IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re: *Application of the Reporters Committee for Freedom of the Press for an Order Authorizing the Release of Grand Jury Material Cited, Quoted, or Referenced In the Report of Special Counsel Robert S. Mueller III,* 1156 15th Street NW, Suite 1020 Washington, D.C. 20005	Miscellaneous Action No. _____ **Oral Argument Requested**

APPLICATION OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS FOR AN ORDER AUTHORIZING THE RELEASE OF GRAND JURY MATERIAL CITED, QUOTED, OR REFERENCED IN THE REPORT OF SPECIAL COUNSEL ROBERT S. MUELLER III

The Reporters Committee for Freedom of the Press (the "Reporters Committee") is an unincorporated nonprofit association founded by leading journalists and lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists. The Reporters Committee has a longstanding interest, demonstrated throughout its fifty-year existence, in advocating for transparency in government, including for the rights of the press and the public to access government records.

Pursuant to Local Rule 57.6, the Reporters Committee hereby petitions this Court for an order authorizing the release of grand jury material cited, quoted, or referenced in the Report of Special Counsel Robert S. Mueller III (the "Special Counsel's Report") to the public. To the extent necessary to facilitate this Court's ruling on its Application, the Reporters Committee further requests that the Court issue an order directing the Attorney General to lodge a copy of the Special Counsel's Report with the Court for *in camera* review.

PRELIMINARY STATEMENT AND INTEREST OF THE APPLICANT

1. The recently concluded investigation of Special Counsel Robert S. Mueller III inquired into fundamental questions about the strength and vitality of our democracy and electoral process. The Special Counsel's two-year probe examined whether Russia interfered in the 2016 U.S. presidential election, whether the winner of that election, the current President of the United States, and/or members of his presidential campaign conspired with Russia to interfere in our nation's elections, and whether the President obstructed justice. This was no ordinary secret grand jury investigation but rather one that was in many respects public and that has affected the entire country and all branches of the federal government.

2. Upon conclusion of the investigation, the Special Counsel delivered to the Attorney General a nearly 400-page report. Letter from Attorney Gen. William P. Barr to Sen. Lindsey Graham and Rep. Jerrold Nadler 2 (Mar. 29, 2019), *available at* https://wapo.st/2CL4B3k ("Mar. 29 Letter"). On March 24, 2019, the Attorney General delivered a letter to Congress that briefly summarized the report's "principal conclusions" in only four pages. According to the Attorney General, Special Counsel Mueller "outlines the Russian effort to influence the election and documents crimes committed by persons associated with the Russian government in connection with those efforts." Letter from Attorney Gen. William P. Barr to Sen. Lindsey Graham, Rep. Jerrold Nadler, Sen. Dianne Feinstein, and Rep. Doug Collins 1 (Mar. 24, 2019), *available at* https://wapo.st/2V7mi4i ("Mar. 24 Letter"). Mr. Barr further, quoting a sentence fragment from the report, states that the Special Counsel also concluded that the President and his campaign had not "conspired or coordinated" with the Russian government "in its election interference activities." *Id.* The Attorney General also stated that the Special Counsel made no conclusions as to whether the President had committed the crime of obstruction of justice, though the Special Counsel had not "exonerated" the President either. *Id.* at 3. The Attorney General then announced that he had made his own determination that "the evidence" was "not sufficient to establish that the President committed an obstruction-of-justice offense." *Id.* In subsequent days, the Attorney General stated that he would provide the Special Counsel's Report to Congress with certain information redacted, including unspecified grand jury material cited, quoted, or referenced in the report. *See* Fed. R. Crim. P. 6(e); Mar. 29 Letter at 1.

3. On March 27, 2019, three days after the Attorney General issued his four-page summary of the Special Counsel's Report, the Reporters Committee submitted a request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, to the Attorney General, requesting access

to and a copy of the Special Counsel's Report in its entirety. *See* Ex. 1.[1] The Reporters Committee has a longstanding and demonstrated interest in supporting the newsgathering efforts of journalists and promoting transparent governance for the benefit of the public at large, and sought to advance those interests with its FOIA request.[2] The Attorney General, however, has already made clear that he will not—and maintains that he cannot—release the Special Counsel's Report in full. He has stated that he believes himself to be bound by obligations imposed by Federal Rule of Criminal Procedure 6, requiring him to, among other things, maintain the secrecy of materials relating to grand jury investigations. Mar. 29 Letter at 1.

4. In light of the Attorney General's public pledge to release only a redacted version of the Special Counsel's Report that excises grand jury material, the Reporters Committee brings this Application for an order authorizing the release of grand jury material cited, quoted, or referenced in the Special Counsel's Report pursuant to Local Criminal Rule 57.6. Granting the relief requested in this Application will allow the Attorney General to release a more complete, unredacted version of the Special Counsel's Report, allowing for transparency and promoting governmental accountability, and ensuring public trust and confidence in the results of this important investigation. The Reporters Committee therefore requests that this Court, pursuant to Federal Rule of Criminal Procedure 6 and its inherent supervisory authority, issue an order

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[1] Exhibits cited herein are to the Declaration of Amir C. Tayrani dated Apr. 1, 2019, filed in support of this Application.

[2] Most recently, the Reporters Committee moved to unseal opinions, briefs, transcripts, and record documents underlying a previously sealed contempt proceeding connected to the Special Counsel's investigation. *See In re Grand Jury Subpoena No. 7409*, No. 18-gj-41-BAH (D.D.C.). In the hearing on the Reporters Committee's motion to unseal in that matter, the Court stated that it "appreciate[d] the fact that the Reporters Committee has . . . come forward" to advocate for "[t]ransparency," which the Court recognized was "very important." Ex. 2 at 16:20-25.

authorizing the release of grand jury material cited, quoted, or referenced in the Special Counsel's Report by either the Department of Justice or Congress so that the public can access that report in full, and fairly assess the Special Counsel's and Attorney General's conclusions.

