THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Appellate Case No.: 2022-001604

State of Georgia, Respondent.

v.

Mark Randall Meadows, Appellant.

MOTION TO CERTIFY CASE FOR REVIEW BY THE SOUTH CAROLINA SUPREME COURT

Pursuant to South Carolina Appellate Court Rule 204(b), Appellant Mark Meadows, through his undersigned counsel, moves this Court to certify this case for review before it is determined by the Court of Appeals. This case concerns issues of significant public interest and legal principles of major importance such that certification is warranted under Rule 204(b). Mr. Meadows seeks vacatur of the Circuit Court's order compelling him to testify before a Georgia special purpose grand jury under South Carolina Code § 19-9-20. With a stated deadline to comply of November 30, 2022, the Circuit Court's order incorrectly interprets Section 19-9-20, enforces a moot certification, incorrectly holds that Mr. Meadows is a material witness to the Fulton County investigation, and violates Mr. Meadows's constitutional right to privacy. The Court should therefore grant certification and reverse.

I. This Case Concerns an Issue of Significant Public Interest and Legal Principles of Major Importance Under Rule 204(b)

The Court should certify this case for review because it concerns time sensitive issues of public interest and major importance, as required by South Carolina Appellate Court Rule 204(b). This case concerns the ability of South Carolina citizens to be free from compulsion to travel out of state to testify before state civil investigative bodies. The Circuit Court wrongly ordered Mr. Meadows, a South Carolina citizen, to travel out of state and testify before a Georgia special purpose grand jury on November 30, 2022, pursuant to South Carolina's Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings ("the Uniform Act"). South Carolina, however, adopted the Uniform Act for limited circumstances in *criminal* cases, not far-reaching (politically fraught) matters of mere *civil* investigation. A Georgia special purpose grand jury is not a criminal proceeding or a true grand jury as that term is used in South Carolina's Uniform Act. The Georgia special purpose grand jury has no authority to issue indictments and will instead issue a public report making recommendations regarding possible criminal charges. It lacks the *sine qua non* of a grand jury: the ability to issue indictments. Moreover, it does not appear to be bound by the secrecy requirements inherent in actual grand jury proceedings. Without the ability to issue indictments or conduct its business in secret, the special purpose grand jury is not a true grand jury under South Carolina law, or Georgia law, for that matter. Such a body does not constitute a grand jury and, it was clear legal error to order a South Carolina citizen to travel out of state for a non-criminal matter. This Court should refuse to allow South Carolina citizens to be hailed before a civil inquest in another jurisdiction so that they may be questioned under oath and their participation and testimony publicized.

Furthermore, the lower court's order implicates important issues of public interest. Even if the special purpose grand jury could be considered a grand jury under South Carolina law, the

Georgia certification and its finding of materiality has expired, and this controversy is moot. The citizens of South Carolina have a strong interest (and one backed by important legal principles) in ensuring that only procedurally sound out-of-state certifications are enforced. Additionally, the Fulton County certification seeks information protected by executive privilege, rendering Mr. Meadows's testimony immaterial. Finally, the lower court's order failed to respect Mr. Meadows's constitutional right to privacy, which will be invaded by compelled testimony before the special purpose grand jury. The Fulton County District Attorney has already widely publicized the findings of the ongoing investigation, and there is no doubt that she and the special purpose grand jury will continue to do so.

These important legal issues deserve this Court's attention and this Motion should be granted before the November 30 deadline imposed by the Circuit Court. At a minimum, if a South Carolina citizen is to be compelled out of state for this type of civil action (not a routine criminal matter), it should be this Court that decides such a weighty and consequential matter.

II. Superior Court Order is Contrary to South Carolina Law

The Circuit Court decision makes four fundamental errors that independently warrant this Court's correction.

A. The Underlying Certification is Moot

The Circuit Court should have dismissed the petition as moot. Georgia seeks to compel compliance with a certification that includes a specific date: September 27, 2022, a date now passed. Specifically, this matter comes before the Court on the Fulton County District Attorney's petition, dated August 19, 2022, to compel Mark R. Meadows, former Chief of Staff to President Trump, to testify in their civil inquiry on the specific date and time of Tuesday, September 27, 2022, at 9:00 a.m. in Fulton County, Georgia. (Petition ¶ 14). Under the same circumstances and

in this same Georgia civil inquiry, the Texas Court of Criminal Appeals dismissed a Georgia petition as moot because the certification date had already come and gone. *In re Pick*, __ S.W.3d __, 2022 WL 4003842 (Sept. 1, 2022). As one judge on that court put it, "That subpoena has now expired. Because it has expired, the underlying legal arguments are now moot." *Id.* at *1.

