

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-3052

IN RE: GRAND JURY INVESTIGATION

ANDREW MILLER,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

**GOVERNMENT’S OPPOSITION TO
MOTION FOR LEAVE TO INTERVENE**

The United States of America, by and through Special Counsel Robert S. Mueller, III, opposes the motion to intervene of Concord Management and Consulting, LLC (“Concord”). Although Article III standing is a prerequisite to intervention in this Court, Concord cannot make that showing: it has not suffered a concrete and particularized injury as a result of the district court’s contempt finding against Andrew Miller. In any event, the participation of Concord—a defendant in a separate criminal case—in this grand jury appeal is unwarranted. Its motion should be denied.

Relevant Procedural History

Andrew Miller was served with two grand jury subpoenas, but he failed to appear. ECF No. 1; *see* ECF No. 32-3, at 19-22. Accordingly, the government moved to compel and for an order to show cause why Miller should not be held in contempt, which the district court (Chief Judge Beryl Howell) granted on June 18, 2018. *See* ECF No. 32-3, at 22. On the scheduled date of his grand jury appearance (June 28), Miller moved to quash the subpoenas, arguing that the Special Counsel's appointment violated the Constitution's Appointments Clause. *Id.*

Miller's motion to quash "adopt[ed] and incorporat[ed] by reference those same arguments" that Concord had previously made in a separate criminal matter being prosecuted by the Special Counsel. ECF No. 10, at 1-2; *see* ECF No. 32-3, at 22. In February 2018, a federal grand jury returned an indictment charging Concord and other defendants with, among other things, conspiracy to defraud the United States in violation of 18 U.S.C. § 371. *See United States v. Internet Research Agency LLC, et al.*, No. 1:18-CR-32 (DLF). On June 25, 2018, Concord filed a motion to dismiss that Indictment, arguing, *inter alia*, that the Acting Attorney General lacked the statutory authority to appoint the Special Counsel

and that the Special Counsel was a principal officer for purposes of the Appointments Clause, rendering his appointment unconstitutional. *See* ECF 32-3, at 22-23.

On July 31, 2018, Chief Judge Howell denied Miller's motion to quash, rejecting the arguments articulated in Concord's brief that Miller had adopted in his own motion, as well as additional distinct arguments by Miller. ECF Nos. 22, 26. Thereafter, on August 2, Chief Judge Howell unsealed a redacted version of her opinion denying Miller's motion to quash. ECF No. 26.¹

The next day, on August 3, Judge Dabney Friedrich held a hearing on Concord's motion to dismiss the Indictment in *United States v. Internet Research Agency LLC, et al.*, No. 1:18-CR-32 (DLF). At the hearing, the parties discussed Chief Judge Howell's opinion, which Concord acknowledged receiving the prior day. *See* 8/3/18 Tr. 22-23.

On August 10, Chief Judge Howell held Miller in civil contempt. ECF No. 36. Three days later, on August 13, Miller filed his notice of

¹ Because the motion to quash concerned a grand jury subpoena and was therefore sealed, *see* Fed. R. Crim. P. 6(e)(6), the government did not advise Concord of the existence of the litigation until the unsealed opinion was issued.

appeal seeking this Court's review of the contempt finding and the order denying his motion to quash. ECF No. 39.

Also on August 13, Judge Friedrich entered an order denying Concord's motion to dismiss the Indictment in *United States v. Internet Research Agency LLC, et al.*, No. 1:18-CR-32. In its present motion to intervene, Concord asserts (Mot. 3 n.1) that it "intends to file a timely notice of appeal" from this order but, to date, Concord has not filed such a notice.

Discussion

Although Concord became aware of Chief Judge Howell's decision before Miller filed his notice of appeal, Concord did not move to intervene below. *Cf. United Airlines, Inc. v. McDonald*, 432 U.S. 385, 391-395 (1977) (motion to intervene timely though filed after final judgment). "A court of appeals may allow intervention at the appellate stage where none was sought in the district court only in an exceptional case for imperative reasons." *Amalgamated Transit Union Int'l, AFL-CIO v. Donovan*, 771 F.2d 1551, 1553 (D.C. Cir. 1985) (per curiam) (internal quotation marks omitted); *accord Public Svc. Co. of New Mexico v. Barboan*, 857 F.3d 1101, 1113 (10th Cir. 2017); *In re Grand Jury Inv.*,

587 F.2d 598, 601 (3d Cir. 1978). Because Concord has not shown an imperative reason for permitting intervention for the first time on appeal—or, indeed, a justification for intervention under any standard—and because allowing intervention would circumvent the bar against taking an interlocutory appeal in Concord’s own criminal case, this Court should deny its motion.

