No. S23O_____

In the Supreme Court of Georgia

PRESIDENT DONALD J. TRUMP,
Petitioner,

v.

FANI WILLIS,
DISTRICT ATTORNEY, ATLANTA JUDICIAL CIRCUIT,

&

HON. ROBERT MCBURNEY,
SUPERIOR COURT JUDGE, ATLANTA JUDICIAL CIRCUIT,
Respondents.

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Original Petition for Writs of Mandamus and Prohibition

INTRODUCTION

This is an original petition for writs of mandamus and prohibition against Respondents, the District Attorney and a Superior Court Judge of the Atlanta Judicial Circuit. It seeks to both compel Respondents' compliance with the lawful duties of their offices and bar their further contortion of legal processes whose object is Petitioner's irremediable injury. The circumstances involve the Fulton County special purpose grand jury investigation into the 2020 election, in whose crosshairs the District Attorney has placed Petitioner. The injuries include reputational harm to the Petitioner

as he seeks his Party's nomination for the Presidency of the United States via a flagrant disregard for and violation of his fundamental constitutional rights. And while an original petition in this Court is disfavored, the extraordinary circumstances here justify it—particularly since Petitioner's every attempt to seek redress in the normal course have been ignored, and the District Attorney has given every indication that the injury is imminent.

Some 19 months ago, the Superior Court of Fulton County indulged a request from the Atlanta Judicial Circuit District Attorney to impanel a special purpose grand jury to "investigat[e] the facts and circumstances relating directly or indirectly to possible attempts to disrupt the lawful administration of the 2020 elections in the State of Georgia." That body convened regularly for eight months, until its January 2023 dissolution—always at the District Attorney's direction and under her guidance. Cloaking itself with the imprimatur of the special purpose grand jury's authority, the District Attorney's Office compelled the testimony of over 75 witnesses, many via material-witness warrants—criminal investigative tools that were beyond the special purpose grand jury's lawful purview. All the while, the District Attorney was laboring under an impermissible and actual conflict of interest: hosting and headlining a fundraiser for the political opponent of one of her investigation's targets.

Having completed the District Attorney's business, the special purpose grand jury has since been dissolved. It has approved a report whose full

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contents, recommendations, and authorship are as yet uncertain, since the report's status remains in limbo.[1] Nevertheless, the District Attorney has signaled that she will use the report—itself the fruit of a contorted and co-opted process—to secure an indictment within weeks, if not days. Petitioner moved to quash its report and disqualify the District Attorney. Petitioner asked that a different judge hear his motion, but Respondent, the same Superior Court Judge who supervised the special purpose grand jury up to its dissolution, asserted jurisdiction.[2] More than 100 days have passed since that filing, and the Supervising Judge has yet to rule—not even issued an adverse-but-appealable ruling.[3] And while Petitioner is contemporaneously seeking an extraordinary writ from the Superior Court, resolution on even an expedited timeline under Unif. Super. Ct. R. 6.7 would not outpace the grand jury proceedings, in which case, the damage will have been done. Thus, stranded between the Supervising Judge's protracted passivity and

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[1] See *In re: 2 May Special purpose Grand Jury*, No. A23A1453.

[2] The District Attorney's office responded a month-and-a-half later, after which the Superior Court Judge twice denied Petitioner an opportunity to reply: once after the District Attorney's response, and again after a later, uninvited brief in support of the District Attorney by interested amici.

[3] Indeed, the Superior Court Judge refused to grant other targets of the proceedings certificates of immediate review, leaving them without recourse to challenge his rulings until there is such an order, which is not forthcoming. Of course, if the Superior Court Judge were to have treated the special purpose grand jury's proceedings as civil, which Petitioner demonstrates below that he should have, he might have certified the matter final at least as to those claims. See OCGA § 9–11–54(b).

the District Attorney's looming indictment, Petitioner has no meaningful option other than to seek this Court's intervention.

That *should* be shocking. Even in an extraordinarily novel case of national significance, one would expect matters to take their normal procedural course within a reasonable time. But nothing about these processes have been normal or reasonable. And the all-but-unavoidable conclusion is that the anomalies below are because Petitioner is President Donald J. Trump.

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PARTIES TO THE PETITION

Petitioner is Donald J. Trump, 45th President of the United States. Petitioner seeks writs of mandamus and prohibition against respondents with respect to their official duties as the District Attorney and a Superior Court Judge of the Atlanta Judicial Circuit vis-à-vis the Fulton County special purpose grand jury convened to investigate alleged attempts to disrupt Georgia's 2020 election.

Respondents are Fani Willis, Esq., in her capacity as Atlanta Judicial Circuit District Attorney, and Hon. Robert McBurney, in his capacity as Judge of the Superior Court for the Atlanta Judicial Circuit. Respondent Willis (District Attorney) requested the convention of a special purpose grand jury to investigate alleged criminal conduct with respect to the 2020 election. She now seeks an indictment, the basis for which would be evidence unlawfully obtained during the special purpose grand jury's

proceedings and the special purpose grand jury's report itself. Respondent McBurney (Supervising Judge) oversaw the special purpose grand jury's proceedings, asserted authority over but has declined to rule on Petitioner's challenges to the special purpose grand jury's processes, and retained decision-making power to disseminate its final report publicly. Further, the Supervising Judge opted to classify the special purpose grand jury's proceedings as criminal, which provided to the District Attorney tools to, *inter alia*, compel the production of evidence, overcome claims of state and federal sovereign immunity, and to otherwise secure evidence that she could not lawfully have accessed.

