No. _____

In The
Supreme Court of the United States

MARION E. PITCH, the Personal Representative of the Estate of ANTHONY S. PITCH, and LAURA WEXLER,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Federal Rule of Criminal Procedure 6 governs grand jury proceedings, including the obligations of secrecy imposed on specific classes of persons under Rule 6(c). This Rule also expressly lists five exceptions under Rule 6(e) that permit the disclosure of grand jury materials under certain notable circumstances.

Federal Circuit Courts of Appeals are divided on the question of whether the Federal District Court possesses the inherent authority to release grand jury materials outside of the enumerated exceptions under Rule 6(e). The Second and Seventh Circuits have specifically recognized that such authority exists upon a showing of exceptional circumstances and have applied this standard to applications for the release of grand jury materials in cases of national historical significance. The Eleventh Circuit's recent en banc decision in the case at bar deepened the Circuit Split arising out of the D.C. Circuit's ruling in *McKeever v. Barr*, 920 F.3d 842 (D.C. Cir. 2019), *cert. denied*, 589 U.S. ___, 140 S. Ct. 597 (Jan. 21, 2020), concluding that no such inherent authority exists. This critical split arose after the District Court's inherent authority was uniformly relied upon to release such materials in cases of historical significance.

The instant matter seeks the disclosure of grand jury materials arising from one of the last unsolved mass lynching crimes, the Moore's Ford Grand Jury convened in Georgia in December 1946, a case of exceptional historical significance which occurred at the onset of the modern Civil Rights Movement.

THE QUESTION PRESENTED IS:

1. Whether the Federal District Court has the inherent authority under case law precedent or the

Civil Rights Cold Case Records Collection Act to release grand jury materials under exceptional circumstances outside of the exceptions listed in Rule 6(e), including in cases of historical significance where public interests strongly compel disclosure?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner Marion E. Pitch is the Executrix of the Estate of Anthony S. Pitch, a historian who researched and wrote a literary work on the subject matter of the instant Petition. Laura Wexler is a historian who researched and wrote on the subject matter of the instant Petition. Neither Petitioner is a corporation, has a corporate parent, or is owned in whole or in part. Respondent is the United States of America.

LIST OF RELATED PROCEEDINGS

In re Petition of: Anthony S. Pitch, No. 5:14-mc-00002 (MTT), U.S. District Court for the Middle District of Georgia. Judgment entered October 26, 2017.

Marion E. Pitch, The Personal Representative of the Estate of Anthony S. Pitch, Plaintiff-Appellee, Laura Wexler, Intervenor, v. United States of America, Defendant-Appellant, No. 17-15016, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered March 27, 2020.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Marion E. Pitch and Laura Wexler respectfully petition this Honorable Court for a Writ of Certiorari to review the majority judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS AND ORDERS BELOW

The majority opinion of the Court of Appeals en banc reversing the Court of Appeals (App. 1a-107a) is reported at 953 F.3d 1226 (11th Cir. 2019). The order of the Court of Appeals ordering rehearing en banc (App. 151a-152a) is reported at 925 F.3d 1224 (11th Cir. 2019). The opinion of the Court of Appeals affirming the District Court's decision (App. 126a-150a) is reported at 915 F.3d 704 (11th Cir. 2019). The District Court's memorandum opinion and order directing the release of grand jury materials (App.108a-125a) is reported at 275 F. Supp.3d 1373 (M.D.Ga. 2017).

JURISDICTION

The Court of Appeals entered its opinion and judgment on February 11, 2019. App. 126a. On June 4, 2019, the Court of Appeals, upon its own initiative, ordered that the matter be set down for a rehearing en banc. App. 151a. On March 27, 2020, the Court of Appeals entered its majority opinion and judgment following a rehearing en banc. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RULE AND STAUTORY PROVISIONS INVOLVED

Federal Rule of Criminal Procedure 6(e) is reproduced at App. 153a-159a. Federal Rule of Criminal Procedure 57 is reproduced at App. 160a-161a. The Civil Rights Cold Case Records Collection Act of 2018, Pub. L. No. 115-426, 132 Stat. 5489 (2019) (codified at 44 U.S.C. § 2107) is reproduced at App. 162a-187a.

INTRODUCTION

This case raises signal questions concerning the inherent authority of Federal District Courts to release grand jury records in matters where applicable procedural rules do not specifically address important circumstances, including those involving historical significance and the ability of the public to access such information. Federal District Courts have long possessed the inherent authority to release grand jury records under exceptional circumstances and have exercised such authority under narrow circumstances whenever justice or the public interest impel them to do so. This has resulted in the release of grand jury records in matters of historical significance, concerning President Richard Nixon and Watergate, James Hoffa, the espionage cases of Alger Hiss and Julius and Ethel Rosenberg, and the *Chicago Tribune's* reporting on preparations for the Battle of Midway.

The Petitioners Marion Pitch, the personal representative of the Estate of Anthony Pitch, and Laura Wexler, submit this Petition for Certiorari to the Honorable United States Supreme Court seeking

disclosure of the Transcripts and Related Materials of the Grand Jury convened on December 2, 1946 concerning the "Moore's Ford Lynching" that occurred on July 25, 1946, and in response to an en banc Eleventh Circuit Court of Appeals majority opinion dated March 27, 2020, which reversed an Eleventh Circuit panel opinion and a United States District Court for the Middle District of Georgia order directing release of the transcripts. This decision also reversed the Eleventh Circuit's own precedent recognizing the inherent supervisory authority of the District Court over grand jury materials. This reversal eliminated the Court's own authority to release grand jury materials in cases of historical significance, even where the records were decades old and the need for secrecy had greatly diminished. This decision also deepens an existing Circuit Split. Finally, this decision ignores the guidance of the Advisory Committee on Criminal Rules, which held in 2012 that District Courts possessed the inherent supervisory authority to release grand jury materials under exceptional circumstances outside of the confines of Rule 6(e). This Honorable Court should grant certiorari to the instant petition in the interest of historical truths, resolving the Circuit Split, and correcting the Eleventh Circuit's misinterpretation of the Rule, thereby permitting disclosure of the Moore's Ford Grand Jury transcripts.

Federal Rule of Criminal Procedure 6 governs grand jury proceedings and records in Federal District Courts, including grand jury secrecy. *See* Fed. R. Crim. P. 6(c), 6(d), 6(e); *United States v. Sells Eng'g, Inc.,* 463 U.S. 418, 425 (1983); *In re Biaggi*, 478 F.2d 489, 491 (2d Cir. 1973). This Rule provides that "[n]o 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). Under this Rule, specific persons must "not disclose a matter before the grand jury" "[u]nless these rules provide otherwise." Fed. R. Crim. P. 6(e)(2)(B). This obligation is imposed on seven specific classes of persons associated with a grand jury, such as grand jurors and government attorneys. Significantly, the District Court and its judges, who possess supervisory authority over grand juries, are not included in this proscription. *See* Fed. R. Crim. P. 6(e)(2)(B). Rule 6(e) lists five "Exceptions" to the secrecy imposed, including authorizing disclosure "preliminary to or in connection with a judicial proceeding", to a defendant where such records may provide grounds for dismissal of an indictment due to "a matter before the grand jury", or to the government regarding other criminal investigations. Fed. R. Crim. P. 6(e)(3).

