ORAL ARGUMENT NOT YET SCHEDULED

No. 18-3052

IN THE

United States Court of Appeals for the District of Columbia Circuit

IN RE: GRAND JURY INVESTIGATION

ANDREW MILLER,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
GRAND JURY ACTION NO. 18-34 (BAH)

REPLY IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE OF CONCORD MANAGEMENT AND CONSULTING LLC

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ARGUMENT

The Special Counsel concedes that Rule 24's standards govern Concord's motion to intervene. But he devotes little attention to those requirements, spending most of his effort on a meritless standing argument. Here, when the relevant requirements are fairly considered, Concord's motion should be granted.

I. The Special Counsel fails to rebut Concord's showing on each of the Rule 24 requirements for intervention.

Timeliness. The Special Counsel offers no response to the crux of Concord's timeliness showing—that Concord's participation would not unduly disrupt this appeal to the unfair detriment of the parties (one of whom, Mr. Miller, does not oppose intervention). (Mot. 9–10). Instead, the Special Counsel makes the spurious claim that Concord should have moved to intervene in the district court sometime between the unsealing of Chief Judge Howell's 92-page ruling on August 2 and the filing of Mr. Miller's appeal on August 13. (Opp. 4–5). The Special Counsel cites no authority supporting such a draconian timeliness requirement, nor does he explain what such an intervention motion would have accomplished given that Chief Judge Howell already had reviewed Concord's brief before her ruling.

Moreover, it is Mr. Miller's appeal, and the likelihood of a ruling from this Court, that gives rise to Concord's motion. The impact on Concord's interests follows from this proceeding, not the proceeding now stayed before Chief Judge Howell. ECF No. 36.

The Special Counsel's claim that Concord should have moved to intervene in the grand jury proceeding also directly contradicts his stated concerns with ensuring the secrecy of grand jury proceedings and avoiding "undue interference in a grand jury's criminal investigation." (Opp. 12). And he does not even try to show that Concord's intervention on appeal would disturb the grand jury proceedings or the appeal itself—because it would not. Chief Judge Howell stayed her contempt order pending Mr. Miller's appeal (ECF No. 36), thus delaying his grand jury appearance until this appeal is resolved. Concord has agreed to abide by the Court's expedited briefing schedule. (Mot. 10 n.3). And this appeal, which is the proceeding where Concord seeks to intervene, raises only legal issues under the Appointments Clause, not questions implicating the grand jury proceeding itself or any aspect of it that remains under seal.

The Special Counsel's timeliness case of choice is *Amalgamated Transit Union Int'l, AFL-CIO v. Donovan*, 771 F.2d 1551, 1553 (D.C. Cir. 1985) (per curiam), where a panel of this Court stated that if intervention is not "sought in the district court[,]" it may be permitted on appeal "in an exceptional case for imperative reasons." But that case could not be more different from this one. There, the putative intervenor moved to intervene "more than four months after this court heard oral argument and almost two months after [the panel] reversed the judgment of the court below." *Id.* Concord, for its part, moved expediently and with due regard for this Court's schedule.

In any event, particularly given the issues raised, this is indeed an "exceptional case" and there are "imperative reasons" to allow Concord to intervene. Consider that:

- Concord first raised the core Appointments Clause arguments in its own criminal proceeding, which Mr. Miller subsequently raised before Chief Judge Howell in his motion to quash;
- Concord's initial brief asserting those legal arguments was attached by Mr. Miller to his motion to quash;
- Chief Judge Howell cited Concord's brief 22 times in her ruling and effectively denied Concord's motion; and
- This Court almost certainly will resolve the Appointments Clause issues in this appeal, and its ruling likely will have *stare decisis* effect on future appeals raising those issues—including Concord's own.

(Mot. 1–7).

It is hard to conceive what could be more imperative than allowing Concord to be heard in these circumstances.

Impairment of interest. The Special Counsel characterizes Concord's "interest and practical harm" in the "potential precedential effect of this appeal on its criminal case" as a mere "keen" and "attenuated" interest not worthy of intervention. (Opp. 9, 11). But this contrived standard ignores this Court's settled precedent. (Mot. 10–12 (citing cases)). The Special Counsel tries to distinguish Concord's cited cases on grounds that the intervenors there supposedly had standing, while Concord, supposedly, does not. (Opp. 8 n.3, 10–11 n.4). But the impairment-of-interest analyses in Concord's cited cases did not turn on standing, and their holdings—that

the potential *stare decisis* effect of an anticipated judicial decision meets the impairment-of-interest requirement—have direct application here.[1]

Adequacy of representation. Ignoring his heavy burden to "clearly" show that existing parties will adequately represent Concord's interests (Mot. 13), the Special Counsel equates adequacy with mere alignment between a putative intervenor

