No. 19-1328

IN THE

Supreme Court of the United States

UNITED STATES DEPARTMENT OF JUSTICE,

Petitioner,

v.

COMMITTEE ON THE JUDICIARY OF THE UNITED STATES HOUSE OF REPRESENTATIVES,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether a Senate impeachment trial is a "judicial proceeding" under Federal Rule of Criminal Procedure 6(e)(3)(E)(i).

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTRODUCTION 1

STATEMENT OF THE CASE 3

A. The Constitution's impeachment procedure 3

B. Federal Rule of Criminal Procedure 6(e) 6

C. The present controversy 8

SUMMARY OF THE ARGUMENT 13

ARGUMENT 16

I. An impeachment trial is a judicial proceeding under Rule 6(e) 16

A. An impeachment trial falls squarely within the plain meaning of "judicial proceeding" 16

1. The Constitution gives the Senate the judicial power of trying impeachments 17

2. Every traditional indicator of ordinary meaning confirms that an impeachment trial is a judicial proceeding 21

B. A plain-meaning interpretation of "judicial proceeding" is consistent with the other uses of that term in the Federal Rules of Criminal Procedure 27

C. A plain-meaning interpretation of "judicial proceeding" is consistent with longstanding practice 29

D. A plain-meaning interpretation of "judicial proceeding" is compelled by the canon of constitutional avoidance.......... 35

1. Precluding the House from accessing grand-jury material would violate the Constitution...................................... 36

2. Adhering to the plain meaning of "judicial proceeding" creates no constitutional difficulty.......................... 37

II. In the alternative, the district court's order was a permissible exercise of its inherent authority 43

CONCLUSION.. 50

TABLE OF AUTHORITIES

Page(s)

Cases

Astoria Fed. Sav. & Loan Ass'n v. Solimino,
501 U.S. 104 (1991) 48

Bank of Nova Scotia v. United States,
487 U.S. 250 (1988) 46

Barry v. United States,
279 U.S. 597 (1929) 30, 32

Bostock v. Clayton Cty.,
140 S. Ct. 1731 (2020) 20

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498 U.S. 533 (1991) 16

In re Carter,
74 P. 997 (Cal. 1903) 24

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501 U.S. 32 (1991) 46

Chandler v. Judicial Council,
382 U.S. 1003 (1966) 23

Clark v. Herring,
260 N.W. 436 (Iowa 1935) 24

Clinton v. Jones,
520 U.S. 681 (1997) 36

Dennis v. United States,
384 U.S. 855 (1966) 38

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136 S. Ct. 1885 (2016) 45

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441 U.S. 211 (1979) .... *passim*

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19 N.W. 112 (Mich. 1884)....................................24

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485 U.S. 568 (1988) 35

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138 S. Ct. 1134 (2018) 26

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28 S.W.2d 526 (Tex. 1930) 24

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139 S. Ct. 2356 (2019) 26

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No. 09-4346 (E.D. La. Aug. 6, 2009)................8, 27

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No. 09-30737 (5th Cir. Nov. 12, 2009)...................8

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408 U.S. 606 (1972) 38

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501 F.2d 714 (D.C. Cir. 1974) (en banc)..........8, 33

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27 P. 177 (Kan. 1891)...24

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460 U.S. 557 (1983) 41

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510 U.S. 27 (1993) 42

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103 U.S. 168 (1881) 1, 13, 14, 23

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370 U.S. 626 (1962) 46, 48

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434 U.S. 575 (1978) 34

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No. 94-1 (D.C. Cir. Spec. Div. July 7, 1998) 8

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273 U.S. 135 (1927) 36

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920 F.3d 842 (D.C. Cir. 2019), *cert. denied*,
140 S. Ct. 597 (2020) 44

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326 U.S. 438 (1946) 48

Mississippi v. Johnson,
71 U.S. 475 (1867) 13, 23

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139 S. Ct. 532 (2019) 22

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Civ. No. H88-0052(G) (S.D. Miss. Dec. 5,
1988)...8

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524 U.S. 206 (1998) 20

People v. Swena,
296 P. 271 (Colo. 1931)...24

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360 U.S. 395 (1959) 45

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349 U.S. 155 (1955) 36

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833 F.2d 1438 (11th Cir. 1987) (en banc)........8, 40

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477 U.S. 21 (1986) 48

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439 U.S. 463 (1979) 44

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574 U.S. 265 (2015) 16, 22

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138 S. Ct. 2067 (2018) 16

Yancey v. Commonwealth,
122 S.W. 123 (Ky. 1909) 24

Constitutional Provisions

U.S. Const., art. I 5, 18

U.S. Const., art. I, § 2, cl. 5 ....3, 36

U.S. Const., art. I, § 3, cls. 6-7...........................1, 5, 18

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U.S. Const., art. I, § 6, cl. 1 ....37, 38

U.S. Const., art. II 39

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Statutes

28 U.S.C. § 2072(a) 29

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Rules

Fed. R. Crim. P. 1 30

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Fed. R. Crim. P. 6(e)(2)..6, 47

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Fed. R. Crim. P. 6(e)(3)(D)...................................6, 39
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Fed. R. Crim. P. 6(e)(3)(E)(iii) 7, 38
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Fed. R. Crim. P. 6(e)(3)(G)..28
Fed. R. Crim. P. 53 29
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INTRODUCTION

The Framers made impeachment a cornerstone of our Constitution's system of checks and balances. It is the ultimate safeguard against Presidential abuse. It is also the only way to remove federal judges who commit crimes or engage in misconduct. The question presented here is whether, in fulfilling that essential constitutional function, the House of Representatives is categorically barred from reviewing the type of grand-jury material that is available for use in ordinary civil and criminal litigation.

The text of Federal Rule of Criminal Procedure 6 makes clear that the answer is no. Rule 6(e)(3)(E)(i) authorizes the disclosure of grand-jury material preliminarily to a "judicial proceeding." An impeachment trial falls squarely within the plain meaning of that term. Impeachment originated in England, where the House of Lords tried impeachments in its capacity as the highest court in the realm. The Constitution assigns the Senate the same judicial function, empowering it to "try" impeachments and render "[j]udgment." U.S. Const., art. I, § 3, cls. 6-7.

Since the Founding, it has been recognized that the Senate has a "judicial character" when it sits "as a court for the trial of impeachments." *The Federalist No. 65*, at 396 (Alexander Hamilton) (Clinton Rossiter ed., 1961). In fact, the Senate formally "convene[s] as a Court of Impeachment." 166 Cong. Rec. S289 (Jan. 21, 2020) (the Chief Justice). This Court, too, has long recognized that the Senate "exercises the judicial power of trying impeachments." *Kilbourn v. Thompson*, 103 U.S. 168, 191 (1881). And every other traditional indicator of ordinary meaning, including dictionaries and common usage when Rule 6 was

adopted, further confirms that an impeachment trial is a "judicial proceeding."

The canon of constitutional avoidance compels the same conclusion. "The power to impeach includes a power to investigate." *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2046 (2020) (Thomas, J., dissenting). Recent history teaches that grand juries often uncover evidence of official misconduct, including misconduct that may warrant impeachment. And whatever limits might constrain the House's constitutional authority to investigate, there is no plausible basis for flatly excluding a class of evidence that is regularly disclosed to serve far lesser public purposes.

Until recently, all of this was uncontroversial. The House has relied on grand-jury material in most of the impeachment inquiries since Rule 6 was adopted in 1946. Every court—in fact, every *judge*—to consider the issue has agreed that Rule 6 authorizes such disclosures. And the Department of Justice (DOJ) had taken the same position for almost 50 years, before abruptly reversing itself in this one case. DOJ was right before, and it is wrong now.

