No. 17-15016

# In the United States Court of Appeals for the Eleventh Circuit

MARION E. PITCH,

*Plaintiff-Appellee*,

v.

UNITED STATES OF AMERICA,

*Defendant-Appellant*.

On Appeal from the United States District Court
for the Middle District of Georgia, Case No. 5:14-mc-00002-MTT

## EN BANC BRIEF *AMICUS CURIAE* OF CONSTITUTIONAL ACCOUNTABILITY CENTER IN SUPPORT OF PLAINTIFF-APPELLEE AND AFFIRMANCE

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Dated: September 11, 2019

/s/ Ashwin P. Phatak
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## INTEREST OF *AMICUS CURIAE*[1]

*Amicus* Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights, freedoms, and structural safeguards that our nation's charter guarantees. CAC has a strong interest in the grand jury as an institution and the circumstances under which grand jury materials may be disclosed. CAC accordingly has an interest in this case.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Grand jury records are ordinarily kept secret. But this rule of secrecy is not—indeed, has never been—absolute. Long before the Federal Rules of Criminal Procedure were enacted, courts routinely disclosed grand jury materials when the interests of justice made such disclosure appropriate. And in the decades since, courts across the country have released grand jury materials, including materials of historical importance, pursuant to their inherent authority.

In this case, the government is asking this Court to ignore this history and

[1] *Amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus* or its counsel made a monetary contribution to the brief's preparation or submission. Counsel for both parties have consented to the filing of this brief.

long-standing precedent on the theory that the Federal Rules abrogated the inherent authority that district courts have long possessed to disclose historically important grand jury materials. Under the government's theory, a district court may never release grand jury materials pursuant to its inherent authority, even in cases involving important moments in American history, and even decades after those cases were closed. That is wrong.

Courts have long permitted the release of grand jury materials under certain circumstances. *See, e.g.*, *Metzler v. United States*, 64 F.2d 203 (9th Cir. 1933); *Atwell v. United States*, 162 F. 97 (4th Cir. 1908); *In re Grand Jury Proceedings*, 4 F. Supp. 283, 284 (E.D. Pa. 1933) ("the rule of secrecy has long since been relaxed by permitting disclosure whenever the interest of justice requires," a determination that "rests largely within the discretion of the court whose grand jury is concerned"). Indeed, nearly a century ago, the Supreme Court made clear that although "[g]rand jury testimony is ordinarily confidential . . . disclosure is wholly proper" "after the grand jury's functions are ended . . . where the ends of justice require it." *United States v. Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150, 233-34 (1940).

The Federal Rules of Criminal Procedure did not abrogate this inherent authority of courts to disclose grand jury materials. Although "[i]t is true that the exercise of the inherent power of lower federal courts can be limited by statute and rule," the Supreme Court has made clear that courts should not "'lightly assume that

Congress . . . intended to depart from established principles' such as the scope of a court's inherent power." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 47 (1991) (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982)). Instead, there must be a "clear[] expression of purpose" showing that Congress "intended to abrogate [a] well-acknowledged" inherent power. *Link v. Wabash R.R. Co.*, 370 U.S. 626, 631-32 (1962).

Rule 6(e) does not suggest—let alone clearly express—that it was adopted to abrogate courts' inherent authority to disclose grand jury materials. To the contrary, the Rule explicitly states that "[n]o obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B)," Fed. R. Crim. P. 6(e)(2)(A), and district court judges are *excluded* from the list of persons in Rule 6(e)(2)(B) who "must not disclose a matter occurring before the grand jury," Fed. R. Crim. P. 6(e)(2)(B). Moreover, although Rule 6(e)(3)(E) identifies certain circumstances in which district courts "may" disclose grand jury information, it nowhere states that those are the *only* circumstances in which district courts may disclose grand jury information. Fed. R. Crim. P. 6(e)(3)(E). Nor does the provision state—or even suggest—that it was intended to abrogate courts' inherent power. In short, there is nothing in the text of the Rule that clearly wipes away courts' long-standing inherent authority to disclose grand jury materials.

