No. 15-2972

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ELLIOT CARLSON, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AMERICAN HISTORICAL ASSOCIATION, NATIONAL SECURITY ARCHIVE, NAVAL HISTORICAL FOUNDATION, NAVAL INSTITUTE PRESS, ORGANIZATION OF AMERICAN HISTORIANS, AND SOCIETY FOR MILITARY HISTORY,
Petitioners-Appellees,

v.

UNITED STATES OF AMERICA,
Respondent-Appellant,

On Appeal from the United States District Court
For the Northern District of Illinois
Honorable Rubén Castillo
Case No. 14-cv-09244

SUPPLEMENTAL BRIEF OF PETITIONERS-APPELLEES ELLIOT CARLSON, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AMERICAN HISTORICAL ASSOCIATION, NATIONAL SECURITY ARCHIVE, NAVAL HISTORICAL FOUNDATION, NAVAL INSTITUTE PRESS, ORGANIZATION OF AMERICAN HISTORIANS, AND SOCIETY FOR MILITARY HISTORY

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In accordance with the Court's February 18, 2016 order, Appellees respectfully submit this supplemental brief addressing the jurisdictional basis for the order of the United States District Court for the Northern District of Illinois directing the release of transcripts of testimony given before the 1942 grand jury that investigated the *Chicago Tribune* (the "*Tribune*").

SUMMARY OF ARGUMENT

The *Tribune* grand jury transcripts are historically valuable archival records that, in accordance with federal law, were retained and transferred from the Department of Justice ("DOJ") to the National Archives and Records Administration ("NARA") to ensure "their continued preservation by the United States Government." 44 U.S.C. § 2107(1); *see* JA5–10.[1] Prior to the filing of Appellees' petition for an order authorizing their disclosure, NARA denied a request for access to the *Tribune* transcripts made by appellee Elliot Carlson ("Carlson")—a naval historian and author of a forthcoming book about the grand jury's investigation of the *Tribune*, JA28–29—on the basis of the general rule of grand jury secrecy codified in Federal Rule of Criminal Procedure 6(e)(2).[2] *See* JA30–31. The District Court, relying on the long-recognized inherent authority of the supervising court to authorize the disclosure of grand jury materials when warranted in appropriate circumstances—authority guided, but not displaced, by Rule 6(e)—granted Appellees' petition, and issued an order directing NARA to release the *Tribune* transcripts. *See* Appellees' Brief at 12–18; *id*. at 27–32. The District Court's order is jurisdictionally sound and should be affirmed.

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[1] Citations to documents found in the Government's Appendix are "A__." Citations to documents found in the Joint Appendix are "JA__."

[2] Unless otherwise indicated, all references herein to the "Rules" are to the Federal Rules of Criminal Procedure.

1. The District Court had subject-matter jurisdiction over Appellees' petition under 28 U.S.C. § 1331. *See* Appellees' Br. at 3. Appellees sought access to the *Tribune* transcripts pursuant to the supervisory authority possessed by the District Court at federal common law—authority not displaced by Rule 6(e). Appellees' claim for relief thus "aris[es] under" federal law. *See National Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 850 (1985). Alternatively, because Appellees' "right to relief necessarily depends on resolution of a substantial question of federal law," the District Court did not err by ruling on the merits of Appellees' petition. *Turner/Ozanne v. Hyman/Power*, 111 F.3d 1312, 1316 (7th Cir. 1997).

2. Appellees had and continue to have standing to petition for the disclosure of the *Tribune* transcripts. Appellees have suffered concrete injury fairly traceable to NARA's denial of access to the *Tribune* transcripts that is capable of being redressed by a favorable decision. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 559–60 (1992). The absence of judicial authorization for the transcripts' disclosure is the sole impediment to access, and Appellees are entitled to seek such authorization for at least the following reasons:

First, although the grand jury's "institutional relationship with the Judicial Branch has traditionally been, so to speak, at arm's length," *United States v. Williams*, 504 U.S. 36, 47 (1992), the grand jury is nevertheless "an arm of the court," *Levine v. United States*, 362 U.S. 610, 617 (1960). Its records are court records, even when they are in the physical possession of the Executive Branch. *In re Grand Jury Investigation of Cuisinarts, Inc.*, 665 F.2d 24, 31 (2d Cir. 1981) ("*Cuisinarts*"). Accordingly, Appellees have standing to seek their disclosure under common law, *see Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597–98 (1978), even if they are "confidential" records not presumptively open to the public, *United States v. Corbitt*, 879 F.2d 224, 228 (7th Cir. 1989).

