[ORAL ARGUMENT HELD NOVEMBER 8, 2018]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-3052

IN RE: GRAND JURY INVESTIGATION

UNITED STATES OF AMERICA, Appellee,

v.

ANDREW MILLER, Appellant.

GOVERNMENT'S OPPOSITION TO MOTION TO STAY THE MANDATE

The government respectfully opposes Andrew Miller's motion to stay the mandate. This is an appeal from a district court order holding Miller in civil contempt for failing to comply with a grand jury subpoena that was served in May of last year. In a unanimous opinion, this Court affirmed the district court's decision, holding that Miller's primary constitutional and statutory arguments are governed by prior decisions

of this Court and the Supreme Court. This Court denied rehearing en banc with no noted dissent.

Miller now asks the Court to stay issuance of the mandate so that he may file a petition for a writ of certiorari. Miller, however, has failed to establish a reasonable probability that the Supreme Court would grant certiorari and reverse the judgment of this Court. This Court's decision does not conflict with any decision of the Supreme Court or any other court of appeals. It also concerns a set of questions that arise infrequently—including the constitutional significance of a special counsel regulation that has been applied twice in the twenty years that it has existed. In all events, this Court's decision is correct and is largely governed by Supreme Court precedent and by the plain text of the statutes at issue.

Contrary to Miller's contention, the balance of equities further counsels against a stay. The need for expedition in this grand jury matter—which arises from a subpoena served more than a year ago—outweighs the only harm that Miller claims, which is the burden of traveling to Washington, D.C. (at government expense) to testify and the attendant risk of his case becoming moot. Miller alleges no harm other

than the general inconveniences that all witnesses face. Delaying his testimony, on the other hand, would delay an ongoing criminal investigation, to the detriment of the government and the public at large. Miller's stay request should be denied.

BACKGROUND

1. On May 10, 2018, the Special Counsel served Miller with a grand jury subpoena requiring that he testify and produce documents. B1; C19.[1] On June 28, Miller moved to quash the subpoena, raising constitutional and statutory challenges to the Special Counsel's appointment. B2; C22. On July 31, the district court denied his motion. *See* C3, 92; D1. The Special Counsel moved to compel the testimony, and Miller asked to be held in civil contempt. B2. On August 10, the district court granted both

[1] Miller's appendix was not consecutively paginated but was instead divided into lettered sections. This opposition refers to appendix pages by section and page number. Because the contempt order is reproduced at Appendix B, it is cited as B1-B3. Similarly, the opinion and order denying the motion to quash are reproduced at Appendices C and D respectively and are accordingly cited as C1-C92 and D1. "Mot." refers to Miller's stay motion. "Gov't Br." refers to the government's merits brief in this Court, filed on September 28, 2018.

requests and found Miller in civil contempt, but stayed the contempt order pending appeal. *See* B3.

2. On February 26, 2019, this Court affirmed the district court's order. *In re Grand Jury Investigation*, 916 F.3d 1047 (D.C. Cir. 2019).

First, this Court held that the Constitution permits the Attorney General to appoint the Special Counsel, because the Special Counsel is an "inferior officer." *Grand Jury Investigation*, 916 F.3d at 1052-53. The Court concluded that the Special Counsel was an "inferior officer" because his work was "'directed and supervised at some level'" by the Acting Attorney General. *Id.* at 1052 (quoting *Edmond v. United States*, 520 U.S. 651, 663 (1997)). The Court acknowledged Miller's argument, which had been rejected by the district court, that the Department of Justice's special counsel regulations impermissibly impair the Attorney General's ability to oversee the Special Counsel. *See id.* But the Court reasoned that, even if the self-imposed regulations on their face constrained the Attorney General's supervision of the Special Counsel, the Special Counsel is nonetheless an inferior officer because the Attorney General retains the ability to lift those constraints. *See id.* (citing *In re Sealed Case*, 829 F.2d 50, 56-57 (D.C. Cir. 1987); *Morrison v.*

Olson, 487 U.S. 654, 721 (1988) (Scalia, J., dissenting)). The Attorney General can rescind those regulations "at any time" or "otherwise render them inapplicable to the Special Counsel." *Id.* The Special Counsel thus "effectively serves at the pleasure of" the Attorney General, giving the Attorney General sufficient control to make the Special Counsel an inferior officer. *Id.* at 1052-53.