5. "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980) (opinion of Burger, C.J.). This Court should enable the release of the Special Counsel's Report to the public to the fullest extent possible. Although the Special Counsel's investigation has only recently concluded, the resulting report—and the grand jury material the Attorney General has proposed to redact therein—is of unique public interest and historical significance. This Court should grant this Application and issue an order that would allow the Attorney General to comply with the Reporters Committee's FOIA request and let the Attorney General make public those portions of the Special Counsel's Report that cite, quote, or reference grand jury materials.

STATEMENT OF FACTS

6. In May 2017, Deputy Attorney General Rod Rosenstein appointed Robert S. Mueller III to serve as Special Counsel for the Department of Justice to investigate the Russian government's efforts to interfere in the 2016 presidential election and related matters, and to prosecute any federal crimes uncovered during the investigation. *In re Grand Jury Investigation*, 916 F.3d 1047, 1051 (D.C. Cir. 2019). The investigation has received widespread attention from the public and the press ever since. *See, e.g.*, *In re Grand Jury Subpoena No. 7409*, No. 18-gj-41, Dkt. No. 57 at 1-3 (D.D.C. Jan. 15, 2019) (noting intense public interest in all facets of these proceedings). Nearly two years later, the Special Counsel's Office concluded its investigation by submitting a confidential report to the Attorney General. Mar. 24 Letter at 1.

7. On March 24, 2019, the Attorney General issued to Congress and the public a four-page "summar[y of] the principal conclusions reached by the Special Counsel and the results of his investigation." *Id.* The letter summarized the Special Counsel's findings and conclusions on two issues: "Russian Interference in the 2016 U.S. Presidential Election," and "Obstruction of Justice." *Id.* at 2-3. The Attorney General wrote that the Special Counsel's investigation "determined that there were two main Russian efforts to influence the 2016 election," but that: "'[T]he investigation did not establish that members of the Trump Campaign conspired or coordinated with the Russian government in its election interference activities.'" *Id.* at 2 (quoting partial sentence from report). The Attorney General further stated that the Special Counsel "did not draw a conclusion" as to whether "the examined conduct constituted obstruction [of justice]," and quotes another partial sentence from the report instead stating that "'while this report does not conclude that the President committed a crime, it also does not exonerate him.'" *Id.* at 3.

8. Consistent with his testimony in the Senate before his confirmation, the Attorney General stated that his "goal and intent is to release as much of the Special Counsel's [R]eport as I can consistent with applicable law, regulations, and Departmental policies." *Id.* at 4. Importantly, however, he noted that "it is apparent that the report contains material that is or could be subject to Federal Rule of Criminal Procedure 6(e)." *Id.* The Attorney General revealed that the Special Counsel's Office would assist the Department of Justice in "identifying all 6(e) information contained in the report," and indicated that he believes such material must be redacted as a matter of law. *Id.*

9. On March 27, 2019, the Reporters Committee submitted a FOIA request to the Department of Justice, seeking "access to and copies of the Special Counsel's [R]eport." Ex. 1 at 1. Although that FOIA request is still pending, the Attorney General's planned redactions make

clear that the Department of Justice will, in response to that FOIA request, withhold those portions of the Special Counsel's Report that consist of material it deems subject to Federal Rule of Criminal Procedure 6(e). *See* 5 U.S.C. § 552(b)(3) (FOIA exemption providing for nondisclosure if another federal law "requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue").

10. Two days after the Reporters Committee filed its FOIA request, the Attorney General announced publicly that he "anticipate[d]" the Department of Justice "will be in a position to release the report by mid-April, if not sooner." Mar. 29 Letter at 1. But the Attorney General reaffirmed that he would not be willing or able to release the full report. Rather, he stated that the government would be "identifying *and redacting* the following: (1) material subject to Federal Rule of Criminal Procedure 6(e) that by law cannot be made public; (2) material the intelligence community identifies as potentially compromising sensitive sources and methods; (3) material that could affect other ongoing matters, including those that the Special Counsel has referred to other Department offices; and (4) information that would unduly infringe on the personal privacy and reputational interests of peripheral third parties." *Id.* (emphasis added).

11. The Attorney General's intended redactions will stymie the efforts of not only the Reporters Committee in its FOIA request, but the intentions of members of Congress, too, who have asked that the report be released in full to the public. Chairmen Jerrold Nadler, Adam B. Schiff, and Elijah E. Cummings of the House Judiciary, Intelligence, and Oversight Committees, respectively, have "call[ed] for the release of the Special Counsel's full and complete report and all underlying documents" because the "Special Counsel's Report should be allowed to speak for itself." Joint Statement (Mar. 24, 2019), https://bit.ly/2JVRnH0. Representatives Nadler, Cummings, Schiff, Maxine Waters, Richard E. Neal, and Elliot L. Engel have further issued a

"formal[] request that [the Attorney General] release the Special Counsel's full report to Congress no later than Tuesday, April 2." Letter to Attorney Gen. Barr (Mar. 25, 2019), https://bit.ly/2HTgHe0. And earlier in March, the House of Representatives nearly unanimously passed a 420-0 resolution "[e]xpressing the sense of Congress that the report of Special Counsel Mueller should be made available to the public and to Congress." H.R. Con. Res. 24, 116th Cong. (Mar. 7, 2019). If Congress receives the full Special Counsel's Report, it would have the ability to share it with the public, the press, and the Reporters Committee, allowing the report "to speak" to the public "for itself."

