THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. 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.

REPLY TO RESPONDENT'S RESPONSE

Appellant has raised several independent grounds that warrant vacatur or reversal of the Circuit Court's order: (1) as a threshold matter, the underlying certification which the State of Georgia is seeking to enforce is moot, since it required an appearance date of September 27, 2022, which has now come and gone, and since the Circuit Court lacked authority to set its own new appearance date, *see In re Pick*, __ S.W.3d __, 2022 WL 4003842 (Tx. Crim. App. Sept. 1, 2022) (dismissing appeal as moot after the date on the material-witness certificate from the Georgia "special purpose grand jury");[1] (2) the Georgia "special purpose grand jury" does not qualify as a "criminal . . . proceeding" or "grand jury" under South Carolina Code § 19-9-20 because it lacks the authority to issue criminal indictments, *see Kenerly v. State*, 715 S.E.2d 688 (Ga. Ct. App.

[1] The Texas Court of Criminal Appeals is "the State's highest court for criminal appeals." *Gonzalez v. Thaler*, 565 U.S. 134 (2012).

2011); *State v. Bartel*, 479 S.E.2d 4 (Ga. Ct. App. 1996), and because it lacks the rule of secrecy that is the hallmark of a real grand jury, *cf. Evans v. State*, 363 S.C. 495, 611 S.E.2d 510 (2005); *State v. Rector*, 158 S.C. 212, 155 S.E. 385 (1930); (3) the Georgia "special purpose grand jury" seeks privileged information arising from Appellant Mark R. Meadows's service as White House Chief of Staff which he is not in a position to divulge, such that his testimony is not "material and necessary within the meaning of South Carolina Code § 19-9-40 and it would be improper to compel him to travel to Georgia and appear just to assert privilege; and (4) compelling Appellant Meadows to appear before the Georgia "special purpose grand jury," which does not honor grand-jury secrecy would violate his right to privacy under the South Carolina Constitution, *see State v. Ferguson*, 436 S.C. 596, 874 S.E.2d 234 (Ct. App. 2022).

The State of Georgia has not overcome any one of these independent grounds for vacating or reversing the order below.

First, Georgia completely ignores the holding of this Court's sister court, the Texas Court of Criminal Appeals, in *In re Pick* as to why this proceeding is moot. And neither of its two arguments—both of which boil down to the notion that it *could have* sought a different date—overcomes that reasoning. In fact, they simply show that Georgia will not be substantially prejudiced by dismissing this matter as moot; if they wish to pursue a new material-witness certificate with a later date (and one that affords sufficient time for litigation over the propriety of the request), then they still have the opportunity to do so.

Second, Georgia's suggestion that its "special purpose grand jury" can qualify as a "criminal . . . proceeding" even if it does not qualify as a "grand jury" is flatly wrong; the Uniform Act was amended in 1936 to add the grand-jury provision precisely because grand juries (that is, real ones that have the authority to indict and that operate under the rule of secrecy) were not

already covered by the phrase "criminal action, prosecution or proceeding." *See* Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Proceedings, Explanatory Note (1936).[2] Georgia does not cite a single case holding that its "special purpose grand jury" meets either definition, and the arguments that it meets *other* requirements of a grand jury, aside from the fundamental authority to indict and the sacrosanct rule of secrecy, does not save it.

Third, while Georgia argues that Appellant Meadows can give "material and necessary" testimony in Georgia while still preserving the opportunity to assert privilege objections to particular questions, *see* Resp. 9, the State fails to account for the unique immunity from compelled testimony that is enjoyed by the President's most senior aides.

And finally, Georgia fails to show that compelling Appellant Meadows to testify before this Georgia investigative body would not violate his right to privacy under the South Carolina constitution. In the same breath, *see* Resp. 13, Georgia argues that its "special purpose grand jury" follows "[t]he same secrecy rules that apply to a regular grand jury" and that "Meadows' testimony may be revealed in an investigative report" by that same "special purpose grand jury." Those statements are fundamentally incompatible and confirm that Appellant Meadows faces the threat of improper disclosure if he appears before this investigative body.

For these reasons, and for the reasons set forth in Appellant's Motion to Certify, the Court should either vacate the order below and dismiss the appeal as moot, or it should reverse the order on the merits.