Once the return date on the certification has passed, the certification has expired, and the Court should not issue an Order granting the relief requested. As Georgia's petition makes clear, the purported obligation on Mr. Meadows was to appear and testify on a specific date. This is not a request with an ongoing legal obligation to cooperate, but rather a demand to appear on a date that has now come and gone.

Significantly, the Georgia Superior Court's determination that Mr. Meadows was a material witness can change over time as more evidence becomes available to the special purpose grand jury. The Georgia District Attorney has an obligation to request a new determination of Mr. Meadow's materiality after the date that was stated in the original Petition and the Superior Court's Order expired. Regardless, nothing in Georgia's special purpose grand jury statutes, Georgia or South Carolina's Uniform Act gives authority to the trial court to change the date stated in the original Petition or the Order that was filed. These two documents, the Petition and the Order, are filed documents in a Georgia Court of Record. The trial court has effectively modified them *sua sponte*.

If the Circuit Court had properly addressed the certification, in the form that it was issued from Georgia, it would have resulted in an order for Mr. Meadows to testify on September 27, a date in the past, and "would have no practical legal effect." *See, e.g.*, *Treasured Arts, Inc. v. Watson*, 319 S.C. 560, 564, 463 S.E.2d 90, 92 (1995) (holding that request for injunctive relief was moot where the underlying program had expired and an "order for injunctive relief would

have no practical legal effect" such that "no injunctive relief can be granted"); *accord*, *S.C. Coastal Conservation League v. Dominion Energy S.C., Inc.*, 432 S.C. 217, 223–24, 851 S.E.2d 699, 702 (2020) (challenge to public utility rates became moot when the rates expired); *Ivey v. Town of Cherry Grove Beach*, 244 S.C. 363, 364, 137 S.E.2d 277, 277 (1964) (dispute over discharge of town employee became moot when his term expired). To avoid this nullity, the Circuit Court effectively re-wrote the Georgia certification, taking the role reserved for authorities in Georgia, and announced that Mr. Meadows must appear on November 30, 2022, a date outside the scope of the Georgia certification and without the necessary materiality analysis. Whatever powers South Carolina courts retain to assist with compliance with a sister state's subpoena, they should not be permitted to engage in revising any specific terms of the certificate.

Therefore, because the legal relief requested by Georgia "would have no practical legal effect", the Georgia petition was moot and this Court should vacate the Circuit Court opinion seeking to enforce an extinguished legal request after-the-fact. *Id.*

B. There is No Criminal Matter or "Grand Jury" as Required by South Carolina's witness compulsion law

The special purpose grand jury in Fulton County, Georgia, does not constitute "a grand jury" within the meaning of South Carolina Code § 19-9-20. The ability to issue indictments and deliberate in secrecy are defining characteristics of a grand jury under South Carolina law, but the special purpose grand jury cannot issue indictments and its deliberations are not secret. While its name may contain the words "grand jury," it is truly just a civil investigatory body. *Kennerly v. State, 311 Ga. App. 190, 195, 715 S.E.2d 688, 692 (Ga. Ct. App. 2011).* It is therefore not a "grand jury" for the purposes of the South Carolina Uniform Act. As a result, Mr. Meadows cannot be compelled to testify before the special purpose grand jury under South Carolina Code § 19-9-20.

Under the Uniform Act, a citizen may only be compelled to appear in "a criminal action, prosecution or proceeding" or in a "proceeding or investigation by a grand jury." S.C. Code § 19-9-20. The Fulton County District Attorney asserts that Mr. Meadows's testimony is sought in connection with "a grand jury investigation." *See* Petition for Order to Appear at 2. But the special purpose grand jury does not constitute a grand jury under South Carolina law and Mr. Meadows therefore cannot be compelled to testify before it under South Carolina's Uniform Act.