12. The Attorney General's decision that he has no choice but to redact grand jury material from any disseminated version of the Special Counsel's Report means that the Reporters Committee and other members of the press and public will not be able to obtain access to the full report, either through a FOIA request to the Department of Justice or through Congress sharing the report with the public. That harms the Reporters Committee's interests in transparent government, in enforcing the public's right to access government records, and in advancing the newsgathering rights of journalists. *See, e.g.*, *Zerilli v. Smith*, 656 F.2d 705, 710 (D.C. Cir. 1981) ("The First Amendment guarantees a free press primarily because of the important role it can play as a vital source of public information." (internal quotation marks omitted)). The Reporters Committee brings this Application to allow the Attorney General and Congress to make the Special Counsel's Report public to the fullest extent possible.

DISCUSSION

13. Local Criminal Rule 57.6 provides that "[a]ny news organization or other interested person, other than a party or a subpoenaed witness, who seeks . . . relief relating to a criminal investigative or grand jury matter, shall file an application for such relief with the Court. The application shall include a statement of the applicant's interest in the matter as to which relief is

sought, a statement of facts, and a specific prayer for relief."[3] Pursuant to Local Rule 57.6, this Court should issue an order authorizing the grand jury material cited, quoted, or referenced in the Special Counsel's Report to be made public both pursuant to the Court's inherent authority to unseal grand jury materials and pursuant to the Federal Rules of Criminal Procedure. To the extent necessary to aid the Court's ruling on this Application, the Reporters Committee further requests that the Court issue an order directing the Attorney General to lodge an unredacted copy of the Special Counsel's Report with the Court for *in camera* review, and to identify for the Court the redactions the Attorney General proposes to make pursuant to Rule 6(e). *See* 28 U.S.C. § 1651.

14. An order from this Court authorizing release of this grand jury material will allow the Attorney General and Congress to provide the Reporters Committee, and the press and public at large, a more fulsome version of the Special Counsel's Report. This Court should grant the Application in full.

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[3] The Reporters Committee has standing to bring this Application based on Rule 57.6, which allows "[a]ny news organization or other interested person" to bring such an application. That rule reflects that "the press' function as a vital source of information is weakened whenever the ability of journalists to gather news is impaired." *Zerilli*, 656 F.2d at 711. The Reporters Committee further has standing in light of its pending FOIA request, which the Attorney General has effectively stated will be denied to the extent it seeks material deemed subject to Rule 6(e), and to advance its "First Amendment interest in receiving information from willing speakers." *Taylor v. Resolution Trust Corp.*, 56 F.3d 1497, 1508 (D.C. Cir. 1995); *see also Stephens v. Cty. of Albemarle, Va.*, 524 F.3d 485, 492 (4th Cir. 2008) (a plaintiff has "standing to assert a right to receive speech" by "show[ing] that there exists a speaker willing to convey the information to her"). Because the Attorney General and FOIA make clear, *supra* ¶¶ 8-10; 5 U.S.C. § 552(b)(3), that absent judicial intervention the full Special Counsel's Report will not be released, this dispute is also ripe for adjudication. *See Teva Pharm. USA, Inc. v. Sebelius*, 595 F.3d 1303, 1309 (D.C. Cir. 2010) (pre-enforcement administrative challenge ripe where "it is clear what the FDA will do absent judicial intervention"); *cf. Susan B. Anthony List v. Drehaus*, 573 U.S. 149, 165 (2014) ("[A]dministrative action . . . may give rise to harm sufficient to justify pre-enforcement review."). The issue is "fit for judicial review," it "does not depend on 'contingent future events,'" and the absence of judicial intervention will cause "hardship" to the Reporters Committee and the public, *see infra* ¶¶ 19-20. *Flynt v. Rumsfeld*, 355 F.3d 697, 702-03 (D.C. Cir. 2004); *see Zerilli*, 656 F.2d at 711.

I. This Court Should Exercise Its Inherent Authority To Unseal Grand Jury Material Cited, Quoted, Or Referenced In The Special Counsel's Report.

15. This Court "retains an inherent authority to unseal and disclose grand jury material not otherwise falling within the enumerated exceptions to Rule 6(e)." *In re Unseal Dockets Related to Indep. Counsel's 1998 Investigation of President Clinton*, 308 F. Supp. 3d 314, 323 (D.D.C. 2018) (Howell, C.J.) (collecting cases). Courts have identified nine "non-exhaustive . . . factors" used to determine whether the court's inherent authority should be exercised in a given case. *Id.* at 326. Those factors include:

> (i) the identity of the party seeking disclosure; (ii) whether the defendant to the grand jury proceeding or the government opposes the disclosure; (iii) why disclosure is being sought in the particular case; (iv) what specific information is being sought for disclosure; (v) how long ago the grand jury proceedings took place; (vi) the current status of the principals of the grand jury proceedings and that of their families; (vii) the extent to which the desired material—either permissibly or impermissibly—has been previously made public; (viii) whether witnesses to the grand jury proceedings who might be affected by disclosure are still alive; and (ix) the additional need for maintaining secrecy in the particular case in question.

In re Petition of Kutler, 800 F. Supp. 2d 42, 47-48 (D.D.C. 2011) (quoting *In re Craig*, 131 F.3d 99, 106 (2d Cir. 1997)); *Carlson v. United States*, 837 F.3d 753 (7th Cir. 2016). And courts have further recognized that, irrespective of the nine factors, "historical or public interest alone" can justify the release of information related to a grand jury investigation. *Craig*, 131 F.3d at 105.