The Advisory Committee's statements regarding Rule 6(e) over the last 75

years only underscore this interpretation. In 1946 when the Rules were enacted, the Advisory Committee Notes explicitly stated that Rule 6(e) was intended to "continue[] 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) 1944 advisory committee's note 1 (emphasis added). And in 2011, the Advisory Committee considered the exact question at issue here—whether courts have inherent authority to release historically significant materials that would not otherwise be covered by a Rule 6(e) exception—and concluded that "in the rare cases where disclosure of historic materials had been sought, the district judges acted reasonably in referring to their inherent authority." Minutes, Committee on Rules of Practice and Procedure, at 44 (June 11-12, 2012). In short, the text and history of Rule 6(e) make clear that courts retain inherent authority to release grand jury materials in appropriate circumstances.

Finally, a district court's disclosure of materials of historical significance is hardly an abuse of the discretion allowed by the Federal Rules. The typical justifications for the secrecy of grand jury records—such as incentivizing witnesses to testify and preventing defendants from fleeing—are necessarily less salient decades after cases are closed. And those justifications may be outweighed in especially important cases, where records of critical moments in our nation's history are shrouded by the veil of grand jury secrecy. Here, Ms. Pitch seeks grand jury

materials concerning the Moore's Ford Lynching—"the last mass lynching in American history"—an unsolved case involving a grand jury that heard testimony for sixteen days but failed to bring charges. *Pitch v. United States*, 915 F.3d 704, 707 (11th Cir. 2019). The records of these deliberations have been kept under seal for 73 years. In these circumstances, the district court should be permitted to exercise its inherent authority to release grand jury materials that may shed light on this event of historic significance.

## ARGUMENT

### I. THERE IS A LONG HISTORY OF COURTS EXERCISING INHERENT AUTHORITY TO DISCLOSE GRAND JURY MATERIALS IN APPROPRIATE CIRCUMSTANCES.

The grand jury is a centuries-old institution, and while there is a long tradition of maintaining the secrecy of grand jury deliberations, grand jury secrecy has never been absolute. Throughout the development of the federal grand jury in American law prior to the enactment of the Federal Rules of Criminal Procedure, grand jury materials were disclosed where courts concluded that the interests of justice required it.

"[A]n English institution," the grand jury was "brought to this country by the early colonists and incorporated in the Constitution by the Founders." *Costello v. United States*, 350 U.S. 359, 362 (1956); *see United States v. Calandra*, 414 U.S. 338, 342 (1974) ("The institution of the grand jury is deeply rooted in Anglo-

American history."); *United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 423 (1983) ("The grand jury has always occupied a high place as an instrument of justice in our system of criminal law—so much so that it is enshrined in the Constitution."). Specifically, the Fifth Amendment provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. Const. amend. V. In other words, under the Fifth Amendment, the government may not indict an individual for a federal felony except with the consent of a grand jury. *Blair v. United States*, 250 U.S. 273, 280 (1919) ("By the Fifth Amendment a presentment or indictment by grand jury was made essential to hold one to answer for a capital or otherwise infamous crime . . . .").

Even before the grand jury was enshrined in the Constitution, "grand jury proceedings [were] closed to the public, and records of such proceedings [were] kept from the public eye." *Douglas Oil Co. of Cal. v. Petrol Stops Nw.*, 441 U.S. 211, 218 n.9 (1979) (citing Richard M. Calkins, *Grand Jury Secrecy*, 63 Mich. L. Rev. 455, 457 (1965)). Legal scholars in England, like John Somers, explained that "grand jurors were sworn not to disclose the subjects of the inquiry, the witnesses, or any of the evidence," and were also prohibited from revealing "their own personal knowledge, the knowledge of their fellow jurors, their investigative plans, or their deliberations." Mark Kadish, *Behind the Locked Door of an American Grand Jury: Its History, Its Secrecy, and Its Process*, 24 Fla. St. U. L. Rev. 1, 14-15 (1996) (citing

John Somers, *The Security of Inglish-Mens Lives, or the Trust, Power, and Duty of the Grand Jurys of England* 43 (London, Benjamin Alsop 1682)).

The Grand Jury Clause in the U.S. Constitution incorporated this tradition, making "grand jury secrecy an implicit part of American criminal jurisprudence." *Id.* at 16. Importantly, however, the general rule of grand jury secrecy was "not unyielding." Michael A. Foster, Cong. Research Serv., R45456, *Federal Grand Jury Secrecy: Legal Principles and Implications for Congressional Oversight* 5 (2019). Instead, the rule of secrecy was "relaxed [to] permit[] disclosure whenever the interest of justice requires," and the decision whether to disclose grand jury materials was left "largely within the discretion of the court whose grand jury is concerned." *In re Grand Jury Proceedings*, 4 F. Supp. at 284; *see United States v. Farrington*, 5 F. 343, 346 (N.D.N.Y. 1881) ("[i]t is only practicable" for courts to exercise "a salutary supervision over the proceedings of a grand jury" by "removing the veil of secrecy whenever evidence of what has transpired before them becomes necessary to protect public or private rights").

