No. 19-307

In the Supreme Court of the United States

STUART A. MCKEEVER, PETITIONER

v.

WILLIAM P. BARR, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a district court may authorize the disclosure of secret grand jury materials outside the circumstances in which Federal Rule of Criminal Procedure 6(e)(3)(E) provides that a court "may authorize disclosure," based on its view that the materials are of historical interest.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D.D.C.):

McKeever v. *Holder*, No. 13-mc-54 (May 23, 2017)

United States Court of Appeals (D.C. Cir.):

McKeever v. *Barr*, No. 17-5149 (Apr. 5, 2019)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 920 F.3d 842. The opinion of the district court (Pet. App. 28a-40a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 5, 2019. A petition for rehearing was denied on July 22, 2019 (Pet. App. 41a). The petition for a writ of certiorari was filed on September 5, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner filed a pro se petition in the United States District Court for the District of Columbia seeking the release of all grand jury records from the 1957 indictment of John Joseph Frank, see *United States* v. *Frank*, No. 493-57 (D.D.C.). See C.A. J.A. 3-10. The district

court denied the request. Pet. App. 28a-40a. The court of appeals affirmed. *Id.* at 1a-27a.

1. a. Rule 6(e) of the Federal Rules of Criminal Procedure "codifies the traditional rule of grand jury secrecy," *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418, 425 (1983), which is "older than our Nation itself," *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 399 (1959). Congress directly enacted much of the relevant text of that rule in 1977, see Act of July 30, 1977 (1977 Act), Pub. L. No. 95-78, § 2(a), 91 Stat. 319-320 (enacting Rule 6(e)), although this Court has promulgated additional amendments since then. Paragraph (2) of the rule is entitled "Secrecy," and paragraph (3) is entitled "Exceptions." Fed. R. Crim. P. 6(e)(2) and (3).

Paragraph (2) states that "[u]nless these rules provide otherwise, the following persons must not disclose a matter occurring before the grand jury: (i) a grand juror; (ii) an interpreter; (iii) a court reporter; (iv) an operator of a recording device; (v) a person who transcribes recorded testimony; (vi) an attorney for the government; or (vii) a person to whom disclosure is made" for certain governmental purposes. Fed. R. Crim. P. 6(e)(2)(B). That list does not include grand jury witnesses. Paragraph (2) further states that "[n]o obligation of secrecy may be imposed on any person except in accordance with" the provision just quoted. Fed. R. Crim. P. 6(e)(2)(A).

Paragraph (3) contains a list of "[e]xceptions," the vast majority which allow disclosure only for governmental use and do not require a court order. See Fed. R. Crim. P. 6(e)(3)(A), (B), (C), and (D). Subparagraph (E), by contrast, sets forth five enumerated circumstances in which "[t]he court may authorize disclosure."

Fed. R. Crim. P. 6(e)(3)(E). The first is "preliminarily to or in connection with a judicial proceeding." Fed. R. Crim. P. 6(e)(3)(E)(i). The second is "at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury." Fed. R. Crim. P. 6(e)(3)(E)(ii). The remaining three are "at the request of the government" for use in relation to state, tribal, military, and foreign criminal matters, if certain conditions are met. Fed. R. Crim. P. 6(e)(3)(E)(iii)-(v). None of the exceptions in subparagraph (E) permits a court to disclose grand jury matters on the ground that they are of historical interest.

In 2011, the Attorney General proposed amendments to Rule 6(e) that would have "permit[ted] the disclosure, in appropriate circumstances, of archival grand-jury materials of great historical significance." Letter from Eric H. Holder, Jr., Att'y Gen., to Hon. Reena Raggi, Chair, Advisory Comm. on the Crim. Rules 1 (Oct. 18, 2011); see *id.* at 8-10 (text of proposed amendments). The Attorney General explained that although grand jury records of historical significance are catalogued and preserved at the National Archives, no legal mechanism exists for allowing public access to those records. *Id.* at 4, 6.

The criminal rules committee, however, declined to pass forward the Attorney General's proposal for further consideration. See Advisory Comm. on Crim. Rules, Minutes of Apr. 22-23, 2012, at 7. The committee expressed its view that although the text of Rule 6(e) did not list such disclosures among the exceptions to the requirement of secrecy, "in the rare cases where disclosure of historically significant materials had been

sought, district judges had reasonably resolved applications by reference to their inherent authority." *Ibid.* The committee thus concluded that "it would be premature to set out standards for the release of historical grand jury materials in a national rule." *Ibid.*

b. Petitioner, a researcher and author, states that he is writing a book about the 1956 disappearance of Jesús de Galíndez Suárez, who was an "outspoken opponent" of Rafael Trujillo, the dictator of the Dominican Republic. C.A. J.A. 4. Petitioner believes that Galíndez was kidnapped by persons acting on behalf of Trujillo, and that a former federal agent, John Joseph Frank, played an integral role in that kidnapping and presumed murder. *Id.* at 5.

