No. 17-15016-U

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MARION PITCH,

Petitioner-Appellee,

v.

UNITED STATES OF AMERICA,

Respondent-Appellant.

On Appeal from the United States District Court
for the Middle District of Georgia

EN BANC BRIEF FOR *AMICI CURIAE* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 30 MEDIA ORGANIZATIONS IN SUPPORT OF PETITIONER-APPELLEE

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Pitch v. United States, No. 17-15016-U

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1, the undersigned certifies that the Reporters Committee for Freedom of the Press is an unincorporated association of reporters and editors with no parent corporation and no stock. Corporate disclosure statements for additional *amici* are listed at Appendix A. The undersigned further certifies that the following persons are known to have an interest in the outcome of this case.

1. American Society of Magazine Editors
2. The Associated Press
3. Association of Alternative Newsmedia
4. AT&T Inc. (T)
5. Bell, Joseph J
6. BlackRock, Inc. (BLK)
7. Brown, Bruce D.
8. Cable News Network, Inc.
9. Californians Aware
10. The E.W. Scripps Company (SSP)
11. The Foundation for National Progress, dba Mother Jones
12. Fox Television Stations, LLC
13. Freeman, Mark R.

14. Gannett Co., Inc. (GCI)

15. Hinshelwood, Bradley A.

16. Hunt, Joseph H.

17. International Documentary Association

18. Investigative Reporting Program at the University of California, Berkeley

19. Investigative Reporting Workshop at American University

20. Karp, David A.

21. The McClatchy Company (MNI)

22. McNeil, W. Taylor

23. The Media Institute

24. MediaNews Group Inc.

25. Meredith Corporation (MDP)

26. MPA – The Association of Magazine Media

27. National Newspaper Association

28. National Press Photographers Association

29. The New York Times Company (NYT)

30. The News Leaders Association

31. Online News Association

32. Peeler, Charles E.

33. Peterman, G.F., III

34. Pitch, the Estate of Anthony S.

35. Pitch, Marion E.

36. POLITICO LLC

37. Public Citizen

38. Raab, Michael S.

39. Radio Television Digital News Association

40. Reveal from The Center for Investigative Reporting

41. Readler, Chad A.

42. Reuters New & Media Inc.

43. Reporters Committee for Freedom of the Press

44. The Society of Environmental Journalists

45. Society of Professional Journalists

46. Thompson Reuters Corporation (TRI)

47. Townsend, Katie

48. Treadwell, The Honorable Marc T.

49. Tribune Publishing Company (TPCO)

50. The Tully Center for Free Speech

51. Weeks, Lin

52. Zieve, Allison M.

Dated: September 11, 2019

/s/ Katie Townsend
Katie Townsend
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REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

STATEMENT OF IDENTITY OF *AMICI CURIAE*

The Reporters Committee for Freedom of the Press and 30 other media organizations, through undersigned counsel, respectfully submit this brief as *amici curiae* in support of Petitioner-Appellee. As representatives of the news media, *amici* have a particularly powerful interest in this case. This Court's recognition in *In re Petition to Inspect and Copy Grand Jury Materials* (*Hastings*), 735 F.2d 1261 (11th Cir. 1984), that federal courts possess inherent authority to disclose grand jury materials in appropriate circumstances other than those explicitly identified in Federal Rule of Criminal Procedure 6(e) is consistent with the origin and history of the Rule—which codifies the role that federal courts have traditionally played in the development of the law of grand jury secrecy—and is in accord with decisions of both the Second and Seventh Circuits. *Amici*, some of whom have successfully sought the disclosure of grand jury materials in "exceptional circumstances consonant with [Rule 6(e)'s] policy and spirit," *Hastings*, 735 F.2d at 1269, in order to further the work of journalists covering matters of particular social, political, and historical significance, have a strong interest in ensuring that this Court's holding in *Hastings*, which reflects the correct interpretation of Rule 6(e), is not disturbed.

Amici curiae are: Reporters Committee for Freedom of the Press, American Society of Magazine Editors, The Associated Press, Association of Alternative

Newsmedia, Cable News Network, Inc., Californians Aware, The E.W. Scripps Company, Foundation for National Progress, dba Mother Jones, Fox Television Stations, LLC, Gannett Co., Inc., International Documentary Assn., Investigative Reporting Program at the University of California, Berkeley, Investigative Reporting Workshop at American University, The McClatchy Company, The Media Institute, MediaNews Group Inc., Meredith Corp., MPA – The Association of Magazine Media, National Newspaper Association, National Press Photographers Association, The New York Times Company, The News Leaders Association, Online News Association, POLITICO LLC, Radio Television Digital News Association, Reuters News & Media Inc., Reveal from The Center for Investigative Reporting, Society of Environmental Journalists, Society of Professional Journalists, Tribune Publishing Company, and Tully Center for Free Speech.

Amici have filed an accompanying motion for leave to file this brief pursuant to 11th Cir. R. 35-8 and Federal Rule of Appellate Procedure 29(a)(3). Both Appellee and Appellant consent to the filing of this brief.

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici* declare: (i) no party's counsel authored the brief in whole or in part; (ii) no party or party's counsel contributed money intended to fund preparing or submitting the brief; and

(iii) no person, other than *amici*, their members or their counsel, contributed money intended to fund preparing or submitting the brief.

