CASE NO. 17-15016-U

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

United States of America,

Appellant,

v.

Marion E. Pitch,
as personal representative of the Estate of Anthony Pitch,

Appellee.

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

EN BANC AMICUS BRIEF OF GILBERT KING & THE FIRST AMENDMENT FOUNDATION SUPPORTING AFFIRMANCE FOR APPELLEE MARION E. PITCH

CARLTON FIELDS, P.A.
Attorneys for Amicus Curiae Gilbert King and the First Amendment Foundation
100 Southeast Second Street
Miami Tower, Suite 4200
Miami, Florida 33131
Telephone: (305) 539-7280
By: Richard J. Ovelmen
David A. Karp

United States v. Pitch
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CERTIFICATE OF INTERESTED PERSONS

Amicus Curiae Gilbert King and the First Amendment Foundation certify under Fed. R. App. P. 26.1 and 11th Cir. L.R. 26.1-1 that the following persons or entities may have an interest in the outcome of this litigation:

1. **Bell, Joseph J.** (attorney for Appellee Marion E. Pitch, as personal representative of the Estate of Anthony S. Pitch, and Intervenor Laura Wexler)
2. **Bell & Shivas, P.C.** (attorney for Appellee Marion E. Pitch, as personal representative of the Estate of Anthony S. Pitch, and Intervenor Laura Wexler)
3. **Carlton Fields P.A.** (attorney for Amicus Curiae Gilbert King and the First Amendment Foundation)
4. **Freeman, Mark R.** (attorney for Appellant United States)
5. **Hinshelwood, Bradley A.** (attorney for Appellant United States)
6. **Hunt, Joseph H.** (Assistant U.S. Attorney General)
7. **Karp, David A.** (attorney for Amicus Curiae Gilbert King and the First Amendment Foundation)
8. **McNeill, W. Taylor** (attorney for Appellant United States)
9. **Ovelmen, Richard J.** (attorney for Amicus Curiae Gilbert King and the First Amendment Foundation)
10. **Peeler, Charles E.** (U.S. Attorney, Middle District of Georgia)
11. **Peterman, G.F., III** (attorney for Appellant United States)

12. **Pitch, the Estate of Anthony S.** (original Appellee)

13. **Pitch, Marion E.**, as personal representative of Estate of Anthony S. Pitch (Appellee)

14. **Public Citizen** (Amicus Curiae)

15. **Readler, Chad A.** (Acting Assistant U.S. Attorney General)

16. **Raab, Michael** (attorney for Appellant United States)

17. **Reporters Committee for Freedom of the Press** (Amicus Curiae)

18. **Townsend, Katie** (attorney for Amicus Curiae Reporters Committee for Freedom of the Press)

19. **Treadwell, The Honorable Marc T.** (U.S. District Judge, Middle District of Georgia)

20. **Wexler, Laura** (Intervenor)

21. **Zieve, Allison M.** (counsel for Amicus Curiae Public Citizen)

/s/ David A. Karp
David A. Karp
Florida Bar No. 69226

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CORPORATE DISCLOSURE STATEMENT

Amicus Curiae the First Amendment Foundation Inc. states under Fed. R. App. P. 9(a)(4)(A) and 26.1, and 11th Cir. L.R. 26.1-3 that it is non-profit corporation, has no parent corporation, and does not issue shares of stock.

/s/ David A. Karp
David A. Karp
Florida Bar No. 69226

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INTEREST OF AMICUS CURIAE

Gilbert King is the author of three books of historical non-fiction, notably *Devil in the Grove: Thurgood Marshall, the Groveland Boys, and the Dawn of a New America*, which won the 2013 Pulitzer Prize for General Nonfiction and became a *New York Times* best seller. The book tells the story of four African-American men falsely accused of raping a 17-year-old white woman in Groveland, Florida, in 1949. A mob murdered one of the men, and the sheriff of Lake County shot two others while driving them from prison. When the Klu Klux Klan could not lynch the men, they burnt to the ground homes in an African-American neighborhood and forced hundreds of residents to flee. Sixty-eight years later, the State of Florida formally apologized to the families of the Groveland Four. In January, Florida Governor Ron DeSantis posthumously pardoned the four men. Mr. King was able to tell the story in part by obtaining the unredacted FBI files into the investigation. He has attempted to obtain grand jury material while researching other cases about civil rights and social injustice.

Mr. King is also the author of two other books, *Beneath a Ruthless Sun* and *The Execution of Willie Francis*. He has written about race and civil rights for the *New York Times*, *Washington Post*, and *The Atlantic*.

The First Amendment Foundation is a 501(c)(3) tax-exempt, non-profit organization, based in Tallahassee, Florida, and established in 1984 by other non-

profits—the Florida Press Association, the Florida Society of News Editors, and the Florida Association of Broadcasters—to ensure government openness and transparency. The Foundation was created to advocate the public interest in free speech, free press and open government, and to provide training and legal advocacy. The Foundation has filed numerous *amicus curiae* briefs relating to First Amendment free speech issues and access to government records and meetings. The Foundation provides education and training, monitors open records and meetings laws, and assists citizens and journalists in obtaining access to government.