Second, this Court held that the Attorney General had statutory authority to appoint the Special Counsel, explaining that the question was governed by "binding precedent." *Grand Jury Investigation*, 916 F.3d at 1053-54. The Court relied on, among other cases, *United States v. Nixon*, 418 U.S. 683 (1974), which stated: "[Congress] has also vested in [the Attorney General] the power to appoint subordinate officers"—there, the Watergate special prosecutor—"to assist him in the discharge of his duties. 28 U.S.C. §§ 509, 510, 515, 533," *id.* at 694. This Court rejected Miller's argument that *Nixon*'s language was dicta, explaining that the Attorney General's statutory authority to appoint the special prosecutor "was necessary to the decision that a justiciable controversy existed." *Grand Jury Investigation*, 619 F.3d at 1053.

Finally, this Court found that the Acting Attorney General could appoint the Special Counsel after the Attorney General's recusal. *See Grand Jury Investigation*, 916 F.3d at 1054-56. The Court rejected Miller's contention that only physical incapacitation—and not a legally mandated recusal—can constitute a "disability" that authorizes the Deputy Attorney General to exercise the Attorney General's authority. *See id.* at 1055-56 (citing 28 U.S.C. § 508(a)). Miller's interpretation, the Court explained, is at odds with the "ordinary meaning" of the term and would create an anomaly where an Attorney General is legally barred from acting, as there would be "no Attorney General, acting or otherwise, to be in charge of the matter." *Id.* at 1055.

3. On April 29, 2019, this Court denied petitions for panel rehearing and rehearing en banc without any noted dissent. The Court's Order stated that no member of the en banc Court requested a vote. On May 6, Miller moved to stay the mandate for 30 days pending the filing of a petition for a writ of certiorari.[2]

[2] It is unclear whether Miller envisions that the stay would remain in place pending the Supreme Court's disposition of any certiorari petition. *See* Fed. R. App. P. 41(d)(2)(B)(ii).

DISCUSSION

Miller seeks extraordinary relief from this Court, aimed at maintaining the district court's stay of the contempt order while Miller petitions for a writ of certiorari. To obtain that relief, Miller must establish a reasonable probability that the Supreme Court would both grant certiorari and reverse, and also show that the balance of equities warrants a stay. Miller has not made and cannot make those showings.

A. A Stay Requires An Extraordinary Showing

To obtain a stay of the mandate, a movant "must show that the [certiorari] petition would present a substantial question and that there is good cause for a stay." Fed. R. App. P. 41(d)(1); *see also* D.C. Cir. R. 41(a)(2) (motion must set forth facts showing good cause). This rule reflects the factors that a Circuit Justice considers in ruling on a stay motion, requiring the party seeking a stay to "demonstrate (1) a reasonable probability that this Court will grant certiorari, (2) a fair prospect that the Court will then reverse the decision below, and (3) a likelihood that irreparable harm will result from the denial of a stay." *Maryland v. King*, 133 S. Ct. 1, 2 (2012) (Roberts, C.J., in chambers) (internal quotation marks and brackets omitted); *see United States v.*

Warner, 507 F.3d 508, 510-11 (7th Cir. 2007) (opinion of Wood, J., in chambers, adopted by panel); Fed. R. App. P. 41 Adv. Comm. Notes. In addition, because a stay is an equitable remedy, "[i]t is ultimately necessary . . . to 'balance the equities'—to explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Barnes v. E-Sys., Inc. Grp. Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1304-05 (1991) (Scalia, J., in chambers) (some internal quotation marks omitted); *see Nara v. Frank*, 494 F.3d 1132, 1133 (3d Cir. 2007); *John Doe I v. Miller*, 418 F.3d 950, 951 (8th Cir. 2005).[3]

B. Miller Has Not Shown a Reasonable Likelihood That the Supreme Court Will Grant Review and Reverse

To demonstrate a reasonable probability of succeeding on the merits of a certiorari petition, Miller must establish a sufficient likelihood that four Justices will to vote to grant certiorari and that five Justices will vote to reverse the judgment of this Court. *See Warner*, 507

[3] Miller cites (Mot. 3, 7) this Court's decision in *Deering Milliken, Inc. v. FTC*, 647 F.2d 1124 (D.C. Cir. 1978). But that decision construed a prior version of Rule 41. *See id.* at 1127 n.5. The amended rule (unlike the old one at issue in *Deering Milliken*) makes clear that the motion "must show" *both* that the certiorari petition presents "a substantial question" *and* that there is "good cause for a stay." Fed. R. App. P. 41(d)(1).

