

**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

**EMERGENCY MOTION OF AMICI CURIAE
FORMER PROSECUTORS TO FILE A RESPONSE TO THE
EMERGENCY MOTION TO STAY ORDER COMPELLING TESTIMONY
OF MICHAEL T. FLYNN IN THE STATE OF GEORGIA**

Amici Curiae Donald F. Ayer, Sarah Saldaña, Shan Wu, and William F. Weld (collectively, “Former Prosecutors”) move for leave to file a response to the Emergency Motion to Stay Order Compelling Michael T. Flynn in the State of Georgia and for the Court to accept this filing as their response. In support, the Former Prosecutors state:

1. ***Interests of Amici Curiae.*** Amici curiae are a bipartisan group of former prosecutors¹ who are concerned that this case may unduly

¹ Mr. Ayer served as Deputy Attorney General at the U.S. Department of Justice from 1989 to 1990, Principal Deputy Solicitor General of the United States from 1986 to 1989; and U.S. Attorney for the Eastern District of California from 1981 to 1986. Ms. Saldaña served as the U.S. Attorney for the Northern District of Texas from 2011 to 2014 and Director of U.S.

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 border, abide by the comity principles that underlie the Uniform Law to Secure the Attendance of Witnesses Within or Without a State in Criminal Proceedings ("Uniform Law"), § 942.01, Fla. Stat.

2. This action is one of several by potential witnesses to avoid testifying in a Georgia special grand jury proceeding investigating potential interference in the 2020 election. These witnesses have asked courts to narrowly construe the Uniform Law and refuse to honor the special grand jury's request to summon witnesses.

3. The disposition of these cases turns on the proper interpretation of a statute—the Uniform Law—that is critical to the administration of justice in Florida and other states. If accepted, General

Immigration and Customs Enforcement from 2014 to 2017. Mr. Wu previously served as Counsel to Attorney General Janet Reno and as an Assistant United States Attorney in Washington, D.C. Mr. Weld served as the U.S. Attorney for Massachusetts from 1981 to 1986, as the Assistant U.S. Attorney General in charge of the Criminal Division from 1986 to 1988, and as Governor of Massachusetts from 1991 until 1997.

Flynn's arguments could adversely impact Florida's and other states' grand juries' ability to obtain testimony from essential witnesses in other states. His arguments also are belied by the caselaw and the principles of comity that underlie the Uniform Law. Courts in Florida, South Carolina, and Virginia have issued summonses over these objections.² (See App. 3-7.) None has refused to issue a summons based on them.³

4. To begin with, the special purpose grand jury's investigation fits comfortably within the text of the Uniform Law, which provides a means to obtain testimony from out-of-state witnesses needed by a "grand jury investigation." § 942.02, Fla. Stat. The law's drafters chose not to define the term "grand jury investigation" further or include additional requirements for what does or does not qualify as a grand jury. See *id.* §§ 942.01, 942.02. This is significant. As the Florida Supreme Court recognized shortly

² The Court of Appeals of Virginia issued an agreed-to temporary stay while it considers the appeal. (App. 8.)

³ In a case that was dismissed as moot, and without the benefit of argument or responsive briefing, a dissenting opinion from the Texas's Criminal Court of Criminal Appeals indicated its agreement with some of the arguments made by General Flynn. *In re Pick*, --- S.W.3d ----, 2022 WL 4003842, at *2-7 (Tex. Crim. App. Sept. 1, 2022) (Yeary, J., dissenting). The dissent is not controlling even in Texas and should be rejected for the reasons articulated here.

after Florida adopted the Uniform Law in 1941, grand juries' "function now depends on the law of the particular forum, some states being much broader than others." *In re Report of Grand Jury*, 11 So. 2d 316, 318 (Fla. 1943); see *id.* at 317 (recognizing that "[f]ew legal institutions have experienced a more remarkable evolution than the jury system"). Given this variation, the lack of a specialized definition should be understood as a choice *not* to impose limitations on what qualifies as a grand jury.

5. For this reason, General Flynn's argument that the special grand jury is not a "grand jury" because it lacks the power to indict fails. While this lack of indictment authority is a difference between Florida's grand juries and the Georgia special grand jury, General Flynn offers no persuasive reason why this should matter, given that the power to issue indictments is not specified as a requirement under the Uniform Law. Indeed, investigation is a primary purpose of the contemporary grand jury. In nearly half of the states, a prosecutor may charge without obtaining a grand jury indictment, leaving grand juries to focus principally on investigations. Beale *et al.*, *Grand Jury Law & Prac.* § 1:7 (2d ed.). Mandating that grand juries have indictment authority to obtain out-of-state assistance is simply out of touch with contemporary grand jury practice in

many states. Had the Uniform Law's drafters wanted to require that a "grand jury investigation" necessarily be for the purpose of the grand jury considering whether it would indict, then they could have written such a limitation into the law. They chose not to.

6. General Flynn also claims that the special grand jury is not a criminal proceeding. But that flouts common sense. The Georgia Superior Court overseeing the special grand jury's investigation has made clear that the special grand jury'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." (Appellant App. 44)

7. Additionally, General Flynn claims that the special grand jury's mandate to issue a report at the conclusion of its investigation that is made public is disqualifying because it is inconsistent with grand jury secrecy. But his argument ignores that Florida's grand juries issue public reports as well. As a recent example, the statewide grand jury issued a public report castigating the Broward County School Board's conduct surrounding the

Marjory Stoneman Douglas mass shooting. See Final Report, *Statewide Grand Jury No. 20*, Case No. SC19-240 (Fla. Aug. 19, 2022). And the authority of other Florida grand juries to issue reports has long been recognized. *In re Report of Grand Jury*, 11 So. 2d at 319. If accepted, General Flynn’s argument would seriously jeopardize Florida grand juries’ ability to secure testimony from out-of-state witnesses under the Uniform Law.⁴

8. Finally, ensuring that General Flynn testifies in Georgia is consistent with the Uniform Law’s purpose to “increase comity among the States,” “an end particularly to be cherished when the object is the enforcement of internal criminal laws.” *People of N.Y. v. O’Neill*, 359 U.S. 1, 9, 11-12 (1959). By virtue of its certification, the Georgia Superior Court has already determined that a qualifying grand jury proceeding is underway in Georgia. See Ga. Code § 24-13-94(a); accord § 942.02(1), Fla. Stat. And the Georgia Superior Court judge explicitly rejected arguments similar to General Flynn’s about the nature of that proceeding. See *supra*. It would be inconsistent with the Uniform Law’s comity goals to second-guess that

⁴ Indeed, **29 states** authorize grand juries to issue public reports. Grand Jury Law & Prac. § 2:2.

determination and impose unwritten limitations on the kind of grand jury proceeding that qualifies.

9. Former Prosecutors have sought the positions of the parties on whether the Court should accept this filing and will file a notice with the Court when the parties indicate their positions.

WHEREFORE, Amici Curiae Former Prosecutors respectfully request that the Court grant leave to file and accept this filing as a response to the Emergency Motion to Stay Order Compelling of Michael T. Flynn in the State of Georgia.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I certify that on November 22, 2022, I served the foregoing document on the following counsel of record by filing it on the Florida Courts E-Portal system:

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