Finally, even if the Court held that Rule 6(e) does not expressly authorize the disclosure of grand-jury material for impeachments, it should affirm on the alternative ground that such disclosures are a valid exercise of the courts' inherent authority. At common law, district courts had inherent authority to disclose grand-jury material, including for impeachments. Nothing in Rule 6(e)'s text withdraws that authority, and history and context refute any suggestion that the rule extinguished it by silent implication. If the Court concludes that an impeachment trial is not a "judicial proceeding" under Rule 6(e), moreover,

construing the rule to preserve that inherent authority would be the only way to render it consistent with the House's constitutional impeachment power.

STATEMENT OF THE CASE

The Constitution vests the House with "the sole Power of Impeachment." U.S. Const., art. I, § 2, cl. 5. The House's "investigative authority" in matters of "presidential conduct" thus has "an express constitutional source." *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 732 (D.C. Cir. 1974). Respondent, the House Committee on the Judiciary, is exercising that constitutional authority in its ongoing investigation into President Trump's efforts to obstruct inquiries into foreign interference in the 2016 election. This case involves the Committee's attempt to obtain the narrow set of grand-jury material discussed in Special Counsel Robert Mueller's report on the same subject.

A. The Constitution's impeachment procedure

1. Impeachment has deep roots in English law. "Impeachment in the House of Commons, with trial in the House of Lords, originated in the fourteenth century." Peter Charles Hoffer & N.E.H. Hull, *Impeachment in America 1635-1805*, at 3 (1984). The House of Lords was England's "highest court," and its jurisdiction to try impeachments "rested upon this privilege." *Id.* at 3, 6.

The colonists brought impeachment with them to America. Early colonial assemblies asserted the power to impeach corrupt or incompetent officials. *Impeachment in America* 14. Later, impeachment became part of a "primitive system of checks and

balances" and a way for the assemblies to challenge royal appointees. *Id.* This history indelibly "link[ed] impeachment with republicanism in the minds of American thinkers." *Id.*; *see id.* at 15-56.

Reflecting that connection, most of the newly independent states included impeachment in their constitutions. The drafters of those constitutions recognized that trying impeachments in the upper house of the legislature "violated the doctrine of a strict separation of the functions of the legislative and judicial branches." *Impeachment in America* 77. A few states responded by designating the state supreme court as the impeachment tribunal, or by creating a special court composed of both regular judges and legislators. Frank O. Bowman III, *High Crimes and Misdemeanors* 67, 75-79 (2019) (reproducing constitutional provisions). But "[t]rial in the upper house was the most common resolution." *Impeachment in America* 77. State constitutions answered the separation-of-powers concerns about that arrangement by adopting "trial court procedures at upper house impeachment proceedings." *Id.* "When state senates and councils sat to hear the trial of impeachments," therefore, "they became, temporarily, courts of law." *Id.*

2. The Framers of the federal Constitution grappled with the same separation-of-powers concern and landed on the same solution. For most of the convention, the draft Constitution vested jurisdiction to try impeachments in the regular federal courts or in this Court. *See Walter Nixon v. United States*, 506 U.S. 224, 233 (1993). Hamilton proposed a special tribunal of state-court judges. *Id.* at 244 (White, J., concurring in the judgment). Ultimately, however,

the Framers concluded that the Senate was "the least of evils among the various trial courts." *Impeachment in America* 99; *see Walter Nixon*, 506 U.S. at 233-35.

Consistent with that judgment, the Constitution vests the Senate with the "sole Power to try all Impeachments." U.S. Const., art. I, § 3, cl. 6. At every turn, the Constitution instructs that an impeachment trial is not ordinary legislative activity. Article I directs that in an impeachment trial, Senators must "be on Oath or Affirmation." *Id.* It further provides that "the Chief Justice shall preside" when the President is tried and specifies the vote by which the accused "shall be convicted." *Id.* Article I also prescribes the consequences of a "Judgment in Cases of Impeachment." *Id.*, art. I, § 3, cl. 7. And Article III exempts "Cases of Impeachment" from the general requirement that the "Trial of all Crimes" must be "by Jury." *Id.*, art. III, § 2, cl. 3.

3. In the 230 years since the Framing, the House has impeached twenty officials: three Presidents, a Senator, a Secretary of War, a Justice of this Court, and fourteen federal judges. U.S. Senate, *Impeachment* (2020), https://perma.cc/9BVA-CE2N. All but one of those impeachments led to a trial in the Senate. *Id.* Consistent with the constitutional design, the Senate "convene[s] as a Court of Impeachment" when it sits to try an impeachment. 166 Cong. Rec. S289 (Jan. 21, 2020) (the Chief Justice). As required by Article I, Senators take a special oath to "do impartial justice according to the Constitution and laws." *Id.* at S290. And after the trial, "[t]he Presiding Officer directs judgment to be entered in accordance with the judgment of the Senate." *Id.* at S938 (Feb. 5, 2020) (the Chief Justice).

B. Federal Rule of Criminal Procedure 6(e)

1. Witnesses who provide evidence to a grand jury have always been free to share it with the public. *See United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 425 (1983). But grand jurors, and the prosecutors and others who assist them, have long been prohibited from disclosing material presented to the grand jury. *Id.* at 424-25. That policy guards against interference with active investigations, encourages candor, and protects privacy. *Id.* at 424. This Court has long recognized, however, that the need for disclosure of grand-jury material sometimes "outweighs the public interest in secrecy." *Douglas Oil Co. v. Petrol Stops Nw.*, 441 U.S. 211, 223 (1979). The common law thus recognized that "disclosure [wa]s wholly proper where the ends of justice require[d] it." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 234 (1940).

Rule 6(e), which took effect in 1946, "continues the traditional practice of secrecy on the part of members of the grand jury, except when the court permits a disclosure." Fed. R. Crim. P. 6(e) advisory comm. 1944 note. The rule imposes a general duty of secrecy on grand jurors, prosecutors, and other enumerated persons. Fed. R. Crim. P. 6(e)(2). It then lists a series of exceptions. Rules 6(e)(3)(A) and (D), for example, allow grand-jury material to be shared with government officials—including those of a "state, state subdivision, Indian tribe, or foreign government"—for federal criminal law enforcement and threat prevention. Those disclosures do not require court approval.

Rule 6(e) also provides for a variety of court-authorized disclosures. Most also involve government officials—for example, grand-jury material may be

disclosed "when sought by a foreign court or prosecutor for use in an official criminal investigation," or when the material "may disclose a violation of State, Indian tribal, or foreign criminal law." Fed. R. Crim. P. 6(e)(3)(E)(iii)-(iv).

As relevant here, Rule 6 has, since its adoption, allowed a court to authorize disclosure of grand-jury material "preliminarily to or in connection with a judicial proceeding." Fed. R. Crim. P. 6(e)(3)(E)(i); *see Federal Rules of Criminal Procedure*, 327 U.S. 821, 837-38 (1946). Congress preserved that language without change when it reenacted Rule 6 in 1977. *See* Pub. L. No. 95-78, § 2(a), 91 Stat. 319-20. Rule 6 itself does not prescribe a standard governing such disclosures, but this Court has held that the party seeking grand-jury material must establish a "particularized need." *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 683 (1958).

In *Douglas Oil*, the Court held that this standard requires a showing that the material "is needed to avoid a possible injustice in another judicial proceeding," that "the need for disclosure is greater than the need for continued secrecy," and that the request "is structured to cover only material so needed." 441 U.S. at 222. "The *Douglas Oil* 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. The standard's application is committed "to the considered discretion of the district court." *Douglas Oil*, 441 U.S. at 228.

