

**SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA**

IN RE: THE SPECIAL PURPOSE
GRAND JURY WITNESS MICHAEL
FLYNN

Case No. 2D22-3725
L.T. Case No. 2022FF-
011326NC

**MOTION OF AMICI CURIAE FORMER PROSECUTORS FOR
LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF APPELLEE TO
BE CONSIDERED ON THE MERITS AND IN CONNECTION WITH
APPELLANT’S NOVEMBER 30 EMERGENCY MOTION TO STAY**

Amici curiae Donald B. Ayer, John Farmer, Stuart Gerson, Renato Mariotti, Sarah Saldaña, William F. Weld, and Shan Wu (collectively “Former Prosecutors”) move for leave to file an amicus brief in support of Appellee, pursuant to Florida Rule of Appellate Procedure 9.370. They request that the brief be considered both in connection with the merits briefing in the above-captioned case, and as a response to Appellant’s November 30 motion to stay the order compelling him to testify before the special purpose grand jury on December 8. The Former Prosecutors are submitting their proposed brief concurrently with this motion so that the Court may consider it in connection with Appellant’s motion to stay if the Court grants this motion. In support, the Former Prosecutors state:

1. **Interests of Amici Curiae:** Amici are a bipartisan group of former prosecutors who are concerned that this case may unduly constrict the ability of all states, including Florida, to secure other states' assistance with investigating and prosecuting crimes. Amici have a substantial interest in ensuring that all states, including the state of Georgia, with which Florida shares a lengthy border, abide by the comity principles that underlie the the Uniform Law to Secure the Attendance of Witnesses from Within or Without the State in Criminal Proceedings ("Uniform Law").

2. **Issues Amici Curiae Will Address:** Amici will address whether Appellant Michael Flynn can be compelled to testify in front of the Fulton County special grand jury pursuant to the Uniform Law. Amici explain why the special-purpose grand jury qualifies as a "grand jury" under the Uniform Law.

3. **How Amici Curiae Can Assist the Court:** Amici respectfully submit that their proposed amicus brief may assist the Court in evaluating the legal issues raised in this matter. Amici are former prosecutors, and they collectively have many decades of experience with subpoenas. They also have substantial experience with the structure and process of law-enforcement investigations

and grand jury procedures.

4. **Parties' Position:** Counsel for amici have conferred with counsel for Flynn, counsel for Fulton County, State of Georgia, and counsel for State of Florida and no party objects to this Motion.

WHEREFORE, the Former Prosecutors request that the Court grant them leave to file an amicus curiae brief in support of Appellee.

Respectfully submitted

s/ Steven A. Hirsch
Steven A. Hirsch*
Keker, Van Nest & Peters LLP
633 Battery Street
San Francisco, CA 94111-1809
Telephone: (415) 391-5400
shirsch@keker.com

s/ Jonathan L. Williams
Jonathan L. Williams
Florida Bar No. 117574
States United Democracy Center
400 NW 7th Ave #14310
Ft. Lauderdale, FL 33311
Telephone: (202) 999-9305
jonathan@statesuniteddemocracy.org

Norman L. Eisen*
States United Democracy Center

1101 17th St. NW, Suite 250
Washington, D.C. 20036
Telephone: (202) 999-9305
norm@statesuniteddemocracy.org

Maithreyi Ratakonda*
States United Democracy Center
1 Liberty Plaza
165 Broadway
23rd Floor, Office 2330
New York, New York 10006
Telephone: (202) 999-9305
mai@statesuniteddemocracy.org

**Pro Hac Vice Forthcoming*

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I certify that on December 5, 2022, I served the foregoing document on the following counsel of record by filing it on the Florida Courts E-portal system:

Jared J. Roberts
Jason C. Greaves
Binnall Law Group, PLLC
717 King Street, Suite 200
Alexandria, Virginia 22314
Phone: (703) 888-1943
Fax: (703) 888-1930
jared@binnall.com
jason@binnall.com

Counsel for Michael Flynn

Will Wooten
Deputy District Attorney
Atlanta Judicial Circuit
136 Pryor Street, SW, Third
Floor
Atlanta, Georgia 30303
will.wooten@fultoncountyg
.gov

Counsel for the State of Georgia

Arthur E. Jackman
Assistant State Attorney
Office of the State Attorney
2071 Ringling Blvd.
Sarasota, Florida 34237
ajackman@sao12.org

Counsel for the State of Florida

/s/ Jonathan L. Williams
Jonathan L. Williams

Case No. 2D22-3725

IN THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

IN RE: THE SPECIAL PURPOSE GRAND JURY
WITNESS MICHAEL FLYNN

On Appeal from a Final Order in the
Twelfth Judicial Circuit, in and for Sarasota County, Florida

**BRIEF OF AMICI CURIAE FORMER PROSECUTORS
IN SUPPORT OF APPELLEE**

Jonathan L. Williams
Fla. Bar No. 117574
STATES UNITED DEMOCRACY
CENTER
400 NW 7th Ave #14310
Ft. Lauderdale, FL 33311
Telephone: (202) 999-9305
jonathan@statesuniteddemocra
cy.org

Steven A. Hirsch
Pro hac vice forthcoming
KEKER, VAN NEST & PETERS LLP
633 Battery Street
San Francisco, CA 94111
Telephone: (415) 391-5400
shirsch@keker.com