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RELIEF SOUGHT

To redress the former and forthcoming consequences of Respondents' mishandling of the Fulton County special purpose grand jury proceedings, Petitioner seeks writs of mandamus and prohibition:

- Directing the quashal of the special purpose grand jury's report and barring its or its contents' use in any future proceedings, civil or criminal;
- Forbidding the District Attorney from introducing any evidence obtained via the special purpose grand jury process to a regular grand jury; and

- Compelling the District Attorney's disqualification as a party representative in any proceeding involving Petitioner.

STATEMENT OF JURISDICTION

This Court has jurisdiction under Art. VI, § 1, ¶ IV of the Georgia Constitution of 1983 "to issue process in the nature of mandamus, prohibition, specific performance, quo warranto, and injunction." That jurisdiction is rarely invoked, however. The preferred course is to petition for extraordinary relief in the superior court and appeal from an adverse decision. *Brown v. Johnson*, 251 Ga. 436, 436 (306 SE2d 655) (1983). Petitioner has identified no case in 40 years where the Court has accepted jurisdiction of an original petition.[4] Then again, never has there been a case like this one. And the Court has always acknowledged that there will be "extremely rare situations in which there is a need for the exercise of this court's original jurisdiction."[5] *Graham v. Cavender*, 252 Ga. 123, 123 (311 SE2d 832) (1984).

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Petitioner urges the Court to exercise jurisdiction over this petition. Although this Court has never outlined what considerations would support its discretion in that regard, the Supreme Court of the United States has. Its Rule is illuminating:

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[4] To be sure, the Court's rules offer petitioners no guidance on preparing and filing an original petition. Cf. U.S. Sup. Ct. R. 20.

[5] Petitioner is, in an abundance of caution, contemporaneously filing a similar petition in the Superior Court of Fulton County. But he does not concede that process is adequate or appropriate here

> Issuance by the Court of an extraordinary writ ... is not a matter of right, but of discretion sparingly exercised. To justify the granting of any such writ, the petition must show that the writ will be in aid of the Court's appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court.
>
> U.S. Sup. Ct. R. 20.

Moreover, Petitioner's case easily satisfies even that rigorous standard.

First, the writs Petitioner seeks would be in aid of the Court's appellate jurisdiction because it presents issues that only this Court may review. Cf. *U.S. Alkali Exp. Ass'n v. United States*, 325 U.S. 196, 202 (65 SCt 1120, 89 LEd 1554) (1945) ("[W]here, as here, sole appellate jurisdiction lies in this Court, application for a common law writ in aid of appellate jurisdiction must be to this Court."). Petitioner's lead claim is that Georgia's special purpose grand jury scheme (OCGA § 15–12–100 et seq.) is facially unconstitutional under the 14th Amendment and Art. I, § 1, ¶ I of the Georgia Constitution. Were that claim to arise in the normal course, any direct appeal of an adverse decision would be to this Court, not the Court of Appeals under Ga. Const. Art. VI, § 6, ¶ II(1). What is more, the novel issues in this case—*inter alia*:

- Whether a special purpose grand jury may utilize criminal investigative tools;

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- Whether a district attorney laboring under an actual conflict of interest may continue in a proceeding; and
- Whether a district attorney can rely on otherwise-privileged evidence unlawfully obtained by a special purpose grand jury in seeking an indictment—

are all of "great, gravity, concern, [and] importance to the public," and so would prompt this Court's certiorari jurisdiction, even if a superior court and the Court of Appeals were to pass on them first.[6] Ga. Sup. Ct. R. 40; see Ga. Const. Art. VI, § 6, ¶ V.

Second, that this case is extraordinary goes almost without saying: No prosecutor, state or federal, has ever indicted a former president for conduct committed while in office.[7] Nor, closer to home, has any Georgia prosecutor ever unconstitutionally and so publicly weaponized the special purpose grand jury process as the District Attorney has done here. Also, the posture of this case is unique. A defendant in the normal course of a criminal prosecution could only challenge past illegality via motion. Here, though, Respondents' unlawful conduct is on full display. And Petitioner

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[6] This Court's processes do not allow for certiorari before a decision below. Cf. U.S. Sup. Ct. R. 11.

[7] President Nixon was no exception. He was not under indictment when President Ford pardoned him. A pardon has always been available in anticipation (and bar) of a later indictment. *Ex parte Wells*, 18 How. (59 U.S.) 307, 311 (15 LEd 421) (1855)

has a chance to prevent the further illegality before it happens. Moreover, the litany of errors tied to Respondents' conduct is unprecedented, e.g., interpretations of:

- The special purpose grand jury scheme;
- State and federal sovereign immunity;
- The Speech and Debate Clause in Article I of the United States Constitution;
- Attorney–client privilege;
- Executive privilege;
- The authority to compel out-of-state targets of an investigation to provide evidence in support of their eventual indictments; and
- Whether a local prosecutor even has jurisdiction to investigate and charge a federal official for conduct while in office.

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And because of the stakes involved—up to and including a looming national election—review by the Court, of the state-law issues at least, is eventually inevitable and appropriate now.