Second, as the Supreme Court has stated, Rule 6(e) is "but declaratory of" the common law principle that disclosure of grand jury materials is within the discretion of the court. *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 399 (1959). Thus, even assuming, *arguendo*, that the *Tribune* transcripts are not records of the court, they are nevertheless materials to which the court controls access under both Rule 6(e) and common law. The common law recognizes that a party may invoke the court's supervisory authority to disclose grand jury materials by "petitioning the district court," thereby "permit[ing it] to exercise its customary control over grand jury materials." *In re Petition to Inspect and Copy Grand Jury Materials*, 735 F.2d 1261, 1266 (11th Cir.1984) ("*Hastings*"). The identity of the party seeking disclosure on that basis is not a jurisdictional limitation; it is one factor to be considered by the court when ruling on the merits of the request. *In re Petition of Craig*, 131 F.3d 99, 102 n.2 (2d Cir. 1997).

Third, Appellees' inability to obtain access to the *Tribune* transcripts from NARA under the statutes and regulations that provide for public access to the archival materials in its collection also affords standing in this case. *See Public Citizen v. Department of Justice,* 491 U.S. 440, 449 (1989) (plaintiff suffers an "injury in fact" when it is unable to obtain information subject to public disclosure by statute).

This Court's prior decision in *Bond v. Utreras*, 585 F.3d 1061 (7th Cir. 2009) suggests no jurisdictional infirmity here. That a third-party may lack standing to intervene in a civil suit postjudgment for the purpose of challenging a protective order governing unfiled discovery merely exchanged between private citizens does not bear on whether Appellees have standing to seek an order authorizing access to grand jury records. To the contrary, as discussed below, *Bond* supports standing in this case.

ARGUMENT

I. THE DISTRICT COURT HAD SUBJECT-MATTER JURISDICTION UNDER 28 U.S.C. § 1331.

Subject-matter jurisdiction "refers to a tribunal's power to hear a case." *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 254 (2010) (internal quotation marks omitted). Congress has vested federal courts with subject-matter jurisdiction over actions "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Such jurisdiction arises when a petition for relief "establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Turner/Ozanne*, 111 F.3d at 1316 (internal quotation marks omitted).

1. Prior to the enactment of Rule 6(e), federal courts possessed the discretionary supervisory authority to authorize disclosure of matters occurring before a grand jury where, for example, "the ends of justice can be furthered thereby and the reasons for secrecy no longer exist." *Metzler v. United States*, 64 F.2d 203 (9th Cir. 1933); *see also U.S. v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 233–34 (1940). As its history and development make clear, Rule 6(e) was intended to "continue[]" and to guide—not displace—that "traditional," pre-Rule 6(e) discretion of the court to "permit[] a disclosure" when warranted by the circumstances before it, Fed. R. Crim. P. 6(e), Advisory Committee Notes 1944. *See* Appellees' Brief at 12–15. Indeed, as the Supreme Court made clear after Rule 6(e)'s enactment, the Rule is "but declaratory of" the long-settled common law principle that disclosure is "committed to the discretion of the trial judge." *Pittsburgh Plate Glass*, 360 U.S. at 399.

For purposes of determining, as a threshold matter, whether the District Court had jurisdiction under § 1331, it is not essential that this Court determine whether the supervisory authority invoked by Appellees derives from the "judicial Power" vested in the courts by the

Constitution, Const. art. III, § 1, or whether it is also a power afforded by the Rules themselves, *see* Fed. R. Crim. P. 57(b) (providing that in the absence of express authority to the contrary, a district court may proceed "in any manner consistent with federal law, these rules, and the local rules of the district"). Appellees assert that Rule 6(e) has not divested district courts of the supervisory authority they possessed at common law to order the release of grand jury materials in appropriate circumstances other than those expressly listed in Rule 6(e)(3)(E). Accordingly, it is federal law on which they base their claim for access to the *Tribune* transcripts. *See National Farmers Union Ins. Companies*, 471 U.S. at 850 ("Federal common law as articulated in rules that are fashioned by court decisions are 'laws' as that term is used in § 1331.")

2. Moreover, Appellees' "right to relief necessarily depends on resolution of a substantial question of federal law"—namely, the scope of the court's authority to direct the disclosure of grand jury materials in circumstances not addressed in Rule 6(e)(3)(E). *Turner/Ozanne*, 111 F.3d at 1316 (internal quotation marks and citations omitted). As the Supreme Court has explained, "the district court has jurisdiction if the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another, unless the claim clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous." *Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 643 (2002) (internal quotation marks and citations omitted).

Here, resolution of Appellees' petition turned on the District Court's determination that Rule 6(e)(3)(E) did not preclude it from authorizing disclosure of the *Tribune* transcripts. And the construction of federal law asserted by Appellees and adopted by the District Court is far

from "wholly insubstantial" or "frivolous." *Id*. For that reason too, the District Court had subject-matter jurisdiction under § 1331 to adjudicate the merits of Appellees' petition.