16. As an initial matter, "historical or public interest alone [] justif[ies] the release" of grand jury information cited, quoted, or referenced in the Special Counsel's Report. *Id.* Courts have recognized that the public's interest in understanding grand jury investigations assessing criminal conduct *directed at* a president may "overwhelm" any need for secrecy. *Id.* (addressing hypothetical investigations into John Wilkes Booth and Aaron Burr). The same is certainly true with regard to a grand jury investigation into alleged criminal conduct by a president or a

presidential campaign. Public access to such material is of uniquely paramount importance. And, indeed, courts in this Circuit have readily exercised their inherent authority to release grand jury material related to criminal investigations of recent presidents. *See Kutler*, 800 F. Supp. 2d at 47-48 (ordering disclosure of President Nixon's grand jury testimony); *In re Unseal Dockets*, 308 F. Supp. 3d at 327-36 (ordering unsealing of eleven dockets relating to the Independent Counsel's investigation of President Clinton); *see also In re North*, 16 F.3d 1234, 1241 (D.C. Cir. 1994) (ordering release of Independent Counsel report on Iran-Contra matters based, in part, on the "national interest that the public, its representatives in the political branches, and its surrogates in the media have as full an access to the fruits of the investigation as possible"); *Haldeman v. Sirica*, 501 F.2d 714, 715-16 (D.C. Cir. 1974) (affirming district court's order transmitting sealed report and grand jury evidence to Congress). Based on the unparalleled historic and public import of the grand jury material cited, quoted, or referenced in the Special Counsel's Report, this Court should do the same here. The interests of history and the public "overwhelm" any need to maintain secrecy of such grand jury material.

17. Application of the relevant factors identified in *Unseal Dockets* further demonstrates that this Court should authorize public release of grand jury material in the Special Counsel's Report. Although the Reporters Committee cannot fairly address several of the factors because the Special Counsel's Report and its underlying material are not public, the key factors support disclosure here.

18. ***The information sought.*** The Special Counsel's Report is no ordinary government document that refers to grand jury material: "There is no question" that the report and "the requested records are of great historical importance." *Kutler*, 800 F. Supp. 2d at 48. Like the grand jury investigations into Presidents Nixon and Clinton, the Special Counsel's grand jury

investigation into President Trump has "capture[d] both scholarly and public interest," counseling in favor of unsealing here. *Id.* Allowing the public to access the grand jury material cited, quoted, or referenced in the Special Counsel's Report will enable the Attorney General and Congress to release to the public a more fulsome version of that report, which will promote public trust in government. It will "enhance the existing historical record, foster further scholarly discussion, and improve the public's understanding of a significant historical event." *Id.* The nature of the information sought clearly counsels in favor of disclosure.

19. ***Purpose for seeking disclosure.*** If "otherwise secret information is being sought" because of "significant historical interest," that significant historic interest "militates in favor of release," and is a "weighty" consideration. *Craig*, 131 F.3d at 106. Disclosure of the Special Counsel's Report, including those portions that cite, quote, or reference grand jury materials, would "foster[] vigorous and sustained debate, not only about the case itself, but also about broader issues concerning fundamental and, at times, countervailing aspects of our democracy—freedom of expression, . . . governmental investigative power, . . . and the role and function of grand juries themselves." *In re Am. Historical Ass'n*, 49 F. Supp. 2d 274, 295 (S.D.N.Y. 1999). The American public has an acute interest in seeing the report unveiled and, indeed, is clamoring for such a release. Domenico Montanaro, *Poll: After Barr Letter, Overwhelming Majority Wants Full Mueller Report Released*, NPR (Mar. 29, 2019), https://n.pr/2FIE34u.

20. The purposes of the requested disclosure also counsel in favor of the relief sought by the Reporters Committee. As the country looks ahead to the next presidential election in 2020, public access to the Special Counsel's findings is essential. The report details an investigation into Russian interference with the 2016 presidential election and thus has immensely important ramifications for our foreign policy, national security, and electoral system. The public, the press,

and scholars should not have to wait decades for the public and historical record to be full and accurate. Although courts have recognized that the government's interest in grand jury secrecy diminishes over time, no court has determined that grand jury materials may only be released years after the investigation has concluded. And for good reason: Robust public debate, news reporting, and historical analysis occur in real-time. *See Carlson v. United States*, 109 F. Supp. 3d 1025, 1035 (N.D. Ill. 2015), *aff'd* 837 F.3d 753 (7th Cir. 2016) (noting that grand jury investigation "received media coverage at the time it occurred"). Disclosure now "ensur[es] the pages of history are based upon the fullest possible record." *In re Am. Historical Ass'n*, 49 F. Supp. 2d at 295. Our nation's impending "vigorous and sustained debate," *id.*, should be fully informed based on the full report from Special Counsel Mueller. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 339 (2010) ("Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. . . . The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it."); *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) ("[T]he First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office."); *Buckley v. Valeo*, 424 U.S. 1, 14–15 (1976) ("In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation."); *id.* at 14 ("Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution.").