In 1957, a federal grand jury in the District of Columbia returned an indictment charging Frank with willfully failing to register as a foreign agent of the Dominican Republic and willfully acting as such an agent without registering under the Foreign Agents Registration Act of 1938, 22 U.S.C. 611 *et seq.* (1952). See Pet. App. 2a. Frank was subsequently tried and convicted, but the D.C. Circuit overturned the conviction, based in part on the prosecution's references during the trial to the disappearance of Galíndez, with which Frank was never charged. See *Frank* v. *United States*, 262 F.2d 695, 697 (D.C. Cir. 1958).

Many records relating to Frank's investigation and trial are available to the public, including the trial transcripts and files from the Department of Justice's Criminal Division. See C.A. J.A. 6. Petitioner acknowledges that he has examined "thousands of pages of documents" at the National Archives and "is presently in possession of hundreds of documents on the case." *Ibid.* Petitioner believes, however, that the transcript of the

1957 federal grand jury proceedings will allow him to prove that Frank committed a crime for which he was never indicted—namely, "that Frank masterminded the Galíndez kidnapping on orders from Trujillo." Pet. App. 30a.

2. In January 2013, petitioner filed a petition in district court seeking an order "releasing all grand jury records" from Frank's 1957 case. C.A. J.A. 10. As relevant here, petitioner asked the district court to release those materials under its "inherent supervisory authority to order release of grand jury materials outside of Fed. R. Cr. P. 6(e)." C.A. J.A. 9.

The district court denied the petition. Pet. App. 28a-40a. Although the court took the view that it had inherent authority to release the requested records, *id.* at 33a-36a, it also determined that petitioner's request was impermissibly overbroad, *id.* at 39a-40a. For both aspects of its decision, the court principally relied on the Second Circuit's decision in *In re Petition of Craig*, 131 F.3d 99 (1997).

The district court first cited *Craig* for the proposition that "there may be 'special circumstances in which release of grand jury records is appropriate even outside the boundaries'" of Rule 6(e). Pet. App. 32a (citation omitted). The court acknowledged that *Carlisle* v. *United States*, 517 U.S. 416 (1996), made clear "that a district court's inherent power 'does not include the power to develop rules that circumvent or conflict with the Federal Rules of Criminal Procedure.'" Pet. App. 34a (citation omitted). But the court deemed that principle "inapplicable here" because in its view Rule 6(e) is "silent as to other circumstances that may merit disclosure," including for grand jury records of historical significance. *Ibid.*

Nevertheless, the district court declined to release the requested grand jury records. Applying a non-exhaustive list of nine factors drawn from *Craig*, the court determined that the balance of those factors weighed against disclosure. See Pet. App. 36a-40a. In particular, the court explained that the "sheer breadth" of the requested materials "renders disclosure outside of Rule 6(e) inappropriate" in part because it threatened to undermine "the privacy of individuals who may have been subjects of the grand jury's investigation, but were never indicted." *Id.* at 39a.

3. The court of appeals affirmed on the alternative ground that the district court lacked inherent authority to release the grand jury materials in the first instance. Pet. App. 1a-17a.

a. The court of appeals observed that paragraph (2) of Rule 6(e) "sets out the general rule of grand jury secrecy and provides a list of 'persons' who 'must not disclose a matter occurring before the grand jury' 'unless these rules provide otherwise.'" Pet. App. 4a (brackets and citation omitted). The court further observed that paragraph (3) "sets forth a detailed list of 'exceptions' to grand jury secrecy, including in subparagraph (E) five circumstances in which a 'court may authorize disclosure of a grand-jury matter.'" *Ibid.* (citation and ellipsis omitted). The court explained that those two provisions together "explicitly require secrecy in all other circumstances." *Id.* at 5a.