1. The Special Purpose Grand Jury Lacks the Ability to Issue Bills of Indictment and May Only Conduct Civil Investigations

Most fundamentally, grand juries are secret deliberative bodies tasked with issuing (or declining to issue) criminal indictments. *See* Grand Jury, Black's Law Dictionary (11th ed. 2019) ("A body . . . of people who are chosen to sit permanently for at least a month – and sometimes a year- and who, in ex parte proceedings, decide whether to issue indictments."). The South Carolina Supreme Court established nearly 100 years ago that a grand jury is, at its most basic, a body whose "duty it is to inquire into charges of crime or mis-demeanor, to decide from evidence offered whether there is prima facie ground for criminal accusation, and thence to find a bill of indictment, or ignore the charge as the evidence heard may warrant." *State v. Bramlett*, 166 S.C. 323, 164 S.E. 873, 875 (1932).

The Fulton County special purpose grand jury cannot issue indictments—the *sine qua non* of a grand jury. In fact, Georgia law specifically prohibits special purpose grand juries from issuing indictments. *See Kenerly v. State*, 715 S.E.2d 688, 692 (Ga. Ct. App. 2011). Even Georgia courts recognize that this limitation means that special purpose grand juries can conduct only "civil investigations." *Id.* at 692; *see also State v. Bartel*, 479 S.E.2d 4, 6 (Ga. Ct. App. 1996) (referring to special purpose grand juries as "civil special purpose grand juries").

No doubt aware of this problem, the Fulton County District Attorney avers in the Petition that "the Special Purpose Grand Jury's investigation is criminal in nature *in that* it was requested for the purpose of investigating criminal disruptions" and "authorized to *make recommendations* concerning criminal prosecutions." Petition ¶ 2 (emphasis added). But those carefully crafted statements prove the point: the "special purpose grand jury" might be investigating potential crimes and making recommendations; but it cannot indict, and it is not a criminal "grand jury" in the traditional sense. *State v. Lampl*, 770 S.E.2d 629 (Ga. 2015), which the Fulton County District Attorney cites, (*see* Petition ¶ 2), does not say anything different. In fact, it confirms that "the authority of a special purpose grand jury is limited to conducting investigations and does not include the power to issue indictments." *Id.* at 631. Thus, even under Georgia law, the special purpose grand jury is not a criminal grand jury.

At the hearing before the Circuit Court, reference was made to a court order issued by the Judge who signed the Georgia certification. In this order, the Georgia Superior Court Judge declined to quash the special purpose grand jury subpoena to Governor Kemp. *See* Transcript at 9–11. The Georgia court declined to quash the subpoena under the Georgia constitutional doctrine of sovereign immunity, holding that the doctrine did not apply because the subpoena was issued as part of an investigation into potentially criminal conduct. *See In Re 2 May 2022 Special Purpose Grand Jury*, 2022-EX-000024, Order Denying Motion to Quash (Ga. Super. Aug. 29, 2022).[1] But that order is not compelling in this case for three reasons.

[1] At the hearing on the petition, the Circuit Court suggested that it believed itself bound to give full faith and credit to the Georgia court order under Article IV, Section I of the United States Constitution. *See* Transcript at 32. The full faith and credit clause does not apply here because the question before the Court is (and was) whether the special purpose grand jury constitutes a grand jury under South Carolina law, not whether it is engaged in a criminal investigation under Georgia law.

First, the fact that an investigative body is engaged in investigating something criminal does not make it a grand jury. A grand jury is defined by the power to issue bills of indictment, not by the fact that it investigates crimes.

Second, the Superior Court Judge's order concluded that when the Georgia Court of Appeals in *Kennerly* said: "[a]lthough *Bartel* did not decide whether the particular grand jury before which *Bartel* testified was operating under OCGA § 15–12–100 or § 15–12–71, *it concluded that special purpose grand juries conduct only civil investigations*", this holding didn't really mean what it said. *Compare Kenerly*, 715 S.E.2d at 692, *with In Re 2 May 2022 Special Purpose Grand Jury*, 2022-EX-000024, Order Denying Motion to Quash (Ga. Super. Aug. 29, 2022

