 41) Gage, McIlvaine, and O'Kelly have submitted declarations in support of the Amended Complaint's claim that the 9/11 tragedy was the result of explosives planted at the WTC site. (Gage Decl. (Dkt. No. 20-2); McIlvaine Decl. (Dkt. No. 20-6); O'Kelly Decl. (Dkt. No. 20-7)) Evans, Gioia, and Hetzel have submitted declarations in support of the Lawyers' Committee petition to the USAO. (Evans Decl. (Dkt. No. 20-3); Gioia Decl. (Dkt. No. 20-4); Hetzel Decl. (Dkt. No. 20-5))

The Amended Complaint asserts four claims: (1) a request to disclose grand jury records pursuant to common law rights, the Court's inherent authority, the First Amendment, and Rule 6 of the Federal Rules of Criminal Procedure (Am. Cmplt. (Dkt. No. 20) ¶¶ 69-83); (2) violation of Plaintiffs' First Amendment right to petition for redress and request for injunctive relief (*id.* ¶¶ 84-91); (3) mandamus relief to compel presentation of the amended petition to a grand jury pursuant to 28 U.S.C. § 1361 (*id.* ¶¶ 92-98); and (4) mandamus relief to compel presentation of the amended petition to a grand jury pursuant to the APA, 5 U.S.C. § 706(1). (*Id.* ¶¶ 99-102).

On May 8, 2020, Defendants moved to dismiss. (Dkt. No. 28) Defendants contend that Plaintiffs lack standing to compel the USAO to present information to the grand jury. (Def. Br. (Dkt. No. 29) at 10)[2] Defendants further

2. The page numbers referenced in this Order correspond to the page numbers designated by this District's Electronic Case Files ("ECF") system.

argue that, even if Plaintiffs had standing, they have not stated a claim under the First Amendment, the APA or the mandamus statute for the relief they seek — an order compelling the USAO to present certain evidence to a grand jury. (*Id.* at 23; Def. Reply Br. (Dkt. No. 30) at 13) Defendants also contend that Plaintiffs are not entitled to release of grand jury material under Rule 6(e) of the Federal Rules of Criminal Procedure. (Def. Br. (Dkt. No. 29) at 25-27)

DISCUSSION

I. LEGAL STANDARDS

A. Rule 12(b)(1) Motion to Dismiss

"[A] federal court generally may not rule on the merits of a case without first determining that it has jurisdiction over the category of claim in suit ([i.e.,] subject-matter jurisdiction)." *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 430-31, 127 S. Ct. 1184, 167 L. Ed. 2d 15 (2007). "A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000).

Where subject matter jurisdiction is challenged, a plaintiff "bear[s] the burden of 'showing by a preponderance of the evidence that subject matter jurisdiction exists.'" *APWU v. Potter*, 343 F.3d 619, 623 (2d Cir. 2003) (quoting *Lunney v. United States*, 319 F.3d 550, 554 (2d Cir. 2003));

see also Aurecchione v. Schoolman Transp. Sys., Inc., 426 F.3d 635, 638 (2d Cir. 2005) (citing *Luckett v. Bure*, 290 F.3d 493, 497 (2d Cir. 2002)) ("The plaintiff bears the burden of proving subject matter jurisdiction by a preponderance of the evidence."). And "[u]nder Rule 12(b)(1), even 'a facially sufficient complaint may be dismissed for lack of subject matter jurisdiction if the asserted basis for jurisdiction is not sufficient.'" *Castillo v. Rice*, 581 F. Supp. 2d 468, 471 (S.D.N.Y. 2008) (quoting *Frisone v. Pepsico Inc.*, 369 F. Supp. 2d 464, 469 (S.D.N.Y. 2005)).

In considering a Rule 12(b)(1) motion, a court "must accept as true all material factual allegations in the complaint." *J.S. ex rel. N.S. v. Attica Cent. Sch.*, 386 F.3d 107, 110 (2d Cir. 2004). The court "may consider affidavits and other materials beyond the pleadings to resolve the jurisdictional issue, but . . . may not rely on conclusory or hearsay statements contained in the affidavits." *Id.; see also Morrison v. Nat'l Austl. Bank Ltd.*, 547 F.3d 167, 170 (2d Cir. 2008), *aff'd*, 561 U.S. 247, 130 S. Ct. 2869, 177 L. Ed. 2d 535 (2010) ("In resolving a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) a district court may consider evidence outside the pleadings." (citing *Makarova*, 201 F.3d at 113)). In resolving a Rule 12(b)(1) motion, a court may also "consider 'matters of which judicial notice may be taken.'" *Greenblatt v. Gluck*, No. 03 Civ. 597 RWS, 2003 U.S. Dist. LEXIS 3846, 2003 WL 1344953, at *1 n.1 (S.D.N.Y. Mar. 19, 2003) (quoting *Hertz Corp. v. City of New York*, 1 F.3d 121, 125 (2d Cir. 1993)).

