No. 20-224

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 a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF CIVIL RIGHTS COLD CASE RECORDS GROUP AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST[1]

*Amicus (*the Civil Rights Cold Case Records) Group are students of the past five years' AP Government and Politics classes from Hightstown High School in central New Jersey. These students, led by their instructor Stuart Wexler, drafted the bill from a combination of the *Kennedy Assassination Records Collection Act* of 1992 and the *Emmett Till Unsolved Civil Rights Crime Act* of 2007 to create what would ultimately become the foundation for the bipartisan-supported *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) (the "Cold Case Act"). *See From Students in High School All the Way to the President's Desk: How a Government Class Fought for the Release of Unsolved FBI Civil Rights Case Files*, Wash. Post, Feb. 23, 2019.[2]

Amicus lobbied for the bill at every stage of the legislative process, in both chambers, at the committee level, and to the President for his final signature. After the bill was passed, Amicus worked to obtain an appropriation, with success coming in

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[1] Pursuant to Rule 37.6, amicus affirms that no counsel for a party authored this brief in whole or in part and that no person other than amicus, its members, or its counsel made a monetary contribution to its preparation or submission. Counsel of record for the parties received notice at least 10 days prior to the due date of the intention of amicus to file this brief and consented to its filing.

[2] *See also, e.g.*, Jerry Mitchell, *Students Write Bill to Open Civil Rights Files for Families, Investigators,* Clarion Ledger, July 10, 2018; Holly Cook, *High School Advocates Renew Hope for Answers to Civil Rights-Era Mysteries*, ABA Journal, Nov. 1, 2019.

December 2019. Amicus thus has a unique perspective on the Cold Case Act, and a particular interest in this case since the Act was part of the diverging opinions of the majority and dissent in the Eleventh Circuit's decision below. This Court should grant review here for the reasons set forth by the petitioners. Review is further warranted to correct the majority's decision, which could have a detrimental impact on the Cold Case Act and Congress' intent that the Act provide a vehicle to uncover critical records—including grand jury records—to help right historical wrongs.

INTRODUCTION

Amicus first became aware of the *Pitch* litigation[3] in October 2019, when articles emerged detailing the en banc proceedings in the Eleventh Circuit. The articles quoted an exchange between the appellee's attorneys and the court regarding the Cold Case Act. It was only upon reading this case that the students learned of the multi-year effort of historian Anthony S. Pitch to obtain grand jury records on the unsolved murder of two black couples on Moore's Ford Bridge by a mob on July 25, 1946, known as the Moore's Ford Lynching.[4]

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[3] Buck Files, *Grand Jury Secrecy in the Eleventh Circuit*, *The Federal Corner (2020),* https://www.bainfiles.com/wp-content/uploads/2020/05/May-2020.pdf.

[4] Kayla Goggin, *En Banc 11th Circuit Hears Bid to Release Lynching Records.* (2019),https://www.courthousenews.com/en-banc-11th-circuit-hears-bid-to-release-lynching-records.

The United States District Court for the Middle District of Georgia initially ruled that the federal district courts have the inherent authority to release grand jury records to the public.[5] Citing *In re Petition to Inspect and Copy Grand Jury Materials (Hastings),* 735 F.2d 1261 (11th Cir. 1984), the court concluded that "it has long been recognized that a district court's authority to order disclosure of grand jury records is not limited to the exceptions found in Rule 6(e)." A divided Eleventh Circuit panel affirmed the district court's ruling,[6] finding that "[W]e cannot say that the district court abused its substantial discretion in ordering the release of the grand jury transcripts." Sitting en banc, in a 9-3 decision,[7] The Eleventh Circuit overturned the prior rulings, concluding that the Federal Rules of Criminal Procedure "leave no room for district courts to fashion new exceptions beyond those listed in Rule 6(e). We therefore hold that Rule 6(e) by its plain terms limits disclosures of grand jury materials to the circumstances enumerated therein."