2. Between the adoption of Rule 6 and the beginning of the investigation at issue here, there were six impeachments and the near-impeachment of

President Nixon. U.S. Senate, *Impeachment* (2020), https://perma.cc/9BVA-CE2N. In five of those cases, the House obtained and relied on grand-jury material: the investigation of President Nixon, and the impeachments of President Clinton and Judges Alcee Hastings, Walter Nixon, and Thomas Porteous. Pet. App. 14a-15a. In each case, courts authorized the disclosure after concluding that an impeachment trial is a "judicial proceeding" under Rule 6(e). *Id.* No judge has ever dissented. And DOJ took the same position for decades, supporting each of the prior disclosures as authorized by Rule 6(e). *Id.* 138a-39a n.30.[1]

C. The present controversy

1. In July 2016, the Federal Bureau of Investigation (FBI) began investigating Russian interference in the then-upcoming Presidential election. In May 2017, the Acting Attorney General appointed Robert Mueller as Special Counsel to continue the FBI's work and to investigate related matters, including whether the President had obstructed justice. Robert Mueller, *Report on the Investigation into Russian Interference in the 2016 Presidential*

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[1] *See Haldeman v. Sirica*, 501 F.2d 714, 715 (D.C. Cir. 1974) (en banc) (President Nixon); *In re Madison Guar. Sav. & Loan Ass'n*, No. 94-1 (D.C. Cir. Spec. Div. July 7, 1998) (per curiam) (reprinted at C.A. App. 267) (President Clinton); *In re Request for Access to Grand Jury Materials,* 833 F.2d 1438, 1439-40 (11th Cir. 1987) (en banc) (Judge Hastings); H. Rep. No. 101-36, at 15 & n.46 (1989) (citing *Nixon v. United States*, Civ. No. H88-0052(G) (S.D. Miss. Dec. 5, 1988)) (Judge Nixon); *In re Grand Jury Proceeding*, No. 09-30737 (5th Cir. Nov. 12, 2009), *summarily aff'g* No. 09-4346 (E.D. La. Aug. 6, 2009) (Judge Porteous).

Election, Vol. I at 8 (2019) (Mueller Report), https://perma.cc/6E3T-MD7T.

In March 2019, Special Counsel Mueller issued a report finding that President Trump's conduct raised "questions about whether he had obstructed justice" by attempting to impede the Russia investigation and related law enforcement proceedings. Mueller Report, Vol. II at 1. But the report stopped short of determining whether President Trump had committed criminal obstruction of justice, in part to avoid "preempt[ing] constitutional processes for addressing presidential misconduct"—that is, impeachment. *Id.*

2. In April 2019, the Attorney General released a redacted version of the Mueller Report to Congress and the public. Many of the redactions cover grand-jury material subject to Rule 6(e). Pet. App. 90a-93a.

In June 2019, the House authorized the Committee to seek a court order allowing disclosure of that material for use in its ongoing impeachment investigation. H. Res. 430, 116th Cong. (2019). The redacted grand-jury material bears on whether the President committed impeachable offenses, including by obstructing the Special Counsel's investigation. Pet. App. 88a-93a; *see, e.g.*, Mueller Report, Vol. I at 85, 93-94, 98, 100-02, 110, 111-12; C.A. App. 726-29 (redacted declaration describing the grand-jury material in Volume II of the Mueller Report).

Judiciary Committee Chairman Jerrold Nadler issued protocols to protect the confidentiality of any grand-jury material obtained. C.A. App. 122-23. The protocols are based on those successfully used to protect grand-jury material disclosed to the House during the investigation of President Nixon. Among other things, they strictly limit staff access and

require that grand-jury material be stored in a secure location. *Id.*

3. In July 2019, the Committee filed an application seeking the redacted grand-jury material in the U.S. District Court for the District of Columbia. The application invoked both Rule 6(e)(3)(E)(i)'s "judicial proceeding" provision and the court's inherent authority. The Committee requested three categories of grand-jury material: (1) the portions of the Mueller Report redacted under Rule 6(e); (2) any grand-jury transcripts or exhibits referenced in those redactions; and (3) grand-jury transcripts or exhibits that relate directly to certain individuals and events described in the Mueller Report. Pet. App. 103a-04a. DOJ opposed the application, reversing "its longstanding position regarding whether impeachment trials are 'judicial proceedings.'" *Id.* 138a n.30.

4. In October 2019, the district court granted the Committee's application in part. Pet. App. 82a-181a. The court first held that impeachment trials are "judicial proceedings" under Rule 6(e). *Id.* 117a. The court grounded that holding in "historical practice, the Federalist Papers, the text of the Constitution, and Supreme Court precedent." *Id.*

The court next determined that the requested disclosure is "preliminary to" a judicial proceeding because "the primary purpose" of the Committee's investigation is "to determine whether to recommend articles of impeachment." Pet. App. 157a.

The court then held that the Committee had established "particularized need" under the *Douglas Oil* standard. Pet. App. 163a-78a. The court noted that it "would be difficult to conceive of a more compelling need" than the national interest in an

impeachment inquiry "based on all the pertinent information." *Id.* 166a (citation omitted). After reviewing the record, including a sealed *ex parte* declaration describing some of the withheld material, *see id.* 5a-6a, the court concluded that specific features of this case make the Committee's need "especially particularized and compelling," *id.* 167a. The court found, for example, that the redacted grand-jury testimony could "shed[] light on inconsistencies or even falsities" in testimony the same witnesses gave during the House's investigation. *Id.* 169a.

The court further explained that the usual considerations justifying grand-jury secrecy "'became less relevant' once the Special Counsel's investigation, and attendant grand jury work, concluded." Pet. App. 175a (brackets omitted) (quoting *Douglas Oil*, 441 U.S. at 223). The court found that any risk to "future grand juries' ability to obtain 'frank and full testimony'" was "slim" given the limited scope of the disclosures and the Committee's protective protocols. *Id.* 175-76a (quoting *Douglas Oil*, 441 U.S. at 222). Balancing the *Douglas Oil* factors, the court concluded that the "minimal" need for secrecy was "easily outweighed by [the Committee's] compelling need for the material." *Id.* 178a.

Finally, the court held that the Committee's request was appropriately tailored as to the material quoted and referenced in the Mueller Report. The court authorized disclosure of that material, but directed that the Committee would have to file "further requests" establishing particularized need for any of the additional grand-jury material sought in its original request. Pet. App. 165a; *see id.* 178a.

5. The D.C. Circuit affirmed. Pet. App. 1a-81a. Although they differed on issues not relevant here, Judges Rogers, Griffith, and Rao unanimously agreed that an impeachment trial is a "judicial proceeding." Pet. App. 27a; *see id.* 37a (Rao, J., dissenting).

Like the district court, the D.C. Circuit concluded that "traditional tools of statutory construction," "constitutional text," and "historical practice" show that an impeachment trial is a "judicial proceeding" under Rule 6(e). Pet. App. 11a-15a. The D.C. Circuit also concluded that the district court acted well within its broad discretion in finding particularized need. Analyzing the *Douglas Oil* factors, the court emphasized the narrow scope of the disclosure, which includes "only those materials that the Special Counsel found sufficiently relevant to discuss or cite" in a report written "with the expectation that Congress would review it." *Id.* 16a-17a.

The D.C. Circuit further concluded that the Committee's particularized need for those materials "remains unchanged" following events that occurred while the appeal was pending. Pet. App. 17a. In December 2019, the House adopted Articles of Impeachment charging President Trump with abuse of power and obstruction of Congress in connection with a scheme to coerce Ukraine to announce an investigation into former Vice President Biden—a matter not addressed in the Mueller Report. The Senate acquitted the President on those charges. But the Committee "has continued and will continue" its impeachment investigation concerning the Russia investigation. H. Rep. No. 116-346, at 159 n.928 (2019). The material at issue here "remains central to the Committee's ongoing inquiry." Comm. C.A. Supp.

Br. 17; *see* Pet. App. 4a-5a. The D.C. Circuit thus noted that the Committee had "repeatedly stated that if the grand jury materials reveal new evidence of impeachable offenses, the Committee may recommend new articles of impeachment." Pet. App. 17a.