1. This Court has “identified four prerequisites to intervene as of right: (1) the application to intervene must be timely; (2) the applicant must demonstrate a legally protected interest in the action; (3) the action must threaten to impair that interest; and (4) no party to the action can be an adequate representative of the applicant’s interests.” *Karesner v. Lothian*, 532 F.3d 876, 885 (D.C. Cir. 2008) (internal quotation marks omitted); see Fed. R. Civ. P. 24(a)(2) (intervenor as of right must “claim[] an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest, unless existing parties adequately represent that interest”). Additionally, “[i]n this circuit, because an intervenor ‘participates on equal footing with the original parties to a suit,’ a prospective intervenor

must satisfy Article III standing requirements.” *United States v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1146 (D.C. Cir. 2009) (citation omitted); *see also Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017) (“an intervenor of right must have Article III standing in order to pursue relief that is different from that which is sought by a party with standing”); *Environmental Integrity Project v. Pruitt*, 709 F. App’x 12, 13 (D.C. Cir. 2017) (unpub.) (“*Town of Chester* did not address whether an intervenor must show standing when it seeks the *same relief* as that sought by a party,” and this Court’s “prior precedents” requiring such a showing “remain undisturbed”) (emphasis added).²

Because standing “implicates” this Court’s “jurisdiction,” it is where this Court must “start” its analysis of Concord’s motion. *Deutsche Bank Nat’l Trust Co. v. Federal Deposit Ins. Corp.*, 717 F.3d 189, 191 (D.C. Cir.

² Although Concord suggests (Mot. 8 n.2) that a question exists on whether this Court requires a putative intervenor to establish standing, this Court has consistently “held that a movant seeking to intervene as of right must additionally demonstrate Article III standing.” *In re Endangered Species Act Section 4 Deadline Litigation*, 704 F.3d 972, 976 (D.C. Cir. 2013) (collecting cases and explaining that “the underlying rationale for this requirement is clear: because a Rule 24 intervenor seeks to participate on an equal footing with the original parties, he must satisfy the standing requirements imposed on those parties”) (citation omitted).

2013). “Standing requires more than just a ‘keen interest in the issue.’” *Trump v. Hawaii*, 138 S. Ct. 2392, 2416 (2018) (quoting *Hollingsworth v. Perry*, 570 U.S. 693, 700 (2013)). “A party has standing only if he shows that he has suffered an ‘injury in fact,’ that the injury is ‘fairly traceable’ to the conduct being challenged, and that the injury will likely be ‘redressed’ by a favorable decision.” *Wittman v. Personhuballah*, 136 S. Ct. 1732, 1736 (2016); *see also Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018) (injury in fact means “the ‘invasion of a legally protected interest’ that is concrete and particularized,’ *i.e.*, which ‘affect[s] the plaintiff in a personal and individual way’”) (alteration in original).

Concord has not “personal[ly]” suffered a concrete and particularized injury “in connection with the conduct about which [it] complains,” *Trump v. Hawaii*, 138 S. Ct. at 2416. Concord has moved to intervene so that it can—along with Miller—complain about Chief Judge Howell’s decision holding Miller in contempt. If Miller prevails, this Court’s decision will redress Miller’s injury by vacating his contempt finding or releasing him from the grand jury subpoenas. But even if this Court agrees that Chief Judge Howell erred in holding the grand jury witness (Miller) in civil contempt, such a decision cannot redress the only

“injury-in-fact” that Concord claims (Mot. 8 n.2) it has “suffered,” namely “a criminal indictment charging it with a federal crime, along with the reputational and defense costs associated with it[.]”³

Concord concedes that this Court cannot redress its purported injury, pointing out (Mot. 13) that it “seek[s] different relief” and noting