Most exceptions to grand jury secrecy developed in response to criminal defendants' arguments that the grand jury had heard improper evidence or that some other type of misconduct had infected the grand jury proceedings. Foster, *supra*, at 5. For instance, in *United States v. Smith*, decided only a few years after the Bill of Rights was ratified, a New York district court held that a defendant could challenge

an indictment on the theory that illegal evidence was introduced to a grand jury. 27 F. Cas. 1186 (C.C.D.N.Y. 1806). The prosecution argued that a grand jury was meant to be "independent, and irresponsible; judging for themselves as to the grounds on which they will prefer an accusation, and that no one has a right to investigate or to know what evidence they have had before them." *Id.* at 1188. Defense counsel responded that "no unlawful act done in the grand jury, is such a secret as jurors are bound by their oaths to keep." *Id.* at 1189. The court agreed with the defense, holding that although the grand jury itself is bound to "keep[] its deliberations secret," the court is entitled to determine whether the grand jury has acted "according to the rules of law." *Id.* at 1188. The court therefore "implicitly accept[ed] the defense argument" that secrecy was in part intended to "protect[] the individual accused and, consequently, could be lifted where secrecy defeated that purpose." Kadish, *supra*, at 17.

Later cases came to a similar conclusion. In *Atwell v. United States*, the Fourth Circuit held that the policy of grand jury secrecy alone did not shield a grand juror from being questioned about the evidence he considered while serving (though the court prevented the juror from testifying for other reasons). 162 F. at 98, 101, 103. The court acknowledged that secrecy was important "during the sittings and deliberations of the grand jury" because otherwise the grand jury's role "to make a preliminary and ex parte investigation . . . could easily be impeded by persons

fearing indictment." *Id.* at 100. Moreover, although the court suggested there should be "indefinite secrecy as to the discussions and vote of the individual members of the jury," it held that the "evidence adduced before the grand jury" could sometimes be made public "after such jury has made its presentment and indictment, publication thereof has been made, the grand jury finally discharged, and the defendant is in custody." *Id.* At that point, the court held, secrecy must be maintained "[t]o the full extent necessary to fulfill the ends of justice, *and no further*." *Id.* (emphasis added).

In *Metzler v. United States*, the Ninth Circuit similarly held that "[a]fter the [grand jury's] indictment has been found and made public and the defendants apprehended, the policy of the law does not require the same secrecy as before." 64 F.2d at 206. To the contrary, "[w]here the ends of justice can be furthered thereby and when the reasons for secrecy no longer exist, the policy of the law requires that the veil of secrecy be raised." *Id.* Thus, the court permitted an assistant U.S. attorney to read into evidence his shorthand notes of grand jury proceedings in which certain defendants had confessed. *Id.*

Finally, in *In re Grand Jury Proceedings*, a district court allowed the presentation of grand jury material from an investigation regarding an alleged conspiracy to violate the National Prohibition Act in a civil case regarding the revocation of a liquor license. 4 F. Supp. at 284. The court noted that the secrecy rules were "designed for the protection of the witnesses who appear and for the

purpose of allowing a wider and freer scope to the grand jury itself." *Id.* at 284-85. However, "[t]he fact that the grand jury has adjourned and been discharged has often been considered as one reason for abandoning secrecy as to its deliberations." *Id.* at 285. In the end, the court explained that the decision to release grand jury material "yields to the general consideration whether the ends of justice will be furthered by the disclosure." *Id.* On that basis, the court allowed the grand jury material to be introduced in the civil case.

Building on this precedent, the Supreme Court recognized nearly a century ago that grand jury materials need not always remain secret. Although "[g]rand jury testimony is ordinarily confidential," the Court reasoned, "after the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it." *Socony-Vacuum Oil Co.*, 310 U.S. at 233, 234 (citing *Metzler*, 64 F.2d 203).

* * *

In short, there is a long history of courts exercising their inherent authority to disclose grand jury materials in appropriate circumstances, notwithstanding the general tradition of grand jury secrecy. As the next Section will show, the Federal Rules of Criminal Procedure did not eliminate that inherent authority.