Third, the Georgia court's work-around to avoid the plain meaning of Kenerly and *Bartel* relies on the idea that the special purpose grand jury "was sought by the elected official who investigates, lodges, and prosecutes criminal charges in this Circuit; its convening Order specifies its purpose as the investigation of possible criminal activities; and its final output is a report recommending whether criminal charges should be brought." *In Re 2 May 2022 Special Purpose Grand Jury*, 2022-EX-000024, Order Denying Motion to Quash at 4 (Ga. Super. Aug. 29, 2022). None of these things change the special purpose grand jury from a body authorized to do civilly investigation into a grand jury authorized to criminally investigate. This should be especially true for out-of-state citizens. Civil authorities and civil cases often investigate conduct that is also criminal and even refer cases to prosecutors, but that does not convert those authorities or their statutory authority into "criminal" authorities or criminal statutory purpose. If a criminal proceeding is defined by investigation of potentially criminal conduct and the ability to issue a recommendation, any government body could conduct a criminal proceeding. And, under the

Fulton County District Attorney's construction of the law, if that body included the words "grand jury" in its name, it could avail itself of the Uniform Act.

Ultimately, the question here is not whether the "special purpose grand jury" is civil or criminal—it is whether it qualifies as a "grand jury" within the meaning of the South Carolina Uniform Act. It does not, because it lacks the ability to issue bills of indictment and is engaged in a fundamentally non-criminal (or civil) investigation. It is therefore not a grand jury under South Carolina law. Georgia, or any other State, cannot merely title some government body a "grand jury" in name and then force South Carolina courts to coerce citizens to travel out of state, since that is not the law adopted by the people of South Carolina in the form of the Uniform Act.

Normally, a state's citizens cannot be compelled to travel out of state for a matter in a different State, with the narrow exception adopted by the Uniform Act for compliance with a proper "grand jury" where the relative importance and role of secretive criminal indictment was a compelling reason for South Carolina to agree to compel its citizens out of state where they are outside the normal protection of the South Carlina legal system. In other words, while South Carolina could adopt a law compelling citizens to travel and participate in mere investigations in other states, it quite sensibly has not done so.

2. The Special Purpose Grand Jury Lacks the Hallmark Secrecy of a True Grand Jury

Not only is the special purpose grand jury incapable of performing the most fundamental act of a grand jury, it does not operate under the principles of secrecy that are the hallmark of grand jury proceedings. This alone is sufficient to place it beyond the scope of the term "grand jury" in the South Carolina Uniform Act.

Georgia law requires "a report by the special grand jury of the matter investigated by it." Ga. Code § 15-12-101(b). In this case, the special purpose grand jury was directed that its report

should include "recommendations concerning criminal prosecution." Order Approving Special Purpose Grand Jury at 2. There are no provisions of Georgia law requiring that the report be kept secret or otherwise protecting the information contained in the report. *See* Transcript at 26. This lack of secrecy flies in the face of South Carolina law with respect to the powers of a grand jury. "As long as the grand jury has been known to our judicial system, and that body came with the organization of our first courts, their acts and proceedings have been regarded almost sacredly secret." *State v. Rector*, 158 S.C. 212, 225, 155 S.E. 385, 390 (1930) *overruled in part on other grounds by Evans v. State*, 363 S.C. 495, 611 S.E.2d 510 (2005). More than just a tradition, the rule of secrecy is a limit on the legal authority of a grand jury. The Supreme Court of South Carolina has said that

> "[A] grand jury transcends its powers and exceeds its duty when in its presentment it expresses its opinion of the force and effect of the evidence which it has heard, ex parte, or has itself collected in its investigations, or when it discusses that evidence, and/or, when it presents an officer or person by name, and with words of censure and reprobation, without presenting him for indictment." *Bramlett*, 166 S.C. at 329, 164 S.E. at 876.

South Carolina has a long tradition of enforcing this rule of secrecy. *See*, *e.g.*, *Evans* 363 S.C. at 505, 611 S.E.2d at 515 (2005) (stating that "the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings" and discussing in detail the long-standing reasons behind grand jury secrecy); *State v. Whitted*, 279 S.C. 260, 305 S.E.2d 245 (1983) ("investigations and deliberations of a grand jury are conducted in secret and are, as a rule, legally sealed against divulgence"), *overruled on other grounds by State v. Collins*, 329 S.C. 23, 495 S.E.2d 202 (1998); *State v. Williams*, 263 S.C. 290, 295-296, 210 S.E.2d 298, 301 (1974) (upholding the "long-established secrecy of grand jury actions and the nature and of its operations and functions"); *State v. Sanders*, 251 S.C. 431, 437, 163 S.E.2d 220, 224 (1968) (rejecting a procedure that would violate "the cloak of secrecy which has always been thrown around the

deliberations of that body [the grand jury]."); *Margolis v. Telech*, 239 S.C. 232, 241, 122 S.E.2d 417, 421 (1961) (emphasizing secret nature of grand jury matters).