Rule 6(e) is tellingly silent regarding the authority of the District Court to release grand jury records in other circumstances. Rule 6(e) states that, "[u]nless these rules provide otherwise, the following persons must not disclose a matter occurring before the grand jury" before listing certain specific persons, which do not include the Court itself. Fed. R. Crim. P. 6(e)(2).

Importantly, several District Courts have ordered the release of such records in matters involving historical significance under their inherent supervisory authority. The Second and Seventh Circuits have held that under Rule 6(e), District Courts retain the inherent supervisory authority to release grand jury records under exceptional circumstances where the interest in disclosure far outweighs the continuing need for secrecy, including

in matters of historical significance, great public interest, and the passage of time. *See In re Petition of Craig for Order Directing Release of Grand Jury Minutes ("In re Craig")*, 131 F.3d 99 (2d Cir. 1997); *Carlson v. United States,* 837 F.3d 753 (7th Cir. 2016). Additionally, the First and Tenth Circuits have recognized the inherent supervisory authority of District Courts under other circumstances. This result is entirely consistent with the Rule, which prevents the court from imposing any "obligation of secrecy ... except in accordance with Rule 6(e)(2)(B)." Fed. R. Crim. P. 6(e)(2)(A). Although Rule 6(e) does not specify a temporal endpoint on grand jury secrecy, the listed exceptions establish that temporal limits exist on a case-by-case basis. *See* Fed. R. Crim. P. 6(e)(3).

This result also comports with Rule 6(e) because while a Federal District Court cannot fashion a remedy in contravention of established law or procedural rules, the Court may exercise discretion in addressing situations which are not so explicitly covered. Fed. R. Crim P. 57(b) ("[a] judge may regulate practice in any manner consistent with federal law, these rules, and the local rules of the district."); *see also Carlson v. United States*, 837 F.3d 753 (7th Cir. 2016) (order to disclose grand jury records of criminal investigation of major intelligence leak during World War II affirmed where seventy years elapsed).

In the instant case, however, the Eleventh Circuit understood the Rule very differently than the above-referenced Circuits as well as its own precedent. Although the text of Rule 6(e)(2)(A) does not list the District Court, the Eleventh Circuit read such list as *including* the District Court. On that

basis, the Eleventh Circuit held that the District Court does not possess the inherent supervisory authority to release grand jury materials outside of the exceptions listed in Rule 6(e)(3). In so doing, the Eleventh Circuit underscored an existing disparity among the Circuits and reversed its own precedent in both the instant matter and its longstanding decision, *In re Petition to Inspect & Copy Grand Jury Materials ("In re Hastings")*, 735 F.2d 1261, 1272 (11th Cr. 1984), *cert. denied*, 469 U.S. 884 (1984).

This Honorable Court should reverse this decision for four fundamental reasons. *First*, the Eleventh Circuit's decision deepens a split among the Circuits which became apparent with the D.C. Circuit's holding in *McKeever v. Barr*, 920 F.3d 842 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 597 (2020). The Eleventh Circuit's interpretation of Rule 6(e) explicitly differs and "therefore disagree[s] with the Seventh Circuit." App. 17a. This decision conflicts with the interpretation of Rule 6(e) as applied in the Second Circuit, *In re Craig*, 131 F.3d 99, 105 (2d Cir. 1997), and the Seventh Circuit in *Carlson v. United States*, 837 F.3d 753 (7th Cir. 2016). Both the D.C. and the Eleventh Circuits disagree with the interpretation of Rule 6(e) by the Seventh Circuit. *McKeever v. Barr*, 920 F.3d 842, 848 (calling Seventh Circuit's "account of Rule 6 ... difficult to square with the text"); *Carlson v. United States*, 837 F.3d 753, 764 (finding that D.C. Circuit's approach "makes no sense."). The First and Tenth Circuits have also recognized this inherent authority over grand jury disclosures outside of the confines of Rule 6(e)(3). *See In re Grand Jury Proceedings*, 417 F.3d 18, 26 (1st Cir. 2005), *cert. denied*, 546 U.S. 1088 (2006); *In re Special Grand Jury 89-2*, 450 F.3d 1159, 1178 (10th Cir.

2006). The issues remain active. *See, e.g., In re Petition of Lepore*, Case No. 1:18-mc-91539 (D.Mass. judgment entered June 23, 2020) (petition seeking disclosure of 1971 Boston Pentagon Papers Grand Jury materials).[1]

Second, the Eleventh Circuit's holding is patently erroneous. This Court does not "lightly assume" that the Federal Rules of Criminal Procedure eliminate a District Court's inherent supervisory authority. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 47 (1991) (citation omitted). The text and history of Rule 6(e) demonstrate that the District Court's longstanding preexisting inherent supervisory authority over the grand jury and records is maintained under the Rules. The Eleventh Circuit's interpretation of this Court's precedent is clearly erroneous as demonstrated by the unequivocal interpretations of the Advisory Committee on Criminal Rules and Committee on Rules of Practice and Procedure in 2012, as recognized in the denial of certiorari in *McKeever v. Barr*, 140 S. Ct. 597 (2020), decided before the instant matter. The Eleventh Circuit's determination is also mistaken based upon the enactment of the Civil Rights Cold Case Records Collection Act of 2018, Pub. L. No. 115-426, 132 Stat. 5489 (2019) (codified at 44 U.S.C. § 2107) ("Cold Case Act"), which operates upon a predicate of existing inherent supervisory authority of the District Court over grand jury materials. The Cold Case Act provides for the collection and public disclosure of

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[1] In *Lepore*, the District Court granted the petition in an opinion dated February 4, 2020 and entered judgment on June 23, 2020, subject to the filing of an appeal within sixty days. As of August 16, 2020, Petitioners and Counsel are unaware of further developments.

records relating to civil rights cold cases arising between 1940 and 1979. *See id.* at §§ 2(2), 3(A). This timely legislation also establishes a Review Board tasked with requesting that the Attorney General petition Courts to release grand jury records, where such request would demonstrate a particularized need under Rule 6(e). *See id.* at §§ 4, 132 Stat. at 5493-5494, 5(h), 132 Stat. at 5496, 8(a)(2), 132 Stat. at 5501.