F.3d at 511. Miller cannot make either showing for any of the three questions that he intends to present (see Mot. 3-4). Indeed, every judge to consider the issues presented by Miller has voted against his position. *See Grand Jury Investigation*, 916 F.3d 1047; *In re Grand Jury Investigation*, 315 F. Supp. 3d 602 (D.D.C. 2018); *United States v. Concord Mgmt. & Consulting LLC*, 317 F. Supp. 3d 598 (D.D.C. 2018). No member of the en banc Court requested a vote on his rehearing petition. *Cf. John Doe I*, 418 F.3d at 952 (recognizing that divided panel decision, which five judges voted to rehear en banc, "will receive careful consideration" by Supreme Court).

1. Miller contends (Mot. 4-5) that the Supreme Court will "likely" grant review on whether the Attorney General had statutory authority to appoint the Special Counsel. This Court's holding is correct and does not conflict with any decision of the Supreme Court or any other court of appeals. Miller declares (Mot. 5) that the Supreme Court "will likely grant review to revisit its unexamined dictum" in *Nixon*, which guided this Court's decision. Miller does not explain why, in the absence of a circuit conflict, that question warrants certiorari. In fact, this statutory question arises infrequently. Nor does Miller explain why the relevant

passage of *Nixon* was dicta; this Court persuasively explained why *Nixon*'s explanation was a holding. *See Grand Jury Investigation*, 916 F.3d at 1053.

In any event, this Court correctly held that Congress has vested the Attorney General with statutory authority to appoint special counsels, and the Supreme Court is unlikely to conclude otherwise. As the government has argued (see Gov't Br. 30-45) the text and history of Sections 515 and 533 confirm that they confer appointment authority. Indeed, Attorneys General have long used these powers to appoint special attorneys with responsibilities like the Special Counsel's—with consistent support from Congress, the Executive Branch, and the courts. Miller urges (Mot. 5) that "Congress [must] use clear statutory language when altering the structural safeguards of the [C]onstitution." This Court already found that Miller failed "to preserve that issue for appeal and it is forfeited." *Grand Jury Investigation*, 916 F.3d at 1054. And a clear-statement rule also makes no difference here, as both Sections 533 and 515 would easily satisfy it (see Gov't Br. 35-40).

2. Miller next contends (Mot. 5-6) that the Supreme Court will "likely grant review" on whether the Special Counsel was an inferior

officer to "clarify" its decision in *Edmond*, which Miller asserts this Court "misapplied." The only conflict that Miller suggests is with a separate opinion for one Justice in *Edmond*, who "unlike the Court," was "not prepared" to decide that an officer is inferior based only on "whether he has a superior." 520 U.S. at 667 (Souter, J., concurring in part and concurring in judgment) (citation omitted). Justice Souter would instead have also considered "the duties, jurisdiction, and tenure" of the officer. *Id.* at 667-68. In taking that position, Justice Souter relied on the multi-factor balancing used in *Morrison*, the very decision that Miller declares (Mot. 6) to be "widely discredited." The Supreme Court has further clarified *Edmond* in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477 (2010), where the Court quoted *Edmond* and repeated that "[w]hether one is an inferior officer depends on whether he was a superior," 561 U.S. at 510, but did not include *Edmond*'s prefatory statement that this is "[g]enerally speaking" the test, 520 U.S. at 662-63.

Miller also does not justify why his asserted disagreement with the "implication[s]" of *Edmond* (Mot. 6) means that the Supreme Court is likely to grant review. And this case would be a poor vehicle to address

those implications, because the Special Counsel did not have the "Herculean and wide-ranging" authority that Miller claims (Mot. 6). Miller declares (Mot. 5) that the Special Counsel had "more power than U.S. Attorneys," who have long been appointed by the President. But every court that has considered the question has concluded that U.S. Attorneys are inferior officers.[4] And the Special Counsel's investigative and prosecutorial powers are generally the same as that of a U.S. Attorney. *See* 28 C.F.R. § 600.6. While he was not limited to a single judicial district, the Special Counsel was far more limited than a U.S. Attorney in that he could investigate only the particular matters assigned to him. *See id.*; 28 C.F.R. § 600.4(b).

Even if the Supreme Court granted certiorari, Miller offers no basis to believe that the Court would reverse. This Court correctly reasoned that any restrictions imposed by the special counsel regulation are beside the point because the Attorney General retains the ability to lift those constraints. *See Grand Jury Investigation*, 916 F.3d at 1052-53. As the

[4] *See Myers v. United States*, 272 U.S. 52, 159 (1926); *United States v. Hilario*, 218 F.3d 19, 25-26 (1st Cir. 2000); *United States v. Gantt*, 194 F.3d 987, 999 (9th Cir. 1999); *see also United States Attorneys—Suggested Appointment Power of the Attorney General—Constitutional Law (Article II, § 2, cl. 2)*, 2 Op. O.L.C. 58, 59 (1978).

government has argued, the Special Counsel is in any event an inferior officer, because while the regulation provides that a Special Counsel is not subject to "day-to-day supervision," 28 C.F.R. § 600.7(b), it still provides constitutionally sufficient direction and control, *see, e.g.*, 28 C.F.R. §§ 600.4, 600.7, 600.8, and ensures "that ultimate responsibility for the matter [that the Special Counsel is appointed to investigate and, if appropriate, prosecute] and how it is handled will continue to rest with the Attorney General," *Office of Special Counsel*, 64 Fed. Reg. 37,038, 37,038 (July 9, 1999). *See* Gov't Br. 12-22.