STATEMENT OF THE ISSUES

The Court's July 12, 2019 order directed the parties to address the following questions:

1. This Court, in *In re Petition to Inspect and Copy Grand Jury Materials* (*Hastings*), 735 F.2d 1261 (11th Cir. 1984), recognized that courts have inherent power to go beyond the exceptions listed in Federal Rule of Criminal Procedure 6(e) to disclose grand jury records. Should we overturn our holding from *Hastings* and conclude that courts have no power to go beyond the exceptions listed in Rule 6(e)?

2. If courts have inherent power to go beyond the exceptions listed in Rule 6(e), may courts use this inherent power to recognize an exception to grand jury secrecy for matters of historical significance?

3. If courts have the inherent power to disclose grand jury records for matters of historical significance, what test should they apply when deciding whether to grant such disclosure?

4. Whether the district court's disclosure of the grand jury records in their entirety was an abuse of discretion given (a) the purposes of grand jury secrecy and (b) the government's failure to request any redactions.

SUMMARY OF THE ARGUMENT

As this Court correctly recognized more than three decades ago in *In re Petition to Inspect and Copy Grand Jury Materials* (*Hastings*), 735 F.2d 1261 (11th Cir. 1984), Rule 6(e) is "declaratory of" the longstanding principle that disclosure of grand jury material is "committed to the discretion of the trial judge." *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 399 (1959). The "exceptions to the secrecy rule" found in Rule 6(e)(3)(E) "have developed through conformance of Rule 6 to the 'developments wrought in decisions of the federal courts,' not *vice versa*." *In re Am. Historical Ass'n*, 49 F. Supp. 2d 274, 286 (S.D.N.Y. 1999) ("*Historical Ass'n*") (quoting *Hastings*, 735 F.2d at 1268). Those exceptions "were not intended to ossify the law," *Hastings*, 735 F.2d at 1269, which remains subject to development by the courts in their sound discretion and in accordance with the general purposes underlying grand jury secrecy.

The district court's exercise of its inherent authority to order disclosure of the Moore's Ford Lynching grand jury documents was "fully consonant with the role of the supervising court and will not unravel the foundations of secrecy upon which the grand jury is premised." *Craig v. United States (In re Craig)*, 131 F.3d 99, 103 (2d Cir. 1997) ("*Craig*"). Indeed, far from undermining the proper functioning of either the grand jury process or the criminal justice system, a district court's rare exercise of its inherent authority to release grand jury materials in

appropriate circumstances not expressly identified in Rule 6(e) "in the long run, build[s] confidence in our government by affirming that it is open, in all respects, to scrutiny by the people." *Historical Ass'n*, 49 F.Supp.2d at 295.

For these reasons, *amici* write to emphasize the importance to journalists, news organizations, and the public at large of this Court's holding in *Hastings* and, because *Hastings* was correctly decided, urge the Court to "reject[ ] the government's suggestion that [it] unsettle this area of good law," *Craig*, 131 F.3d at 103, by overturning that decision.

In addition, in determining what test courts should apply when deciding whether to order the disclosure of grand jury materials for reasons other than those expressly identified in Rule 6(e), *amici* urge the Court to adopt the framework set forth by the Second Circuit in *Craig*. The Second Circuit identified a series of non-exhaustive factors for district courts to consider when evaluating whether disclosure is warranted, including, *inter alia*, "the identity of the party seeking disclosure," the "reasons for seeking disclosure and the specific information sought," and "how long ago the grand jury proceeding took place." *Craig*, 131 F.3d at 106. This flexible approach, which allows for the nuanced consideration of a variety of relevant factual matters and makes the public interest in disclosure a primary consideration, is consistent with the type of "restraint and discretion"

befitting the appropriate exercise of a court's "inherent powers." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991).

ARGUMENT

I. *Hastings* was correctly decided; its holding should not be overturned.

A. Rule 6(e) does not displace district courts' inherent authority to order the disclosure of grand jury materials in appropriates cases.

This Court's decision in *Hastings* correctly recognized that district courts have inherent authority to disclose grand jury records in circumstances not specifically enumerated in Federal Rule of Criminal Procedure 6(e). Rule 6(e) "is but declaratory of" the broad discretion historically afforded federal courts to determine whether the disclosure of grand jury material is warranted. *Pittsburgh Plate Glass*, 360 U.S. at 399. Contrary to the contention of Appellant ("the Government"), Rule 6(e) was never intended to, and does not, prohibit a district court from authorizing the release of grand jury in "'exceptional circumstances consonant with the [R]ule's policy and spirit.'" *Craig*, 131 F.3d at 103 (quoting *Hastings*, 735 F.2d at 1269).[1]

[1] Federal courts' "inherent supervisory authority over grand juries" is "well recognized." *In re United States*, 441 F.3d 44, 57 (1st Cir. 2006); *see also Dietz v. Bouldin*, 136 S. Ct. 1885, 1891–92 (2016) (reaffirming the "long recognized" principle that "a district court possesses inherent powers not governed by rule or statute" so long as those powers are "a reasonable response to a specific problem" and do not "contradict any express rule or statute"); *United States v. Williams*, 504 U.S. 36, 45–50 (1992) (recognizing courts' supervisory power over grand juries); *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254–57 (1988) (same); *Carlson v. United States*, 837 F.3d 753, 761 (7th Cir. 2016); *Craig*, 131 F.3d at

Rule 6(e) was enacted in 1944 to "continue[]"—not fundamentally alter—"the traditional practice of secrecy on the part of members of the grand jury, *except when the court permits a disclosure*." Fed. R. Crim. P. 6(e), Advisory Committee Notes 1944 (italics added) (citations omitted); *see also In re Report & Recommendation of June 5,1972 Grand Jury*, 370 F. Supp. 1219, 1229 (D.D.C. 1974) (stating that Rule 6(e) "was not intended to create new law," and "remains subject to the law or traditional policies that gave it birth"); *Craig*, 131 F.3d at 102 (explaining that the Rule originated to "reflect[] rather than create[] the relationship between federal courts and grand juries").

