21-1338

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

Plaintiffs-Appellants,

v.

MERRICK GARLAND, ATTORNEY GENERAL OF THE UNITED STATES, AUDREY STRAUSS, UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF NEW YORK, UNITED STATES DEPARTMENT OF JUSTICE,

Defendants-Appellees.

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

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

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I. Defendants-Appellees Err in Arguing in the Alternative that Plaintiffs Either Have No First Amendment Right to Petition a Grand Jury, or that Plaintiffs Lack Standing to Do So

The Federal Defendants-Appellees (hereafter the "Government") argue, in their Response Brief at 16-20, that citizens of the United States have no right to petition a federal grand jury to report a federal crime, submit evidence of such crime, and request that the grand jury exercise its powers and duties to investigate and if appropriate issue an indictment. The Government asserts as authority for this surprising position case decisions that are not on point and which are distinguishable, and the Government ignores the authority that matters and controls on this question. That controlling authority is the plain language of the Constitution itself and the unambiguous decisions of the Supreme Court. Those Supreme Court decisions establish, first, the right of citizens under the First Amendment to petition *all* government entities and, second, the fact that grand juries are government entities.

There can be no real question about the right recognized historically of citizens to report crimes directly to a grand jury, a right which existed before the Constitution existed. The Constitution incorporated the grand jury as it existed prior in common law.

The only thing that has changed in recent times is that Congress has seen fit

to regulate by statute how citizens report to grand juries but still requiring, as a mandatory duty, that United States Attorneys relay any citizen report of a crime to the grand jury. 18 U.S.C. § 3332(a); *Simpson v. Reno*, 902 F.Supp. 254, 257 (D.D.C. 1995) ("Plaintiffs are correct when they claim that 18 U.S.C. § 3332(a) requires a United States Attorney to present information concerning criminal activity to a special grand jury upon the request of an individual."); *cf Sargeant v. Dixon*, 130 F.3d 1067, 1070 (D.C. Cir. 1997). Congress, in so doing, did not amend out of the First Amendment the right of citizens to petition a grand jury as a government entity nor did Congress amend the Constitutions' incorporation of the grand jury as it existed pre-Constitution.

The Government misrepresents that the Plaintiffs seek, via their Petition to the Grand Jury submitted through the U.S. Attorney, to interfere with the prosecutorial discretion of federal prosecutors. This is simply false. All the Plaintiffs have sought is to have their well-documented report of federal crimes *delivered* to the grand jury. What the U.S. Attorney does or does not do to pursue the reported crimes, and what the Grand Jury does or does not do to investigate the reported crimes and to issue or not issue any indictments, *after Plaintiffs' Petition is delivered*, is up to the U.S. Attorney and the Grand Jury respectively.

One major flaw in the Government's argument that the Plaintiffs lack standing is that the Government ignores the well-established law that obstruction

of the exercise of a constitutional right, or even the chilling of such a right, causes constitutional injury sufficient to confer standing. Here, the Federal Defendants outright obstruction of Plaintiffs' right under the Constitution to have their First Amendment Petition *delivered* to the government entity for which it was intended, the federal special grand jury, caused constitutional injury sufficient to provide standing. *See Speech First, Incorporated v. Fenves*, 979 F.3d 319, 330-31 (5th Cir. 2020) (even merely chilling the exercise of a First Amendment right causes injury sufficient to confer standing); *The Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 521–523 (9th Cir.1989). *And see*, *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 Government cites to *Carney v. Adams*, 141 S. Ct. 493, 499 (2020) to support its argument that Plaintiffs lack the type of injury required to convey standing but this case is not about a government agency obstructing the *delivery* of a Petition submitted in the exercise of the First Amendment Right to Petition the government for redress. Neither is the *Keepers, Inc. v. City of Milford*, 807 F.3d 24, 42-43 (2d Cir. 2015) decision cited by the Government. The Supreme Court's decision in *Lewis v. Casey*, 518 U.S. 343, 349 (1996), cited by the Government, is not only clearly distinguishable factually, having a fact context

relating to a few weeks delay in inmates' receiving or sending communications related to legal proceedings where the delay was based on a prison policy that served a rational governmental purpose, but the legal principles described in *Lewis* are consistent with Plaintiffs' argument here that a more severe obstruction of a citizen's rights to petition would cause an injury sufficient to convey standing.

The Government's reliance on cases such as *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271, 285 (1984) and *Smith v. Arkansas State Highway Employees*, 441 U.S. 463, 466 (1979) (*per curiam*) is completely misplaced. This is so because, again, these cases relate to the government's obligation to respond to a citizen petition, not to the citizen's right to have their petition delivered so that the recipient government agency or official can decide for themselves whether and how to respond.