Not to be overlooked in that regard is timing. Criminal processes, particularly in Georgia, can be ponderously slow. Of the five direct appeals from convictions in the Superior Court of Fulton County that the Court decided this term, *Blocker v. State*, S23A0032 (Ga. Jun. 21, 2023); *Head v.*

State, S23A0111 (Ga. May 31, 2023); *Davis v. State*, S23A0166 (Ga. May 31, 2023), *Copeland v. State*, S23A0281 (May 31, 2023), and *Williams v. State*, S23A0203 (Ga. May 16, 2023), the average time from indictment to affirmance was 12 years. As the Court considers this petition, one Fulton County Superior Court courtroom is seven months into jury selection for what may become the longest criminal trial in state history. The notion that the issues in this petition would timely bubble up to this Court through the quagmire of the normal process is grossly unrealistic. If matters this significant and this urgent are not sufficiently extraordinary to trigger this Court's original jurisdiction, nothing could be.

Relatedly, third, Petitioner cannot obtain adequate relief from any other court. And he has tried. On 20 March 2023—32 days after the Supervising Judge published portions of the special purpose grand jury's final report—Petitioner raised the issues in this petition via a motion to quash the report and disqualify the District Attorney. The State responded on 15 May. And the Supervising Judge has disallowed any further reply—the intervention of several uninvited amici and media intervenors notwithstanding. Meanwhile, the District Attorney, citing security concerns, has asked that the Superior Court of Fulton County be closed to the public on certain dates in July and August, presumably for proceedings related to this matter. If an indictment issues before the Supervising Judge rules, the process will have worked its mischief and Petitioner will be struggling to disentangle himself from a net that was not lawfully cast. Neither would a petition for an

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extraordinary writ in the superior court be any more effective than Petitioner's motion to redress his injuries, as the process of litigation followed by review could not be sufficiently expedited. Bottom line: This Court is the only one that can timely and decisively resolve this matter. Petitioner asks that it do so.

As Petitioner noted above, in the 40 years that this Court has had original jurisdiction over petitions for extraordinary relief, not once in that time has it found any case to have been sufficiently extraordinary to warrant an exercise of that jurisdiction. If Petitioner's case is not sufficiently extraordinary for this Court to exercise jurisdiction, no case could be. And the Court should say so.

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STATEMENT OF STANDING

Petitioner has standing to seek relief. Georgia law has long acknowledged that the subject of a grand jury's report has standing to seek its quashal on the basis that the report, or portions thereof, were unlawful.[8] *E.g.*, *In re Floyd Cnty. Grand Jury Presentments for May Term 1996*, 225 Ga.App. 705, 707(1) (484 SE2d 769) (1997); *Harris v. Edmonds*, 119 Ga.App. 305, 305 (166 SE2d 909) (1969). Petitioner was an object of the

[8] The cases identify expungement as the available remedy. Though Petitioner has sought the report's quashal below, the practical effect of those remedies would be the same. And for these purposes, any shade of difference between the terms is immaterial. Compare EXPUNGE, *Black's Law Dictionary* (11th ed. 2019) ("To remove from a record, list, or book; to erase or destroy") with QUASH, *id.* ("To annul or make void; to terminate").

District Attorney's pursuit from beginning to end of the special purpose grand jury process. And as Petitioner demonstrates below, the report is the fruit of a process that was both unlawful on its face and unlawful in its application. Petitioner has a right to seek redress.

Further to the point, Petitioner's lead argument is that the scheme that authorized the special purpose grand jury is too vague, even for a procedural statute, to constitutionally administer under any circumstances. The report targeting Petitioner, therefore, could not have comported with the process of laws that he was due under the 14th Amendment and the § 1, ¶ I of the Georgia Bill of Rights. For this reason too, Petitioner has standing to challenge the special purpose grand jury scheme because "the only prerequisite to attacking the constitutionality of a statute 'is a showing that it is hurtful to the attacker.'" *Bo Fancy Prods., Inc. v. Rabun Cnty. Bd. of Comm'rs*, 267 Ga. 341, 344(2)(a), (478 SE2d 373) (1996) (quoting *Stewart v. Davidson*, 218 Ga. 760, 764(1) (130 SE2d 822) (1963)).

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Argument for Relief

Petitioner now sits on a precipice. A regular Fulton County grand jury could return an indictment any day that will have been based on a report and predicate investigative process that were wholly without authority. Indeed, the Supervising Judge, on 11 July and in front of television cameras, volunteered to oversee the selection and swearing in of the grand jury that will hear evidence in support of the District Attorney's proposed indictment

related to the 20202 election. The Judge volunteered to do so while knowing full well that Petitioner's motion vis-à-vis the use and release of the special purpose grand jury's report is pending before him. Thus, between the District Attorney's driving the process and the Supervising Judge's inaction, Petitioner is at the mercy of State actors who have heretofore paid no regard to his rights—even his right to have his motion heard and ruled upon. Petitioner resorts, therefore, to a prayer for relief from this Court:

(1) This Court should order the Supervising Judge to quash the special purpose grand jury's report and bar its use in regular grand-jury proceedings.

