No. 21 - _____

In the
SUPREME COURT OF THE UNITED STATES

THE LAWYERS' COMMITTEE FOR 9/11 INQUIRY, INC., ROBERT MCILVAINE, and ARCHITECTS & ENGINEERS FOR 9/11 TRUTH,	)	
Plaintiffs – Appellants,	)	
v.	)	**On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**
CHRISTOPHER A. WRAY, Director, Federal Bureau of Investigation, MERRICK GARLAND, Attorney General of the United States, and the UNITED STATES DEPARTMENT OF JUSTICE,	)	
Defendants -- Appellees.	)	

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. Did the United States Court of Appeals for the District of Columbia Circuit Depart from the Accepted and Usual Course of Judicial Proceedings to Such an Extent as to Call for an Exercise of this Court's Supervisory Power When the Court of Appeals Failed to Provide a Remedy or a Disclosure Regarding an Apparent Violation of the Federal Judicial Disqualification Statute Regarding a Judge Who Was a Member of an Appeals Panel in a Case where the Department of Justice was a Defendant While that Judge Was a Candidate Under Consideration for the Nomination to be Attorney General of the United States?

B. Did the United States Court of Appeals for the District of Columbia Circuit Err in Deciding the Proper Role of Legislative History in Determining Congressional Intent in a Manner that Conflicts with Decisions of the Supreme Court on this Important Question When the District Court Concluded that an Appropriations Act, which Provided Substantial Funding for the FBI to Conduct an Independent Assessment of Evidence Related to the Terrorist Attacks of September 11, 2001, Did Not Require the FBI to Report or Disclose Any Information Resulting from this Assessment to Anyone, Including to Congress, Notwithstanding Unambiguous and Authoritative Legislative History to the Contrary?

C. Did the United States Court of Appeals for the District of Columbia Circuit Err in Interpreting the Requirements for Article III Standing in a Manner that Is in Conflict with Decisions of the Supreme Court on this Important Question When It Denied Standing to a Father Who Lost His Son in the 9/11 Attacks, and to Two Non-Profit Organizations Asserting Informational and Organizational Standing, the Missions of which Are Focused on 9/11 Transparency and Government Accountability?

LIST OF PARTIES

Petitioners, who were Plaintiffs-Appellants below, are: The Lawyers' Committee for 9/11 Inquiry, Inc.; Architects & Engineers for 9/11 Truth, and Robert McILvaine.

The Defendants-Appellees are Christopher A. Wray, Director, Federal Bureau of Investigation, Merrick Garland, Attorney General of the United States, and the United States Department of Justice.

CORPORATE DISCLOSURE STATEMENT

The Lawyers' Committee for 9/11 Inquiry, Inc. and Architects & Engineers for 9/11 Truth are not-for-profit corporations which do not have stockholders. Plaintiff Robert McILvaine is an individual.

LIST OF PRIOR DIRECTLY RELATED PROCEEDINGS

The United States Court of Appeals for the District of Columbia Circuit, in *Lawyers' Committee for 9/11 Inquiry, Inc. et al. v. Wray et al.*, Case No. 20-5051, issued its unpublished Judgment, affirming the District Court's decision dismissing Plaintiffs-Appellants claims, on February 16, 2021.

The United States Court of Appeals for the District of Columbia Circuit, in *Lawyers' Committee for 9/11 Inquiry, Inc. et al. v. Wray et al.*, Case No. 20-5051, issued its Order denying Appellants Motion for Disclosure and Alternative Motion to Vacate Judgment, regarding judicial disqualification, on April 16, 2021.

The United States District Court for the District of Columbia, in *Lawyers' Committee for 9/11 Inquiry, Inc. et al. v. Wray et al.*, Case No. 1:19-cv-00824-TNM, issued both its Memorandum Opinion and its Order (District Court Dkt. Nos. 15, 16), dismissing Plaintiffs-Appellants' claims for lack of standing, on January 3, 2020.

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The United States Court of Appeals for the District of Columbia Circuit's Judgment, affirming the District Court's decision dismissing Plaintiffs-Appellants claims, on February 16, 2021 is unpublished, and reported at *Lawyers' Comm. for 9/11 Inquiry, Inc. v. Wray*, 848 F. App'x. 428 (D.C. Cir. 2021).

The United States Court of Appeals for the District of Columbia Circuit's Order denying Appellants Motion for Disclosure and Alternative Motion to Vacate Judgment, regarding judicial disqualification, issued on April 16, 2021 in *Lawyers' Committee for 9/11 Inquiry, Inc. et al. v. Wray et al.*, Case No. 20-5051, is not published or reported.

The United States District Court for the District of Columbia's Memorandum Opinion dismissing Plaintiffs-Appellants' claims for lack of standing, on January 3, 2020, is published. *See Lawyers' Comm. for 9/11 Inquiry, Inc. v. Wray*, 424 F. Supp. 3d 26 (D.D.C. 2020), *aff'd*, 848 F. App'x. 428 (D.C. Cir. 2021).

STATEMENT OF JURISDICTION

The United States Court of Appeals for the District of Columbia Circuit issued its opinion, affirming the District Court's decision, on February 16, 2021.

Petitioners filed the instant Petition on July 16, 2021, within 150 days of the February 16, 2021, decision of the Court of Appeals, via commercial courier for delivery to the Clerk of this Court within three days, in compliance with this Court's Order of March 19, 2020 (which allows 150 days for the filing of any Petition for Certiorari).

28 U.S.C. § 1254(1) is the statutory provision which confers on this Court jurisdiction to review on a W*rit of Certiorari* the judgment and orders of the United States Court of Appeals for the District of Columbia Circuit in question in this case.

No special notifications pursuant to Rule 29.4(b) or (c) are required.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

> Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

28 U.S.C. § 455(a).

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same

> State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const. art. III, § 2, cl. 1.

> Provided further, That $500,000 shall be for a comprehensive review of the implementation of the recommendations related to the Federal Bureau of Investigation that were proposed in the report issued by the National Commission on Terrorist Attacks Upon the United States.

Consolidated and Further Continuing Appropriations Act, Public Law 113–6, 127 STAT. 198, 247 (Mar. 26, 2013).

STATEMENT OF THE CASE

A. Jurisdiction of the District Court

The federal statutes that provide jurisdiction to the District Court are 28 U.S.C. § 1331 (federal question); 28 U.S.C. §1346(a)(2) (United States as defendant); and 28 U.S.C. § 1361 (mandamus).