Judge Rao "agree[d] with the majority" that a "Senate impeachment trial" has "always been understood as an exercise of judicial power." Pet. App. 37a. She explained that the Framers understood the Constitution "to vest in the Senate a 'distinct' non-legislative power to act in a 'judicial character as a court for the trial of impeachments.'" *Id.* (quoting *The Federalist No. 65* (Alexander Hamilton)). And she added that this Court "has consistently recognized the Senate as a court of impeachment parallel to the federal courts." *Id.* (citing *Mississippi v. Johnson*, 71 U.S. 475, 500-01 (1867), and *Kilbourn v. Thompson*, 103 U.S. 168, 191 (1881)). Judge Rao dissented on other grounds not relevant here. *Id.* 41a-81a.

SUMMARY OF THE ARGUMENT

I. It would be astonishing if Rule 6 authorized disclosure of grand-jury material for ordinary law enforcement by federal, state, local, tribal, and foreign governments—and even for civil litigation—but not for the impeachment proceedings at the heart of the Framers' system of checks and balances. Fortunately, the rule does no such thing: An impeachment trial is a "judicial proceeding" under Rule 6(e).

A. An impeachment trial falls squarely within the plain meaning of "judicial proceeding." Everyone agrees that the term includes, at a minimum, proceedings before a court. DOJ Br. 16-17. English and colonial history, the text of the Constitution, the

Framers' understanding, and early Senate practice all show that the Senate sits as a court when it "exercises the judicial power of trying impeachments." *Kilbourn v. Thompson*, 103 U.S. 168, 191 (1881).

That understanding remained equally strong when Rule 6 was adopted in 1946. Every traditional indicator of ordinary meaning—from dictionaries, to the Senate's own proceedings, to this Court's opinions, to contemporary usage—confirms that an impeachment trial was recognized as a "judicial" proceeding in which the Senate sat as a "court." That usage was thus anything but "idiosyncratic." DOJ Br. 17.

B. DOJ lacks any traditional argument about the plain meaning of "judicial proceeding." Instead, it leads its brief with an extended argument that a plain-meaning interpretation of that term would not fit with *other* provisions of the Federal Rules of Criminal Procedure where the term appears. But one of those provisions is perfectly consistent with interpreting "judicial proceeding" to include an impeachment trial. And the text of the other provisions makes clear that they refer to only a subset of "judicial proceedings." For example, those provisions exclude state-court cases, but no one can reasonably doubt that such cases are "judicial proceedings" under Rule 6(e). So too with an impeachment trial.

C. A plain-meaning interpretation of "judicial proceeding" is consistent with longstanding practice. Throughout our Nation's history, the House and Senate have considered grand-jury material in impeachments and in the exercise of their authority to judge the qualifications of their Members and to punish Members for misconduct—two other special circumstances where the House and Senate exercise

judicial power. DOJ has not identified any example of a court invoking grand-jury secrecy to refuse to provide material for use in an impeachment. That unbroken history provides further reason to adhere to a plain-meaning interpretation of the rule.

D. A plain-meaning interpretation of Rule 6 is also the only one consistent with the Constitution. The House's impeachment power includes the authority and duty to investigate official misconduct—indeed, the Framers referred to an impeachment as an "inquest." It would flout that constitutional authority to categorically deny to the House evidence that would be available to a regular prosecutor, a foreign government, or an ordinary civil litigant.

DOJ offers no response to that grave separation-of-powers problem. Instead, it asserts that *allowing* the House to obtain grand-jury material under Rule 6(e) would somehow invade the House and Senate's impeachment powers. But decades of history show that it would not. And DOJ's assertion that courts have avoided constitutional difficulties only by impermissibly diluting the *Douglas Oil* standard is wrong. If anything, the courts below applied that standard with *more* rigor than this Court did in its most analogous precedent, a case authorizing a far broader disclosure in service of a civil suit brought by DOJ. *See United States v. John Doe, Inc. I*, 481 U.S. 102, 105-06, 112-13 (1987).

II. Even if this Court holds that an impeachment trial is not a judicial proceeding under Rule 6(e), it should affirm on the alternative ground that the district court's disclosure was a permissible exercise of its inherent authority. At common law, district courts had inherent authority to disclose grand-jury

material in the interests of justice, including for impeachments. Nothing in the text of Rule 6 purports to withdraw that authority. And interpreting the rule to do so by silent implication would infringe on the House's constitutional power to investigate official misconduct.

ARGUMENT

I. An impeachment trial is a judicial proceeding under Rule 6(e).

A. An impeachment trial falls squarely within the plain meaning of "judicial proceeding."

This Court gives the Federal Rules of Procedure "their plain meaning." *Bus. Guides, Inc. v. Chromatic Commc'ns Enters.*, 498 U.S. 533, 540 (1991) (citation omitted). As in interpreting a statute, therefore, the Court's task is to interpret the words of Rule 6 in a manner "consistent with their 'ordinary meaning' at the time" they were adopted. *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2070 (2018) (citation and ellipsis omitted). The term "judicial proceeding" has "remained unchanged" since Rule 6 was adopted in 1946 and thus "presumptively retains its original meaning." *Whitfield v. United States*, 574 U.S. 265, 267 (2015).

In 1946, as today, the term "judicial proceeding" meant a proceeding "wherein judicial action is invoked and taken," including proceedings in "a court of justice." *Black's Law Dictionary* 986-87 (4th ed. 1951); *see Black's Law Dictionary* 1458 (11th ed. 2019). DOJ effectively concedes as much. Br. 16-17. The question, then, is whether the Senate sits as a court, or takes judicial action, when it tries an impeachment. The Constitution makes clear that it

does. And all traditional indicia of ordinary meaning confirm that the same understanding prevailed when Rule 6 was adopted in 1946.

1. The Constitution gives the Senate the judicial power of trying impeachments.

English and colonial history, the text of the Constitution, the Framers' understanding, and early Senate practice all show that the impeachment-trial procedure created by the Constitution is a judicial proceeding.

1. The Framers did not create impeachment out of whole cloth; they "borrowed" a legal procedure with centuries of history in England and the colonies. *The Federalist No. 65*, at 397 (Alexander Hamilton); *see Impeachment in America* 3-14. That procedure was unquestionably judicial: The House of Lords tried impeachments because it was England's "general supreme court." Akhil Reed Amar, *America's Constitution: A Biography* 210 (2005); *see Impeachment in America* 3, 6.

Impeachment kept its judicial character when it crossed the Atlantic. As in England, the upper houses of colonial legislatures often acted as courts of last resort and tried impeachments along with their other judicial responsibilities. *America's Constitution* 210; *see Impeachment in America* 14. And in Pennsylvania, which lacked an upper house, two Lieutenant Governors refused to hear impeachments precisely because they "had no judicial authority" and thus were "not a proper substitute for the House of Lords." *High Crimes and Misdemeanors* 59; *see Impeachment in America* 34-35, 43-45.

Impeachment remained a judicial proceeding in the newly independent states. Some states vested jurisdiction to try impeachments in the regular courts and others in special courts constituted for the purpose. *High Crimes and Misdemeanors* 67. But most assigned that function to the upper legislative house, with procedures making clear that those bodies became "courts of law" when they "sat to hear trial of impeachments." *Impeachment in America* 77; *see The Federalist No. 47*, at 304-06 (James Madison) (describing these upper houses as "court[s]" or "judicial tribunal[s]" for impeachments).