And, as this Court recognized in *Hastings*, the enumerated exceptions to the general rule of grand jury secrecy found in Rule 6(e)(3)(E) were added gradually, over time, to conform Rule 6(e) to the "developments wrought in decisions of the federal courts." *Hastings*, 735 F.2d at 1268. For example, it was district courts' "recognition of the occasional need for litigants to have access to grand jury

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102–03; *Hastings*, 735 F.2d at 1268–69*; In re Special February, 1975 Grand Jury*, 662 F.2d 1232, 1235–37 (7th Cir. 1981), *aff'd on other grounds sub nom.*, *United States v. Baggot*, 463 U.S. 476 (1983). The Supreme Court has "repeatedly stressed" the "wide discretion" that "must be afforded to district court judges in evaluating whether disclosure [of grand jury material] is appropriate." *United States v. John Doe, Inc. I*, 481 U.S. 102, 116 (1987); *see also Douglas Oil of Cal. v. Petrol Stops Nw.*, 441 U.S. 211, 223 (1979) ("[W]e emphasize that a court called upon to determine whether grand jury transcripts should be released necessarily is infused with substantial discretion.").

transcripts [that] led to the provision" now found in Rule 6(e)(3)(E)(i) "that disclosure of grand jury transcripts may be made 'when so directed by a court preliminarily to or in connection with a judicial proceeding.'" *Douglas Oil,* 441 U.S. at 220. Similarly, "in 1979 the requirement that grand jury proceedings be recorded was added to Rule 6(e) in response to a trend among [federal] courts to require such recordings." Fed. R. Crim P. 6(e)(1), Advisory Committee Notes to 1979 Amendment. And when Rule 6(e) was amended in 1983 to permit disclosure of material from one grand jury for use in another, the Advisory Committee again looked to the practices of the courts, noting that "[e]ven absent a specific provision to that effect, the courts have permitted such disclosure in some circumstances." Fed. R. Crim. P. 6(e)(3)(C), Advisory Committee Notes to 1983 Amendment; *Hastings*, 735 F.2d at 1268–69. Simply put, both the origin and history of Rule 6(e) belie any claim that it was meant to be "a straitjacket on the courts." *Historical Ass'n*, 49 F. Supp. 2d at 284. Rather, it is and has always been "responsive to courts' interpretation of the appropriate scope of grand jury secrecy." *Id.*

B. The overwhelming weight of case law is in accord with *Hastings*.

Recently, in *McKeever v. Barr*, 920 F.3d 842 (D.C. Cir. 2019), a majority of a three-judge panel of the D.C. Circuit departed from the reasoning of this Court in *Hastings*, the Seventh Circuit in *Carlson v. United States*, 837 F.3d 753 (7th Cir.

2016) ("*Carlson*"), the Second Circuit in *Craig*, as well as a number of federal district courts.[2] The D.C. Circuit's decision in *McKeever*, which holds that the exceptions to secrecy set forth in Rule 6(e) are exclusive, is an outlier and its reasoning should be rejected by this Court. [3]

Notably, while recognizing that the Supreme Court has "not squarely addressed the issue," the panel majority in *McKeever* relied on the argument that Supreme Court precedent cuts against recognition of a district court's inherent authority to authorize the release of grand jury material in situations other than those expressly identified in Rule 6(e). *McKeever*, 920 F.3d at 846 ("the Court has at least four times suggested that the exceptions in Rule 6(e) are exclusive") (citing

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[2] *See, e.g., In re Tabac*, No. 3:08-MC-0243, 2009 WL 5213717 (M.D. Tenn. Apr. 14, 2009) (granting petition to unseal testimony from the grand jury investigation of Jimmy Hoffa); *In re Nat'l Sec. Archive*, No. 08-civ-6599, 2008 WL 8985358, at *1 (S.D.N.Y. Aug. 26, 2008) (granting petition to unseal 57-year old testimony from grand jury investigation of Julius and Ethel Rosenberg).

[3] Arguably, the majority of the panel in *McKeever* also departed from its own precedent. As Judge Srinivasan wrote in dissent, in *Haldeman v. Sirica*, 501 F.2d 714 (D.C. Cir. 1974), the D.C. Circuit, sitting en banc, considered an appeal from a district court order disclosing materials from the Watergate grand jury. The D.C. Circuit in *Haldeman* emphasized that Rule 6(e) "'continues the traditional practice of secrecy on the part of members of the grand jury *except when the court permits a disclosure*.'" *See McKeever*, 920 F.3d at 854 (Srinivasan, J., dissenting) (quoting *In re Report & Recommendation of June 5, 1972 Grand Jury etc.*, 370 F. Supp. 1219, 1227 (D.D.C. 1974). As Judge Srinivasan noted, "when our court in *Haldeman* endorsed [*In re Report & Recommendation of June 5, 1972 Grand Jury etc.*], we in my view affirmed [the] understanding that a district court retains discretion to release grand jury materials outside the Rule 6(e) exceptions." *McKeever*, 920 F.3d at 855 (Srinivasan, J., dissenting).