Plaintiffs' action below was an action under the federal mandamus statute, 28 U.S.C. § 1361 (Mandamus Statute), and the Administrative Procedures Act, 5 U.S.C. §§ 702, 706 (APA), seeking to compel the Federal Bureau of Investigation (FBI) and the Department of Justice (DOJ) to comply with a mandate from Congress issued in 2013-2014 in the Consolidated and Further Continuing Appropriations Act, 2013, Pub. L. No. 113-6, 127 Stat. 198, 247 (2013). This mandate from Congress required the FBI to conduct an independent assessment of

all evidence known to the FBI related to the terrorist attacks of September 11, 2001 (9/11) not considered by the original 9/11 Commission.

In their Amended Complaint Plaintiffs alleged, *inter alia,* that Defendants, after acknowledging this mandate from Congress, and purporting to comply with this mandate, knowingly failed to include in Defendants' assessment (issued in the form of a 2015 report by the FBI's "9/11 Review Commission") numerous entire categories of significant evidence known to the FBI related to the terrorist attacks of September 11, 2001, that were not considered by the original 9/11 Commission, and thereby failed to comply with the mandate from Congress.

B. Jurisdiction of the Court of Appeals

The Court of Appeals had appellate jurisdiction pursuant to 28 U.S.C. § 1291. Petitioners timely appealed to the United States Court of Appeals for the District of Columbia Circuit from the final Memorandum Opinion and Order, both entered by the District Court on January 3, 2020, which dismissed all of Petitioners' claims in the action.

Plaintiffs timely filed their Notice of Appeal within 60 days on March 3, 2020.

C. Relevant Procedural History

On March 25, 2019, Plaintiffs filed their original Complaint seeking

injunctive relief under the APA and the Mandamus Statute and alleging that the federal Defendants had failed to comply with the mandate from Congress which imposed on them a non-discretionary duty to conduct an independent assessment of all evidence known to the FBI related to the terrorist attacks of September 11, 2001, not considered by the original 9/11 Commission. District Court Dkt. #1. The Complaint included several counts each addressing a significant category of 9/11 evidence ignored and excluded by the federal Defendants in their 2015 report.

On August 30, 2019, Plaintiffs filed their First Amended Complaint (FAC), District Court Dkt. #10, which reasserted Plaintiffs' original counts under the APA and the Mandamus Statute and added additional fact allegations.

On September 11, 2019, the federal Defendants filed a Motion to Dismiss the FAC. District Court Dkt. #12.

On January 3, 2020, the District Court granted the Defendants' Motion to Dismiss and dismissed with prejudice all counts of the Amended Complaint. District Court Dkt. #15 (Memorandum Opinion), #16 (Order).

On March 3, 2020, Plaintiffs filed their Notice of Appeal of the District Court's Order and Final Judgment. District Court Dkt. #17.

On June 22, 2020, Petitioners filed their Brief before the D.C. Circuit.

On August 21, 2020, the federal Defendants-Appellees filed their appellate

Brief.

On October 16, 2020, after Petitioners' appeal had been briefed, the D.C. Circuit issued an order scheduling oral argument in the case for December 9, 2020. The composition of the appeals panel was not announced.

On November 24, 2020, the D.C. Circuit appeals panel issued an Order in Petitioners' appeal stating that oral argument would not assist the Court and that the case would be decided on the record and the briefs. This Order disclosed that the three Circuit judges on the appeals panel included then-Circuit Judge Merrick Garland (now Attorney General of the United States).

On February 16, 2021, the D.C. Circuit appeals panel issued its unpublished Judgment affirming the Judgment of the District Court.

On April 1, 2021, Petitioners filed their Motion for Disclosure and Alternative Motion to Vacate Judgment with the D.C. Circuit (regarding a judicial disqualification issue related to then-Circuit Judge Garland, see discussion *infra*).

On April 12, 2021, the federal Defendants-Appellees filed their response to Petitioners' Motion for Disclosure and Alternative Motion to Vacate Judgment.

On April 16, 2021, the appeal panel of the D.C. Circuit issued its decision denying Petitioners' Motion for Disclosure and Alternative Motion to Vacate Judgment.

On July 16, 2021, Petitioners filed the instant Petition for Certiorari with the Supreme Court.

D. Material Facts

Plaintiffs Robert McILvaine, the father of a victim of the 9/11 terrorist attacks at the World Trade Center WTC), the nonprofit organization Lawyers' Committee for 9/11 Inquiry, Inc., and the nonprofit organization Architects and Engineers for 9/11 Truth filed the underlying action for injunctive relief on March 25, 2019 under the Administrative Procedure Act (APA), 5 U.S.C. §§ 702, 706, and the federal mandamus statute, 28 U.S.C. § 1361 (Mandamus Statute), regarding FBI failures to comply with a mandate from Congress regarding 9/11.

Following those tragic events of 9/11 at the WTC in New York City, at the Pentagon, and near Shanksville Pennsylvania, the Congress initiated a joint inquiry into the 9/11 attacks. This investigation (the "Joint Inquiry") was conducted by Senate and House Intelligence Committees. The report from this inquiry was released in part in December 2002 but the final section, encompassing some twenty-eight pages, was withheld from the public. Fourteen years later, on July 15, 2016, public pressure finally caused the release of the withheld "Twenty-Eight Pages." The 2002 Joint Inquiry was limited in scope, partially secret, and did not satisfy the public demand for a comprehensive investigation into 9/11. FAC, ¶ 2.

Public pressure from 9/11 family members caused Congress to establish the National Commission on Terrorist Attacks Upon the United States (the 9/11 Commission). This Commission was tasked to prepare a full account of the circumstances surrounding 9/11. FAC, ¶ 3). The 9/11 Commission suffered from several publicly acknowledged limitations. For example, Co-Chair of the Commission former Congressman Lee Hamilton concluded that the government established the 9/11 Commission in a manner designed to ensure that it would fail. Commission Co-Chair Hamilton stated that there were all kinds of reasons that he and others on the Commission thought they were set up to fail. FAC, ¶ 4.

Ultimately, the 9/11 Commission produced its own voluminous report which made certain recommendations related to the FBI and addressed some, but not all, of the then-available evidence relating to the 9/11 attacks. The members of the 9/11 Commission acknowledged that additional evidence relating to 9/11 would likely be brought forward later. Over the years that followed, significant additional evidence regarding the 9/11 attacks was publicly reported, some from government inquiries and some from inquiries by concerned citizens and non-profits. FAC, ¶ 5.