21. ***Information has already been made public.*** "[E]ven partial previous disclosure often undercuts many of the reasons for secrecy." *Craig*, 131 F.3d at 107; *see In re Unseal*

Dockets, 308 F. Supp. 3d at 322-23 ("[G]rand jury secrecy is not unyielding when there is no secrecy left to protect." (internal quotation marks and citation omitted)); *see also In re Grand Jury Subpoena, Judith Miller*, 493 F.3d 152, 154-55 (D.C. Cir. 2007) (ordering the "release [of] those redacted portions of [the] concurring opinion and the two ex parte affidavits that discuss grand jury matters" where "the 'cat is out of the bag'" given that one grand jury witness "discusse[d] his role on the CBS Evening News"); *In re Motions of Dow Jones & Co.*, 142 F.3d 496, 505 (D.C. Cir. 1998) (noting that when grand jury witness's attorney "virtually proclaimed from the rooftops that his client had been subpoenaed," that fact was no longer protected by grand jury secrecy); *In re North*, 16 F.3d 1234, 1245 (D.C. Cir. 1994) (noting that "information widely known is not secret" and "when information is sufficiently widely known" it "los[es] its character as Rule 6(e) material"); Local Crim. R. 6.1 (authorizing disclosure of grand jury material where secrecy is no longer "necessary").

22. Much of the information that relates to this grand jury investigation has already been made public. The public knows the focus and scope of the investigation; it knows who many of the witnesses are; it also knows the subjects and targets of the investigation. *See* Margaret Hartmann & Nick Tabor, *Everything We've Learned From Robert Mueller's Investigation (So Far)*, N.Y. Mag. (Mar. 22, 2019), https://nym.ag/2V67mU7 (detailing the trove of information available from public indictments and news reports). But more importantly, the public knows the outcome—including the Attorney General's conclusion that the Special Counsel's investigation "determined that there were two main Russian efforts to influence the 2016 election" but that the Special Counsel "did not find that the Trump campaign, or anyone associated with it, conspired or coordinated with the Russian government in these efforts." Mar. 24 Letter at 2.

23. Additionally, broad swaths of information from the grand jury investigation have come into the public domain as a result of the "number of indictments and convictions of individuals" that the Special Counsel obtained during his investigation, "all of which have been publicly disclosed." Mar. 24 Letter at 2. Specifically, the Special Counsel obtained some 34 indictments of foreign nationals as well as high-level officials of the federal government and the President's previous campaign apparatus, including Paul Manafort, Rick Gates, Retired Lieutenant General Michael Flynn, George Papadopoulous, Michael Cohen, and Roger Stone, among others. *See* Amy Sherman, *All of the People Facing Charges From Mueller's Investigation Into Russian Meddling*, Politifact (Mar. 25, 2019), https://bit.ly/2Wx5nIR. Several of these defendants have been publicly tried or pleaded guilty—and allocuted—in public. *See* Karen Yourish, Larry Buchanan, and Alicia Parlapiano, *Everyone Who's Been Charged in Investigations Related to the 2016 Election*, N.Y. Times (Mar. 13, 2019), https://nyti.ms/2nZjxTy. Others have been publicly sentenced to significant jail time, *id.*, or even testified publicly before Congress about information relevant to the grand jury investigation, *see Full Transcript: Michael Cohen's Opening Statement to Congress*, N.Y. Times (Feb. 27, 2019), https://nyti.ms/2U6gDLg (testifying regarding contacts with Russia). That the subject of a grand jury investigation has "generally" been "disclosed to the public" through, for example, "indictments" of multiple persons "and media accounts" "weighs most strongly in favor of release." *In re North*, 16 F.3d at 1240 (applying statutory factors to release Independent Counsel report and reasoning that "[t]he American public is particularly entitled to this accountability where the subject of the investigation and the investigation itself have been widely publicized of long duration and great expense"). These prior public disclosures about the Special Counsel's investigation clearly countenance in favor of disclosure of grand jury material cited, quoted, or referenced in the Special Counsel's Report.

24. ***Identity of the party seeking disclosure.*** The Reporters Committee is a nonprofit association founded almost five decades ago by leading journalists and lawyers to protect press freedom and promote government transparency. The Reporters Committee seeks to ensure the ability of the news media to serve as the "vital source of information" that the First Amendment meant it to be—a source that can "'bare the secrets of government and inform the people.'" *Zerilli*, 656 F.2d at 711 (quoting *N.Y. Times Co. v. United States*, 403 U.S. 713, 717 (1971)). As this Court has noted, the Reporters Committee's efforts to promote "[t]ransparency" is a "very important" aim. *See* Ex. 2 at 16:20-25. The Reporters Committee's identity, a factor that "carr[ies] great weight," *Craig*, 131 F.3d at 106, plainly counsels in favor of disclosure. *See Kutler*, 800 F. Supp. 2d at 48 (major historical groups and scholars sought access, and their identity "weighs in petitioners' favor").

25. ***Whether the government opposes disclosure.*** The federal government's public positions support disclosure here. The head of the Executive Branch—the President himself—has indicated that he has no objection to public release of the Special Counsel's Report. Cheyenne Haslett, *Trump Says Release of Mueller Report "Wouldn't Bother" Him At All*, ABC News (Mar. 25, 2019), https://abcn.ws/2WoUloW. In fact, the President has gone further, expressing affirmative support for disclosure, stating "let [the Special Counsel's Report] come out, let people see it." *Id.* Numerous members of Congress, too, including a nearly unanimous House of Representatives, have concluded that the Special Counsel's Report should be released. H.R. Con. Res. 24, 116th Cong. (Mar. 7, 2019) (420-0 resolution "[e]xpressing the sense of Congress that the report of Special Counsel Mueller should be made available to the public and to Congress").