³ Concord’s reliance on *Foster v. Gueory*, 655 F.2d 1319, 1324 (D.C. Cir. 1981) (Mot. 10), is misplaced because that decision did not address standing under Article III, but instead proceeded directly to analysis under Fed. R. Civ. P. 24(a). In any event, the Rule 24 holdings of *Foster* and other cited cases cannot be stretched to cover this one. For example, *Foster* involved employees who were subject to claimed discrimination by the same defendants in similar circumstances to the original plaintiffs. 655 F.2d at 1324 (original plaintiffs challenged discrimination by the union; intervenors claimed discrimination in being denied union membership). Concord has no comparable “interest relating to the property or transaction that is the subject of” the government’s dispute with Miller over the grand jury subpoena directed to him. Fed. R. Civ. P. 24(a)(2). Nor is Concord aided by *Nuesse v. Camp*, 385 F.2d 694 (D.C. Cir. 1967). In that case, the court of appeals allowed intervention by a state banking commissioner, who was charged with enforcing state law, in an action by a state bank challenging the Comptroller of the Currency’s decision to allow a national bank to open a branch in violation of state law. The commissioner there sought the same relief as the state bank and had independent standing to pursue that relief. *Id.* at 700. The court’s Rule 24(a) analysis was also driven by the state official’s “direct[] concern[] in effectuating the state policy . . . in a legal controversy involving the Comptroller which concerns the nature and protection of the state policy.” *Id.* Concord has no similar relationship to the legal controversy between Miller and the government that would give him a cognizable “interest” under Rule 24(a).

(Mot. 3 n.1) that it “intends” to file its own notice of appeal “from Judge Friedrich’s August 13, 2018 ruling” denying its motion to dismiss the Indictment in *United States v. Internet Research Agency LLC, et al.*, No. 1:18-CR-32. If Concord does appeal Judge Friedrich’s ruling, then a separate panel of this Court will have the opportunity to consider Concord’s claimed injury (Mot. 8 n.2), *i.e.*, that the Indictment in its criminal case is the “unconstitutional act” of an “unconstitutionally appointed Special Counsel,” and can assess other jurisdictional issues associated with an interlocutory appeal of the denial of a motion to dismiss in a criminal case. But nothing in this appeal can redress Concord’s claimed injury.

Although Concord might have a “keen interest” in the Appointments Clause issue at the heart of Miller’s contempt appeal, *Trump v. Hawaii*, 138 S. Ct. at 2416, that interest alone does not satisfy Article III’s standing requirement. A “long line of decisions [has] reject[ed] claims of standing based merely on supposed adverse precedential effect.” *See Williams Gas Processing-Gulf Coast Co., LP v. FERC*, 145 F.3d 377, 378 (D.C. Cir. 1998) (precedent within agency); *see also Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 316

(D.C. Cir. 2015) (“where a party tries to intervene as another defendant, we have required it to demonstrate Article III standing, reasoning that otherwise ‘any organization or individual with only a philosophical identification with a defendant—or a concern with a possible unfavorable precedent—could attempt to intervene and influence the course of litigation”) (citation omitted); *Sea-Land Serv., Inc. v. DOT*, 137 F.3d 640, 648 (D.C. Cir. 1998) (“mere precedential effect within an agency is not, alone, enough to create Article III standing, no matter how foreseeable the litigation”); *Telecommunications Research & Action Ctr. v. FCC*, 917 F.2d 585, 588 (D.C. Cir. 1990) (“TRAC’s interest in the Commission’s legal reasoning and its potential precedential effect does not by itself confer standing where, as here, it is ‘uncoupled’ from any injury in fact caused by the substance of the FCC’s adjudicatory action”). Concord offers no reason to depart from the bedrock principle that the “possibility of an adverse precedent is clearly insufficient to establish the injury necessary for standing under Article III.” *National Lime Ass’n v. EPA*, 233 F.3d 625, 636 (D.C. Cir. 2000).⁴

⁴ Concord’s reliance on *Roane v. Leonart*, 741 F.3d 147, 151 (D.C. Cir. 2014) (Mot. 11), is misplaced. There, this Court allowed intervention by

In any event, Concord cannot satisfy the ordinary requirements of Rule 24 for intervention as of right. Rule 24 authorizes intervention as of right where an intervenor has a cognizable interest and “disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest.” Fed. R. Civ. P. 24(a)(2). The interest and practical harm that Concord invokes—the potential precedential effect of this appeal on its separate criminal case—is too attenuated to justify intervention in an grand jury proceeding for the apparent purpose of securing the right to seek further review even if the contemnor declines to do so (*see* Mot. 15 n.4). *Cf. Donaldson v. United States*, 400 U.S. 517, 528-531 (1971) (declining intervention in a proceeding to enforce third-party summons because the asserted interest “cannot be the kind contemplated by Rule 24(a)(2)” and the putative intervenor “may always

a prisoner on death row in a challenge to lethal injection procedures brought by other inmates, noting that at a minimum the intervenor would be worse off if the case established adverse precedent. But there was no dispute that the lethal injection procedures being challenged in that case equally applied to the intervenor, giving him standing in the same challenge. Here, Concord is a stranger to Miller’s subpoena dispute with the government, sharing only an interest in an antecedent legal issue.

assert that interest or that claim in due course at its proper place in any subsequent trial”).