In January 2014, Congress mandated a new 9/11 inquiry by the FBI. Congress mandated that the FBI conduct a comprehensive external review of the implementation of the recommendations related to the FBI that were proposed in

the report issued by the 9/11 Commission. Specifically included in this mandate was the requirement that the FBI and the external review body it created in implementing this external review (which ultimately became known as the "9/11 Review Commission"), assess any 9/11 related evidence known to the FBI that was not considered by the original 9/11 Commission. Further, the Congress mandated that the FBI submit a report to the relevant committees of the Congress on the findings and recommendations resulting from this review. FAC, ¶ 6. This mandate was expressed in P.L. 113-6, and in the Senate Explanatory Report of March 11, 2013 for Public Law 113-6 (March 23, 2013), which states:

> Implementation of 9/11 Commission recommendations. This Act includes $500,000 for a comprehensive external review of the implementation of the recommendations related to the FBI that were proposed in the report issued by the National Commission on Terrorist Attacks Upon the United States (commonly known as the ''9/11 Commission''). The scope of this review shall include: (1) … **(3) an assessment of any evidence now known to the FBI that was not considered by the 9/11 Commission related to any factors that contributed in any manner to the terrorist attacks of September 11, 2001**; and (4) … . **The FBI shall submit a report to the Committees, no later than one year after enactment of this Act, on the findings and recommendations resulting from this review.** The FBI is encouraged, in carrying out this review, to draw upon the experience of 9/11 Commissioners and staff.

CONGRESSIONAL RECORD, March 11, 2013, SENATE at page S1305 (emphasis added).

The Congress as a whole was not only aware of this Senate Explanatory Report, but included in Public Law 113-6 the following statement:

> EXPLANATORY STATEMENT
>
> SEC. 4. The explanatory statement regarding this Act printed in the Senate section of the Congressional Record on or about March 11, 2013, by the Chairwoman of the Committee on Appropriations of the Senate **shall have the same effect with respect to the allocation of funds and implementation of this Act as if it were a joint explanatory statement of a committee of conference**.

PUBLIC LAW 113–6, MAR. 26, 2013, 127 STAT. 199 (emphasis added).

This directive from Congress was understood *by the federal Defendants* at the time to be mandatory. The 2015 Report of the FBI's 9/11 Review Commission itself shows that the contemporaneous understanding of the Defendants was that they were indeed acting under a clear mandate from Congress.

> (U) INTRODUCTION THE FBI 9/11 REVIEW COMMISSION
>
> (U) The FBI 9/11 Review Commission was established in January 2014 pursuant to a congressional mandate. The United States Congress directed the Federal Bureau of Investigation (FBI, or the "Bureau") to create a commission with the expertise and scope to conduct a "comprehensive external review of the implementation of the recommendations related to the FBI that were proposed by the National Commission on Terrorist Attacks Upon the United States (commonly known as the 9/11 Commission)." The Review Commission was tasked specifically to report on:
>
> * * *

> 3. **An assessment of any evidence not [sic] [now] known to the FBI that was not considered by the 9/11 Commission related to any factors that contributed in any manner to the terrorist attacks of September 11, 2001**.
>
> * * *
>
> (U) The Review Commission was funded by Congress in Fiscal Years 2013, 2014, and 2015 (FY13, FY14, and FY15) budgets … . **The enabling legislation also required the FBI Director to report to the Congressional committees of jurisdiction on the findings and recommendations resulting from this review.**

Report of the 9/11 Review Commission, p. 3 (footnotes omitted, emphasis added)

(Petitioners' D.C. Circuit Appendix at 114).

> The Senate passed Resolution 610 on September 26, 2018, stating:
>
> There are so many we honor today by our passage of this sense-of-the-Senate resolution. This Senate resolution is itself succinct but significant. It resolves that it is the sense of the Senate that documents related to the events of September 11, 2001, should be declassified to the greatest extent possible; and, two, that the survivors, the families of the victims, and the people of the United States deserve answers about the events and circumstances surrounding the September 11 terrorist attack upon the United States. Many years later, the pain and grief they endured on that horrific day is still with them. Each year in Connecticut we commemorate this day, and we will never forget. That is our resolve--never to forget, never to yield to hopelessness, never to allow our support for these families to diminish. This sense-of-the-Senate resolution makes real the promise the Nation made to these 9/11 families. They deserve this evidence. Even if it is embarrassing to foreign governments or foreign nationals, they deserve justice.

Senate Resolution 610, Wed. September 26, 2018, Cong. Rec. pp. 56316-56317.

Defendants failed to comply with the mandate from Congress in several ways, as reflected in the FBI's 9/11 Review Commission Report, completed and released March 25, 2015, and as described in the FAC. The FAC provides details of significant 9/11 evidence not considered by the original 9/11 Commission, evidence the existence of which the FBI's 9/11 Review Commission Report failed to even recognize, and totally failed to assess. FAC, ¶ 7, and Counts IA-VIIB.

A few examples from Paragraph 34 and its subparagraphs in the First Amended Complaint illustrate the significance of the evidence ignored by the FBI in its 2015 "9/11 Review Commission" report:

> 34a. Numerous First Responders … reported sights and sounds of explosions on 9/11 which due to the circumstances, timing, and specific details observed and reported could not be explained by plane impacts or resultant office fires. …
>
> 34b. … See, Harrit, N.H., Farrer, J., Jones, S., "Active Thermitic Material Discovered in Dust from the 9/11 World Trade Center Catastrophe," The Open Chemical Physics Journal, Vol. 2, pp. 7-31 (2009). According to these highly qualified scientists, WTC dust contained distinctive red/gray colored chips, which when tested, "possess a strikingly similar chemical signature" to "commercial thermite" – a high tech explosive or incendiary … "[T]he red layer of the red/gray chips . . . discovered in the WTC dust is active, unreacted thermitic material, incorporating nanotechnology, and is a highly energetic pyrotechnic or explosive material."
>
> 34c. Expert analysis of seismic data and the resulting conclusion that explosions occurred at WTC1 and WTC2 on 9/11 prior to the airplane impacts on WTC1 and WTC2, as well as prior to

the buildings' collapses.

> 34d. The presence in all of the WTC dust of tons of previously molten iron-rich metal microspheres, … that would be physically impossible based on the burning of jet fuel and office contents alone, but would be expected if high-tech … nano-thermite explosives and/or incendiaries were used … .
>
> * * *
>
> 34g. Testimony from experts and eye-witnesses which confirm instrument readings of extremely high temperatures exceeding 2,800ºF and fires persisting at Ground Zero for months after 9/11 that cannot be explained by burning jet fuel or building contents but which are consistent with the presence of thermate … or nano-thermite.

FAC (Petitioners' D.C. Circuit Appendix at 50).