Contrary to the Government's arguments, the requirements of Article III standing are satisfied here. The standing requirements explicated in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), are satisfied by Plaintiffs here in regard to Plaintiffs' First Amendment claim in Count II. Plaintiffs here meet the first of the three standing requirements -- an "injury in fact." The concrete and individualized actual harm suffered by Plaintiffs here is the denial of their right to petition a government entity, the grand jury, under the First Amendment. The second *Lujan* standing requirement, that there must be a causal connection, i.e., the

injury must be fairly traceable to the challenged action of the defendant, is satisfied because the Government's refusal to provide Plaintiffs' Amended Petition and incorporated evidence of federal crimes to the special grand jury obstructed Plaintiffs' constitutional right to petition the grand jury. *Lujan*'s third requirement, that it must be likely that the injury will be redressed by a favorable decision is met here because it is absolutely certain that a favorable decision from this Court or the court below, 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).

The Plaintiffs' position here is supported by the Second Circuit's reasoning in *Morello v. James*, 810 F.2d 344 (2d Cir.1987) and *Franco v. Kelly*, 854 F.2d 584 (1988). In *Franco*, the Second Circuit noted that Morello's allegation that prison officials had intentionally stolen his legal papers "describe[d] an unconstitutional denial of Morello's access to the courts." This Court has made clear that both the right of access to the courts and the broader right to petition the government for redress of grievances are substantive rather than procedural and cannot be obstructed, regardless of the procedural means applied. *Franco* at 588-89; *Morello* at 346–47.

The right to petition government for redress of grievances is "among the most precious of the liberties safeguarded by the Bill of Rights." *United Mine*

Workers v. Illinois State Bar Ass'n, 389 U.S. 217, 222 (1967). The right of petition applies with equal force to a person's right to seek redress from all branches of government. *Franco* at 589.

The right of citizens to petition government has a long-honored tradition in both British and American law. Because of the importance of this history, it was described in detail in the Supreme Court's decision in *Borough of Duryea, Pa. v. Guarnieri,* 564 U.S. 379, 395–97 (2011). The First Amendment protects the right of citizens to petition any federal government entity.

> "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. …" *Id*., at 137, 81 S.Ct., at 529. …
>
> 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).

While a federal grand jury is a unique government entity, it remains a government entity and one with constitutional stature. The grand jury is a pre-constitutional institution given constitutional stature by the Fifth Amendment but not relegated by the Constitution to a position within any of the three branches of

government, as the federal grand jury is a constitutional fixture in its own right. *U.S. v. Chanen*, 549 F.2d 1306, 1312 (9th Cir. 1977) *quoting Nixon v. Sirica*, 487 F.2d 700, 712 n.54 (D.C. Cir. 1973). *Also see, United States v. Williams*, 504 U.S. 36, 47 (1992).

The Government here is improperly asking this Court, on a matter of first impression of huge public importance, to change the law of the United States to eliminate citizens' rights to report federal crimes to a grand jury (even if citizens, as here, follow the procedure Congress has specified by statute for making such reports). This Court should summarily reject the Government's attempt to do so. The Government, in asserting this position, misrepresents that it has "long been established" that citizens have no right to communicate with a grand jury. This assertion is not only incorrect as a matter of historical fact, it flies in the face of the plan language of, and mandatory duty imposed in the U.S. Attorney in, 18 U.S.C. § 3332(a). Further, the Government's reliance on cases that speak to restrictions on citizens "independently" or "directly" communicating with a grand jury are inapposite because in the instant case Plaintiffs followed the statutorily prescribed procedure of submitting their Petition to the grand jury by going through the U.S. Attorney's office.

Not only would an adoption of the Government's position here result in elimination of a fundamental constitutional right, the adoption of such a position

would also allow federal prosecutors to usurp the authority and historical function of the federal grand jury. It is the grand jury's job, not the U.S. Attorney's job, to review the evidence and determine whether an indictment should issue (and whether a report on public corruption should be prepared. Once that job is accomplished, the federal prosecutors have been deemed to have discretion as to whether they will prosecute. But the grand jury cannot perform its role if it never gets to see the evidence of the crime.

A special grand jury may pursue an investigation on its own without the consent or participation of a prosecutor. *In re Report and Recommendation of June 5, 1972 Grand Jury Concerning Transmission of Evidence to the House of Representatives*, 370 F. Supp. 1219, 1222 (D.D.C. 1974). The grand jury may insist that prosecutors prepare whatever accusations it deems appropriate and may return a draft indictment even though the government attorney refuses to sign it." *Id*.

