No. 19A1035

IN THE

Supreme Court of the United States

UNITED STATES DEPARTMENT OF JUSTICE,
Applicant,

v.

COMMITTEE ON THE JUDICIARY OF THE
UNITED STATES HOUSE OF REPRESENTATIVES

On Application for Stay of the Mandate of the United States Court of Appeals for the District of Columbia Circuit

OPPOSITION TO APPLICATION FOR A STAY OF MANDATE

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OPPOSITION TO APPLICATION FOR A STAY OF MANDATE

The Department of Justice does not meet the standard for a stay of the mandate pending disposition of its petition for a writ of certiorari, and its application for a stay should therefore be denied. At bottom, DOJ has failed to demonstrate that this Court's review would be warranted here.

This case involves the correctness of an order by Chief Judge Howell (based in part on an exercise of her discretion) for disclosure to the House Committee on the Judiciary of a limited set of grand-jury materials for use in the Committee's ongoing Presidential impeachment investigation. The decision by the court of appeals affirming that district court order is unanimous on the question DOJ plans to bring before this Court: whether an impeachment trial in the Senate is a "judicial proceeding" for purposes of one of the exceptions to grand-jury secrecy articulated in Federal Rule of Criminal Procedure 6(e). There is no conflict with any decision of this Court; there is no conflict among the circuits; and the sole question at issue likely will arise only rarely. DOJ's forthcoming certiorari petition therefore will be merely a call for error correction, which is generally not a basis for review by this Court. And the correction that DOJ seeks does not warrant plenary consideration by this Court, particularly given that it can be accomplished through a rule amendment.

In any event, the decision below was plainly correct to reject the newly developed position that DOJ has advocated here, after decades of taking the opposite view that Congress can indeed legally obtain grand-jury materials in connection with impeachment proceedings.

Furthermore, any harm to DOJ from the limited disclosure to the Committee here is far outweighed by the harm to the Committee and the public from further delay. The grand-jury material to be disclosed does not belong to DOJ, and the grand-jury investigation at issue is done. In addition, the Committee has adopted procedures—which both the district court and the court of appeals found sufficient—to protect the confidentiality of the material. And, tellingly, DOJ makes no argument that a stay of disclosure to the Committee is necessary to protect ongoing criminal investigations.

By contrast, the Committee and the public continue to suffer grave and irreparable injury each additional day the district court's order is prevented from going into effect: the Committee is being deprived of the information it needs to exercise its weighty constitutional responsibility. The Committee first requested this information from DOJ more than a year ago. The district court issued its disclosure order more than six months ago. If DOJ's request for a stay is granted, DOJ need not file its certiorari petition until August 2020,[1] and therefore this Court likely would not determine whether to grant or deny that petition until at least October 2020. This substantial delay will seriously endanger the Committee's ability to complete its impeachment investigation during the current Congress—which ends not long thereafter on January 3, 2021.

[1] *See* Order, 589 U.S. — (Mar. 19, 2020), https://www.supremecourt.gov/orders/courtorders/031920zr_d1o3.pdf.

This Court accordingly should deny the stay. If it does not, the Committee requests that the Court condition any stay on a requirement that DOJ file its certiorari petition by June 1, 2020, to ensure that this Court will be positioned to grant or deny that petition during this Term.

STATEMENT

This case concerns a district court order under Federal Rule of Criminal Procedure 6(e) directing disclosure of a limited amount of grand-jury material bearing on the Committee's impeachment investigation of President Donald J. Trump for misconduct detailed in Special Counsel Robert Mueller's Report.

1. "The Russian government interfered in the 2016 presidential election in sweeping and systematic fashion." Robert S. Mueller III, *Report on the Investigation into Russian Interference in the 2016 Presidential Election*, Vol. I at 1 (2019) (Mueller Report), https://www.justice.gov/storage/report.pdf. In July 2016, the Federal Bureau of Investigation (FBI) began investigating this unprecedented foreign interference in the American electoral process. *Id.* In May 2017, the Acting Attorney General appointed Mueller to serve as Special Counsel to continue the FBI's investigation, determine "whether individuals associated with the Trump Campaign [had] coordinat[ed] with the Russian government," *id.*, and investigate other matters "aris[ing] directly from the investigation," including whether the President had obstructed justice, *id.*, Vol. I at 8.

At the conclusion of his investigation in March 2019, Special Counsel Mueller produced a Report describing his findings. Among other things, the Report concluded that President Trump's conduct raised serious questions "about whether

he had obstructed justice" by attempting to impede the federal investigation into Russian interference in the 2016 election. *Id.*, Vol. II at 1. But the Report stopped short of determining whether President Trump obstructed justice in violation of criminal law, given that a DOJ Office of Legal Counsel opinion provides that "a sitting President may not be prosecuted" and because Special Counsel Mueller did not want to "preempt constitutional processes for addressing presidential misconduct"—*i.e.*, impeachment. *Id.*

The Attorney General released a redacted version of the report to Congress and to the public in April 2019. That version of the Mueller Report contains numerous redactions, including redactions made under Federal Rule of Criminal Procedure 6(e) to protect the secrecy of grand-jury material. These redactions bear on whether the President committed impeachable offenses by obstructing the FBI's and Special Counsel's investigation into Russian interference in the 2016 election and his possible motivations for doing so. *See, e.g.*, *id.*, Vol. I at 85, 93-94, 98, 100-02, 110, 111-12; C.A. App. 726-29 (redacted DOJ declaration describing the redacted grand-jury material in Volume II of the Mueller Report).

