No. 20-1836

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

IN RE: PETITION FOR ORDER DIRECTING RELEASE OF RECORDS

JILL LEPORE,
Petitioner-Appellee

v.

UNITED STATES,
Respondent-Appellant.

On Appeal from the United States District Court
for the District of Massachusetts

BRIEF OF AMICI CURIAE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 39 MEDIA ORGANIZATIONS IN SUPPORT OF PETITIONER-APPELLEE

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The Tully Center for Free Speech is a subsidiary of Syracuse University.

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IDENTITY OF AMICI CURIAE, THEIR INTEREST IN THE CASE, AND THE SOURCE OF THEIR AUTHORITY TO FILE THIS BRIEF

Amici have obtained consent to file this brief from both parties and therefore may file it pursuant to Federal Rule of Appellate Procedure 29(a)(2).

Pursuant to Federal Rule of Appellate Procedure 29(a)(4), amici state that no party's counsel authored this brief in whole or in part, and no party, party's counsel, or any other person, other than the amici curiae, their members, or their counsel, contributed money that was intended to fund preparing or submitting the brief.

Amici are the Reporters Committee for Freedom of the Press, Advance Publications, Inc., ALM Media, LLC, The Associated Press, The Atlantic Monthly Group LLC, Boston Globe Media Partners, LLC, CBS Broadcasting Inc., on behalf of CBS News, The Center for Investigative Reporting (d/b/a Reveal), Committee to Protect Journalists, Dow Jones & Company, Inc., The E.W. Scripps Company, Freedom of the Press Foundation, Fundamedios Inc., Gannett Co., Inc., The Guardian U.S., Inter American Press Association, International Documentary Assn., The McClatchy Company, LLC, The Media Institute, Mother Jones, MPA - The Association of Magazine Media, National Freedom of Information Coalition, National Journal Group LLC, National Newspaper Association, National Press Photographers Association, New England First Amendment Coalition, The New York Times Company, The News Leaders Association, Newsday LLC, Online

News Association, The Philadelphia Inquirer, POLITICO LLC, Pulitzer Center on Crisis Reporting, Radio Television Digital News Association, Society of Environmental Journalists, Society of Professional Journalists, Tribune Publishing Company, Tully Center for Free Speech, Vox Media, LLC, The Washington Post.

Amici are media outlets and organizations that advocate on behalf of journalists and the press. Lead amicus the Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media.

Amici, some of whom have successfully sought the disclosure of grand jury materials in exceptional circumstances similar to those present in this case in order to further the work of journalists covering matters of particular social, political, and historical significance, have an especially powerful interest in this case. Amici agree with Petitioner-Appellee that federal courts possess the inherent authority to disclose grand jury materials in appropriate circumstances other than those expressly enumerated in Federal Rule of Criminal Procedure 6(e)—an interpretation of the law that is consistent with the origin and history of the Rule and is in accord with decisions of both the Second and Seventh Circuits. For the reasons herein, amici urge this Court to affirm the district court's decision.

INTRODUCTION

Fifty years ago this June, *The New York Times* published the first installments of a massive, secret history of the United States' political and military involvement in Vietnam created by the Department of Defense that would come to be known as the Pentagon Papers. *See* Neil Sheehan, *Vietnam Archive: Pentagon Study Traces 3 Decades of Growing U.S. Involvement*, N.Y. Times, June 13, 1971, at 1;[1] Neil Sheehan, *The Covert War*, N.Y. Times, June 13, 1971, at 38.[2] The *Times, The Washington Post,* and other newspapers obtained the classified study from whistleblower Daniel Ellsberg, who "illicitly copied the entire report, hoping that making it public would hasten an end to a war he had come passionately to oppose." Janny Scott, *Now It Can Be Told: How Neil Sheehan Got the Pentagon Papers*, N.Y. Times, Jan. 7, 2021, at B10;[3] Niraj Chokshi, *Behind the Race to Publish the Top-Secret Pentagon Papers*, N.Y. Times, Dec. 20, 2017.[4]