According to the United States Supreme Court: "a grand jury investigation is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed." *Branzburg v. Hayes*, 408 U.S. 665, 701 (1972) (emphasis added) (citing *United States v. Stone*, 249 F.2d 138, 140 (2d Cir. 1970)).

In order to achieve its mandate, a grand jury "necessarily holds broad

powers of inquiry into any conduct possibly violating federal criminal laws." *In the Matter of Special 1975 Grand Jury*, 565 F.2d 407, 411 (7th Cir. 1977) (citing *United States v. Bukowski*, 435 F.2d 1094, 1103 (7th Cir. 1970), cert. denied, 401 U.S. 911 (1970)). A grand jury also holds "broad power" over the "charges it returns." *In re Report and Recommendation of June 5, 1972 Grand Jury Concerning Transmission of Evidence to the House of Representatives*, 370 F. Supp. 1219, 1222 (D.D.C. 1974).

The above described and long recognized powers and duties of the grand jury are consistent with 18 U.S.C. § 3332(a) which provides: "(a) It shall be the duty of each such [special] 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."

In seeking to have this Court approve its conduct in this case, the Government seeks to establish new law to the effect that the Government can hide from federal special grand juries any and all evidence of federal crimes reported to the Government by citizens. Adopting this approach has obvious dangers, and is contrary to the Constitution and the historic role of the grand jury. Adoption of such a new rule of law would allow any federal government administration to pursue prosecutions only against its political enemies and insulate from investigation and indictment its friends, campaign donors, and political allies.

Plaintiffs had a right here to report federal crimes to the Special Grand Jury, pursuant to both statute, 18 U.S.C. § 3332(a), and the First Amendment. The grand jury cannot perform its duties and functions unless it is allowed to see Plaintiffs' Petition reporting federal crimes and providing compelling evidence that such crimes were in fact committed.[1]

II. Defendants-Appellees' Err in Arguing that Plaintiffs Lack Standing to Pursue Their Claims Under the Administrative Procedures Act and Under the Federal Mandamus Statute

Plaintiffs' arguments in their Opening Brief to this Court adequately explain why the Government errs in arguing that Plaintiffs lack informational or organizational standing to pursue their mandamus claims to enforce the mandatory duty imposed on the U.S. Attorney pursuant to 18 U.S.C § 3332(a). Those arguments are incorporated here.

Under 18 U.S.C. § 3332(a), the U.S. Attorney must present to the grand jury

[1] The Government attempts in footnote 6 of its Response Brief, improperly, to bias this Court regarding the evidentiary strength of Plaintiffs' Petition to the grand jury at issue by falsely analogizing Plaintiffs' Petition to a prior litigation not brought by Plaintiffs or Plaintiffs' counsel. While as a matter of law, the strength of Plaintiffs' Petition here is not at issue in this appeal, Government counsel in order to comply with their duty of candor to this tribunal should have disclosed, if they wish to assert that this issue is relevant, that the facts alleged in Plaintiffs' Petition are supported by eye-witness reports of numerous fire fighter and police first responders, expert testimony of numerous scientists, architects, and engineers, independent scientific laboratory analysis of the World Trade Center dust showing the presence of the high-tech explosive/incendiary nano-thermite, expert analysis of seismic evidence, video evidence of the WTC building collapses, and government reports establishing beyond doubt the existence at Ground Zero of extreme temperatures that cannot be explained by the government's explanation to date of the events on 9/11 at the World Trade Center, whether or not that government explanation remains widely accepted. Proof of facts in a litigation, or before a grand jury, is not a process based on a public opinion poll. The Government here wants this Court to believe that Plaintiffs' allegations of federal crimes in their Petition to the Grand Jury are mere speculation and conjecture. Plaintiffs' Petition, prepared by attorneys with considerable expert scientific support, and supported by numerous evidentiary exhibits containing both scientific evidence and eye-witness accounts, shows on its face quite the contrary. The Government has no obligation to agree with the Petition's conclusions, nor does the grand jury, but the Government attorneys do not comply with their duty of candor or with Fed. R. Civ. P. 11 in making this disingenuous argument in footnote 6.

Plaintiffs' Petition reporting federal crimes and providing evidence of those crimes. And, based on the applicable law discussed *supra* and in Appellants' Opening Brief regarding standing relating to injuries resulting from government violation of statutory or constitutional rights, the U.S. Attorney's failure to comply with this mandatory duty caused sufficient injury to Plaintiffs to convey standing.