The court of appeals identified other features of Rule 6(e) that confirmed its construction. The court observed that "the list of enumerated exceptions is so specific"—authorizing, for example, disclosures "to certain non-federal officials 'at the request of the government' to aid in the enforcement of a criminal law" within

the jurisdiction of those non-federal officials—that it indicates exclusivity. Pet. App. 5a (citation omitted). The court explained, in particular, that by limiting the scope of permissible disclosures to those in aid of criminal law enforcement, "those provisions implicitly bar the court from releasing materials to aid in enforcement of civil law." *Ibid.* And the court noted that petitioner "points to nothing in Rule 6(e)(3) that suggests a district court has authority to order disclosure of grand jury matter outside the enumerated exceptions," such as a residual clause or an illustrative term like "'including.'" *Id.* at 6a.

The court of appeals recognized that the list of exceptions in paragraph (3) "can clearly be seen * * * as the product of a carefully considered policy judgment by the Supreme Court in its rulemaking capacity, and by the Congress, which in 1977 directly enacted Rule 6(e) in substantially its present form." Pet. App. 5a. And the court explained that adopting petitioner's conception of inherent authority "would allow the district court to create such new exceptions as it thinks make good public policy," thus "render[ing] the detailed list of exceptions merely precatory" and impermissibly "enabl[ing] the court to 'circumvent' or 'disregard' a Federal Rule of Criminal Procedure." *Id.* at 6a (citation omitted).

The court of appeals rejected petitioner's argument that Rule 6(e) does not bind the district court because "the district court is not on the list of 'persons' to whom grand jury secrecy applies" under paragraph (2). Pet. App. 10a. The court of appeals observed that the government ordinarily "retain[s] control" over grand jury records, Fed. R. Crim. P. 6(e)(1), such that a district court generally authorizes disclosure by ordering gov-

ernment attorneys—who *are* bound by Rule 6(e)—to release the records. Pet. App. 11a. Accordingly, the court of appeals explained, the district court "as a practical matter" is "subject to the strictures of Rule 6." *Ibid.* The court of appeals also rejected petitioner's suggestion that district courts retain inherent authority to disclose grand jury records because Rule 6(e) "d[oes] not contain a 'clear expression' that it displaced the district court's preexisting authority." *Id.* at 12a (citation omitted). The court of appeals explained that the text of Rule 6(e) itself provides that "clear expression"—in particular, its prohibition of disclosure "unless these rules provide otherwise." *Id.* at 12a-13a (citations omitted).

Finally, the court of appeals rejected petitioner's contention that because of the passage of time, disclosure here would not undermine the purposes of grand jury secrecy. Pet. App. 13a-14a. The court explained that privacy interests can persist even after death, and that allowing disclosure here might affect the willingness of grand jury witnesses to be candid and truthful in the future. *Ibid.*

b. Judge Srinivasan dissented. Pet. App. 22a-27a. In his view, the case was controlled as a matter of circuit precedent by *Haldeman* v. *Sirica*, 501 F.2d 714 (D.C. Cir. 1974) (en banc), which he viewed as having "endorsed" and "affirmed" the "understanding that a district court retains discretion to release grand jury materials outside the Rule 6(e) exceptions." Pet. App. 26a. Judge Srinivasan acknowledged, however, that in contrast to what he described as the majority's "careful opinion" here, *Haldeman* "contains no meaningful analysis of Rule 6(e)'s terms." *Ibid.*

ARGUMENT

Petitioner renews his contention (Pet. 22-30) that the district court had inherent authority to order the release of grand jury records notwithstanding Rule 6(e). The court of appeals correctly applied the plain text of Rule 6(e), and its decision is consistent with the historical tradition of grand jury secrecy. Although the decision below creates a conflict with decisions of other circuits, that conflict can and should be addressed in the first instance by the rules committee, which has the ability to amend Rule 6(e). Moreover, other circuits—including one already considering the issue en banc—may reconsider, or weigh in on, this issue in the near future. And at all events this case is a poor vehicle because the district court agreed with petitioner on the question presented here, yet still denied him relief. No further review is warranted.

1. a. "Since the 17th century, grand jury proceedings have been closed to the public, and records of such proceedings have been kept from the public eye." *Douglas Oil Co.* v. *Petrol Stops Nw.*, 441 U.S. 211, 218 n.9 (1979). Rule 6(e) "codifies" that "traditional rule of grand jury secrecy." *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418, 425 (1983). Paragraph (2) of the rule makes clear that non-witness participants in the grand jury "must not disclose a matter occurring before the grand jury" "[u]nless these rules provide otherwise." Fed. R. Crim. P. 6(e)(2)(B). That language, enacted directly by Congress in 1977, reflects a "general rule of nondisclosure." S. Rep. No. 354, 95th Cong., 1st Sess. 7; see 1977 Act § 2(a), 91 Stat. 319-320 (enacting Rule 6(e)).