Yet even before the first installment of the Pentagon Papers was published, a federal criminal investigation already had commenced into their disclosure. Ellsberg and his former colleague Anthony Russo were indicted on charges of theft and espionage by a grand jury in Los Angeles in June of 1971; at the same time,

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1 Available at https://perma.cc/Q9QH-R9YQ.
2 Available at https://perma.cc/ESV5-E7RN.
3 Available at https://perma.cc/DK5S-ZECE.
4 Available at https://perma.cc/VYL2-54BC.

another grand jury was empaneled in Boston. Mem. and Order on Pet. for Order Directing Release of Records and Mot. to Dismiss at 2, *Lepore v. United States*, No. 18-mc-91539 (D. Mass. Feb. 4, 2020) ("District Court Opinion"). When that latter grand jury was discharged without returning any indictments, a second Boston-based grand jury was convened in August of 1971. *Id*. This appeal arises from a district court order granting a request from Petitioner-Appellee Jill Lepore—a professor of American history at Harvard and a staff writer for *The New Yorker*—for access to the records of those Boston grand juries charged with investigating disclosure of the Pentagon Papers.

Ellsberg's "leak" of the Pentagon Papers stands as one of the most consequential unauthorized disclosures of government information to the news media in American history. And the government's attempted prosecution of Ellsberg and Russo in 1971 for that disclosure is not only of profound historical significance, but it also raises legal, political, and societal questions that reverberate into the present day. Since 2009, the number of prosecutions of individuals charged under the Espionage Act—a 1917 statute intended to address spying by or on behalf of foreign nations—for allegedly making unauthorized disclosures of government information to members of the news media has risen precipitously, a development that has had serious ramifications for newsgathering, and has been the subject of ongoing public debate. *See, e.g.*, Laura Poitras, *I Am*

Guilty of Violating the Espionage Act, N.Y. Times, Dec. 21, 2020;[5] Gabe Rottman, *Government Leaks to the Press Are Crucial to Our Democracy. So Why Are We Suddenly Punishing Them So Harshly?*, TIME, Nov. 1, 2018.[6]

Amici agree with Petitioner-Appellee that the district court's order authorizing the disclosure of records from the Boston grand juries 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*"). First, the government's argument that Federal Rule of Criminal Procedure 6(e) prohibits a federal court from authorizing the disclosure of grand jury records in any circumstance not expressly listed in Rule 6(e)(3)(E) ignores the language and the historical development of the Rule, and the longstanding principle recognized by the Supreme Court that disclosure of grand jury records is "committed to the discretion of the trial judge." *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 399 (1959). The enumerated "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*

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5 Available at https://perma.cc/K52Y-UVDV.

6 Available at https://perma.cc/MN66-V5C7.

Ass'n, 49 F. Supp. 2d 274, 286 (S.D.N.Y. 1999) ("*Historical Ass'n*") (citation omitted).[7]

Second, the district court properly looked to the framework first applied by the Second Circuit in *Craig*. The Second Circuit identified a series of non-exhaustive factors for district courts to consider when determining 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 proceedings took place." *Craig*, 131 F.3d at 106. This approach, which allows for the consideration of any and all relevant facts, and makes the public interest in disclosure a primary consideration, is consistent with the type of "restraint and discretion" that befits the exercise of a court's inherent powers. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991).

Here, the district court's order authorizing the public release of records from the Boston grand juries was a proper exercise of the district court's discretion that will, "in the long run, build 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 the reasons herein, amici urge this Court to affirm the district court's order.

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[7] All references herein to the "Rules" are to the Federal Rules of Criminal Procedure unless otherwise stated.

ARGUMENT

I. A district court may authorize the disclosure of grand jury records to the public in appropriate cases pursuant to its inherent, supervisory authority.