No party, party's counsel, or person contributed money intended to fund this brief, and no party's counsel authored this brief in whole or part. *See* Fed. R. App. P. 29(a)(4)(E).

STATEMENT OF THE ISSUES

Mr. King and the First Amendment Foundation adopt the statement of issues set forth in the Court's July 12, 2019 briefing memorandum.[1]

[1] Citations in this brief omit internal quotations and citations unless included.

SUMMARY OF ARGUMENT

U.S. District Judge T. Hoyt Davis convened a grand jury inside the federal courthouse in Athens, Georgia, on the morning of December 2, 1946. He charged the twenty-three men assembled inside his courtroom with investigating the lynching of four African-Americans by the Moore's Ford Bridge in Walton County, Georgia.[2] George W. Dorsey, a private first class decorated for his service in World War II, his wife Mae Murray, Roger Malcolm, and his pregnant wife, Dorothy Malcolm, were murdered by the bridge about four months earlier. A mob pulled them from a car, bound them, tied a noose around Roger Malcolm's neck, forced them at gunpoint down an embankment, and shot them about 60 times. Within a few hours, several dozen residents had come to the bridge to see the carnage and collect bullet shells and pieces of rope as keepsakes of the crime.[3]

The grand jurors seated before Judge Davis swore they would not indict, or fail to indict, out of "fear, favor, or affection." For sixteen days, the grand jury met inside a room on the third floor of the white marble courthouse adorned by a flag of

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[2] Laura Wexler, *Fire in a Canebreak: The Last Mass Lynching in America* 173-74 (2003); Anthony S. Pitch, *The Last Lynching: How a Grusome Mass Murder Rocked a Small Georgia Town* 122 (2016); *Inquiry is Opened in Georgia Lynching*, N.Y. Times, Dec. 3, 1946, at 25.

[3] Pitch, *supra* note 2, at 1-5; Wexler, *supra* note 2, at 62-66.

the United States.[4] Witnesses waited for hours outside the grand jury in separate rooms, African-Americans in one, whites in the other.[5] One by one, the witnesses slipped behind the grand jury door to testify. Most left in silence. None would identify the men who had murdered two young couples and an unborn child.[6]

Seventy-two years later, the families affected by the murders cannot realistically expect anyone will be held to account for these crimes. Nor can the judicial system undo its failure to bring these murderers, known to an entire town, to justice. Courts can, however, restore some sense of justice and grant these families a chance at reconciliation by allowing them and the public to know what occurred inside the grand jury room. The district court ordered the release of the grand jury records in this exceptional case not merely to "sate the curiosity of the general public," as the Government argues. (Br. 38). Rather, the court ordered the release of the grand jury's records to fulfill one of its essential functions—to restore confidence in the judiciary by laying bare how a community's silence allowed murderers to remain free.

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[4] Pitch, *supra* note 2, at 124-25. *See also* Court Info., U.S. District Court, Middle District of Georgia, https://www.gamd.uscourts.gov/offices/athens (last visited Sept. 1, 2019); Historic Federal Courthouses, Athens, Georgia (1942), Federal Judicial Center, https://www.fjc.gov/history/courthouse/athens-georgia-1942 (last visited Sept. 5, 2019).

[5] Wexler, *supra* note 2, at 178-181.

[6] Wexler, *supra* note 2, at 184-85; Pitch, *supra* note 2, at 127-30.

Informed by the values reflected in the First Amendment, courts have long held inherent authority to instill confidence in the judicial process, including through their supervisory role over the grand jury. This Court recognized this principal in *In re Petition to Inspect & Copy Grand Jury Materials (Hastings)*, 735 F.2d 1261 (11th Cir. 1984), and nothing has changed to cause the Court to jettison stare decisis and discard a precedent courts have reliably applied. *See Pitch v. United States*, 915 F.3d 704, 714 (11th Cir. 2019) (Jordan, J., concurring). Nothing in Federal Rule of Criminal Procedure 6 countermands a court's inherent powers to release historically significant grand jury records after carefully weighing competing interests. Neither the plain text nor organizational structure of Rule 6 support the Government's cramped and ahistorical reading of the rule.

This case falls squarely within *Hastings*, which should be re-affirmed. Indeed, the exercise of the court's inherent powers here takes on special resonance. These grand jury records shed light not only on the nation's history, but also on the role of the court itself as an instrument of justice.

ARGUMENT

I. A court has inherent power to release grand jury records in exceptional cases to vindicate confidence in the judicial process.

"It has long been understood that '[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution,' powers 'which cannot be dispensed with in a Court, because they are necessary to the exercise of

all others." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991). A court's inherent power derives in part from the need to manage cases, but also encompasses "actions that protect and vindicate the judicial process and the judicial institution itself," as the Government acknowledged to the Panel below. *See* (Panel Reply Br. 7) (quoting *Carlson v. United States*, 837 F.3d 753, 771 (2016) (Skyes, J., dissenting)); *see also* (Br. 32). "[G]uided by considerations of justice," and "to preserve judicial integrity," courts may use supervisory powers to "formulate procedural rules not specifically required by the Constitution or the Congress." *United States v. Hastings*, 461 U.S. 499, 505 (1983).