"A motion to dismiss a complaint for lack of standing is properly brought pursuant to Rule 12(b)(1) . . . because

it relates to the court's subject matter jurisdiction." *ED Capital, LLC v. Bloomfield Inv. Res. Corp.*, 155 F. Supp. 3d 434, 446 (S.D.N.Y. 2016), *aff'd in rel. part*, 660 F. App'x 27 (2d Cir. 2016).

B. Rule 12(b)(6) Motion to Dismiss

"To survive a motion to dismiss [pursuant to Fed. R. Civ. P. 12(b)(6)], a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). "In considering a motion to dismiss[,] . . . the court is to accept as true all facts alleged in the complaint," *Kassner v. 2nd Ave. Delicatessen Inc.*, 496 F.3d 229, 237 (2d Cir. 2007) (citing *Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 87 (2d Cir. 2002)), and must "draw all reasonable inferences in favor of the plaintiff." *Id.* (citing *Fernandez v. Chertoff*, 471 F.3d 45, 51 (2d Cir. 2006)).

A complaint is inadequately pled "if it tenders 'naked assertion[s]' devoid of 'further factual enhancement,'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557), and does not provide factual allegations sufficient "to give the defendant fair notice of what the claim is and the grounds upon which it rests." *Port Dock & Stone Corp. v. Oldcastle Ne., Inc.*, 507 F.3d 117, 121 (2d Cir. 2007) (citing *Twombly*, 550 U.S. at 555).

Under this standard, a plaintiff is required only to set forth a "short and plain statement of the claim," Fed. R. Civ. P. 8(a), with sufficient factual "heft to 'sho[w] that the pleader is entitled to relief.'" *Twombly*, 550 U.S. at 557 (alteration in *Twombly*) (quoting Fed. R. Civ. P. 8(a)). To survive a motion to dismiss, plaintiff's "[f]actual allegations must be enough to raise a right to relief above the speculative level," *id.* at 555, and present claims that are "plausible on [their] face." *Id.* at 570. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678.

"Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* (quoting *Twombly*, 550 U.S. at 557). Where "the allegations in a complaint, however true, could not raise a claim of entitlement to relief," *Twombly*, 550 U.S. at 558, or where a plaintiff has "not nudged [his] claims across the line from conceivable to plausible, the[ ] complaint must be dismissed." *Id.* at 570.

II. ANALYSIS

A. Standing

1. Applicable Law

"The doctrine of standing asks whether a litigant is entitled to have a federal court resolve his grievance. This inquiry involves both constitutional limitations on

federal-court jurisdiction and prudential limits on its exercise." *United States v. Suarez*, 791 F.3d 363, 366 (2d Cir. 2015) (internal quotation marks and citation omitted). To establish constitutional standing, a plaintiff must show that he has "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)).

The requisite "injury in fact" is "an invasion of a legally protected interest which is (a) concrete and particularized[;] . . . and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (internal quotation marks and citations omitted). Where a statute creates private rights, the violation of those rights may constitute an injury in fact sufficient to confer standing. *See Spokeo*, 136 S. Ct. at 1549. Conversely, a plaintiff lacks standing to assert a claim under a statute that does not afford a private right of action. *See Naylor v. Case & McGrath, Inc.*, 585 F.2d 557, 561 (2d Cir. 1978).

The plaintiff bears the burden of establishing the elements of standing, *Spokeo*, 136 S. Ct. at 1547 (citation omitted), and, "at the pleading stage, the plaintiff must 'clearly . . . allege facts demonstrating' each element." *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 518, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)).

2. Standing to Bring the Amended Complaint's Second, Third, and Fourth Causes of Action

Title 18, United States Code, Section 3332(a) provides as follows:

> 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 . . . 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.

18 U.S.C. § 3332(a).

In their Second Cause of Action, Plaintiffs contend that Defendants' refusal to present their amended petition to a grand jury "constitutes not only a failure to perform the mandatory duties imposed on the U.S. Attorney by 18 U.S.C. § 3332(a), but also constitutes a violation of Plaintiffs' First Amendment Right to Petition (the grand jury) for Redress."[3] (Am. Cmplt. (Dkt. No. 20) ¶ 89)

3. To the extent that Plaintiffs argue that violation of their First Amendment right to petition the Government is a basis for

The Third Cause of Action alleges, "on information and belief, that the United States Attorney here has, unlawfully withheld, in violation of his clear duty pursuant to 18 U.S.C. § 3332(a), the action requested by Plaintiffs" to deliver their amended petition to a grand jury. (*Id.* ¶ 97) Plaintiffs seek a writ of mandamus to compel the USAO to comply with its obligations under 18 U.S.C. § 3332(a). (*Id.* ¶¶ 92-98)