Both the majority and dissenting opinions en banc discussed Sections 2-3 of the Cold Case Act, which provide:

> (2) GRAND JURY MATERIALS.—
>
> (A) IN GENERAL.—The Review Board may request the Attorney General to

[5] *In Re Pitch*, 275 F. Supp. 3d 1373 (M.D. Ga. 2017).
[6] *Pitch v. United States*, 915 F.3d 704 (11th Cir. 2019).
[7] *Pitch v. United States*, 953 F.3d 1226 (11th Cir. 2020) (en banc).

> petition any court in the United States to release any information relevant to civil rights cold cases that is held under the injunction of secrecy of a grand jury.
>
> (B) PARTICULARIZED NEED.—A request for disclosure of civil rights cold case records under this Act shall be deemed to constitute a showing of particularized need under rule 6 of the Federal Rules of Criminal Procedure.
>
> (3) DEADLINE.—
>
> (A) IN GENERAL.—The Attorney General shall respond to any request that is subject to this subsection within 45 days.
>
> (B) NON DISCLOSURE OF GRAND JURY INFORMATION.— If the Attorney General determines that information relevant to a civil rights cold case that is held under the injunction of secrecy of a grand jury should not be made public, the Attorney General shall set forth in the response to the request the reasons for the determination.

Amicus the Civil Rights Cold Case Records Group (a designation students gave themselves in 2018 due to the multi-year nature of the effort, which also included former students) concurs with the dissent and urges this Court to grant certiorari and overturn the majority's decision below. Doing so will not only address a circuit conflict concerning Rule

6(e) as the petitioners explain, but also avoid potentially limiting the intended scope and force of the Cold Case Act.

ARGUMENT

I. The dissent accurately apprehended the purpose of the Cold Case Act.

A. Amicus drafted the bill with the intent to maximize public access to all records.

As the original drafters of the bill that became the Cold Case Act, Amicus have frequently and stridently asserted what they argue in this brief—the law was intended to release as many records to the public with as few restrictions and redactions as possible. Although the Senate and not Amicus contributed the specific language about grand jury records, Amicus can speak to the purpose of the law as a whole; a purpose echoed by key players in legislative history.

The Cold Case Act was written with the intent of easing the process of releasing records from civil rights cold cases and providing much needed answers to the families of the victims, and the American community as a whole. The student drafters' objectives were largely influenced by their frustrations with the Freedom of Information Act (FOIA) process. Having filed a number of FOIA requests seeking release of records on civil rights cold cases that had been opened but closed under the Emmett Till Unsolved Civil Rights Act of 2007, the students became intimately aware of the flaws in the

system. The FOIA review process was not efficient and, due to excessive redactions or withheld material upon release, the process yielded few new insights into the civil rights cold case crimes the students chose to focus on. As the students learned, this is consistent with watchdog criticisms of the FOIA process as a whole, with requests taking over a year to be processed, if they are not rejected altogether. This in turn prompted the students to write the Cold Case Act. *See* Aditya Shah, *How to Get Justice in Civil Rights Cold Cases*, Politico, May 10, 2016.

While Amicus hold out hope that records releases might spur some long overdue criminal prosecutions, they recognized that, given the passage of time, such cases would be rare if they happened at all. Instead, the students and their teacher consistently emphasized in interviews the role the Cold Case Act could play in helping provide answers about the crimes to victims' families and communities, and in clarifying and illuminating the public record on historical injustices.

B. The lawmakers who introduced and shepherded the Cold Case Act through Congress shared Amicus' goals for the law.

Just one month after Hightstown High School Junior Aditya Shah published a May 2016 *Politico* article highlighting the intent of the students' proposed bill, House Representative Bobby Rush of the Illinois 3rd District gave an interview to the same magazine championing the bill's goals and

affirming its intent. Rep. Rush predicted that that the law, which creates an independent review board of scholars to facilitate the release of records, could "lift up the morass of our common past … diminishing redactions [and] ... make it easier for these families who for generations did not receive the totality of American Justice." Natisha Korecki, *Bobby Rush Pushes for Access to Civil Rights-era Cold Case Records*, Politico, June 6, 2016. Rep. Rush introduced the bill into the 115th Session of the United States House of Representatives in 2017.