Petitioners also alleged in the FAC facts related to the Petitioners' standing. Plaintiff Robert McILvaine is the father of Bobby McIlvaine. Bobby McIlvaine was killed at the World Trade Center on 9/11. FAC ¶ 15. If the Defendants are ordered to comply with the mandate from Congress, the result of such an FBI investigation and report to Congress, regarding 9/11 evidence that Defendants have heretofore failed to assess or report, is reasonably expected to be a better public understanding of the events of 9/11 and disclosure of any criminal conduct or government malfeasance, misfeasance or non-feasance not previously known by the public. Such a report would provide a more complete picture of what happened on 9/11, assisting the family members of the 9/11 victims, including Robert

McIlvaine, in coming to closure regarding this tragedy. *See* FAC ¶ 15.

Plaintiff Lawyers' Committee for 9/11 Inquiry, Inc. (hereafter "Lawyers' Committee") is a Pennsylvania non-profit corporation. The mission of the Lawyers' Committee is to promote transparency and accountability regarding the tragic events of 9/11. The Lawyers' Committee has a special interest in the Defendants complying with the mandate from Congress at issue. A report to Congress by Defendants regarding the 9/11 related evidence referenced in the FAC that Defendants failed to assess would promote both primary goals in the Lawyers' Committee's mission: transparency and accountability regarding the tragic events of 9/11. These are important organizational interests distinct from the general public's interest in agency compliance with the law. FAC, ¶ 10.

Plaintiff Architects & Engineers for 9/11 Truth (AE) is a non-profit organization, incorporated in California, that has conducted an independent multi-year scientific investigation of the causes of the collapse on 9/11 of the WTC towers and WTC Building 7. AE's mission includes investigation and education of the public as to the true reasons these WTC buildings collapsed. This is an important organizational interest distinct from the general public's interest in seeing agencies comply with the law. A report to Congress by Defendants regarding the 9/11 related evidence addressed in the FAC that Defendants failed to

assess, particularly in regard to the evidence regarding use of explosives and incendiaries to demolish three WTC buildings on 9/11, would promote the primary goals of AE's non-profit mission. FAC, ¶ 13. AE funded a special engineering study of the collapse of World Trade Center 7 on 9/11, contracted for by AE with civil engineering Professor Leroy Hulsey of the University of Alaska (available at https://www.ae911truth.org/wtc7).

On August 30, 2019, the Lawyers' Committee along with AE filed an application for a reward with the U.S. State Department and the FBI under the State Department's Rewards for Justice Program. FAC, ¶¶ 11, 14. This program offers rewards to citizens who report information that leads to the arrest or conviction of persons who committed or aided the commission of terrorist acts or crimes. As part of its application, the Lawyers' Committee submitted evidence and information it had previously submitted to the U.S. Attorney (S.D.N.Y.) pursuant to 18 U.S.C. § 3332(a). This evidence, which includes eye-witness testimony from First Responders and extensive scientific evidence and expert analysis, thoroughly addresses the fact, described in the FAC, Count IA, that three WTC buildings were destroyed on 9/11 by use of explosives. FAC, Count IA, ¶¶ 30-49. Petitioners also offered to submit to the District Court additional standing facts and evidence via affidavits or declarations or via a requested evidentiary hearing.

During the pendency of Petitioners' appeal to the D.C. Circuit an issue arose regarding whether a Circuit Judge on the appeal panel should have been disqualified or recused earlier. On October 16, 2020, after the appeal had been briefed, the D.C. Circuit issued an order scheduling oral argument in the case for December 9, 2020. The three-judge panel that would hear and decide the case was not announced at that time. On November 20, 2020, at least four media organizations (NPR, FOX, Yahoo News, and The Hill) published stories indicating that Judge Merrick Garland was under consideration by then President-Elect Biden to be his nominee for the position of Attorney General of the United States, and that Judge Garland was on the short list of 3-5 such candidates. (Exhibits 1, 2, and 3 to Petitioners' Motion for Disclosure to the D.C. Circuit).

On November 24, 2020, the D.C. Circuit issued another order stating that the three-judge panel had decided that oral argument would not assist the Court and that the case would be decided on the record and the briefs. The three judges on the panel were listed as Garland, Pillard, and Katsas. No indication was given that any Judge had not participated in this decision to dispense with oral argument.

The D.C. Circuit's rules and procedures require that the judge designated as the case screening judge determine initially if oral argument appears to not be necessary and then that screening judge must get the concurrence of both other

judges on the three-judge panel before issuance of an order dispensing with oral argument. Thus, there is little doubt that Judge Garland participated in the November 24, 2020 decision that dispensed with oral argument in this appeal.

Judge Garland at some later point may have recused. The date any recusal commenced has not been reported to Petitioners. Judge Garland's possible disqualification in Petitioners' appeal was not discovered until the final unpublished Judgment was issued on February 16, 2021. Neither "disqualification" nor "recusal" was explicitly referenced in this unpublished Judgment. There was no appointment of a judge to replace Judge Garland on the three-judge panel.

On January 6, 2021, the media reported that Judge Garland had won the competition among the candidates and that President-Elect Biden intended to nominate Judge Garland to be Attorney General of the United States. (Exhibit 4 to Petitioner's Motion for Disclosure to the D.C. Circuit). President Biden thereafter officially announced that Judge Garland was the President's nominee for Attorney General. The Senate held confirmation hearings and Judge Garland was confirmed by the Senate. (Exhibits 5, 6, Petitioners' Motion for Disclosure).

On February 16, 2021, the D.C. Circuit appeal panel issued an unpublished Judgment in Petitioners' appeal. The unpublished Judgment affirmed the District Court's decision that all Appellants lacked standing. This Judgment included a

footnote stating that "Judge Garland was a member of the panel at the time this case was submitted but did not participate in the final disposition of the case."

On April 1, 2021, Petitioners filed their Motion for Disclosure and Alternative Motion to Vacate Judgment with the D.C. Circuit, requesting a full disclosure of the facts and sequence and timing of events relating to Judge Garland's participation on the appeal panel while under consideration to be the President's nominee to become Attorney General. In the alternative to such a full disclosure, the Petitioners requested that the panel's unpublished Judgment be vacated in order to promote public confidence in the judicial system. On April 16, 2021, the appeal panel denied Petitioners' Motion.