Third, the question presented is truly substantial. The judiciary correctly recognizes significant reasons for maintaining grand jury secrecy as its default *modus operandi*. There are, however, narrow circumstances in which the need for continued secrecy is far outweighed by the need for disclosure favoring public interest. District Courts have possessed and should maintain their inherent supervisory authority to make disclosures in the rare instances where these exceptional circumstances warrant disclosure. Such disclosures advance the interests of governmental transparency, trust in the judiciary, and the understanding of historically significant events. These interests were recognized within the federal government in 2012, when the Advisory Committee on Criminal Rules and Committee on Rules of Practice and Procedure weighed a request by Attorney General Eric Holder to explicitly recognize the District Court's inherent supervisory authority to disclose grand jury materials in historically significant cases by amending Rule 6(e). *See* Letter from Hon. Eric H. Holder, Jr., Att'y Gen., to Hon. Reena Raggi, Chair, Advisory Comm. on

the Criminal Rules (Oct. 18, 2011) ("Holder Letter"); App. at 89a-107a.[2]

The Advisory Committee only declined to recommend amending the Rules because of its belief that District Courts already possessed, since time out of memory, the requisite authority and had responsibly exercised discretion regarding requests for grand jury materials in historically significant cases because of the relatively few requests of this nature. *See* Advisory Comm. on Criminal Rules of the U.S. Courts, Minutes of Apr. 22-23, 2012 at 7 ("April 2012 Minutes").[3] The Committee on Rules of Practice and Procedure, a panel of thirteen judges and attorneys which included current United States Supreme Court Justice Neil Gorsuch, affirmed the statement of the Advisory Committee and held that: "[t]he full advisory committee concurred in the recommendation and concluded in the rare cases where disclosure of historic materials had been sought, the district judges acted reasonably in referring to their inherent authority. Therefore, there is no need for a rule on the subject." Comm. on Rules of Practice and Procedure, Minutes of June 11-12, 2012 at 1, 44 ("June 2012 Minutes").[4] This exact determination left the text of Rule 6(e) undisturbed while maintaining the jurisprudence under which

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[2] Available at App. at 89a-107a (en banc opinion exhibit) and http://www.uscourts.gov/sites/default/files/fr_import/11-CR-C.pdf

[3] Available at http://www.uscourts.gov/sites/default/files/fr_import/criminal-min-04-2012.pdf

[4] Available at http://www.uscourts.gov/sites/default/files/fr_import/ST06-2012-min.pdf

Carlson later developed, which has evolved into a Circuit Split. *See, e.g., Carlson v. United States*, 837 F.3d 753 (7th Cir. 2016).

Fourth, this case is of extraordinary historical significance. The Moore's Ford Lynching outraged the nation in 1946, resulting in an investigation by the FBI and the creation of the Civil Rights Commission by President Harry Truman through Executive Order 9808. Our nation's leading historians recognize the tragic incident as the beginning of the modern Civil Rights Movement. A then-student at Morehouse College, Martin Luther King Jr., wrote about the significance of the lynching in a letter to the *Atlanta Constitution* in August 1946. These events remain transcendent and highlight the importance of transparency in our democracy. Its significance poignantly rings true today.

Seventy-four years have passed since this cruel stain upon America's past. There is no known active investigation nor any realistic probability that any person will ever be charged with a crime. If any witnesses are still alive, they would likely be approximately age ninety or older. The Moore's Ford Grand Jury Transcripts clearly meet the test of historical significance and are the last remaining unexamined portion of the historical record. These transcripts will shed light on understanding the crime and failure to bring any perpetrators to justice. Disclosure may assist with a larger societal dynamic in the judiciary's restoration of trust to all citizens through transparency and openness. Given that the Cold Case Act Review Board presently lists no board appointees on its Internet site and possesses a sunset

provision scheduled for 2023,[5] there is presently no effective remedy absent judicial review. Accordingly, Petitioners respectfully request that the United States Supreme Court grant certiorari to consider the question presented, reverse the en banc decision of the Eleventh Circuit, and order the release of the Moore's Ford Grand Jury Transcripts.

STATEMENT OF THE CASE

Petitioner Marion Pitch is the Executrix of the Estate of Anthony Pitch and representative party in this case pursuant to Fed. R. App. P. 43(a). Anthony S. Pitch ("Pitch") was a noted historian who researched the murder of four African-Americans in or about Monroe, Georgia on July 25, 1946, known as the Moore's Ford Lynching. Pitch published a book on this in 2016 titled *The Last Lynching: How a Gruesome Mass Murder Rocked a Small Georgia Town*. Petitioner Laura Wexler ("Wexler") is a noted historian who researched and published a book about the same crime in 2003 entitled *Fire in a Canebrake: The Last Mass Lynching*. Petitioners seek disclosure of the grand jury records, including transcripts, of the Moore's Ford Grand Jury which was convened in December 1946. The District Court (Treadwell, J.) recognized the authority to grant this request, as did a panel of the Eleventh Circuit. The divided Eleventh Circuit, rehearing the case en banc, reversed.

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[5] *See* Cold Case Act at § 5 (sunset provision); Civil Case Act Review Board website ("CCA Site"), available at https://coldcaseact.com.

A. The Moore's Ford Lynching

1. The Moore's Ford Lynching, one of the most infamous and heinous crimes in modern American history, occurring on July 25, 1946, was one of the last mass "lynching" crimes in the United States. On that date, a group of white people, estimated to be of "some considerable size," participated in or were present when two African American couples were pulled from a car, tied to trees, and shot at close range by an estimated sixty bullets. The victims were George W. Dorsey, a U.S. Army World War II veteran, his wife, Mae Murray Dorsey, Roger Malcom, and his wife, Dorothy Malcom. *See* Pitch, *The Last Lynching* 48-49, 56.

The Moore's Ford Lynching occurred shortly after the racially charged 1946 Democratic Party gubernatorial primary election, the first Democratic primary in Georgia where African-Americans were permitted to vote. Some believe that the Moore's Ford Lynching was directly linked to the primary. *See* Calvin Kytle and James Mackay, *Who Runs Georgia? A Contemporary Account of the 1947 Crisis that Set the Stage for Georgia's Political Transformation* 72 (1998). App. 108a-109a.

2. National outrage over this brutal attack resulted in an investigation by the Federal Bureau of Investigation ("FBI"), notwithstanding a separate investigation by the Georgia Bureau of Investigation ("GBI"). A federal grand jury was convened in Athens, Georgia on December 3, 1946 by U.S. District Court Judge T. Hoyt Davis to hear witness testimony about this crime. See Pitch, *The Last Lynching* 120-121; Moore's Ford Grand Jury Decision, Dec. 19, 1946. The FBI interviewed approximately 2,790 people and 106

witnesses were subpoenaed by the Grand Jury. *See* Laura Wexler, *Fire in a Canebrake: The Last Mass Lynching* 190 (2003).

After sixteen days of testimony, the Grand Jury concluded, reporting that it was "unable to establish the identity of any persons guilty of violating the civil rights statutes of the United States." Moore's Ford Grand Jury Decision, Dec. 19, 1946. Thereafter, future U.S. Supreme Court Justice, Thurgood Marshall, then General Counsel of the NAACP, strongly criticized the FBI for treating blacks differently from whites. *See* Letter from Thurgood Marshall, NAACP General Counsel to Attorney General Tom Clark, Dec. 27, 1946, NAACP Records, Library of Congress.