Students also sought outside support from Doug Jones, a then-private practice lawyer who, as a federal prosecutor, helped convict two Ku Klux Klan members for the deadly bombing of the 16th Street Baptist Church almost four decades after the original crime. Many months later, Jones introduced the Cold Case Act into the United States Senate after winning a special election in 2018. He was joined by Texas Senator Ted Cruz as co-sponsor. The Senate version of the bill, which added, among other things, the provisions on grand jury records, ultimately prevailed and the bill passed by unanimous consent in the Senate and with only 6 "Nay" votes in the House. *See* S.3191 - 115th Congress (2017-2018): Civil Rights Cold Case Records Collection Act of 2018.

In introducing the bill in the Senate, Jones highlighted the ultimate purpose of the law on the Senate floor. *Congressional Record* Vol. 164, No. 115 (2018). Speaking to his own experience of

successfully prosecuting a cold case crime, Jones noted the potential of the law to bring forth criminal prosecutions as investigative reporters and historians gain access to new leads. But Jones emphasized that, this long after the fact, such prosecutions would be unlikely. However, he added:

> Justice can take many forms. It doesn't always have to be a criminal conviction. One measure of justice—not a full measure but a measure nonetheless—can be achieved through a public examination of the facts and determination of the truth about what happened and why… but because these were criminal cases, the records and files relating to these unsolved cases are often classified or shielded from public view, and sometimes they are literally scattered among various agencies and hard to find.
>
> Yet the victims of these crimes and their families have no less right to justice than they did at the time the crimes were committed, and the American people have a right to know this part of our Nation's history.
>
> As has often been said, if we do not learn from the mistakes of the past, we are doomed to repeat them. In today's climate, I believe we need to be more than ever vigilant and knowledgeable about the mistakes of the crimes of the civil rights era.

Congressional Record Vol. 164, No. 115 (2018).

Senator Cruz echoed this sentiment, explaining, after the bill passed the House, that "Crimes committed against Americans seeking their rightful place in the American dream during the civil rights movement too often went unsolved…. It is my hope that, with additional sunlight to these cold cases, there will be revelation, justice, and closure where it has long been lacking." Doug Jones, Press Release, *Jones, Cruz Announce House Passage of Civil Rights Cold Case Legislation*, https://www.jones.senate.gov/newsroom/press-releases/jones-cruz-announce-house-passage-of-civil-rights-cold-case-legislation. As Representative Rush added, "With the passage of this legislation, families and communities that have waited too long for answers about the loss of loved ones may finally have the chance for closure." *Id.*

The dissent below recognized the broad purpose of the Cold Case Act "to provide public access to the records of the covered cold cases, for educational, historical, and scholarly uses." 953 F.3d at 1263 (Rosenbaum, J., dissenting). And that purpose and the Act's provisions on grand jury materials presupposed that district courts have inherent authority to order the production of historic grand jury materials.

II. The Eleventh Circuit's ruling could fundamentally compromise the intended operation of the Cold Case Act.

The decision by Eleventh Circuit fundamentally threatens the reach and potency of the Cold Case Act. The courts were meant to be allies in acquiring cold case records; instead, the Eleventh Circuit majority limited that role and, by implication, a section of the law would now be a roadblock to releasing the records. It is vital that the courts use their inherent authority to force the release of these records when necessary because federal grand jury records may, for certain cases such as the Moore's Ford Lynching, be the best primary sources for understanding decades-old racial murders and the failure of law enforcement agencies to resolve them at the time of commission.