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[2] *Available at* https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=f3d74fd1-ceb3-7543-b82d-510fbcb784c9&forceDialog=0#:~:text=The%20Uniform%20Act%20as%20originally,a%20criminal%20action%20was%20pending. "The Uniform Act as originally adopted had been subject to criticism on the ground that it provided for the compulsory attendance of witnesses only when a criminal action was pending. It was pointed out that occasionally the ability to secure a warrant for arrest or an indictment before a Grand Jury may depend upon the testimony of witnesses outside the state. Accordingly, the first important change adopted in 1936 extends the application of the act so as to provide for the possibility of securing the attendance of witnesses in connection with Grand Jury proceedings as well as in criminal cases." *Id*.

I. The Underlying Subpoena is Moot

Georgia chose to order Meadows to testify on a specific date: September 27, 2022. It cannot now revive this expired and moot subpoena by arguing that it may not have *needed* to specify a date. It *did*, and the date has passed. Georgia does not dispute that the certification giving rise to this dispute specified that Meadows is ordered 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). The arguments in response to this Petition fail to defeat this fatal jurisdictional flaw. Just as a South Carolina resident could not be compelled to testify at a trial that has, in fact, concluded, Meadows cannot be ordered to testify out of state on a date that has passed.

Notably, on the issue of mootness, Georgia completely ignores the carefully reasoned decision of the Texas Court of Criminal Appeals which found a similar subpoena by this Georgia investigation to be moot. The case remains the most persuasive authority facing a nearly-identical question about how to apply the Uniform Act to a request by this very Georgia investigation that asks for an appearance at a specific date that has passed. *See In re Pick*, __ S.W.3d __, 2022 WL 4003842 (Sept. 1, 2022). This Court should follow the Texas interpretation, since South Carolina Code § 19-9-130 provides a rule of construction directing the South Carolina courts to interpret and construe the material-witness statute "as to effectuate its general purpose to make uniform the law of the states which enact substantially identical legislation."

Georgia makes two primary arguments about mootness; neither revive this moot request. First, Georgia's argument that the "Special Purpose Grand Jury" is still meeting does not revive this moot controversy. It was a deliberate choice by the Georgia authorities to request Meadows testimony on a specific date. That the investigation is ongoing does not change this fact. (Georgia has not claimed this is a request capable of reputation yet evading review, and with cross-jurisdictional requests, such an exception to mootness would fail in any event.) In support of its

position, Georgia offers no on-point legal authority from a court considering such a request under the Unform Act. Meadows pointed to the well-reasoned and extremely similar decision

Second, Georgia argues that it was not "required by law" to specify a date for Meadows testimony, rather it was required to specify a length of time. Yet Georgia *did* specify a date for testimony, and it is not the role of the South Carolina courts to fundamentally re-write the Georgia certificate which calls for testimony on a specific date. Even if a specific date for testimony is not required, that does not change the undisputed facts of this case: there was a specific date for testimony set by Georgia, and that date passed. Whether a request for testimony that was open-ended, without a specific date, would be valid under Georgia or South Carolina law is simply of no moment and not an issue for decision in this case because that is not this case.

It is not the duty or role of this Court to save Georgia from the consequence of having elected to request Meadows testify on a specific date that has now passed. The fact that Georgia's prosecuting authority testified before the Circuit Court in Pickens County judge that the Uniform Act did not require a specific date for testimony does not eliminate the specific date chosen by Georgia before initiating this Uniform Act request. Whether the South Carolina court should specify a date for compliance under SC Code § 19-9-40 is beside the point: Georgia must have a non-moot request for Meadows attendance in order for the South Carolina judge to have any role to play under the Uniform Act. This case should have been dismissed as moot. *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").

Indeed, if anything, Georgia's arguments just confirm that it will not be unduly prejudiced if this Court dismisses the matter as moot. As it says, the "special purpose grand jury" is still

active and can apparently contemplate testimony at a later date. Thus, if this Court dismisses this proceeding as moot, Georgia will have the opportunity to pursue a new material-witness certificate with a later date or, perhaps, without any date at all. And so long as Georgia affords sufficient time for litigation over the propriety of the request, it will not face the same mootness issue in that instance. But that is a decision for Georgia to make after dismissal, not for the South Carolina courts to effectuate on their own.

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

Without citing a single case in support of its assertion, Georgia claims that its "special purpose grand jury" can qualify as either a "criminal . . . proceeding" or a "grand jury" under the Uniform Act. Both assertions are flatly wrong.