Grand jury matters are normally sealed and conducted with dispatch to avoid undue interference in a grand jury’s criminal investigation. *See Cobbledick v. United States*, 309 U.S. 323, 325 (1940) (“encouragement of delay is fatal to the vindication of the criminal law”); *see, e.g., United States v. R Enterprises, Inc.*, 498 U.S. 292, 298 (1991) (warning against “delay[ing] and disrupt[ing] grand jury proceedings”). And appeals arising from contempt orders “must receive expedited treatment.” *In re Sealed Case*, 829 F.2d 189, 189-190 (D.C. Cir. 1987) (*per curiam*); *see* 18 U.S.C. §§ 1657(a), 1826(b). This Court should not lightly allow unrelated parties to claim a cognizable interest in the development of the law that allows them to intervene in separate contempt proceedings arising from grand jury matters. *See Donaldson*, 400 U.S. at 531 (Rule 24(a)(2) requires a “significantly protectable interest”). Concord cites no grand jury case having taken that step.

Concord similarly makes scant effort to overcome the requirement that intervention as of right should be denied when “existing parties adequately represent that interest.” Fed. R. Civ. P. 24(a)(2). Miller

shares Concord's apparent interest in challenging the appointment of the Special Counsel. *See, e.g., Envtl. Def. Fund, Inc. v. Higginson*, 631 F.2d 738, 740 (D.C. Cir. 1979) (rejecting intervention where "there appears to be no possible divergence" between the putative intervenor's and party's "position on the primary issue"). Miller's counsel is in the same position to brief the legal issues as Concord, and Miller's adoption of Concord's brief below suggests that no daylight exists between them on the merits. If Concord believes that Miller has failed to address any important aspect of the legal issue in which Concord is interested, Concord may present arguments to this Court as an *amicus curiae*. *See Fed. R. App. P. 29(a)*. But Concord's and Miller's interests are aligned, and Concord's interest in shaping circuit law cannot overcome the party-inadequacy prerequisite to intervention as of right. *See Bethune Plaza, Inc. v. Lumpkin*, 863 F.2d 525, 531-533 (7th Cir. 1988).

2. Concord's lack of standing also precludes this Court from granting its motion for permissive intervention pursuant to Fed. R. Civ. P. 24(b).⁵ Although, until recently, it was "an open question in this circuit

⁵ That Rule provides that "[o]n timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the

whether Article III standing is required for permissive intervention,” *In re Endangered Species Act Section 4 Deadline Litigation*, 704 F.3d 972, 980 (D.C. Cir. 2013), several courts have concluded that it is now “settled” that “standing is required of a party seeking permissive intervention,” *Keepseagle v. Vlisack*, 307 F.R.D. 233, 245 (D.D.C. 2014) (citing *Deutsche Bank*, 717 F.3d at 193; *id.* at 195-196 (Silberman, J., concurring)); *see also National Fair Housing Alliance v. Carson*, No. 18-cv-1076 (BAH), 2018 WL 3962930, at *32 (D.D.C. Aug. 17, 2018) (“For either intervention as a matter of right or permissive intervention * * * the movant must establish Article III standing.”) (citing *Deutsche Bank*, 717 F.3d at 193).

Even if this Court were to view the standing issue for permissive intervention as “unresolved,” however, the uncertainty counsels against granting Concord’s motion for intervention. *See In re Endangered Species Act*, 704 F.3d at 980 (citation omitted). Apart from circumstances in which a privilege holder intervenes in a criminal proceeding to protect its independent interest in privileged materials, *see United States v. Hubbard*, 650 F.2d 293, 311 n.67 (D.C. Cir. 1980), intervention in a

main action a common question of law or fact.” Fed. R. Crim. P. 24(b)(1)(B).

dispute between the government and a witness in a criminal investigation is extraordinarily rare. Concord cites no examples of interventions in ongoing grand jury matters in any way resembling its own.