## II. THE FEDERAL RULES OF CRIMINAL PROCEDURE DID NOT ELIMINATE COURTS' INHERENT AUTHORITY TO DISCLOSE GRAND JURY MATERIALS.

In 1946, the Federal Rules of Criminal Procedure were enacted, including several provisions governing grand jury procedures. Rule 6(e) codified grand jury secrecy principles that had, up until that time, been a part of the common law enforced by courts. Rule 6(e)(2)(A) states that "[n]o obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B)." Fed. R. Crim. P. 6(e)(2)(A). Rule 6(e)(2)(B), in turn, lists seven categories of persons who, "[u]nless these rules provide otherwise, . . . must not disclose a matter occurring before the grand jury": grand jurors, interpreters, court reporters, operators of a recording device, people who transcribe recorded testimony, government attorneys, and people to whom a disclosure is made under Rule 6(e)(3)(A)(ii) or (iii). Fed. R. Crim. P. 6(e)(2)(B). Notably, district court judges do not appear on this list.

Rule 6(e)(3) provides "[e]xceptions" to secrecy rules, Fed. R. Crim. P. 6(e)(3), and subsection (E) states that "[t]he court may authorize disclosure—at a time, in a manner, and subject to any other conditions that it directs—of a grand-jury matter" in five specified circumstances. Fed. R. Crim. P. 6(e)(3)(E). Nothing about Rule 6(e), however, suggests that those five specified circumstances are the only circumstances in which district courts may authorize a disclosure. And nothing about Rule 6(e) suggests—let alone clearly states—that it was intended to abrogate

courts' long-standing inherent authority to disclose grand jury materials in certain circumstances. Rather, the text of Rule 6(e), 75 years of Advisory Committee history, and Supreme Court precedent all make clear that courts retain inherent authority to release grand jury materials.

**1.** Although "[i]t is true that the exercise of the inherent power of lower federal courts can be limited by statute and rule, . . . 'we do not lightly assume that Congress has intended to depart from established principles' such as the scope of a court's inherent power." *Chambers*, 501 U.S. at 47 (quoting *Weinberger*, 456 U.S. at 313); *see Dietz v. Bouldin*, 136 S. Ct. 1885, 1891 (2016) (explaining that the Federal Rules of Civil Procedure "set out many of the specific powers of a federal district court," "[b]ut they are not all encompassing"); *United States v. Williams*, 504 U.S. 36, 50-51 (1992) (permitting federal courts to exercise inherent power where doing so would not "alter the grand jury's historical role," but rather would "preserve []or enhance the traditional functioning of the institution"). Thus, the Supreme Court looks for a "clear[] expression of purpose" that Congress "intended to abrogate [a] well-acknowledged" inherent power. *Link*, 370 U.S. at 631-32.

The language of Rule 6(e) does not eliminate courts' inherent authority to release grand jury materials for reasons other than those specified in Rule 6(e)(3)(E) because it does not offer a "clear[] expression of purpose" that Congress intended to "abrogate" this long-standing authority, *id*. Indeed, district court judges are

conspicuously *excluded* from the list of persons in Rule 6(e)(2)(B) who "must not disclose a matter occurring before the grand jury." Fed. R. Crim. P. 6(e)(2)(B). This exclusion is strong evidence that the Rule's drafters did not intend for it to impose the same secrecy requirements on courts that it did on other individuals. And courts' exclusion from that list is especially noteworthy in light of subsection (A), which explicitly commands that "[n]o obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B)." Fed. R. Crim. P. 6(e)(2)(A). *See Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 81 (2002) (noting that the *expressio unius* canon applies when "circumstances support[] a sensible inference that the term left out must have been meant to be excluded").[2]

Moreover, Rule 6(e)(3)(E) states simply that courts "*may* authorize disclosure." Fed. R. Crim. P. 6(e)(3)(E) (emphasis added). This "permissive language of the Rule—which merely authorizes" a court to release grand jury materials in certain circumstances—does not suggest "that it was the purpose of the Rule to abrogate the power of courts, acting on their own initiative," to release materials for other reasons, *Link*, 370 U.S. at 630. Significantly, nothing in the

[2] Notably, grand jury witnesses are not listed in Rule 6(e)(2)(B), and for that reason courts have held that they are generally not covered by secrecy rules either, unless a court determines otherwise. *See, e.g.*, *In re Grand Jury Proceedings*, 417 F.3d 18, 26 (1st Cir. 2005) (noting that "[w]itnesses are not listed in Rule 6(e)(2)(B)," but permitting district courts to "accommodate rare exceptions" to that rule "premised on inherent judicial power").