Petitioner's first concern is the report itself. Left untouched, the report's existence will allow the District Attorney to circumvent the normal presentation of evidence and could invite a new grand jury to uncritically ratify the previous one's findings. It is one thing to indict a ham sandwich. To indict the mustard-stained napkin that it once sat on is quite another. One-sided as its proceedings are, a grand jury can be no "great security to the citizens against vindictive prosecutions by the government, or by political partisans, or by private enemies" if they perform only in a summary fashion. 3 Joseph Story, *Commentaries on the Constitution of the United States*, 592, § 1785 (E.H. Bennett ed., 3d ed. 1858).

As discussed briefly above, the remedy for an ultra vires action of the grand jury is the expungement (or here, quashal) of its report. E.g., *In re Floyd Cnty. Grand Jury Presentments*, 225 Ga.App. at 707(1). If the report

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was unlawfully produced, no one—the District Attorney included—should have it to use. And the report at issue here was. To be sure, the whole of Georgia's special purpose grand jury scheme is so unadministrable as to be facially void. Ergo, it is not possible for this, or any, special purpose-grand jury to act within the law.

(a) Georgia's special purpose grand jury scheme is unconstitutionally vague.

"[A] law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." *Giaccio v. Pennsylvania*, 382 U.S. 399, 402–03 (86 SCt 518, 15 LEd2d 447) (1966). In *Giaccio*, the Court considered a Pennsylvania statute that governed how jurors determined what court costs an acquitted defendant should pay. The statute said relevantly,

> in all cases of acquittals by the petit jury on indictments for (offenses other than felonies), the jury trying the same shall determine, by their verdict, whether the county, or the prosecutor, or the defendant shall pay the costs ... and whenever the jury shall determine as aforesaid, that the ... defendant shall pay the costs, the court in which the said determination shall be made shall forthwith pass sentence to that effect, and order him to be committed to the jail of the county until the costs are paid, unless he give security to pay the same within ten days.

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Id. at 400–01 (citation omitted).

The Court determined that statute to be unconstitutionally void and susceptible to arbitrary enforcement because it provided no standard to determine what the court costs would be or who should pay them. "[T]he law," the Court explained, "must be one that carries an understandable meaning with legal standards that courts must enforce." *Id.* at 403.

This Court held similarly in *Jekyll Island State Park Civic Auth. v. Jekyll Island Citizens Ass'n.*, 266 Ga. 152 (464 SE2d 808) (1996). There, itt considered former OCGA § 12–3–235(23), which governed how much the Jekyll Island State Park Authority could charge lessees in fees:

> The annual amount of any fee charged to any person, natural or artificial, or upon any property owned or leased by any such person under this paragraph shall not exceed the annual amount which would be levied for such services by the County of Glynn in the form of ad valorem taxes if such services had been provided by the County of Glynn.

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The Court held the final sentence of that statute to be unconstitutionally vague and indefinite because it provided "insufficient objective standards and guidelines to meet the requirements of Due Process." *Id.* at 153.

The statutes governing special purpose grand juries suffer similar infirmities. The special purpose grand jury statute has empowered

> [t]he chief judge of the superior court of any county to which this part applies, on his or her own motion, on motion or petition of the district attorney, or on petition of any elected public

> official of the county or of a municipality lying wholly or partially within the county, may request the judges of the superior court of the county to impanel a special grand jury for the purpose of investigating any alleged violation of the laws of this state or any other matter subject to investigation by grand juries as provided by law.
>
> OCGA § 15–12–100(a).

Having first empaneled a special purpose grand jury, a circuit's chief judge must then

> assign a judge of the superior court of the county to supervise and assist the special grand jury in carrying out its investigation and duties. The judge so assigned shall charge the special grand jury as to its powers and duties and shall require periodic reports of the special grand jury's progress, as well as a final report.
>
> OCGA § 15–12–101(a).

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In fulfilling its charge, a special purpose grand jury may:

- Compel evidence and subpoena witnesses;
- Inspect records, documents, correspondence, and books of any department, agency, board, bureau, commission, institution, or authority of the state or any of its political subdivisions; and
- Require the production of records, documents, correspondence, and books of any person, firm, or corporation which relate

> directly or indirectly to the subject of the investigation being conducted by the investigative grand jury.
>
> OCGA § 15–12–100(c).

When (a) the special purpose grand jury issues a report; or (b) the supervising judge decides the investigation is complete, that judge can recommend the special purpose grand jury's dissolution, and the circuit's judges must vote whether to dissolve the special purpose grand jury. OCGA § 15–12–101(b). If a circuit's judges opt not to dissolve a special purpose grand jury, the chief judge "shall instruct and charge the special purpose grand jury as to the particular matters to be investigated." *Id.* And the special purpose grand jury itself will determine how long it will continue to exist and fulfill its charge. *Id.*

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All that seems reasonable at first blush. But once one broaches questions of administration, the statutes are quickly found wanting:

- Are a special purpose grand jury's proceedings civil or criminal?
- What role does the requesting authority, here the District Attorney, play vis-à-vis a supervising judge?
- What must the special purpose grand jury's interstitial reports contain, and may they be disclosed?