A vast majority, if not all of the civil rights cold cases that were opened and closed under the recent Emmett Till Unsolved Civil Rights Act of 2007, were state level crimes; thus limiting the extent to which federal authorities could investigate the murders at the time. Due to pervasive racism in certain regions of the country, often there was little to no chance that state and local authorities would run a full and honest investigation. One need only look at cases like the 1964 Mississippi Burning Case (in which local law enforcement themselves were involved in the crime) to understand the extent of this corruption of the state and local criminal justice systems during that era. According to historians, the federal

government, through the Federal Bureau of Investigation and the Department of Justice, was often regarded by local authorities and witnesses as an outsider intruding on state affairs. At best the DOJ could pursue civil rights charges, but while this was used to allow for investigative assistance or a parallel investigation by the FBI, actual charges under Reconstruction-era civil rights laws were uncommon until the late 1960s. *See* Stuart Wexler, *America's Secret Jihad* (2015). President Harry Truman ordered just such a parallel civil rights investigation into the Moore's Ford Lynching in 1946, but, according to historians, only with reluctant acceptance by then FBI Director, J. Edgar Hoover. He knew what was often the case with such investigations—that it was difficult for the FBI to get the needed cooperation, from either the local sheriff or local witnesses, to thoroughly investigate the crimes. It was exactly the problem the FBI encountered in the Moore's Ford Lynching. *See* Laura Wexler, *Fire in a Canebrake: The Last Mass Lynching in America* (2013).

A potential solution to this conundrum, one pursued in the Moore's Ford Lynching case and other crimes clouded by racial animus, was to use a federal grand jury. This could force a witness to testify and then hold the witness accountable with potential charges of perjury or obstruction of justice for inadequate cooperation. The secret hearings may well reveal important, even dispositive information about the crime—but likely only to the individuals directly involved in the grand jury process. This is

because even a productive grand jury investigation could be thwarted by the jurors themselves, and a biased grand jury selection process might ultimately fail to produce an indictment, even in the face of compelling evidence.

The grand jury materials may provide the only insights as to why the Moore's Ford grand jury—consisting of twenty-three individuals, only two of whom were black— failed to indict. Wexler, *Fire in a Canebrake*, *supra*. Thus a full examination of grand jury records could yield important information on what happened during these crimes, even if no one was indicted at the time. Furthermore, with access to federal grand jury records, scholars could educate the country about the role racial prejudice played in undermining trust between law enforcement and the black community. By implication, the Cold Case Act assumes the courts will use their inherent authority for this very purpose. If, however, the majority decision below holds, these records could invariably remain secret, thus undermining the very purpose of the Cold Case Act.

III. Practical and historical considerations should dispose the courts toward releasing federal grand jury records on the Moore's Ford Lynching and other civil rights cold cases, including through the mechanism of the Cold Case Act.

The Moore's Ford Lynching took place on July 25, 1946, more than seventy-four years ago. Most government documents in the Western world are

released in less than half of this time. For example, the United Kingdom, Ireland, and Australia follow the 30-year rule, which is an informal rule-of-thumb that orders the release of records withheld by the government three decades after they are created.[8]

In the same spirit, U.S. Executive Order 13526 states that, "all classified records that (1) are more than 25 years old and (2) have been determined to have permanent historical value under title 44, United States Code, shall be automatically declassified whether or not the records have been reviewed. All classified records shall be automatically declassified on December 31 of the year that is 25 years from the date of origin." Exec. Order No. 13,526, 75 Fed. Reg. 2 (Dec. 29, 2009). The average age of civil rights cold cases examined by the Justice Department under the Emmett Till Act was fifty-nine years old.[9]

Congress recognized the need for greater transparency in these civil rights cold cases when it

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[8] While international norms are not binding on American legal institutions, they do suggest a common sense approach to government transparency. UK Public General Acts 1958 c. 51 Section 5 Freedom of Information (Removal of Conclusive Certificates and Other Measures) Bill, S. 42th Parliament 2008 [2009].

[9] THE ATTORNEY GENERAL'S SEVENTH ANNUAL REPORT TO CONGRESS PURSUANT TO THE EMMETT TILL UNSOLVED CIVIL RIGHTS CRI:ME ACT OF 2007 AND FIRST ANNUAL REPORT TO CONGRESS PURSUANT TO THE EMMETT TILL UNSOLVED CIVIL RIGHTS CRIMES REAUTHORIZATION ACT OF 2016 , (2018), https://www.justice.gov/crt/page/file/1059451/download.

passed the Emmett Till Unsolved Civil Rights Act of 2007, which permitted the reopening of civil rights cases prior to 1970. Despite that Act's intentions, it had an overall miniscule effect on the justice system. Out of 132 reopened cases, 120 were closed, ten were sent back to the states, and only two resulted in prosecution. Almost all civil rights cold cases of the past four decades were solved not by the federal government, but by the combined efforts of investigative journalists, news reporters, and local prosecutors.[10] Without the ability to data-mine documents, it effectively limits the public's ability to bring justice to families, answers to communities, and revisions to the historical record.