Such inherent powers extend past cases before the court. "This power reaches both conduct before the court and that beyond the court's confines[.]" *Chambers*, 501 U.S. at 44 (explaining that contempt powers punish "disobedience to the orders of the Judiciary, *regardless* of whether such disobedience interfered with the conduct of trial") (emphasis added). For instance, "a court has inherent power to prevent the sale of transcripts at exorbitant profit [because] public confidence in administration of the courts demands no less." *Lipman v. Com. of Mass.*, 475 F.2d 565, 571 (1st Cir. 1973). A court under its inherent powers can also disqualify counsel whose appearance forces the recusal of a district judge and "bring[s] the judicial system itself into disrepute." *In re BellSouth Corp.*, 334 F.3d 941, 959-60 (11th Cir. 2003) (courts can use inherent powers to preserve the manipulation of random case

assignments). "[F]ederal courts also possess the inherent power, derived from the common law, to dismiss a case for want of prosecution" to prevent "immense court backlogs undermining public confidence in the courts[.]" *United States v. Furey*, 514 F.2d 1098, 1103 (2d Cir. 1975). *See also Gaca v. United States*, 411 U.S. 618, 618 (1973) (using supervisory power to reinstate appeal dismissed for lack of prosecution "to avoid possible injustice"). "There can be no question of the inherent power of a court 'to protect itself, and hence society, as an instrument of justice.'" *In re Osborn*, 376 F.2d 808, 810 (6th Cir. 1967).

The court's inherent power to instill confidence in the judiciary not only serves public policy; it also advances the court's structural powers. "The importance of public confidence in the integrity of judges stems from the place of the judiciary in the government." *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1666 (2015). Courts do not command armies and have "no influence over either the sword or the purse[.]" *Id.* (citing The Federalist No. 78, p. 465 (C. Rossiter ed. 1961) (A. Hamilton)). "The judiciary's authority therefore depends in large measure on the public's willingness to respect and follow its decisions." *Id.*

This Court acknowledged that relationship in *Hastings*, 735 F.2d at 1270, where it held a court could exercise its inherent powers to release grand jury records about the indictment (and later impeachment) of a federal judge. The Court exercised its inherent power to further "a matter of great societal importance" that

affected "the public confidence in the judiciary[.]" *Id.* at 1269-70. "The perception of a viable healthy judiciary is of critical importance to our system of justice." *Id.* at 1271. Without releasing the grand jury records, the Court found the investigation into the judge's conduct "might well not reach the degree of thoroughness necessary to ensure public confidence that justice had been done." *Id.* at 1271.

II. The release of grand jury records would help restore faith in justice and provide for reconciliation in this exceptional case.

The Government argues that *Hastings* cannot "be extended beyond the protection and vindication of the judicial process" to authorize the release of "historically interesting" grand jury records "simply to satisfy the public's curiosity[.]" (Br. 37, 32, 36). That argument both trivializes and misconceives the values advanced by the release of the grand jury records here. The district court's order rested on the same foundation as the court's order in *Hastings*. Both courts recognized in different contexts the importance of restoring faith in the judiciary after grievous acts undermined that confidence. The Government's misapprehension of those values follows from its failure to consider the crucial historical context of this case.

A. This case is part of a legacy of lynchings that eroded trust in the justice system across the South.

On a six-acre site overlooking the Alabama State Capitol, a memorial sits on

a crest.[7] More than 800 columns of corten steel monuments hang from the roof at the National Memorial for Peace and Justice, one for each county where a documented lynching occurred between 1877 and 1950.[8] Two hundred and sixty-five of those monuments represent the 1,267 documented lynchings in the three states comprising the Eleventh Circuit.[9] At least 29 lynching occurred in Jefferson County, Alabama, alone; at least 33 took place in Orange County, Florida; at least 35 in Fulton County, Georgia, and 24 in Early County, Georgia.[10] Nine lynchings, if not more, occurred in Walton County, Georgia, site of the Moore's Ford murders.

Witness the brutality: In Perry County, Alabama, a mob tied an African-American sharecropper, Joe Spinner Johnson, to a board and beat him senseless before delivering him to the jail in Selma, Alabama, where the beating continued.[11] His mutilated body was found a few days later in a field near Greensboro, Alabama. In Newnan, Georgia, a mob lynched Sam Hose before a crowd, and then sold pieces

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[7] Campbell Robertson, *A Lynching Memorial Is Opening. The Country Has Never Seen Anything Like It.*, N.Y. Times, Apr. 25, 2018, at A12.

[8] The National Memorial for Peace and Justice, https://museumandmemorial.eji.org/memorial (last visited Sept. 2, 2019).

[9] Racial Terror Lynchings, https://lynchinginamerica.eji.org/explore (last visited Sept. 2, 2019).

[10] Equal Justice Initiative, *Lynching in America: Confronting the Legacy of Racial Terror*, 42 (3d ed.), https://lynchinginamerica.eji.org/.