Norman L. Eisen
Pro hac vice forthcoming
STATES UNITED DEMOCRACY
CENTER
1101 17th Street, NW, Suite
250
Washington, DC 20036
Telephone: (202) 999-9305
norm@statesuniteddemocracy.o
rg

Maithreyi Ratakonda
Pro hac vice forthcoming
STATES UNITED DEMOCRACY
CENTER
1 Liberty Plaza
165 Broadway
23rd Floor, Office 2330
New York, NY 10006
Telephone: (202) 999-9305
mai@statesuniteddemocracy.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....iii

I. IDENTITY OF THE AMICI CURIAE AND THEIR INTEREST
IN THE CASE 1

II. LEGAL AND FACTUAL BACKGROUND 5

 A. THE PURPOSE AND RELEVANT PROVISIONS OF THE UNIFORM
 LAW 5

 B. THE CRIMINAL-INVESTIGATION POWERS OF GEORGIA’S
 SPECIAL-PURPOSE GRAND JURY 7

 C. FLYNN’S FAILED ATTEMPT TO REBUT THE GEORGIA COURT’S
 PRIMA FACIE EVIDENCE 10

III. SUMMARY OF ARGUMENT 14

IV. ARGUMENT 16

 A. FLYNN’S ARGUMENTS ARE HOSTILE TO THE INTERSTATE
 LAW-ENFORCEMENT COMITY THAT MOTIVATED ALL 50
 STATES TO ADOPT THE UNIFORM LAW..... 16

 B. THE GEORGIA COURT UNDERSTOOD GEORGIA LAW
 CONCERNING SPGJS CORRECTLY; FLYNN DOES NOT 18

 C. FLYNN ASKS THE COURT TO MAKE THE UNIFORM LAW *NON-*
 UNIFORM BY GIVING IT A UNIQUE FLORIDA INTERPRETATION 22

V. CONCLUSION 26

CERTIFICATE OF SERVICE..... 28

CERTIFICATE OF COMPLIANCE 29

TABLE OF AUTHORITIES

CASES

<i>In re Pick</i> , __ S.W.3d __, 2022 WL 4003842 (Tex. Ct. Crim. App. Sept. 1, 2022).....	4
<i>Kenerly v. State</i> , 715 S.E.2d 688 (Ga. Ct. App. 2011).....	9, 19, 20
<i>McLarty v. Fulton Cnty.</i> , 183 S.E. 646 (Ga. Ct. App. 1936).....	9
<i>N.Y. v. O’Neill</i> , 359 U.S. 1 (1959).....	14
<i>People v. Glass</i> , 627 N.W.2d 261 (Mich. 2001).....	17
<i>People v. Super. Ct. (Jans)</i> , 274 Cal. Rptr. 586 (Cal. Ct. App. 1990).....	17
<i>Smith v. Chase</i> , 109 So. 94 (Fla. 1926).....	24
<i>State v. Bartel</i> , 479 S.E.2d 4 (1996).....	19, 20
<i>State v. Bastos</i> , 985 So. 2d 37 (Fla. 3d DCA 2008).....	4
<i>State v. Christiansen</i> , 365 P.2d 1189 (Utah 2015).....	18
<i>State v. Kahler</i> , 232 So. 2d 166 (Fla. 1970).....	6
<i>State v. Lampl</i> , 770 S.E.2d 629 (Ga. 2015).....	9, 10, 12, 19
<i>Terl v. State of Md. ex rel. Grand Jury of Baltimore City</i> , 237 So. 2d 830 (Fla. 2d DCA 1970).....	6
<i>Vannier v. Super. Ct.</i> , 185 Cal. Rptr. 427 (Cal. 1982).....	17
<i>Wright v. State</i> , 500 P.2d 582 (Okla. Ct. Crim. App. 1972).....	16

STATUTES

18 U.S.C. § 3331.....	7
-----------------------	---

Fla. Stat. §§ 941.01–941.30.....	24
Fla. Stat. § 941.04.....	25
Fla. Stat. § 942.02.....	6, 11, 20, 25
Fla. Stat. § 942.03.....	7
Fla. Stat. § 942.05.....	4, 7, 15, 24
Ga. Code § 15-12-62.1.....	9
Ga. Code § 15-12-67.....	9
Ga. Code § 15-12-71.....	9, 10, 20, 26
Ga. Code § 15-12-100.....	7, 8, 9, 10, 19
Ga. Code § 15-12-102.....	9
Ga. Code §§ 17-13-20—17-13-49.....	24
Ga. Code § 24-13-92, <i>et seq.</i>	12

MISCELLANEOUS

13 Fla. Jur. Evidence § 4 (1957).....	6
38A C.J.S. <i>Grand Juries</i> § 5 (2022).....	18
38A C.J.S. <i>Grand Juries</i> § 7 (2022).....	18

I. IDENTITY OF THE AMICI CURIAE AND THEIR INTEREST IN THE CASE

This is a significant case for two reasons. First, it concerns a Georgia special-purpose grand jury's investigation of alleged attempts to interfere with the results of Georgia's 2020 presidential election and thereby overturn the will of the voters.

The second reason, and the one that amici curiae address here, is that accepting Appellant Michael Flynn's arguments as to why he should not be compelled to testify before the Georgia special-purpose grand jury would unravel the decades-old system of interstate law-enforcement comity enabled by the adoption, in all 50 states, of the Uniform Law to Secure the Attendance of Witnesses from Within or Without the State in Criminal Proceedings.