The Fourth Cause of Action alleges that the USAO's failure to deliver the amended petition to a grand jury violates 18 U.S.C. § 3332(a), and that Plaintiffs' rights under Section 3332(a) are enforceable under the APA pursuant to a "claim[] for mandamus[-]type relief." (*Id.* ¶¶ 99-102)

As to all three claims, Plaintiffs request the same injunctive relief: that the Court "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))." (*Id.* ¶ 91; *see also id.* ¶ 98 (asking for a writ of mandamus compelling the same); ¶ 102 ("Plaintiffs are entitled to an order from this Court mandating the United States Attorney to provide Plaintiffs' Amended Petition

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standing in and of itself, Plaintiffs cite no case law that establishes a right under the First Amendment distinct from Section 3332(a). (Pltf. Opp. (Dkt. No. 30) at 15-16) Although Plaintiffs contend that "being heard [is] an end in itself" (id. at 15), this argument is indistinguishable from the standing arguments Plaintiffs make with respect to their APA and mandamus claims. As such, the standing inquiry for each of these three claims will be treated as coextensive.

and Exhibits to a special grand jury and inform the special grand jury of the Plaintiffs' identity in order to remedy agency action unreasonably delayed or withheld and that is arbitrary and capricious."))

In sum, the Second, Third, and Fourth Causes of Action all seek to compel the USAO, pursuant to the following language in Section 3332(a), to provide the amended petition to a grand jury:

> [A]lleged offenses may be brought to the attention of the grand jury 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.

18 U.S.C. § 3332(a).

The Second Circuit has held, however, that "the denial of [a] § 3332(a) right is insufficient" to establish standing. *Zaleski v. Burns*, 606 F.3d 51, 52 (2d Cir. 2010) (*per curiam*). In *Zaleski*, an inmate alleged that there existed a "vast . . . conspiracy to deny criminal defendants their constitutional rights," and sought to present his allegations to a grand jury pursuant to Section 3332(a). *Id.* The Second Circuit held that the inmate lacked standing to pursue such an application. *Id.* at 52-53.

Plaintiffs attempt to distinguish *Zaleski* by arguing that — unlike the inmate plaintiff in that case — they "seek only indirect access to the grand jury," and "have explicitly requested" that the USAO submit their amended petition to a grand jury. (Pltf. Opp. (Dkt. No. 30) at 20) But *Zaleski* states that "even had" plaintiff "requested that the Southern District U.S. Attorney's Office present his information to a grand jury," he would still not have standing. *Zaleski*, 606 F.3d at 52.[4] In sum, under *Zaleski*, the USAO's failure to provide the amended petition to a grand jury does not provide Plaintiffs with standing to pursue their Second, Third, and Fourth Causes of Action.[5]

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4. Other Circuits agree that a private plaintiff "lacks standing to force presentation of his alleged evidence to a grand jury under 18 U.S.C. § 3332(a)." *Hawkins v. Lynch*, 626 F. App'x 1, 2 (D.C. Cir. 2015); *see also Morales v. U.S. Dist. Court for S. Dist. of Fla.*, 580 Fed. Appx. 881, 886 (11th Cir. 2014) ("The U.S. Attorney's denial of a request to present information [to a grand jury] does not invade any 'concrete' and 'particularized' interest of [plaintiff] or affect [plaintiff] any differently than it affects everyone else."); *Banks v. Buchanan*, 336 F. App'x 122, 123 (3d Cir. 2009) ("[Plaintiff] is correct that § 3332 requires the U.S. Attorney to inform the grand jury of information provided by 'any person' about an 'offense[ ] against the criminal laws of the United States.' It does not, however, confer standing upon [Plaintiff] to enforce the U.S. Attorney's obligation, as [Plaintiff's] interest in the prosecution of [another] is not a legally protected interest.").

5. Plaintiffs also cite to *In re Grand Jury Application*, 617 F. Supp. 199, 201 (S.D.N.Y. 1985) (see Pltf. Opp. (Dkt. No. 30) at 15), which appears to be the only case that has held that "18 U.S.C. § 3332(a) creates a duty on the part of the United States Attorney that runs to [a private party], and [that] the breach of that duty gives [that private party] standing to seek its enforcement." As a

Appendix B

In addition to the alleged violation of their rights under Section 3332(a), Plaintiffs cite other injuries that they contend are sufficient to establish standing. As discussed above, in order for these alleged injuries to provide a basis for standing, Plaintiffs must show that they are "(a) concrete and particularized[;] . . . and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (internal quotation marks and citations omitted). Plaintiffs do not meet this standard.