As the government has argued (Gov't Br. 26-30) the Special Counsel's status as an inferior officer is not only a straightforward application of *Edmond* but is also governed by *Nixon*—which characterized the Watergate Special Prosecutor as a "subordinate officer[ ]," appointed "to assist [the Attorney General] in the discharge of his duties," 418 U.S. at 694—and by both opinions in *Morrison*. *See* 487 U.S. at 671-73; *id.* at 721 (Scalia, J., dissenting). While Miller declares that *Morrison* is "widely discredited" (Mot. 6), this Court correctly recognized that even Justice Scalia's dissent would have treated the Special Counsel as an inferior officer, "because, in the end, the President

or the Attorney General could have removed him at any time, if by no other means than amending or revoking the regulation defining his authority." *Morrison*, 487 U.S. at 721 (Scalia, J., dissenting); *see Grand Jury Investigation*, 916 F.3d at 1052.

3. Miller finally contends (Mot. 7) that the Supreme Court will grant review on whether, in the face of a legally mandated recusal, the Deputy Attorney General was the "Head of the Department" who could appoint an inferior officer. Miller alleges no circuit conflict or conflict with any decision of the Supreme Court. Nor does he explain why, in the absence of a conflict, this question would merit review. Miller asserts (Mot. 7) that the Supreme Court has a "deep and profound concern that the appointment of inferior officers faithfully hew to the requirements of the Appointments Clause." But the only arguments that Miller presented to this Court were statutory arguments under 28 U.S.C. § 508 and under the Federal Vacancies Reform Act, 5 U.S.C. § 3345. The Supreme Court does not review every case that challenges an appointment.

In any event, Miller does not even assert, let alone argue, that the Supreme Court would likely reverse on this issue. This Court's conclusion that the Acting Attorney General can make appointments flows from

long-settled principles about the authority of acting officers. *See Grand Jury Investigation*, 916 F.3d at 1055 (citing *Ryan v. United States*, 136 U.S. 68, 81 (1890); *Keyser v. Hitz*, 133 U.S. 138, 145-46 (1890); *Acting Officers*, 6 Op. O.L.C. 119, 120 (1982)). And the conclusion that a legally mandated recusal qualifies as a "disability" under 28 U.S.C. § 508(a) accords with the plain meaning of the term "disability" and four other circuits' interpretations of an analogous rule about judicial disability. *See Grand Jury Investigation*, 916 F.3d at 1055.

* * *

In sum, Miller provides no basis to believe that the Supreme Court will grant review or that, if it does, it would reverse the judgment of this Court. Miller therefore cannot obtain a stay of the mandate pending certiorari.

C. Miller Faces No Irreparable Injury, and the Balance of Equities Weighs Against a Stay

Miller's reliance on equitable factors (Mot. 7-10) also does not warrant a stay. As an initial matter, given the small chance that the Supreme Court will grant review and reverse this Court's judgment, a stay is unwarranted. No sound reason exists to postpone the effective date of a judgment that the Supreme Court is likely to leave undisturbed.

See Ind. State Police Pension Trust v. Chrysler LLC, 556 U.S. 960, 961 (2009) (per curiam) ("A stay is not a matter of right, even if irreparable injury might otherwise result." (citation omitted)).[5]

In any event, the equitable considerations in this case counsel against a stay. The only concrete harms that Miller claims from compliance with the mandate (Mot. 8) are the costs of testifying before a grand jury: travel from Missouri to Washington, D.C., and missing two days of "self-employed" work. But the travel costs will be reimbursed, and Miller will earn a daily witness fee. *See* 28 C.F.R. §§ 21.1(c), 21.4; *see also* 28 U.S.C. § 1821. Despite his burden to set forth facts showing good