United States v. Williams, 504 U.S. 36, 46 n.6 (1992); *Illinois v. Abbott & Assocs., Inc.*, 460 U.S. 557, 567 (1983); *United States v. Sells Eng'g*, 463 U.S. 418, 425 (1983); *United States v. Baggot*, 463 U.S. 476, 479–80 (1983)). This is incorrect.

Three of the four cases cited by the *McKeever* majority in support of that proposition do not address courts' inherent power to disclose grand jury materials at all. *See United States v. Williams*, 504 U.S. 36, 46 & n.6 (1992) (addressing whether courts may use inherent authority to obligate prosecutors to disclose exculpatory evidence *to* the grand jury); *Illinois v. Abbott & Assocs., Inc.*, 460 U.S. 557, 567 (1983) (holding that section 4F(b) of the Clayton Act does not confer power to the Attorney General to disclose grand jury records to a state Attorney General without a showing of particularized need); *United States v. Sells Eng'g*, 463 U.S. 418, 425–26 (1983) ("The main issue in this case is whether attorneys in the Justice Department may obtain automatic [Rule 6(e)(3)](A)(i) disclosure of grand jury materials for use in a civil suit, or whether they must seek a (C)(i) [now (E)(i)] court order for access.").

In the fourth case, *United States v. Baggot*, the sole issue before the Court was "whether disclosure [of grand jury materials] for use in an IRS civil audit" fell within the meaning of Rule 6(e)(3)(E)(i), one of the Rule's enumerated exceptions to grand jury secrecy. 463 U.S. at 479. Though the Seventh Circuit in *Baggot* had reversed the district court's order granting disclosure of the grand jury materials at

issue in that case pursuant to the district court's inherent authority, in doing so the Seventh Circuit had also made clear that such inherent authority existed. *In re Special Feb., 1975 Grand Jury*, 662 F.2d at 1238 ("[w]e may not always be bound by a strict and literal interpretation of Rule 6(e) in the situation where there is some extraordinary and compelling need for disclosure in the interest of justice and little traditional need for secrecy remains").[4] And, in any event, the Supreme Court did not address the issue because the Government's petition for certiorari in *Baggot* was limited to seeking review of the Seventh Circuit's interpretation of Rule 6(e)(3)(E)(i). *See Baggot*, 463 U.S. at 478 (1983).

In sum, nothing in these Supreme Court decisions, which are cited by the Government here (*see* Appellant's en banc Br. at 28), undercuts *Hastings*' central holding. This Court, the Second Circuit, and the Seventh Circuit were correct to conclude that Rule 6(e) preserves district courts' longstanding discretion to order disclosure of grand jury materials outside the confines of Rule 6(e)(3)(E) in "'exceptional circumstances consonant with the rule's policy and spirit.'" *Craig*, 131 F.3d at 103 (quoting *Hastings*, 735 F.2d at 1269). This Court's recognition in *Hastings* that the origin and history of Rule 6(e) "indicate that [its] exceptions permitting disclosure were not intended to ossify the law, but rather are subject to

[4] The Seventh Circuit would later expressly hold that "a district court's limited inherent power to supervise a grand jury includes the power to unseal grand-jury materials when appropriate." *Carlson*, 837 F.3d at 756.

development by the courts in conformance with the rule's general rule of secrecy," 735 F.2d at 1269, is no less true today. Were this Court to overturn *Hastings*, it would depart sharply from the traditional interpretation and understanding of Rule 6(e), and strip district courts in this Circuit of the flexibility they have historically possessed to grant access to grand jury materials when warranted.

II. The disclosure of historically significant grand jury records has benefitted the public and not undermined grand jury secrecy.

A. The public benefits when courts exercise their inherent discretion to disclose grand jury records in exceptional cases.

Access to grand jury records in exceptional cases is of particular importance to the news media. When district courts exercise their inherent authority to disclose grand jury materials, the press, historians, and scholars use that access to create a more complete, accurate public record of historically significant events.

For example, the petitioners in *Carlson* included Elliot Carlson, "a journalist and historian with a special expertise in naval history," 837 F.3d at 756, as well as *amicus* the Reporters Committee for Freedom of the Press. *See* Docketing Statement for United States of America at 28, Carlson v. United States, No. 15-2972 (7th Cir. Sept. 10, 2015). The petitioners sought access to grand jury "materials concern[ing] an investigation into the *Chicago Tribune* in 1942 for a story it published revealing that the U.S. military had cracked Japanese codes"—a closely held military secret at the height of World War II. *Carlson*, 837 F.3d at

755. Following the publication of the *Tribune* article, which "appeared to be . . . based on a classified Navy communiqué that alerted naval commanders to the impending attack on Midway Island[,]" the government empaneled a grand jury and launched an investigation into the *Tribune* and one of its reporters under the Espionage Act of 1917. *Id.* at 756. The district court in *Carlson* ordered the release of the *Tribune* grand jury transcripts and the Seventh Circuit affirmed. *Id.* at 755–56.