[11] *Lynching in America*, *supra* note 10, at 39 & n.184.

of his heart, liver, and bones as souvenirs.[12] In Thomasville, Georgia, a mob seized William Kirkland from jail, hung him, filled his body with bullets, and dragged his remains through town before leaving him on the courthouse lawn.[13] Three days later in the same town, an African-American man, Lacy Mitchell, was lynched for testifying against a white man accused of raping an African-American woman. The white defendant was then acquitted of his crime. *Id.* In Luverne, Alabama, Jesse Thornton was lynched for calling a white police officer by his name, rather than "Mister."[14] At least 4,084 such documented lynching occurred in the American South between 1877 and 1950.[15]

The mobs not only murdered the victims, they terrorized African-American communities. After a lynching in Forsyth County, Georgia, in 1912, a mob demanded that all African Americans leave. Many did, and eight years later, the county's African-American population plummeted from 1,100 to 30.[16] The Ku Klux

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[12] *Lynching in America*, *supra* note 10, at 35 & n.167.

[13] *Lynching in America*, *supra* note 10, at 32 & n.158.

[14] *Lynching in America*, *supra* note 10, at 32 & n.150.

[15] *Lynching in America*, *supra* note 10, at 40; Racial Terror Lynchings, *supra* note 9.

[16] W. Fitzhugh Brundage, *Lynching in the New South: Georgia and Virgina, 1880-1930*, 43-44 (1993); *The 'Racial Cleansing' That Drove 1,100 Black Residents Out of Forsyth County, Ga.*, NPR Fresh Air (Sept. 15, 2016), https://www.npr.org/2016/09/15/494063372/the-racial-cleansing-that-drove-1-100-black-residents-out-of-forsyth-county-ga.

Klan stormed into Groveland, Florida, to try to lynch four men falsely accused of rape. When they did not immediately succeed—the sheriff shot two of the men instead—the Klan burned African-Americans' homes, forcing hundreds to flee.[17]

Despite the legacy of public lynchings, less than one percent of lynchings ended with a criminal conviction for any crime.[18] Law enforcement were often indifferent to, or even complicit in, the killings. In Scott County, Missouri, a mob of 500 men in 1942 broke into City Hall, where a 30-year-old cotton mill worker, Cleo Wright, was held in a washroom, rather a jail cell.[19] The mob tied his ankles to a trunk and dragged him through the African-American area of town, before lighting his body on fire.[20] A state and federal grand jury both failed to indict.[21] In Haywood County, Tennessee, a mob abducted Elbert Williams, a NAACP leader who advocated for voting rights, from his home in the middle of the night. His body

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[17] Gilbert King, *Devil in the Grove: Thurgood Marshall, the Groveland Boys, and the Dawn of a New America* 72-73, 84-99, 108-09 (2012).

[18] *Lynching in America*, *supra* note 10, at 48 & n.200.

[19] *Sikeston Inquiry Seek to Identify Men in Lynching: Grand Jury to Be Called—Prisoner Wounded After Attack on Woman, Burned by Mob*, St. Louis Post-Dispatch, Jan. 26, 1942; *Lynch Negro After Knife Attacks*, Sikeston Standard (Sikeston, Mo.), Jan. 27, 1942 at 1.

[20] *Id.*

[21] *Jury Reports No True Bills in Lynch Probe*, Sikeston Standard (Sikeston, Mo.), Mar. 13, 1942; *St. Louis Dailies Call for Federal Anti-Lynching Law*, Pittsburgh Courier, Aug. 15, 1942.

was found floating in the Hatchie River days later.[22] The coroner refused to conduct an autopsy, and state and federal grand juries both declined to bring charges.[23] A review ordered by FBI director J. Edgar Hoover found the FBI had failed to follow relevant leads or interview key witnesses.[24]

The Moore's Ford lynching fits within this same narrative. The mob pulled Mr. and Mrs. Dorsey and Mr. and Mrs. Malcolm from a car driven by Loy Harrison, who owned the land where they lived as tenants.[25] Harrison testified he saw the men in the mob, but could not identify them.[26] Other witnesses saw cars loaded with men driving near Moore Ford's Bridge at the time, but no one would identify the occupants. About 125 witnesses appeared under subpoena before the grand jury; none apparently identified the killers.[27] FBI director Hoover reported that an "iron

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[22] *Brownsville Whites Begin Campaign of Terrorism to Prevent Voting*, N.Y. Age, July 6, 1940.

[23] *Nearly 80-year-old Civil-Rights Murder Case Reopened in Tennessee*, USA Today, *Aug*. 9, 2018, https://www.usatoday.com/story/news/nation-now/2018/08/09/elbert-williams-civil-rights-murder-case-reopened/945320002/ (last visited Sept. 9, 2019).

[24] Willie James Inman, *Reopening of 1940 Elbert Williams Case Part of National Effort to Bring Justice to Civil Rights Heroes*, Fox News, Aug. 17, 2018, https://www.foxnews.com/us/reopening-of-1940-elbert-williams-case-part-of-national-effort-to-bring-justice-to-civil-rights-heroes (last visited Sept. 9, 2019).

[25] Pitch, *supra* note 1, at 46; Wexler, *supra* note 1, at 61-64.