As noted in Appellants' Opening Brief, in 1985, the United States District Court for the Southern District of New York concluded in an analogous case that the requirements for mandamus relief were satisfied and that the plaintiff there had standing to pursue a mandamus claim that the United States Attorney violated its mandatory duty under 18 U.S.C. § 3332(a). *In re Grand Jury Application*, 617 F. Supp. 199, 201 (S.D.N.Y. 1985). The District Court below however held that Plaintiffs here had no standing to enforce that duty, even though the duty was a mandatory one, as the Government now argues to this Court in the instant appeal. The court in *In re Grand Jury Application* however analyzed the legislative history of 18 U.S.C. § 3332(a) and correctly came to the opposite conclusion.

> "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]

Id. at 201 (emphasis added). For the reasons stated in Appellants' Opening Brief, the court in *In re Grand Jury Application* was correct.

The Government cites to a recent Sixth Circuit decision, *Gratton v. Cochran*, No. 19-5176, 2020 WL 2765775, at *2 (6th Cir. Jan. 2, 2020) to support its argument that Plaintiffs lack standing to bring a mandamus action here. But *Gratton* is distinguishable as a *pro se* plaintiff case where the court there did not consider the statutory mandate under 18 U.S.C. § 3332(a), apparently because the pro se plaintiff did not raise it. To the extent *Gratton* is not distinguishable, it is not controlling and in any case would be wrongly decided for the reasons explained in *In re Grand Jury Application*, 617 F. Supp. 199, 201-206 (S.D.N.Y. 1985) and in Appellants' Opening Brief.

The Government and the District Court erred in relying on the Second Circuit's decision in *Zaleski v. Burns*, 606 F.3d 51 (2d Cir. 2010) (*per curiam*) as controlling here and as having abrogated *In re Grand Jury Application*. *Zaleski* was a *per curiam* decision by the Second Circuit made on distinguishable facts and the key statement from *Zaleski* relied on by the District Court below was both conclusory and *dicta*.

The Second Circuit in *Zaleski* makes no reference to *In re Grand Jury Application*, 617 F. Supp. 199, 201-206 (S.D.N.Y. 1985). In contrast, the 1985 decision by the Southern District of New York in *In re Grand Jury Application* was on all fours with the instant case and was based on a thorough and detailed analysis of the legislative history of 18 U.S.C. § 3332(a) and the history of the

grand jury. For the reasons explained in Appellants' Opening Brief, the Second Circuit has not abrogated the decision in *In re Grand Jury Application*, nor should it.

III. Defendants-Appellees' Err in Arguing that the District Court Did Not Err or Abuse Its Discretion in Denying *in toto* Plaintiffs' Request that Certain Grand Jury Records Be Released

Plaintiffs' arguments in their Opening Brief to this Court adequately explain why the Government errs in arguing that Plaintiffs were not entitled to the release of any grand jury records, not even a single piece of ministerial records noting whether Plaintiffs' Petition was submitted to the special grand jury. Those arguments are incorporated here.

Contrary to the Government's arguments, at least the fact, or records disclosing the fact, that Defendants have or have not submitted Plaintiffs Amended Petition to the grand jury should be releasable without causing any unjustified intrusion into the secrecy of grand jury. The Government has an obligation to disclose to Plaintiffs, as the petitioners, the simple fact that their Amended Petition was, or was not, submitted to the grand jury. Plaintiffs-Petitioners of course already know the details of the evidence in their Petition, and the world has known that for some time now given the public posting of the Petition and its Exhibits. The disclosure of this one simple fact 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.

Contrary to the Government's assertions, 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). *In re Special Grand Jury (for Anchorage, Alaska)*, 674 F.2d 778 (1982).

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*. Although the Second Circuit has yet to address the issue of whether "ministerial records" of the grand jury enjoy little if any protection, Plaintiffs believe this Circuit should now address this issue in the instant appeal and find that Plaintiffs are entitled to a release of the ministerial grand jury records, if any exist, relating to their Petition or Amended Petition.

CONCLUSION AND RELIEF REQUESTED

For all of the foregoing reasons, Plaintiffs respectfully request that this Court of Appeals reverse the District Court's Order and Judgment of March 24, 2021 which granted Defendants' Motion to Dismiss, find that Plaintiffs have standing to pursue Counts II, III, and IV of the First Amended Complaint, and that Count I of the First Amended Complaint states a claim for relief, and remand this matter to

the District Court for further appropriate proceedings on Plaintiffs' First Amended Complaint.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATIONS

I certify pursuant to Fed. R. App. P. 32(g)(1) that this brief complies with the type-volume limitation in Fed. R. App. P. 32(a)(7) because the brief contains 4,640 words, *including* exempted parts as counted by Microsoft Word 2010 software, which is less that the 7,000 words allowed by Local Rule 32.1(a)(4)(B). This brief complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14 point.

/s/ Mick G. Harrison
Mick G. Harrison