As an initial matter, Plaintiffs contend that the first responders among them — Gioia and O'Kelly — "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." (Pltf. Opp. (Dkt. No. 30) at 22) Plaintiffs further suggest that anyone living in, or related to someone living in or near New York City — such as Plaintiffs Hetzel and Evans — has a unique interest in preventing terrorist attacks, as "New York City is a prime target" for such attacks. (Pltf. Opp. (Dkt. No. 30) at 23)

"This claimed harm relies on multiple conjectural leaps, most significantly its central assumption that the . . . Plaintiffs will be among the victims of an as-yet unknown terrorist attack by independent actors not before the court." *Cohen v. Facebook, Inc.*, 252 F. Supp. 3d 140, 150 (E.D.N.Y. 2017), *aff'd in part, dismissed in part sub*

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result of the Second Circuit's contrary holding in *Zaleski, In re Grand Jury Application* is no longer good law.

nom. Force v. Facebook, Inc., 934 F.3d 53 (2d Cir. 2019). Plaintiffs have not shown that they "*in particular* are at any 'substantial' or 'certainly impending' risk of future harm." *Id.* (citing *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158, 134 S. Ct. 2334, 189 L. Ed. 2d 246 (2014)) (emphasis in *Cohen*). And courts have ruled that Plaintiffs who cite no more than "a general risk of harm to residents of [New York City]" do not have standing. *Id.* A plaintiff must instead allege that he or she "'*specifically* will be the target of any future, let alone imminent, terrorist attack.'" *Id.* (citing *Tomsha v. Gen. Serv. Admin.*, 15-cv-7326 (AJN), 2016 U.S. Dist. LEXIS 80875, 2016 WL 3538380, at *2 (S.D.N.Y. June 21, 2016)) (emphasis in *Tomsha*). Nor is a fear of future attacks sufficient to justify standing, as "allegations of a subjective fear are not an adequate substitute for a claim of specific present objective harm or threat of a specific future harm." *Id.* at 151 (quotation marks, alteration, and citation omitted).

Plaintiffs also assert that their application for a reward from the State Department's Rewards for Justice program gives them standing. (Am. Cmplt. (Dkt. No. 20) ¶¶ 61-65; Pltf. Opp. (Dkt. No. 30) at 7, 12) Under this program, someone who provides "actionable information" may be eligible for a reward if "a terrorist involved in either the planning or execution of an attack against U.S. persons and/or property is arrested or convicted as a result of [that] information." (*Id.* ¶ 65) Plaintiffs argue that — were the amended petition presented to a grand jury — they "would have a reasonable probability of receiving a RFJ reward." (Pltf. Opp. (Dkt. No. 30) at 12) In arguing that the reward program provides a basis for

standing, Plaintiffs cite *Sargeant v. Dixon*, 130 F.3d 1067, 1070, 327 U.S. App. D.C. 274 (D.C. Cir. 1997), which held that a litigant attempting to enforce Section 3332 "might well have standing" if they "would be entitled to a bounty if a prosecution were initiated."

The Supreme Court has rejected the notion that a plaintiff's potential bounty or reward that could result from litigation provides a basis for standing. In *Vermont Agency of Natural Resources v. United States ex. rel. Stevens*, a *qui tam* relator argued that the bounty he would receive if a False Claims Act lawsuit were successful could constitute an injury in fact sufficient to establish standing. 529 U.S. 765, 772, 120 S. Ct. 1858, 146 L. Ed. 2d 836 (2000). In rejecting this argument, the Supreme Court ruled that an injury in fact "must consist of obtaining compensation for, or preventing, the violation of a legally protected right. . . . [whereas] the 'right' [the *qui tam* relator] seeks to vindicate does not even fully materialize until the litigation is completed and the relator prevails." *Id.* at 772-73 (citations omitted). Because an interest in a financial reward was "merely a 'byproduct' of the suit itself[, it] cannot give rise to a cognizable injury in fact for Article III standing purposes." *Id.* at 773.

Here, any potential reward Plaintiffs might receive for information set forth in the amended petition is too speculative and attenuated an interest to give rise to an injury in fact for standing purposes.

Plaintiffs attempt to distinguish *Vermont Agency of Natural Resources* by stating that — unlike a *qui tam*

lawsuit under the False Claims Act — Plaintiffs here "are not simply, or primarily, seeking to obtain some kind of financial windfall," but rather "seek to prevent future terrorist crimes from being committed, including against them." (Pltf. Opp. (Dkt. No. 30) at 25) For the reasons stated above, neither the potential financial reward from the Rewards for Justice program nor the prevention of future terrorist crimes provides a sufficient basis for standing.