The government's primary argument on appeal is that district courts lack any authority to permit the disclosure of grand jury records in any situation not expressly listed in Rule 6(e)(3)(E). Government Br. at 15–20. Squarely rejected by the Second Circuit in *Craig*, 131 F.3d at 103, and the Seventh Circuit in *Carlson v. United States*, 837 F.3d 753 (7th Cir. 2016), this argument was accepted by the Eleventh Circuit in *Pitch v. United States*, 953 F.3d 1226, 1229 (11th Cir. 2020) (en banc) and the D.C. Circuit in *McKeever v. Barr*, 920 F.3d 842, 846 (D.C. Cir. 2019) (holding that "deviations from the detailed list of exceptions in Rule 6(e) are not permitted").[8] Amici agree with Petitioner-Appellee that, as the district

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[8] Arguably, the majority of the panel in *McKeever* departed from D.C. Circuit precedent. As now-Chief 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*, 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*], 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).

court recognized, below, the government's argument is foreclosed in this Circuit by the reasoning of *In re Grand Jury Proceedings*, 417 F.3d 18 (1st Cir. 2005), s*ee* District Court Opinion at 6–7, the language of Rule 6(e)(3),[9] and contraindicating statements by both the Supreme Court and the Advisory Committee on Criminal Rules to the effect that Rule 6(e) is but declaratory of the broad discretion historically afforded to federal courts to determine, in a given circumstance, whether a departure from the general rule of grand jury secrecy is permitted. *See Carlson v. United States*, 837 F.3d 753 (7th Cir. 2016); *Craig*, 131 F.3d 99. Given the strength and breadth of authority contradicting the government's argument, amici urge this Court to affirm the district court's sound conclusion that Rule 6(e)'s enumerated exceptions to the rule of grand jury secrecy are not exclusive.

A. Federal courts' inherent, supervisory authority over grand juries includes the power to authorize the disclosure of grand jury records in appropriate circumstances.

Federal courts' "inherent supervisory authority over grand juries" is "well recognized." *In re United States*, 441 F.3d 44, 57 (1st Cir. 2006) (citing *McNabb v. United States*, 318 U.S. 332, 340–41, 346–47 (1943)). Such authority has been said to derive from a federal court's "power to call a grand jury into existence," as well as its "power to issue and [its] duty to enforce grand jury subpoenas." *In re*

[9] *See id.* at 8 ("[I]t is clear that, unlike Rule 6(e)(2)(A), subsections (e)(3) and (e)(3)(E) contain no limiting language such as 'unless these rules provide otherwise,' 'except in accordance with these rules,' or 'only.'").

Grand Jury Proceedings, 507 F.2d 963, 964 n.2 (3d Cir. 1975); *see also In re Grand Jury Subpoena Duces Tecum*, 797 F.2d 676, 680 n.4 (8th Cir. 1986) ("It is axiomatic that the grand jury derives its power from the district court and therefore acts under the inherent supervision of the court.").

While proceedings before a grand jury have generally "been closed to the public, and records of such proceedings have been kept from the public eye," *Douglas Oil Co. of Cal. v. Petrol Stops Nw.*, 441 U.S. 211, 218 n.9 (1979) ("*Douglas*"), the "'tradition'" of grand jury secrecy "'is not,'" and has never been, "'absolute.'" *Craig*, 131 F.3d at 103 (quoting *In re Biaggi*, 478 F.2d 489, 492 (2d Cir. 1973) ("*Biaggi*")). "[F]ederal courts historically have exercised [their] supervisory power . . . to develop exceptions to the rule of secrecy when appropriate." *Historical Ass'n*, 49 F. Supp. 2d at 286 (finding it "unquestionable that courts possess supervisory power to develop rules regarding this discrete aspect of grand jury procedure"); *see also United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 233–34 (1940) (acknowledging that "[g]rand jury testimony is ordinarily confidential," but stating that "after the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it").