[26] Pitch, *supra* note 1, at 46.

[27] *Id.* at 128.

curtain" of silence had fallen over the community.[28]

B. The release of records informs the public about the past and provides reconciliation for past injustice.

The Court's inherent power to release grand jury records advances two core values—the need to inform the public about government conduct and the need to restore faith in the judiciary for communities whose confidence in the courts has been shattered.

1. The First Amendment provides for freedom of speech and the press, but courts "have long eschewed any narrow, literal conception of the Amendment's terms, for the Framers were concerned with broad principles, and wrote against a background of shared values and practices." *Globe Newspaper Co. v. Superior Court for Norfolk Cty.*, 457 U.S. 596, 604 (1982). "[I]n a variety of contexts," the Supreme Court "has referred to a First Amendment right to receive information and ideas," which depend on a "right of access" or a "right to gather information, for . . . without some protection for seeking out the news, freedom of the press could be eviscerated." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980). The First Amendment also "has a *structural* role to play in securing and fostering our republican system of self-government" by ensuring that "debate on public issues

[28] Wexler, *supra* note 1, at 191.

should be [not only] uninhibited, robust, and wide-open," but also "informed." *Richmond Newspapers, Inc.*, 448 U.S. at 587 (Brennan, J., concurring).

The need to keep the public informed about the criminal justice system and shed light on the functioning of the grand jury undergirds the Court's inherent power to release grand jury records in exceptional cases. Informed by the First Amendment, the courts share "a keen appreciation of the structural interest served in opening the judicial system to public inspection." *Richmond Newspapers, Inc.*, 448 U.S. at 592 (Brennan, J., concurring). Such disclosure "serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government." *Globe Newspaper Co.*, 457 U.S. at 604. Releasing the grand jury records here furthers this interest by providing historians and journalists with material to examine how the grand jury and the larger community failed to bring the Moore's Ford murderers to justice.

The Supreme Court has recognized time and again that balancing First Amendment interests with competing values requires careful weighing of facts on a case-by-case basis—not mandatory bright line rules. *See Globe Newspaper Co.*, 457 U.S. at 604 (First Amendment could not tolerate mandatory closure of court during victim testimony). The Government here would eliminate all judicial discretion, which courts have exercised soundly over decades, in favor of a "categorical" ban on all disclosure of historical material, even decades later, under all circumstances.

See In re Craig, 131 F.3d 99, 104 (2d Cir. 1997) (rejecting categorical approach, noting that evaluating a request to release grand jury records "is one of the broadest and most sensitive exercises of careful judgment that a trial judge can make").

2. The Moore's Ford lynching occurred more than 73 years ago, but interest in the unsolved murders "remains very much alive[.]" *Pitch v. United States*, 915 F.3d 704, 717 (11th Cir. 2019) (Graham, J. dissenting). Members of the Moore's Ford Memorial Committee have "placed grave markers for the victims and a historical marker near the site of the lynching. A member of the Committee and a granddaughter of one the victims attended oral argument in this appeal. Community members organize an annual reenactment in honor of the victims." *Id.* Family members and the broader community "still search for justice."[29] *Id.*

Courts have long recognized that judicial acts can provide reconciliation even

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[29] Judge Graham would have subordinated the public and victims' interests to the reputational interests of subsequent generations related to Klu Klux Klan members or uncooperative witnesses. He proposed a new "subsequent generation[]" exception found nowhere in the *Craig* factors or *Douglas Oil* factors, which "serve[] as a useful aid" outside Rule 6(e). *See In re Craig*, 131 F.3d at 104 n.5; *Douglas Oil Co. of Cal. v. Petrol Stops Nw.*, 441 U.S. 211, 218-19 (1979).

The district court did not abuse its discretion by reaching a contrary judgment. The deferential abuse of discretion standard "allows a range of choice for the district court, so long as that choice does not constitute a clear error of judgment," even if a reviewing court "would have gone the other way[.]" *United States v. Frazier*, 387 F.3d 1244, 1259 (11th Cir. 2004).

The district court also did not abuse its discretion by not redacting the records where the Government did not seek redactions and the court conducted an in camera review of the records. *See In re Pitch*, 275 F. Supp. 3d 1373, 1376 (M.D. Ga. 2017).

when a case has closed. Consider, among other examples, the gesture from the Supreme Court last term when it overruled *Korematsu v. United States*, 323 U.S. 214 (1944), a decision that upheld the forced relocation of Japanese Americans into internment camps more than 73 years ago. *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018). The Court acted to overturn *Korematsu* without any case or request for legal relief before it.