II. APPELLEES HAD AND CONTINUE TO HAVE STANDING TO SEEK ACCESS TO THE *TRIBUNE* GRAND JURY TRANSCRIPTS.

Appellees are Carlson, the Naval Institute Press—the publisher of Carlson's forthcoming book about the *Tribune* grand jury—and six leading national organizations representing the interests of historians, scholars, and journalists. *See* JA6–7, 9, 29. The American Historical Association, the Organization of American Historians, and the Society for Military History are membership organizations devoted to advancing the study of history, including U.S. military history. JA6–7. Their members include professional historians, authors, and scholars, among others. *Id*.[3] The National Security Archive, Naval Historical Foundation, and Reporters Committee for Freedom of the Press are nonprofit organizations dedicated, respectively, to expanding public access to government information, promoting U.S. naval history, and safeguarding press freedom and the right of the public to be informed of the activities of government. *Id*. Carlson and Dr. John Prados, a historian and senior fellow at the National Security Archive who has written about the *Tribune* grand jury investigation, JA53–54, submitted declarations in support of Appellees' petition describing its historical significance, as well as their professional interest in disclosure of the *Tribune* transcripts. JA28–52; JA53–55.

Article III of the Constitution limits the federal courts to adjudicating actual "Cases" or "Controversies." U.S. Const. art. III, § 2, cl. 1. "The doctrine of standing enforces this

[3] For the reasons discussed herein, each of these organizations meets the requirements of associational standing for purposes of this case. Specifically, "(1) their members would otherwise have standing to sue in their own right; (2) the interests the associations seek to protect are germane to their organizational purposes; and (3) neither the claim asserted nor the relief requested requires the participation of individual association members in the lawsuit." *Ezell v. City of Chicago*, 651 F.3d 684, 696 (7th Cir. 2011).

limitation." *Ezell*, 651 F.3d at 695. "Standing is a prerequisite to *filing suit*, while the underlying merits of a claim . . . determine whether the plaintiff is *entitled to relief*." *Arreola v. Godinez,* 546 F.3d 788, 794–95 (7th Cir. 2008) (italics original) (noting that "the two concepts unfortunately are blurred at times"); *see also Booker-El v. Superintendent, Indiana State Prison*, 668 F.3d 896, 899–900 (7th Cir. 2012) (rejecting argument that plaintiff lacked standing where he had "a colorable claim to" the "property interest" asserted; "[w]ere we to require more than a colorable claim we would decide the merits of the case before satisfying ourselves of standing").

The requirements of Article III standing are threefold: (1) an injury in-fact; (2) fairly traceable to the defendant's action; and (3) capable of being redressed by a favorable decision from the court. *Lujan,* 504 U.S. at 560–61. Appellees satisfy each of these requirements. *See* JA6–7, 9, 29.[4] Appellees have suffered concrete injury to legally cognizable interests. They have been denied access to the *Tribune* transcripts—records retained and transferred to NARA pursuant to federal law because of their historical value. Appellees have a strong interest in obtaining access to those records, which concern a singular event in U.S. history, for the purposes of, *inter alia*, conducting and publishing research, and contributing to an ongoing scholarly and public debate about the relationship between the federal government and the news media. *See* A16–18. These injuries are traceable to NARA's refusal to permit access to the *Tribune* transcripts in the absence of a court order authorizing such disclosure, and will be redressed by a court order directing NARA to release them.

Specifically, as discussed in detail herein, Appellees are entitled to seek a District Court order authorizing access to the *Tribune* grand jury materials because (1) they are records of the court to which Appellees are entitled to seek access under common law; (2) even assuming,

[4] Only one member of the Coalition must have standing for jurisdiction to be secure. *Ezell*, 651 F.3d at 696 n.7.

arguendo, that they are not court records, the determination as to whether they should be disclosed is nevertheless "committed to the discretion of the trial judge," *Pittsburgh Plate Glass*, 360 U.S. at 399, and Appellees are entitled to invoke that common law discretion by following the "traditional path" of "petitioning the district court," *Hastings*, 735 F.2d at 1266; and (3) they are archival records subject to a federal statutory and regulatory scheme that entitles Appellees to seek their disclosure. *See generally*, Erwin Chemerinsky, *Federal Jurisdiction* § 2.3, at 68 (4th ed. 2003) ("The law is clear that injuries to common law, constitutional, and statutory rights are sufficient for standing.") This case is thus distinguishable from *Bond*, where a journalist sought to intervene in a civil lawsuit postjudgment to challenge a protective order governing unfiled discovery materials in the possession and sole control of private litigants. *See Bond*, 585 F.3d at 1066 (stating that the journalist "claim[ed] no constitutional or common-law right" to intervene, and "based his intervention petition on a supposed 'presumption' of public access emanating from [Federal Rule of Civil Procedure 26(c)'s] 'good cause' requirement").

A. The *Tribune* grand jury transcripts are records of the court to which Appellees are entitled to seek access under common law.

