No. 19-307

In the Supreme Court of the United States

STUART A. MCKEEVER,

Petitioner,

v.

WILLIAM P. BARR,
ATTORNEY GENERAL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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ARGUMENT

Everyone agrees: The decision below creates a circuit split over whether district courts have inherent authority to release grand-jury materials in limited circumstances not covered by Federal Rule of Criminal Procedure 6(e). The D.C. Circuit is now an outlier in denying the existence of that authority, with five other circuits taking the contrary view. The split is important; it will not disappear on its own; and this Court should resolve it. *See* Sup. Ct. R. 10(a).

Seeking to escape that straightforward conclusion, the Government devotes virtually its entire response to arguing that the D.C. Circuit's divided panel got it right on the merits. Those arguments are better saved for later, but the Government is mistaken: Its flawed interpretation of Rule 6(e) is out of step with the Rule's text and history, as well as with the Government's own prior interpretations. And the Government's half-hearted suggestion that petitioner would be denied relief under the correct standard is also meritless: Disclosure of grand-jury testimony from a handful of witnesses who appeared more than 60 years ago would advance the public interest while harming no one. This case is an ideal vehicle to resolve the circuit split and reaffirm that district courts have inherent authority to release grand-jury materials in appropriate cases. The petition should be granted.

A. This Court Should Resolve The Split

1. The Government concedes that "the decision below creates a conflict among the courts of appeals on the question presented." BIO 18. As the petition explains (at 15–20), the Second, Seventh, and

Eleventh Circuits have expressly held that district courts have inherent authority to release grand-jury records in limited circumstances not directly addressed by Rule 6(e), and the First and Tenth Circuits have indicated they would rule the same way. The D.C. Circuit, meanwhile, has now rejected that view, expressly acknowledging that its "view of Rule 6(e) differs from that of some other circuits." Pet. App. 15a.

The circuit split is reason enough to grant certiorari. *See* Sup. Ct. R. 10(a). Distinguished judges have issued thoughtful and reasoned opinions coming down on both sides of a significant question of federal law. Moreover, the Government does not deny that the question presented is important and frequently recurs. There is no reason that requests for historically significant grand-jury materials should be resolved differently throughout the country, based simply on the happenstance of where the underlying grand-jury proceeding arose.

2. The Government nonetheless urges this Court to let the circuit split fester, arguing that review would be "premature" because the courts on the other side of the split might suddenly decide to change their minds. BIO 18. That is not remotely likely.

The Second Circuit's rule has been entrenched for almost fifty years, since Chief Judge Friendly's decision in *In re Biaggi*, 478 F.2d 489 (2d Cir. 1973). It was later reaffirmed and expanded upon in *In re Craig*, where Judge Calabresi's opinion identified factors that courts should analyze when considering whether to exercise their inherent authority to release grand-jury materials. 131 F.3d 99, 105 (2d Cir. 1997). As the Government knows, the Second Circuit virtually never grants rehearing en banc. *See,*

e.g., *United States v. Taylor*, 752 F.3d 254, 255 n.1 (2d Cir. 2014) (Cabranes, J., dissenting from denial of rehearing en banc) ("Our Court hears the fewest cases en banc of any circuit by a substantial margin, both in absolute terms and when considering the relative size of our docket."). The odds that the Second Circuit is going to suddenly decide to rethink decades of precedent—to overturn decisions by Judges Friendly and Calabresi, no less—is vanishingly small.

Nor is the Seventh Circuit likely to change its mind anytime soon. That court upheld the inherent authority of district courts to release grand-jury materials three years ago, in a reasoned and thoughtful opinion by Chief Judge Wood. *See Carlson v. United States*, 837 F.3d 753, 761–67 (7th Cir. 2016). It did so in the face of an equally thoughtful (albeit mistaken) dissent from Judge Sykes. *See id.* at 767–71. Both sides of the issue were fully aired, and yet no member of that court called for en banc review—nor did the Government itself see any point to requesting it. There is no reason to believe the Seventh Circuit is going to abruptly reverse course.

The Government points to the First Circuit (in which the inherent-authority question is now pending in district court) and the Eleventh Circuit (which recently granted rehearing en banc sua sponte to reconsider its longstanding rule recognizing inherent authority). *See* BIO 21 (discussing *In re Lepore*, No. 1:18-mc-91539 (D. Mass. filed Dec. 17, 2018), and *Pitch v. United States*, 925 F.3d 1224 (11th Cir. 2019)). But neither circuit can eliminate the split on its own, given the entrenched positions taken by the Second, Seventh, and D.C. Circuits. Whatever those courts ultimately decide, the split is real and here to stay—unless this Court intervenes.