Other courts have made similar attempts at reconciliation. The district court presiding over the criminal case against accused sex trafficker Jeffrey Epstein held a hearing in which it allowed Mr. Epstein's victims to give voice to their belief that the justice system had again failed them, after Mr. Epstein committed suicide before he could be brought to trial. "Mr. Epstein's death obviously means that a trial in which he is a defendant cannot take place," the district court said at the hearing.[30] "I believe it is the court's responsibility, and manifestly within its purview, to ensure that the victims in this case are treated fairly and with dignity." *Id.*

The district court's decision to release the grand jury records here carries its own symbolic meaning. The release serves as recognition that the grand jury's actions warrant historical scrutiny and open an important chapter into how the courts

[30] Ali Watkins, Benjamin Weiser, Amy Julia Harris, *Jeffrey Epstein's Victims, Denied a Trial, Vent Their Fury: 'He is Coward,'* N.Y. Times, Aug. 28, 2019, at A1. *See also United States v. Epstein*, No. 19-cr-490 (S.D.N.Y. Aug. 21, 2019).

operated in the segregated South. Courts have long realized that a transparent justice system, including public trials, have "significant community therapeutic value." *Richmond Newspapers, Inc.*, 448 U.S. at 570-71. "[T]he open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion." *Id.* at 571. "The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is done in a corner [or] in any covert manner." *Id.*

III. The court's inherent power extends to the release of grand jury records.

The grand jury "is a constitutional fixture in its own right," *United States v. Williams*, 504 U.S. 36, 47 (1992), that operates at once independently, "belong[ing] to no branch of the institutional Government," and also "under judicial auspices," *id.*, and as "an arm of the court . . . under general instructions from the court to which it is attached and to which, from time to time, it reports its findings." *Levine v. United States*, 362 U.S. 610, 617 (1960). A district court summons and swears in the grand jury, appoints its foreperson, can select alternative jurors, decides objections to grand juror qualifications, decides who retains grand jury records, excuse jurors from services, and discharges the grand jury. Fed. R. Crim. P. 6 (a)-(c), (e)(1), (g)-(h). The court also compels compliance with grand jury subpoenas—and can refuse to do so when subpoenas "would override rights accorded by the Constitution." *Williams*, 504 U.S. at 48. "[G]rand juries are expected to operate

within the limits of the First Amendment, as well as the other provisions of the Constitution," *Butterworth v. Smith*, 494 U.S. 624, 630 (1990), and "are subject to judicial control[.]" *United States v. Dionisio*, 410 U.S. 1, 12 (1973). Even though the court does not completely control the grand jury, it is still "an arm of the court and its in camera proceedings constitute 'a judicial inquiry.'" *Levine*, 362 U.S. at 617 (1960). Indeed, "[t]he Constitution itself makes the grand jury a part of the judicial process." *Id.*

The Government relies on *Williams* to argue that the court's inherent powers "have only limited application to the grand jury. . . [a]s a result of the arm's length relationship between the district court and grand jury." (Br. 33). The Supreme Court found such a limitation existed when a court required prosecutors to present exculpatory evidence to the grand jury. *Williams*, 504 U.S. at 46-47. This requirement interfered with the "the grand jury's historical role, transforming it from an accusatory to an adjudicatory body." *Id.* at 51. But here, the court's power to release grand jury records in historically exceptional cases remains consistent with the court's and grand jury's "historical role." Historically, "the federal trial courts . . . have been nearly unanimous in regarding disclosure as committed to the discretion of the trial judge." *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 399 (1959). *See also United States v. Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150, 233-34 (1940) (disclosure of grand jury testimony "rests in the sound discretion

of the trial judge," noting that "after the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it.").

The grand jury may act independently in some spheres of its work, but it remains dependent on the court in other spheres, including the handling of its end product, whether a no bill or indictment, which the district court can dismiss both for substantive reasons and for irregularities with the grand jury. *See* Fed. R. Crim. P. 6(b)(2); *Bank of Nova Scotia v. United States*, 487 U.S. 250, 259-60 (1988) (recognizing court can dismiss indictment where prosecutorial misconduct affected grand jury's charging decision). The court's powers over the grand jury are broad enough, even if not absolute, to encompass the release of grand jury records in exceptional circumstances.

IV. Rule 6 cannot extinguish the courts' inherent powers by implication.

The Supreme Court has said Rule 6(e) "is but declaratory of" the court's well-established power to release grand jury records, rather than the source of such power. *Pittsburgh Plate Glass Co.*, 360 U.S. at 399. A statute or rule can limit such inherent power, but not "in the absence of a clear expression" that the rules "abrogated this 'long . . . unquestioned' power." *Carlisle v. United States*, 517 U.S. 416, 426 (1996). *See also Dietz v. Bouldin*, 136 S. Ct. 1885, 1892 (2016) ("[T]he exercise of an inherent power cannot be contrary to any ***express*** grant of or limitation on the district court's power contained in a rule or statute.") (emphasis added); *Link v. Webash R.R.*

Co., 370 U.S. 626, 630 (1962) (permissive language of Fed. R. Civ. P. 41(b) allowing a motion for involuntary dismissal did not limit court's inherent to dismiss case without such a motion).

A. Rule 6 does not expressly limit the court's inherent power.

Rule 6 contains no express limitation on a court's inherent power. The Government attempts to creates such a prohibition by conflating the mandatory language in Rule 6(e)(2)(B) with the permissive language in Rule 6(e)(3)(E). Rule 6(e)(2)(B) specifies which "persons" must not reveal grand jury matters, "[u]nless these rules provide otherwise[.]" The "persons" include grand jurors, court reporters, and government attorneys—but *not* the court. By contrast, Rule 6(e)(3)(E) falls in a different subpart of the Rule and covers a different subject. Rule 6(e)(3)(E) states that the court "may authorize disclosure" of a grand jury matter and lists five circumstances in which disclosure may apply.