The Lawyers' Committee and Architects also assert that they have suffered harm from DOJ-funded communications, such as the Columbus, Ohio police flyer. According to Plaintiffs, the Ohio 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 26; *see also* Am. Cmplt. (Dkt. No. 20) ¶¶ 66-68; Ohio Police Flyer (Dkt. No. 20-9) at 1) Plaintiffs contend that such communications are "potentially defamatory," and "significantly undercut the ability of [these] nonprofits . . . 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." (Am. Cmplt. (Dkt. No. 20) ¶ 67)

As an initial matter, the Ohio flyer does not reference the Lawyers' Committee or Architects in any way; accordingly, it is not plausible that the flyer defamed these organizations or "undercut" their efforts. Even if it had, "[c]laiming reputational harm is not an exception

or loophole that excuses litigants from satisfying Article III's injury criteria. The issue, as with any alleged harm, is whether it is also 'concrete and particularized,' and 'actual or imminent,' as opposed to 'conjectural or hypothetical.'" *Floyd v. City of New York*, 302 F.R.D. 69, 119 (S.D.N.Y.), *aff'd in part, appeal dismissed in part*, 770 F.3d 1051 (2d Cir. 2014) (citation omitted). The alleged harm to these organizations is purely hypothetical and too abstract to constitute an injury in fact.[6]

Plaintiffs also contend that Plaintiff McIlvaine has a personal interest in obtaining closure concerning his son's death, and that this interest is served by publicly disclosing "the events of 9/11 and possibly . . . criminal conduct or government malfeasance, misfeasance or non-feasance not previously known by the public." (Pltf. Opp. (Dkt. No. 30) at 27) But "a private citizen lacks a judicially

6. The Lawyers' Committee and Architects also contend that they have organizational standing based on "[t]he mission of the Lawyers' Committee . . . to promote transparency and accountability regarding the tragic events of September 11, 2001," and Architects' mission to "establish[] the truth about the events of September 11, 2001." (Am. Cmplt. (Dkt. No. 20) ¶¶ 12-13, 19; *see also* Pltf. Opp. (Dkt. No. 30) at 7) The alleged mission of these organizations is not sufficient to confer standing. In *Sierra Club v. Morton*, the Supreme Court ruled that "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.'" 405 U.S. 727, 739, 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972). Accordingly, the interest of the Lawyers' Committee and Architects in promoting the organizations' goals are not cognizable injuries in fact for purposes of standing.

cognizable interest in the prosecution or nonprosecution of another." *Linda R.S. v. Richard D.*, 410 U.S. 614, 619, 93 S. Ct. 1146, 35 L. Ed. 2d 536 (1973). Accordingly, McIlvaine does not have standing to compel the USAO to present evidence to a federal grand jury.

Plaintiffs contend that Plaintiff Gage, as an architect, has a special interest in avoiding "unnecessary expense and effort to design and construct (and fund) high-rise buildings to meet a perceived building vulnerability to fire" that Plaintiffs contend "does not exist" based on their evidence that the WTC was destroyed by explosives and not fire. (Pltf. Opp. (Dkt. No. 30) at 26) Gage's alleged interest in avoiding unnecessary business expense is too attenuated and hypothetical to afford him standing.

Because Plaintiffs have not demonstrated that they have Article III standing to pursue the Second, Third, and Fourth Causes of Action, these claims will be dismissed.[7]

B. Whether the First Cause of Action States a Claim

In the First Cause of Action, Plaintiffs seek an order directing the Government to "release to Plaintiffs all substantive and ministerial records of any federal grand

7. Because Plaintiffs do not have standing to pursue the claims set forth in the Second, Third, and Fourth Causes of Action, the Court does not reach Defendants' argument that Plaintiffs have not stated a claim under the First Amendment, the mandamus statute, or the APA. (*See* Def. Br. (Dkt. No. 29) at 22 n.3, 23-25)

jury with which the U.S. Attorney has communicated regarding Plaintiffs' [petitions] to the U.S. Attorney . . . or such subset of such records as the law may allow to be released." (Am. Cmplt. (Dkt. No. 20) ¶ 80) Defendants have moved to dismiss, arguing that the First Cause of Action fails to state a claim. (Def. Br. (Dkt. No. 29) at 25)

1. Applicable Law

The Supreme Court has "consistently . . . recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings." *Douglas Oil Co. of Cal. v. Petrol Stops Nw.*, 441 U.S. 211, 218, 99 S. Ct. 1667, 60 L. Ed. 2d 156 (1979). While "courts have been reluctant to lift unnecessarily the veil of secrecy from the grand jury[,] . . . in some situations justice may demand that discrete portions" of the record before the grand jury be disclosed to prevent a possible injustice. *Id.* at 219-221. The Supreme Court has instructed that "disclosure is appropriate only in those cases where the need for it outweighs the public interest in secrecy, and that the burden of demonstrating this balance rests upon the private party seeking disclosure." *Id.* at 223.