2. After the Attorney General released the redacted Mueller Report to Congress, but declined a series of requests from the Committee for the redacted material, the Committee issued a subpoena for an unredacted version of the Mueller Report and certain grand-jury material underlying those redactions. DOJ refused to comply, but it allowed a limited number of Members of Congress and

certain staff to confidentially review all of the redacted material except what DOJ considered to be grand-jury material.

Although DOJ had long taken the position that Rule 6(e)'s provision authorizing disclosures "preliminarily to … a judicial proceeding" permits disclosure of grand-jury material to Congress for use in impeachment, DOJ reversed course in this matter and for the first time asserted that Rule 6(e) forbids disclosure to the Committee in connection with an impeachment. *See* App. 117a-18a n.30.

In June 2019, the House adopted a resolution authorizing the Committee to file an application under Rule 6(e) to obtain the withheld material. *See* H. Res. 430, 116th Cong. (2019). On July 26, 2019, Chairman Nadler issued protocols to protect the confidentiality of any grand-jury material obtained. *See* C.A. App. 122-23. These protocols, which are similar to those used to protect grand-jury and other confidential materials during the Nixon impeachment investigation, limit staff access to grand-jury material; require storage of such material in a secure location; and provide that such material may not be publicly disclosed absent a majority vote by the Committee. *See id.*

3. In July 2019, the Committee filed an application with the Chief Judge of the district court pursuant to Rule 6(e)(3)(E)(i), which permits courts to disclose grand-jury materials "preliminarily to or in connection with a judicial proceeding." The Committee requested release of three categories of withheld grand-jury material: (1) portions of the Mueller Report redacted under Rule 6(e); (2) any underlying grand-jury transcripts or exhibits referenced in those redactions; and

(3) any underlying grand-jury testimony and exhibits that relate directly to certain individuals and events described in the Mueller Report. *See* App. 91a-92a.

On October 25, 2019, the district court granted the Committee's application as to the first two categories. App. 151a-52a. The district court first concluded that Rule 6(e)'s provision authorizing disclosure preliminarily to "a judicial proceeding" encompasses disclosures in advance of a Senate impeachment trial. App. 96a-137a. That conclusion was required by "binding D.C. Circuit precedent," App. 112a, and confirmed by "historical practice, the Federalist Papers, the text of the Constitution, and Supreme Court precedent," App. 101a.

The district court also found that the Committee established the requisite "particularized need" for the first two categories of requested material, weighing the Committee's need for the withheld material against the interests in grand-jury secrecy under this Court's test in *Douglas Oil Co. v. Petrol Stops Nw.*, 441 U.S. 211, 218-23 (1979). *See* App. 137a-49a. The district court found that the Committee's "especially particularized and compelling" need for the material in its impeachment investigation, App. 140a, outweighed any interests in maintaining secrecy, which were diminished once "the Special Counsel's investigation, and attendant grand jury work, concluded," App. 146a. It therefore ordered a "focused and staged disclosure" of the first two categories of material, App. 139a, to be followed, as necessary, by disclosure of the third category upon a showing of particularized need, App. 149a.

4. The court of appeals granted an administrative stay of the district court's order, App. 160a, which remained in place through expedited proceedings on the merits, culminating in the court of appeals ruling affirming the district court on March 10, 2020.

While DOJ's appeal was pending, the House adopted two Articles of Impeachment against President Trump for abuse of power in connection with a scheme to coerce Ukraine to investigate his political rival, and his obstruction of Congress. The President was acquitted after a trial on those Articles in the Senate.

The Committee's impeachment investigation related to obstruction of justice pertaining to the Russia investigation is ongoing. As the Committee has explained, it "has continued and will continue those investigations consistent with its own prior statements respecting their importance and purposes." H. Rep. No. 116-346, at 159 n.928 (2019). The Mueller Report grand-jury material remains "central to the Committee's ongoing inquiry into the President's conduct. If this material reveals new evidence supporting the conclusion that President Trump committed impeachable offenses that are not covered by the Articles adopted by the House, the Committee will proceed accordingly—including, if necessary, by considering whether to recommend new articles of impeachment." Comm. Supp. Br. 17 (Dec. 23, 2019).

5. On March 10, 2020, the court of appeals affirmed the district court's order in a 2-1 decision. App. 1a-75a. All three members of the panel agreed on the answer to the primary legal question presented, and the only one on which DOJ

intends to seek certiorari: whether a Senate impeachment trial is a "judicial proceeding" for purposes of Rule 6(e)(3)(E)(i). *See* App. 25a-26a; App. 33a-34a (Rao, J., dissenting); Stay App. 2. Like the district court, the court of appeals explained that both "circuit precedent," App. 6a, 11a-12a (citing *McKeever v. Barr*, 920 F.3d 842 (D.C. Cir. 2019), and *Haldeman v. Sirica*, 501 F.2d 714 (D.C. Cir. 1974) (en banc)), as well as "traditional tools of statutory construction," "constitutional text," and "historical practice" establish that a Senate impeachment trial is a "judicial proceeding" under the Rule, App. 12a-14a.

The court of appeals also concluded that the district court did not abuse its discretion when it found that the Committee had established the required "particularized need" for the grand-jury materials that it ordered disclosed. The court of appeals held that the district court had properly balanced the Committee's need for the information with any interests in continued secrecy under the *Douglas Oil* test. App. 19a-25a. Especially given the Committee's "special protocols to restrict access to the grand jury materials in order to maintain their secrecy," App. 20a, the court held that the district court had properly applied this Court's precedent to balance the competing interests.