In any event, the First Circuit will surely follow Chief Judge Boudin's analysis in *In re Grand Jury Proceedings*, which stated that "district courts have inherent power beyond the literal wording of Rule 6(e)(3) to disclose grand jury material." 417 F.3d 18, 26 n.9 (1st Cir. 2005) (citation omitted), *cert. denied*, 546 U.S. 1088 (2006). And the Eleventh Circuit's grant of en banc review does not necessarily mean it will abandon its longstanding position: The court ordered en banc consideration of four questions, three of which involved the standards by which courts should *exercise* their inherent authority. *See* Memorandum from David J. Smith, Clerk of Court, to Counsel or Parties 1, *Pitch*, No. 17-15016 (11th Cir. July 12, 2019). The cases pending in those circuits offer no reason to abstain from resolving the split.

3. The Government also suggests (at 19–21) that this Court should deny review and defer to the Advisory Committee on Criminal Rules. But this Court does not ordinarily shy away from resolving important circuit splits simply because they implicate the Federal Rules. The Court regularly grants certiorari to decide other important questions about the Rules,[1] and over the years it has decided no fewer

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[1] *See, e.g.*, *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865, 1872 (2018) (Fed. R. Civ. P. 44.1); *Chen v. Mayor of Baltimore*, 574 U.S. 988, 988 (2014) (Fed. R. Civ. P. 4(m)); *United States v. Davila*, 569 U.S. 597, 605 (2013) (Fed. R. Crim. P. 11(c)(1)); *Henderson v. United States*, 568 U.S. 266, 270 (2013) (Fed. R. Crim. P. 52(b)); *United States v. Marcus*, 560 U.S. 258, 262 (2010) (Fed. R. Crim. P. 52(b)); *Ashcroft v. Iqbal*, 556 U.S. 662, 670, 677–78 (2009) (Fed. R. Civ. P. 8(a)(2)); *Puckett v. United States*, 556 U.S. 129, 133 (2009) (Fed. R. Crim. P. 52(b)); *Republic of Philippines v. Pimentel*, 553 U.S. 851, 854 (2008) (Fed. R. Civ. P. 19); *Irizarry v. United States*, 553 U.S.

than *seven* cases about the meaning of Rule 6(e) specifically.[2] Indeed, the Government itself regularly asks for certiorari in cases implicating the Rules when doing so serves its interests.[3] This case should not be treated differently.

Waiting for action by the Advisory Committee is especially ill-advised here, because the Committee has already—and recently—made clear it agrees with the majority side of the circuit split. The Government does not deny that in 2012, the Committee rejected a government-sponsored amendment to Rule 6(e) after concluding that the Rule does not eliminate district courts' inherent authority to release grand-jury materials outside of Rule 6(e)'s exceptions. *See* Pet.

708, 713 (2008) (Fed. R. Crim. P. 32(h)); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553–55 (2007) (Fed. R. Civ. P. 8(a)(2)); *Weisgram v. Marley Co.*, 528 U.S. 440, 446 (2000) (Fed. R. Civ. P. 50); *Agostini v. Felton*, 521 U.S. 203, 214 (1997) (Fed. R. Civ. P. 60(b)(5)); *Henderson v. United States*, 517 U.S. 654, 660 (1996) (Fed. R. Civ. P. 4); *United States v. Mezzanatto*, 513 U.S. 196, 197 (1995) (Fed. R. Crim. P. 11(e)(6)); *Crosby v. United States*, 506 U.S. 255, 256–58 (1993) (Fed. R. Crim. P. 43).

[2] *United States v. John Doe, Inc. I*, 481 U.S. 102 (1987); *United States v. Sells Eng'g, Inc.*, 463 U.S. 418 (1983); *United States v. Baggot*, 463 U.S. 476 (1983); *Illinois v. Abbott & Assocs., Inc.*, 460 U.S. 557 (1983); *Douglas Oil Co. of Cal. v. Petrol Stops Nw.*, 441 U.S. 211 (1979); *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395 (1959); *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958).

[3] *See, e.g.*, Br. for the United States as Amicus Curiae, *Animal Sci. Prods.*, No. 16-1220 (Nov. 14, 2017) (Fed. R. Civ. P. 44.1); Pet. for a Writ of Cert., *Davila*, No. 12-167 (Aug. 3, 2012) (Fed. R. Crim. P. 11(c)(1)); Pet. for a Writ of Cert., *Marcus*, No. 08-1341 (May 1, 2009) (Fed. R. Crim. P. 52(b)); Br. for the United States as Amicus Curiae, *Pimentel*, No. 06-1204 (Nov. 2, 2007) (Fed. R. Civ. P. 19); Pet. for a Writ of Cert., *United States v. Barnett*, No. 04-1690 (June 16, 2005) (Fed. R. Crim. P. 52(b)).