2. The Framers adopted the same approach. Article I provides that "[t]he Senate shall have the sole Power to *try* all Impeachments." U.S. Const., art. I, § 3, cl. 6. It describes a "*Judgment* in *Cases* of Impeachment." *Id.*, art. I, § 3, cl. 7. And it refers to "the *Party convicted*." *Id.* Article III similarly describes an impeachment as a type of "*Trial* of all *Crimes*." *Id.*, art. III, § 2, cl. 3 (all emphases added). A *trial* for a *crime* in which the Senate *convicts* or acquits the accused and renders a *judgment* is a judicial proceeding. And the Constitution underscores impeachment's judicial character by specifying that when the President is tried, "the Chief Justice shall preside." *Id.*, art. I, § 3, cl. 6.

3. That is exactly how the Framers understood things. They recognized that the Impeachment Clause "vest[s] in the Senate a 'distinct' non-legislative power to act in a 'judicial character as a court for the trial of impeachments.'" Pet. App. 37a (Rao, J.) (quoting *The Federalist No. 65* (Alexander Hamilton)). During the convention, for example, delegates stated that the Constitution made the Senate "the Court of

Impeachments" and allowed it to exercise the "[j]udiciary power[]." 2 *Records of the Federal Convention of 1787*, at 522-23 (Max Farrand ed. 1911) (James Wilson); *see id.* at 500 (Gouverneur Morris) ("Court of Impeachment."); *id.* at 551 (Charles Pinkney) (same); *id.* at 563 (Edmund Randolph) (same).

In the *Federalist Papers*, Hamilton described the Senate as a "court" for the trial of impeachments at least a dozen times. *The Federalist Nos. 65-66, 81*, at 396-400, 402-05, 482, 485. Another prominent voice in the ratification debates likewise emphasized that, although the Senate had "a much smaller share of the judicial power than the upper house in Britain," it retained judicial power over "[i]mpeachments." 2 *Documentary History of the Ratification of the Constitution* 142-43 (Merrill Jensen ed. 1976) (Tench Coxe).

4. The Senate's practice in the years just after the Framing reflected the same understanding of its role. When the Senate took up its first impeachment in 1798, involving Senator William Blount, it "formed itself into a High Court of Impeachment, in the manner directed by the Constitution." 8 Annals of Cong. 2245 (1798). At the conclusion of the trial, Vice President Jefferson announced that "[t]he Court is of opinion that the matter alleged in the plea of the defendant is sufficient in law to show that this Court ought not hold jurisdiction of the said impeachment." *Id.* at 2319 (1799).

The Senate followed the same model in the early Republic's other impeachments. In 1804, the trial of Judge John Pickering began with a proclamation that the Senate was "sitting as a Court of Impeachments." 13 Annals of Cong. 319 (1804). Later that year, the Senate sat "as a High Court of Impeachments" to try

Justice Samuel Chase. 14 Annals of Cong. 89 (1804). And in 1830, the Senate again "resolved itself into a Court of Impeachment" for the trial of Judge James Peck. 7 Cong. Deb. 9 (1830).

5. DOJ dismisses all of this evidence, insisting that the meaning of the Constitution's impeachment clauses is "irrelevant." Br. 21. Instead, DOJ asserts that the focus should be on the ordinary meaning of "judicial proceeding." *Id.* But that meaning is not in dispute—everyone agrees that a judicial proceeding includes proceedings before a court. *Id.* at 16-17. The question is whether an impeachment trial falls within that agreed-upon meaning. That is a question about the nature of impeachment. And on that question, the meaning of the constitutional provisions establishing the impeachment procedure is not merely relevant, but dispositive.

DOJ appears to suggest that the correct question is instead whether the drafters of Rule 6 would have expected it to apply to an impeachment. *E.g.*, Br. 21. But "[t]hat is exactly the sort of reasoning this Court has long rejected." *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1750 (2020). The Court interprets legal texts based on their "plain terms," not speculation about the drafters' "expected applications." *Id.*; *see Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 211-12 (1998). In any event, as we explain below, the general understanding that an impeachment trial is a judicial proceeding remained as strong when Rule 6 was adopted in 1946 as it had been in 1789. *See infra* pp. 21-26.

6. DOJ also asserts that "the Framers did not view impeachment to be 'judicial' in anything like the ordinary sense." Br. 22. But DOJ offers little to substantiate that assertion. DOJ primarily insists

that the Framers cannot have meant what they repeatedly said because the Constitution vests the "judicial power" of the United States in the Article III courts. Contemporary critics of the proposed Constitution likewise objected that giving the Senate the power to try impeachments "confounds legislative and judiciary authorities in the same body." *The Federalist No. 66*, at 401 (Alexander Hamilton). But the Framers did not respond, as DOJ would, that impeachment trials are not truly "judicial."

Instead, Hamilton and Madison explained that the Constitution's system of separation of powers allows for this "partial intermixture" of the legislative and judicial powers "for special purposes" like impeachment. *The Federalist No. 66*, at 401 (Alexander Hamilton); *see id. No. 47*, at 304-06 (James Madison); *see also Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2046 (2020) (Thomas, J., dissenting). That response removes any doubt that when the Founders consistently referred to impeachment as "judicial" and the Senate as a "court," they were very much using those words in "the ordinary sense." DOJ Br. 22.

2. Every traditional indicator of ordinary meaning confirms that an impeachment trial is a judicial proceeding.

The Constitution makes impeachment a judicial procedure in which the Senate sits as a court. That should resolve the question presented, because it establishes that an impeachment trial falls within the agreed-upon meaning of "judicial proceeding." But the answer would not change if one instead asked whether an ordinary English speaker would have regarded an impeachment trial as a judicial

proceeding when Rule 6 was adopted in 1946. To find "evidence of [a] term's meaning," this Court looks to "dictionaries," "legal authorities," and usage reflected in contemporary writings. *New Prime, Inc. v. Oliveira*, 139 S. Ct. 532, 539-40 (2019); *see, e.g.*, *Whitfield*, 574 U.S. at 267-68 & nn.1-4. All of those traditional sources confirm that in 1946, just as at the Founding, a Senate impeachment trial was understood to be a "judicial proceeding."

1. Start with contemporary dictionaries. The Fourth Edition of *Black's Law Dictionary* listed "[t]he Senate of the United States, sitting as a court of impeachment" as the first of the "courts of the United States." *Black's Law Dictionary* 435 (4th ed. 1951); *see also Black's Law Dictionary* 451 (11th ed. 2019) (defining the "U.S. Senate" as a "court for the trial of impeachments"). Other contemporary dictionaries likewise recognized that "in cases of impeachment" the Senate "acts as a court." Walter A. Shumaker & George Foster Longsdorf, *The Cyclopedic Law Dictionary* 783 (3d ed. 1940); *see* 2 *Bouvier's Law Dictionary* 2402 (8th ed. 1914) (same).

2. The Senate's own contemporaneous practice tells the same story. The last impeachment trial before the adoption of Rule 6 was that of Judge Halsted Ritter in 1936. Just as it had done in the first decades of the Nation's history, the Senate formally convened "as a Court of Impeachment." 80 Cong. Rec. 3489 (1936) (the Vice President). It did the same for the impeachment before that, the 1933 trial of Judge Harold Louderback. 77 Cong. Rec. 3394 (1933) (the Vice President) ("[T]he senate is now in session sitting as a Court of Impeachment.").

To this day, the Senate "convene[s] as a Court of Impeachment" when it sits to try impeachments. 166 Cong. Rec. S289 (Jan. 21, 2020) (the Chief Justice). The Senate's rules likewise distinguish between its legislative proceedings and "the proceedings when sitting as a Court of Impeachments." Rule IV.1(d), Standing Rules of the Senate, 113th Cong. (2013). And during President Clinton's trial, Chief Justice Rehnquist ruled that Senators should not be referred to as jurors, because "the Senate is not simply a jury; it is a court in this case." S. Doc. No. 106-4, Vol. II at 1142 (1999).[2]

3. Similarly, this Court has long recognized that the Senate "exercises the judicial power of trying impeachments." *Kilbourn v. Thompson*, 103 U.S. 168, 191 (1881). The Court has also recognized that the Senate sits as a "court of impeachment." *Mississippi v. Johnson,* 71 U.S. 475, 501 (1867); *see, e.g.*, *The Pocket Veto Case*, 279 U.S. 655, 672 n.1 (1929); *Walton v. House of Representatives of Okla.*, 265 U.S. 487, 489 (1924) (state senate); *see also Chandler v. Judicial Council*, 382 U.S. 1003, 1006 (1966) (Black, J., dissenting).