26. Although it is possible that the Attorney General may oppose this Application, given his statement that the Department of Justice would redact material subject to Rule 6(e) "that

by law cannot be made public," Mar. 29 Letter at 1, the President's position renders entirely unpersuasive any such possible opposition. The Attorney General's position, too, could be based on his views of the secrecy obligations imposed by Rule 6(e) on him and the Special Counsel, and this Court could issue an order freeing them from those obligations. In any event, the Department of Justice's "position is not dispositive. Government support cannot 'confer' disclosure, nor can government opposition preclude it." *Kutler*, 800 F. Supp. 2d at 48 (quoting *Craig*, 131 F.3d at 106). *If* the Department of Justice opposes disclosure, it must identity a "specific reason" showing that such disclosure will "cause harm." *Carlson*, 109 F. Supp. 3d at 1034. And not just any harm will do—in keeping with background principles of public access to government documents grounded in the First Amendment and the common law, the harm should be compelling, such as a "threat[to] national security[.]" *Id.*; *see also Am. Historical Ass'n*, 49 F. Supp. 2d at 291 (ordering disclosure of grand jury materials related to the investigation of Alger Hiss).[4]

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27. At bottom, an order authorizing the public disclosure of grand jury materials cited, quoted, or referenced in the Special Counsel's Report is warranted in this unique and important case of national significance. The public's need for access to the Special Counsel's Report, to the

[4] Even if there are continued secrecy interests as to particular witnesses—which the Reporters Committee lacks information to directly address—the Special Counsel's Report carries "undisputed historical interest" that "far outweigh[s] the need to maintain the secrecy of the records." *Kutler*, 800 F. Supp. 2d at 50; *see also In re Petition of Gary May*, No. M 11–189, Mem. & Order at 3–4 (S.D.N.Y. Jan. 20, 1987) (finding that "undisputed historical significance" justified the disclosure of grand jury minutes relating to William Remington, a prominent public official accused of being a Communist during the McCarthy era). And, in any event, the President's position favoring public release of the report should carry great weight in light of the fact that the President himself was a subject of the investigation. Likewise, to the extent the government identifies any specific information the disclosure of which will actually cause cognizable harm, the Court is well-positioned to address such specific pieces of information as appropriate.

greatest extent possible, unquestionably outweighs the ordinary interests that grand jury secrecy is designed to uphold. Although grand jury secrecy generally seeks to protect "the innocent accused from disclosure of the accusations made against him before the grand jury," *Douglas Oil Co. of Cal. v. Petrol Stops Nw.*, 441 U.S. 211, 218 n.8 (1979), the grand jury material included in the Special Counsel's Report is broader than any one individual (nor can it be ignored that the main individual at issue in the investigation *supports* disclosure here). Rather, the grand jury material at issue cuts to the core of our democracy. *See Craig*, 131 F.3d at 105 (noting that "historical or public interest alone" can "justify the release of grand jury information").

28. Likewise, the normal deterrence rationales favoring grand jury secrecy—"prevent[ing] the escape of those whose indictment may be contemplated," "insur[ing] the utmost freedom to the grand jury in its deliberations," "prevent[ing] subornation of perjury or tampering," and "encourage[ing] free and untrammeled disclosures" by witnesses—will not meaningfully be harmed by unsealing in these special circumstances. *Douglas Oil*, 441 U.S. at 219 n.10. A witness in an ordinary grand jury investigation is unlikely to be deterred from complying with that investigation merely because the Special Counsel's Report made public grand jury material connected to a widely publicized investigation into the President of the United States and Russian interference in our electoral process. *See Kutler*, 800 F. Supp. 2d at 47-48 (ordering disclosure of President Nixon's grand jury testimony); *In re Unseal Dockets*, 308 F. Supp. 3d at 327-36 (ordering unsealing of eleven dockets relating to the Independent Counsel's investigation of President Clinton). Indeed, President Clinton's own videotaped grand jury testimony was released in full to the public for its consideration, *see Starr's Evidence*, Wash. Post., https://wapo.st/2uA5OpH, with no detrimental effect on the institution of the grand jury.

29. The material at issue is of singular historical and public value. The public should be able to access it.

II. This Court Should Direct That The Exceptions To Grand Jury Secrecy In Federal Rule Of Criminal Procedure 6 Apply, Allowing Release Of Grand Jury Material Contained In The Special Counsel's Report.

30. "Grand jury material may also be disclosed under various exceptions listed in Rule 6(e)," *In re Unseal Dockets*, 308 F. Supp. 3d at 323, several of which apply here. Accordingly, this Court should also issue an order authorizing the public release of grand jury material cited, quoted, or referenced in the Special Counsel's Report pursuant to Rule 6(e).

31. ***Judicial Proceedings Exception.*** "The court may authorize disclosure—at a time, in a manner, and subject to any other conditions that it directs—of a grand-jury matter . . . preliminarily to or in connection with a judicial proceeding." Fed. R. Crim. P. 6(e)(3)(E)(i). A party seeking grand jury materials pursuant to this exception must show that she (1) has a particularized need to use those materials (2) preliminarily to or in connection with (3) a judicial proceeding. *See United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 442-43 (1983); *United States v. Baggot,* 463 U.S. 476, 480-81 (1983). In order to show a particularized need, parties "must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed." *Douglas Oil Co.*, 441 U.S. at 222. "This standard is 'a highly flexible one . . . and sensitive to the fact that the requirements of secrecy are greater in some situations than in others.'" *Judicial Watch, Inc. v. Tillerson*, 270 F. Supp. 3d 1, 5 (D.D.C. 2017). The judicial proceedings exception is not limited to situations in which a party seeks access to grand jury material for use in a criminal trial. In fact, the D.C. Circuit has applied the judicial proceedings exception to its own determinations of whether to release grand jury material contained in an Independent Counsel's report. *In re North*, 16 F.3d at 1244

(applying the exception where the court, by statute, made "the decision to release the [Independent Counsel's] Report").[5] Under a full and fair reading of the Rule, the exception should apply here.