Public release of the *Tribune* grand jury transcripts gave the news media, as well as historians and scholars, a more complete public record of a singular event in American history: the first and, to date, only time that the government has sought the indictment of a major news organization for allegedly violating the Espionage Act by publishing classified information. Included in the *Tribune* grand jury materials were details about how the *Tribune* reporter obtained the classified information. *See*, *e.g.*, Michael E. Ruane, *75 Years Ago, an Epic Battle—and an Alarming Press Leak*, Washington Post, June 6, 2017, B01, 2017 WLNR 17428030 ("The dispatch wound up in the hands of the [aircraft carrier USS] Lexington's rescued executive officer, Cmdr. Morton Seligman, who was bunking with [*Tribune* reporter Stanley] Johnson.").

Media coverage following release of the *Tribune* grand jury transcripts was not merely historical. It included commentary about the government's more recent

efforts to pursue "leak" investigations under the Espionage Act, *see*, *e.g.*, Ofer Raban, *Assange's new indictment: Espionage and the First Amendment*, Columbus Telegram, May 15, 2019, 2019 WLNR 16212339 ("An incensed President Franklin Roosevelt demanded that Espionage Act charges be brought against the reporter, the managing editor and the Tribune itself. But unlike Assange's grand jury, the Tribune's grand jury refused to issue indictments."), and the nature of unauthorized disclosures of information to members of the news media in general. *See*, *e.g.*, *The Grave Danger Posed by Leakers*, Providence Journal, September 3, 2017, A13, 2017 WLNR 27137979 (arguing that "[t]he same issues that prevented justice after Midway are still in play today"); Noah Feldman, *World War II Leak Case is a Win for Edward Snowden*, Times of Oman, Sept. 21, 2016, 2016 WLNR 28720320 ("It's hard to escape the conclusion that the Justice Department under Barack Obama was in part continuing its hard line against leakers. . . . The deeper lesson of the court's ruling is that it's absurd and undemocratic for secrecy to endure when there is no continuing reason to maintain it and the public interest supports disclosure.").

Likewise, in *In re Petition of Kutler*, petitioners led by Stanley Kutler, a historian and author, sought access to "the transcript of President Richard M. Nixon's grand jury testimony from June 23 and 24, 1975." 800 F. Supp. 2d 42, 43

(D.D.C. 2011).[5] President Nixon's testimony, taken by the Watergate Special Task Force following his resignation and pardon by President Gerald Ford, was of great historical interest. *Id.* News media accounts at the time had indicated that the testimony addressed the gap in a tape recording that covered a key meeting between President Nixon and H.R. Haldeman, the alteration of transcripts of tape recordings of other Oval Office meetings, the Nixon administration's use of the IRS "to harass political enemies," and a $100,000 payment from Howard Hughes to a friend of President Nixon. *Id.* The district court, applying the multi-factored test set forth by the Second Circuit in *Craig*, ordered the transcript unsealed. *Id.* at 47–48, 50.

As with the *Tribune* grand jury transcripts that were at issue in *Carlson*, journalists used the unsealed transcript of President Nixon's grand jury testimony to create a more complete public record of the Watergate scandal. Indeed, as the *Los Angeles Times* reported, "the testimony closed one of the last gaps in the record of the scandal and provided an irresistible look at a master politician as he sparred with some of the people who had indicted more than 60 members of his administration." Timothy M. Phelps, *Parsing Nixon's Secret Testimony: Transcripts of his 1975 Grand Jury Appearance are Unsealed*, Los Angeles Times,

[5] The district court's holding in *Kutler* has been abrogated by *McKeever*. *Amici* cite this case only to demonstrate the benefit to the press and the public from disclosure of the grand jury records at issue.

November 11, 2011, 2011 WLNR 23308490. Among the revelations covered by the news media following the unsealing was President Nixon's insistence that "it was vitally important" that Navy Stenographer Charles Radfer—"who was discovered to have stolen 5,000 pages of classified papers from [Secretary of State Henry] Kissinger's office"—have his phone tapped "'to see whether this mania he had developed for leaking was continuing.'" *Fox: Special Report* (Fox News Network television broadcast Nov. 10, 2011) (quoting Nixon). And multiple enterprises—including the *Los Angeles Times*—began cataloguing and annotating the grand jury testimony for the public's use. *See* Nixon's Watergate grand jury testimony, Los Angeles Times (Nov. 10, 2011), htpp://www.documents.latimes.com/richard-m-nixon-watergate-grand-jury-testimony; Kim Geiger, *Secret Nixon Testimony Unsealed*, Nashua Telegraph, Nov. 11, 2011, 2011 WLNR 23282878 ("[t]he Los Angeles Times is reviewing and annotating the documents."). Simply put, the district court's exercise of its inherent authority to order President Nixon's grand jury testimony unsealed served the public good, as "'[t]here [were] certain dark corners of the Watergate story only Nixon could shed light on.'" Timothy M. Phelps, *Parsing Nixon's Secret Testimony: Transcripts of his 1975 Grand Jury Appearance are Unsealed*, Los Angeles Times, November 11, 2011, 2011 WLNR 23308490 (quoting Timothy Naftali, director of the Nixon Library).