25–26. There is no good reason to hope for the Committee to revisit this issue yet again.

B. The Government Is Wrong On The Merits

Perhaps sensing its weakness on the traditional certiorari criteria, the Government (at 9–18) instead devotes most of its response to the merits. This is not the time or place to address the Government's arguments in full, but a few points are worth briefly noting.

1. The Government asserts (at 9, 11) that its position is based on the "plain text" of Rule 6(e), but that's simply not true. The Government repeatedly claims that Rule 6(e) imposes a "prohibition on disclosure '[u]nless these rules provide otherwise.'" BIO 10 (alteration in original) (quoting Fed. R. Crim. P. 6(e)(2)(B)). From that premise, the Government reasons (at 10–11) that Rule 6(e)(3)'s "[e]xceptions" are the only provisions to "provide otherwise," are exclusive, and do not cover the disclosure sought here.

But the Government gets the language of the Rule exactly backwards. Rule 6(e) actually starts from the opposite textual premise: "*No obligation of secrecy may be imposed on any person* except in accordance with Rule 6(e)(2)(B)." Fed. R. Crim. P. 6(e)(2)(A) (emphasis added). The Rule then imposes a secrecy obligation on specific, named persons—grand jurors, government attorneys, and certain others. Fed. R. Crim. P. 6(e)(2)(B). Crucially, however, the Rule does *not* include the district court on that list.

The Government's self-described "plain text" argument against inherent authority thus lacks any textual basis whatsoever. The Government itself essentially concedes as much, plaintively insisting (at 11) that "a rule of criminal procedure need not

explicitly name the district court for its provisions to be understood as applying to the court." Whatever the merits of that atextual assertion in general, it has no application here, where the Rule expressly states that it applies *only* to certain specifically listed persons and *also* states that "[n]o" additional "obligation of secrecy may be imposed on any person." Fed. R. Crim. P. 6(e)(2)(A). The Rule itself embraces the *expressio unius* principle, and the district court is thus not directly subject to Rule 6(e)'s prohibition.[4]

2. The Government also argues that petitioner's argument renders the list of exceptions in Rule 6(e)(3) "largely superfluous." BIO 12. But that's not right, either. Those exceptions memorialize—and make uniform nationwide—a variety of common reasons why courts have authorized disclosure of grand-jury materials. *See In re Petition to Inspect & Copy Grand Jury Materials* (*Hastings*), 735 F.2d 1261, 1268–69 (11th Cir.), *cert. denied*, 469 U.S. 884 (1984); *In re Am. Historical Ass'n*, 49 F. Supp. 2d 274, 286 (S.D.N.Y. 1999). As the Seventh Circuit has explained, it is "entirely reasonable for the rulemakers to furnish a list that contains frequently invoked reasons to disclose grand-jury materials, so that the court knows that no special hesitation is necessary in those circumstances." *Carlson*, 837 F.3d at 764–65. The exceptions provide guidance to district courts and

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[4] The Government also repeatedly mentions that "Congress directly enacted much of the relevant text of [Rule 6(e)] in 1977." BIO 2. This is a red herring. The Federal Rules are "as binding as any statute duly enacted by Congress." *Bank of Nova Scotia v. United States*, 487 U.S. 250, 255 (1988). Congress's direct involvement with Rule 6(e) has no bearing on the validity (or not) of the parties' competing interpretations.

eliminate any need to rely on inherent authority in the specified circumstances.

Although the Government points out (at 12) that Rule 6(e)(3)(E)'s exceptions are directed to "[t]he court," those exceptions are permissive, do not purport to be exhaustive, and do not curtail district courts' traditional, inherent authority to disclose grand-jury materials in other appropriate circumstances. Moreover, those exceptions address when courts may "*authorize*" disclosure—*i.e.*, approve disclosures made by the individuals specifically identified in Rule 6(e)(2)(B)—not when they may disclose the materials *themselves*.[5]

3. The Government barely even tries to refute petitioner's historical arguments. It is undisputed that before the Federal Rules were enacted, district courts had discretion to release grand-jury materials. *See* Constitutional Accountability Center Amicus Br. 5–8. Rule 6(e) has never expressly imposed a secrecy obligation on the court, and in 1944 the Advisory Committee made clear that the recently enacted Rule 6(e) "continue[d] the traditional practice of secrecy on the part of members of the grand jury, *except when the court permits a disclosure*." Fed. R. Crim. P. 6(e)