- What rubric does a supervising judge apply to determine whether an investigation is "complete," as would support a recommendation to dissolve?
- By the same token, how is a supervising judge (or for that matter, the judge's colleagues in the circuit) to determine whether a report and/or investigation is satisfactory?
- Must a circuit's judges consider the special purpose grand jury's report or the course of the investigation before they vote on dissolution?
- If the judges reject dissolution, how does the chief judge know what to instruct the jury on?
- Assuming a circuit's judges reject a special purpose grand jury's dissolution, how long may the grand jurors extend their own service?
- And how would any of this get reviewed?

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The special purpose grand jury statutes offer no answers. Nor, for that matter, do the regular grand-jury provisions, which also govern special purpose grand jury proceedings. See OCGA § 15–12–102. But the answers matter. And the scheme's silence with respect to any governing standards has licensed the District Attorney's and the Supervising Judge's arbitrary and capricious manipulation of these processes.

(i) The special purpose grand jury scheme is vague about whether such proceedings are civil or criminal.

Take first the nature of the proceedings. Binding precedent treats special purpose grand jury proceedings as civil. See *Kenerly v. State*, 311 Ga.App. 190, 191–95(1) (715 SE2d 688) (2011) (holding that a special purpose grand jury exercises civil investigative powers and has no authority to return a criminal indictment); *State v. Bartel*, 223 Ga.App. 696, 696–98 (479 SE2d 4) (1996) (distinguishing the authority of civil and criminal grand juries); see also *In re Gwinnett Cnty. Grand Jury*, 284 Ga. 510, 513, (668 SE2d 682) (2008) (distinguishing the criminal accusatory role of a grand jury from its civil investigative role). It should follow, *inter alia*, that a special purpose grand jury's statutory investigative powers would yield to the constitutional doctrine of sovereign immunity.

Not so, apparently. When the District Attorney sought testimony from Georgia's Governor Brian Kemp and United States Senator Lyndsey Graham, both interposed sovereign immunity claims. The Supervising Judge rejected those claims, however, holding that the underlying, *non-accusatory*, special purpose grand jury proceedings were criminal, which, it said, took immunity off the board.

But the Supervising Judge was happy to change postures when the shoe squeezed his other foot. According to a grand juror's post-dissolution interview, the grand jurors, whom the Supervising Judge had a duty to instruct, drew adverse inferences about the credibility of witnesses who

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invoked the Fifth Amendment privilege. Such inferences are permissible only in civil proceedings, not criminal ones. Compare *Baxter v. Palmigiano*, 425 U.S. 308, 318 (96 SCt 1551, 47 LEd2d 810) (1976), with *Griffin v. California*, 380 U.S. 609, 614–15 (85 SCt 1229, 14 LEd2d 106) (1965). So the Supervising Judge appears, at least tacitly, to have waffled on the nature of the proceedings as the circumstances dictated. More than that, though, he doubled down on his error—pondering rhetorically at a hearing on the matter, which was broadcast online and accessible to the special-purpose grand jurors, "[B]ut if [the witnesses invoking privilege] did nothing wrong, why aren't they talking to the grand jury?"

The consequence of this back and forth was that the special purpose grand jury based its final report on unlawful evidence—evidence either that it could not have compelled in a civil proceeding or that it could not have considered in a criminal one. The statutory scheme's frailties opened that crack. And the Supervising Judge widened it as he saw fit.

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(ii) The special purpose grand jury scheme is unconstitutionally vague with regard to the contents and disclosure of interstitial and final reports.

A second issue pertains here: Whether the Supervising Judge should publicly disclose all or part of the special purpose grand jury's final report. Again, § 15–12–101(a) offers no guidance. It told the Supervising Judge only that he was obliged to require interstitial and final reports. It said nothing about

- What to do when he got them;
- What they should include;
- What form they should take;
- Whether someone named in a report should have an opportunity to review and object to its contents; or
- What protections those named in a report should have.

The District Attorney, along with media intervenors argued whether the final report was a court record under Unif. Super. Ct. R. 21, a special presentment under OCGA §§ 15–12–71(e)(1) and 80 (in which case disclosure was within the grand jury's discretion), or some third thing. The Supervising Judge declined to invite Respondent's views, or for that matter, the views of anyone else whom the report may name, and held without citation or analysis that immediate disclosure to anyone other than the District Attorney would breach fundamental fairness. The Supervising Judge neglected, however, (and statutory scheme declines) to provide an opportunity for parties, like Petitioner, whom the report doubtless impugns, to challenge its contents as ultra vires or unlawful. Cf. *In re Floyd Cnty. Grand Jury Presentments*, 225 Ga.App. at 707(1) (authorizing the subject of a grand-jury report to seek its expungement). Thus, despite his having recognized the due-process implications of his decision, *Lisenba v. California*, 314 U.S. 219, 236 (62 SCt 280, 86 LEd 166) (1941) (A "denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice."); see *Snyder v. Massachusetts*, 291 U.S. 97, 105 (54 SCt 330, 78 LEd2d 674)

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(1934), he declined to afford Petitioner the minimum incidents of the process he was due: "notice and an opportunity to be heard ... 'at a meaningful time and in a meaningful manner.'" *Fuentes v. Shevin*, 407 U.S. 67, 80 (92 SCt 1983, 32 LEd2d 556) (1972) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (85 SCt 1187, 14 LEd2d 62) (1965)). In so doing, the Supervising Judge has anointed the District Attorney with what she sought from the start—unconstitutional powers that Petitioner and others can neither challenge nor shield against.