Specifically, amici explain why Flynn's argument that the Georgia special-purpose grand jury is not a true "grand jury" entitled to comity under the Uniform Law is not merely incorrect, but "manifestly without merit," as the South Carolina Supreme Court

held in a similar case in November.¹

Amici curiae² are a bipartisan group of former law-enforcement officials who submit this brief to explain the important

¹ Memorandum Op. No. 2022-MO-010, *State of Georgia v. Meadows*, No. 2022-001604 (S.C. Nov. 29, 2022) (per curiam). Amici do not address Flynn’s arguments that he is not a “necessary or material” witness.

² Donald B. Ayer served as Deputy Attorney General at the U.S. Department of Justice, Principal Deputy Solicitor General of the United States; and U.S. Attorney for the Eastern District of California. John Farmer served as an Assistant U.S. Attorney, New Jersey Attorney General, Senior Counsel to the 9/11 Commission, and Dean of Rutgers Law School. Stuart M. Gerson served as the Acting Attorney General of the United States, as Assistant Attorney General, and as Assistant United States Attorney for the District of Columbia. As an Assistant United States Attorney, Mr. Gerson represented the United States in litigation under the Uniform Act with respect to matters related to the initial Watergate prosecution. Renato Mariotti served in the U.S. Attorney’s Office for the Northern District of Illinois. Sarah Saldaña served as the U.S. Attorney for the Northern District of Texas and Director of U.S. Immigration and Customs Enforcement. William F. Weld served as the U.S. Attorney for Massachusetts, as the Assistant U.S. Attorney General in charge of the Criminal Division, and as Governor of Massachusetts. Shan Wu previously served as Counsel to Attorney General Janet Reno and as an Assistant United States Attorney in Washington, D.C.

state policies served by the Uniform Law³ and to voice their concerns that accepting Flynn’s view of the Uniform Law would undermine interstate comity and the effectiveness of law enforcement across state borders, not just between Florida and its neighbor Georgia, but nationwide.

Unsurprisingly, the court below correctly rejected Flynn’s interpretation of the Uniform Law. Other courts have repudiated it

³ Throughout this brief, **(1)** “Uniform Law” refers to the Uniform Law to Secure the Attendance of Witnesses from Within or Without the State in Criminal Proceedings, **(2)** “SPGJ” means “special-purpose grand jury,” **(3)** “Flynn” refers to Appellant Lt. General Michael T. Flynn, **(4)** “BoA” refers to the Brief of Appellant filed on November 30, 2022; and **(5)** unless otherwise indicated, emphases were added to quotations and internal quotation marks, brackets, ellipses, footnotes, citations, and the like were omitted from them.

as well.⁴ This Court should “follow the prevailing rule of the adopting states”⁵ and likewise reject Flynn’s interpretation.

For reasons set forth below, the Circuit Court’s order compelling Flynn to testify in Georgia is correct and should be

⁴ Besides the court below and the recent South Carolina Supreme Court decision, a Virginia court recently rejected similar arguments. See Order Directing Witness to Appear in the Superior Court, Fulton County, Georgia, In re Newton Leroy Gingrich, Case No. KM 2022-623 (Va. Cir. Ct. Nov. 9, 2022); see also Anna Bower, “Everything You Ever Wanted to Know About Georgia Special Purpose Grand Juries But Were Afraid to Ask,” *Lawfare* (Oct. 17, 2022), <https://www.lawfareblog.com/everything-you-ever-wanted-know-about-georgia-special-purpose-grand-juries-were-afraid-ask> [hereinafter *Everything About Georgia SPGJs*] (“Thus far, judges in Georgia and elsewhere have overwhelmingly rejected the view that the special purpose grand jury’s investigation is civil rather than criminal. Here’s a running list of judges who have weighed in and explicitly rejected the idea: Judge Leigh Martin May of the U.S. District Court for the Northern District of Georgia; Judge Gregory Lammons of the Eighth District Court of Colorado; and Judge Robert McBurney, the special purpose grand jury’s supervising judge on the Fulton County Superior Court.”).

By contrast, Flynn can cite only the dicta of dissenting Texas judges in a case that was dismissed as moot. See BoA 29–30 (discussing *In re Pick*, __ S.W.3d __, 2022 WL 4003842 (Tex. Ct. Crim. App. Sept. 1, 2022)). It is untrue, therefore, for Flynn to assert that the Texas court in *Pick* is “[t]he only court to [have] address[ed] this question.” BoA 29.

⁵ *State v. Bastos*, 985 So. 2d 37, 40 (Fla. 3d DCA 2008) (observing that “Florida has adopted the Uniform law, including that portion of the Uniform Law which calls for uniformity of interpretation by the adopting states. § 942.05, Fla. Stat. (2005). Therefore we are to follow the prevailing rule of the adopting states.”).

affirmed.

II. LEGAL AND FACTUAL BACKGROUND

A. The purpose and relevant provisions of the Uniform Law

Proposed in 1931 and modified in 1936 to secure the attendance of grand-jury witnesses,⁶ the Uniform Law has been enacted by all 50 states, including by Florida in 1941.⁷ The Law's purpose is to "facilitate the administration of the criminal law" by providing "statutory authority for securing the attendance of a witness from without the state in which the criminal proceeding is pending."⁸

To that end, the Uniform Law provides a mechanism by which a court in a signatory state ("the investigating state") may issue a certificate stating that "there is a criminal prosecution pending in [that] court, or that a grand jury investigation has commenced or is about to commence" and that a person in another signatory state

⁶ Explanatory Statement, Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, Nat'l Conf. of Comm'rs on Unif. State Laws, at 1 (1936) [hereinafter *Explanatory Statement*].