1. Although the grand jury is mentioned only in the Bill of Rights—and, thus, has not been "textually assigned" to any branch of government, *Williams*, 504 U.S. at 47—it has long been recognized that the Constitution "makes the grand jury a part of the judicial process." *Cobbledick v. United States*, 309 U.S. 323, 327 (1940) ("The proceeding before a grand jury constitutes 'a judicial inquiry . . . of the most ancient lineage.'") (quoting *Hale v. Henkel*, 201 U.S. 43, 66, (1906)); *see also Blair v. United States,* 250 U.S. 273, 278 (1919) ("At the foundation of our federal government the inquisitorial function of the grand jury and the compulsion of witnesses were recognized as incidents of the judicial power of the United States.") Thus, although "[a] grand jury is clothed with great independence in many areas," it

"remains an appendage of the court. . . ." *Brown v. United States*, 359 U.S. 41, 49 (1959) ("*Brown*"), *overruled on other ground by Harris v. United States,* 382 U.S. 162 (1965); *see also Levine*, 362 U.S. at 617 (grand jury is "an arm of the court"); *United States v. John Doe Inc*., 481 U.S. 102, 119 (1987) (J. Brennan, dissenting) (same).

The powers of grand juries "are not unlimited and are subject to the supervision of a judge." *Branzburg v*. *Hayes*, 408 U.S. 665, 688 (1972). The grand jury's authority extends only to investigating possible violations of federal criminal law that occurred within the district in which it is sitting. *See United States v*. *Brown*, 49 F. 3d 1162, 1168 (6th Cir. 1995). The grand jury is also "powerless to perform its investigative function without the court's aid." *Brown*, 359 U.S. at 49. It "must rely on the court to compel production of books, papers, documents, and the testimony of witnesses." *United States v. Calandra,* 414 U.S. 338, 346 n.4 (1974). And a witness's refusal to testify before a grand jury is punishable as a contempt of court. *See Levine*, 362 U.S. at 617–18. In addition, witnesses who seek to quash or modify a grand jury subpoena must seek relief from the court. *See*, *e.g.*, *In re Subpoenaed Grand Jury Witness*, 171 F.3d 511, 513 (7th Cir. 1999). The court is also responsible for safeguarding grand jury secrecy, including by punishing unauthorized breaches of the general rule of secrecy as contempt, *see, e.g.,* Fed. R. Crim. P. 6(e)(7), and authorizing the disclosure of grand jury materials when warranted.

Thus, while the Supreme Court has long recognized what the *Williams* majority described as the grand jury's "tradition of independence"—i.e., the wide latitude it possesses to investigate possible violations of federal law within the territorial jurisdiction of the district court that convened it without the permission of court or prosecutor—it has also rejected the Government's suggestion that a federal grand jury is a free-floating, wholly autonomous body, untethered to any branch of government. *Compare* Gov't Brief at 33 (arguing that "the grand jury is not an

arm of the Judicial Branch") *with Levine*, 362 U.S. at 617 ("[t]he grand jury is an arm of the court"). As Judge Learned Hand recognized more than 85 years ago, "a grand jury is neither an officer nor an agent of the United States, but a part of the court." *Falter v. United States*, 23 F.2d 420, 425 (2d Cir. 1928); *see also Cuisinarts*, 665 F.2d at 31 ("The grand jury, while maintaining independence in many areas, is fundamentally an arm of the judiciary.") (citations omitted); *In re Grand Jury Proceedings Harrisburg Grand Jury 79-1*, 658 F.2d 211, 216 n.6 (3d Cir. 1981) ("Grand juries have traditionally been regarded as an arm of the court."); *In re Long Visitor*, 523 F.2d 443, 447 (8th Cir. 1975) (the grand jury is "an arm of the district court through which it derives its power").

It follows, as Justice Whittaker stated in his concurring opinion in *United States v. Procter & Gamble*, that "[g]rand jury minutes and transcripts are not the property of the Government's attorneys, agents or investigators," but "are records of the court." 356 U.S. 677, 684–685 (1958)(Whittaker, J., concurring); *Cuisinarts*, 665 F.2d at 31 (grand jury materials are "records of the courts"); *see also United States v. Penrod,* 609 F.2d 1092, 1097 (4th Cir.1979) (same); *Standley v. Dept. of Justice*, 835 F.2d 216, 218 (9th Cir. 1987) (same); N.D. Ill. L. Cr. R. 6.2 (providing that certain "documents relating to grand juries . . . shall be public records," and that "[a]ll other records maintained by the clerk relating to grand juries are restricted documents and shall be available only on order of the chief judge").

2. The Supreme Court in *Nixon*, recognized a "general right to inspect and copy public records and documents," including court records, not conditioned "on a proprietary interest in the document or upon a need for it as evidence in a lawsuit." 435 U.S. at 597–98 (explaining that the "interest necessary to support the issuance of a writ compelling access has been found, for example, in the citizen's desire to keep a watchful eye on the workings of public agencies" and

"in a newspaper publisher's intention to publish information concerning the operation of government") (citations omitted). While not absolute, *id*., its application is broad; the common law right reaches, for example, "transcripts of proceedings" as well as "items not admitted into evidence." *Smith v. United States Dist. Court for Southern Dist.*, 956 F.2d 647, 650 (7th Cir. 1992); *see also Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 945 (7th Cir. 1999) (explaining that because "the public at large pays for the courts," it "has an interest in what goes on at all stages of a judicial proceeding").