Both the Seventh and Second circuits, as well as this Court in *Hastings*, rejected the argument that the mandatory language in Rule 6(e)(2)(B) "somehow carries over to all of Rule 6[.]" *Carlson v. United States*, 837 F.3d 753, 764 (7th Cir. 2016). *See also In re Craig*, 131 F.3d at 102; *Hastings*, 735 F.2d at 1268 ("[A] court's power to order disclosure of grand jury records is not strictly confined to instances spelled out in the rule[.]"). The Court may not move over the language to "impose a limitation that Congress did not include," *Gorss Motels Inc. v. Safemark*

Sys., LP, 931 F.3d 1094, 1102 (11th Cir. 2019) (citing Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 8 at 93 ("Nothing is to be added to what the text states or reasonably implies[.]")). And Rule 6(e)(2)(A) bars the Government's interpretation of Rule 6(e). Rule 6(e)(2)(A) makes explicit that Rule 6(e)(2) cannot limit the court's inherent powers. It commands: "No obligation of secrecy may be imposed on any person" except under Rule 6(e)(2)(B), which does not cover the court.

The Government relies on two cases in which the Supreme Court found explicit language in the Rules of Criminal Procedure limited the court's inherent power. (Br. 28-30). In both cases, the rules contained mandatory language—not the permissive language here. *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988), turned on Fed. R. Crim. P. 52(a), which then mandated that any harmless error "*shall* be disregarded" by the court. *Id.* at 254-55 (emphasis added). By contrast, Rule 6(e)(3)(E) does not say a district court *shall* not order disclosure except for specified reasons. *Carlisle* also does not advance the Government's position. *Carlisle* focused on the unambiguous language of Fed. R. Crim. P. 45(b), which commanded that "the court may not extend the time for taking any action under Rul[e] 29." 517 U.S. at 421. Invoking its inherent powers, the district court in *Carlisle* had extended the time to act under Fed. R. Crim. P. 29. The Supreme Court found Rule 45 had abrogated the court's inherent power given "the clarity of

the text, but also because we are unaware of any 'long, unquestioned' power of federal district courts to acquit for insufficient evidence *sua sponte*[.]" *Id.* at 426. Here, Rule 6(e)(3)(E) contains no such clarity, and the district courts do possess a "long and unquestioned" power to release grand jury records in exceptional cases.

B. *McKeever* was wrongly decided but is distinguishable.

The Court should not follow the D.C. Circuit's recent decision in *McKeever v. Barr*, 920 F.3d 842 (D.C. Cir. 2019), in which a divided panel adopted the Government's arguments. *McKeever* claims the Supreme Court in four cases "suggested the exceptions in Rule 6(e) are exclusive." *Id.* at 846. Three of those cases concerned disclosures squarely within the scope of specific statutes or provisions of Rule 6(e), not disclosures under inherent authority.[31] The fourth case, *Williams*, concerned dismissal of a grand jury indictment for misconduct, not disclosure of grand jury records. *McKeever* imagined that these cases suggested more than they do.

McKeever also found that the separate provisions in Rule 6(e)(2)(B) and

[31] *United States v. Baggot*, 463 U.S. 476, 478 (1983) was "limited to the question of whether the IRS's civil tax audit" falls under Rule 6(e)(3)(E)(i)—and nothing more. *Illinois v. Abbott & Associates, Inc.*, 460 U.S. 557, 565-66 (1983), interpreted the Antitrust Improvement Act of 1974, which permitted the U.S. Attorney General to share grand jury materials in antitrust cases with state attorney generals. Even with this exception, the Court found the government had to show "particularized need," part of "judicially-developed standards implementing Rule 6(e)." *Id.* at 573. *United States v. Sells Engineering, Inc.*, 463 U.S. 418 (1983), concerned disclosure by the Government to its attorneys and staff, not disclosure by the court. *Id.* at 420.

6(e)(3)(E) must be read together to prevent the grand jury's secrecy rule from becoming "ineffectual." *Id.* at 849 (quoting *Carlson*, 837 F.3d at 769 (Sykes, J., dissenting)). This interpretation makes the policy judgment that the rule must treat disclosure by the court and government personnel the same. But the rule treats the two groups differently.

Rule 6(e)(2) establishes the rule that government personnel such as attorneys, interpreters, and court reporters—but not the court—must not disclose a grand jury matter "[u]nless these rules provide otherwise." Other subparts of Rule 6(e)(3) *do* provide otherwise, but *only* for government personnel. Rule 6(e)(3)(A)(i) allows a government attorney to disclose grand jury material without court approval "for use in performing that attorney's duty[.]" Rule 6(e)(3)(C) allows a government attorney without court approval "to disclose any grand-jury matter to another federal grand jury." Rule 6(e)(3)(D) allows government attorneys to disclose grand jury material involving foreign intelligence. All of these rules create exceptions to the general rule of secrecy for government personnel. By contrast, the last three subparts of Rule 6(e)(3) concern disclosure by the court. *See* Rule 6(e)(3)(E)-(G). The disparate parts of Rule 6(e) can be read together, without rendering any part ineffective, if the Court accepts the plain language treating government personnel and the court differently.