ARGUMENT ON REASONS FOR ALLOWANCE OF THE WRIT

A. The United States Court of Appeals for the District of Columbia Circuit Departed from the Accepted and Usual Course of Judicial Proceedings to Such an Extent as to Call for an Exercise of this Court's Supervisory Power When the Court of Appeals Failed to Provide a Remedy or Even a Disclosure Regarding an Apparent Violation of the Federal Judicial Disqualification Statute Regarding a Judge Who Was a Member of an Appeals Panel in a Case Where the Department of Justice was a Defendant While that Judge Was a Candidate Under Consideration for the Nomination to be Attorney General of the United States

This Court should grant this Petition for Certiorari because the D.C. Circuit failed to provide a remedy or even a disclosure regarding an apparent and blatant

violation of the federal judicial disqualification statute in a high profile matter involving a judge who was a candidate for the nomination to be Attorney General (who was nominated and confirmed as Attorney General). This case, a civil action brought by Petitioners against the United States Department of Justice and the FBI, was decided on February 16, 2021 by a panel of this Court that included then-Circuit Judge Merrick Garland. Judge Garland was then the nominee of President Biden to lead the Department of Justice, a defendant-appellee in this matter, as Attorney General. Judge Garland has since been confirmed as Attorney General.

The facts presented *supra* require some appropriate judicial action in order to maintain and promote public confidence in the integrity of the judiciary. Given the facts stated herein, Petitioners believe it would be appropriate for the Supreme Court to grant this Petition for Certiorari and order the D.C. Circuit to make the disclosures requested by Petitioners in their Motion for Disclosure and Alternative Motion to Vacate, and to also determine whether the unpublished Judgment issued by the D.C. Circuit on February 16, 2021, should be vacated to promote and maintain public confidence in the integrity of the judiciary.

Members of the public reviewing the facts here could reasonably have a concern that even though Judge Garland is reported to have taken no part in the final decision of the D.C. Circuit, the decision to dispense with oral argument that

Judge Garland did participate in, and the likely related decision to issue the later final decision in unpublished form, could have been outcomes desired in themselves by the federal Defendants-Appellees, the DOJ and FBI.

These decisions, while not the final decision on the merits, would result in the appeal and the underlying case, which relate to an FBI failure to comply with a mandate from Congress to evaluate 9/11 evidence, having a lower profile, i.e., getting less media and public attention (and less attention from Congress) than would have been the case had oral argument been held and had the final decision been in the form of a published opinion.

As reflected in the facts stated *supra*, Judge Garland was publicly known to be on President Biden's short list of candidates for the Attorney General nomination at least as early as November 20, 2020. This was four days prior to Judge Garland's participation in the panel's decision and order to dispense with oral argument, issued November 24, 2020.

Pursuant to 28 U.S.C. § 455, "(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." While Appellants are not in a position to know when Judge Garland first knew he was a candidate for the

Attorney General nomination, the obligation of a judge under 28 U.S.C. § 455 to disqualify turns on what the public, not the judge, knew at the relevant time.

> [A] judge must recuse when his impartiality "might reasonably be questioned," 28 U.S.C. § 455(a), whether or not he is aware of the circumstances giving rise to the basis for such reasonable questioning, see *Liljeberg v. Health Services Acquisition Corp*., 486 U.S. 847, 858–61, 108 S.Ct. 2194, 2201–03, 100 L.Ed.2d 855 (1988), … .

Whitehall Tenants Corp. v. Whitehall Realty Co., 136 F.3d 230, 233 (2d Cir. 1998) (emphasis added).

28 U.S.C. § 455(a) establishes a disqualification standard more demanding (of judges) than that required by the Due Process Clause. *Southern Pacific Communications Co. v. American Tel. & Tel. Co.*, 740 F.2d 980, 991 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1005 (1985), *citing Tumey v. Ohio*, 273 U.S. 510, 523 (1927), *United States v. Haldeman*, 559 F.2d 31, 130 n. 276 (D.C. Cir. 1976) (*en banc*) (*per curiam*), *cert. denied*, 431 U.S. 933 (1977); *In re IBM Corp*., 618 F.2d 923, 932 n. 11 (2d Cir. 1980); *FTC v. Cement Institute*, 333 U.S. 683, 702 (1948).

What matters is not just justice but also that "the appearance of justice" be satisfied. *U.S. v. Diaz*, 797 F.2d 99, 100 (2d Cir. 1986), *citing Offutt v. United States*, 348 U.S. 11, 14 (1954). The standard under 28 U.S.C. § 455(a) is objective, not subjective, and requires recusal when a judge's impartiality "might reasonably

be questioned." *U.S. v. Diaz*, 797 F.2d 99, 100 (2d Cir. 1986), *citing In re IBM Corp*., 618 F.2d 923, 929 (2d Cir.1980); 28 U.S.C. § 455(a).

The Due Process Clause may sometimes require disqualification of a judge who has no actual bias and "who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, 'justice must satisfy the appearance of justice."' *Aetna Life Insurance Co. v. Lavoie,* 475 U.S. 813, 825 (1986).

The Supreme Court observed in *Liljeberg* that the purpose of 28 U.S.C. § 455(a) is to "promote public confidence in the integrity of the judicial process," a concern which has "constitutional dimensions." *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 860, 865 n. 12 (1988) *citing Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986).

A judge's lack of awareness of the circumstances that bear on the question of disqualification are irrelevant to the duty to disqualify. *Whitehall Tenants Corp. v. Whitehall Realty Co*., 136 F.3d 230, 233 (2d Cir. 1998) *citing Liljeberg*, 486 U.S. at 859. In the *Whitehall* case, there were only "remote" circumstances that persuaded the judge to recuse himself in an abundance of caution, circumstances that involved no interest—pecuniary or otherwise—in the outcome of the litigation. *Id*. Thus, invalidation of the judgment was not considered necessary.

On the other extreme of the disqualification circumstances continuum is *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986) in which the Court vacated a judgment where the deciding vote was cast by a judge with a substantial pecuniary interest in the outcome. The *Aetna* court held that the appropriate inquiry should be whether the "situation is one 'which would offer a possible temptation to the average ... judge to ... lead him not to hold the balance nice, clear and true.'" *Id.* at 822 (*quoting Ward v. Monroeville*, 409 U.S. 57, 60 (1972)).

Further, in another case on different facts, but analogous, the Supreme Court distinguished scenario where a judge was not eligible to have been appointed to a panel in the first instance versus where the initial appointment was valid.

> It is "clear that the statute was not intended to preclude disposition by a panel of two judges in the event that one member of a three-judge panel to which the appeal is assigned becomes unable to participate," *ibid*., but it is less clear whether the quorum statute offers postjudgment absolution for the participation of a judge who was not otherwise competent to be part of the panel under § 292(a).

Nguyen v. U.S., 539 U.S. 69, 83 (2003).

In a situation as here, where a judge who though eligible to participate in a panel when appointed to the panel becomes ineligible during the panel's deliberations, but only disqualifies himself after having participated to some extent in the panel including in significant procedural decisions, the remaining two judges

should not be considered to constitute a proper quorum of the panel to decide the case because this procedure would not remove the taint of the disqualified judge's earlier participation.