Paragraph (3) of the rule contains most of the exceptions to secrecy that "these rules provide" (two others

are in Rules 16(a)(1)(B)(iii) and 26.2(f)(3)), and subparagraph (E) is the only provision of "these rules" listing circumstances in which a district court "may authorize disclosure" of grand jury matters. As this Court has recognized in construing them, those carefully defined exceptions operate as "an affirmative limitation on the availability of court-ordered disclosure of grand jury materials," and reflect Congress's "judgment that not every beneficial purpose, or even every valid governmental purpose, is an appropriate reason for breaching grand jury secrecy." *United States* v. *Baggot*, 463 U.S. 476, 479-480 (1983).

Consistent with that congressional judgment, Rule 6(e)'s prohibition on disclosure "[u]nless these rules provide otherwise," Fed. R. Crim. P. 6(e)(2)(B), makes clear that the circumstances listed in subparagraph (E) are the *only* circumstances in which a district court may order disclosure. As this Court has recognized in other contexts, when "Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *Andrus* v. *Glover Constr. Co.*, 446 U.S. 608, 616-617 (1980).

That principle has special force here. Congress directly enacted the core text of Rule 6(e) in 1977, including the "[u]nless these rules provide otherwise" language. See 1977 Act § 2(a), 91 Stat. 319-320. And in the particular context of grand jury secrecy, this Court has warned that "[i]n the absence of a clear indication in a statute or Rule, we must always be reluctant to conclude that a breach of [grand jury] secrecy has been authorized." *Sells Engineering*, 463 U.S. at 425. The rule of grand-jury secrecy "is so important, and so deeply-rooted in our traditions," that although Congress "has

the power to modify the rule of secrecy," this Court "will not infer that Congress has exercised such a power without affirmatively expressing its intent to do so." *Illinois* v. *Abbott & Assocs., Inc.*, 460 U.S. 557, 572-573 (1983).

As the court of appeals here recognized (Pet. App. 6a), nothing in Rule 6(e) contains a clear indication or affirmative expression of congressional intent to authorize disclosures outside of the express exceptions listed in that rule. This Court has described Rule 6 as "one of those 'few, clear rules which were carefully drafted and approved by this Court and by Congress to ensure the integrity of the grand jury's functions.'" *United States* v. *Williams*, 504 U.S. 36, 46 (1992) (citation omitted); see *id.* at 46 n.6. Accordingly, no sound basis exists to infer that Congress intended district courts to authorize disclosure of grand-jury records in circumstances not expressly listed in paragraph (3).

b. Petitioner's primary response to the plain text of Rule 6(e) is to assert (Pet. 23-27) that the district court is not bound by that rule at all. Petitioner offers the following syllogism: the rule states that "'[n]o obligation of secrecy may be imposed on any person except in accordance with'" the secrecy provision in paragraph (2); that secrecy provision "does not include the district court" as one of the persons bound by its rule of secrecy; and therefore Rule 6(e) "forbids" placing any secrecy obligations on the district court. Pet. 24 (citation omitted); see Pet. 27.

No court of appeals has adopted petitioner's flawed syllogism, which is unsound for several reasons. First, a rule of criminal procedure need not explicitly name the district court for its provisions to be understood as applying to the court. That is particularly true for Rule

6(e). As paragraph (1) of that rule makes clear, generally "an attorney for the government will retain control of the" grand jury records. Fed. R. Crim. P. 6(e)(1). Accordingly, as the court of appeals recognized (Pet. App. 11a), "[w]hen the court authorizes their disclosure, it does so by ordering 'an attorney for the government' who holds the records to disclose the materials." And "[b]ecause an 'attorney for the government' is one of the 'persons' subject to grand jury secrecy in Rule 6(e)(2)(B), the Rule need not also list the district court as a 'person' in order to make the court, as a practical matter, subject to the strictures of Rule 6." *Ibid.* Indeed, the court of appeals observed that the Department of Justice has "legal control" of the records that petitioner seeks here, and that any relief would take the form of an "order directing the Attorney General to release" them. *Id.* at 3a n.2.