[5] Miller cites (Mot. 7 n.4) a single judge's decision to stay a mandate pending certiorari where the petitioner presented a "weak case" for certiorari but "the equities of the situation" warranted a stay. *Books v. City of Elkhart*, 239 F.3d 826, 829 (7th Cir. 2001) (Ripple, J., in chambers). That stay followed a divided opinion holding that the placement of a monument bearing the Ten Commandments violated the Establishment Clause, ordering the parties and the district court to "fashion a remedy" that would "correct[ ] the condition that offends the Constitution." *Id.* at 827; *see Books v. City of Elkhart,* 235 F.3d 292 (7th Cir. 2000). Although the judge did not agree with the asserted circuit conflict and therefore thought that the movant had not "made a strong case" for further review, "both parties agree[d] that a stay ought to be granted," given the complex "remedial task" that the appellate court's decision would require. 239 F.3d at 828-29.

cause, *see* D.C. Cir. R. 41(a)(2), Miller never establishes that he will actually lose income beyond what the daily witness fee will reimburse.

Moreover, those general inconveniences that all witnesses face do not rise to an "irreparable injury." "Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974); *see also United States v. Microsoft Corp.*, No. 00-5212, 2001 WL 931170, at *1 (D.C. Cir. Aug. 17, 2001) (en banc) (burden of further proceedings does not justify a stay pending certiorari). The same goes for the possibility that if Miller complies, his challenge may become moot—particularly where little possibility exists that the Supreme Court will grant certiorari. Notably, Miller does not claim that the testimony sought is itself protected or privileged. *Cf. Maness v. Meyers*, 419 U.S. 449, 460 (1975) (order to reveal privileged information may cause irreparable injury, as "appellate courts cannot always 'unring the bell' once the information has been released"). Nor does Miller face a "Hobson's choice" in being forced to choose between complying with the subpoena and contempt (Mot. 8). The choice is easy: he should comply with the subpoena. *See Maness*, 419 U.S. at 458 ("We begin with the basic

proposition that all orders and judgments of courts must be complied with promptly.").

Far greater harm to the government and the public interest—which merge here, *see Nken v. Holder*, 556 U.S. 418, 435 (2009)—would be done by further delays in providing evidence to the grand jury. *See United States v. R. Enters., Inc.*, 498 U.S. 292, 298 (1991) (warning against "delay[ing] and disrupt[ing] grand jury proceedings" (citation omitted)); *Cobbledick v. United States*, 309 U.S. 323, 325 (1940) ("encouragement of delay is fatal to the vindication of the criminal law"). Contrary to Miller's suggestion (Mot. 9-10), the government has a continued need for his testimony, which concerns an ongoing investigation that is now being handled by the U.S. Attorney's Office for the District of Columbia. The subpoena is thus consistent with Justice Manual policy (cf. Mot. 10). And a two-hour, unsworn interview with FBI agents in May 2018 is not an appropriate substitute (cf. Mot. 9).

The subpoena was issued over a year ago. Miller has had the opportunity to raise his claims with the district court, before a panel of this Court, and before the en banc Court. A further stay of the district court's order would occasion significant delay. In fact, Miller appears to

be asking for an additional 30 days before he even files a certiorari petition from this Court's decision of February 26. While Miller claims (Mot. 8) that his request "for only 30 days" mitigates the prejudice to the government, Miller presumably envisions that the stay would remain in place pending the Supreme Court's disposition of any certiorari petition, *see* Fed. R. App. P. 41(d)(2)(B)(ii)—otherwise, the stay serves little purpose. The public's interest in swift justice far outweighs any inconveniences that Miller faces. Miller's motion to stay the mandate should be denied.

CONCLUSION

WHEREFORE, the government respectfully requests that the motion of appellant Andrew Miller to stay issuance of the mandate be denied.

Respectfully submitted,

JESSIE K. LIU
United States Attorney

ELIZABETH TROSMAN
JONATHAN KRAVIS
Assistant United States Attorneys

ADAM C. JED
AARON S.J. ZELINSKY
Special Assistant United States Attorneys

/s/
ERIC HANSFORD
D.C. Bar #1017785
Assistant United States Attorney
555 Fourth Street, NW, Room 8104
Washington, D.C. 20530
Eric.Hansford@usdoj.gov
(202) 252-6829

CERTIFICATE OF COMPLIANCE WITH RULE 27(d)

I HEREBY CERTIFY pursuant to Fed. R. App. P. 32(g) that this response contains 3818 words, and therefore complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A). This response has been prepared in 14-point Century Schoolbook, a proportionally spaced typeface.

/s/
ERIC HANSFORD
Assistant United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 16, 2019, I electronically filed and served the foregoing response through the Court's CM/ECF system.

/s/
ERIC HANSFORD
Assistant United States Attorney