⁷ Unif. Act Secure Attend. Witnesses Without State in Crim. Proc. Refs. & Annos. (Westlaw 2022) [hereinafter *Refs. & Annos.*].

⁸ *Explanatory Statement*.

(“the witness’s state”) is a “material witness” in the proceeding.

§ 942.02(1), Fla. Stat.

The court in the witness’s state then holds a hearing (“the certificate-confirmation hearing”) and, upon confirming (inter alia) that the witness is “material and necessary” to the prosecution or to the existing or imminent grand-jury investigation, “shall” issue a summons directing the witness to “attend and testify in the court in” the investigating state. *Id.*, § 902.02(2). Importantly, “[i]n any such hearing the certificate [issued by the court of the investigating state] shall be *prima facie evidence* of all the facts stated therein.” *Id.* “Prima facie evidence is evidence sufficient to establish a fact unless and until rebutted.” *State v. Kahler*, 232 So. 2d 166, 168 (Fla. 1970) (citing 13 Fla. Jur. Evidence § 4 (1957)). It is therefore the burden of the witness opposing the requested appearance to “rebut” the accuracy of the statements that the investigating state’s court made in its certificate.⁹

The Uniform Law’s provisions are expressly reciprocal, *see id.*,

⁹ *Cf. Terl v. State of Md. ex rel. Grand Jury of Baltimore City*, 237 So. 2d 830, 831 (Fla. 2d DCA 1970) (holding that witness bears burden under Uniform Law of proving that being compelled to appear will cause him “undue hardship”).

§§ 942.03, 942.05, and the Law itself instructs courts to interpret it so as to “effectuate its general purpose to make uniform the law of the states which enact it[.]” *Id.*, § 942.05. Accordingly, any judicial interpretation of the Law must take into account the Law’s intended national purpose of furthering law-enforcement comity among the states.

B. The criminal-investigation powers of Georgia’s special-purpose grand jury.

State statutes authorizing special grand juries followed the enactment of federal legislation in 1970, when Congress authorized the empanelment of federal special grand juries as a part of the Organized Crime Control Act. *See* 18 U.S.C. § 3331.¹⁰ Today at least 26 states, including Georgia, permit the empanelment of some form of the special grand jury.¹¹

Georgia Code § 15-12-100(a) authorizes the superior court, on its own motion or that of various public officials including (as here) the district attorney, to “impanel a special grand jury for the purpose of investigating *any alleged violation of the laws of [Georgia] or any other matter subject to investigation by grand juries as*

¹⁰ *Everything About Georgia SPGJs.*

¹¹ *Id.*

provided by law.” That language unambiguously embraces criminal investigations.

Georgia SPGJs “are useful vehicles to investigate organized criminal activity or other complex issues of inquiry” because—being “unburdened by the heaps of cases that bedevil regular grand juries”—they “can develop a deeper understanding of the convoluted issue at hand.”¹² Moreover, Georgia SPGJs “are not limited to the typical two-month fixed term of regular grand juries but, instead, are empaneled for any time period required to complete [their] investigation. That flexibility permits prosecutors to take on complex investigations that would normally exceed the brief term of a regular grand jury.”¹³ The SPGJ “can recommend indictments for criminal acts uncovered during the investigation, and the district attorney can then pursue those indictments by empaneling a separate, regular grand jury.”¹⁴

Although a Georgia SPGJ focuses on judicially specified subject matter and may only recommend but not issue indictments,

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

see *Kenerly v. State*, 715 S.E.2d 688, 689 (Ga. Ct. App. 2011), in most other respects the SPGJ functions like any other grand jury and is governed by the same laws, see *State v. Lampl*, 770 S.E.2d 629, 632 (Ga. 2015) (citing Ga. Code § 15-12-102). For example:

- Both types of grand juror are chosen the same way, under the same statute, see Ga. Code § 15-12-100(b) (referring to Ga. Code § 15-12-62.1); and both types are sworn to secrecy, see Ga. Code § 15-12-67 (oath, made applicable to SPGJs by Ga. Code § 15-12-102).
- Both bodies are empowered to conduct investigations and to produce reports on the findings of those investigations, which may lead to criminal prosecutions. Compare Ga. Code § 15-12-100(a) (re: SPGJ investigations) with Ga. Code § 15-12-71(a), (b) (re: general-grand-jury investigations); see also *McLarty v. Fulton Cnty.*, 183 S.E. 646, 649 (Ga. Ct. App. 1936) (recognizing investigatory power of general grand juries).¹⁵

¹⁵ The general grand jury's investigatory powers are far more limited than those of an SPGJ, being restricted to investigations of various state officials and fatal police shootings. See Ga. Code § 15-12-71(b).