In the instant case, the circumstance of Judge Garland serving on the appeals panel after being under consideration by the President-Elect to be nominated to lead the federal agency being sued by the Lawyers' Committee in this case cannot reasonably be considered "remote" in regard to either potential bias or an impact on public confidence in the judiciary. While it is not clear that Judge Garland's participation in the panel proceedings here was analogous to casting a deciding vote on the merits, nonetheless, Judge Garland participated in some of the panel's early proceedings and in at least one procedural decision of consequence -- dispensing with oral argument. That decision may have had another significant consequence – issuance of the case decision as an unpublished Judgment.

The question is whether the circumstances here require vacating the panel's decision in order to promote public confidence in the integrity of the judiciary.

> Moreover, advancement of the purpose of the provision—to promote public confidence in the integrity of the judicial process, see S.Rep. No. 93–419, p. 5 (1973); H.R.Rep. No. 93–1453, p. 5 (1974)—does not depend upon whether or not the judge actually knew of facts creating an appearance of impropriety, so long as the public might reasonably believe that he or she knew.

Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 859-60 (1988).

Where the instant case falls on the continuum of disqualification circumstances in regard to deciding a proper remedy, and whether the panel's decision should be vacated, may only be capable of being adequately evaluated based on the information requested by Petitioners to be disclosed. Unfortunately, the D.C. Circuit appeal panel declined to grant any disclosure on the matter. That decision further undermines public confidence in the judiciary. Petitioners respectfully request that the Supreme Court grant this Petition for Certiorari in order to avoid irreparable damage to public confidence in the judicial system.

B. The Decision Below of the United States Court of Appeals for the District of Columbia Circuit, that an Appropriations Act, which Provided Substantial Funding for the FBI to Conduct an Independent Assessment of Evidence Related to the Terrorist Attacks of September 11, 2001, Did Not Require the FBI to Report or Disclose Any Information Resulting from this Assessment of the Worst Terrorist Attack in the Nation's History to Anyone, Even to Congress Itself, Notwithstanding Unambiguous and Authoritative Legislative History to the Contrary, Is in Error and in Conflict with Decisions of the Supreme Court on the Important Question of the Role of Legislative History in Determining Congressional Intent

The D.C. Circuit, in affirming the District Court's decision, acted contrary to precedent of this Court and erred as a matter of law in its interpretation of the Consolidated and Further Continuing Appropriations Act, 2013, Pub. L. No. 113-6, 127 Stat. 198, 247 (2013), and the legislative history for this Act, when the District

Court concluded that this Act, which provided substantial funding for the FBI to conduct an independent assessment of all 9/11 evidence did not require the FBI to report or disclose any information resulting from this expensive assessment of the worst terrorist attack in the nation's history to anyone, even to Congress itself. This interpretation was an absurdity and flew in the face of plainly contrary clear and authoritative legislative history, which under the Supreme Court's precedent should have been considered.

Certiorari should be granted here because this departure from this Court's precedent by the D.C. Circuit was an extreme one with the potential for far reaching consequences. Both lower courts have essentially put themselves in the position of deciding what only Congress can decide and express – the intent of Congress, in this case regarding a comprehensive FBI review and assessment of 9/11 the details of which are not spelled out in the statutory language. The D.C. Circuit, like the District Court, not only transgressed the Supreme Court's precedent, but both lower courts transgressed the Separation of Powers established in the Constitution by usurping the authority of Congress to define for itself what its intentions are in ordering and funding a study by an executive agency.

The D.C. Circuit, like the District Court, concluded that because the language requiring the report to Congress was not found in the language of the

public law at issue, which only stated that the FBI had to conduct a congressionally funded comprehensive 9/11-related external review, but was found in the Senate Explanatory Report, that the plain language of the statute precluded resort to that (abundantly clear and indisputably authoritative) legislative history, and thus concluded erroneously that there was no reporting or disclosure requirement imposed on the federal Defendants by Congress.

The District Court gave no weight to the fact that in Public Law113–6, Mar. 26, 2013, 127 STAT. 199, itself, the Congress gives this Senate Explanatory Statement the force of a joint explanatory statement of a committee of conference. Further, the District Court ignored this Court's precedent that legislative history may be resorted to when the language of a statute is only superficially clear, and in particular when a plain reading of the literal language results in an absurdity. Here, it is an absurdity to conclude that Congress spent over a million dollars for an FBI independent assessment of all evidence related to the worst terrorist attack in the nation's history and did not intend the FBI's assessment to be reported to anyone, including 9/11 victim's families, or even to the funding entity -- Congress.

"[W]hen the statute's language is plain, the sole function of the courts — **at least where the disposition required by the text is not absurd** — is to enforce it according to its terms." *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004)

(emphasis added). *And see, Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (same); *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) (same).

"Reference to statutory design and pertinent legislative history may often shed new light on congressional intent, notwithstanding statutory language that appears superficially clear." *See, e.g., Natural Res. Def. Council v. Browner*, 57 F.3d 1122, 1127 (D.C. Cir. 1995) (emphasis added). *Also see, Sierra Club v. EPA*, 353 F.3d 976, 988 (D.C. Cir. 2004); *Consumer Elec. Ass'n v. FCC*, 347 F.3d 291, 298 (D.C. Cir. 2003).

> The plain meaning of legislation should be conclusive, **except in the "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters**." *Griffin v. Oceanic Contractors, Inc*., 458 U.S. 564, 571, 102 S.Ct. 3245, 3250, 73 L.Ed.2d 973 (1982). **In such cases, the intention of the drafters, rather than the strict language, controls**. *Ibid*.

United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 242 (1989) (emphasis added). Interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available. *Griffin v. Oceanic Contractors, Inc*., 458 U.S. 564, 575 (1982) (citing *United States v. American Trucking Assns., Inc.*, 310 U.S., at 542–543; *Haggar Co. v. Helvering*, 308 U.S. 389, 394 (1940)); *U.S. ex rel. Totten v. Bombardier Corp.*,

380 F.3d 488, 494–95 (D.C. Cir. 2004).

The lower courts here focused on the fact that Public Law 113-6 did not explicitly specify that the FBI was mandated to assess and report all 9/11 evidence, but there is no language in Public Law 113-6 to the contrary, and what Public Law 113-6 does say is that the 9/11 review to be conducted by the FBI is to be "comprehensive." Congress simply made clear in the Senate Explanatory Report, which the entire Congress in enacting Public Law 113-6 gave the force of a joint explanatory statement of a committee of conference, that to be "comprehensive," a term not free of ambiguity, the FBI review must include "an assessment of any evidence now known to the FBI that was not considered by the 9/11 Commission related to any factors that contributed in any manner to the terrorist attacks of September 11, 2001." A conference report offers "'persuasive evidence of congressional intent' after statutory text itself." *Moore v. District of Columbia*, 907 F.2d 165, 175 (D.C. Cir.1990) (*quoting & citing Demby v. Schweiker*, 671 F.2d 507, 510 (D.C. Cir. 1981)).