In contrast to a true grand jury, the special purpose grand jury eschews any attempts at secrecy and instead is conducting its investigation in broad daylight. Look no further than the Certificate and Petition before the Circuit Court, which publicly lay bare the Fulton County District Attorney's views on Mr. Meadows and his conduct, and publicly explain what she wants him to testify about before the "special purpose grand jury." And when details of the investigation are not publicly filed, they are fed to press. The Fulton County District Attorney openly talks to the news media about details of the investigation and has even done a podcast about it.[2] In an interview with the Washington Post on September 15, 2022, the Fulton County District Attorney gave details about the investigation, and apparently divulged information regarding likely targets and the specific allegations against them. Washington Post Article 09/15/2022 (available at https://www.washingtonpost.com/national-security/2022/09/15/fani-willis-georgia-prison/). On top of these ongoing disclosures, the special purpose grand jury will issue a public report after its termination detailing its investigation and recommendation. That is a far cry from the strict secrecy provisions that attach to true grand juries in South Carolina, Georgia, and across the Nation. More than a mere departure from tradition, the special purpose grand jury's total lack of secrecy removes it from the category of "grand jury" altogether. Were the special purpose grand jury truly a grand jury, its deliberations would be "almost sacredly secret." *Rector*, 158 S.C. at 225, 155 S.E. at 390,

[2] *See, e.g.*, NBC News Interview (available at https://www.youtube.com/watch?v=HHWp82iyWgE) (commenting on timing and progress of investigation); Atlanta Journal-Constitution, *Breakdown Episode 2, "A force of nature"* (June 27, 2022) (available at https://www.ajc.com/news/breakdown/breakdown-ep-2-a-force-of-nature/EWUB2GEYOZDCXA5ZGYTVJ4HGFY/) (discussing details of the investigation and opining on the timing and nature of potential charges).

not fodder for front page news. This lack of secrecy, especially when combined with the inability to issue an indictment, means that the special purpose grand jury is not a grand jury under the South Carolina Uniform Act.

At least one other court has expressed these precise concerns regarding Georgia special purpose grand juries. In *In re Pick*, __ S.W.3d __, 2022 WL 4003842 (Sept. 1, 2022), the Texas Court of Criminal appeals dismissed as moot a petition pursuant to a special purpose grand jury subpoena. Four judges dissented, raising concerns about whether the special purpose grand jury was a grand jury at all. Judge Yeary explained:

> The "special grand jury" in Georgia that seeks to compel Relator's attendance and submission to that state's compulsory process laws lacks the authority to indict. This suggests to me that it is not an actual "grand jury" in contemplation of the Uniform Act. If my assessment is correct, the Texas district court judge who ordered Relator to travel to Georgia and to submit to its laws had no discretion, under the Act, to compel such attendance and submission.

2022 WL 4003842, at *6. Judge Richardson concurred in dismissing the appeal as moot but explained that he "share[d] the dissent's concern about whether a special grand jury constitutes the type of grand jury envisioned by the State of Texas when they entered into an agreement that could force a citizen of this State to the State of Georgia for a hearing or investigation beyond the scope of that Interstate agreement." *Id.* at *1. Thus, a majority of the judges on the Texas Court of Criminal Appeals expressed serious reservations about whether a "special purpose grand jury" qualifies as a grand jury under Texas's Uniform Act.

Because the special purpose grand jury is not a grand jury under South Carolina law, the Circuit Court erred in issuing a summons under South Carolina Code § 19-9-20. The South Carolina Uniform Act only authorizes such summons for testimony in "a criminal action, prosecution or proceeding" or in a "proceeding or investigation by a grand jury." S.C. Code § 19-

9-20. The Fulton County proceeding fits neither of these categories. Therefore, Mr. Meadows cannot be compelled to testify before the special purpose grand jury under the Uniform Act.