Given the nature of the common law right of access, it is well-settled that any member of the public has standing to assert it. *See Jessup v. Luther*, 227 F.3d 993, 997 (7th Cir. 2000) (explaining that "[r]epresentatives of the press and general public must be given an opportunity to be heard on the question of . . . access to documents") (internal quotation marks and citations omitted); *see also Bond*, 585 F.3d 1061. That does not mean that disclosure of court records is automatic under common law. While the right establishes, "as a general matter," that court records "should be open to the public for inspection and copying," it is a "flexible concept," that requires the district court to make a "discretionary decision" that is "informed by a sensitive appreciation of the circumstances." *Corbitt*, 879 F.2d at 228. Moreover, while the common law right of access "creates a 'strong presumption' in favor of public access," this Circuit does not apply that presumption to materials, like grand jury materials, "properly" maintained under seal. *Id.* at 228. Put another way, where court records are properly "confidential," the "party seeking disclosure may not rely on presumptions[.]" *Id*.

This Court's decision in *Corbitt*, 879 F.2d 224, is instructive. *Corbitt* involved a request for disclosure of a criminal defendant's presentence report by a newspaper publisher. *Id*. at 226. The Court expressly recognized that the "common law right of access attach[ed] to" the

presentence report. *Id*. at 237.[5] However, because it found that "presentence reports have traditionally been confidential," *id*. at 229–30, the Court concluded that the party seeking disclosure could not rely on a presumption in favor of public access. *Id.* at 228. In reaching that conclusion, the Court compared presentence reports to grand jury materials. *See, e.g., id*. at 234 ("In a related area, the Supreme Court has stressed that a district judge ruling on a petition for disclosure of grand jury materials must consider the possible 'systemic effects' of disclosure on future grand juries before releasing grand jury materials in any particular case."); *id*. at 238–39.

The "important question" for the Court in *Corbitt* was "what kind of showing will be sufficient to warrant disclosure of the contents of the report to a third party." *Id*. at 237. It concluded that a "news organization seeking access to a presentence report must make a substantial, and specific, showing of need for disclosure before a district court may," in its discretion, allow access to such a report, *id*. at 238; *see also, id*. at 239–40. The Court vacated the district court's disclosure order and remanded for reconsideration of the newspaper publisher's request for access under that more rigorous standard. *Id*.

As with the presentence report at issue in *Corbitt*, grand jury materials are subject to a general rule of secrecy and the public does not enjoy a presumption of access to such materials. Nevertheless, the common law right of access attaches to such records, and provides entitles members of the public to seek access to grand jury materials in appropriate cases. *Id*. at 237; *cf*. *Bond*, 585 F.3d at 1066. Like the standard established in *Corbitt*, the showing that Appellees

[5] Given the right of Appellees to seek access to the *Tribune* transcripts under common law, Appellees need not assert a First Amendment right. Appellees note, however, that the *Amicus Curiae* Brief of Legal Scholars, Dkt. No. 24, argues compellingly that, where as here, the traditional justifications for grand jury secrecy are no longer present, the First Amendment may provide an alternative basis for disclosure and, at a minimum, supports affirmance of the District Court's order in this case. Indeed, this Court has long recognized that the "common law right supports and furthers many of the same interests which underlie those freedoms protected by the Constitution." *United States v. Edwards*, 672 F.2d 1289, 1294 (7th Cir. 1982).

were required to make to justify disclosure of the *Tribune* transcripts was a heightened one that addressed numerous competing considerations—a standard the District Court found Appellees satisfied. A14–A20; *see also In re Kutler*, 800 F.Supp.2d 42, 47 (D.D.C. 2011) (explaining that the "special circumstances exception" applies "only in exceptional circumstances" and "require[s] a nuanced and fact-intensive assessment of whether disclosure is justified").

3. Unlike the *Tribune* transcripts, which are in the physical possession of NARA, the presentence report at issue in *Corbitt* was in the possession of the district court. *Corbitt*, 879 F.2d at 237. Yet the status of grand jury materials as records of the court does not turn on their location. Grand jury materials remain court records to which the common law right of access attaches even if they are in the physical possession of the Executive Branch. Indeed, the Second Circuit in *Cuisinarts* expressly rejected the argument that grand jury materials—"traditionally records of the Judicial Branch"—lose that status when in the hands of the DOJ, holding instead that grand jury materials in the possession of the Executive Branch "remain the records of the courts, and courts must decide whether they should be made public." 665 F.2d at 31.

That conclusion is consistent with the practice—now codified in Rule 6(e)(1)—of permitting Government attorneys to retain possession of grand materials in the absence of a court order directing otherwise.[6] In his separate opinion in *Procter & Gamble*, Justice Whittaker expressed concerns about the potential for Government abuse of that practice. 356 U.S. at 684–685 (1958) (Whittaker, J., concurring) (suggesting a rule requiring that the grand jury materials

[6] Rule 6(e)(1) provides that "[u]nless the court orders otherwise," grand jury materials are to remain in the physical custody of government attorneys after the grand jury proceedings have concluded. This subsection was added to Rule 6(e) in 1979. The Advisory Committee Notes accompanying that amendment explain that the provision "is in accord with present practice. It is specifically recognized, however, that the court in a particular case may have reason to order otherwise." Fed. R. Crim. P. 6(e), Advisory Committee Notes 1979.