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(b) The District Attorney and Supervising Judge applied the special purpose grand jury statutory scheme in an unconstitutional manner.

As demonstrated above, the special purpose grand jury scheme is unadministrably vague. Its lack of clarity on essential points has given the District Attorney and the Supervising Judge carte blanche to pull standards and procedures out of the thinnest air. And so the District Attorney, with the Supervising Judge's indulgence and protection, has subverted the process and made of it an unregulated, jerry-rigged investigative weapon to use against Petitioner.

Even if this Court were to conclude that the scheme itself was not void for vagueness, cf. *United States v. Harriss*, 347 U.S. 612, 618 (74 SCt 808, 98 LEd 989) (1954), it should still hold that Respondents' application of it violated the 14th Amendment Due Process Clause, as well as Art. I, § 1, ¶ I of the Georgia Constitution of 1983. That is particularly so with regard to

the Superior Court's having classified the special purpose grand jury proceedings as criminal. If *arguendo* the statutory scheme was not unconstitutional in that regard, Respondent's subversion of it was.

As discussed above, the Supervising Judge's having classed the special purpose grand jury proceedings as criminal empowered the District Attorney to access pieces of evidence that she could not otherwise have obtained. Chief among those were the testimony of Gov. Kemp and Sen. Graham, whose claims of constitutional immunity—wholly viable in a civil proceeding—the Supervising Judge shot down. The venom spread farther than that, though. The District Attorney was able to compel the appearances and testimony of out-of-state targets via material witness warrants, which the Supervising Judge signed—a process that should not have been available. The District Attorney circumvented witnesses' Fifth Amendment rights in so doing.

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Early on, the District Attorney sent letters to witnesses whom she intended to subpoena, identifying them as targets. In a federal prosecution, "[a] 'target' is a person as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant." U.S. Att'y Manual § 9-11.151. But there is no comparable authority defining "target" in Georgia. And while subpoenaing an investigation's subjects or targets is permissible to a grand jury proceeding, *United States v. Wong*, 431 U.S. 174, 179 n.8, (97 SCt 1823,52 LEd2d 231) (1977), federal prosecutors take

special care to avoid even the appearance of unfairness and to respect a defendant's rights. U.S. Att'y Manual § 9-151. The District Attorney was less circumspect. She publicly labeled targets with neither apparent reason nor rhyme, and offered them no courtesies to insulate their constitutional and statutory rights.

This raises the question of what constitutional protections a target should have in a *criminal* special purpose grand jury proceeding (if there is such an animal). The Georgia Constitution prohibits the appearance before a regular grand jury of a witness named in a proposed charging instrument. See *State v. Lampl*, 296 Ga. 892, 899 (770 SE2d 629) (2015) (a grand jury cannot compel the appearance of one accused in a returned or proposed charging document); accord *Jenkins v. State*, 65 Ga.App. 16 hn.2 (14 SE2d 594) (1941) (grand jury had no lawful right to call the accused before it while considering a bill of indictment against him); cf. *State v. Butler*, 177 Ga. App. 594, 594 (340 SE2d 214) (1986) (the grand jury may compel the appearance of a wife to testify to her husband's alleged crime against her); see generally OCGA § 24–5–506. A criminal special purpose grand jury (as the Supervising Judge deemed this one to be) tasked with investigating possible criminal conduct and drafting a report recommending criminal indictment thus creates unique problems vis-à-vis the privilege against compulsory self-incrimination, U.S. Const. Amend. V; Ga. Const. Art. I, § 1, ¶ XVI; OCGA § 24–5–506. Since the special purpose grand jury could not itself return an indictment or consider a proposed one, a strict reading of the case

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law would empower it to compel the appearance and testimony of any witness, which a subsequent, regular grand jury could then rely on to indict that witness. Surely the special purpose grand jury scheme does not authorize so flagrant an end run around the Fifth Amendment.

Further to the point, not only were the District Attorney's purported "targets" afforded no protections, but they also appear to have been given that label arbitrarily. The target notifications were publicly released in July 2022. But the District Attorney abandoned that labeling soon thereafter, likely in response to the Supervising Judge's admonition that the practice could be problematic for the District Attorney down the road. The District Attorney's waffling was more than merely inconvenient for the District Attorney's public and possibly secret targets alike. Each faced decisions (both personally and upon advice of counsel) about how to conduct themselves in the public sphere, as well as under oath. In the federal context, whether one is a target often instructs that person and their counsel how to best defend themselves. That the District Attorney's Office opted to label some witnesses as "targets" (which they need not have done) but not others forces the question whether any later omission was purposeful. If not, unlabeled witnesses could only conclude that the District Attorney designated her targets at random, and no one could rely on the legitimacy of their "witness" status.

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Therefore, the Supervising Judge's capricious fabrication of a *criminal* special purpose grand jury, which the District Attorney capitalized on,

obviated the due process rights of all involved. Consequently, the special purpose grand jury never acted consistently with lawful authority. And its report should be quashed.

(2) This Court should bar the use of any evidence obtained via the special purpose grand jury investigation in any subsequent proceedings.