Second, petitioner's reading would render the list of exceptions in Rule 6(e)(3) largely superfluous. In particular, subparagraph (E) describes in some detail five specific circumstances in which a court may authorize disclosure. See Fed. R. Crim. P. 6(e)(3)(E)(i)-(v). Were petitioner's reading correct, however, courts could authorize disclosure even in circumstances that do not satisfy subparagraph (E), making the inclusion of that detailed list—and judicial decisions carefully considering its text, see, *e.g.*, *Baggot*, 463 U.S. at 480—largely pointless. Indeed, as the court of appeals observed (Pet. App. 6a), petitioner's reading would in effect render the entirety of paragraph (3) merely precatory. Petitioner does not seriously contest that observation, arguing (Pet. 28) only that paragraph (3) "serves (at least) two purposes"—"list[ing] common scenarios in which disclosure * * * is allowed" and "inform[ing] district

courts' exercise of discretion on disclosure requests"—both of which are precatory.

Third, and relatedly, petitioner's reading contravenes this Court's admonition that a district court's inherent power "does not include the power to develop rules that circumvent or conflict with the Federal Rules of Criminal Procedure." *Carlisle* v. *United States*, 517 U.S. 416, 426 (1996); see *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 254 (1988). Taken to its logical conclusion, petitioner's view would allow courts to authorize disclosure of grand jury matters not just in circumstances unaddressed by Rule 6(e), but in circumstances when that rule would otherwise affirmatively prohibit disclosure. Far from disclaiming that view, petitioner appears to embrace it, asserting (Pet. 27) that "[a] court may * * * take possession of the [grand jury] materials itself, at which point it is outside the scope of Rule 6(e)(2)'s prohibition on disclosures by government attorneys." That is almost the definition of "circumvent[ion]. *Carlisle*, 517 U.S. at 426.

Fourth, petitioner's reading rests on a misunderstanding of the grand jury system. A cardinal feature of the grand jury's "functional independence from the Judicial Branch," *Williams*, 504 U.S. at 48, is that "[n]o judge presides to monitor its proceedings," *United States* v. *Calandra*, 414 U.S. 338, 343 (1974). A district judge's presence is forbidden when the grand jury is in session or deliberating. See Fed. R. Crim. P. 6(d). "Judges' direct involvement in the functioning of the grand jury has generally been confined to the constitutive one of calling the grand jurors together and administering their oaths of office." *Williams*, 504 U.S. at 47. Only when the grand jury requires the court's assistance to "compel the appearance of witnesses and the

production of evidence" does the district court engage with the grand jury. *Id.* at 48.

As a result of that separation, "a district court is not ordinarily privy to grand jury matters," Pet. App. 11a, which further explains its absence from the list of "persons" subject to Rule 6(e)(2)'s secrecy provisions—all of whom (unlike the court) are *participants* in grand jury proceedings, see Fed. R. Crim. P. 6(e)(2)(B)(i)-(vii), and thus the ones who necessarily will have knowledge of those proceedings. In those exceptional circumstances when a district court does become privy to grand jury matters, Rule 6(e) protects the secrecy of those matters by requiring closed hearings and the sealing of records when necessary to prevent disclosure. See Fed. R. Crim. P. 6(e)(5) and (6). Those requirements obviously apply to the district court, and thus undercut petitioner's suggestion that a district court is free to violate grand jury secrecy outside of the limited circumstances in which Rule 6(e) gives it authority to order disclosure.[*]

c. Petitioner's suggestion (Pet. 23) that grand jury materials are no different from "court records," which the district court has inherent authority to disclose, likewise has no basis in the text of Rule 6(e). Rule 6(e) does not anywhere mention "court" or "judicial" records; it instead refers to "matter[s] occurring before the grand jury," "grand-jury matter[s]," and the like. Fed.

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[*] In *Haldeman* v. *Sirica*, 501 F.2d 714 (D.C. Cir. 1974) (en banc), Watergate special prosecutor Leon Jaworski evidently took the position that petitioner presses here. See Pet. 24-25. *Haldeman* gave no indication that it relied on or adopted that position, and the government has, at least since this Court's decision in *Carlisle, supra*, consistently maintained that district courts are bound by Rule 6(e), *e.g.*, *United States* v. *Aisenberg*, 358 F.3d 1327, 1347 n.32 (11th Cir.), cert. denied, 543 U.S. 868 (2004); *In re Petition of Craig*, 131 F.3d 99, 101 (2d Cir. 1997).

R. Crim. P. 6(e)(2) and (3); see Pet. App. 11a-12a. Given that "the grand jury is an institution separate from the courts," *Williams*, 504 U.S. at 47, as well as the presumption in Rule 6(e) that grand jury records will be in the custody and control of government lawyers, not the court, see Fed. R. Crim. P. 6(e)(1), no sound basis exists to conclude that a "grand-jury matter" is a "court record" or a "judicial record." Cf. *SEC* v. *American Int'l Grp.*, 712 F.3d 1, 3 (D.C. Cir. 2013) (explaining that "not all documents filed with courts are judicial records").