Here, it is an absurdity to conclude that Congress spent over a million dollars for an FBI independent assessment of all evidence related to the worst terrorist attack in the nation's history and did not intend the FBI's assessment to be reported to anyone, even to Congress. Consequently, the lower courts here should

have examined the legislative history and found it to be as abundantly clear as it plainly is, to the effect that Defendants were obligated to report their independent assessment of all 9/11 evidence to the relevant committees of Congress.

The District Court acknowledged that the federal Defendants themselves read this mandate from Congress to require them to issue a report to Congress, which in fact Defendants did.

> To be sure, the FBI took the explanatory statement seriously. As Plaintiffs point out, the 9/11 Review Commission did in fact issue a report in response to the 2013 appropriations act. See Opp'n at 10–11. The report opined that Congress had "required" the FBI to produce it. Mot. to Dismiss Ex. 1 at 5. It is hardly surprising that the FBI heeded the stated desire of its appropriators. That does not mean the FBI was legally required to do so, though. In any event, the FBI's interpretation of the law is not controlling.

District Court January 3, 2020, Memorandum Opinion, p. 7.

The District Court should have taken this evidence of the Defendants' own contemporaneous conduct, in reading the mandate as Plaintiffs read it, as a clear indication that a contrary interpretation that there was no reporting requirement in the mandate from Congress would lead to an absurd result – that Congress would spend more than a million dollars for a "comprehensive" external FBI review of the crime of the century and the worst terrorist attack in the United States in history and not intend to have the results reported to the Congress or the American people.

Once reported to Congress, such reports would normally be publicly available, absent extraordinary circumstances and a specific finding by Congress that they needed to be kept secret. The Journal Clause of the United States Constitution requires that "Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy." U.S. CONST. art. I § 5 cl. 3. The Supreme Court, for example, in 1892, in *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892), noted the purpose of the Journal Clause was to inform the electorate regarding congressional proceedings and promote government transparency.

> On the contrary, as Mr. Justice Story has well said, 'the object of the whole clause is to insure publicity to the proceedings of the legislature, and a correspondent responsibility of the members to their respective constituents. And it is founded in sound policy and deep political foresight. Intrigue and cabal are thus deprived of some of their main resources, by plotting and devising measures in secrecy. The public mind is enlightened by an attentive examination of the public measures; patriotism and integrity and wisdom obtain their due reward; and votes are ascertained, not by vague conjecture, but by positive facts. * * * So long as known and open responsibility is valuable as a check or an incentive among the representatives of a free people, so long a journal of their proceedings and their votes, published in the face of the world, will continue to enjoy public favor and be demanded by public opinion.' 2 Story, Const. §§ 840, 841.

Id. at 670-71.

It is clear that the Congress would not likely see a need for secrecy regarding

this FBI assessment. Apart from the fact that the "9/11 Review Commission" report of 2015 was unclassified and made available to the public, the Senate has made clear its desire and intention that all 9/11 related evidence be declassified and disclosed not only to the public to the maximum extent possible but also specifically for the benefit of 9/11 family members. *See* Senate Resolution 610, Wed. September 26, 2018, Cong. Rec. pp. 56316-56317.

Here, the D.C. Circuit's failure to abide by the Supreme Court's precedent is blatant because in the instant case it is not actually the disposition required by the statutory text standing alone that is absurd. It is worse than that. The statutory text here simply says that the FBI is to conduct a comprehensive review and assessment. This general language is not incompatible with the specifics in the legislative history – the Senate Explanatory Report (treated as a report of a joint committee of conference.) That Senate Explanatory Report simply fleshes out the details of what is to be included in the "comprehensive" assessment that the Congress requested. It is the D.C. Circuit's and the District Court's misreading of the language of the 2013 Appropriations Act, as if it were not only specific and unambiguous so as to foreclose any role for legislative history in interpreting the statute but also somehow incompatible with the intent the Congress clearly expressed in the Senate Explanatory Report, that results in the absurdity.

Review on certiorari by this Court here is clearly warranted. Not only is the D.C. Circuit's decision contrary to this Court's precedent regarding the proper role of legislative history in statutory interpretation, it is such an extreme departure from this Court's precedent that it will invite courts in the D.C. Circuit, and likely elsewhere, to usurp the role of Congress in defining what the Congress intends in a particular legislative act.

C. The Decision Below of the United States Court of Appeals for the District of Columbia Circuit, which Denied Standing to a Father Who Lost His Son in the 9/11 Attacks, and to Two Non-Profit Organizations Asserting Informational and Organizational Standing, the Missions of which Are Focused on 9/11 Transparency and Government Accountability, Is in Error and in Conflict with Decisions of the Supreme Court on the Important Question of the Constitutional Requirements for Article III Standing

Certiorari should be granted here because the D.C. Circuit, in affirming the District Court's decision, clearly and knowingly acted contrary to Supreme Court precedent. Both lower courts here concluded that each of the Plaintiffs-Appellants, including one family member of a 9/11 victim, Plaintiff Robert McILvaine whose son Bobby perished at the World Trade Center on 9/11, and two nonprofit organizations whose mission is focused on 9/11 transparency and government accountability, lacked Informational Standing to challenge the FBI's failure to comply with the mandate from Congress to conduct an independent assessment of

all 9/11 evidence. In so doing, the D.C. Circuit, like the District Court, acknowledged the precedent holding that Informational Standing is to be determined based on the *plaintiffs reading* of the requirements of the law at issue, but nonetheless decided the Informational Standing issue based on the *Circuit's and the District Court's contrary reading* of the law at issue (the Consolidated and Further Continuing Appropriations Act, 2013, Pub. L. No. 113-6).

Under the Supreme Court's precedent, Plaintiffs do have Informational Standing because the Defendants actions deprived Plaintiffs of access to information to which they and the public would have had access had Defendants complied with the mandate from Congress, as Plaintiffs-Petitioners read (and as the federal Defendants previously read – prior to being sued) that law. That is, Petitioners, absent Defendants' arbitrary and capricious actions and actions not in accordance with law and Defendants' failure to comply with their non-discretionary duty under the mandate from Congress, would have had access to a congressionally mandated comprehensive independent assessment of truly all 9/11 evidence known to the FBI that was not considered by the 9/11 Commission.