The Supreme Court has articulated a number of purposes served by the general rule of grand jury secrecy. *See, e.g.*, *Douglas*, 441 U.S. at 219 n.10; *see also United States v. Procter & Gamble Co.*, 356 U.S. 677, 681 n.6 (1958). As

recognized by the district court below, however, these considerations are not present here. *See* District Court Opinion at 10 n.6, 11 n.7 ("The Court notes that the 'forward-looking interest' in ensuring that future participants in grand jury proceedings 'will not be inhibited due to the possibility of subsequent disclosure,' as articulated in *Douglas*, is not evident here, where nearly fifty years have elapsed since the grand jury proceedings in question and many contemporaneous leaks and disclosures have already occurred.").

Moreover, at least one jurist has called into question *Douglas*'s "oft-cited reasons animating the need for secrecy." While amici strongly disagree with the conclusion of Judge Jordan in his concurring opinion in *Pitch* that district courts lack inherent authority to order disclosure of grand jury materials in circumstances not expressly enumerated in Rule 6(e), amici agree that the reasons for the general rule of grand jury secrecy stated in *Douglas* "gloss[] over the evolution in thinking about the reasons for grand jury secrecy and do[] not tell the whole story about the federal judiciary's approach to secrecy before the adoption of the Federal Rules of Criminal Procedure." *Pitch*, 953 F.3d at 1248 (en banc) (Jordan, J., concurring). As Judge Jordan explained, at English common law, a major reason for secrecy was not to shield the grand jury from the general public, but rather to shield it from the crown. *See id.* ("From its inception in England, the rule of secrecy appears to have functioned to secure the grand jury's independence from the crown." (citing

Richard Calkins, *The Fading Myth of Grand Jury Secrecy*, 1 J. Marshall J. Prac. & Proc. 18, 18–19 (1967))). Other legal commentators have similarly noted that, historically, independence from the *prosecution* was essential to the grand jury's traditional role as a safeguard for the accused. *See* Kevin K. Washburn, *Restoring the Grand Jury*, 76 Fordham L. Rev. 2333, 2342–43 (2008) (noting that grand juries that resisted the King's demands were "widely lauded for their courage," and contributed to "the perception of the grand jury as a bulwark of citizens' liberty"). This independent role was personified in early America by the attempted prosecution of John Peter Zenger; two grand juries refused to return an indictment of seditious libel for the newspaper publisher for printing an editorial critical of the crown. *Id.* at 2343.

Notably, as Judge Jordan's concurring opinion in *Pitch* highlights, well into the 1900s, prior to the Rules, grand jury materials were regularly disclosed pursuant to courts' inherent, supervisory authority after the grand jury had concluded its work:

> Courts facing the question of whether to disclose grand jury materials looked to the specific circumstances before them to determine whether the need for secrecy had dissipated. For example, several pre-Rules cases concluded that the need for secrecy was lessened after the grand jury had made its presentment and indictment, the indictment had been made public, the grand jury had been discharged, and/or the accused was in custody. . . . In these cases, concerns about an escaping offender or tampering with jurors and witnesses were no longer at issue.

Pitch, 953 F.3d at 1248–49 (en banc) (Jordan, J., concurring) (citations omitted). Courts of that era took a "circumstance-specific approach," "recognized distinctions among the types of materials sought to be obtained," and examined "policy reasons to afford greater secrecy to some kinds of records and information." *Id.* at 1249. In other words, the legal framework governing the disclosure of grand jury records at the time the Rules were enacted was one of courts' measured discretion, with the "guidepost for disclosure . . . only whether the ends of justice would be furthered." *Id.*

In sum, federal courts have historically had discretion, pursuant to their inherent, supervisory authority over grand juries, to determine whether or not disclosure of grand jury material is warranted under the circumstances before them. *See Craig*, 131 F.3d at 102. As the Supreme Court stated in 1959, determinations as to whether grand jury records should be disclosed "have been nearly unanimous[ly]" regarded as "committed to the discretion" of the district courts. *Pittsburgh Plate Glass*, 360 U.S. at 399. Since that time, 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*, 441 U.S. at 223 ("[W]e emphasize that a court called upon to determine

whether grand jury transcripts should be released necessarily is infused with substantial discretion.").