Judge Rao dissented, but not on the issues on which DOJ intends to seek this Court's review. She "agree[d] with the majority that the Committee's petition could fit within Rule 6(e)'s 'judicial proceeding' exception because it sought the grand jury materials preliminary to a possible Senate impeachment trial, which has always been understood as an exercise of judicial power." App. 33a-34a (Rao, J.,

dissenting). Judge Rao also agreed with the majority that, "[a]t the time of its decision, the district court did not abuse its discretion in concluding that the Committee had shown a 'particularized need' for the grand jury materials," App. 35a, but she believed that the case nevertheless should be remanded, in light of the developments since the district court first ruled, for the court to determine whether release of the materials was still warranted, App. 36a.

6. DOJ did not seek rehearing en banc in the court of appeals and instead sought a stay of the mandate pending the final disposition of a petition for a writ of certiorari. With no noted dissent, the court of appeals denied the requested stay. *See* App. 163a. Subsequently, the Chief Justice administratively stayed the court of appeals' mandate pending receipt of this response and further order of the Chief Justice or of the Court. *See* Order (May 8, 2020).

ARGUMENT

I. This Court Should Deny A Stay Of The Mandate Pending Certiorari

This Court should deny DOJ's application to stay the mandate. DOJ "must demonstrate (1) a reasonable probability that this Court will grant certiorari, (2) a fair prospect that the Court will then reverse the decision below, and (3) a likelihood that irreparable harm [will] result from the denial of a stay." *Maryland v. King*, 567 U.S. 1301, 1302 (2012) (Roberts, C.J., in chambers) (quotation marks omitted). These conditions "are *necessary*" but "not necessarily *sufficient*" to grant a stay. *Barnes v. E-Sys., Inc. Grp. Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1304 (1991) (Scalia, J., in chambers).

If these conditions are met, this Court also must "balance the equities—[by] explor[ing] the relative harms to applicant and respondent, as well as the interests of the public at large." *Id.* at 1305 (quotation marks omitted). "Where there is doubt, it should inure to the benefit of those who oppose grant of the extraordinary relief which a stay represents." *Williams v. Zbaraz*, 442 U.S. 1309, 1316 (1979) (Stevens, J., in chambers).

DOJ cannot satisfy this standard. The case plainly does not warrant this Court's review—there is no conflict with any decision of this Court, there is no circuit split, and the district court ordered only limited disclosure in a context that rarely arises. And the decision below was correct: the court of appeals' interpretation of "judicial proceeding" is supported by the Constitution, historical practice, and Rule (6)(e) itself, and the court's application of the particularized-need test comported fully with the standard established by this Court. DOJ has failed to establish that the disclosure of the grand-jury materials would harm any interest DOJ has in maintaining grand-jury secrecy. By contrast, the potentially lengthy stay sought by DOJ would seriously and irreparably harm the public and the House, whose Article I functions remain stymied.

A. DOJ Cannot Show A Reasonable Probability That This Court Will Grant Certiorari

This case does not warrant this Court's review. The court of appeals' opinion does not conflict with a decision of this Court or any other circuit. *See* S. Ct. R. 10(a), (c). On the primary legal question—the meaning of the term "judicial proceeding" in Rule 6(e)(3)(E)(i)—the panel was unanimous. All three judges,

including Judge Rao, agreed that a Senate impeachment trial is a "judicial proceeding" for purposes of Rule 6(e)'s exception for disclosures of grand-jury material "preliminarily to … a judicial proceeding." App. 25a-26a; App. 33a-34a (Rao, J., dissenting). No circuit has held otherwise, and this holding accords with decades of precedent as well as DOJ's own longstanding position before this case. *See McKeever*, 920 F.3d 842, *cert. denied*, 140 S. Ct. 597 (2020); *Haldeman*, 501 F.2d 714; *see also In re Grand Jury Proceedings of Grand Jury No. 87-1*, 669 F. Supp. 1072, 1075-76 (S.D. Fla. 1987).

The most that DOJ can muster is an assertion (at 14) that the court of appeals' reading of the term "judicial proceeding" to encompass a Senate impeachment trial is "in serious tension" with language referring to "litigation" in *United States v. Baggot*, 463 U.S. 476, 480 (1983). But as discussed below, the court of appeals' decision is fully consistent with *Baggot*, which said nothing at all about disclosure to Congress.

Furthermore, this Court's review is unwarranted because the issues presented here almost certainly will arise only rarely. Impeachments are rare, and impeachments requiring the use of grand-jury materials are rarer still. It is not likely that a decision by this Court in this case would provide guidance for many future cases.

DOJ nonetheless contends (at 14) that the court of appeals' opinion requires review because it "create[s] serious separation-of-powers concerns." Not so. This case does not pit the political branches against one another. As the court of appeals

explained, "grand jury records are court records," App. 9a, and "it is the district court, not the Executive or [DOJ], that controls access to the grand jury materials at issue here," App. 10a. And DOJ acknowledges (at 15) that the scope of the grand-jury secrecy rules is "ordinarily" best left to the Advisory Committee on Criminal Rules, which can recommend amendments to the rules that this Court can accept or reject. *See* 28 U.S.C. § 2071 *et seq*.

Nor does this case "create" separation-of-powers concerns between Congress and the courts. As the court of appeals noted, since Rule 6(e) was enacted in 1946, "federal courts have authorized the disclosure of grand jury materials to the House for use in impeachment investigations involving two presidents and three federal judges." App. 14a. To our knowledge, no court has ever turned down a request for grand-jury materials by Congress in connection with an impeachment.