C. Mr. Meadows Does Not Qualify As a "Material Witness" Under the Statute

If the Court does not dismiss the petition as moot or deny it on other grounds, it should conclude that Mr. Meadows is not a "material witness" within the meaning of South Carolina Code § 19-9-30, nor is his testimony "material and necessary" within the meaning of § 19-9-40. Under the Uniform Act, a witness may only be compelled to testify in another state where their testimony is "material and necessary" to the criminal proceeding or grand jury investigation. *See* S.C. Code § 19-9-40. Mr. Meadows's testimony is subject to a sweeping and valid claim of executive privilege, rendering his potential testimony immaterial. Additionally, his claim of privilege is the subject of ongoing litigation in the federal courts.

As demonstrated by his pending federal lawsuit in the U.S. District Court for the District of Columbia, *Meadows v. Pelosi*, No. 1:21-cv-03217-CJN (D.D.C.), Mr. Meadows has been instructed by the former President to preserve certain privileges and immunities attaching to his former office as White House Chief of Staff that prevent him from being compelled to testify about his work with and on behalf of then-President Donald Trump.[3] Most relevant here are the protections of executive privilege, which reach Mr. Meadows's communications "in the course of preparing advice for the President," *In re Sealed Case*, 121 F.3d 729, 752 (D.C. Cir. 1997), and any materials that reveal his or other executive officials' pre-decisional deliberative processes. *See Army Times Publ'g Co. v. Department of the Air Force*, 998 F.2d 1067, 1070 (D.C. Cir. 1993). Mr. Meadows was the most senior advisor to the President, and the confidentiality of his deliberations and communications is protected by the Constitution of the United States as necessary to a healthy

[3] Appellant incorporates by reference the pleadings filed on his behalf addressing Executive Privilege in *Meadows v. Pelosi*, No. 1:21-cv-03217-CJN (D.D.C.).

executive branch. *See United States v. Nixon*, 418 U.S. 683, 708, (1974). The privilege protects Mr. Meadows interactions with the former President, his deliberations with the former President's other senior advisors, and the processes by which he formulated advice for the former president.

Many, if not all, of those same issues would arise if this Court were to compel Mr. Meadows to appear before the Georgia "special purpose grand jury" to testify about the topics identified in the petition—which plainly call for him to divulge the contents of privileged communications with the President. The certificate seeking to bring Mr. Meadows before the special purpose grand jury identifies six areas in which it believes Mr. Meadows can give relevant testimony. *See* (Certificate at 2–5). All six concern Mr. Meadows's official duties as the Chief of Staff to former President Donald Trump. Three of six are concerned exclusively with Mr. Meadows's conversations and interactions with the former president, and the other three center almost entirely on the same topic.

Moreover, these are almost precisely the same topics as those at issue in Mr. Meadows's federal lawsuit. *See* (*Meadows v.* Pelosi, No. 1:21-cv-03217-CJN (D.D.C.) (Docket Entry _29, 29-1, and 38). To determine if Respondent is a "material witness", this Court would need to adjudicate the same executive privilege issues currently before the federal courts in D.C. The South Carolina courts should, at a minimum, allow the federal courts to weigh in on Mr. Meadows's claims of privilege before compelling him to testify. Since Mr. Meadows has legal privileges that would prevent him from responding to the questions to be posed by the "special purpose grand jury," the Fulton County District Attorney cannot show that his testimony is "material and necessary"—nor can they show that compelling Mr. Meadows to appear would not impose an "undue hardship" to the extent he would be required to travel in person to Fulton County, Georgia, just to assert privilege.

Further, it would be improper for the Fulton County District Attorney to force Mr. Meadows to appear just to assert a privilege. The ABA Standards relating to the prosecutor function state that it is improper conduct for the prosecutor "to call a witness to testify in the presence of the jury . . . when the prosecutor knows the witness will claim a valid privilege not to testify." ABA Standard Relating to the Prosecution Function § 3-6.7; accord, 98 C.J.S. Witnesses § 434(b); 1 McCormick on Evidence, § 137 at p. 513 (misconduct sufficient to render a conviction invalid might occur if the prosecution, knowing that a witness will invoke the privilege, calls that witness before the jury and then makes a "conscious and flagrant attempt to build its case out of inferences arising from the use of the privilege"). In other words, Mr. Meadows cannot be a material witness for the improper purpose of having him appear simply to assert a privilege.

D. Compelling Mr. Meadows to Testify Would Violated his Constitutional Right to Privacy

Finally, compelling Mr. Meadows to testify before the "special purpose grand jury," which fails to observe the stringent secrecy provisions required of a true grand jury, would violate his right to privacy under the South Carolina Constitution.