- Both bodies may subpoena witnesses and require the production of records, documents, correspondence, and books relating to the subject of an investigation. *Compare* § 15-12-100(c) (re: SPGJ investigations) *with* Ga. Code § 15-12-71(c) (re: general-grand-jury investigations).
- Both bodies may, notwithstanding the Fifth Amendment, subpoena a prospective criminal defendant to testify without regard to his testimony’s eventual admissibility at trial, *see Lampl*, 770 S.E.2d at 634; and the *ultra vires* acts of both bodies will not result in dismissal of an indictment or the suppression of evidence. *Id.* at 633.

In sum: The Georgia SPGJ is, without question, a “grand jury” empowered to investigate and recommend the prosecution of criminal matters—especially those too complex for an ordinary and overburdened grand jury to tackle.

C. Flynn’s failed attempt to rebut the Georgia court’s prima facie evidence.

In this case, the October 7, 2022 Certificate of Material Witness issued by the Superior Court of Fulton County, Georgia set forth (inter alia) the following facts—each of which, under Florida’s

Uniform Law,¹⁶ had to be treated as “*prima facie evidence*” at the certificate-confirmation hearing held in Sarasota County, Florida, where Flynn resides:

- A Fulton County SPGJ is currently “investigat[ing] any and all facts and circumstances relating directly or indirectly to possible attempts to disrupt the lawful administration of the 2020 elections in the State of Georgia.”¹⁷
- “While Georgia law authorizes special purpose grand juries to conduct both civil and criminal investigations, [this] Special Purpose Grand Jury’s investigation is criminal in nature in that it was requested for the purpose of investigating criminal disruptions related to the 2020 elections in Georgia, and the Special Purpose Grand Jury is authorized to make recommendations concerning criminal prosecution. Further, the authority for a special purpose grand jury to conduct a criminal

¹⁶ See Fla. Stat. § 942.0(2).

¹⁷ Certificate of Material Witness Pursuant to Uniform Act to Secure the Attendance of Witnesses from Without a State, Codified in the State of Georgia as O.C.G.A. § 24-13-90 *et seq.*, ¶ 1 (“Certificate”).

investigation has been upheld by the Supreme Court of Georgia. *See State v. Lampl*, 770 S.E.2d 629 (Ga. 2015). Accordingly, the provisions of the Uniform Act . . . apply pursuant to O.C.G.A. § 24-13-92 et seq.”¹⁸

- Flynn is a “necessary and material witness to the Special Purpose Grand Jury’s investigation” because, inter alia, **(1)** Flynn is a retired United States Army lieutenant general who briefly served as National Security Advisor under former President Donald Trump, who later pardoned Flynn of his criminal conviction for making false statements to the FBI during the Mueller investigation of Russian interference in the 2016 election; **(2)** Flynn proposed in a televised Newsmax interview in December 2020 that President Trump could deploy “military capabilities” to force swing states to “re-run” their November 2020 elections; **(3)** Flynn was identified as having attended meetings in South Carolina, organized by attorney L. Lin Wood and attended by other Trump Campaign associates, “for the purpose of

¹⁸ Certificate ¶ 2.

exploring options to influence the results of the November 2020 elections in Georgia and elsewhere”; and **(4)** on December 18, 2020, three weeks after being pardoned, Flynn met at the White House with President Trump, Sidney Powell, and other Trump Campaign associates, reportedly to discuss “invoking martial law, seizing voting machines, and appointing Powell as special counsel to investigate the 2020 election.”¹⁹

- The Certificate further stated that Flynn possesses “unique knowledge” concerning all these matters and that his testimony will “not be cumulative of any other evidence this matter.”²⁰

In the certificate-confirmation hearing before the Circuit Court, Flynn asserted that—contrary to the Georgia court’s

¹⁹ Certificate ¶¶ 4–8.

²⁰ Certificate ¶¶ 9–10. Besides the representations made in the Certificate, the Georgia Superior Court has previously addressed and rejected the argument that the special-purpose grand jury proceeding at issue here was civil in nature. See Order Denying Motion to Quash, *In re 2 May 2022 Special Purpose Grand Jury—Subpoena for Governor Kemp*, No. 2022-EX-000024, at 4–5 (Ga. Super. Ct. Aug. 29, 2022) [hereinafter *Kemp Order*].

representation that the SPGJ’s investigation is criminal in nature—the SPGJ is not entitled to law-enforcement comity under the Uniform Law because its investigation is civil, not criminal, and because the SPGJ is not a “grand jury” within the meaning of Florida’s version of the Uniform Law.²¹

The Circuit Court has now repeatedly rejected Flynn’s arguments and ordered him to appear in the Fulton County, Georgia Superior Court on December 8, 2022.²² For reasons discussed below, amici urge this Court to affirm that result.

III. SUMMARY OF ARGUMENT

As the U.S. Supreme Court observed when upholding the constitutionality of the Uniform Law, “[c]omity among States” is “an end particularly to be cherished when the object is enforcement of internal criminal laws[.]” *N.Y. v. O’Neill*, 359 U.S. 1, 11–12 (1959). Interstate law-enforcement comity and reciprocity constitute the

²¹ Response in Opposition to and Motion to Quash State of Georgia’s Motion for Order Compelling Attendance of Michael T. Flynn in the State of Georgia, at 6–15 (Fla. Cir. Ct. No. 2022FF011326NC) (filed Nov. 14, 2022).