The court of appeals' decision here merely preserves the separation-of-powers status quo reflected in those cases, including the House's prerogative to obtain the information necessary to carry out its core Article I functions. Until this litigation, DOJ had, for decades, agreed that courts have authority to order disclosure of grand-jury materials for Congress's use in impeachment proceedings. *See* App. 117a-18a n.30. As the court of appeals observed, "[i]t is only the President's categorical resistance and the Department's objection that are unprecedented." App. 14a. Indeed, DOJ advanced its previous position as part of a successful effort to persuade the D.C. Circuit that courts lack inherent authority to order disclosure of grand-jury material outside the Rule's enumerated exceptions—and the

Committee argued in this case that DOJ is judicially estopped from pressing its new position. *See* 117a-18a n.30 (noting but declining to address estoppel arguments given the court's decision on the merits). The potential for estoppel makes this case an especially poor vehicle for the Court's review.

Moreover, as explained below, the court of appeals in this case correctly applied this Court's precedent to ensure that the Committee had an appropriately particularized need for the materials without the second-guessing of the House's impeachment process that DOJ claims could create separation-of-powers concerns.

DOJ's remaining arguments regarding the proper interpretation of Rule 6(e) (at 14-33) were correctly rejected by both courts below. DOJ asks this Court to engage in error correction, but the "Court is not primarily concerned with the correction of errors in lower court decisions." Stephen M. Shapiro et al., *Supreme Court Practice* § 4.17 (11th ed. 2019). And to the extent that DOJ's application attempts to cast doubt on whether the panel correctly concluded that the district court did not abuse its discretion in *applying* the Rule 6(e) standard to the facts of this case, that claim is a fact-bound determination that does not warrant this Court's review. *See* App. 15a-16a; S. Ct. R. 10.

B. DOJ Cannot Establish A Fair Prospect That This Court Will Reverse The Court Of Appeals' Decision

The court of appeals correctly decided this case, and DOJ's arguments to the contrary are meritless. DOJ thus cannot establish a fair prospect that, even if this Court were to grant certiorari, it would prevail on the merits.

1. The Court of Appeals Correctly Determined That A Senate Impeachment Trial Is A Judicial Proceeding

a. As all three members of the court of appeals panel recognized, Rule 6(e)(3)(E)(i)'s exception to the general rule of grand-jury secrecy for use of grand-jury material "preliminarily to or in connection with a judicial proceeding" encompasses disclosures to the House preliminary to a Senate impeachment trial.

The Constitution makes clear that a Senate impeachment trial is a judicial proceeding and therefore fits within Rule 6(e)(3)(E)(i)'s exception. Article I provides that "[t]he Senate shall have the sole Power to *try* all Impeachments." U.S. Const., Art. I, § 3, cl. 6 (emphasis added). It further states that when the President "is *tried*, the *Chief Justice* shall *preside*." *Id.* (emphases added). It describes a "*Judgment* in *Cases* of Impeachment." *Id.*, Art. I, § 3, cl. 7 (emphases added). And it refers to "the *Party convicted*." *Id.* (emphasis added). Article III similarly describes an impeachment trial as a type of "*Trial* of all *Crimes*." *Id.*, Art. III, § 2, cl. 3 (emphases added).

The Federalist Papers and this Court's precedent dating to the Founding confirm that impeachment trials have long been understood as an exercise of judicial power. *See The Federalist No. 47* (James Madison) (describing the Senate as the "depositary of *judicial power* in cases of impeachment" (emphasis added)); *The Federalist No. 65* (Alexander Hamilton) (referring to the "*judicial character* [of the Senate] *as a court* for the trial of impeachments" (emphases added)); *Hayburn's Case*, 2 U.S. 408, 410 n.* (1792) ("[N]o judicial power of any kind appears to be vested [in Congress], but the important one relative to impeachments."); *Kilbourn v.*

Thompson, 103 U.S. 168, 191 (1880) ("The Senate … exercises the *judicial power* of trying impeachments[.]" (emphasis added)); *Marshall v. Gordon*, 243 U.S. 521, 547 (1917) (Congress's contempt power can be "transformed into *judicial authority*" when a "committee contemplat[es] impeachment" (emphasis added)).

Senate practice bears this out: the Senate ceases its legislative functions and convenes as a "court of impeachment" when sitting for that purpose. *See* 166 Cong. Rec. S289 (daily ed. Jan. 21, 2020) (Chief Justice convening the Senate "as a Court of Impeachment"); *see also* S. Doc. No. 106-4, Vol. II at 1142 (1999) (ruling by Chief Justice Rehnquist during President Clinton's impeachment trial that Senators should not be referred to as jurors, because "the Senate is not simply a jury; it is a court in this case"). As one of President Trump's attorneys told the Senate during the President's impeachment trial, "for literally decades, this body was referred to in this context as the High Court of Impeachment. So we are not a legislative Chamber during these proceedings…. We are in court." 166 Cong. Rec. S580 (daily ed. Jan. 27, 2020) (statement of Kenneth Starr).