As the Court of Appeals recently emphasized, "[t]he South Carolina Constitution grants citizens an express right to privacy." *State v. Ferguson*, 436 S.C. 596, 602, 874 S.E.2d 234, 237 (Ct. App. 2022). Article I, Section 10 of the South Carolina Constitution states in pertinent part: "The right of the people to be secure in their persons, houses, papers, and effects against . . . unreasonable invasions of privacy shall not be violated." In *Singleton v. State*, 313 S.C. 75, 437 S.E.2d 53 (1993), the South Carolina Supreme Court recognized this protection as a substantive right of privacy. *Id*. at 61; *see also*, *Watson v. Medical Univ. of S.C.*, No. 9:88-2844-18, 1991 WL 406979 (D.S.C. Feb. 7, 1991), *aff'd* 974 F.2d 482 (4th Cir. 1992).

The legislative history of South Carolina's right to privacy indicates that it was intended to "give an aggrieved individual a cause for action if the authorities get out of hand in an invasion of privacy by whatever means." *See Committee to Make a Study of the Constitution of South Carolina*, 1895, Minutes of Committee Meeting at 6 (Sept. 15, 1967) (unpublished minutes, on file with the University of South Carolina School of Law Coleman Karesh Library) (statement of W.D. Workman, Jr.). To that end, the courts "favor an interpretation offering a higher level of privacy protection" than the U.S. Constitution. *State v. Boston*, 433 S.C. 177, 183, 857 S.E.2d 27, 30 (Ct. App. 2021) (addressing the Fourth Amendment) (quoting *State v. Counts*, 413 S.C. 153, 168, 776 S.E.2d 59, 68 (2015)). And, "other than the use of the word 'unreasonable' to modify this right, there are no parameters concerning the right or a definition of what constitutes 'unreasonable invasions of privacy.'" *Counts*, 413 S.C. at 167, 776 S.E.2d at 67. Intrusion on the right to privacy are permissible where necessary to further a compelling state interest and where the intrusion is narrowly tailored to further that compelling interest. *See Singleton*, 313 S.C. at 89, 437 S.E.2d at 61.

Compelled testimony before the special purpose grand jury would be a grievous intrusion on Mr. Meadows's privacy. Under penalty of perjury and contempt, he will be forced to answer a litany of questions. His answers to those question will then be published in a public report at the end of the special purpose grand jury and will likely be fed to the press in the meantime. This intrusion into Mr. Meadows's rights is wholly unlike the intrusion worked by a true grand jury subpoena. True grand jury proceedings are secret, and the invasion of witness's privacy is minimal. Here, the Fulton County District Attorney has *already* provided public comment on the progress of the investigation and its targets. And yet to come is the special purpose grand jury's report, which will publicize its investigation and recommendation. This represents a substantial intrusion

into Mr. Meadows's privacy rights, one far greater than would normally be associated with an order to testify under the Uniform Act.

Not only is the intrusion greater than in a normal Uniform Act case, the state interests are greatly diminished. As detailed above, the special purpose grand jury does not constitute a true grand jury under South Carolina law and the Uniform Act. South Carolina's comity interest is therefore far less than if Fulton County were seeking testimony before an actual grand jury. If anything, the state interest in this case cuts against an order to testify. The courts should not allow South Carolina citizens to be haled before a civil inquest in another jurisdiction so that they may be questioned under oath and their testimony publicized.

Respectfully submitted,

November 17, 2022

s/James W. Bannister
James W. Bannister (SC Bar No. 8895)
Bannister, Wyatt & Stalvey, LLC
Post Office Box 10007
Greenville, South Carolina 29603
(864) 298-0084
jbannister@bannisterwyatt.com
Attorney for the Appellant

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PROOF OF SERVICE

I certify that I have served the Motion To Certify Case For Review By the South Carolina Supreme Court on Walter W. Wilkins and Kyle M. Thompson by electronic mail on November 17, 2022, emailed to wwilkins@greenvillecounty.org and kythompson@greenvillecounty.org.

November 17, 2022

s/James W. Bannister
James W. Bannister
Bannister, Wyatt & Stalvey, LLC
Post Office Box 10007
Greenville, South Carolina 29603
864-298-0084
jbannister@bannisterwyatt.com
Attorney for Appellant