3. In seventy-four years since the lynching, the investigation has been reopened, but no person has ever been indicted, arrested, charged, or convicted in connection with the lynching. This tragedy proved to be a galvanizing moment and remains a polarizing event in the Civil Rights Movement and is annually reenacted to draw attention to this atrocity. *See* Letter from Martin Luther King, Jr., to Editor, *The Atlanta Constitution*, published Aug. 6, 1946; App. at 4a-5a. National outrage has been credited as the catalyst behind President Harry Truman's creation of the President's Committee on Civil Rights by Executive Order No. 9808 on December 5, 1946. *See* Executive Order 9808 (President Harry Truman, Dec. 5, 1946).

There have been several re-openings and official actions taken since at least 1982. In 2007, over 3,700 pages of the investigation file were released to the public under the Freedom of Information Act ("FOIA"). *See* App. at 5a. In 2008, the GBI and FBI

conducted digging on land in Monroe, Georgia that was connected to the 1946 killings. *See* Pitch, *The Last Lynching* 150-151. In 2015, the FBI interviewed a person of interest. The case, however, remains unsolved, and any witnesses or potential suspects would likely be at least age ninety if still alive. *See generally* Pitch, *The Last Lynching* 151-152; App. at 4a.

B. Facts and Procedural History

1. Anthony Pitch was a historian and author with an interest in American history and exploring racial and religious persecution. He published several books exploring these subjects. *See, e.g.,* Pitch, *They Have Killed Papa Dead! – The Road to Ford's Theatre, Abraham Lincoln's Murder, and the Rage for Vengeance* (2008); Pitch, *The Burning of Washington: The British Invasion of 1814* (1998); Pitch, *Our Only Crime Was Being Jewish* (2015); App. at 5a.

Pitch spent his last years researching Moore's Ford as part of his research into lynching in the United States. Moore's Ford attracted his interest due to its unimaginable brutality. His book on that subject, *The Last Lynching: How a Gruesome Mass Murder Rocked a Small Georgia Town*, was published in March 2016. Pitch thereafter sought the transcripts as the last unexamined portion of the historical record of this atrocity. *See generally* Pitch, *The Last Lynching* (2016); *see also* App. at 4a-5a, 9a.

2. Following the passing of Anthony Pitch, Marion Pitch was recognized as his representative in this matter. Pitch's family also contacted the only other historian to have a published work on this subject: historian and author Laura Wexler. Wexler

released her own literary work in 2003 on the subject, *Fire in a Canebrake: The Last Mass Lynching in America*. Wexler's work also remains incomplete. *See* App. at 9a.

3. Pitch filed this Petition in January 2014 with the United States District Court for the Middle District of Georgia as the Court which exercised supervisory authority over the Moore's Ford Grand Jury and its records. The Petition was denied without prejudice in August 2014 since the transcripts' existence had not been confirmed. *See* App. at 5a-6a, 110a.

Pitch subsequently learned that the transcripts were located at the National Archives and Records Administration facility in Maryland, *prima facie* evidence of their historical significance. Pitch refiled the Petition in January 2017. The Department of Justice then forwarded the transcripts to the Court for *in-camera* inspection. *See* App. at 5a, 110a-111a; 44 U.S.C. § 2107.

Pitch argued that District Courts have the inherent authority to disclose grand jury transcripts outside of the listed exceptions in Rule 6(e) based on the established precedent concerning historical significance. The Government recognized the transcripts' historical significance while arguing that Rule 6(e) controlled. *See* App. at 115a-117a.

On August 18, 2017, the District Court granted the Petition and ordered the release of the Moore's Ford Grand Jury Transcripts, finding that Pitch "established exceptional circumstances consonant with the policy and spirit of Rule 6(e)". App. at 124a-125a. Judge Treadwell relied on controlling Eleventh Circuit precedent, *In re Petition to Inspect & Copy Grand Jury Materials (In re Hastings)*, 735 F.2d 1261

(11th Cir. 1984), in holding "that a District Court's authority to order disclosure of grand jury records is not limited to the exceptions found in Rule 6(e)" and that the District Court had "requisite authority … to order disclosure of grand jury records." App. at 108a, 120a-121a. Judge Treadwell applied a "balancing test" that considers "factors favoring continued secrecy and the factors favoring public access to, in this case, historical information." *Id.* at 121a, n. 10, citing *In re Petition of Craig*, 131 F.3d 99 (2d Cir. 1997); *Carlson v. United States*, 837 F.3d 753 (7th Cir. 2016).

4. The Government appealed to the United States Court of Appeals for the Eleventh Circuit. A divided panel affirmed, holding that *Hastings* had not been overruled by any intervening Supreme Court precedent, noting that the Court could not "disregard binding case law that is … closely on point and has only been weakened, rather than directly overruled by the Supreme Court." *Pitch v. United States*, 915 F.3d 704, 708 n. 3 (11th Cir. 2019) (130a-131a). The Court recognized in *Hastings* that exceptions under Rule 6(e) were "normally controlling" and that inherent authority could be exercised when an exception did not "directly govern" under the circumstances. *Id.* at 131a-132a. No Rule 6(e) exceptions applied to Pitch's request, and the panel affirmed based upon the judiciary's inherent supervisory authority over grand jury materials. *Id.*

Judge Wilson's majority opinion recognized that inherent authority is to be exercised under "exceptional circumstances" where "the need for disclosure outweighs the public interest in continued secrecy" and applied the test from the Second Circuit in *Craig*, 131 F.3d at 106 in evaluating petitions based

upon historical significance. *Id.* at 127a-140a. Judge Jordan's concurrence suggested that inherent authority "seem[ed] to be too open-ended", but nevertheless recognized the *Hastings* precedent, as well as the existence and application of inherent authority by several Federal Courts in granting petitions seeking the disclosure of historically significant grand jury materials. *Id.* at 141a-146a. Judge Graham's dissent recognized no exceptions beyond Rule 6(e) and expressed concern about reputational injury to relatives of witnesses, suspects, or grand jurors. *See id.* at 147a-150a.

5. On June 4, 2019, the Eleventh Circuit, upon its own initiative, vacated the opinion and directed that the matter be heard en banc. *See id.* at 9a; 151a-152a. Pitch passed on June 29, 2019. Thereafter, the Court granted both the applications for the substitution of Marion Pitch and intervention of Wexler. *See id.* at 9a.

On March 27, 2020, in an eight-four decision, the Eleventh Circuit en banc reversed its previous decision in *Pitch* and overruled *Hastings*, finding that District Courts have no inherent authority to release grand jury materials outside of Rule 6(e). It explained that Rule 6(e)(2)(B) requires that persons bound by grand jury secrecy "must not disclose a matter occurring before the grand jury" unless otherwise provided. App. at 13a-14a. The majority noted that Rule 6(e)(3) lists five "[e]xceptions" and held that the rules are not "permissive." App. at 12a-19a. It also held that the District Court was not listed in Rule 6(e)(2)(B) due to the independence of the grand jury. *See* App. at 19a-21a.