Admittedly, the reports' quashal, without more, does not answer the related question of whether to suppress the evidence that the special purpose grand jury relied on in drafting it. In general, suppression of evidence from a regular grand-jury proceeding is not an available remedy. See *Lampl*, 296 Ga. at 897–98; see also *United States v. Calandra*, 414 U.S. 338, 343(II) (94 SCt 613, 38 LEd2d 561) (1974) (grand jury's "operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials"). But there are exceptions. Suppression *is* a proper remedy (1) to redress the violation of a constitutional right, see *United States v. Giordano*, 416 U.S. 505, 524 (94 SCt 1820, 40 LEd2d 341) (1974); (2) when the State has "so compromised [the structural protections of the grand jury] that the proceedings have been rendered "fundamentally unfair," *Bank of Nova Scotia v. United States*, 487 U.S. 250, 257(III) (108 SCt 2369, 101 LEd2d 228) (1988); and even (3) for the violation of a statute that implicates underlying constitutional interests, see *Sanchez–Llamas v. Oregon*, 548 U.S. 331, 348 (126 SCt 2669, 165 LEd2d 557) (2006).

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Respondents' conduct supports the first and second bases for suppression, which are intermingled. That the District Attorney and Supervising Judge exploited an unconstitutionally vague statutory scheme (or contorted a sufficiently clear one) both violated Petitioner's rights under the 14th Amendment and gutted the essential protections of the grand-jury process. The District Attorney availed herself of an uncertain and unchecked process to compel the disclosure of evidence that she could not have lawfully obtained. This resulted in a serious infringement of witnesses' privileges against compulsory self-incrimination. The Supervising Judge facilitated those efforts by reclassifying the special purpose grand jury's investigation as civil or criminal, as suited the District Attorney's needs. And via the Supervising Judge's vacillations, the District Attorney secured evidence that she could not otherwise have obtained.

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Of note, classifying the special purpose grand jury as criminal opened the door to The Uniform Act to Secure the Attendance of Witnesses from Without the State, OCGA § 24–13–90 et seq. That Act applies exclusively to criminal proceedings, not civil ones.[9] Thus, the District Attorney was empowered to drag witnesses to Georgia from foreign states and extract their testimony under threat of arrest.

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[9] While the Act permits the compulsion of an out-of-state witness to appear for, *inter alia*, a "grand jury investigation," it does not embrace the sort of non-accusatory proceedings that Georgia's special purpose grand jury scheme contemplates. See *In re Pick*, 664 S.W.3d 200, 202–08 (Tex. Crim. App. 2022) (Yeary, J., dissenting).

One inherent protection that the grand jury purports to offer is the independent evaluation of the State's evidence in support of a proposed indictment. Here, though, the District Attorney has had the unprecedented opportunity to build her case in advance via compulsory criminal processes that she otherwise could not have lawfully accessed (not to mention the Superior Court's having overridden sovereign immunity for her benefit). Unavoidable now, is that whatever presentation the regular grand jury receives will have been calculated to circumvent its fundamental independence.

Compounding the prejudice is that the grand jurors who will consider the indictment were sworn in by the Supervising Judge on live television in front of the District Attorney and members of the special purpose grand jury team. Indeed, though their faces were not shown, the Supervising Judge read their names aloud. Under those circumstances, and in front of television cameras, how could the jurors not know whose indictment they would pass on and what they were expected to do with the District Attorney's evidence? Any pretense of independence or critical review of the evidence is a sham.

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(3) This Court should bar the District Attorney from proceeding in this matter because she is laboring under an actual conflict of interest.

On 25 July 2022, the Supervising Judge ordered the disqualification of the District Attorney's Office from any further investigation or prosecution of Lt. Governor Burt Jones, due to an "actual and palpable" conflict. He did

not, however, remove the conflicted party, the District Attorney and her office, from the case entirely. Nevertheless, in entering a limited order of disqualification the Supervising Judge recognized what Georgia law clearly proscribes—that a prosecutor can be removed from a matter for which a legal conflict exists, at any stage in the proceedings, including the investigative stage: "[A] Georgia district attorney is of counsel in all criminal cases or matters pending in his circuit. This includes the investigatory stages of matters preparatory to seeking an indictment as well as the pendency of the case." *McLaughlin v. Payne*, 295 Ga. 609, 613 (761 SE2d 289) (2014) (quoting *King v. State*, 246 Ga. 386, 389 (271 SE2d 630) (1980)). The Supervising Judge was correct that disqualification was the proper remedy for a conflict. But he erred in applying that remedy piecemeal. He should have disqualified the District Attorney from the entire proceeding.

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A prosecutor's ethical conflicts are not isolated or excisable. As the United States Supreme Court recognized in *Young v. United States ex rel. Vuitton Et Fils S.A. et. al*, 481 U.S. 787 (107 SCt 2124, 95 LEd2d 740) (1987), the existence of an actual conflict does not stop at the prosecution of one individual; it to the entire proceeding:

> This difference in treatment is relevant to whether a conflict is found, however, not to its gravity once identified. We may require a stronger showing for a prosecutor than a judge in order to conclude that a conflict of interest exists. Once we have drawn that conclusion, however, we have deemed the prosecutor subject to influences that undermine confidence that a

> prosecution can be conducted in a disinterested fashion. If this is the case, we cannot have confidence in a *proceeding* in which this officer plays the critical role of preparing and presenting the case ...."

Id. at 811. (emphasis added).