B. Rule 6(e) did not displace district courts' historical authority to order the disclosure of grand jury materials in appropriate cases.

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 Craig*, 131 F.3d at 102 (explaining that the Rule originated to "reflect[] rather than create[] the relationship between federal courts and grand juries").

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 developments wrought by decisions of the federal courts. For example, it was district courts' "recognition of the occasional need for litigants to have access to grand jury 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*, 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 the trend among [federal] courts to require such recordings." *Carlson v. United States*, 109 F. Supp. 3d 1025, 1032 (N.D. Ill. 2015) (citing 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 "even 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.

Simply put, both the origin and history of Rule 6(e) belie any claim that it was ever intended to be a "straitjacket on [the] courts." *Historical Ass'n*, 49 F. Supp. 2d at 284. Rather, Rule 6(e) is and has always been "responsive to courts' interpretation of the appropriate scope of grand jury secrecy." *Id.*

II. The district court's application of the factors identified by the Second Circuit in *Craig* appropriately reconciled the importance of grand jury secrecy with the public interest in disclosure.

Craig provides a workable test for district courts to apply when determining whether or not to exercise their inherent authority to disclose grand jury materials in exceptional circumstances not expressly identified in Rule 6(e). Cognizant of the need to consider a number of factors and interests in a given case, and "[m]indful that there is no talismanic formula or rigid set of prerequisites," the Second Circuit in *Craig* 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." *Craig*, 131 F.3d at 106. The Seventh Circuit, too, has adopted this framework. *Carlson*, 837 F.3d at 766.

Amici agree with Petitioner-Appellee that the district court in this case appropriately applied and weighed the *Craig* factors. The fact-specific, flexible test announced in *Craig*, and applied in both the Second and Seventh Circuits, allows district courts to appropriately consider the weight of the public interest in disclosure of historically significant grand jury materials, as well as any other specific factual matters relevant in a given case. District Court Opinion at 8–10. Such a case-by-case inquiry that allows for the careful consideration of a variety of relevant factors, but makes the public interest in disclosure a primary consideration, is consistent with the "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 affirm the district court's application of the *Craig* factors in this case.

III. The public interest and ends of justice would be served by affirming the district court's exercise of its inherent discretion to disclose grand jury records.

A. Ossification of the exceptions to grand jury secrecy to those explicitly listed in Rule 6(e) would be detrimental to the public interest.

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, 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).[10] 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.* at 43–44.

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. 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

[10] 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.

people who had indicted more than 60 members of his administration." Timothy M. Phelps, '*Nixon Being Nixon' – This Time Under Oath*, L.A. Times, Nov. 10, 2011.[11]

Among the revelations covered by the news media following the unsealing was President Nixon's insistence that "it was vitally important" that Navy Yeoman and stenographer Charles Radford—who was discovered to have "rifled [Secretary of State Henry] Kissinger's briefcase and wastebaskets" and stolen "up to 5,000 classified documents"—have his phone tapped "'to see whether this mania he had developed for leaking was continuing.'" James Rosen, *Watergate: Nixon Warned Grand Jury on Pentagon Spy Ring*, Fox News, Nov. 10, 2011 (quoting Nixon).[12] 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, L.A. Times, Nov. 10, 2011;[13] Kim Geiger, *Nixon's Long-Secret Grand Jury Testimony Released*, L.A. Times, Nov. 10, 2011 ("The Los Angeles Times is reviewing and annotating the documents.").[14] 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

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11 Available at https://perma.cc/H93G-M8JH.
12 Available at https://perma.cc/YQ22-NV5W.
13 Available at https://perma.cc/AE9S-5WDN.
14 Available at https://perma.cc/WS8D-ZMVL.

corners of the Watergate story only Nixon could shed light on.'" Phelps, '*Nixon Being Nixon'*, *supra* (quoting Timothy Naftali, director of the Nixon Library).