32. The various committees of the House of Representatives investigating the actions arising from the same conduct that spurred the appointment of the Special Counsel, at the very least, are "preliminary to" the type of proceedings for which Rule 6(e)'s exception applies. *See In re Request for Access to Grand Jury Materials Grand Jury No. 81-1 Miami*, 833 F.2d 1438, 1440-41 (11th Cir. 1987) ("Judge Butzner below held, and the parties agree, that within the meaning of the rule a Senate impeachment trial qualifies as a 'judicial proceeding' and that a House impeachment inquiry is 'preliminary to' the Senate trial."); *In re Grand Jury Proceedings of Grand Jury No. 81-1 (Miami)*, 669 F. Supp. 1072, 1076 (S.D. Fla. 1987) ("It is apparent from the text of the Constitution that the framers considered impeachment to be judicial in nature."); *but see In re Unseal Dockets*, 308 F. Supp. 3d at 318 n.4 ("Consideration by the House of Representatives, even in connection with a constitutionally sanctioned impeachment proceeding, falls outside the common understanding of 'a judicial proceeding.'") (citing *In re Pet. to Inspect & Copy Grand Jury Materials*, 735 F.3d 1261, 1271 (11th Cir. 1984)). The relevant grand jury material need not relate to a judicial proceeding that is actually ongoing but rather needs merely to pertain "to some identifiable" proceeding that is "pending *or anticipated*." *Baggot*, 463 U.S. at 480 (emphasis added). The House investigations qualify. And the grand jury material at issue here is plainly and particularly necessary because it pertains to the very inquiries Congress will conduct: specifically, the nature of the President's conduct and any evidence as to its criminality or lack thereof. Grand

[5] According to the D.C. Circuit its "decision . . . as to which portions [of the Independent Counsel's report in the Iran Contra proceedings] are appropriate for release . . . are acts of the Court," and these "acts constitute a judicial proceeding." *In re North*. 16 F.3d at 1244; *see also In re Sealed Motion*, 880 F.2d 1367, 1379 (D.C. Cir. 1989) ("The term judicial proceeding has been given a broad interpretation by the courts.").

jury testimony included in the Special Counsel's Report, for example, may be essential when evaluating the credibility of witnesses testifying before Congress and it may be necessary to refresh the recollection of witnesses testifying before Congress. The grand jury material cited, quoted, or referenced in the Special Counsel's Report should not only be accessible to Congress, but also to the public.

33. ***National Security Exception.*** "An attorney for the government may disclose any grand-jury matter involving foreign intelligence, counterintelligence, or foreign intelligence information to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official to assist the official receiving the information in the performance of that official's duties." Fed. R. Crim. P. 6(e)(3)(D) (internal citations omitted). Further,

> An attorney for the government may also disclose any grand-jury matter involving, within the United States or elsewhere, a threat of attack or other grave hostile acts of a foreign power or its agent, a threat of domestic or international sabotage or terrorism, or clandestine intelligence gathering activities by an intelligence service or network of a foreign power or by its agent, to any appropriate federal, state, state subdivision, Indian tribal, or foreign government official, for the purpose of preventing or responding to such threat or activities.

Id. Because the grand jury investigation at issue involved questions of whether a foreign government attempted to interfere with and disrupt our national elections—quintessential "grave hostile acts of a foreign power or its agent" (*id.*)—this exception to grand jury secrecy applies.

34. Each element of Rule 6(e)(3)(D)'s exception applies under the Rule's plain text. First, the grand jury investigation plainly includes matters involving both "grave hostile acts of a foreign power or its agent" and "foreign intelligence, counterintelligence, or foreign intelligence information." Indeed, the primary purpose of the Special Counsel's investigation was to investigate Russia's efforts to interfere in the 2016 presidential election. *See In re Grand Jury*

Investigation, 916 F.3d at 1051. Second, the members of the House Judiciary and Intelligence Committees and their staffs qualify as "any federal law enforcement, *intelligence*, protective, immigration, *national defense*, or *national security* official" (emphasis added)—the types of individuals who are permitted to receive the grand jury material included in the Special Counsel's Report. And third, these officials need the grand jury material "to assist" them "in the performance of" their "duties." The chairmen of those committees in particular have made it clear that the Special Counsel's Report is needed in full—not in redacted form—in order to assess threats to this country at home and from afar. *See supra* ¶ 11; *see also* H.R. Con. Res. 24, 116th Cong. (Mar. 7, 2019). It is further within their official duties to disclose this grand jury material to the public to the extent it allows them to inform the public of potential foreign and domestic threats and prepare for future attacks on our nation. *See* Fed. R. Crim. P. 6(e)(3)(D) (authorizing disclosure "for the purpose of preventing or responding to such threat or activities"). The national security exception enumerated in Rule 6(e) therefore applies here.