The Supervising Judge, however, ignored that clear directive by excising one target of the District Attorney's investigation from the others. He thus undermined the fundamental fairness and reliability of the proceedings:

> Appointment of an interested prosecutor is also an error whose effects are pervasive. Such an appointment calls into question, and therefore requires scrutiny of, the conduct of an entire prosecution, rather than simply a discrete prosecutorial decision. Determining the effect of this appointment thus would be extremely difficult. A prosecution contains a myriad of occasions for the exercise of discretion, each of which goes to shape the record in a case, but few of which are part of the record.

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Id. at 812.

Indeed, the Supervising Judge ought to have called a halt to the whole process, rather than let a conflicted District Attorney press on. To do otherwise is to tolerate structural error:

> Furthermore, appointment of an interested prosecutor creates an appearance of impropriety that diminishes faith in the fairness of the criminal justice system in general. The narrow focus of harmless-error analysis is not sensitive to this underlying concern. If a prosecutor uses the

> expansive prosecutorial powers to gather information for private purposes, the prosecution function has been seriously abused even if, in the process, sufficient evidence is obtained to convict a defendant. Prosecutors "have available a terrible array of coercive methods to obtain information," such as "police investigation and interrogation, warrants, informers and agents whose activities are immunized, authorized wiretapping, civil investigatory demands, [and] enhanced subpoena power." The misuse of those methods "would unfairly harass citizens, give unfair advantage to [the prosecutor's personal interests], and impair public willingness to accept the legitimate use of those powers."
>
> *Id.* at 811 (quoting C. Wolfram, *Modern Legal Ethics*, 460 (1986)).

> Public confidence in the disinterested conduct of that official is essential. *Harmless-error analysis is not equal to the task of assuring that confidence.* It is best suited for the review of discrete exercises of judgment by lower courts, where information is available that makes it possible to gauge the effect of a decision on the trial as a whole. In this case, however, *we establish a categorical rule against the appointment of an interested prosecutor*, adherence to which requires no subtle calculations of judgment. Given the fundamental and pervasive effects of such an appointment, we therefore hold that harmless-error analysis is inappropriate in reviewing the appointment of an interested prosecutor in a case such as this.
>
> *Id.* at 814 (emphasis added) (citing *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 432 (1983)).

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That the Supervising Judge determined the District Attorney to have had a conflict of interest is conclusive. By leaving the District Attorney on this case—her actual conflict notwithstanding—the Supervising Judge casually erased Petitioner's right to a fundamentally fair proceeding (not to mention the rights of every other affected target).[10] And he forever razed any basis for public confidence in the special-purpose grand jury process or anything that follows from it.

Petitioner asks this Court to do what the Supervising Judge should have but did not—command the District Attorney's disqualification from these proceedings.

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Conclusion and Prayer for Relief

Much ink has been spilled, by judges and academics alike, over the importance of the grand jury as a bulwark against unjust or improper prosecutions. Whether they serve that function effectively is a matter of debate. But they surely cannot if prosecutors and courts short-circuit the procedural protections grand juries are meant to provide. Yet, at every turn, the Supervising Judge and District Attorney have trampled the procedural safeguards for Petitioner's and other's rights. The whole of the process is now incurably infected. And nothing that follows could be legally sound or publicly respectable.

[10] The District Attorney's many extrajudicial comments are enumerated in the underlying motion.

What is worse, the Supervising Judge had myriad opportunities to protect the integrity of the investigation. But he opted not to. Now it is too late for anyone but this Court to intervene. Accordingly, Petitioner asks this Court to

- Exercise jurisdiction over this petition;
- Stay all proceedings related to and flowing from the special purpose grand jury's investigation until this matter can be resolved;
- Provide for the submission of evidence and findings of fact;
- Issue writs compelling the quashal of the special purpose grand jury's report, prohibiting the use of any evidence gathered via the special purpose grand jury's investigation; and
- Grant any other relief that it deems proper under the circumstances.

[signature page follows]

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Respectfully submitted on 13 July 2023 by:

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VERIFICATION

I, Drew Findling, as counsel for and representative of Petitioner, President Donald J. Trump, verify that the averments in this Petition are true and correct to the best of my knowledge.

DREW FINDLING

Ga. Bar No. 260425

Sworn and subscribed
before me this 13 day of
July, 2023.

Notary Public

My Commission Expires: 4-18-2027

Alexis Levine
NOTARY PUBLIC
DeKalb County, GEORGIA

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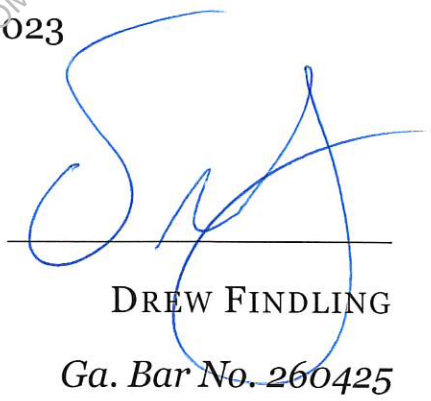
CERTIFICATE OF SERVICE

I hereby certify that I have served opposing counsel with a copy of the within and foregoing ***Original Petition for Writs of Mandamus and Prohibition*** via electronic filing and personal service.

Respectfully submitted this 13th day of July, 2023



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