Moreover, grand jury records are fundamentally different from judicial records because the former are secret, whereas the latter presumptively are not. See *Douglas Oil*, 441 U.S. at 218 & n.9; *Press-Enterprise Co.* v. *Superior Court of California*, 478 U.S. 1, 8-9 (1986). For example, unlike traditional court or judicial records, grand jury records "have historically been inaccessible to the press and the general public." *United States* v. *Smith*, 123 F.3d 140, 156 (3d Cir. 1997). Accordingly, courts of appeals have been unanimous in rejecting arguments that grand jury records are subject to First Amendment or common-law rights of access. See, *e.g.*, *United States* v. *McDougal*, 559 F.3d 837, 840 (8th Cir. 2009); *In re Motions of Dow Jones & Co.*, 142 F.3d 496, 499-504 (D.C. Cir.), cert. denied, 525 U.S. 820 (1998); *Smith*, 123 F.3d at 148-152, 155-156. That fundamental difference is reflected in Rule 6(e)'s framework codifying the rule of secrecy and specifying procedures for disclosure of grand jury records in limited circumstances. That framework is inapplicable to court or judicial records.

d. Finally, petitioner suggests that Rule 6(e) cannot be construed to "eliminate" the preexisting inherent power of district courts to disclose grand jury records

absent "a 'clear expression of purpose' in the Rule." Pet. 23 (brackets and citation omitted). That suggestion lacks merit. With respect to grand jury materials in particular, this Court has articulated precisely the opposite presumption: "[i]n the absence of a clear indication in a statute or Rule, we must always be reluctant to conclude that a breach of [grand jury] secrecy has been authorized." *Sells Engineering*, 463 U.S. at 425; see *Abbott & Assocs.*, 460 U.S. at 572-573. Moreover, as the court of appeals observed, Rule 6(e) itself provides whatever "clear expression of purpose" might be required by stating that disclosures are forbidden "unless these rules provide otherwise." Pet. App. 12a-13a (citation omitted).

Even were petitioner correct that Rule 6(e) silently preserved district courts' preexisting powers, it would not help him here because district courts have never possessed the inherent power to disclose grand jury records on the ground that they are of historical significance. As a general matter, inherent powers "deal strictly with the courts' power to control their *own* procedures." *Williams*, 504 U.S. at 45. Such powers thus concern the management, protection, and vindication of the judicial process. See *Dietz* v. *Bouldin*, 136 S. Ct. 1885, 1892 (2016); *Degen* v. *United States*, 517 U.S. 820, 823 (1996).

Consistent with that principle, courts that exercised their "very limited" inherent power to order disclosure of grand jury materials before the promulgation of Rule 6(e) did so only "to improve the truth-finding process of the trial" or "to prevent parties from reaping benefit or incurring harm from violations of substantive or procedural rules * * * governing matters apart from the trial itself." *Williams*, 504 U.S. at 46, 50. For example, in

United States v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), this Court found that a district court had discretion to authorize the disclosure of grand jury transcripts to refresh the recollection of witnesses at trial—in other words, for use in a judicial proceeding occurring before the court. *Id.* at 233-234. Similarly, lower courts recognized district courts' inherent power to lift grand jury secrecy to determine whether an indictment should be quashed on the basis of misconduct before the grand jury. See, *e.g.*, *Schmidt* v. *United States*, 115 F.2d 394, 395-396 (6th Cir. 1940); *Murdick* v. *United States*, 15 F.2d 965, 968 (8th Cir. 1926), cert. denied, 274 U.S. 752 (1927).

The original Rule 6(e) codified those limited exceptions to the rule of grand jury secrecy, permitting disclosures (other than to government attorneys) "only [(1)] when so directed by the court preliminarily to or in connection with a judicial proceeding or [(2)] when permitted by the court at the request of a defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury." Fed. R. Crim. P. 6(e) (1946). Congress repeated those limited exceptions—and only those two exceptions—nearly verbatim when it revised and directly enacted Rule 6(e) in 1977. See 1977 Act § 2(a), 91 Stat. 319-320 (Fed. R. Crim. P. 6(e)(2)(C)(i) and (ii) (1978)). The rules committee and this Court have since added additional carefully reticulated secrecy exceptions authorizing court-ordered disclosure, see Fed. R. Crim. P. 6(e)(3)(E)(iii)-(v), but the congressionally enacted ones remain part of the rule today, see Fed. R. Crim. P. 6(e)(3)(E)(i) and (ii).