Press and public access to grand jury materials in these cases have served the same laudable goals that the Supreme Court and this Court have identified as the purpose of press and public access to judicial proceedings. Disclosure of judicial records informs the public about issues in modern society and historically significant events,[6] promotes the integrity of the judicial process, especially as a check of factfinding,[7] and legitimizes the judicial process in the eyes of the public by manifesting transparency.[8] For example, in *Comm'r, Ala. Dep't of Corrections v. Adv. Local Media LLC*, the Associated Press, the Alabama Media Group, and

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[6] *See Newman v. Graddick*, 696 F.2d 796, 801 (11th Cir. 1983) ("This right, like the right to attend judicial proceedings, is important if the public is to appreciate fully the often significant events at issue in public litigation and the workings of the legal system.") (citation omitted); *see also F.T.C. v. AbbVie Prod. LLC*, 713 F.3d 54, 62 (11th Cir. 2013) (analysis should weigh in favor of common-law right of access when "access is likely to promote public understanding of historically significant events.").

[7] *See Globe Newspaper Co. v. Superior Court for Norfolk Cty.*, 457 U.S. 596, 606 (1982) ("[Access] enhances the quality and safeguards the integrity of the factfinding process. . . . [I]n the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government."); *Newman*, 696 F.2d at 801 (quoting *Globe Newspaper Co.*, 457 U.S. at 606).

[8] *See Globe Newspaper Co.*, 457 U.S. at 606 ("public access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process"); *Comm'r, Alabama Dep't of Corr. v. Advance Local Media, LLC*, 918 F.3d 1161, 1166 (11th Cir. 2019) ("Access to public and judicial records protects 'the citizen's desire to keep a watchful eye on the workings of public agencies, and . . . a newspaper publisher's intention to publish information concerning the operation of government"') (citation omitted); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980) ("People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.").

the Montgomery Advertiser sought disclosure of Alabama's lethal injection protocol, which had been protected as confidential by the State and had not been filed with the court. 918 F.3d 1161, 116–65 (11th Cir. 2019). After determining that Alabama's protocol was a judicial record, this Court approvingly recounted the district court's rationale for unsealing the protocol. *Id.* at 1169. Access to the protocol would "likely promote understanding of a historically significant event. . . . '[and] may help the public to understand how the same scenario might be repeated or avoided under the protocol as it currently stands.'" *Id*. The same is true of public access to the grand jury materials at issue here.[9]

B. The disclosure of historically significant grand jury records in extraordinary circumstances does not undermine the general rule of grand jury secrecy.

A district courts' exercise of its inherent power to disclose grand jury materials in exceptional circumstances has not and "'will not unravel the foundations of secrecy upon which the grand jury is premised.'" *Carlson*, 837 F.3d at 766 (quoting *Craig*, 131 F.3d at 103, 105); *see also Historical Ass'n*, 49 F. Supp. 2d at 287 ("The exception fits comfortably within the sphere of discretion afforded to courts concerning matters of grand jury secrecy.").

[9] The Government "has never contested the premise that the Moore's Ford Lynching was a historically significant event." *See* Appellant's en Banc Br. at 45.

In *Douglas Oil*, the Supreme Court identified a number of reasons for the general rule of grand jury secrecy. It reasoned that if such proceedings were open to the public,

> [m]any prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements. There would be the risk that those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment.

441 U.S. at 219; *see also United States v. Proctor & Gamble Co.*, 356 U.S. 677, 681 n.6 (1958). Yet these considerations are not present in all instances. The rare cases in which courts have exercised their inherent authority to release grand jury material since this Court decided *Hastings* in 1984 have done no damage to the interests meant to be served by the tradition of grand jury secrecy. *See*, *e.g.*, *Carlson v. United States*, 109 F. Supp. 3d 1025, 1037 (N.D. Ill. 2015) ("No one other than the government has come forward to object to the disclosure, and many of the details related to the Tribune scandal have already been made public."); *In re Tabac*, No. 3:08-MC-0243, 2009 WL 5213717, at *2 (M.D. Tenn. Apr. 14, 2009) (secrecy interests not compromised because "Both Mr. Hoffa and Mr. Sheridan are deceased. The testimony was given more than forty years ago. Mr. Sheridan was a 'special consultant' for the Government on the Hoffa case and wrote a book about it."); *Historical Ass'n*, 49 F. Supp. 2d at 291 (S.D.N.Y. 1999)

("No national security interest is asserted and, with a few exceptions addressed below, no privacy concerns are raised.").

Likewise, in this case, the district court below found no remaining need for secrecy:

> The reasons behind the traditional rule of grand jury secrecy, and thus the policy undergirding Rule 6(e), are no longer implicated. There is no need to protect witnesses from retribution, public scrutiny, or undue influence; there is no fear that suspects will flee; and innocent victims of grand jury scrutiny will not be embarrassed. Nothing favors continued secrecy other than the bare principle that grand jury proceedings should be secret, and while that is important, it is outweighed by the historical significance of the grand jury transcripts and the critical role they can play in enhancing the historical record of the tragic event that occurred at Moore's Ford.

Doc. 22 (Order) at 14. As the district court recognized, disclosure is justified "in those cases where the need for it outweighs the public interest in secrecy." Doc. 22 (Order) at 10 (quoting *Douglas Oil*, 441 U.S. at 219); *see also Dennis v. United States*, 384 U.S. 855, 870 (1966) (constitutional balance tips in favor of "disclosure, rather than suppression" when continued secrecy of grand jury proceedings no longer furthers compelling interest in secrecy); *Carlson v. United States*, 109 F. Supp. 3d at 1037 ("Disclosing the transcripts will not only result in a more complete public record of this historic event, but will "in the long run, build confidence in our government by affirming that it is open, in all respects, to scrutiny by the people.") (quoting *Hastings*, 49 F. Supp. 2d at 295).