Rule's text indicates that the specified circumstances are the exclusive circumstances in which disclosure may be made. Indeed, if the Rule's drafters had intended the Rule 6(e)(3)(E) circumstances to be exclusive, the Rule could easily have stated that courts "may *only*" release materials in the specified circumstances. *Cf.* Fed. R. Crim. P. 6(e)(3)(B) (person "may use that information *only* to assist an attorney" (emphasis added)). But that is not what it says.

The government argues that "[i]f a district court were always free in its discretion to authorize a disclosure of grand jury information, it is difficult to fathom why the Supreme Court and the Rules Committee would have bothered to enumerate the five carefully circumscribed exceptions in Rule 6(e)(3)(E), or what purpose the detailed limitations on those exceptions would serve." Appellant Br. 25. However, as the Seventh Circuit explained, "it would be entirely reasonable for the rulemakers to furnish a list that contains frequently invoked reasons to disclose grand-jury materials, so that the court knows that no special hesitation is necessary in those circumstances." *Carlson v. United States*, 837 F.3d 753, 764-65 (7th Cir. 2016). It is much more difficult to understand why the drafters of the Rule would have *excluded* district court judges from the list of persons who are prevented from disclosing grand jury materials if they intended the secrecy requirement to apply to judges no less than to the persons explicitly enumerated in the Rule.

**2.** If the text were not clear enough, the Advisory Committee, which plays a

pivotal role in crafting the Rules, has made its view crystal clear for 75 years: Rule 6(e) does not abrogate a district court's inherent authority to disclose grand jury materials. *Cf. Schiavone v. Fortune*, 477 U.S. 21, 31 (1986) ("Although the Advisory Committee's comments do not foreclose judicial consideration of the Rule's validity and meaning, the construction given by the Committee is 'of weight.'" (quoting *Miss. Publ'g Corp. v. Murphree*, 326 U.S. 438, 444 (1946))). First and foremost, at the time the Rules were enacted, the Advisory Committee Notes explicitly stated that Rule 6(e) was intended to "continue[] 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) 1944 advisory committee's note 1 (emphasis added). As described above, the traditional practice of secrecy gave courts inherent authority to release grand jury materials "where the ends of justice require it." *Socony-Vacuum Oil Co.*, 310 U.S. at 234.

The 1944 Advisory Committee Notes go on to cite three cases, all of which stand for the proposition that district courts have discretion to release grand jury materials publicly where appropriate. Fed. R. Crim. P. 6(e) 1944 advisory committee's note 1; *see Schmidt v. United States*, 115 F.2d 394, 397 (6th Cir. 1940) ("Logically, the responsibility for relaxing the rule of secrecy and of supervising any subsequent inquiry should reside in the court, of which the grand jury is a part and under the general instructions of which it conducted its 'judicial inquiry.' It is a

matter which appeals to the discretion of the court when brought to its attention." (citations omitted)); *United States v. Am. Med. Ass'n*, 26 F. Supp. 429, 430 (D.D.C. 1939) ("Neither indictment, arrest of the accused, nor expiration of the jury term will operate to release a juror from the oath of secrecy, as the defendants here contend. That can only be done by a court acting in a given case when in its judgment the ends of justice so require." (citations omitted)); *Atwell*, 162 F. at 99-101 (described *supra* at 8-9).

That the Rules did not displace courts' inherent authority is also made clear by the fact that "exceptions to the secrecy rule generally 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) (quoting *In re Hastings*, 735 F.2d 1261, 1268 (11th Cir. 1984) (emphasis omitted)); *see In re Kutler*, 800 F. Supp. 2d 42, 45-46 (D.D.C. 2011) ("as new exceptions outside of those enumerated in Rule 6(e) have gained traction among the courts, the scope of the rule has followed suit"). In other words, in response to court decisions permitting disclosure in contexts not encompassed by the existing exceptions, the Advisory Committee did not amend the Rule to make clear that such disclosures were inappropriate; rather, it amended the Rule to add those contexts to the existing list of exceptions.