District courts' pre-rule practice thus provides no support for a free-ranging inherent authority to disclose grand jury records for purposes unconnected to a judicial proceeding before the court. Rather, petitioner's view of inherent authority would in effect grant district courts a *new* power to make policy judgments about when and under what circumstances grand jury secrecy should yield—with no limiting principle. See Pet. 30-33. But that policy judgment already was made by Congress in 1977, and by the advisory rules committee and this Court in promulgating subsequent amendments to Rule 6(e). As this Court has long recognized, "the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings." *Douglas Oil*, 441 U.S. at 218. Balancing the risks to that proper functioning against the purported benefits of public disclosure is a policy decision more appropriately left to Congress or to this Court in its rulemaking capacity—not to district courts applying nine-factor tests on an ad hoc basis.

2. Petitioner correctly observes (Pet. 15-22) that the decision below creates a conflict among the courts of appeals on the question presented. This Court's review, however, is unwarranted. The circuit conflict should be addressed in the first instance by the criminal-rules committee, which can amend Rule 6(e) to provide clear standards for disclosure of historically significant grand jury records. And in any event, other courts of appeals likely soon will reconsider or consider the issue. This Court's review would thus be premature.

a. Before the court of appeals issued its decision here, the Second and Seventh Circuits had stated that district courts have inherent authority outside the text

of Rule 6(e) to order disclosure of historically significant grand jury materials. See *In re Petition of Craig*, 131 F.3d 99, 102 (2d Cir. 1997); *Carlson* v. *United States*, 837 F.3d 753, 766-767 (7th Cir. 2016). In February of this year, a divided panel of the Eleventh Circuit agreed, following earlier circuit precedent holding that district courts had inherent authority to order disclosures outside the text of Rule 6(e). *Pitch* v. *United States*, 915 F.3d 704, 707 (2019) (affirming disclosure order "[b]ecause we are bound by our decision in" *In re Petition to Inspect & Copy Grand Jury Materials* (*Hastings*), 735 F.2d 1261, cert. denied, 469 U.S. 884 (1984)). But after the court of appeals' decision here, the Eleventh Circuit vacated the panel opinion in *Pitch* and sua sponte ordered rehearing en banc to consider several questions, including whether its precedent should be overruled and, if not, whether district courts have inherent authority to disclose grand jury records of historical interest. *Pitch* v. *United States*, 925 F.3d 1224 (2019) (per curiam); see Memorandum from David J. Smith, Clerk of Court, to Counsel or Parties at 1, *Pitch*, *supra* (No. 17-15016) (July 12, 2019). Oral argument before the en banc court was held on October 22, 2019.

That limited circuit conflict does not warrant further review in this case because the question whether and under what circumstances historically significant grand jury materials should be disclosed can be resolved through the rulemaking process, as overseen by this Court under the Rules Enabling Act, 28 U.S.C. 2072. Although the rules committee previously declined to act on the government's 2011 proposal to amend Rule 6(e) to provide a mechanism for such disclosure, it did so because of its view that "a national rule" on the issue

"would be premature." Advisory Comm. on Crim. Rules, Minutes of Apr. 22-23, 2012, at 7. The existence of a circuit conflict plainly eliminates that perceived impediment.

Rulemaking would be a better forum than judicial review to address the policy judgments involved in deciding whether and when grand jury secrecy should expire, including for historically significant records. Petitioner easily could direct his policy arguments (Pet. 30-33) to the rules committee, which could solicit input from a variety of stakeholders presenting different viewpoints. Alternatively, petitioner could present his arguments to Congress, which has itself not only amended Rule 6(e), but also on occasion directly provided for the disclosure of historically interesting grand jury materials. See, *e.g.*, Civil Rights Cold Case Records Collection Act of 2018, Pub. L. No. 115-426, § 8(a)(2), 132 Stat. 5501 (44 U.S.C. 2107 note); President John F. Kennedy Assassination Records Collection Act of 1992, Pub. L. No. 102-526, § 10(a)(2) and (b)(1), 106 Stat. 3456-3457 (44 U.S.C. 2107 note).