²² Order Following Hearing on November 30, *In Re: The Special Purpose Grand Jury* (Fla. Cir. Ct. No. 2022-EF-11326) (filed Nov. 30, 2022).

very heart of the Uniform Law, which must be interpreted so as to further its national purposes. See § 942.05, Fla. Stat. But Flynn urges this Court to create a precedent that disrespects comity and hobbles interstate law enforcement. Under Flynn's view of the Uniform Law, the court in the witness's state may **(a)** brush aside the prima facie evidence presented in the investigating state's judicial certificate and then **(b)** decide for itself whether, under the law and public policy of its own state, a specialized grand jury that the investigating state has organized to probe its most complex crimes possesses the requisite characteristics to be afforded comity and reciprocity under the Uniform Law.

Flynn thus calls for each state to create, through judicial interpretation, its own *state-specific version* of the Uniform Law—necessarily rendering the Law *non-uniform*. For each state to arrogate to itself the right to determine the adequacy of other states' grand-jury systems represents the very opposite of comity—and it invites retaliation that could swiftly unravel the 50-state cooperative system enabled by universal adoption of the Uniform Law. As applied here, moreover, Flynn's theory would give short shrift to Georgia's special-purpose grand jury—a body organized to probe

some of the state's most complex and daunting criminal matters.

IV. ARGUMENT

Flynn asserts that the Georgia SPGJ is not a true “grand jury” entitled to comity under the Uniform Law. Accepting Flynn’s view would undermine interstate law-enforcement comity and the effectiveness of law enforcement across state borders, not only in the vicinity of this State, but nationwide.

A. Flynn’s arguments are hostile to the interstate law-enforcement comity that motivated all 50 states to adopt the Uniform Law.

The Uniform Law “was intended as a matter of comity between states to enable states to obtain material witnesses for criminal prosecutions.” *Wright v. State*, 500 P.2d 582, 588 (Okla. Ct. Crim. App. 1972). The Law therefore applies to witnesses needed for “a trial or a grand jury investigation, or other criminal proceedings, which [are] pending or under way.” *Id.*

Comity and reciprocity are the Law’s touchstones. The Law “requires reciprocal cooperation for the enforcement of witness attendance orders. The essence of the Uniform [Law] is to create a community of jurisdictions which will honor the request of fellow members for the appearance of witnesses at criminal

proceedings under the conditions specified in the [Law].” *People v. Super. Ct. (Jans)*, 274 Cal. Rptr. 586, 589 (Cal. Ct. App. 1990).

A state that turns its back on the Law’s comity and reciprocity by erecting needless barriers to other states’ requests should expect similar treatment when its turn comes to seek cooperation to secure the presence of a material witness. “A restrictive interpretation” of the Law’s reach “necessarily restricts the reach of the enacting jurisdiction to ensure that all who are deemed necessary and material witnesses will be forced to appear in its own criminal cases. The [Law] gives only insofar as it takes.” *Jans*, 274 Cal. Rptr. at 589. Florida thus “has a fundamental interest in complying with the demands of other jurisdictions which have adopted similar legislation.” *Vannier v. Super. Ct.*, 185 Cal. Rptr. 427, 431 (Cal. 1982).

Comity under the Uniform Law requires respect for the diverse types of grand juries that exist throughout the United States. As applied to state criminal proceedings, the grand jury is entirely a creature of state law,²³ and the resulting “grand-jury federalism”

²³ See *People v. Glass*, 627 N.W.2d 261, 272 (Mich. 2001) (“[T]he Fifth Amendment does not require grand juries in state prosecutions[.]”).

has produced a flowering of diverse institutional arrangements and innovations. 38A C.J.S. *Grand Juries* § 5 (2022); see generally *State v. Christiansen*, 365 P.2d 1189, 1192–94 (Utah 2015) (tracing historical development of states’ varying systems and criteria for summoning grand juries). And as previously noted, some 26 states, including Georgia, have exercised their prerogative to create some form of special-purpose grand jury.²⁴ Those grand juries, too, come in a wide variety of state-specific forms. See 38A C.J.S. *Grand Juries* § 7 (2022). All of these variants are presumptively entitled to comity under the Uniform Law.

B. The Georgia court understood Georgia law concerning SPGJs correctly; Flynn does not.

Here, the Georgia court certified to the Florida court that the Special Purpose Grand Jury’s investigation is “criminal in nature in that it was requested for the purpose of investigating criminal disruptions related to the 2020 elections in Georgia, and the Special Purpose Grand Jury is authorized to make recommendations concerning criminal prosecution.”²⁵ The Georgia court further

²⁴ See *Everything About Georgia SPGJs*.

²⁵ Certificate ¶ 2.

observed that “the authority for a special purpose grand jury to conduct a criminal investigation has been upheld by the Supreme Court of Georgia.”²⁶

The Georgia court’s understanding of Georgia’s grand-jury system was—unsurprisingly—correct. A Georgia SPGJ may be impaneled to investigate “*any* alleged violation of the laws of [Georgia] or *any* other matter subject to investigation by grand juries[.]” Ga. Code § 15-12-100(a). That sweeping authority necessarily encompasses criminal investigations. *See Lampl*, 770 S.E.2d at 633 (holding that Georgia SPGJ lacked authority to investigate matters *outside* its judicially designated focus on “*potential criminal conduct* by county officials or employees”).