For example, in 1977, Congress amended Rule 6(e)'s exception permitting

"attorney[s] for the government" to view grand jury materials to include "such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce Federal criminal law." Act of July 30, 1977, Pub. L. No. 95-78, § 2, 91 Stat. 319, 319.[3] This change was important because "there [are] often government personnel assisting the Justice Department in grand jury proceedings." Fed. R. Crim. P. 6(e) advisory committee's 1977 amendment.

As the Advisory Committee Notes explain, however, that change came *after* several courts had already held that non-attorney government personnel could access grand jury materials. *Id.* For instance, the Notes cite *In re Grand Jury Investigation of William H. Pflaumer & Sons, Inc.*, which permitted IRS agents to view grand jury documents when assisting government attorneys. 53 F.R.D. 464, 476-77 (E.D. Pa. 1971); *see United States v. Anzelmo*, 319 F. Supp. 1106, 1116 (E.D. La. 1970) (similar for SEC attorneys who did not fit within the Rule's definition of "attorneys for the government"). The Notes explained that "[a]lthough case law is limited, the trend seems to be in the direction of allowing disclosure to government personnel who assist attorneys for the government in situations where their expertise is

[3] Today, that provision similarly reads: "any government personnel—including those of a state, state subdivision, Indian tribe, or foreign government—that an attorney for the government considers necessary to assist in performing that attorney's duty to enforce federal criminal law." Fed. R. Crim. P. 6(e)(3)(A)(ii).

required." Fed. R. Crim. P. 6(e) advisory committee's 1977 amendment.

Likewise, in 1983, Rule 6(e)(3)(C) was amended to permit "the attorney for the government to make disclosure of matters occurring before one grand jury to another federal grand jury." Fed. R. Crim. P. 6(e) advisory committee's 1983 amendment. Importantly, the Notes explained that "[e]ven absent a specific provision to that effect, *the courts have permitted such disclosure in some circumstances*." *Id.* (emphasis added); *see id.* (citing *United States v. Garcia*, 420 F.2d 309 (2d Cir. 1970), which permitted the use of grand jury minutes before another grand jury). In short, as this Court has previously explained, "the exceptions permitting disclosure were not intended to ossify the law, but rather are subject to development by the courts in conformance with the rule's general rule of secrecy." *In re Hastings*, 735 F.2d at 1269.

Finally, the Advisory Committee recently considered the exact question at issue here—whether courts have inherent authority to release historically important materials—and it agreed that they do have such authority. In 2011, the Attorney General argued to the Advisory Committee that Rule 6(e) should be amended "to allow district courts to permit the disclosure, in appropriate circumstances, of archival grand-jury materials of great historical significance." Letter from Eric H. Holder, Jr., Attorney General, Dep't of Justice, to The Honorable Reena Raggi, Chair, Advisory Committee on the Criminal Rules, at 1 (Oct. 18, 2011) ("Holder

Letter"). According to the Attorney General, this amendment was necessary because "federal courts have no inherent authority to develop rules that circumvent or conflict with the Federal Rules," and the courts that had applied a "'historical significance' exception to Rule 6(e) threaten[ed] to undermine" the Rule. *Id.*

The Advisory Committee *explicitly rejected* this argument because, in its view, courts have inherent authority to release historically important grand jury material. All members of a subcommittee that examined the issue, except for Department of Justice representatives, agreed that the proposed amendment did not need to be pursued. The full advisory committee "concurred in the recommendation and concluded that in the rare cases where disclosure of historic materials had been sought, the district judges acted reasonably in referring to their inherent authority." Minutes, Committee on Rules of Practice and Procedure, at 44 (June 11-12, 2012).

**3.** Supreme Court precedent supports the conclusion that the Federal Rules did not abrogate courts' inherent authority to disclose grand jury materials. Generally speaking, this interpretation accords with the Supreme Court's repeated insistence that district courts have substantial flexibility in their role overseeing a grand jury, including disclosure of grand jury materials. After all, "[t]he grand jury is an arm of the court." *Levine v. United States*, 362 U.S. 610, 617 (1960); *see Cobbledick v. United States*, 309 U.S. 323, 327 (1940) ("The Constitution itself makes the grand jury a part of the judicial process."). To that end, the Court has

routinely reiterated that "a court called upon to determine whether grand jury transcripts should be released necessarily is infused with substantial discretion." *Douglas Oil Co.*, 441 U.S. at 223; *see United States v. John Doe, Inc. I*, 481 U.S. 102, 116 (1987) ("stress[ing] that wide discretion must be afforded to district court judges in evaluating whether disclosure is appropriate"); *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 400 (1959) ("disclosure is wholly proper where the ends of justice require it" (quoting *Socony-Vacuum Oil Co.*, 310 U.S. at 234)). And speaking specifically about Rule 6(e), the Court has emphasized that the Rule is "but declaratory" of the "principle"—adopted by "the federal trial courts as well as the Courts of Appeals"—that "disclosure [i]s committed to the discretion of the trial judge." *Id.* at 399.