"in cases where a 'no true bill' has been voted, be promptly upon return sealed and impounded with the clerk of the court"). Yet nothing in his opinion, nor in any subsequent opinions of the Court, suggests that practice converts grand jury materials to something other than court records, or divests the court of control over their disclosure. To the contrary, Justice Whittaker made clear that the grand jury transcripts at issue in that case, while in the possession of government attorneys, were nevertheless "records of the court." *Id*. at 685. And, indeed, at least one district court has expressly rejected the contention that Rule 6(e)(1) "changes the essential nature of the [grand jury] transcript from a court record to an agency record." *Valenti v. U.S. Dept. of Justice*, 503 F.Supp. 230, 233 (E.D. La. 1980) ("grand jury transcript is a court record generated by an arm of the court, and it remains a court record despite the fact that the local United States Attorney is its physical custodian").

B. Even if the *Tribune* grand jury transcripts are not court records, Appellees are entitled to seek access to them under common law.

1. As the Supreme Court stated in *Pittsburgh Plate Glass*, Rule 6(e) is "but declaratory of" the common law principle that disclosure of grand jury materials is within the discretion of the supervising court. 360 U.S. at 399. The Court reiterated that principle in *Douglas Oil Co. of Calif. v. Petrol Stops Nw.*, when it concluded that "requests for disclosure of grand jury transcripts should be directed to the court that supervised the grand jury's activities." 441 U.S. 211, 226 (1979).[7] "Indeed," it explained, "those who seek grand jury transcripts have little choice other than to file a request with the court that supervised the grand jury, as it is the only

[7] At the time *Douglas Oil* was decided, no provision of Rule 6(e) addressed this issue. The Rule has since been amended. *See* Fed. R. Crim. P. 6(e)(3)(D), Advisory Committee Notes 1983.

court with control over the transcripts." *Id*. at 225; *see also id*. at 216 (referring to the supervising court as the transcripts' "guardian").[8]

Douglas Oil involved a request for disclosure made under Rule 6(e). However, "like the authority to disclose grand jury records within the parameters set by [the Rule], the authority to determine whether, outside of those parameters, special circumstances warranting release exist," likewise, "rest[s] with the district court that initially supervised the grand jury." *Craig* 131 F.3d at 102 n.2. Thus, even assuming, *arguendo*, that the *Tribune* grand jury transcripts are not records of the court, they are nevertheless materials in the possession of the Government to which the supervising court controls access under both Rule 6(e) and common law. Courts have recognized that a party seeking access to grand jury materials in circumstances that fall outside the scope of the exceptions enumerated in Rule 6(e)(3)(E) must seek authorization from the supervising court. *See Craig*, 131 F.3d at 102 n.2; *Hastings*, 735 F.2d at 1265–66. And the "traditional path" for doing so is by "petitioning the district court," thereby "permit[ing it] to exercise its customary control over grand jury materials." *Id.* at 1266.[9]

2. There is no threshold barrier that precludes certain parties or classes of parties from petitioning a district court for access to grand jury materials within its control in circumstances

[8] The grand jury transcripts at issue in *Douglas Oil* were in the physical possession of the Government and petitioners (private parties). *Id*. at 216, 225 n.17.

[9] As discussed in Appellees' Brief, the Eleventh Circuit has held that "a court's power to order disclosure of grand jury records is not strictly confined to instances spelled out in [Rule 6(e)(3)(E)]." *Hastings*, 735 F.2d at 1267–68. In doing so, it rejected a challenge to a Judicial Committee's standing to petition for access to grand jury materials. Its reasoning, however, provides little guidance here because the challenge was based on the Committee's status as a government entity. The party opposing disclosure argued that because the Committee was "an entity of the United States" it lacked standing to petition for disclosure "absent more explicit congressional authorization." *Id*. at 1265. "Assuming" that standing doctrine applied, the Eleventh Circuit held that the Committee's statutory duty to conduct an investigation "provid[ed] the necessary congressional grant of standing. . . ." *Id*. at 1265.

not expressly provided for in Rule 6(e)(3)(E). To the contrary, as discussed in detail in Appellees' brief, Rule 6(e) has evolved over time in response to successful petitions for disclosure brought by parties for whom none of Rule 6(e)(3)(E)'s enumerated exceptions applied. *See* Appelles' Br. at 15–17. It was federal courts' "recognition of the occasional need for litigants to have access to grand jury transcripts," for example, that "led to the provision" found in Rule 6(e)(3)(E)(i) that disclosure of grand jury transcripts may be made to a third-party civil litigant "when so directed by a court preliminarily to or in connection with a judicial proceeding." *Douglas Oil*, 441 U.S. at 220.