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[1] For his part, the Special Counsel cites decisions that are inapposite because they involve alleged harm created by the precedential effect of agency decisions in future agency proceedings, which, in turn, could be challenged in court, unlike the appellate precedent likely to control in Concord's own case. *See Nat'l Lime Ass'n v. EPA*, 233 F.3d 625, 636 (D.C. Cir. 2001) (finding trade group had associational standing to petition for review of an agency order even though the group had suggested before the agency that the group was only interested in avoiding the creation of adverse agency precedent that could later be applied by the agency to an industry segment not directly impacted by the agency order); *Williams Gas Processing-Gulf Coast Co. v. FERC*, 145 F.3d 377, 378 (D.C. Cir. 1998) (addressing petition for review of an agency order asserting jurisdiction over certain gas facilities maintained by another party that did not seek judicial review of the agency's order, where the petitioner claimed that the agency order injured the petitioner by creating adverse agency precedent); *Sea-Land Serv., Inc. v. DOT*, 137 F.3d 640, 648 (D.C. Cir. 1998) ("But mere precedential effect *within an agency* is not, alone, enough to create Article III standing, no matter how foreseeable the future litigation.") (emphasis added); *Telecomms. Research & Action Ctr. v. FCC*, 917 F.2d 585, 588 (D.C. Cir. 1990) (finding petitioner lacked standing to challenge agency order that reached the end result advocated by the petitioner before the agency, and noting that the petitioner could later obtain judicial review of the order's underlying reasoning when it was applied in future cases). *But see, e.g.*, *Roane v. Leonhart*, 741 F.3d 147, 151 (D.C. Cir. 2014) (finding district court erred in denying third party's motion to intervene where third party was at risk that district court's decision on the merits would establish unfavorable *judicial* precedent); *Nuesse v. Camp*, 385 F.2d 694, 702 (D.C. Cir. 1967) (finding district court erred in denying third party's motion to intervene in a case presenting a legal question of first impression even though, unlike with respect to this Court's ultimate decision on the merits here as it relates to Concord, the third party in *Roane* would not be bound by the district court's merits ruling).

and a party to the proceeding on relevant legal issues (Opp. 13). This Court has rejected any such standard. *See Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 321 (D.C. Cir. 2015) ("[B]y treating general alignment as dispositive, the district court went against the weight of authority in this Circuit."). Nor, contrary to the Special Counsel's claim, is amicus participation an adequate substitute. (Mot. 15 n.4). If it was, the amicus option would defeat every intervention request. Concord has more at stake in this proceeding on the controlling legal issues than Mr. Miller, and for reasons that Concord has noted and the Special Counsel does not seriously dispute, alignment alone does not put Mr. Miller in a position to adequately represent Concord's interests. (Mot. 13–15). The Special Counsel does not dispute that because he cannot.

Permissive intervention. The Special Counsel effectively ignores Concord's arguments with respect to permissive intervention, and instead attacks Concord for "seek[ing] to circumvent the interlocutory-appeal prohibition that applies to" Concord's appeal of Judge Friedrich's ruling. (Opp. 16).[2] Simply put, whether Concord can appeal Judge Friedrich's ruling has no bearing on whether it can intervene here. The very reason for intervention is to allow interested persons to participate in cases to which they are not parties but where the legal issues are

[2] Contrary to the Special Counsel's claim (Opp. 4, 9), Concord filed its notice of appeal more than 10 hours before the Special Counsel filed his late-night opposition in this Court. *See* Case No. 1:18-cr-32-DLF-2 (D.D.C.), ECF No. 59.

common to those faced by those persons in their own cases and where the outcome of the case, as here, could impede or impair that person's interests. It thus is no surprise that the Special Counsel does not cite a single case for his "appeal circumvention" limitation, which is nothing more than a request for "another layer of judge-made prudential considerations to deny intervention" that this Court has roundly rejected. *Crossroads*, 788 F.3d at 320 (citation omitted).

The Special Counsel's argument is, in fact, classic "heads I win, tails you lose." If Concord cannot appeal Judge Friedrich's ruling now, the Special Counsel says, intervention should be denied because Concord is just trying to circumvent the supposed bar against interlocutory criminal appeals. (Opp. 16). If Concord can appeal that ruling now, he continues, there is no need for intervention. (*Id.* 16 n.6). And no matter how this issue is resolved, the Special Counsel insists, there is no reason for intervention since Concord can appeal Judge Friedrich's ruling following a final judgment (*id.*)—assuming, of course, that the Special Counsel even convinces a jury to convict Concord. If this reflected the law of this Circuit, no intervenor with a pending case raising the same issues could ever intervene. The Special Counsel does not cite a case supporting his argument and none exists.