III. Application of the factors identified by the Second Circuit in *Craig* allow courts to appropriately reconcile the importance of grand jury secrecy with the public interest in disclosure.

The Second Circuit in *Craig* set forth the appropriate test for courts to apply when deciding whether to exercise their inherent authority to disclose grand jury materials in exceptional circumstances not identified in Rule 6(e). Cognizant of the need to consider a number of factors and interests, and "[m]indful that there is no talismanic formula or rigid set of prerequisites," the *Craig* court offered a "non-exhaustive list of factors that a trial court might want to consider when confronted with these highly discretionary and fact-sensitive 'special circumstances' motions":

> (i) the identity of the party seeking disclosure; (ii) whether the defendant to the grand jury proceeding or the government opposes the disclosure; (iii) why disclosure is being sought in the particular case; (iv) what specific information is being sought for disclosure; (v) how long ago the grand jury proceedings took place; (vi) the current status of the principals of the grand jury proceedings and that of their families; (vii) the extent to which the desired material—either permissibly or impermissibly—has been previously made public; (viii) whether witnesses to the grand jury proceedings who might be affected by disclosure are still alive; and (ix) the additional need for maintaining secrecy in the particular case in question.

Craig, 131 F.3d at 106. According to the Second Circuit, "all of these factors and their precise significance must be evaluated in the context of the specific case." *Id.* at 107.

The nuanced and flexible test announced in *Craig* allows courts to appropriately consider the weight of the public interest in disclosing historically significant grand jury materials, as well as any other specific factual matters, relevant in a given case. Despite ultimately affirming the district court's denial of a petition to unseal grand jury records, the Second Circuit in *Craig* stated that a categorical approach—a rigid rule "that the public interest in a record," alone, "can never suffice" to warrant the release of grand jury materials—would be "inappropriate." 131 F.3d 99, 104 (2d Cir. 1997). And it rejected the notion that an earlier holding prevented "historical interest, on its own, from justifying release of grand jury materials in an appropriate case," *id*., explaining:

> It is, therefore, entirely conceivable that in some situations historical or public interest alone could justify the release of grand jury information. . . . [T]o say that a certain factor—like historical interest—can never suffice as a matter of law misunderstands the fact-intensive nature of the inquiry that is to be conducted. Indeed, the "special circumstances" departure from Rule 6(e) is simply incompatible with per se rules and absolutes.

131 F.3d at 105–06.

The Seventh Circuit in *Carlson* agreed. *Carlson*, 837 F.3d at 766. Adopting what it called the "comprehensive" reasoning of the Second Circuit in *Craig*, the Seventh Circuit in *Carlson* court credited the nuanced approach of the district court in its application of the *Craig* factors to Carlson's petition. *See id.* at 767 ("[t]he district court engaged in a thoughtful and comprehensive analysis of the pros and

cons of disclosure before granting Carlson's request and we are content to let its analysis stand"). Among several reasons weighing in favor of disclosure, the district court in *Carlson* noted both historical-interest benefit and a transparency benefit to disclosing the petitioned-for records. *Carlson v. United States*, 109 F. Supp. 3d 1025, 1035 (N.D. Ill. 2015) ("Petitioners seek the transcripts for scholarly purposes to create a more complete public record of the Tribune investigation, which are worthy goals. . . . . [The] decades-long interest in the case suggests that the public has a significant interest in disclosure of the transcripts."); *id.* ("[T]he Tribune investigation implicates broader principles, namely, the relationship between the government and the press in a democratic society. . . . Other courts have permitted disclosure of grand jury materials where the petitioners sought to explore similarly important events and themes.") (citations omitted).

District courts that have exercised their inherent authority to disclose grand jury materials for reasons other than those expressly set forth in Rule 6(e) have likewise made the public's interest in disclosure a primary consideration in applying the *Craig* factors. In *In re Tabac*, a district court granted a petition to unseal testimony from the grand jury investigation of Jimmy Hoffa, explaining that the testimony in question "is of great historical importance." 2009 WL 5213717, at *2. In *In re Nat'l Sec. Archive*, similarly, the district court held that testimony from the grand jury investigation of Ethel and Julius Rosenburg was "of substantial

historical importance," and ordered that it be released. No. 08 CIV. 6599 AKH, 2008 WL 8985358, at *1 (S.D.N.Y. Aug. 26, 2008). And in *Historical Association*, the historical significance of the transcripts from two grand juries convened to investigate allegations of espionage by Alger Hiss was a primary factor in the district court's decision to order their disclosure. 49 F. Supp. 2d at 278, 298 ("disclosure will fill in important gaps in the existing historical record, foster further academic and other critical discussion of the far-ranging issues raised by the Hiss case, and lead to additional noteworthy historical works on those subjects, all to the immense benefit of the public. The materials should languish on archival shelves, behind closed doors, no longer.").

A case-by-case inquiry that allows for the careful consideration of a variety of relevant factors, but makes the public's interest in disclosure a primary consideration, is consistent with the type of "restraint and discretion" befitting the appropriate exercise of a court's "inherent powers" in this context. *Chambers*, 501 U.S. at 44. Accordingly, *amici* urge this Court to adopt the *Craig* factors as the appropriate framework for district courts to apply when determining whether to exercise their inherent authority to disclose grand jury materials in exceptional circumstances beyond Rule 6(e)'s express exceptions.