The majority recognized that its interpretation of Rule 6(e) differs from other Circuits, citing the

Second and Seventh Circuits and *Hastings*. *See id.* at 7a-8a, 11a-12a (citing, *inter alia*, *In re Petition of Craig*, 131 F.3d at 103; *Carlson*, 837 F.3d at 763-766; *Hastings* at 1269, 1272). The majority, however, opined that its ruling "join[s]" "the interpretation of Rule 6(e)" by the Sixth, Eighth, and D.C. Circuits, *id.* at 12a-13a (citing *In re Grand Jury 89-4-72*, 932 F.2d 481, 488 (6th Cir. 1991); *United States v. McDougall*, 559 F.3d 837, 840-841 (8th Cir. 2009); *McKeever v. Barr*, 920 F.3d 842, 845 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 597 (Jan. 21, 2020), and dicta from three other Circuits. *See* App. at 13a, n. 6.

Two concurring opinions were issued. Judge William Pryor concurred but argued that the outcome in *Hastings* was correct because the disclosure was "in connection with a judicial proceeding" under Rule 6(e)(3)(E)(i). App. at 31a-43a. Judge Jordan filed a separate concurrence, arguing that the contours surrounding grand jury secrecy were "not as neat as the court suggests" based upon pre-Rule 6 precedent, Advisory Committee's 2012 recognition that the issue "might" eventually "become ripe for consideration", current Circuit Split, and this Court's action in *McKeever*, suggesting that the Advisory Committee should consider amending Rule 6(e) to permit disclosure in matters of historical significance. App. at 44a-50a.

Two dissenting opinions were issued. Judge Wilson, argued that en banc review was procedurally inappropriate because there was neither an intra-Circuit Split nor was there "a question of exceptional importance" warranting review. App. at 51a-54a. Judge Wilson also argued that the interpretation of Rule 6(e) in *Hastings* and *Carlson* was consistent with established precedent, District Courts exercise

supervisory authority over grand jury records, and the majority's interpretation of Rule 6(e) was "strained". Lastly, Judge Wilson highlighted the Petition's effort to inform the public about the atrocity. App. at 54a-70a.

Judge Rosenbaum issued a dissent which observed that the Cold Case Act does not fall within any exception listed in Rule 6(e)(3), thereby demonstrating the existence of inherent supervisory authority by District Courts. Judge Rosenbaum also noted that this Court has never opined that Rule 6(e)'s exceptions are "exclusive". App. at 71a-88a.

REASONS FOR GRANTING THE WRIT

This case satisfies all of the traditional criteria for the granting of a Writ of Certiorari. *See* Sup. Ct. R. 10(a). In holding that Federal Rule of Criminal Procedure 6(e) imposes a secrecy obligation on District Courts and that its exceptions are exclusive, the Eleventh Circuit expressly disagreed with the Second and Seventh Circuits while reversing its own precedent. The decision below also significantly conflicts with rulings from the First and Tenth Circuits, though it claimed to find support in rulings from the Third, Fourth, Fifth, Sixth, Eighth, and D.C. Circuits. Accordingly, the confusion and disarray in the Federal Circuit Courts is quite palpable. The undisputed and enhanced Circuit Split is sufficient reason for this Court to grant review.

Certiorari is also warranted because the Eleventh Circuit misconstrued Rule 6(e)'s text and history. The Rule imposes secrecy on certain persons, but not on the District Court supervising the grand jury. The "Exceptions" listed in Rule 6(e) therefore

have no bearing on District Courts' authority to release grand jury materials in special circumstances. Rather, as numerous Courts, the Advisory Committee on Criminal Rules, and the Government itself have previously observed, Rule 6(e) maintains Courts' preexisting authority over grand jury materials. This includes the power to disclose them under appropriate circumstances in cases of historical significance.

Finally, the question presented is substantial. No party, including the government, disputes that there are circumstances outside of Rule 6(e) where grand jury materials *should* be released. The Eleventh Circuit's complete prohibition, however, prevents the Court from even considering such disclosures, even where there is an overwhelming public interest in disclosure and no continuing need for secrecy.

The Eleventh Circuit's interpretation of Rule 6(e) lacks any sound legal or policy basis and engenders nationwide confusion. Thus, the petition should be granted.

A. The Eleventh Circuit's Holding Engenders National Judicial Uncertainty Over The Question Presented

A disparity among the Circuits has recently developed on the issue of whether District Courts possess inherent authority to release grand jury materials in limited circumstances outside of Rule 6(e). The Eleventh Circuit admittedly deepened the existing split in its en banc divided *Pitch* decision, acknowledging its disagreement with the Second and Seventh Circuits, which also creates substantial

tension with the First and Tenth Circuits. This Court's intervention is needed to resolve this perplexing split and restore a uniform interpretation of Rule 6(e).

1. For decades before the recent D.C. and Eleventh Circuit decisions, Federal Courts of Appeals had on multiple occasions explicitly recognized the District Courts' inherent authority to release grand jury records under exceptional circumstances.

a. The Second Circuit led with *In re Biaggi*, where a candidate for mayor who testified before a grand jury asked that his testimony be publicly released to counter allegations that he had invoked his Fifth Amendment right against self-incrimination. *See* 478 F.2d 489-491 (2d Cir. 1973). Chief Judge Friendly wrote that the Court recognizes a tradition of grand jury secrecy "older than the Nation itself." *Id.* at 491 (quoting *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 399 (1959)). The Court opined that grand jury materials should normally be released only under a Rule 6(e) exception. *See id.* at 492-493. The Court, however, found that Rule 6(e) was not absolute, and that "special circumstances" warranted disclosure in the public interest and did not violate the spirit of this Rule. *Id.* at 493-494.

The Second Circuit further developed inherent authority with *In re Craig*, 131 F.3d 99 (2d Cir. 1997). Judge Calabresi wrote that while Rule 6(e) generally governs requests to release grand jury records, there can exist "special circumstances" where such "release" "is appropriate even outside of the boundaries of the rule." *Id.* at 102 (quoting *In re Biaggi*, 478 F.2d at 4940. The Court also stated that "historical or public interest alone" could "justify the release of grand jury information", such as where it "overwhelm[s] any

continued need for secrecy", while outlining a fact-sensitive test for making such determination. *Id.* at 105-106.

b. The Seventh Circuit has also held that District Courts possess "inherent supervisory authority" to release "grand jury materials in circumstances not addressed by" Rule 6(e). *Carlson v. United States*, 837 F.3d 753, 766-767 (7th Cir. 2016). There, a historian ultimately obtained records from a grand jury that investigated a significant intelligence leak during World War II. *See id.* at 756-757, 767. Chief Judge Wood observed that judicial inherent supervisory authority has long been exercised, including "the discretion to determine when otherwise secret grand-jury materials may be disclosed." *Id.* at 761-762. The Court wrote that "[t]he advent of the Criminal Rules did not eliminate a district court's inherent supervisory power" "as a general matter" or regarding the grand jury. *Id.* at 762-763. This applied to grand jury minutes and transcripts, which are "necessarily records of the court", *id.* at 758 (internal quotation omitted), because they "are created under the grand jury, and they remain at all times under the power of the court." *Id.* at 760. The "grand jury cannot create any materials without the power of the court being used to empanel the grand jury and issue and enforce its subpoenas", so grand jury materials are "produced under the supervision of the District Court, and as a result they represent an exercise of the court's powers ...." *Id.*