The identity of a party seeking disclosure of grand jury materials pursuant to the court's supervisory authority in a given case is, however, an appropriate factor to be considered by the court when determining, *on the merits*, whether disclosure is appropriate. *See Craig* 131 F.3d at 106 (identifying "non-exhaustive list" of factors for consideration, including "the identity of the party seeking disclosure"); *In re Kutler*, 800 F.Supp.2d at 48 (finding that "the identity of the parties seeking disclosure—including major historical groups and several leading Nixon and Watergate scholars—weigh[ed]" in favor of disclosure); A15 (finding that the identity of Appellees "militate[d] in favor of disclosure").

C. The *Tribune* grand jury transcripts are subject to a federal statutory and regulatory records regime that entitles Appellees to access.

1. The *Tribune* grand jury transcripts are archival records currently housed in the permanent collection of NARA. JA6; JA30–JA31. NARA is the federal agency charged with preserving and facilitating public access to records of all three branches (Executive, Legislative, and Judicial) of the federal government. 36 C.F.R. § 1254.1; *see also* 44 U.S.C. § 2107.

As discussed above, "[u]nless the court orders otherwise," grand jury materials remain in the physical custody of an attorney for the government after the grand jury proceedings have

concluded. Fed. R. Crim. P. 6(e)(1). Such materials are maintained in DOJ criminal case files, and are retained and disposed of pursuant to records schedules approved by NARA in accordance with its statutory obligations. *See* 44 U.S.C. § 2904; 44 U.S.C. §§ 3302, 3303, 3303a. Because most grand jury materials are deemed to be of no particular historical value, they are destroyed pursuant to those records schedules. Grand jury materials "determined by the Archivist of the United States to have sufficient historical or other value to warrant their continued preservation by the United States Government," 44 U.S.C.§ 2107(1), however, are transferred to NARA, and form part of its permanent collection. Like other records transferred to NARA, such materials continue to be subject to "limitations and restrictions" concerning their "examination and use" that applied prior to their transfer. 44 U.S.C. § 2108. Public access to archival records in NARA's collections is generally obtained either by requesting access at the appropriate NARA research facility, or by filing a request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. *See* 36 C.F.R. § 1252.1 (regulations "prescribe rules and procedures governing the public use of records and donated historical materials in the custody of [NARA]"); *see also* 36 C.F.R. § 1250.10(a)–(b) (stating that "[m]ost archival records held by NARA are available to the public for research" without the filing of a FOIA request).

In connection with research for his forthcoming book, Carlson requested access to the *Tribune* transcripts and related materials located at NARA's College Park, Maryland facility ("NARAII"). JA30. He was given access to thousands of pages of materials relating to the *Tribune* grand jury that had been transferred to NARA by DOJ and the Federal Bureau of Investigation. *Id*. Although Carlson was originally told by NARA staff that they were unable to locate the *Tribune* transcripts at NARAII, *see* JA50, he later learned that they had been found, and were labeled as enclosures to case file materials transferred to NARA by DOJ. JA30–31.

NARA staff informed Carlson that, absent a court order authorizing disclosure, the transcripts would remain closed to the public in accordance with the general rule of grand jury secrecy codified in Rule 6(e)(2). *Id*.

The Supreme Court has held that a plaintiff suffers an "injury in fact" when the plaintiff fails to obtain information subject to public disclosure by statute. *See Public Citizen,* 491 U.S. at 449 (failure to obtain information subject to disclosure under Federal Advisory Committee Act (FACA) "constitutes a sufficiently distinct injury to provide standing to sue"); *see also Fed. Election Comm'n v*. *Akins*, 524 U.S. 11, 18 (1998) (the "'injury in fact' that respondents have suffered consists of their inability to obtain information" about an organization that would otherwise have been required to be made public by statute). Appellees' inability to obtain access to the *Tribune* transcripts from NARA pursuant to the statutes and regulations that govern public access to archival materials in its collection thus provides an independent basis for standing here. As the Supreme Court explained in *Public Citizen*:

> As when an agency denies requests for information under [FOIA], refusal to permit appellants to scrutinize the ABA Committee's activities to the extent FACA allows constitutes a sufficiently distinct injury to provide standing to sue. Our decisions interpreting [FOIA] have never suggested that those requesting information under it need show more than that they sought and were denied specific agency records. There is no reason for a different rule here.
>
> The fact that other citizens or groups of citizens might make the same complaint after unsuccessfully demanding disclosure under FACA does not lessen appellants' asserted injury, any more than the fact that numerous citizens might request the same information under [FOIA] entails that those who have been denied access do not possess a sufficient basis to sue.

491 U.S. at 449–50.

Indeed, to conclude that Appellees lack standing would undermine the federal statutory and regulatory system described above, which was designed to preserve and ultimately provide

the public with access to historically valuable archival records, including those whose disclosure rests, ultimately, within the discretion of a court.