And the detrimental ramifications of ossifying district courts' supervisory authority extend beyond the press and public. In *In re Application of USA*, the government sought an order under the All Writs Act, 28 U.S.C. §1651(a), to prevent the target of a grand jury subpoena (the plaintiff in a civil action) from disclosing receipt of that subpoena to the defendants in that case, as he would otherwise have been required to do under an extant protective order. No. 19-WR-10 (BAH), 2019 WL 4619698, at *1 (D.D.C. Aug. 6, 2019). But the district court noted that the D.C. Circuit's holding in *McKeever* that Rule 6(e) is an exhaustive, rule-based accounting of the parties bound by grand-jury secrecy, and possible exceptions to those rules, precluded such an order. Though the government urged the district court to use the All Writs Act to fill what the court deemed a "gap" in the law, Circuit precedent foreclosed that route: "*McKeever*, however, teaches that Rule 6(e) has not left gaps. Whether courts might have filled a gap through inherent authority or the All Writs Act makes no difference if the gap does not exist." *Id.* at *4–5 (also noting, at *4 n.4, "[c]haritably, the government's approach to Rule 6(e) has been inconsistent"). The district court's inability to act in that case exemplifies the shortsightedness of ossifying exceptions intended to be not exhaustive but merely illustrative of district court's inherent authority.

B. The public interest would be served by affirming the district court's order disclosing the grand jury records sought by Petitioner-Appellee.

The district court was correct from a legal standpoint, as discussed above, when it determined that its inherent supervisory authority (along with Rule 6(e)(6), for certain records that had already been partly disclosed) permitted it to order the disclosure of the grand jury materials Petitioner-Appellee requested. But the Government accompanied its incorrect legal theory with a deficient policy argument: "[W]hy [should] historical significance (as opposed, for example, to social or religious significance, or genealogical interest, or just idle curiosity) . . . be the benchmark for disclosure of grand jury materials[?]"[15] Government Br. at 28–29. Elsewhere, this point is argued in subtler, rhetorical fashion—the materials Petitioner-Appellee seeks are downgraded by the Government from having "significant" public or historical interest (as Petitioner-Appellee contends, mirroring the language of *Craig*, 131 F.3d at 106) to merely "historically interesting" and sought "simply to satisfy the public's curiosity about what occurred before the grand jury." *E.g.*, Government Br. at 23, 28.

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[15] The direct answer to this question, of course, is that it inaccurately describes the district court opinion, which (as amici discuss, *supra*, Section II) applied a non-exhaustive list of factors set forth by the Second Circuit in *Craig*, 131 F.3d at 106. Those factors include "why disclosure is being sought in the particular case." *Id.* Here, that reason is the tremendous historical significance of the Pentagon Papers; neither the district court nor Petitioner-Appellee implies that historical significance is the only consideration that could justify the disclosure of grand jury records.

This reframing trivializes both the substance of the Pentagon Papers and the government's subsequent investigation into their disclosure to news organizations. Ellsberg's actions represent one of the most consequential "leaks" of government documents to the press in American history, and—prior to 2009—the indictment against Russo was the only grand jury indictment returned against a non-governmental third party for leaking under the Espionage Act since its passage in 1917. *See* District Court Opinion at 2; *see also* Gabe Rottman, *Special Analysis of the May 2019 Superseding Indictment of Julian Assange*, Reporters Comm. for Freedom of the Press, May 30, 2019 (providing historical context of Espionage Act charges);[16] Jameel Jaffer, *The Espionage Act and a Growing Threat to Press Freedom*, The New Yorker, June 25, 2019.[17]

The Boston grand juries from which Petitioner-Appellee seeks disclosure of materials were convened concurrently with the Los Angeles grand jury that delivered indictments of Ellsberg and Russo. Mem. of Law in Supp. of Pet. for Order Directing Release of Records of 1971 Boston Grand Jury Investigations of the Pentagon Papers at 2–3, *In re Petition of Jill Lepore*, No. 18-mc-91539 (D. Mass. Dec. 17, 2018) ("Lepore Petition Memorandum"). The leaked materials demonstrated, in the words of Ellsberg, that

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16 Available at https://perma.cc/4WBK-8FBQ.