Even if the Court agreed with *McKeever*, it does not involve the same type of

request as this case or *Hastings*. *McKeever* concerned the release of grand jury records about the indictment of a former FBI agent for failure to register as a foreign agent of Dominican Republic dictator Rafael Trujilo. *McKeever*, 920 F.3d at 843-44. A historian sought the records to investigate whether the former agent was also involved in the murder of a Trujilo critic abducted from the United States. *Id.* That grand jury investigation involved historically significant crimes, possibly shedding light on a foreign dictator's infiltration of the FBI. But the records do not as clearly involve events impairing confidence in the courts, as the grand jury records in *Hastings* and this case do.

C. The Civil Rights Cold Case Records Collection Act implicitly recognizes the court's inherent power over grand jury records.

Congress' recent enactment of the Civil Rights Cold Case Records Collection Act of 2018, Pub. L. No. 115-426, 132 Stat. 5489 (Jan. 8, 2019), only underscores Congress' recognition that a court can release grand jury records under its inherent powers. The new statute deals primarily with the collection, retention, and review of records outside the grand jury, but a provision allows a review board to recommend that the Attorney General petition a court to release grand jury records. *See* § 8(a)(2), 132 Stat. at 5501; § 5(b)(3)(C), 132 Stat. at 5494. Such a request from the Attorney General shall "constitute a showing of particularized need" under Rule 6. § 8(a)(2)(B), 132 Stat. at 5501; *see Sells Eng'g*, 463 U.S. at 424 (articulating

standard). But the statute does not create a new exception under Rule 6 to which such a request would apply. Congress evidently realized it did not need to create a new exception to Rule 6, as courts already possessed inherent power to release historically significant grand jury records. That is not surprising. The Judicial Conference Advisory Committee on Criminal Rules reached the same conclusion in 2012. It also saw "no need" for a new rule covering historic grand jury records given the court's inherent authority to release them. *See Pitch*, 915 F.3d at 715 (Jordan, J., concurring).

By passing this law, Congress acknowledged that releasing these records fulfilled a profound national need for reconciliation and accomplished much more than "satisfy[ing] public curiosity," as the Government claims. (Br. 18). The law's chief sponsor, Senator Doug Jones of Alabama, explained on the Senate floor: "One measure of justice—not a full measure but a measure nonetheless—can be achieved through a public examination of the facts and determination of the truth about what happened and why[.]" 164 Cong. Rec. S4876-01, at *S4877 (July 10, 2018), 2018 WL 3370078 (statement of Sen. Jones). "[T]he victims of these crimes and their families have no less right to justice than they did at the time the crimes were committed, and the American people have a right to know this part of our Nation's history. As has often been said, if we do not learn from the mistakes of the past, we are doomed to repeat them." *Id.*

CONCLUSION

The Court should re-affirm *Hastings*, find that this case falls within it, and conclude, as even the Government concedes, *see* (Br. 41), that the district court did not abuse its discretion in applying the *Craig* factors to order the release of the grand jury records in this case.

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Respectfully submitted,

CARLTON FIELDS, P.A.
Attorneys for Amicus Curiae Gilbert King and the First Amendment Foundation
100 Southeast Second Street
Miami Tower, Suite 4200
Miami, Florida 33131
Telephone: (305) 539-7280
Facsimile: (305) 530-0055

By: */s/ Richard J. Ovelmen*
RICHARD J. OVELMEN
Florida Bar No. 284904
E-mail: rovelmen@carltonfields.com
DAVID A. KARP
Florida Bar No. 69926
E-mail: dkarp@carltonfields.com

CERTIFICATE OF COMPLIANCE

The undersigned certifies this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) and 11th Cir. L.R. 28-1. This brief contains 6,231 words and 528 lines of text, and uses Times New Roman 14 point font.

/s/ David A. Karp
David A. Karp

CERTIFICATE OF SERVICE

I certify a true copy of the foregoing was served on September 11, 2019, on the following counsel by electronically filing it with the Court through CM/ECF:

Joseph H. Hunt
Charles E. Peeler
Michael S. Raab
Mark R. Freeman
Brad Hinshelwood
Bradley.A.Hinshelwood@usdoj.gov
U.S Department of Justice
Civil Division, Room 7256
950 Pennsylvania Avenue N.W.
Washington, D.C. 20530
Telephone: (202) 514-7823
Via Notice of Electronic Filing

Attorneys for Appellant United States of America

Joseph J. Bell
joebell@bsblawgroup.com
Bell & Shivas P.C.
150 Mineral Springs Drive
P.O. Box 220
Rockaway, NJ 07866
Telephone: (973) 442-7900
Via Notice of Electronic Filing

Attorneys for Appellee Marion E. Pitch, as personal representative of the Estate of Anthony Pitch, and Intervenor Laura Wexler

By: */s/ David A. Karp*
David A. Karp
Florida Bar No. 69226

119519111.5