History confirms this interpretation of Rule 6(e). The Rule was adopted to "codif[y] the traditional rule of grand jury secrecy" that was applied at common law. *United States v. Sells Eng'g*, 463 U.S. 418, 425 (1983). That common-law history includes numerous examples of Congress obtaining grand-jury material for use in investigations, including impeachment inquiries. *See* App. 14a; *see also, e.g.*, 3 *Hinds' Precedents of the House of Representatives* § 2488, at 984-85 (1907) (reflecting that, as early as 1811, a grand jury in Mississippi forwarded to the

House its presentment of charges against a federal judge for use in an impeachment investigation). Since the enactment of Rule 6(e), the federal courts have repeatedly authorized disclosure of grand-jury material to Congress for use in impeachment proceedings. *See* App. 14a (collecting cases). That history both reflects and confirms the widely held understanding that the Rule codifies, rather than alters, traditional practice.

Moreover, the Rule uses the term "judicial proceeding"—not "court proceeding." If the Advisory Committee and Congress had wanted to restrict this exception to only those proceedings that take place in a courtroom, they would have so stated. Instead, the Rule uses a broader term that, on its face, encompasses all proceedings of a judicial nature. Indeed, lower courts have long given the term "judicial proceeding" a "broad interpretation" that may include "every proceeding of a judicial nature before a court or official clothed with judicial or quasi judicial power." *In re Sealed Motion*, 880 F.2d 1367, 1380-81 (D.C. Cir. 1989) (per curiam) (quotation marks omitted); *see also Doe v. Rosenberry*, 255 F.2d 118, 120 (2d Cir. 1958) (Hand, J.) (bar disciplinary proceeding); *In re Special February 1971 Grand Jury v. Conlisk*, 490 F.2d 894, 897-98 (7th Cir. 1973) (police disciplinary proceedings); *Patton v. Comm'r of Internal Revenue*, 799 F.2d 166, 172 (5th Cir. 1986) (tax court proceedings).

The structure of Rule 6(e) further supports this conclusion. The other exceptions in Rule 6(e) permit disclosure of grand-jury material in circumstances comparable to this one—where government officials seek the material for use in

connection with their official duties. Because statutory terms "are often known by the company they keep," *Lagos v. United States*, 138 S. Ct. 1684, 1688-89 (2018), the judicial-proceedings exception should be understood to allow for disclosure to the Committee for use in impeachment.

b. DOJ's arguments to the contrary are wrong. DOJ claims (at 14) the court of appeals' reading of the term "judicial proceeding" to encompass a Senate impeachment trial is "in serious tension" with this Court's decision in *Baggot*. But DOJ misreads that case, which said nothing at all about disclosures of grand-jury material to Congress for impeachment purposes. *Baggot* involved a request for grand-jury materials by the Internal Revenue Service (IRS) for use in a taxpayer audit. 463 U.S. at 478. Both parties agreed that the "judicial proceeding" for purposes of Rule 6(e) in that case was possible litigation in the form of a redetermination proceeding or refund suit that could result from the audit. *Id.* at 479. Therefore, the only question presented was "whether disclosure for use in an IRS civil audit is 'preliminar[y] to' a redetermination proceeding or a refund suit within the meaning of" Rule 6(e)—not whether those proceedings were "judicial proceedings." *Id.*

In context, this Court's statement that the Rule contemplates "uses related fairly directly to some identifiable litigation" was a reference to the relationship between the use for which the material was sought (there, a civil audit) and the identifiable judicial proceeding (there, a refund suit). *Id.* at 480. It did not express

a limitation on the *types* of proceedings that can fall within Rule 6(e)'s scope. *Id.*; *see also id.* at 479 n.2.

DOJ also incorrectly asserts (at 18) that other uses of "judicial proceeding" in Rule 6(e)(3)(F) and (G) appear to refer to court proceedings and "would make little sense" if applied to a Senate impeachment trial. Rule 6(e)(3)(F) merely requires that courts receiving disclosure petitions afford the "parties to the judicial proceeding" an opportunity to be heard. There is no reason that requirement cannot apply equally to an impeachment proceeding. Indeed, in this case, the Committee served its petition on the President (the "party" to the impeachment proceedings), who had an opportunity to be heard before the district court had he wished to file independently of DOJ. *See* Certificate of Service (July 30, 2019), Dkt. No. 3. Rule 6(e)(3)(G), in turn, directs that "*[i]f* the petition to disclose arises out of a judicial proceeding in another district," the petitioned court must generally "transfer the petition to the other court" (emphasis added). The use of the word "if" contemplates that not all disclosure petitions "arise[] out of a judicial proceeding in another district." Indeed, the Advisory Committee has explained that this transfer provision applies only to proceedings in "federal district court in another district," and not to proceedings in state courts. Fed. R. Crim. P. 6(e)(3)(E) advisory comm. note on 1983 amend. Yet this does not mean that state court proceedings are not "encompassed within" the judicial proceeding exception; it is well-established that they are. *See id.* So too with impeachment proceedings.

Finally, in light of its recent change in position, DOJ dismisses (at 23-24) the historical examples of disclosure of grand-jury information to Congress as not dispositive. But this Court should not discount the lower courts' decisions simply because they agreed with DOJ's prior view. To the contrary, the decisions only underscore that DOJ had it right the first time. Although DOJ agreed in those cases that Congress was entitled to the grand-jury material, the question whether disclosure to Congress was appropriate was vigorously litigated in each case and, in turn, considered and decided by the court in each case.[2] DOJ cannot now use its recent change in position—and the purported separation-of-powers concerns that it raised for the first time before the court of appeals in this very case—as an excuse to discard nearly 50 years of case law.

2. The Court of Appeals Faithfully Applied This Court's Particularized-Need Test To The Impeachment Context

In considering an application for grand-jury material under Rule 6(e)(3)(E)(i), a court must analyze the requester's "particularized need" for the material. *See Douglas Oil*, 441 U.S. at 222-23. That standard can be faithfully applied where the judicial proceeding is a Senate impeachment trial, as the courts below did here.