2. The Government contends that the *Tribune* transcripts are "agency records" subject to FOIA. Gov't Br. at 19 (arguing that they are exempt from disclosure under FOIA Exemption 3). Courts that have addressed this issue, however, have concluded that because "the grand jury is an appendage of the court, the records of the grand jury are court records" within its sole control, and not subject to FOIA. *Valenti*, 503 F.Supp. at 232–33 (explaining that FOIA excludes "the courts of the United States" from its definition of "agency"); *see also Standley*, 835 F.2d at 218. As set forth above, the *Tribune* transcripts are court records regardless of their physical location. Accordingly, this Court need not reach the question of whether they are subject to FOIA to conclude that Appellees had standing to petition the court for access.

To the extent, however, that the *Tribune* transcripts are not court records, then they are agency records subject to FOIA, and that statute provides an additional basis for Appellees' standing to seek an order authorizing their disclosure. *See U.S. Dep't of Justice v. Tax Analysts,* 492 U.S. 136, 149–50 (1989) (holding that the DOJ's Tax Division was obligated under FOIA to release copies of court decisions incorporated into its files). But for the lack of judicial authorization for their disclosure, those records would be disclosed pursuant to FOIA. As the case cited by the Government makes clear, application of FOIA Exemption 3 in this context would mean nothing more than that disclosure could "only be made" by NARA "pursuant to a court order" permitting it. *Fund for Constitutional Gov't v. Nat'l Archives and Records Service,* 656 F.2d 856, 868 (D.C. Cir. 1981); *see* Gov't Br. at 19.

D. This Court's decision in *Bond* supports jurisdiction in this case.

In *Bond*, this Court vacated a district court order granting a journalist's motion to intervene in a civil lawsuit for the purpose of challenging a protective order governing discovery.

585 F.3d at 1065. The district court granted the journalist's motion to intervene and lifted the protective order in its entirety months *after* it had dismissed the civil lawsuit with prejudice. *Id*. Moreover, "the documents produced during discovery were never filed with the court nor used in any judicial proceeding," and no party to the lawsuit had "asked the court to revisit and modify the terms of the protective order postjudgment." *Id*. For these reasons, a two-member majority concluded that the journalist's motion "should have been dismissed for lack of standing."[10]

Bond is distinguishable. The *Tribune* transcripts are court records within the court's control. They are not analogous to unfiled discovery materials that are merely exchanged by private parties in a civil dispute and not "used in any judicial proceeding." While it is certainly true that "[u]nlike an ordinary judicial inquiry," grand jury proceedings "are secret," *Levine*, 362 U.S. at 617, transcripts of testimony given before a grand jury are in no respect "private" materials akin to unfiled civil discovery. *Bond*, 585 F.3d at 1066. Thus, unlike the journalist in *Bond*, who "claim[ed] no constitutional or common-law right" to seek access to unfiled discovery material, *id*., Appellees assert that the common law, as well as the statutory and regulatory regime requiring preservation of the *Tribune* transcripts for posterity, entitles Appellees to petition the court for access.

Further, unlike *Bond*, this case does not involve a motion to intervene in a civil dispute postjudgment. As discussed above, disclosure of grand jury materials under common law and under Rule 6(e) is committed to the discretion of the District Court, including after the grand jury has been dissolved. Indeed, that Appellees' petition—like other requests for access to grand jury

[10] While concurring in the result, Judge Tinder concluded that the journalist "had sufficient standing" to challenge the protective order. *Id*. at 1080 (Tinder, J., concurring) ("So, I would arrive at the same place as the majority opinion but by going to the merits of the decision to alter the protective order rather than barring the petition for lack of standing.").

materials[11]—sought access to transcripts from a grand jury that has long since been dissolved is a factor weighing in favor of granting Appellees' petition on the merits. *See* A18.

Bond recognizes the authority of the court to address requests from parties like Appellees to lift restrictions that "operate to shield the court's own records from public view." 585 F.3d at 1079 (quoting *Nixon*, 425 U.S. at 598 ("[e]very court has supervisory power over its own records and files")). Accordingly, its reasoning supports jurisdiction in this case.

CONCLUSION

For the foregoing reasons, the District Court had jurisdiction over Appellees' petition.

Respectfully submitted this 3rd day of March, 2016.

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[11] *See, e.g.*, *In re Biaggi*, 478 F.2d 489, 492, 494 (2d Cir. 1973) (affirming order granting access to transcript of grand jury testimony pursuant to court's supervisory authority where no indictment was returned and there was "no judicial proceeding preliminary to or in connection with" the proceeding that the testimony might have been relevant to because "the public interest required that the request [for access] be granted").

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume requirement of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 6,994 words, as determined by the word-count function of Microsoft Word 2010, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Circuit Rule 32(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 12-point Times New Roman font.

CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I also hereby certify that I had 15 copies sent to the Clerk's office by a third- party commercial carrier for delivery within 3 days.

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CIRCUIT RULE 30(D) STATEMENT

The undersigned attorney hereby certifies, pursuant to Circuit Rule 30(d), that all material required under Circuit Rule 30(a) and (b) is included in the Appendices.

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