Accordingly, the general rule is that grand jury proceedings remain secret, unless the party requesting disclosure satisfies one of the exceptions set forth in Rule 6(e) of the Federal Rules of Criminal Procedure. Rule 6(e) provides that the district court "may authorize disclosure . . . 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.

Fed. R. Crim. P. 6(e)(3)(E).

"The Supreme Court has fashioned a tripartite analysis to guide lower courts, explaining that '[p]arties seeking grand jury transcripts under Rule 6(e) must 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.'" *Frederick v. New York City*, No. 11 CIV. 469 JPO, 2012 U.S. Dist. LEXIS 150223, 2012 WL 4947806, at *7 (S.D.N.Y. Oct. 11, 2012) (quoting *Douglas Oil*, 441 U.S. at 222). "In other words, to unseal grand jury records the parties must prove a 'particularized need.'" *Id.* (quoting *U.S. v. Procter & Gamble Co.*, 356 U.S. 677, 683, 78 S. Ct. 983, 2 L. Ed. 2d 1077 (1958)).

The Second Circuit "has recognized that there are certain 'special circumstances' in which release of grand jury records is appropriate even outside of the boundaries of [Rule 6(e)]." *In re Petition of Craig*, 131 F.3d 99, 102 (2d Cir. 1997). Courts consider the following "non-exhaustive list of factors . . . when confronted with these highly discretionary and fact-sensitive 'special circumstances' motions":

> (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.

"The burden of demonstrating that the need for disclosure is greater than the public interest in secrecy is a heavy one, and it rests with the party seeking disclosure." *Del Cole v. Rice*, No. CV115138MKBWDW, 2013 U.S. Dist. LEXIS 205777, 2013 WL 12316374, at *2 (E.D.N.Y. Nov. 6, 2013) (citation omitted). "Thus, a party seeking the disclosure of grand jury minutes must make an overall strong showing of 'particularized need' for those materials. *Id.* (citing *U.S. v. Sells Engineering, Inc.*, 463 U.S. 418, 443, 103 S. Ct. 3133, 77 L. Ed. 2d 743 (1983)); *accord United States v. Calk*, No. 19 CR. 366 (LGS), 2020 U.S. Dist. LEXIS 116013, 2020 WL 3577903, at *10 (S.D.N.Y. July 1, 2020). "[I]n deciding whether to make public the ordinarily secret proceedings of a grand jury investigation," a court engages in "one of the broadest and most sensitive exercises of careful judgment that a trial judge can make." *In re Petition of Craig*, 131 F.3d 99 at 104.

2. Analysis

Plaintiffs assert that they "have a common law right and a First Amendment right to petition (for redress) the court for access to [records related to the grand jury]," as well as "the right to request disclosure of grand jury records pursuant to Fed. R. Crim. P. 6(e)." (Am. Cmplt.

(Dkt. No. 20) ¶ 72) As discussed above, Plaintiffs seek an order directing the Government to "release to Plaintiffs all substantive and ministerial records of any federal grand jury with which the U.S. Attorney has communicated regarding Plaintiffs' [petitions] to the U.S. Attorney . . . or such subset of such records as the law may allow to be released." (*Id.* ¶ 80)

In the alternative, Plaintiffs seek only "ministerial records, and such subset of the substantive records as the Court determines would be appropriate in the reasonable exercise of its discretion, of or regarding any federal grand jury with which the U.S. Attorney has communicated regarding Plaintiffs' [petitions] to the U.S. Attorney. . . ." (*Id.* ¶ 81) The "ministerial records" Plaintiffs seek include, *inter alia*, orders that summon a grand jury or special grand jury "that has or will receive Plaintiffs' [p]etition, [a]mended [p]etition, exhibits thereto, or information regarding same," as well as roll sheets, records regarding the method used to impanel such jurors, and voting records. (*Id.* ¶ 82)

Plaintiffs contend that "[t]here are special circumstances that warrant the disclosure of the grand jury records [they] request[]." (*Id.* ¶ 83) According to Plaintiffs, the Government does not have a "significant . . . interest in continued secrecy" regarding whether the USAO has submitted Plaintiffs' amended petition to the grand jury, because Plaintiffs have already publicly disclosed the materials they provided to the USAO. Plaintiffs also note that eighteen years have passed since 9/11, which means that "secrecy is not required

to prevent the escape of those whose indictment may be contemplated." Plaintiffs further contend that this matter is "of unusual public importance," that disclosure "would promote public understanding of and confidence in the executive branch, the Department of Justice, the [USAO], and the judiciary," and that the disclosure they seek would not undermine the interests served by maintaining the secrecy of grand jury proceedings. (*Id.*)