17 Available at https://bit.ly/2RvJOen.

> [a] generation of presidents, believing that the course they were following was in the best interests of the country, nevertheless chose to conceal from Congress and the public what the real policy was, what alternatives were being pressed on them from within the government, and the pessimistic predictions they were receiving about the prospects of their chosen course.

Daniel Ellsberg, *Lying About Vietnam*, N.Y. Times, June 29, 2001.[18]

The government's reaction to the publication of a report laying bare this abuse of the Executive Branch's war powers led directly to a failed attempt by the Nixon Justice Department to enjoin *The New York Times* and *The Washington Post* from publishing the contents of the report, *see N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam), one of the most important Supreme Court rulings of the last 50 years. It also produced extensive prosecutorial activity (and misconduct) as the government gathered evidence to present to the Los Angeles grand jury in its attempt to indict Ellsberg and Russo. *See* Martin Arnold, *New Trial Barred*, N.Y. Times, May 12, 1973, at 69 (quoting the decision to grant a mistrial issued by U.S. District Court Judge William M. Byrne Jr.: "The conduct of the Government has placed the case in such a posture that it precludes the fair, dispassionate resolution of these issues by a jury.").[19] As the district court noted, little is known about one of the two grand juries empaneled in Boston while the government sought its indictment of Ellsberg in Los Angeles; the other "issued

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[18] Available at https://perma.cc/8FRX-YBDY.

[19] Available at https://perma.cc/J4DL-CNWD.

subpoenas to at least thirteen people" before "reportedly [being] dismissed due to leaks to the press." District Court Opinion at 2.

Until recently, the case against Ellsberg and Russo stood as one of a very limited number of known attempts by the government to prosecute the disclosure of national defense information to the press under the Espionage Act.[20] This rarity was by design: Congress passed the Espionage Act in the opening days of U.S. involvement in World War I to combat—as the name implies—espionage by or on behalf of foreign nations. *See* Harold Edgar & Benno C. Schmidt, Jr., *The Espionage Statutes and Publication of Defense Information*, 73 Colum. L. Rev. 929, 939–42 (1973). Indeed, a proposal by President Woodrow Wilson to include in that statute a grant of censorial authority for the President to restrain press publication of defense information was debated by Congress and expressly denied.

[20] Amici's focus on disclosures of government information to the press reflects the facts of this case, and the interests of amici. However, grand jury investigations of espionage involving foreign states are also historically significant and may warrant release to the public pursuant to a district court's inherent authority after a balancing of countervailing factors. Indeed, district courts have ordered such disclosures. *See 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); *Historical Ass'n*, 49 F. Supp. 2d at 295 (disclosure of grand jury testimony related to historically significant prosecution of Alger Hiss warranted due to "vigorous and sustained debate not only about the case itself, but also about broader issues concerning fundamental and, at times, countervailing aspects of our democracy").

Letter from the Honorable Daniel Patrick Moynihan to President William Jefferson Clinton (Sept. 29, 1998) ("Moynihan Letter").[21]

Accordingly, until 2009, the only jail sentence secured by prosecutors under the Espionage Act for a press disclosure was that of Navy analyst Samuel Loring Morison, who was later pardoned by President Clinton following years of lobbying by the then-chair of the Senate Commission on Protecting and Reducing Government Secrecy, Sen. Daniel Patrick Moynihan.[22] As Senator Moynihan noted in a letter to President Clinton, Morison was "convicted of an activity which has become a routine aspect of government life: leaking information to the press in order to bring pressure to bear on a policy question." Moynihan Letter, *supra*. Moynihan also noted that such prosecutions bore a high risk of selective enforcement, which could skew public debate by targeting only certain sources or certain leaks to give the government a leg up in policy controversies.