The Seventh Circuit rejected the Government's restrictive reading of the phrase "[u]nless these rules provide otherwise" in Rule 6(e)(2)(B) as limiting the disclosure of grand jury materials to Rule 6(e)(3)(E)'s exceptions. *Id.* at 763-764 (alteration in original)

(citation omitted). The Court stated that such argument "makes no sense, either as a reading of Rule 6(e) or as a general matter of statutory (or rule) construction", observing that "the government provides no explanation why a limitation buried in [Rule 6(e)(2)(B)] secretly applies to the rule as a whole, or even worse" "to an entirely different subpart." *Id.* at 764. The Court also noted that textual hints within Rule 6(e), such as the term "may", indicate that the exceptions list contained in Rule 6(e)(3)(E) "is *not* exclusive" and that its reading is consistent with that of the Advisory Committee. *Id.* at 765-766; *see also In re Special Feb., 1975 Grand Jury*, 662 F.2d 1232, 1235-1236 (7th Cir. 1981) (noting that the "court in rare situations may have some discretion to slip entirely around Rule 6(e) and permit disclosure"), *aff'd on other grounds sub. nom., United States v. Baggot*, 463 U.S. 476 (1983).

c. The First and Tenth Circuits have also recognized that District Courts can exercise inherent authority to release grand jury records under appropriate circumstances. Although these Courts have not directly ordered such disclosure, their reasoning confirms the historically majority view that District Courts maintain this inherent authority under Rule 6(e).

The First Circuit has held that the District Court may impose secrecy on grand jury witnesses despite Rule 6(e)(2)(A) language stating that "[n]o obligation of secrecy may be imposed on [them]." *In re Grand Jury Proceedings*, 417 F.3d 18, 20 (1st Cir. 2005) (Boudin, C.J.), *cert. denied*, 546 U.S. 1088 (2006). The Court read Rule 6(e) as not eliminating District Court inherent authority to regulate grand jury secrecy, opining that Rule 6(e)'s "phrasing can,

and should, accommodate rare exceptions premised on inherent judicial power." *Id.* This holding governs the current petition regarding Pentagon Papers Grand Jury records. *See In re Petition of Lepore*, Case No. 1:18-mc-91539 (D.Mass. judgment entered June 23, 2020).

The Tenth Circuit has also recognized that Rule 6(e) does not limit the District Court's inherent authority over grand jury disclosures. *See In re Special Grand Jury 89-2*, 450 F.3d 1159, 1178 (10th Cir. 2006). Grand jurors had sought permission to disclose information. The Tenth Circuit remanded to the District Court to consider the issue, while stating that "some relief may be proper under the court's inherent authority". *Id.* at 1178.

2. The Eleventh Circuit's en banc divided ruling in *Pitch* clearly conflicts with the above-referenced decisions. The Court specifically acknowledged the Circuit Split, admitting that its view differs from the Second and Seventh Circuits. *See* App. at 11a-13a (citing, *inter alia, In re Craig, Carlson*); *see also, e.g., Proctor v. Nat'l Archives & Records Admin.*, 331 F.R.D. 508, 2019 WL 2163004, at *5 (N.D.Cal. 2019) (noting the Circuit Split).

The Eleventh Circuit's majority opinion disagreed with the Seventh Circuit's decision in *Carlson*, and instead agreed with the D.C. Circuit in *McKeever*. *See* App. at 12a-13a. The Eleventh Circuit also explicitly overruled its own longstanding precedent from 1984 in *Hastings*, a case in which grand jury materials relating to a bribery indictment against a sitting District judge were provided to a Judicial Council Investigating Committee. *See* App. at 4a, 6a-7a; *see also Hastings*, 735 F.2d at 1263, 1268, 1273-1275.

Significantly, the Eleventh Circuit claims that five additional Circuits support its narrow reading of Rule 6(e), thereby prohibiting District Courts from exercising inherent authority in this regard. The Eleventh Circuit stated that the Sixth and Eighth Circuits have reached the same conclusion regarding inherent authority and disclosure of grand jury materials, although Petitioners argue that those cases are factually distinguishable. *See* App. at 12a (citing *In re Grand Jury 89-4-72*, 932 F.2d 481, 488 (6th Cir. 1991) (addressing only Rule 6(e) "judicial proceedings" exception) and *United States v. McDougall*, 559 F.3d 837 (8th Cir. 2009) (request to unseal records of defendant's contempt proceedings denied)). The Eleventh Circuit also argues that three additional Circuits have indicated such a view in dicta. *See* App. at 12a, n. 6 (citing *United States v. Educ. Dev. Network Corp.*, 884 F.2d 737, 740 (3d Cir. 1989), *cert. denied*, 494 U.S. 1078 (1990); *In re Grand Jury Subpoenas, Apr., 1973 at Baltimore*, 581 F.2d 1103, 1108-1109 (4th Cir. 1978), *cert. denied*, 440 U.S. 971 (1979); *In re J. Ray McDermott & Co., Inc.*, 622 F.2d 166, 172 (5th Cir. 1980)). The Fifth Circuit opinion cited is in distinction to another such decision authorizing disclosure. *See In re Corrugated Container Antitrust Litigation*, 687 F.2d 52 (5th Cir. 1982) (disclosure of grand jury transcripts ordered in civil litigation where such information was otherwise unavailable outweighed other considerations in order to prevent injustice).

At least four Circuits have concluded that District Courts possess the inherent authority over grand jury secrecy, including as to disclosures under appropriate circumstances. The Eleventh and D.C. Circuits have reached the opposite conclusion, and

according to those Courts, at least five more Circuits have similarly determined.

Clearly there is no reason for Rule 6(e)'s grand jury secrecy provisions to be applied differently throughout the nation. This Court has a tradition of granting certiorari to resolve disparities among the Circuits pertaining to the interpretation of Criminal Rules. *See, e.g., Henderson v. United States*, 568 U.S. 266, 270, 279 (2013) (concerning Fed. R. Crim. 52(d) plain error standard); *Irizarry v. United States*, 553 U.S. 708 (2008) (regarding applicability of Fed. R. Crim. P. 32(h) to Sentencing Guidelines variances). This Honorable Court should also grant certiorari here.

B. The Eleventh Circuit Misapplied The Provisions Of Rule 6(e)

Certiorari is also warranted because the Eleventh Circuit's understanding of Rule 6(e) is incorrect.