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[2] During the impeachment of President Johnson, the Senate deleted references to itself as a "court" from its impeachment rules after some Senators expressed concern that this characterization might allow the Chief Justice to cast a vote. *See* William H. Rehnquist, *Grand Inquests* 219 (1992). But the advocates, the Senators, the Chief Justice, and the press still referred to the Senate as a "court" throughout the trial. *See, e.g.*, *id.* at 237, 239; Cong. Globe, 40th Cong., 2d Sess. Supp. 12, 28, 63, 111, 121, 209, 290, 342, 395, 412, 415 (1868).

State courts, too, in describing both federal impeachments and their state equivalents, have repeatedly explained that "[i]n impeachment trials," the Senate "sits as a court and, of course, exercises judicial powers." *People v. Swena*, 296 P. 271, 272 (Colo. 1931). This repeated usage by courts around the Nation provides still more evidence that an impeachment trial was commonly regarded as a judicial proceeding when Rule 6 was adopted.[3]

4. Other contemporaneous usage reinforces that conclusion. In 1941, for example, a *New York Times* editorial noted that "the Senate has sat twelve times as a court of impeachment." *New Method of Impeachment*, N.Y. Times., Oct. 25, 1941, at 16. In 1937, the *Washington Evening Star* observed that "when the Senate sits as a court of impeachment . . . it exercises its judicial power." *Robinson Title for Present Congress May Be Historic*, Wash. Evening Star, Feb.

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[3] *See, e.g.*, *Van De Griff v. Haynie*, 28 Ark. 270, 274 (1873) ("the senate is a high court for the trial of impeachments"); *In re Carter*, 74 P. 997, 998 (Cal. 1903) (the U.S. Senate sits as "a high court of impeachment" (citation omitted)); *Clark v. Herring*, 260 N.W. 436, 438 (Iowa 1935) ("the Senate as a court of impeachment"); *Henderson v. Hovey*, 27 P. 177, 178 (Kan. 1891) ("court of impeachment"); *Yancey v. Commonwealth*, 122 S.W. 123, 125 (Ky. 1909) ("An impeachment proceeding is a judicial proceeding."); *Dullam v. Willson*, 19 N.W. 112, 115 (Mich. 1884) ("[t]he senate, sitting as a court"); *State v. Beadle*, 111 P. 720, 722 (Mont. 1910) ("There can be no question that the Senate 'sitting as a court of impeachment' is a court—a body exercising judicial functions."); *State v. Hill*, 55 N.W. 794, 797 (Neb. 1893) ("the senate of the United States, sitting as a court of impeachment"); *Ferguson v. Wilcox*, 28 S.W.2d 526, 533 (Tex. 1930) ("The Senate in the trial of impeachment cases is a court of original, exclusive, and final jurisdiction.").

13, 1937, at B1; *see, e.g.*, *Guffey on the Court*, Wash. Evening Star, Jan. 27, 1937, at A8 ("The Senate, under the Constitution, sits as a court in impeachment trials.").

The front-page *Times* story describing the last impeachment verdict before Rule 6's adoption called the Senate "a court of impeachment." *Judge Ritter Convicted by Senate*, N.Y. Times Apr. 18, 1936, at 1; *see, e.g.*, *Ritter: Federal Judge Leaves Bench to Face Bar of Justice*, Newsweek, Apr. 25, 1936, at 44 (the trial "changed the Senate into a court of impeachment"). The front-page story on the preceding impeachment similarly stated that the Senate would act "as an impeachment court." *House Impeaches Judge Louderback*, N.Y. Times Feb. 25, 1933, at 1; *see, e.g.*, *Louderback Trial Opens in Senate*, Wash. Evening Star, May 15, 1933, at A2 ("court of impeachment"). Other examples abound in contemporary coverage of state impeachments.[4]

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[4] *See, e.g.*, *Carney Files Answer to Ouster Charges*, Wash. Evening Star, May 12, 1945, at A3 ("the Senate sitting as a court"); *Bay State Executive Pleads Innocent at Impeachment Trial*, Wash. Evening Star, Aug. 5, 1941, at A6 ("High Court of Impeachment"); *Langer to Face Test Vote Today*, Wash. Evening Star July 23, 1934, at A2 ("court of impeachment"); *Impeachment of Gov. Long Suddenly Dropped As 15 Louisiana Senators Hold Trial Illegal*, N.Y. Times May 17, 1929, at 1 ("Senate Court of Impeachment"); *Judge Hardy Listed on M'Pherson Books*, N.Y. Times Apr. 11, 1929, at 2 (same); *Indiana Senate Bars Testimony on Death*, N.Y. Times Mar. 25, 1927, at 27 ("Senate sitting as a court of impeachment"); *Impeachment After Resignation*, N.Y. Times. Nov. 6, 1926, at 16 (same); *Walton Loses Move to Stop His Trial*, N.Y. Times, Nov. 8, 1923, at 3 ("State Senate Court of Impeachment.").

5. DOJ ignores most of this evidence of ordinary meaning. Nor does it muster anything resembling a traditional textual argument of its own. Instead, DOJ simply asserts without citation that it would be "idiosyncratic" to call an impeachment a "judicial proceeding" or the Senate a "court." Br. 17. DOJ builds much of its brief around that premise. But it is demonstrably wrong: A usage employed by Hamilton, Madison, the Senate, this Court, state supreme courts, dictionaries, and contemporary newspapers is not "idiosyncratic"—it is the very definition of ordinary meaning.

DOJ also urges this Court to depart from a plain-meaning approach, asserting that "exceptions to grand-jury secrecy must be interpreted *narrowly*." Br. 24. But the passing statement on which DOJ relies did not adopt such a rule of narrow construction. *See United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 425 (1983). And even if it had, this Court has more recently disapproved such statements in its prior opinions, explaining that it has "no license to give statutory exemptions anything but a fair reading." *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2366 (2019) (brackets and citation omitted) (rejecting argument that "FOIA exemptions should be narrowly construed"); *see Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018) (disapproving "the principle that exemptions to the [Fair Labor Standards Act] should be construed narrowly"). As in those cases, "there is no reason to give [Rule 6's] exceptions anything other than a fair (rather than a 'narrow') interpretation." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 363 (2012).

B. A plain-meaning interpretation of "judicial proceeding" is consistent with the other uses of that term in the Federal Rules of Criminal Procedure.

Lacking a traditional argument about the ordinary meaning of "judicial proceeding," DOJ leads its brief with an extended argument based on *other* provisions of the Federal Rules of Criminal Procedure that use that term. Br. 17-20. DOJ offers the following syllogism: (1) the term "judicial proceeding" does not include a Senate impeachment trial in those other provisions; (2) the term must have the same meaning throughout the Rules; (3) therefore, the term cannot include an impeachment trial in Rule 6(e)(3)(E)(i). That logic dissolves upon examination.

1. Rule 6(e)(3)(F)(ii) requires a court that receives an application for disclosure of grand-jury material for use in a judicial proceeding to afford "the parties to the judicial proceeding" an opportunity to be heard. DOJ asserts that this provision "would make little sense if 'judicial proceeding' included a Senate impeachment trial." Br. 17. But experience shows otherwise. Here, the Committee served its application on the President, who is the other relevant "party." Certificate of Service (July 30, 2019), Dkt. No. 3. The President could have appeared and been heard, just as past subjects of impeachment have done. *See, e.g.*, *In re Grand Jury Investigation of U.S. Dist. Judge G. Thomas Porteous*, *Jr.*, No. 09-4346 (E.D. La. Aug. 6, 2009) (noting opposition filed by Judge Porteous).