Flynn’s only evidence that the Georgia court misunderstood Georgia law is his citation to mistaken obiter dicta in an opinion from an intermediate Georgia court. *See* BoA 26–27. In *Kenerly v. State*, the Georgia Court of Appeals misread an earlier intermediate-court decision, *State v. Bartel*, 479 S.E.2d 4 (1996), as having “concluded that special purpose grand juries conduct *only* civil

²⁶ *Id.* (citing *Lampl*, 296 Ga. 892).

investigations.” *Kenerly*, 715 S.E.2d at 194–95 (citing *Bartel*, 479 S.E.2d at 5 [697 of the official reports]).

Flynn’s reliance on the *Kenerly* dicta fails for two reasons (besides its being dicta). **First**, the Uniform Law does not specify what type of investigation (i.e., “criminal” or “civil”) the grand jury must be conducting—it merely requires, in relevant part, that a prosecution be pending or that a “grand jury investigation” has commenced or is about to commence. § 942.02(1), Fla. Stat.

Second, the *Kenerly* court was simply mistaken: *Bartel* does not say that special-purpose grand juries “only” conduct civil investigations. In fact, *Bartel* acknowledges that both special and general grand juries may conduct “civil investigations.”²⁷ See Ga. Code § 15-12-71(b),(c) (authorizing investigations by general grand

²⁷ See *Bartel*, 479 S.E.2d at 697 (adverting to “1994 enactments . . . broadening the civil investigatory powers of grand juries”); *id.* at 698 (concluding that statutory oath is “irrelevant to civil investigations conducted pursuant to OCGA § 15-12-71(b) [governing general grand juries] and/or OCGA § 15-12-100 et seq. [governing special-purpose grand juries]).

juries).²⁸ If anything, that fact demonstrates the overbreadth of Flynn’s theory, which necessarily implies that even a general Georgia grand jury would be powerless to demand his presence under the Uniform Law while engaged in a “civil investigation.”

Logically, the investigation at issue here could only be criminal—because it has no bearing on any civil proceeding and is entirely concerned with a criminal attempt to overturn the results of the Georgia’s 2020 election. The point was made well by the Fulton County, Georgia Superior Court in the course of denying Georgia Governor Brian Kemp’s motion to quash a subpoena from the same SPGJ at issue here. Governor Kemp had claimed sovereign immunity to the subpoena, but the district attorney countered that sovereign immunity does not apply in criminal matters. The Superior Court had no difficulty concluding that the SPGJ’s investigation is criminal:

²⁸ Although the discretionary investigatory power of general grand juries is restricted to various types of Georgia-specific subject matter, nothing in Georgia Code § 15-12-71 prevents a general grand jury from invoking the Uniform Law to compel an out-of-state witness to testify in such an investigation—as might occur, for example, where a Georgia official is suspected of having received bribes from an out-of-state person.

[This SPGJ's] purpose is unquestionably and exclusively to conduct a criminal investigation: its convening was sought by the elected official who investigates, lodges, and prosecutes criminal charges in this Circuit; its convening Order specifies its purpose as the investigation of possible criminal activities; and its final output is a report recommending whether criminal charges should be brought. Unlike the special purpose grand jury in *Bartel*, it is not investigating “irregularities” in hospital administration. It will not be recommending whether anyone should be sued or should be referred for civil administrative proceedings; it will be recommending whether anyone should be prosecuted for crimes. Put simply, there is nothing about this special purpose grand jury that involves or implicates civil practice.²⁹

It is therefore clear that the Georgia court in this case (and in the *Kemp* case) understood Georgia law concerning SPGJs correctly. Flynn does not.

C. Flynn asks the Court to make the Uniform Law *non-uniform* by giving it a unique Florida interpretation.

Flynn asks this Court to flout an interpretive rule built into the Uniform Law itself—and to render the Uniform Law *non-uniform*—when he asserts that Florida owes Georgia no comity here because “Florida has no parallel to” the Georgia special-purpose grand jury. BoA 33. Flynn argues that, unlike a Georgia SPGJ, a Florida grand jury can issue indictments independently and is more

²⁹ *Kemp Order* at 4–5.

limited in scope and authority. BoA 33–37.

In Flynn’s view, therefore, the “Florida version” of the Uniform Law uniquely defines “grand jury” to mean “a grand jury under Florida law,” incorporating whatever powers and restrictions Florida law may provide in connection with *its own* grand juries. Indeed, Flynn takes the case for non-uniformity a step further, asserting that the “grand jury” referenced in the Uniform Law can only be one having “*the characteristics of [a] grand jury as understood in 1941 Florida*”—1941 being the year in which Florida adopted the Uniform Law.³⁰ Because special-purpose grand juries did not exist in 1941, all such bodies automatically fall outside the scope of the Uniform Law as Flynn interprets it. Doubling down on that sweeping result, Flynn further argues that, because the Uniform Law never expressly mentions “special purpose” grand-jury investigations, the Law must categorically fail to encompass them. BoA 21.

Flynn’s interpretive approach is the very antithesis of the one mandated by the Uniform Law itself, which expressly requires courts to interpret the Law to “effectuate its general purpose to

³⁰ BoA 24. Adoption dates range from 1935 (Minnesota and Wyoming) to 1977 (Alabama). *Refs & Annos*.

make uniform the law of the states which enact it[.]”§ 942.05, Fla. Stat. By asking the Court to give the Uniform Law a unique gloss of Florida law as it stood in 1941, Flynn thus invites the Court to violate the Law’s own explicit interpretive rule—thus rendering it *non-uniform*.