1. Although the grand jury is functionally independent from the District Court, *United States v. Williams*, 504 U.S. 36, 48 (1992), it remains an "arm of the court", *Levine v. United States*, 362 U.S. 610, 617 (1960), operating "under general instructions from the court to which it is attached." *Cobbledick v. United States*, 309 U.S. 323, 327 (1940). Therefore, it "acts under the inherent supervision of the court." *In re Grand Jury Subpoena Duces Tecum*, 797 F.2d 676, 680 n. 4 (8th Cir. 1986) (citing, *inter alia, Levine*, 362 U.S. at 617). While Courts' inherent supervisory authority over the grand jury is "very limited", *Williams*, 504 U.S. at 50, they have exercised it in matters "from the mundane to the weighty." *Carlson*,

837 F.3d at 762. This Court has not defined the boundaries between grand jury independence and court supervision. *Compare Levine*, 362 U.S. at 617 ("The grand jury is an arm of the court .... The Constitution itself makes the grand jury a part of the judicial process."), *with Williams*, 504 U.S. at 47 ("Although the grand jury normally operates … under judicial auspices, its institutional relationship with the Judicial Branch has traditionally been … at arm's length.").

Many Courts recognize that grand jury records are court records. *See id.* at 758-759; *Standley v. Dep't of Justice*, 835 F.2d 216, 218 (9th Cir. 1987); *In re Grand Jury Investigation of Cuisinarts, Inc.*, 665 F.2d 24, 31 (2d Cir. 1981), *cert. denied*, 460 U.S. 1068 (1983); *United States v. Penrod*, 609 F.2d 1092, 1097 (4th Cir. 1979), *cert. denied*, 446 U.S. 917 (1980); *see also United States v. Procter & Gamble Co.*, 356 U.S. 677, 684-685 (1958) (Whittaker, J., concurring). Just as Courts control their other records, they have also been able to access grand jury records exercising "sound discretion" when "the ends of justice require it." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 233-234 (1940); *see Nixon v. Warner Commc'ns, Inc.*, 455 U.S. 589, 598 (1978).

2. While the Court's inherent authority can be limited by statute or rule, the Federal Rules generally do not eliminate it. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 47 (1991); *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-632 (1962). Courts seek a "clear [] expression of purpose" before determining that a Rule eliminates inherent authority on a subject, *Link*, 370 U.S. at 631-632, or search for conflict between the authority and Rule. *See Dietz v. Bouldin*, 136 S. Ct. 1885, 1892 (2016). Rule 6(e) is silent regarding the exercise of

inherent authority over the release of grand jury records.

Rule 6(e)(2)(A) provides that, "[n]o obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B)." Rule 6(e)(2)(B) states that "[u]nless these rules provide otherwise, the following persons must not disclose a matter occurring before the grand jury," before listing seven classes of "persons" connected to a grand jury, including government attorneys, court reporters, and grand jurors. Significantly, Rule 6(e)(2)(B) does not include the District Court, meaning that Rule 6(e)(2)(A) prevents the imposition of an "obligation of secrecy" on it. This logical conclusion has already been reached by multiple Courts, including the Second and Seventh Circuits. *See In re Craig*, 131 F.3d 99 (2d Cir. 1997); *Carlson*, 837 F.3d 753 (7th Cir. 2016).

Even the Government has previously interpreted Rule 6(e) as Petitioners now do. In *Haldeman v. Sirica*, 501 F.2d 714 (D.C. Cir. 1974) (en banc), the Watergate grand jury sought to provide its report to the House Judiciary Committee, and the District Court approved. *See In re Report & Recommendation of June 5, 1972 Grand Jury*, 370 F. Supp. 1219, 1221 (D.D.C. 1974). On appeal, the Government argued for this result. *Haldeman* Mem. for the United States 18-19 (filed Mar. 21, 1974) ("[Rule 6(e)] is a housekeeping provision intended to restrict disclosure of information only by jurors, attorneys and other court personnel, subject to the discretion of this Court. This restriction, *which does not apply to the court itself*, is expressly made exclusive …."); *Haldeman* Transcript of Oral Argument at 41 (arguing that District Court exercised inherent authority in concluding that "public interest"

outweighed secrecy). This interpretation is logical since this Court has declared that "Rule 6(e) is but declaratory" of the principle that "disclosing grand jury materials relies on "the discretion of the trial judge." *Pittsburgh Plate Glass Co.*, 360 U.S. at 399.

The history of Rule 6(e) supports this interpretation. The Advisory Committee indicated that Rule 6(e) would "continue[] the traditional practice of secrecy … except when the court permits a disclosure." Fed. R. Crim. P. 6(e) advisory committee's note to 1944 adoption. The Committee favored precedent affirming that District Courts possess "discretion" to "relax[] the rule of secrecy" as appropriate. *Schmidt v. United States*, 115 F.2d 394, 397 (6th Cir. 1940); *Murdick v. United States*, 15 F.2d 965, 968 (8th Cir. 1926) (Court's "inherent power" provides "right to go behind the secrecy imposed upon a grand jury … where the interest of justice demand it"), *cert. denied*, 274 U.S. 752 (1927).

In 2012, the Advisory Committee reiterated that Rule 6(e) was never meant to curtail the Court's inherent authority. The Department of Justice had proposed an amendment to Rule 6(e) which would have explicitly authorized conditions under which District Courts could release grand jury materials in historically significant cases. *See* Holder Letter. The Advisory Committee considered the Rule's text, history, precedent, and policies, concluding that no amendment was necessary because "in the rare cases where disclosure of historically significant materials had been sought, *district judges had reasonably resolved applications by reference to their inherent authority*." April 2012 Minutes at 7 (emphasis added); *see also* Advisory Comm. on Crim. Rules, Agenda Book

at 209-271 (Apr. 2012) ("Agenda Book").[6] The Committee on Rules of Practice and Procedure, whose members included current-Justice Gorsuch, agreed on the basis that District Courts already possessed and had responsibly employed such authority. *See* June 2012 Minutes at 1, 44.

3. The Eleventh Circuit's contrary and divided opinion relies upon an erroneous interpretation of Rule 6(e). The Eleventh Circuit correctly observed that Rule 6(e)(2) prohibits certain specified persons from making disclosures about grand jury matters "[u]nless these rules provide otherwise." App. at 13a-14a. (alteration in original). The Court read Rule 6(e)(3)'s exceptions to grand jury secrecy as exclusive, thereby precluding the District Court's inherent authority to make disclosures. *See* App. at 12a-19a.

Such reasoning is inaccurate. Rule 6(e)(3)(E)'s "Exceptions" constitute the application of secrecy established under Rule 6(e)(2). Rule 6(e)(2), however, only imposes secrecy on seven specific classes of persons linked to a grand jury, including grand jurors, court reporters, and government attorneys, *while declining to list the court itself*. Rule 6(e)(3)(E)'s exceptions to Rule 6(e)(2) therefore do not impact the District Court's inherent supervisory authority over grand jury materials, as the Government advocated in *Haldeman*. *See supra* at 27-28.

The Eleventh Circuit attempted to dodge this textual reading by describing the independent nature of the grand jury, which would render the Court's non-inclusion in Rule 6(e)(3)'s exceptions meaningless. *See* App. at 19a-21a. This reading is incorrect because

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[6] Available at https://www.uscourts.gov/sites/default/files/fr_import/CR2012-04.pdf

Rule 6(e)(1) provides that "an attorney for the government will retain control" of grand jury materials "[u]nless the court orders otherwise." The Court may take possession of the materials, at which point is beyond the scope of Rule 6(e)(2)'s prohibition on government attorney disclosures. The grand jury is not fully independent of the Court because its records are generated under the Court's operations and subpoena power, rendering them court records. *See Carlson*, 837 F.3d at 758-760. This is exactly what other Courts have held and is reasoning Petitioners rely upon here.