A major barrier to data-mining is grand jury secrecy, which serves an important function in protecting the integrity of ongoing criminal investigations. Nevertheless, secrecy has little to no practical relevance to the cold cases under question, including the Moore's Ford Lynching. The long-established rule of grand jury secrecy is enshrined in Federal Rule of Criminal Procedure 6(e), which provides that government attorneys and the jurors themselves, among others, "must not disclose a matter occurring before the grand jury."[11] However, because the median case age is 59 years

[10] Shah, *supra*.

[11] Michael A. Foster, *Federal Grand Jury Secrecy: Legal Principles and Implications for Congressional Oversight* (2019), https://fas.org/sgp/crs/secrecy/R45456.pdf.

old, these justifications for non-disclosure make little practical sense.

The five reasons for grand jury secrecy are, "1. to prevent the escape of those whose indictment may be contemplated; 2. to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; 3. to prevent subornation of perjury or tampering with the witnesses who may testify before [the] grand jury and later appear at the trial of those indicted by it; 4. to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; 5. to protect [the] innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt." *United States v. Rose*, 215 F.2d 617 (3d Cir. 1954); *Burkholder v. State*, 491 P.2d 754 (1971); *United States of America v. James J. Mahoney*, 495 F. Supp. 1270 (E.D. Pa. 1980); *United States v. Roemmele*, 646 F. App'x 819 (11th Cir. 2016). Common sense dictates that in the cases covered by the Cold Case Act, there are no criminals left to escape, no witnesses to protect, no evidence that can be tampered with, no testimony to be compromised, and no reputations left to be tarnished.

Even if there were witnesses or innocent people who needed protection, the Cold Case Act has a board of scholars able to redact any potential names of witnesses in order to protect the reputations of any

living individuals. The justice system is clearly unharmed by the release of these records. In fact, the release of the grand jury materials will be a small form of justice for the relatives of the victims of the Moore's Ford Lynching. As Senator Doug Jones articulated when he introduced the Cold Case Act to the Senate, "one measure of justice is a public review of the facts." Doug Jones, *Civil Rights Cold Cases: Justice Delayed, Not Justice Denied* (2018), https://www.youtube.com/watch?v=JlXQgHn-USQ&feature=youtu.be.

Senator Jones also highlighted the relevance of the history of such cases in informing the current racial dialogue. He did so two years before highly-publicized and controversial killings of African-Americans by law enforcement officers ignited an unprecedented wave of public protest. Just between May 24 and August 22, 2020, in response to criminal justice issues and race, 7,750 total protests linked to the Black Lives Matter movement have occurred. These protests are not simply about the killings themselves but about the justice system's response to the killings.

The story that federal grand jury records can convey about the past is not limited to what happened to the victims but also to what did *not happen* in the criminal justice system in response to those decades-old crimes. In connecting racial injustices of the present to the past, and arguing for a more complete release of records on the latter, Northeastern Law Professor Margaret Burnham

noted; "an acknowledgment that this legacy of violence still haunts African-American communities may foster more productive conversations and help generate trust in our legal system."[12] The possibility of greater understanding, given the age of the records in question, trumps the demand of grand jury secrecy. Congress understood this in enacting the Cold Case Act and it presupposed such records would be available through a court's inherent authority.

[12] Margaret A. Burnham and Margaret M. Russell, *The Cold Cases of the Jim Crow Era (2015)*, https://www.nytimes.com/2015/08/28/opinion/the-cold-cases-of-the-jim-crow-era.html?auth=login-google

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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