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[2] *See, e.g.*, *In re Request for Access to Grand Jury Materials Grand Jury No. 81-1, Miami*, 833 F.2d 1438, 1442 (11th Cir. 1987) (noting that Judge Hastings opposed the disclosure of grand-jury materials for use in his impeachment trial and argued that such "an 'inter-branch transfer' … should be closely scrutinized under a separation of powers analysis"); *Haldeman*, 501 F.2d at 715 ("The position of both petitioners essentially is that the District Judge should not disclose to the Judiciary Committee evidence taken before the grand jury that returned the indictment against petitioners."); *In re Report & Recommendation of June 5, 1972 Grand Jury*, 370 F. Supp. 1219, 1221 (D.D.C. 1974) ("[A]ttorneys for seven persons named in an indictment returned by the same June, 1972 Grand Jury … have generally objected to any disclosure of the Report[.]").

DOJ's suggestion that the court of appeals applied a different and incorrect standard misunderstands the court's careful opinion. The court of appeals meticulously applied this Court's precedents while avoiding any of the separation-of-powers concerns that DOJ speculates could arise when a court examines the House's need for information for use in impeachment.

a. To establish the required "particularized need," parties seeking grand-jury material under Rule 6(e) must show (1) "that the material they seek is needed to avoid a possible injustice in another judicial proceeding," (2) "that the need for disclosure is greater than the need for continued secrecy," and (3) "that their request is structured to cover only material so needed." *Id.* at 222. These factors require a "balanc[ing]," *id.* at 223, to "accommodate the competing needs for secrecy and disclosure," *id.* at 221. The relevant "standard is a highly flexible one, adaptable to different circumstances and sensitive to the fact that the requirements of secrecy are greater in some situations than in others." *Sells Eng'g*, 463 U.S. at 445. A district court's application of this standard is committed to the court's "considered discretion." *Douglas Oil*, 441 U.S. at 228.

As discussed below, this flexible standard can be applied where the disclosure is preliminary to a Senate impeachment trial. But to the extent DOJ's argument is intended to cast doubt on whether the particularized need test is satisfied here—a fact-bound inquiry subject to a deferential standard of review, *see id.* at 223 ("emphasiz[ing]" that courts applying the particularized need test are "infused with substantial discretion")—that suggestion is unfounded.

As the court of appeals explained, the district court did not abuse its discretion when, after "reviewing in detail the findings in the Mueller Report," it determined "that any remaining secrecy interests in the redacted grand jury materials were readily outweighed by the Committee's compelling need for the materials." App. 20a; *see Douglas Oil*, 441 U.S. at 223. As the court of appeals explained, the Committee has a compelling need for the materials "in order to determine whether, or to what extent, links existed between the Russian government's efforts to interfere in the 2016 United States presidential election proceedings and individuals associated with President Trump's election campaign." App. 20a. And the fact that the "need for grand jury secrecy is reduced after the grand jury has concluded," App. 19a, coupled with "the Committee's adoption of special protocols to restrict access to the grand jury materials in order to maintain their secrecy," App. 20a, diminishes the competing need for secrecy.

There is no merit to DOJ's additional argument (at 31) that the Committee no longer has a particularized need for the requested grand-jury material because the President was impeached and acquitted on separate Articles of Impeachment several months ago. The Committee's investigation did not cease with the conclusion of the impeachment trial. The Committee "has continued and will continue those investigations consistent with its own prior statements respecting their importance and purposes." H. Rep. No. 116-346, at 159 n.928. The withheld material remains central to the Committee's ongoing investigation into the President's conduct. If this material reveals new evidence supporting the

conclusion that President Trump committed impeachable offenses that are not covered by the Articles adopted by the House, the Committee will proceed accordingly—including, if necessary, by considering whether to recommend new articles of impeachment. *See* Comm. Supp. Br. 17.

b. DOJ is also wrong to argue (at 24-32) that the particularized-need test simply cannot be applied in the impeachment context because (1) distinguishing between types of judicial proceedings and tailoring the test accordingly is inappropriate; (2) in attempting to do so here, the court of appeals applied a mere relevance standard inconsistent with this Court's precedent; and (3) any attempt to apply the correct particularized-need standard runs headlong into separation-of-powers problems that render the Rule unconstitutional. Each of these contentions is incorrect.

First, DOJ erroneously asserts (at 28) that it is improper to "distinguish[] between types of judicial proceedings" in applying the particularized-need test. To the contrary, taking into account the context and special circumstances of the request comports with this Court's instruction that the particularized-need standard is "highly flexible" and "adaptable to different circumstances." *Sells Eng'g*, 463 U.S. at 445. It also follows this Court's approach in other cases that considered the nature of the specific judicial proceeding at issue.

For example, in *Dennis v. United States*, 384 U.S. 855 (1966), this Court applied the particularized-need standard to account for the special needs of a criminal defendant facing trial. In that case, this Court authorized disclosure of the

grand-jury testimony of four witnesses, reasoning that the applicant was "entitled to *all relevant aid* which is reasonably available" to ascertain the substance of certain statements at issue in the case. *Id.* at 872-73 (emphasis added). It reversed the district court's refusal to disclose this material, observing that "it is especially important that the defense, the judge and the jury should have the assurance that the doors that may lead to truth have been unlocked," and that the applicant's showing of need "goes substantially beyond the minimum required by Rule 6(e) and the prior decisions of this Court." *Id.* at 873; *see also United States v. John Doe, Inc. I*, 481 U.S. 102, 113-16 (1987) (authorizing sharing of grand-jury information among DOJ attorneys and stressing that "public purposes served by the disclosure—efficient, effective, and evenhanded enforcement of federal statutes"—supported disclosure to select DOJ attorneys, which "does not pose the same risk of a wide breach of grand jury secrecy" as disclosure to the public at large).