Flynn’s remaining arguments are equally meritless. Flynn tries to up the rhetorical ante by repeatedly referring to the challenged order as an “extradition” ordered for “purely investigative” purposes. *See, e.g.*, BoA 37–38. But the “extradition” analogy is misleading, because the burdens that the Uniform Law imposes on witnesses are modest, paling in comparison to the burdens that true extradition imposes on fugitive felons.³¹ Interstate extradition of fugitives is governed in Florida by the Uniform Interstate Extradition Law, §§ 941.01–941.30, Fla. Stat. [hereinafter “Extradition Law”]; *see also* Ga. Code §§ 17-13-20—17-13-49

³¹ It’s true that Chapter 942 of the Florida Statutes, in which the Uniform Law appears, is entitled “Interstate *Extradition of Witnesses*”; but “[t]he subject expressed in the title [of a Florida act] may be broader or more comprehensive than the subject covered by the provisions of the act.” *Smith v. Chase*, 109 So. 94, 96 (Fla. 1926) (citing F.S.A.Const. art. 3, § 16). The word “extradition” and its variants do not appear anywhere in the body of the Uniform Law as enacted by Florida.

(Georgia’s version). The Extradition Law authorizes the Governor to “*have arrested and delivered up to the executive authority of any other state of the United States any person charged in that state with treason, felony, or other crime, who has fled from justice and is found in this state.*” Fla. Stat. § 941.02.

This case under the Uniform Law has nothing to do with the “extradition” of fugitive felons. To the contrary: Before issuing a summons under the Uniform Law, the court in the witness’s state must determine that compelling the witness’s out-of-state appearance will not cause him “undue hardship” and that the state in which he is to testify and all states through which he must travel will give the witness “*protection from arrest and [from] the service of civil and criminal process.*” Fla. Stat. § 942.02(2); *see also id.*, § 942.04 (“Exemption from arrest and service of process”).³² In short: The burdens that the Uniform Law imposes on witnesses are, by design, minimal.

³² The Uniform Law does allow the investigating state’s court to request that the witness be “taken into immediate custody and delivered to an officer of the [investigating] state,” § 942.02(3), Fla. Stat.; but the purpose of that provision appears to be merely to ensure the appearance of a witness whom the court deems unlikely to obey a normal summons.

Flynn’s further argument that Floridians should not be forced to participate in “purely investigative” Georgia proceedings ignores the fact that, as previously noted, a general Georgia grand jury (one that issues indictments) likewise could subpoena a Florida witness for a “mere investigation.” See Ga. Code § 15-12-71(b),(c). Flynn fails to explain why that investigation would be worthy of reciprocity under the Uniform Law while this one is not.³³

In sum, the Court should reject Flynn’s arguments for the judicial creation of a non-uniform, Florida-specific law that would excuse him from appearing before the Georgia special-purpose grand jury.

V. CONCLUSION

For the reasons stated above, amici urge the Court to affirm the order compelling Flynn to testify before Georgia special-purpose grand jury.

Respectfully submitted,

KEKER, VAN NEST & PETERS LLP

³³ Flynn’s reliance on *Miccosukee Tribe of Indians of Fla. v. United States*, No. 00-3453CIV, 2000 WL 35623105 (S.D. Fla. Dec. 15, 2000), which interpreted federal Indian law where the Tribe had *not* adopted the Uniform Law, is inapposite.

s/ Steven A. Hirsch

Steven A. Hirsch*
Keker, Van Nest & Peters LLP
633 Battery Street
San Francisco, CA 94111-1809
Telephone: (415) 391-5400
shirsch@keker.com

s/ Jonathan L. Williams

Jonathan L. Williams
States United Democracy Center
400 NW 7th Ave #14310
Ft. Lauderdale, FL 33311
Telephone: (202) 999-9305
jonathan@statesuniteddemocracy.org

Norman L. Eisen*

States United Democracy Center
1101 17th St. NW, Suite 250
Washington, D.C. 20036
Telephone: (202) 999-9305
norm@statesuniteddemocracy.org

Maithreyi Ratakonda*

States United Democracy Center
1 Liberty Plaza
165 Broadway
23rd Floor, Office 2330
New York, New York 10006
Telephone: (202) 999-9305
mai@statesuniteddemocracy.org

**Pro Hac Vice Forthcoming*

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I certify that on December 5, 2022, I served the foregoing document on the following counsel of record by filing it on the Florida Courts E-portal system:

Jared J. Roberts
Jason C. Greaves
Binnall Law Group, PLLC
717 King Street, Suite 200
Alexandria, Virginia 22314
Phone: (703) 888-1943
Fax: (703) 888-1930
jared@binnall.com
jason@binnall.com

Counsel for Michael Flynn

Will Wooten
Deputy District Attorney
Atlanta Judicial Circuit
136 Pryor Street, SW, Third
Floor
Atlanta, Georgia 30303
will.wooten@fultoncountyga
.gov

Counsel for the State of Georgia

Arthur E. Jackman
Assistant State Attorney
Office of the State Attorney
2071 Ringling Blvd.
Sarasota, Florida 34237
ajackman@sao12.org

Counsel for the State of Florida

/s/ Jonathan L. Williams
Jonathan L. Williams

CERTIFICATE OF COMPLIANCE

I certify that this document complies with the requirements of Florida Rules of Appellate Procedure 9.210 and 9.370.

/s/ Jonathan L. Williams
Jonathan L. Williams