CONCLUSION

For the foregoing reasons, *amici* urge the Court to affirm the judgment of the district court.

Dated: September 11, 2019

Respectfully submitted,

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APPENDIX A: ADDITIONAL CORPORATE DISCLOSURE STATEMENTS FOR *AMICI CURIAE*

The Associated Press is a global news agency organized as a mutual news cooperative under the New York Not-For-Profit Corporation law. It is not publicly traded.

Association of Alternative Newsmedia has no parent corporation and does not issue any stock.

Cable News Network, Inc. ("CNN") is a Delaware corporation that owns and operates numerous news platforms and services. CNN is ultimately a wholly-owned subsidiary of AT&T Inc., a publicly traded corporation. AT&T Inc. has no parent company and, to the best of CNN's knowledge, no publicly held company owns ten percent or more of AT&T Inc.'s stock.

Californians Aware is a nonprofit organization with no parent corporation and no stock.

The E.W. Scripps Company is a publicly traded company with no parent company. No individual stockholder owns more than 10% of its stock.

The Foundation for National Progress is a non-profit, public benefit corporation. It has no publicly-held shares.

Fox Television Stations, LLC is an indirect subsidiary of Twenty-First Century Fox, Inc., a publicly held company. No other publicly held company owns 10% or more of Twenty-First Century Fox, Inc. stock.

Gannett Co., Inc. is a publicly traded company and has no affiliates or subsidiaries that are publicly owned. BlackRock, Inc., a publicly traded company, owns 10 percent or more of Gannett's stock.

The International Documentary Association is an not-for-profit organization with no parent corporation and no stock.

The Investigative Reporting Program is a project of the University of California, Berkeley. It issues no stock.

The Investigative Reporting Workshop is a privately funded, nonprofit news organization affiliated with the American University School of Communication in Washington. It issues no stock.

The McClatchy Company is publicly traded on the New York Stock Exchange American under the ticker symbol MNI. Chatham Asset Management, LLC and Royce & Associates, LP both own 10% or more of the common stock of The McClatchy Company.

The Media Institute is a 501(c)(3) non-stock corporation with no parent corporation.

MediaNews Group Inc. is a privately held company. No publicly-held company owns ten percent or more of its equity interests.

Meredith Corporation is a publicly traded company on the New York Stock Exchange under the symbol MDP. Black Rock, Inc., publicly traded on the New

York Stock Exchange under the symbol BLK, owns ten percent (10%) or more of Meredith Corporation's stock.

MPA – The Association of Magazine Media has no parent companies, and no publicly held company owns more than 10% of its stock.

National Newspaper Association is a non-stock nonprofit Missouri corporation. It has no parent corporation and no subsidiaries.

National Press Photographers Association is a 501(c)(6) nonprofit organization with no parent company. It issues no stock and does not own any of the party's or amicus' stock.

The New York Times Company is a publicly traded company and has no affiliates or subsidiaries that are publicly owned. No publicly held company owns 10% or more of its stock.

The News Leaders Association has no parent corporation and does not issue any stock.

Online News Association is a not-for-profit organization. It has no parent corporation, and no publicly traded corporation owns 10% or more of its stock.

POLITICO LLC's parent corporation is Capitol News Company. No publicly held corporation owns 10% or more of POLITICO LLC's stock.

Radio Television Digital News Association is a nonprofit organization that has no parent company and issues no stock.

Reuters News & Media Inc. is a Delaware corporation whose parent is Thomson Reuters U.S. LLC, a Delaware limited liability company. Reuters News & Media Inc. and Thomson Reuters U.S. LLC are indirect and wholly owned subsidiaries of Thomson Reuters Corporation, a publicly-held corporation, which is traded on the New York Stock Exchange and Toronto Stock Exchange. There are no intermediate parent corporations or subsidiaries of Reuters News & Media Inc. or Thomson Reuters U.S. LLC that are publicly held, and there are no publicly-held companies that own 10% or more of Reuters News & Media Inc. or Thomson Reuters U.S. LLC shares.

Reveal from The Center for Investigative Reporting is a California non-profit public benefit corporation that is tax-exempt under section 501(c)(3) of the Internal Revenue Code. It has no statutory members and no stock.

The Society of Environmental Journalists is a 501(c)(3) non-profit educational organization. It has no parent corporation and issues no stock.

Society of Professional Journalists is a non-stock corporation with no parent company.

Tribune Publishing Company is a publicly held corporation. Merrick Media, LLC, Merrick Venture Management, LLC and Michael W. Ferro, Jr., together own over 10% of Tribune Publishing Company's common stock. Nant Capital LLC, Dr.

Patrick Soon-Shiong and California Capital Equity, LLC together own over 10% of Tribune Publishing Company's stock.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations contained in Federal Rule of Appellate Procedure 29(a)(5) because, excluding the portions exempted by Rule 32(f), the brief contains 6146 words, as determined by the Microsoft Word program used to prepare it.

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

Dated: September 11, 2019

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CERTIFICATE OF SERVICE

I certify that on September 11, 2019, I electronically filed the foregoing brief with the United States Court of Appeals for the Eleventh Circuit using the CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

Dated: September 11, 2019

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