The court of appeals correctly applied this precedent here, recognizing that the particularized-need standard can be applied in the impeachment context to assess need consistent with this Court's precedent while avoiding any constitutional questions that might arise from a court "micromanaging" the Committee's impeachment investigation. App. 18a.

Second, the court of appeals did not apply a "mere 'relevance' standard" or "hand off all relevant materials" to the Committee as DOJ suggests (at 30 (quoting App. 18a)). Rather, the court of appeals, after applying the three *Douglas Oil* factors described above, affirmed the district court's order disclosing two of the

three discrete categories of specific information that the Committee had requested. Those categories of information were limited to the text obscured by specific redactions in the Mueller Report and the portions of the underlying grand-jury materials related to those specific redactions, which the Committee established were necessary for its investigation into whether the President obstructed the Russia investigation. *See Douglas Oil*, 441 U.S. at 222 (disclosure must be "structured to cover only material so needed"). The district court did not order, and the court of appeals did not affirm, a blanket disclosure of all material potentially relevant to the topics of the Committee's impeachment investigation. Indeed, the district court withheld the third category of information requested by the Committee—any underlying grand-jury testimony and exhibits that relate to certain individuals and events described in the Mueller Report—pending a separate showing of particularized need for that specific material. App. 150a.

The court of appeals properly applied the flexible *Douglas Oil* test. Nothing more was required. As the court of appeals explained, "courts have required a line-by-line or witness-by-witness determination only in cases where grand jury materials are needed in a future trial to impeach or refresh the recollection of a specific witness." App. 18a. The court of appeals' approach adhered to this Court's precedent.

Third, the court of appeals' proper application of the particularized-need standard in this case obviated the potential constitutional issues that DOJ raises. As the decision below demonstrates, a court can apply the "highly flexible" test from

Douglas Oil faithfully, *Sells Eng'g*, 463 U.S. at 445, without improperly interfering with Congress's performance of its impeachment functions, App. 18a. There is, therefore, no merit to DOJ's concern (at 26-27) that applying the particularized-need standard would "require[] federal courts to scrutinize particular theories of impeachment and weigh the significance of particular evidence under those theories" in violation of separation-of-powers principles.

DOJ incorrectly argues (at 24-26) that the panel's approach renders unconstitutional the portion of Rule 6(e)(3)(E) that authorizes a district court to disclose grand-jury material "at a time, in a manner, and subject to any other conditions that it directs." In DOJ's view, because the Speech or Debate Clause limits the types of conditions a court may place on disclosure of grand-jury material to Congress, this provision of the Rule necessarily will be invalid as applied to Congress. However, even under DOJ's reading, a court would retain the ability to disclose grand-jury material in the time and manner it chooses—for example, by allowing only *in camera* review at the court. And to the extent the Constitution limits a court's discretion to impose "any conditions it directs" or to enforce conditions after the disclosure of grand-jury information to Congress, that limitation does not render the Rule unconstitutional. A court's actions and application of the law are always bound by the Constitution. Recognizing that a rule must be applied *consistent* with the Constitution does not mean that the rule itself is *unconstitutional*.

C. Any Harm That Releasing The Materials Would Cause DOJ Is Far Outweighed By The Additional Irreparable Harm That A Lengthy Stay Would Cause The Committee And The Public

DOJ has failed to satisfy its burden of establishing irreparable harm. By contrast, the additional irreparable harm to the Committee and the public from further delaying the impeachment investigation vastly outweighs any harm to DOJ.

1. DOJ cannot show that it would suffer irreparable harm absent a stay. As the court of appeals recognized, "grand jury records are court records" and "do not become Executive Branch documents simply because they are housed with the Department of Justice." App. 9a. DOJ itself "has no interest in objecting to the release of these materials outside of the general purposes and policies of grand jury secrecy." App. 10a.

DOJ's primary argument (at 33) for irreparable harm is that "[o]nce the government discloses the secret grand-jury records, their secrecy will irrevocably be lost." But in this case, unlike other cases involving the disclosure of grand-jury material where the same harm argument could be made, the Committee has adopted confidentiality protocols to help maintain the secrecy of the materials. These protocols—now found sufficiently protective by two courts, *see* App. 20a, 147a-48a—provide that, absent a further vote, any grand-jury material the Committee receives will remain confidential.

The protocols are similar to those adopted by the Committee decades ago to protect impeachment-related materials, including the Watergate Roadmap grand-jury report, which the Committee still has not released more than 45 years after receiving it. *See* App. 20a-21a. And despite DOJ's assumption that the Committee

could nonetheless authorize reckless public disclosures, "[t]he courts must presume that the committees of Congress will exercise their powers responsibly and with due regard for the rights of affected parties." *Exxon Corp. v. FTC*, 589 F.2d 582, 589 (D.C. Cir. 1978). The Committee has already done so here with respect to certain non-Rule 6(e) materials that were redacted in the public version of the Mueller Report, including materials that related to then-ongoing criminal matters. DOJ does not assert that the Committee has improperly released that sensitive information.