Defendants contend that the exceptions set forth in Rule 6(e) do not apply here, noting that Plaintiffs are not defendants in a criminal action seeking dismissal of an indictment, and that the grand jury records Plaintiffs seek are not connected to another judicial proceeding. (Def. Br. (Dkt. No. 29) at 27)

Plaintiffs counter that they are not relying solely on Rule 6(e). Instead, Plaintiffs assert that they "have a common law right and a First Amendment right to petition the court for access to . . . grand jury related records, in addition to the right to request disclosure of grand jury records pursuant to Fed. R. Crim. P. 6(e)." (Pltf. Opp. (Dkt. No. 30) at 10)

Plaintiffs also contend that "ministerial records" of grand jury proceedings are treated differently than "substantive records" of grand jury proceedings, and that "[m]inisterial records related to a grand jury should not be subject to any grand jury secrecy restrictions imposed by Rule 6(e)." (Pltf. Opp. (Dkt. No. 30) at 11) In support of this argument, Plaintiffs rely exclusively on *In re Special Grand Jury (for Anchorage, Alaska)*, 674

F.2d 778 (9th Cir. 1982). In that case, the Ninth Circuit narrowly construed Rule 6(e) to apply only to "grand jury testimony, votes of the jurors on substantive questions, and similar records," and recognized a right of public access to ministerial grand jury records. *Id.* at 781.

The Court concludes that none of the exceptions set forth in Rule 6(e) are applicable here: the Government has not requested disclosure; Plaintiffs are not criminal defendants seeking dismissal of an indictment; and the grand jury records are not sought "preliminarily to or in connection with a judicial proceeding." *See* Fed. R. Crim. P. 6(e)(3)(E).

As to Plaintiffs' application for "ministerial records" of the grand jury, and their argument that "ministerial records" of the grand jury enjoy little if any protection, "[t]he Second Circuit . . . has not recognized such a disclosure rule for ministerial Grand Jury materials." *United States v. Reynolds*, No. 10CR32A, 2012 U.S. Dist. LEXIS 153654, 2012 WL 5305183, at *11 (W.D.N.Y. Oct. 25, 2012). Indeed, "courts within the Second Circuit . . . have consistently held that obtaining grand jury instructions requires a showing of particularized need," and have rejected requests to "adopt[] a relaxed disclosure rule for ministerial grand jury materials." *United States v. Chambers*, No. 3:18-CR-00079 (KAD), 2019 U.S. Dist. LEXIS 33478, 2019 WL 1014850, at *2 (D. Conn. Mar. 4, 2019). Accordingly, this Court will not distinguish between "ministerial" and "substantive" grand jury materials. As with any request for grand jury materials, in order to obtain disclosure, Plaintiffs' request "must make an

overall strong showing of 'particularized need' for those materials." *Del Cole*, 2013 U.S. Dist. LEXIS 205777, 2013 WL 12316374, at *2.

Here, Plaintiffs' showing of a "particularized need for disclosure" is rooted in a similar case the Lawyers' Committee and Architects filed in the U.S. District Court for the District of Columbia, in which they "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)." (Pltf. Opp. (Dkt. No. 30) at 12) That case was dismissed on standing grounds. The court held that Plaintiffs' application for a reward from the Rewards for Justice program was too speculative to constitute a basis for standing. (*Id.*) Plaintiffs have appealed. According to Plaintiffs, the disclosure of grand jury records they seek here is "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," as it "creates a non-speculative scenario where Plaintiffs would have a reasonable probability of receiving a RFJ reward." (*Id.* at 12-13)

As to the alleged "special circumstances" that justify a release of grand jury material outside the strictures of Rule 6(e), Plaintiffs contend that "the need for secrecy may be largely reduced where grand jury proceedings are not active." (*Id.* at 11) And, in the event that the USAO has not presented Plaintiffs' amended petition to a grand jury, Plaintiffs contend that the "secrecy presumption should not be invoked at all." (*Id.* at 12)

Defendants counter that "the need for secrecy is paramount," and that the "special circumstances" "factors weigh heavily in favor of non-disclosure." (Def. Br. (Dkt. No. 29) at 28-29) Given Plaintiffs' theory "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," it is obvious that "maintaining secrecy would be of the utmost concern." (*Id.* at 29-30) As to Plaintiffs' argument that they need the grand jury material in order to buttress their case for standing in their D.C. action, Defendants contend that "[t]he existence of such a grand jury investigation . . . would do nothing to alter [the D.C. court's] conclusion that the reward would, still, be [too] speculative" to confer standing. (Def. Reply Br. (Dkt. No. 31) at 6)

This Court concludes that Plaintiffs have not shown "that the material they seek is needed to avoid a possible injustice in another judicial proceeding." *Douglas Oil*, 441 U.S. at 222. Although Plaintiffs argue that "[t]he existence of a grand jury inquiry" concerning the alleged evidence they submitted to the USAO "creates a non-speculative scenario where Plaintiffs would have a reasonable probability of receiving a RFJ reward" (Pltf. Opp. (Dkt. No. 30) at 12), this is the same standing argument that this Court has already rejected.