Moreover, this case is analogous to cases in which the Supreme Court has held that the Federal Rules of Civil Procedure did not abrogate courts' inherent authority. For example, in *Link v. Wabash Railroad Co.*, the Court held that Rule 41(b)—which permits a party to move to dismiss for failure to prosecute—did not implicitly abrogate a court's inherent authority to dismiss a case for failure to prosecute *sua sponte*. 370 U.S. at 630. And in *Dietz v. Bouldin*, the Court held that Rule 51(b)(3)—which permits a court to "instruct the jury at any time before the jury is discharged"—did not implicitly abrogate a court's inherent authority to rescind a discharge order and reassemble a jury to provide further instructions. 136 S. Ct. at

1893. In each case, the Rules did not explicitly authorize the district court action, but the Court approved the courts' exercises of their authority because they had a historical basis and were not "contrary to any express grant of or limitation on the district court's power contained in a rule or statute." *Id*. So too here: as explained above, a district court's exercise of inherent authority to release grand jury materials does not contravene the Rules and has a lengthy historical pedigree.

**4.** The government cites Supreme Court decisions holding that "federal courts have no more discretion to disregard [a Federal] Rule's mandate than they do to disregard constitutional or statutory provisions." Appellant Br. 28-30 (citing *Bank of Nova Scotia v. United States*, 487 U.S. 250, 255 (1988)); *see Carlisle v. United States*, 517 U.S. 416, 426 (1996) (courts lack "the power to develop rules that *circumvent or conflict with* the Federal Rules of Criminal Procedure" (emphasis added)). But the cases the government cites are entirely inapposite. In *Bank of Nova Scotia*, the Court held that courts could not use their inherent authority to ignore Rule 52(a), which mandates the use of a harmless-error standard. 487 U.S. at 254-55. And in *Carlisle*, the Court held that district courts could not exercise inherent supervisory power to "effectively annul[]" Rule 29(c) by granting a post-verdict motion for judgment of acquittal filed outside the time limit expressly prescribed by the Rule. 517 U.S. at 426. Here, as explained above, the list of persons that "must" maintain secrecy does not include district court judges; the Rules simply list five

circumstances in which courts "may" disclose grand jury materials. It is hardly "circumventing" or "annulling" the rules for courts to exercise inherent authority to disclose materials in certain other exceptional circumstances.[4]

Finally, the government argues generally that the exceptions in Rule 6(e) "underscore that secrecy, not disclosure, is the norm." Appellant Br. 18. That is, of course, true, but it says nothing about whether courts retain inherent authority to depart from that norm. Courts should certainly exercise their disclosure authority sparingly and remain "reluctant to lift unnecessarily the veil of secrecy from the grand jury" unless "justice may demand." *Douglas Oil Co.*, 441 U.S. at 219. But under the Federal Rules—as before—district courts are trusted to exercise their discretion to determine when the interests of justice make disclosure of grand jury materials appropriate.

* * *

For all these reasons, the Federal Rules did not eliminate courts' long-standing inherent authority to release grand jury materials in exceptional circumstances. As

[4] The government also cites *United States v. Baggot*, 463 U.S. 476 (1983), which noted that the Rule 6(e) exceptions act as "an affirmative limitation on the availability of court-ordered disclosure of grand jury materials." Appellant Br. 19 (citing *Baggot*, 463 U.S. at 479). But that case considered only the question whether Rule 6(e)(3)(C)(i) itself permitted the disclosure of grand jury materials to the IRS as part of an investigation to determine civil tax liability. *Baggot*, 463 U.S. at 477. No party in that case appears to have argued that disclosure was warranted under the court's inherent authority, and the Supreme Court never addressed that question in its opinion.

the next Section argues, those exceptional circumstances should include the release of historically important materials decades after a case is concluded.