DOJ quibbles that "the House Judiciary Committee would *not* be a 'party' to any Senate impeachment," which instead would be brought by "the full

House of Representatives." Br. 20; *see* Br. 17. But the Committee is participating in this case as the House's authorized representative. H. Res. 430, 116th Cong. (2019). And even if that were somehow insufficient to satisfy Rule 6(e)(3)(F)(ii), it would not establish any difficulty with applying that provision to impeachments. At most, it would mean that future applications for grand-jury materials should be formally captioned as being filed by the House rather than one of its Committees.

2. DOJ also invokes Rule 6(e)(3)(G), which directs that "[i]f the petition to disclose arises out of a judicial proceeding in another district," the petitioned court generally "must transfer the petition to the other court." DOJ observes that a district court could not transfer a petition to the Senate, and it leaps to the conclusion that an impeachment trial thus cannot be a "judicial proceeding." Br. 17. But a district court receiving a petition for the disclosure of grand-jury material for use in a state court likewise could not transfer the petition to that court. Yet no one reasonably doubts that cases in state court are "judicial proceedings" under Rule 6(e). *See* Fed. R. Crim. P. 6(e)(3)(E) advisory comm. notes on 1983 amend.

The explanation is simple: As DOJ itself concedes a few pages later (Br. 19), Rule 6(e)(3)(G)'s transfer requirement does not apply in every case where disclosure is sought in connection with a "judicial proceeding." By its terms, the provision applies only "if" the proceeding is in another federal district court. Fed. R. Crim. P. 6(e)(3)(G). It has no application if the judicial proceeding in question is in a different type of court—whether it be a state court, the Tax Court, *see*

United States v. Baggot, 463 U.S. 476, 479 (1983), or the Senate sitting as a court of impeachment.

3. DOJ next cites Rule 53, which provides that "the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings." Br. 18. DOJ's point appears to be that a Senate trial is not among the "judicial proceedings" covered by Rule 53. But that is because, like Rule 6(e)(3)(G), Rule 53 does not purport to cover *all* "judicial proceedings"—it reaches only federal criminal cases, not (for example) civil or state judicial proceedings. Once again, therefore, the fact that an impeachment trial is not among the subset of "judicial proceedings" covered by Rule 53 does not mean that it is not a "judicial proceeding" under Rule 6(e)(3)(E)(i).

4. Finally, DOJ invokes Rule 1, which says that the Federal Rules of Criminal Procedure "apply in numerous types of specified 'proceedings.'" Br. 18. DOJ emphasizes that a Senate impeachment trial is not among the listed proceedings. *Id.* But that does not suggest that an impeachment trial is not a "judicial proceeding." It simply reflects the obvious reality that this Court's authority to prescribe rules "for cases in the United States district courts," 28 U.S.C. § 2072(a), does not authorize it to regulate procedure in a Senate impeachment trial.

C. A plain-meaning interpretation of "judicial proceeding" is consistent with longstanding practice.

Throughout our Nation's history, the House and Senate have considered grand-jury material in impeachments and in the exercise of their authority

to judge the qualifications of their Members and punish Members for misconduct—two other special circumstances where the House and Senate exercise a form of "judicial" power. *Barry v. United States*, 279 U.S. 597, 613 (1929); *see* U.S. Const., art. I, § 5, cls. 1-2. That unbroken history—which includes precedents before, contemporaneous with, and after the adoption of Rule 6(e)—provides further reason to adhere to a plain-meaning interpretation of the rule.

1. In 1811, a grand jury in the Mississippi Territory prepared a presentment describing its investigation into the conduct of Judge Harry Toulmin and recommending his impeachment. 3 *Hinds' Precedents of the House of Representatives* § 2488, at 984-85 (1907) (*Hinds*). The grand jury addressed the report to the territorial legislature, requesting that it be forwarded to the House for action by "that Tribunal who has the power constitutionally placed in them to examine the conduct of such Officer and to deprive him of that Office."[5] The legislature sent the report to the House, which ultimately found the charges to be without merit. 3 *Hinds* § 2488, at 985.

DOJ dismisses the Toulmin precedent, asserting that it "did not involve compulsory process, judicial involvement of any sort, or even secret grand jury material." Br. 27 (citation omitted). But the first two statements are irrelevant, and the third is misleading. The common law generally barred grand

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[5] Letter from Cowles Mead, Speaker of the House of Representatives of the Mississippi Territory, to James Madison, President of the United States, at 2-3 (Nov. 20, 1811), https://perma.cc/ZBN4-8ZJV (attaching a copy of the presentment).

jurors from disclosing what had transpired before the grand jury in any circumstances—not just under compulsory process or with judicial involvement. *See* Sara Sun Beale et al., *Grand Jury Law & Practice* § 5.2 (Nov. 2019). And the material in the report had ceased to be secret only because the grand jury disclosed it to the territorial legislature with the specific purpose that it be sent to the House for consideration as possible grounds for impeachment. The Toulmin episode thus stands as an early precedent for the release of otherwise-undisclosed grand-jury material for an impeachment inquiry.

2. In the early 20th century, Congress on several occasions received grand-jury material for use in investigations of the conduct of its Members. Pet. App. 127a-29a. In 1902, for example, a House committee investigating allegations of election fraud relied on "a report of a grand jury." 2 *Hinds* § 1123, at 700. And in 1924, a Senate committee investigating a Senator who had been indicted obtained the names of the witnesses who had testified before the grand jury from the judge who had supervised it. 6 *Cannon's Precedents of the House of Representatives of the United States* § 399, at 565 (1935) (*Cannon's*); *see* 65 Cong. Rec. 8864 (1924) (Sen. Borah).[6]

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[6] DOJ notes (Br. 28) that the judge declined to provide the "documentary evidence" that had been before the grand jury. 65 Cong. Rec. 8865 (1924) (Sen. Borah). But he did so because the evidence had been "impounded," not because of grand-jury secrecy. *Id.* And grand-jury secrecy cannot have been the concern, because the judge disclosed the names of grand-jury witnesses and other information about the grand jury's

In the same year, the House commenced an investigation into two unnamed Members who had been implicated in a grand jury report. 6 *Cannon's* § 402, at 573-74. In response to a request from the House, the Attorney General offered to turn over "all the evidence now in the possession of anyone connected with the Department of Justice," including the evidence presented to the grand jury, if the House wished to conduct its own investigation before DOJ's criminal investigation continued. *Id.* at 574.[7]

DOJ dismisses these examples, asserting that because they "did not involve impeachment," they "shed no light on whether a Senate impeachment trial would have been considered a 'judicial proceeding' at the time of Rule 6(e)'s adoption." Br. 28. But that misses the point. Along with impeachment, the House and Senate's authority to "judge the elections, returns, and qualifications of [their] own members" and to discipline their Members are other instances where those bodies exercise "powers which are not legislative, but judicial." *Barry*, 279 U.S. at 613; *see America's Constitution* 210-11. And taken together, these examples "evince a common-law tradition, starting as early as 1811, of providing grand-jury materials to Congress to assist" with those special judicial functions. Pet. App. 14a.

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actions—and also because the Attorney General later provided the Senate with "photostatic copies" of the relevant evidence. *Id.*

[7] DOJ objects that this episode began with a public grand-jury report. Br. 28 n.4. But the significance of the precedent is not the public report that spurred the House to action; it is the Attorney General's willingness to disclose to the House *all* evidence in DOJ's possession, including grand-jury material.