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[5] The Government's more fundamental argument—that grand-jury records are not court records *at all* (BIO 14–15)—is likewise unsupported. Rule 6(e)'s text, structure, and precedent all confirm that grand-jury records are court records subject to judicial supervision and release. *See, e.g.*, Fed. R. Crim. P. 6(e)(1) (requiring government attorneys to retain grand-jury records "[u]nless the court orders otherwise"); *In re Application to Unseal Dockets*, 308 F. Supp. 3d 314, 324 (D.D.C. 2018) (collecting cases from this Court and five circuits). The fact that grand-jury records are secret by default does not change their fundamental character as court records.

advisory committee's note to 1944 adoption (emphasis added). At that time, the Committee also expressly endorsed various decisions embracing district-court inherent authority to relax grand-jury secrecy in appropriate circumstances. *See* Pet. 25–26. The Government has no response to these points.

Nor does the Government have any coherent explanation for its own history of flip-flopping on the inherent-authority issue. *See id.* at 24–25. The Government concedes that it took the opposite position in *Haldeman v. Sirica*, 501 F.2d 714 (D.C. Cir. 1974) (en banc), but claims that since 1996, it has "consistently maintained that district courts are bound by Rule 6(e)." BIO 14 n.*.

That latter assertion is untrue. Since at least 1993, the Office of Legal Counsel (OLC) has taken the position that a district court can exercise its "inherent authority to disclose grand jury materials for reasons other than those specified in Rule 6(e)"—and that courts should use that authority to release such materials *to the President* in certain circumstances. 17 Op. O.L.C. 59, 68 (1993); *see id.* at 65–69 (embracing *Hastings*); *see also* 24 Op. O.L.C. 366, 367, 373 n.8 (2000) (noting OLC's longstanding reliance on "inherent authority" recognized by *Hastings* and *Craig*); *cf.* 26 Op. O.L.C. 78, 79, 84, 87, 91–92 (2002) (repeatedly asserting existence of "implied exception" to Rule 6(e) for certain disclosures to President).

And just a few months ago, the Government sought to impose a secrecy obligation on a grand-jury witness—in direct defiance of Rule 6(e)(2)'s express terms—by appealing to the exact same inherent authority it now purports to disclaim. *See In re Application of USA*, No. 19-wr-10, slip op. at 8–10 (D.D.C. Aug. 6, 2019), https://www.dcd.uscourts.gov

/sites/dcd/files/REDACTED_In_re_1651_20190812_Opt.pdf. As the district court there noted, the Government's position on whether Rule 6(e) eliminates inherent authority has been "inconsistent" and "incongruent." *Id.* at 8 n.4; *see id.* (discussing Government's assertions in this case and others).

C. This Case Is An Ideal Vehicle

The Government closes its opposition with two sentences half-heartedly suggesting that this case is a "poor vehicle in which to review the question presented" because the district court declined to exercise its inherent authority to grant petitioner access to the grand-jury records the court understood him to be seeking. BIO 23.

The D.C. Circuit did not rely on that theory—for good reason. The district court actually found petitioner's pro se request for materials from the John Joseph Frank grand jury to be compelling. It noted that petitioner is a bona fide historian, that the passage of more than 60 years has undercut any continuing need for secrecy, and that the Galíndez case and Frank's role therein are of great historical importance. *See* Pet. App. 37a–39a.

The district court denied petitioner's request only because of its perceived "sheer breadth." *Id.* at 39a. But that conclusion rested on a mistaken "presumpt[ion]" that petitioner sought *all* the Frank grand-jury testimony and records. *Id.* Petitioner has since made clear that he is *not* seeking all the testimony and records, but instead seeks only the testimony of just a handful of witnesses. *See* C.A. Court-Appointed Amicus Br. 53–57 (Apr. 4, 2018).

If this Court agrees with petitioner that district courts have inherent authority to release grand-jury

materials in appropriate circumstances, it can remand the case for consideration of whether his now-clarified—and carefully limited—request should be granted. And that request will almost surely be granted, given the factors supporting disclosure emphasized by the district court. *See* Pet. App. 37a–39a.

In no event should the initial confusion over the scope of petitioner's pro se request prevent this Court from resolving the circuit split and settling—once and for all—the important question of whether Rule 6(e) somehow silently eliminated district courts' long-recognized inherent authority to release grand-jury records in exceptional circumstances.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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