## III. A COURT'S INHERENT AUTHORITY TO DISCLOSE GRAND JURY MATERIALS INCLUDES THE AUTHORITY TO RELEASE HISTORICALLY SIGNIFICANT MATERIALS.

If the federal courts have inherent authority to release grand jury materials in appropriate circumstances, that power should include the discretion to release historically significant materials where, as here, decades have passed since the case was concluded. *Cf. In re Craig*, 131 F.3d 99, 105 (2d Cir. 1997) ("[t]o the extent that the John Wilkes Booth or Aaron Burr conspiracies, for example, led to grand jury investigations, historical interest might by now overwhelm any continued need for secrecy").

The Supreme Court has explained that grand jury secrecy principles serve several important purposes: to incentivize prospective witnesses to come forward voluntarily, to ensure witnesses testify "fully and frankly," to prevent those about to be indicted from fleeing or attempting to influence individual grand jurors, and to assure that persons "who are accused but exonerated by the grand jury will not be held up to public ridicule." *Douglas Oil Co.*, 441 U.S. at 219. Releasing grand jury materials of notable historical interest is consistent with these principles. In cases that were closed decades ago, "[t]here is no need to protect against flight on anyone's part, to prevent tampering with or restraints on witnesses or jurors, to protect grand

jury deliberations, [or] to safeguard unaccused or innocent persons with secrecy." *In re Report & Recommendation of June 5, 1972 Grand Jury Concerning Transmission of Evidence to the House of Representatives*, 370 F. Supp. 1219, 1229 (D.D.C. 1974); *see Douglas Oil Co.*, 441 U.S. at 223 ("as the considerations justifying secrecy become less relevant, a party asserting a need for grand jury transcripts will have a lesser burden in showing justification"). To be sure, releasing grand jury materials could lead to information that might be embarrassing to individuals who were not indicted by the grand jury, but that factor is less salient decades after a case has closed.

There is also a substantial public interest in learning about momentous events in our nation's history, and there is often salient information that can be discovered only by releasing decades-old grand jury materials. *See generally Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 604 (1980) (Blackmun, J., concurring in the judgment) ("the public has an intense need and a deserved right to know about the administration of justice"). Indeed, in the rare instances that courts have concluded that the release of historical grand jury materials was appropriate, they have concerned issues of significance in the history of our nation, important facts regarding which were shrouded behind the veil of grand jury secrecy. These examples include the contents of President Nixon's grand jury testimony associated with Watergate, *see In re Kutler*, 800 F. Supp. 2d at 43-44, materials associated with

Alger Hiss and allegations of Russian espionage in the middle of the twentieth century, *see In re Am. Historical Ass'n*, 49 F. Supp. 2d at 277-78, and of course—in this case—materials concerning the 1946 Moore's Ford Lynching, the "last mass lynching in American history," *Pitch*, 915 F.3d at 707. Yet under the government's theory, the important historical materials that were disclosed in these other cases should have remained secret. No principle of secrecy should be so absolute as to lock away these important records forever, especially once the reasons justifying secrecy have largely dissipated.

Indeed, even the government has in the past agreed as a policy matter that materials of historic significance should be released in exceptional circumstances. In 2011, when the Advisory Committee was considering a change to the rules, the Justice Department endorsed the "fundamentally correct . . . insight" that "in long-closed cases of enduring historical significance, the public's interest in access to the primary-source records of our national history may on occasion overwhelm any continued need for secrecy." Holder Letter at 5 (internal citation and quotation omitted); *see id.* at 4 ("historians have an understandable desire for access, many decades after the investigations have closed, to grand-jury records concerning the Watergate investigation, the espionage trial of the Rosenbergs, and similar matters of enduring historical resonance—provided that interests in personal privacy and governmental functions are taken into account and appropriately weighed"). The

government simply believed that the Rules should be amended to include this exception, a proposal the Advisory Committee rejected based on its understanding that courts retained inherent authority to release such materials.

In short, courts should be permitted to exercise their inherent authority to release grand jury materials of historical importance. Though courts should exercise that authority sparingly, in certain extraordinary cases like this one, courts should have the authority to lift the veil of secrecy decades after a case is closed so that the public can learn about important moments in American history.

## CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because it contains 6,349 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that the attached brief *amicus curiae* complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Times New Roman font.

Executed this 11th day of September, 2019.

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## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on September 11, 2019.

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