While the prosecution of a leaker to the media as a spy was formerly a rarity, in recent years there has been a spate of prosecutions under the Espionage Act for the unauthorized disclosure of classified or controlled information to the press,

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21 Available at https://perma.cc/LCX5-QCUX.

22 In 2006, a former defense official who pleaded guilty to an Espionage Act charge for releasing classified information to two pro-Israel lobbyists was initially sentenced to more than 12 years in prison. However, the sentence was reduced to 10 months of community confinement before any prison time was served. Josh Gerstein, *Leniency for AIPAC Leaker*, POLITICO, June 11, 2009, https://perma.cc/TUB9-BY2U.

including many resulting in significant prison sentences. *See* Reporters Committee for Freedom of the Press, *Federal Cases Involving Unauthorized Disclosures to the News Media, 1778 to the Present* (documenting 4 pre-2009 Media leak cases and 18 such cases post-2009).[23] Just two weeks ago, another such case resulted in a guilty plea; the subject of that prosecution awaits sentencing. *See* Rachel Weiner, *Former Intelligence Analyst Daniel Hale Pleads Guilty to Leaking Classified Information*, Wash. Post, Mar. 31, 2021.[24] This broad development poses a serious threat to newsgathering, an informed public, and the ability of the news media to serve its constitutional function as a check and balance on government power that is essential to the functioning of democracy. Moreover, as one commentator has noted, it "collapses all of the distinctions that should matter in those cases. It draws no distinction between insiders who share information with foreign intelligence services and those who share it with the media, or between those who intend to harm the United States and those who intend to inform the public about the abuse of government power." *See* Jaffer, *supra*.

As such, disclosure of the historically significant grand jury materials that Petitioner-Appellee seeks would undoubtedly serve "the ends of justice." *See Socony-Vacuum Oil Co.*, 310 U.S. at 234. The *Carlson* case, in particular,

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23 Available at https://www.rcfp.org/resources/leak-investigations-chart/.

24 Available at https://perma.cc/3MWR-NQKR.

provides insight into how. The petitioners in that case included Elliot Carlson, "a journalist and historian with a special expertise in naval history," 837 F.3d at 756, as well as amicus 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. 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 known time that the government has sought the indictment of a major news organization for allegedly violating the Espionage Act by publishing classified information. And media coverage following release of the *Tribune* grand jury transcripts was not merely historical. It included commentary about the Espionage Act and the nature of unauthorized disclosures of information to members of the news media in general. *See*, *e.g.*, Ofer Raban, *Is the Assange Indictment a Threat to the First Amendment?*, AP News, May 2, 2019 ("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.");[25] Theodore L. Gatchel, *The Danger Posed by Leakers*, Providence Journal, Sept. 2, 2017 (arguing that "[t]he same issues that prevented justice after Midway are still in play today");[26] Noah Feldman, *World War II Leak Case is a Win for Edward Snowden*, Bloomberg Opinion, Sept. 19, 2016 ("It's hard to escape the conclusion that the Justice Department under President 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.").[27]

The district court in *Carlson* was unequivocal in its later-affirmed opinion that disclosure of the historically significant records would "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." *Carlson*, 109 F. Supp. 3d at 1037 (citation and internal quotation marks omitted). The same is true of the grand jury materials at issue here, which document the government's pursuit and attempted prosecution of

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25 Available at https://bit.ly/3uN3zMD.
26 Available at https://perma.cc/9S5X-H9WV.
27 Available at https://perma.cc/BEL2-A3Q3.

perhaps the most storied and history-changing unauthorized disclosure to the press of secret government records in American history.

CONCLUSION

For the foregoing reasons, amici respectfully urge this Court to affirm the decision of the district court.

Dated: April 12, 2021

Respectfully submitted,

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Dated: April 12, 2021

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CERTIFICATE OF SERVICE

I, Bruce D. Brown, hereby certify that I have filed the foregoing Brief of Amici Curiae electronically with the Clerk of the Court for the United States Court of Appeals for the First Circuit using the appellate CM/ECF system. All participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system, via electronic notice to:

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