Any abstract interest on the part of DOJ in maintaining secrecy is also substantially diminished at this juncture. DOJ, notably, does not contend that disclosure of the grand-jury material would harm any pending law-enforcement matters. And now that the Mueller grand jury has concluded its work, secrecy is no longer necessary to protect many of the core values that Rule 6(e) serves during active investigations, such as preventing flight by the targets of criminal investigations and protecting active witnesses. *See Douglas Oil*, 441 U.S. at 218-19. Nor is there a serious risk that future witnesses before grand juries would be less likely to testify truthfully because of a disclosure in this case. Grand-jury witnesses testify under oath and can be prosecuted for perjury. DOJ offers no reason to think witnesses would break that oath based on the remote possibility that portions of their testimony could one day be disclosed to Congress during an impeachment investigation.

DOJ suggests (at 34) that if the grand-jury materials are disclosed to the Committee, "there is a serious question whether this case would become moot." But, as just discussed, the Committee's confidentiality protocols were adopted to protect against disclosure. And the district court, in any event, ordered a staged release of only two of the three categories of grand-jury material the Committee requested, explaining that it would release the third category only upon a separate showing of particularized need. App. 150a. Therefore, "this case" will remain a live controversy between the parties regardless. *See Knox v. Serv. Emps. Int'l Union*, 567 U.S. 298, 307-08 (2012) ("[A]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot.").

2. In contrast to the lack of irreparable injury to DOJ, any further delay in receiving the materials would cause the Committee and the public to suffer significant, irreparable harm by impairing the House's efforts to determine whether the President committed certain impeachable offenses. Because the inability to obtain this information infringes on the "sole Power of Impeachment" that the Constitution vests in the House, *see* U.S. Const., Art. I, § 2, cl. 5, the lengthy stay DOJ requests would risk subjecting the Committee to significant constitutional harm, *see Loving v. United States*, 517 U.S. 748, 757 (1996) ("[T]he separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties.").

DOJ is wrong (at 35) that the Committee "has not asserted any time-sensitive need for the requested materials." At every stage of this litigation, the Committee

has made clear the urgency and gravity of its task.[3] The Committee initially requested the grand-jury materials more than a year ago, and it has been more than six months since the district court ordered them disclosed to the Committee in a decision that the court of appeals has now affirmed. As the Committee informed the court of appeals in December, its investigation into President Trump's misconduct is ongoing, and the grand-jury material will inform its determination whether President Trump committed additional impeachable offenses in obstructing the Russia investigation and whether to recommend new Articles of Impeachment. *See* Comm. Supp. Br. 17-18.

The Committee's investigation continues today and has further developed in light of recent events. For example, the Committee is investigating the possible exercise of improper political influence over recent decisions made in the Roger Stone and Michael Flynn prosecutions, both of which were initiated by the Special Counsel. *See* Letter from Jerrold Nadler, Chairman, H. Comm. on the Judiciary, et al. to Michael E. Horowitz, Inspector General, U.S. Dep't of Justice (May 8, 2020), https://perma.cc/799D-2PNY. The Committee has announced its intention to hold a hearing with the Attorney General—who has failed to appear before the Committee at any point on any topic during his tenure—on these issues as soon as possible. *See* Press Release, H. Comm. on the Judiciary, Chairman Nadler Statement on

[3] *See, e.g.*, C.A. App. 99-101; Opp'n of the Comm. on the Judiciary to DOJ's Emergency Mot. for a Stay Pending Appeal 20-22 (Nov. 1, 2019); Corrected Br. of the Comm. on the Judiciary 2 (Dec. 17, 2019); Opp'n of the Comm. on the Judiciary to DOJ's Mot. to Stay Mandate 10-12 (Apr. 29, 2020).

DOJ's Decision to Drop Criminal Charges Against Michael Flynn (May 7, 2020), https://perma.cc/R2QT-AVXB.

A stay would also harm the public interest. DOJ's own Office of Legal Counsel has recognized "the public interest in immediately removing a sitting President whose continuation in office poses a threat to the Nation's welfare." *A Sitting President's Amenability to Indictment and Criminal Prosecution*, 24 Op. O.L.C. 222, 258 (2000). Delaying disclosure of this information has already significantly injured that interest in prompt action—and further delay would be irremediable. "[T]he House, unlike the Senate, is not a continuing body." *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 512 (1975). The current House concludes in less than eight months. Because DOJ's petition would not be due until early August, a stay until this Court decides whether to grant or deny that petition would seriously endanger the Committee's ability to complete its investigation during this time-limited Congress. The public interest would be harmed irreparably if DOJ runs out the clock on the impeachment process.

These profound and irreparable injuries to the Committee and the public thus weigh decisively in favor of denying the stay.

II. If The Court Grants A Stay, It Should Order Expedited Briefing On DOJ's Forthcoming Petition For Certiorari

If the Court grants a stay, the Committee requests that the stay be conditioned on the expedited filing of DOJ's petition for certiorari. DOJ should be required to file its petition for a writ of certiorari by June 1, 2020, and the Committee will then file its brief in opposition by June 15, so that the Court can

decide whether to grant or deny the petition at its conference on June 25. *See, e.g.*, *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2085 (2017) (at Solicitor General's request, response to certiorari petition ordered to be filed within 12 days of petition). Such "expeditious treatment," *Eastland*, 421 U.S. at 511 n.17, would reduce, at least to some extent, the serious harms a further, lengthy stay would cause to Congress and the public interest.

CONCLUSION

For the foregoing reasons, the application for a stay should be denied.

Respectfully submitted,

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