The Eleventh Circuit's remaining arguments are also incorrect. The Court held that the District Court having inherent authority to make disclosures outside of Rule 6(e)(3) would render its list of exceptions as "merely precatory." *Id.* at 17a. This is incorrect because Rule 6(e)(3) both informs the Court of common scenarios where disclosure is permitted and informs the Court of considerations relating to discretion, whether within or outside of Rule 6(e)'s scope. *See Carlson*, 837 F.3d at 764-765 (rejecting the argument); *see also Carlisle v. United States*, 517 U.S. 416, 426 (1996).

Contrary to the Eleventh Circuit's assertion, this Court's precedents do not weigh against inherent authority. While the Eleventh Circuit cited several of this Court's opinions, it acknowledged that this Court "has not yet addressed the question." App. at 17a. The cases cited do not address the precise question. *See* App. at 16a-19a. Those cases do not analyze the District Court's inherent authority in relation to the disclosure of grand jury materials. This Court has yet to explicitly or implicitly answer the question

presented, and the Eleventh Circuit was wrong to argue otherwise.

Finally, the Eleventh Circuit was incorrect to disregard the reasoning of the Advisory Committee or enactment of the Cold Case Act as demonstrating the existence of inherent supervisory authority. *See* App. at 13a-14a. The Advisory Committee weighed all available evidence in concluding that inherent supervisory authority did exist and was being employed carefully with appropriate discretion by District Courts. *See* April 2012 Minutes at 7; June 2012 Minutes at 44; Holder Letter at 2-5; Cold Case Act at §§ 4, 5(h), 8(a)(2); *see also Chambers*, 501 U.S. at 44 (inherent powers "must be exercised with restraint and discretion"); *Levine*, 362 U.S. at 617 (as to secrecy of grand jury); *In re Craig*, 131 F.3d at 104, 106 (balancing test to be employed with "baseline presumption against disclosure"); *Douglas Oil Co. of California v. Petrol Stop Northwest*, 441 U.S. 211, 222-223 (1979) (holding that needs favoring disclosure must outweigh continuing need for secrecy before disclosure of grand jury materials may be ordered). The Eleventh Circuit should have ruled on this basis.

C. The Question Presented Is Of National Importance And Warrants This Court's Review And Resolution

Whether District Courts possess inherent authority to disclose grand jury records is an important question which implicates fundamental constitutional values, transparency of governmental functions and judicial proceedings as well as the

public's ability to understand historically significant events vital to our Nation.

Court records and proceedings, including criminal matters, are presumptively open. Such openness serves the following purpose: "[T]he public has an intense need and a deserved right to know about the administration of justice," which implicates First Amendment and additional constitutional values. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 604 (1980) (Blackmun, J., concurring in the judgment).

The presumption of secrecy in grand jury proceedings is a significant but necessary departure from the general rule of openness in criminal proceedings. Yet this presumption is not absolute. This secrecy should diminish whenever it outlives its usefulness and disclosure in the public interest becomes favored. *See, e.g., In re Craig*, 131 F.3d at 105.

The Department of Justice acknowledged the same upon proposing an amendment to Rule 6(e) in 2011. *See* Holder Letter at 5; Agenda Book at 221 (acknowledging that "the public's interest in access to the primary-source records of our national history" will occasionally "overwhelm any continued need for [grand jury] secrecy", quoting *In re Craig*, 131 F.3d at 105). After the Advisory Committee declined to recommend an amendment, the Department of Justice indicated that it would maintain a policy of objecting to petitions based upon inherent authority, while believing that under appropriate circumstances that disclosure may be permitted. *See* April 2012 Minutes at 8.

The small number of authorized grand jury disclosures provides evidence of the public interest in

such disclosures. *See Carlson*, 837 F.3d at 756-757 (news report based on major intelligence leak during World War II); *In re Petition of Am. Historical Ass'n et al. for Order Directing Release of Grand Jury Minutes*, 49 F. Supp.2d 274, 278-279, 291-297 (S.D.N.Y. 1999) (espionage for the Soviet Union); *In re Petition of Kutler*, 800 F. Supp.2d 42, 42-44, 48-49 (D.D.C. 2011); *In re Petition of Tabac*, 2009 WL 5213717 (M.D.Tenn., April 14, 2009) (indictment of James Hoffa).

The factual questions presented in this case are of extreme historical significance. The Moore's Ford Lynching is one of the last mass lynching crimes in our nation's history. Its sheer brutality shocked and outraged the nation to such an extent as to result in an essentially unprecedented FBI investigation, President Truman's executive actions regarding civil rights, and became etched into the collective consciousness of the modern Civil Rights Movement, one of the most transformative dynamics of modern American society and its history. Disclosure of the transcripts would shed light upon the reasons why no person was ever indicted, let alone convicted, in connection with this most heinous act and unsolved crime. Disclosure of these materials would provide much-needed transparency concerning our judiciary and government. Given recent national events relating to racial disparities and discrimination which divide our citizens, the history surrounding the Moore's Ford Lynching remains critical to the eventual healing of our Nation

One last consideration relates to the Cold Case Act, which was enacted while this case was before the Eleventh Circuit. This legislation establishes a Review Board tasked with requesting that the Attorney General seek disclosure of grand jury

records. The lack of such authority for disclosure contained in Rule 6(e) clearly proves that the District Court does have the inherent supervisory authority to release grand jury records. *See* Cold Case Act at §§ 4, 5(h), 8(a)(2); App. at 73a-80a (Rosenbaum, J., dissenting). The Cold Case Act, however, lacks Review Board appointees and is subject to a sunset provision in 2023, CCA Site; Cold Case Act at § 5(n); App. at 50, n. 2 (Jordan, J., concurring in the judgment), which could render any potential relief to Petitioners moot and ineffective absent this Court's review.

Unless this Honorable Court grants a Writ of Certiorari, the important facts contained in the Moore's Ford Grand Jury transcripts will remain forever sealed. After nearly seventy-five years, such an outcome will deny the American public and the families of the victims seeking closure and greater understanding of the crime their last hope of justice.

* * *

The Eleventh Circuit's blanket prohibition of disclosure leaves no room to consider any circumstances which might justify the disclosure of grand jury records in cases of historical significance and national import. The tragedy of the Moore's Ford Lynching now provides this Honorable Court with an historic opportunity to remedy the wrongly decided and divided opinion of the Eleventh Circuit and ensure that the principles and purpose of Rule 6(e) are justly and uniformly applied across the nation.

CONCLUSION

Accordingly, the Petitioners, for all of the foregoing reasons, respectfully urge this Honorable Court to grant their prayer for the issuance of a Writ of Certiorari.

Respectfully submitted,

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