35. ***Government Attorney.*** "Disclosure of grand-jury material . . . may be made to an attorney for the government for use in performing that attorney's duty," Fed. R. Crim. P. 6(e)(3)(A)(i), and "any government personnel . . . an attorney for the government considers necessary to assist in performing that attorney's duty to enforce federal criminal law," Fed. R. Crim. P. 6(e)(3)(A)(ii). *See also* Fed. R. Crim. P. 6(e)(3)(B) ("A person to whom information is disclosed under Rule 6(e)(3)(A)(ii) may use that information only to assist an attorney for the government in performing that attorney's duty to enforce federal criminal law."). The government attorney exception applies to the cadre of attorneys that serve and represent the House of Representatives and, unquestionably, the members of the House they serve constitute "government personnel" that those attorneys can "consider[] necessary to assist in performing that attorney's

duty to enforce federal criminal law." To the extent any member of Congress and their counsel seek to investigate violations of federal criminal law, including any cognizable high crimes or misdemeanors, and to inform the public regarding evidence of criminal conduct by high-ranking administrative officials, the government attorney exception also applies.

* * *

36. The Reporters Committee has a "First Amendment interest in receiving information from willing speakers." *Taylor v. Resolution Trust Corp.*, 56 F.3d 1497, 1508 (D.C. Cir. 1995); *see also Stephens v. Cty. of Albemarle*, 524 F.3d 485, 492 (4th Cir. 2008) (a plaintiff has "standing to assert a right to receive speech" by "show[ing] that there exists a speaker willing to convey the information to her"); *United States v. Wecht*, 484 F.3d 194, 202-03 (3d Cir. 2007) (acknowledging that news organizations may challenge gag orders directed at others "'as long as they can demonstrate that the order is an obstacle to their attempt to obtain access'"); *accord Zerilli*, 656 F.2d at 711 ("Without an unfettered press, citizens would be far less able to make informed political, social, and economic choices. But the press' function as a vital source of information is weakened whenever the ability of journalists to gather news is impaired.").

37. Here, the relevant willing speaker is the House of Representatives. The House's near-unanimously passed resolution "[e]xpressing the sense of Congress that the report of Special Counsel Mueller should be made available to the public and to Congress," H.R. Con. Res. 24, 116th Cong. (Mar. 7, 2019); *see* Miles Parks, *House Votes Almost Unanimously For Public Release of Mueller Report*, NPR, https://n.pr/2HYrxiV, makes clear that if the House obtains the grand jury material cited, quoted, or referenced in the Special Counsel's Report, as it should, it would willingly share that information with members of the public, including the Reporters Committee. The Court should allow the House to do so, and the public should be allowed to

evaluate the Special Counsel's conclusions for itself. Because members of Congress have requested and are entitled to the relevant grand jury material under these exceptions and would willingly share that material with the public, including the Reporters Committee, this Court should grant the Application and authorize the public release of grand jury material cited, quoted, or referenced in the Special Counsel's Report.

III. To The Extent Necessary To Rule On This Application, The Court Should Direct The Attorney General To Lodge An Unredacted Version Of The Special Counsel's Report With The Court.

38. To the extent needed to facilitate this Court's ruling on the Reporters Committee's Application, the Court should order the Attorney General to lodge with the Court an unredacted version of the Special Counsel's Report for *in camera* review and to identify those portions of the Special Counsel's Report it contends must be withheld from the public under Rule 6(e). Pursuant to the All Writs Act, this Court has the power to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). "The authority to issue orders under the Act may be exercised in the court's 'sound judgment' when necessary 'to achieve the rational ends of law' and 'the ends of justice entrusted to it.'" *In United States for an Order Pursuant to 28 U.S.C. § 1651(A) For Order Precluding Notice of Grand Jury Subpoena*, 2017 WL 3278929, at *1 (D.D.C. July 7, 2017) (Howell, C.J.). The Court's "power reaches even 'persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice' and 'who have not taken any affirmative action to hinder justice.'" *United States v. Hughes*, 813 F.3d 1007, 1010 (D.C. Cir. 2016) (quoting *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 172 (1977)).

39. An order requiring the Department of Justice to give the Court access to the Special Counsel's Report is both "necessary" and "appropriate" to aid this Court's "jurisdiction[]" and the

exercise of its inherent and supervisory authority over the grand jury and grand jury materials. *See In re Unseal Dockets*, 308 F. Supp. 3d at 324 (recognizing that the district court has "supervisory authority over grand juries" and that "[g]rand juries have long been recognized as 'a part of the judicial process' and 'an appendage of the court'" (citations omitted)); *accord Carlson*, 837 F.3d at 760 (noting that "grand-jury transcripts are, in their very nature, judicial documents (just as a transcript of a trial would be)"). And where a third party alone possesses information the Court needs to exercise its authority, the Court may issue an order pursuant to the All Writs Act to obtain that information. *Evans v. Williams*, 1999 WL 1212884, at *4 (D.D.C. Aug. 20, 1999) (issuing writ of mandamus to Superior Court, Family Division, where "without" access to "the information that the Superior Court possesses, the Court cannot devise a concrete plan for concluding this case"); *accord In re Grand Jury Proceedings*, 654 F.2d 268, 276 (3d Cir. 1981) (affirming district court's order issued pursuant to All Writs Act to force state court judge to meet with U.S. attorney to determine whether federal grand jury materials should be disclosed to state criminal defendant).

PRAYER FOR RELIEF

40. For the forgoing reasons, Applicant requests the following relief:

    a. An order authorizing the public release of grand jury material cited, quoted, or referenced in the Special Counsel's Report pursuant to this Court's inherent authority;

    b. An order authorizing the public release of grand jury material cited, quoted, or referenced in the Special Counsel's report pursuant to exception(s) set forth in Federal Rule of Criminal Procedure 6(e);

    c. Any further relief that the Court deems just and proper.

ORAL ARGUMENT REQUESTED

41. Applicant respectfully requests oral argument on this application.

April 1, 2019

Respectfully submitted,

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