The Supreme Court has explained that a plaintiff "suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute." *FEC v. Akins*, 524 U.S. 11, 21, 118 S.Ct. 1777, 141 L.Ed.2d

10 (1998); see also *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 449, 109 S.Ct. 2558, 105 L.Ed.2d 377 (1989) (finding that failure to obtain information subject to disclosure under Federal Advisory Committee Act "constitutes a sufficiently distinct injury to provide standing to sue").

> The 'injury in fact' that respondents have suffered consists of their inability to obtain information—lists of AIPAC donors ... and campaign-related contributions and expenditures—that, **on respondents' [plaintiffs'] view of the law**, the statute requires that AIPAC make public.

FEC v. Akins, 524 U.S. 11, 21 (1998) (emphasis added). The Supreme Court held, based on this reasoning, that plaintiffs had informational standing to challenge the agency's decision because were plaintiffs to prevail, the agency would have to disclose the information sought.

In departing from this Court's precedent, the District Court's reasoning, adopted by the D.C. Circuit, was as follows.

> The D.C. Circuit's framing does seem permissive—the question is whether a plaintiff "has been deprived of information that, on its interpretation, a statute requires the government or a third party to disclose to it." *Id*. at 992 (emphasis added). Even so, the case law does not require the Court to ignore the plain terms of a statute, even at the pleading stage.

District Court's Memorandum Opinion of January 3, 2020. The lower courts engaged in this departure from precedent, requiring that the plaintiff's view of the

statutory requirements for agency production of information to the public be adopted for purposes of the standing analysis, on the asserted basis that Plaintiffs' (Petitioners') reading was contrary to the plain language of the 2013 Appropriations Act at issue. However, it was not just the Plaintiffs-Petitioners who read the Act as having a reporting requirement imposed on the federal Defendants – so did the federal Defendants at the time (and they did issue a report to Congress and publicly released it), as noted *supra*.

The erroneous result of this unwarranted departure by the lower courts here from this Court's precedent in *Akins* regarding Informational Standing is particularly disturbing in regard to the District Court's determination that *had there been* a reporting requirement in this mandate from Congress, then Plaintiff Robert McILvaine, father of Bobby McILvaine who perished at the World Trade Center on 9/11, may have had Informational Standing.

> For example, **if Congress had required the FBI to report on new evidence**, **perhaps the goal would have been to mitigate the suffering of survivors like McIlvaine**. But Congress did not require the disclosure of any information, so Plaintiffs cannot show informational injury.

District Court's Memorandum Opinion of January 3, 2020, p. 9 (emphasis added). The D.C. Circuit affirmed the District Court's decision and rationale, and in doing so itself departed from this Court's precedent in *Akins*.

If the Defendants are ordered to comply with the mandate from Congress that they perform an assessment of any 9/11 evidence known to the FBI that was not considered by the 9/11 Commission, the result of such an FBI investigation and report to Congress can reasonably be expected to be a better public understanding of the events of 9/11, and possibly disclosure of criminal conduct or government malfeasance not previously known by the public. The resulting public disclosures will provide a more complete picture of the truth of what happened on 9/11, assisting 9/11 family members in coming to closure regarding this tragedy.

This is an important personal interest, shared only by the family members of 9/11 victims such as Petitioner McIlvaine, and is distinct from the general public's interest in seeing government agencies comply with the law. Mr. McILvaine has been requesting the federal government to provide a true and complete explanation of how and why his son Bobby died at the WTC on 9/11 but to date no agency has done so. Thus, Mr. McILvaine has not only informational standing, but standing under the First Amendment to petition his government for redress of this grievance and the instant case is one mechanism for him to do so. As explained *supra*, the Senate has made clear via a Resolution that it intends that as much government 9/11 evidence as possible be made available to 9/11 family members.

Because the D.C. Circuit acted contrary to this Court's precedent in *Akins*

regarding Informational Standing, and achieved an unjust result, this Court should grant Petitioner's Petition for Certiorari and reverse the Circuit's decision.

The District Court and the D.C. Circuit also erred as a matter of law and acted contrary to this Court's precedent in concluding that each of the Organizational Plaintiffs-Appellants, nonprofit organizations whose mission is focused on 9/11 transparency and government accountability, lacked Organizational Standing.

In *Havens Realty Corp. v. Coleman*, this Court held that an organization may establish Article III standing if it can show that the defendant's actions cause a "concrete and demonstrable injury to the organization's activities" that is "more than simply a setback to the organization's abstract social interests." 455 U.S. at 379, 102 S.Ct. 1114. In making the organizational standing decision in *Havens*, the Supreme Court accepted the allegations in the plaintiff's complaint as true. The Court in *Havens* held that "concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests." *Id.*

The key for organizational standing is whether the challenged actions of Defendants are in direct conflict with the organizational plaintiff's mission and harms the organization's interests in some concrete manner. The refusal of the

Defendants here to honor the mandate from Congress to assess all 9/11 evidence is directly contrary to both organizational plaintiffs' missions which focus on 9/11 transparency and accountability.

> As explained in *Equal Rights Center*, we begin an inquiry into *Havens* standing by asking whether the defendant's allegedly unlawful activities injured the plaintiff's interest in promoting its mission. *Id*. at 1140. If the answer is yes, we then ask whether the plaintiff used its resources to counteract that injury.

American Soc. for Prevention of Cruelty to Animals v. Feld Entertainment, Inc., 659 F.3d 13, 19–20 (D.C. Cir. 2011).

Had the FBI and its 9/11 Review Commission honored its mandate from Congress and assessed and reported to Congress the publicly available evidence articulated in the FAC, the organizational plaintiffs would not have had to expend thousands of hours and tens of thousands of dollars developing and filing a Petition to the U.S. Attorney for the special grand jury in New York and the State Department Rewards Program application, and AE would not have had to expend over two hundred thousand dollars for the special engineering study contracted for by AE with civil engineering Professor Leroy Hulsey of the University of Alaska (available at https://www.ae911truth.org/wtc7). The organizational plaintiffs here engaged in these extraordinary expenditures of resources in an effort to counteract

the harm to their interests caused by Defendants' failures to comply with the mandate from Congress to assess and report on all 9/11 evidence.

Because the D.C. Circuit acted contrary to this Court's precedent in *Havens* regarding Organizational Standing, and achieved an unjust result, this Court should grant Petitioner's Petition for Certiorari and reverse the Circuit's decision.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Supreme Court of the United States grant this Petition for Writ of Certiorari and clarify the applicable law for the nation's courts on these important questions regarding judicial disqualification, use of legislative history, and Article III standing.

Respectfully submitted,

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