First, the history of the Uniform Act squarely refutes Georgia's suggestion that its "special purpose grand jury" can satisfy the definition of "criminal action, prosecution or proceeding," even if it does not count as a "grand jury." Indeed, the National Conference of Commissioners on Uniform State Laws amended the Uniform Act in 1936—five years after it was first promulgated in 1931—to address this very issue. As the Explanatory Note to the Uniform Act explains:

> At its annual meeting in Boston in August, 1936, the Conference approved two significant changes of substance and several minor changes of form in this Uniform Act. The Uniform Act as originally adopted had been subject to criticism on the ground that it provided for the compulsory attendance of witnesses only when a criminal action was pending. It was pointed out that occasionally the ability to secure a warrant for arrest or an indictment before a Grand Jury may depend upon the testimony of witnesses outside the state. Accordingly, the first important change adopted in 1936 extends the application of the act so as to provide for the possibility of securing the attendance of witnesses in connection with Grand Jury proceedings as well as in criminal cases.

Every State has adopted the Uniform Act, and *most* have adopted the 1936 amendments that allow for compelled testimony before a grand jury. But at least a couple of States have declined to adopt the grand-jury provision. *See e.g.*, IDAHO CODE § 19-3005 (1987); WYO. STAT. § 7-11-404(a)

(1977). Georgia completely ignores this history in suggesting that the phrase "criminal action, prosecution or proceeding" already covers its "special purpose grand jury." It plainly does not.

Georgia also tries to argue that its "special purpose grand jury" qualifies as a "grand jury" under the Uniform Act and South Carolina Code § 19-9-20, but that argument is equally unavailing. It is beyond question that Georgia's novel "special purpose grand jury" was not around in 1936 when the National Conference amended the Uniform Act to apply to grand juries in 1936, or when South Carolina adopted the Uniform Act in 1948. Georgia established its unique procedure in 1974. *See In re Pick*, 2022 WL 4003842, at *5 (Yeary, J., dissenting) (citing GRAND JURY HANDBOOK - STATE OF GEORGIA (Prosecuting Attorneys' Counsel of Georgia 2014-2017)).[3] There is thus no basis to conclude that South Carolina bound itself to compel its citizens to testify before a "special purpose grand jury" in Georgia when it adopted the Uniform Act.

Georgia's remaining arguments amount to asserting that, aside from its name, it follows *some* of the rules that ordinarily apply to traditional grand juries. But Georgia does not and cannot dispute that the "special purpose grand jury" fails to satisfy at least one of what Justice Yeary described as the "necessary and defining characteristics of a 'grand jury' in contemplation of the Uniform Act": the "independent power to indict or to refuse indictment." *Id.* at *6. Georgia attempts to show that the "special purpose grand jury" satisfies a second requirement—the rule of secrecy—but its argument falls short. It argues, *see* Resp. 8, that members of the special purpose grand jury are subject to the same statutory requirements of secrecy under Georgia law as regular grand jurors. But that fails to account for two things: (i) that the *prosecutors* who appear before

[3] Four justices dissented in *In re Pick* and would have held that the "special purpose grand jury" is not a "grand jury" within the meaning of the Uniform Act. But Justice Richardson, who concurred in dismissing the appeal as moot, indicated 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 (Richardson, J., concurring).

the "special purpose grand jury" have plainly not been observing the rule of secrecy, whatever limitations may apply to the grand jurors themselves, and (ii) the "special purpose grand jury" procedures specifically contemplate that the body will issue an investigative report at the end of its work, and Georgia specifically acknowledges that this information will become public, *see* Resp. 13.

Of course, Georgia is entitled to establish this unique "special purpose grand jury" procedure if it wishes. But the question before this Court is more narrow: Does that investigative body fall within the 1931 Uniform Act or its 1936 Amendments (as adopted by South Carolina in 1948), such that Appellant Meadows can be compelled under the Uniform Act to travel to Georgia and to testify before it? The answer is "no." The mere fact that Georgia has chosen to designate its unique investigative body a "special purpose *grand jury*" does not resolve that question. "Plenty of formally convened groups of people who investigate things might also uncover facts that could ultimately lead to criminal prosecutions, but that feature alone does not make them grand juries." *In re Pick*, 2022 WL 4003842, at *4 (Yeary, J., dissenting).[4] And as shown, the body fails to meet at least two hallmarks of a traditional grand jury: the power to indict, and the rule of secrecy.