As the D.C. District Court noted in dismissing Plaintiffs' action,

> courts do not lightly speculate on how "independent actors" not before them might exercise their broad discretion. . . . Setting aside

> the chances that [the relief Plaintiffs seek] would lead to the arrest or conviction of a terrorist, just consider how much leeway the Secretary of State[, who implements the Rewards for Justice program,] has. The decision to pay a reward lies in his "sole discretion." . . . And this decision "shall not be subject to judicial review." So the Secretary is an independent actor who exercises broad discretion unreviewable by this Court or any court.

Lawyers' Comm. for 9/11 Inquiry, Inc. v. Wray, 424 F. Supp. 3d 26, 34 (D.D.C. 2020) (first quoting *Lujan*, 504 U.S. at 561; then quoting 22 U.S.C. § 2708) (emphasis omitted).

In sum, there is no reason to believe that the deficiencies highlighted by the D.C. District Court in dismissing the Lawyers' Committee action would be cured by disclosure of the grand jury materials Plaintiffs seek. Accordingly, Plaintiffs have not demonstrated a "particularized need" for the grand jury materials they seek.

The "special circumstances" factors listed by the Second Circuit in *In re Petition of Craig*, 131 F.3d at 106, likewise militate against disclosure of the grand jury material Plaintiffs seek. In that case, the Second Circuit instructed that "the identity of the party seeking disclosure should . . . carry great weight," and that "the government's position should be paid considerable heed." *Id.* Here, these factors weigh in favor of non-disclosure, because Plaintiffs are not a party to the grand jury proceedings and the Government opposes disclosure. And

as to "[t]he timing of the request" — which the Second Circuit identified as "one of the most crucial elements," *id.* at 107 - it is evident that public interest in the 9/11 attack remains high, even though nearly twenty years have passed since the attack. Suffice it to say that the passage of time has not "erode[d] . . . the justifications for continued secrecy." *Id.*

The Court concludes that Plaintiffs have not carried their "heavy burden" to justify breaching grand jury secrecy. Accordingly, Plaintiffs' First Cause of Action will be dismissed.

CONCLUSION

For the reasons stated above, Defendants' motion to dismiss (Dkt. No. 28) is granted. The Clerk of Court is directed to terminate the motion (Dkt. No. 28) and to close this case.

Dated: New York, New York
March 24, 2021

SO ORDERED.

/s/ Paul G. Gardephe
Paul G. Gardephe
United States District Judge

Appendix B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

19 CIVIL 8312 (PGG)

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,

-against-

WILLIAM P. BARR, ATTORNEY GENERAL OF THE UNITED STATES, GEOFFREY BERMAN, UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF NEW YORK, AND U.S. DEPARTMENT OF JUSTICE,

Defendants.

JUDGMENT

It is hereby **ORDERED, ADJUDGED AND DECREED**: That for the reasons stated in the Court's Order dated March 24, 2021, Defendants' motion to dismiss (Dkt. No. 28) is granted; accordingly, this case is closed.

Appendix B

Dated: New York, New York
March 24, 2021

RUBY J. KRAJICK

_____
Clerk of Court

BY:

_____
Deputy Clerk

APPENDIX C — CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction; --to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const. art. III, § 2, cl. 1.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Const., Amend. 1.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amendment V.

> [A]lleged offenses may be brought to the attention of the grand jury 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.

18 U.S.C. § 3332(a).

> (e) Recording and Disclosing the Proceedings.
>
> * * *

(2) *Secrecy.*

(A) No obligation of secrecy may be imposed on any person except in accordance with *Rule 6(e)(2)(B).*

(B) Unless these rules provide otherwise, the following persons must not disclose a matter occurring before the grand jury:

(i) a grand juror;

(ii) an interpreter;

(iii) a court reporter;

(iv) an operator of a recording device;

(v) a person who transcribes recorded testimony;

(vi) an attorney for the government; or

(vii) a person to whom disclosure is made under *Rule 6(e)(3)(A)(ii)* or (*iii*).

(3) *Exceptions.*

* * *

(E) 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;

* * *

(6) *Sealed Records.* Records, orders, and subpoenas relating to grand-jury proceedings must be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury.

Fed. R. Crim. P. 6(e)