II. Concord has Article III standing.

Unable to rebut Concord's showing that each of the Rule 24 requirements is met, the Special Counsel contends that intervention should be denied because Concord cannot establish Article III standing. (Opp. 1, 6–10). "The standing inquiry

for an intervening-defendant is the same as for a plaintiff: the intervenor must show injury in fact, causation, and redressability." *Crossroads*, 788 F.3d at 316 (citing *Deutsche Bank Nat'l Trust Co. v. FDIC*, 717 F.3d 189, 193 (D.C. Cir. 2013)). Concord satisfies all three elements.[3]

Injury in fact. The injury-in-fact element requires a "showing of an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Deutsche Bank*, 717 F.3d at 193 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). The Appointments Clause "is among the significant structural safeguards of the constitutional scheme[,]" *Edmond v. United States*, 520 U.S. 651, 659 (1997) (citation omitted), and it provides Concord a legally protected interest against indictment and prosecution at the hands of an unconstitutionally appointed Officer of the United States. The protections afforded by the Appointments Clause are so substantial that a party challenging compliance with the Clause need not "show a direct causal link between the error and the authority's adverse decision" and can make its objection for the first time on appeal. *Landry v. FDIC*, 204 F.3d 1125, 1131 (D.C. Cir. 2000).

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[3] As the Special Counsel acknowledges (Opp. 13–14), this Court has previously noted that it remains "an open question in this circuit whether Article III standing is required for permissive intervention." *In re Endangered Species Act § 4 Deadline Litig.*, 704 F.3d 972, 980 (D.C. Cir. 2013). Because Concord has Article III standing, the Court need not resolve that particular question here.

Furthermore, the invasion of Concord's constitutionally protected interest is concrete, particularized, and ongoing. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) ("For an injury to be particularized, it must affect the plaintiff in a personal and individual way. . . . When we have used the adjective 'concrete,' we have meant to convey the usual meaning of the term—real, and not abstract.") (internal quotation marks and citations omitted). The criminal action against Concord is proceeding and this appeal will have a direct impact on Concord's own constitutional rights. That certainly demonstrates sufficient injury in fact.

Causal connection. Mr. Miller and Concord challenge the legality of the exact same agency action: namely, the one-page order appointing Mr. Mueller to serve as Special Counsel. *See* Dep't of Justice Order No. 3915-2017, ECF No. 32-1 at 70 (the "Order"). While the procedural contexts of the two cases are different—Mr. Miller's appeal arises from a grand jury proceeding over which Mr. Mueller presides pursuant to the Order, while Concord's case is a criminal prosecution brought by Mr. Mueller through an indictment that was signed by him pursuant to the Order—both of those cases trace their origin to the same appointing Order. That link presents a sufficient connection to support intervention. *See, e.g.*, *Ameren Servs. Co. v. FERC*, 893 F.3d 786, 790 (D.C. Cir. 2018) (addressing third-party intervenor's standing after another party filed a petition for review challenging agency orders subject to immediate judicial review in this Court).

Redressability. The redressability inquiry asks whether it will be "*likely* that a favorable judicial decision will prevent or redress the injury." *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) (emphasis added). The Special Counsel claims that a decision in favor of Mr. Miller would not redress any injury to Concord because such a decision would merely vacate Mr. Miller's contempt finding and release him from the grand jury subpoenas. (Opp. 7). But as the Special Counsel well knows and does not dispute, the *opinion* that the Court would file in support of that judgment will almost certainly create binding precedent on whether the Order violates the Appointments Clause. That will impact Concord directly as far as the viability of the criminal proceedings against it.[4]

Finally, the Special Counsel's standing argument, on analysis, also would bring an end to the ability to intervene. If a direct connection between two proceedings on the legal issues to be raised and decided is not enough, then it is hard to imagine when standing to intervene would exist.

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[4] The Special Counsel likewise suggests that Concord must establish injury in fact flowing directly from Chief Judge Howell's contempt finding against Mr. Miller. (Opp. 1). That is incorrect. Instead, it is sufficient that Concord's injury in fact originates in the very same place as Mr. Miller's injury in fact (i.e., the Order appointing the Special Counsel). Moreover, through the use of a bracketed period, the Special Counsel's opposition (at 8) attempts to elide this distinction by truncating the injury in fact described in Concord's motion. The remainder of the sentence at issue states: "—which flows from the unconstitutional act of indictment *by an unconstitutionally appointed Special Counsel*." (Mot. 9 n.2 (emphasis added)).

CONCLUSION

For the foregoing reasons and those in Concord's motion, the Court should grant Concord leave to intervene and permit it to file a principal and a reply brief on the expedited briefing schedule the Court has set.

Dated: August 29, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

On this twenty-ninth day of August, 2018, the undersigned certifies that:

1. The foregoing reply complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(C) because the reply contains 2,498 words, as determined by the word-count function of Microsoft Word 2010; and

2. As required by Federal Rule of Appellate Procedure 27(d)(1)(E), the foregoing reply complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because the reply has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Garamond font.

/s/ James C. Martin
James C. Martin

CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25(d), the undersigned certifies that on this twenty-ninth day of August, 2018, he caused the foregoing reply to be filed electronically with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Pursuant to Circuit Rule 27(b), the undersigned also caused four (4) copies of the foregoing reply to be hand-delivered to the Clerk of the Court. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ James C. Martin
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