Thus, if the Court does not vacate the decision below and dismiss the appeal as moot, it should reverse the order on the merits.

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

Georgia argues, *see* Resp. 9, that Appellant Meadows remains a material witness notwithstanding his privilege claims because he can assert those privileges in Georgia before the "special purpose grand jury" and they will be heard. Appellant Meadows does not disagree that he would be able to assert privilege in Georgia even if the South Carolina courts compel him to

[4] Again, as noted above, *see supra* n.3, a majority of the Justices on the Texas Court of Criminal Appeals share this concern.

appear there. But that does not mean that the South Carolina courts *should* compel him to appear there—even if the proceeding were not moot, and even if the "special purpose grand jury" were to qualify as a "grand jury" under the Uniform Act.

Unlike your average witness, Appellant Meadows enjoys unique constitutional privileges as a former senior aide to the President of the United States that apply categorically to his communications with the President and that immunize him from compelled testimony, not just answering particular questions. In a similar proceeding involving the U.S. House of Representatives, Appellant Meadows has been litigating those issues for over a year. *See Meadows v. Pelosi*, No. 1:21-cv-03217-CJN (D.D.C.). The federal district court recently held that it lacked jurisdiction to address those issues due to the Speech or Debate Clause of the U.S. Constitution. But that clause has no application here, Appellant Meadows still has the opportunity to appeal that ruling, and in any event, the court's decision does not resolve the underlying privilege issues. It would be entirely inconsistent with the testimonial immunity of a former White House Chief of Staff to compel him to travel to Georgia and to assert privilege on a question-by-question basis. *Cf.* Office of Legal Counsel, U.S. Department of Justice, *Testimonial Immunity Before Congress of the Former Counsel to the President*, O.L.C. slip op., at *4 (May 20, 2019) (explaining that the immunity from compelled testimony enjoyed by senior Presidential aides is "distinct from, and broader than, executive privilege" in that it "extends beyond answers to particular questions, precluding Congress from compelling even the appearance of a senior presidential adviser").

Moreover, the South Carolina courts cannot compel a witness to travel out of state to testify if doing so would "cause undue hardship to the witness." S.C. Code Ann. § 19-9-40. It would impose an undue hardship on Appellant Meadows to compel him to travel to Georgia and to assert privilege to each and every question put to him by the District Attorney or the "special purpose

grand jury." While that approach might be reasonable where a witness has privileges that cover only a limited subset of the anticipated questions, it is not reasonable here as applied to Appellant Meadows. This conclusion is consistent with the ABA Standards, which explain 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.

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

Finally, Georgia fails to show that compelling Appellant Meadows to testify before this Georgia investigative body would not violate his right to privacy under the South Carolina constitution. Georgia argues that its "special purpose grand jury" follows "[t]he same secrecy rules that apply to a regular grand jury," Resp. 13, but as noted above, that argument fails to account for the conduct of the prosecutors and for the anticipate investigative report at the conclusion of the body's work. Indeed, in the very next paragraph, Georgia acknowledges that "Meadows' testimony may be revealed in an investigative report" by that same "special purpose grand jury," and claims that "[t]he Uniform Act has never guaranteed anonymity to witnesses." *Id*. But the argument here is about the privacy protections of the South Carolina Constitution, not the Uniform Act.

Georgia tries to draw an analogy, *see* Resp. 13 & n.5, to compelled testimony in open court during a criminal trial, which the Uniform Act plainly permits, and which the right to privacy would not preclude. But that argument misses two fundamental points: First, it is a far worse invasion of privacy to compel Appellant Meadows to testify ostensibly in secret before a "special purpose grand jury" where it is then up to the prosecutors and the body itself to determine what to

disclose and whether to do so selectively. In an open criminal trial, the record speaks for itself. Second, the right to privacy under the South Carolina Constitution calls for a balancing of the privacy invasion against the state's interest, *see Singleton v. State*, 313 S.C. 75, 89, 437 S.E.2d 53, 61 (1993)—a point that Georgia entirely fails to address. As explained in the opening motion, South Carolina has little to no interest (much less a compelling one) to force its citizens to appear before Georgia's novel "special purpose grand jury." By contrast, the State does have a compelling interest in promoting comity to secure testimony of witnesses in criminal prosecutions, as reflected in South Carolina's 1948 adoption of the Uniform Act.

Respectfully submitted,

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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