Permissive intervention is “an inherently discretionary enterprise,” *EEOC v. National Children’s Center, Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998), and intervention is particularly unwarranted here. Concord, as a criminal defendant, is barred from raising its legal claim in the present posture of its own prosecution. As discussed *supra*, Concord has acknowledged its plan to appeal Judge Friedrich’s denial of its motion to dismiss. And as Concord has acknowledged (Mot. 3 n.1), the government will contest appellate jurisdiction over such an interlocutory appeal, as contrary to the general rule that a criminal defendant must await final judgment before appealing a motion to dismiss. *See, e.g., Midland Asphalt Corp. v. United States*, 489 U.S. 794, 798-802 (1989) (holding that interlocutory appeals in criminal cases are generally barred and noting that the limited circumstances in which a criminal defendant may take an immediate appeal of an interlocutory order in a criminal case involve “[a] right not to be tried . . . [that] rests upon an explicit statutory or

constitutional guarantee that trial will not occur”). Concord’s claims rest on an attack on prosecutorial authority that can be raised upon a final conviction, not a claim of constitutional protection for defendants not to be tried. *Cf. United States v. Rose*, 28 F.3d 181, 185-186 (D.C. Cir. 1994) (entertaining a separation-of-powers claim raised by a congressman in conjunction with Speech or Debate Clause claim as implicating a similar policy of immunity); *but see United States v. Schock*, 891 F.3d 334, 337 (7th Cir. 2018) (rejecting that theory as inconsistent with Supreme Court doctrine because the “separation of powers is about the allocation of authority among the branches of the federal government,” not a “right not to be tried”). Accordingly, any interlocutory appeal Concord brings should be dismissed.⁶

Concord’s motion to intervene in Miller’s appeal thus seeks to circumvent the interlocutory-appeal prohibition that applies to it. If intervention were granted here, Concord would be able to immediately

⁶ Of course, if Concord’s appeal were not dismissed on jurisdictional grounds, it has no reason to participate in Miller’s appeal since it could litigate the Appointments Clause issue in its own. And Concord will similarly be able to litigate its own claim after entry of a final judgment of conviction.

litigate an appeal that will not otherwise be ripe until after final judgment in that separate criminal case. *See Building & Constr. Trades Dep't, AFL-CIO v. Reich*, 40 F.3d 1275, 1282 (D.C. Cir. 1994) (“intervenor participates on equal footing with the original parties to a suit”). But nothing justifies Concord’s effort to acquire the rights of a party to appellate proceedings at this time. The fact that a legal issue raised by Concord in a separate dispute is now before this Court in an appeal by Miller gives Concord no basis to take on the rights of an appellant—rights that it is currently barred from asserting on its own. Like any other litigant who believes that it has something to say in another party’s case, Concord can seek to participate as an amicus curiae. *See Fed. R. App. P.* 29(a).⁷ But it should not be able to use the happenstance of Miller’s appeal to acquire party status.

⁷ Concord asserts (Mot. 15 n.4) that amicus status is inadequate, citing a case noting that an amicus cannot seek rehearing en banc or certiorari. But that is precisely the point: Concord is not entitled at this juncture to take either of those steps.

CONCLUSION

The government respectfully requests that Concord's motion to intervene be denied.

Respectfully submitted,

ROBERT S. MUELLER, III
Special Counsel

By: /s/ _____
Michael R. Dreeben
Jeannie S. Rhee
Adam C. Jed
U.S. Department of Justice
Special Counsel's Office
950 Pennsylvania Avenue NW
Washington, D.C. 20530
Telephone: (202) 616-0800

CERTIFICATE OF COMPLIANCE WITH RULE 27(d)

I hereby certify pursuant to Fed. R. App. P. 32(g) that this motion contains 3,567 words, and therefore complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A). This motion has been prepared in 14-point Century Schoolbook, a proportionally spaced typeface.

/s/

MICHAEL R. DREEBEN

CERTIFICATE OF SERVICE

I hereby certify that I have caused a copy of the foregoing motion to be served by electronic means, through the Court's CM/ECF system, upon counsel for the appellant (Andrew Miller) and the movant (Concord), on this 27th day of August, 2018.

/s/
MICHAEL R. DREEBEN