Addressing requests for historically significant grand jury materials through rulemaking would obviate the need for this Court's intervention here. And because most requests for disclosure of grand jury records under a court's inherent authority involve historically significant cases, see, *e.g.*, *In re Petition of Kutler*, 800 F. Supp. 2d 42 (D.D.C. 2011) (request for President Nixon's Watergate grand jury testimony); *In re Tabac*, No. 08-mc-243, 2009 WL 5213717 (M.D. Tenn. Apr. 14, 2009) (investigation into disappearance of Jimmy Hoffa); *In re American Historical Ass'n*, 49 F. Supp. 2d 274 (S.D.N.Y. 1999) (investigation of Alger Hiss); see

also Pet. App. 14a-15a (listing more cases), a rule addressing the narrow issue of historically significant grand jury records likely would be sufficient to eliminate the need for this Court's intervention in many future cases as well.

b. Furthermore, consideration of this issue by the rules committee, Congress, or (if ever warranted) this Court would benefit substantially from the ongoing percolation that a grant of certiorari here would forestall. As noted above, the en banc Eleventh Circuit soon will consider the question presented here anew, with the benefit of the decision below. The First Circuit likewise may address the issue soon. A petition for disclosure of historically significant grand jury records is pending in the United States District Court for the District of Massachusetts. See *Lepore* v. *United States*, No. 18-mc-91539 (filed Dec. 17, 2018). Any appeal from a final judgment there would provide the First Circuit the opportunity to weigh in on the issue in the first instance, with the benefit of the decision below.

The decision below likewise creates the possibility that the Second and Seventh Circuits will reconsider the issue. The Second Circuit's decision in *Craig* is more than twenty years old, and that court may well reevaluate its position in light of the decision below and, potentially, the Eleventh Circuit's forthcoming en banc decision in *Pitch*. *Craig* contains little analysis of the text of Rule 6(e) or this Court's decisions addressing grand jury secrecy and the limits on a district court's inherent authority to circumvent the criminal rules. See 131 F.3d at 102-103. Instead, *Craig* relied chiefly on *Hastings*—which the en banc Eleventh Circuit now is reconsidering—and the Second Circuit's prior decision in *In re Biaggi*, 478 F.2d 489 (1973) (Friendly,

C.J.). *Biaggi* approved disclosure of a grand jury witness's redacted testimony following a motion by that witness—who was not bound by the rule of secrecy in Rule 6(e)—to disclose his own testimony. *Id.* at 491-492. *Biaggi* recognized that a request by anyone else for any other purpose would be impermissible. *Id.* at 493. "No matter how much, or how legitimately, the public may want to know" the details of the grand jury testimony there, the court explained, "that interest must generally yield to the larger one of preserving the salutary rule of law embodied in Rule 6(e)." *Ibid.* Disclosure was warranted only because "Mr. Biaggi waived this protection [of secrecy] by seeking complete disclosure * * * of his own testimony for its own sake," and because the redactions sufficiently protected the privacy of others. *Ibid.*

Biaggi thus does not support a broad inherent authority to release grand jury records of historical interest notwithstanding the plain text of Rule 6(e). Moreover, that decision predates not only Congress's direct enactment of the "unless these rules provide otherwise" language in 1977, but also this Court's decisions in *Baggot*, *Sells Engineering*, and *Williams*, as well as its decisions in *Carlisle* and *Bank of Nova Scotia*. And even without the benefit of those later developments, the decision elicited a dissent, see *Biaggi*, 478 F.2d at 493-494 (Hays, J., dissenting), which suggests that the Second Circuit may well reevaluate its stance were the issue to present itself today.

The Seventh Circuit's recent divided decision on this issue in *Carlson*, *supra*, also may be subject to reconsideration. *Carlson* was decided without the benefit of the decision below, and also relied in part on the tenuous *Craig* and *Hastings* precedents. See *Carlson*, 837 F.3d at 766. If the en banc Eleventh Circuit were to

overrule *Hastings* when it decides *Pitch*, and if the Second Circuit were to reconsider *Craig* in light of recent developments, it is far from clear that the Seventh Circuit would choose to remain an outlier. At a minimum, the pendency of further developments counsels strongly against granting certiorari now, especially when the issue is better resolved through the rulemaking process.

c. Finally, this case is a poor vehicle in which to review the question presented. The district court agreed with petitioner that it had inherent authority to order disclosure notwithstanding Rule 6(e), but—after applying the *Craig* factors to petitioner's request—made a factbound determination that those factors on balance weighed against disclosure, see Pet. App. 37a-40a. The court thus denied petitioner relief even under the standard that would apply were he to prevail on the question presented here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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