3. An episode that took place in 1945, while proposed Rule 6(e) was pending before Congress, provides further proof of that common-law tradition. A district court ordered "that all transcripts of testimony, together with all the exhibits introduced into evidence before [a] . . . grand jury, be made available to the Committee on Judiciary" for use in the impeachment investigations of two federal judges. *Conduct of Albert W. Johnson and Albert L. Watson, United States District Judges, Middle District of Pennsylvania: Hearing Before Subcomm. of the H. Comm. on the Judiciary*, 79th Cong., pt. 1, at 63 (1945) (*Johnson & Watson Hearings*) (reproducing the court's order). Excerpts of grand-jury testimony were read into the record during those impeachment proceedings. *Id.*, pt. 1, at 84-91; *id.*, pt. 2, at 929-46.

It is highly implausible that Congress, in allowing Rule 6 to take effect, understood itself to be precluding the very type of court-ordered disclosure on which it was actively relying in ongoing impeachment proceedings. And that is especially true because Rule 6(e) was intended to "continue," not disrupt, traditional common-law practice. Fed. R. Crim. P. 6(e) advisory comm. 1944 note.

4. In the decades since Rule 6(e)'s adoption, courts have uniformly concluded that it authorizes the disclosure of grand-jury material for use in impeachment proceedings. The D.C. Circuit, for example, famously authorized the disclosure of the Watergate grand jury's "Roadmap," which featured prominently in the impeachment investigation of President Nixon. *Haldeman v. Sirica*, 501 F.2d 714, 715 (D.C. Cir. 1974) (en banc); *see* Pet. App. 11a-12a.

Just a few years later, Congress reenacted Rule 6(e) in its entirety. Pub. L. No. 95-78, § 2, 91 Stat. 319 (1977). "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons*, 434 U.S. 575, 580 (1978). And that presumption has special force here: The Congress that reenacted Rule 6(e) was surely aware of the D.C. Circuit's recent high-profile decision in *Haldeman* and its own use of the Watergate Roadmap when it readopted Rule 6(e)'s "judicial proceeding" language without modification.

Moreover, the House has sought, and courts have authorized, the disclosure of grand-jury materials in most of the impeachments since Watergate, including the impeachments of President Clinton and three federal judges. Pet. App. 14a-15a. During the same period, Congress has amended Rule 6(e) four times, in 1984, 2001, 2002, and 2004. Fed. R. Crim. P. adv. comm. note. This Court has amended Rule 6(e) on five other occasions, in 1979, 1983, 1985, 2002, and 2006. *Id.* Many of those amendments made fine-grained adjustments to Rule 6(e)'s secrecy provisions, demonstrating that Congress and the Advisory Committee are attuned to the workings of the rule. Yet all of the amendments left the provision authorizing disclosure in connection with a "judicial proceeding" untouched, further confirming that the courts' uniform interpretation of that provision as encompassing impeachment trials is correct.

D. A plain-meaning interpretation of "judicial proceeding" is compelled by the canon of constitutional avoidance.

If there were any remaining doubt about the best interpretation of "judicial proceeding," it would be extinguished by the canon of constitutional avoidance. This Court has long emphasized that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided," the Court's "duty is to adopt the latter." *United States v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909); *see Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988). The Court applies the same canon in construing the Federal Rules of Criminal Procedure. *See, e.g.*, *United States v. Smith*, 331 U.S. 469, 475 (1947).

The application of that venerable principle here is straightforward: Rule 6(e) would violate the Constitution if it categorically precluded the House from reviewing grand-jury materials in exercising its impeachment power. DOJ ignores that fatal problem with its new interpretation. Instead, it asserts that *allowing* the House and Senate to seek grand-jury material under Section 6(e) infringes on their impeachment powers. But there is no merit to DOJ's attempt to invoke Congress's own constitutional responsibilities to deny it the very evidence necessary to fulfill them.

1. Precluding the House from accessing grand-jury material would violate the Constitution.

The Constitution vests the House with "the sole Power of Impeachment." U.S. Const., art. I, § 2, cl. 5. As with the exercise of its legislative authority, the House cannot carry out its impeachment function "wisely or effectively in the absence of information" about the conduct at issue. *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927); *see Quinn v. United States*, 349 U.S. 155, 160-61 (1955). History, too, confirms that "[t]he power to impeach includes a power to investigate and demand documents." *Mazars*, 140 S. Ct. at 2046 (Thomas, J., dissenting). Indeed, "the founding generation repeatedly referred to impeachment as an 'inquest.'" *Id.* (citation omitted); *see, e.g.*, *The Federalist No. 65*, at 397 (Alexander Hamilton) ("a method of NATIONAL INQUEST into the conduct of public men").

Completely denying the House grand-jury material necessary to an impeachment investigation would trample on this crucial constitutional function. As John Quincy Adams put it, "what mockery would it be for the Constitution of the United States to say that the House should have the power of impeachment," but "not the power to obtain the evidence and proofs on which their impeachment was based." Cong. Globe, 27th Cong., 2d Sess. 580 (1842).

Treating grand-jury material as off-limits would also violate separation-of-powers principles, which require that "a branch not impair another in the performance of its constitutional duties." *Clinton v. Jones*, 520 U.S. 681, 701 (1997) (citation omitted). Impeachment is "an essential check" on "the encroach-

ments of the executive." *The Federalist No. 66*, at 402 (Alexander Hamilton). Yet DOJ's interpretation of Rule 6(e) could allow the Executive Branch to effectively "wall off any evidence of presidential misconduct from the House by placing that evidence before the grand jury." Pet. App. 139a.

Whatever the limits on the House's authority to demand evidence for an impeachment, they cannot plausibly include a categorical exclusion of grand-jury material—a result that would put the House in a worse position than state, local, tribal, and foreign governments, as well as private litigants seeking grand-jury material for ordinary civil cases. In the Watergate litigation, DOJ itself rightly dismissed even the suggestion of such a result as "fatuous." C.A. App. 258.

2. *Adhering to the plain meaning of "judicial proceeding" creates no constitutional difficulty.*

DOJ ignores the grave separation-of-powers problems its interpretation would produce. Instead, DOJ asserts that *allowing* the House to seek grand-jury material under Rule 6(e) creates constitutional difficulties. It does not. And to the extent that DOJ veers into a thinly veiled effort to relitigate the lower courts' application of the *Douglas Oil* standard to the facts of this case, its arguments are both procedurally improper and wrong.

1. DOJ first observes that Rule 6(e)(3)(E) allows a district court to authorize disclosure "at a time, in a manner, and subject to any other conditions that it directs." Br. 33 (quoting Fed. Rule Crim. P. 6(e)(3)(E)). DOJ notes that, under the Speech or Debate Clause,

a district court would likely be unable to enforce some conditions on the disclosure of grand-jury material to the House. *Id.* at 34. It could not, for example, hold a Member of Congress in contempt for revealing that material in a Committee meeting or on the House floor. *Cf. Gravel v. United States*, 408 U.S. 606, 615-16 (1972). But nothing about that result creates tension between Rule 6 and the Constitution.

Under Rule 6(e)(3)(E) as currently written, a court authorizing disclosure of grand-jury material for use in an impeachment investigation retains authority to determine the "time" and "manner" of disclosure, as the district court did here. For example, a court could order that grand-jury material be produced for *in camera* inspection by Members and their staff on the court's premises.

The Speech or Debate Clause might prevent a court from imposing (or at least enforcing) other conditions. But there is no anomaly in authorizing disclosure in a context where district courts would have limited authority to enforce certain conditions. Rule 6(e)(3)(E)(iii) authorizes courts to disclose grand-jury material to "a foreign court or prosecutor." A court's ability to enforce conditions on such a disclosure is likely to be subject to severe legal and practical limitations.

Nor is there anything unusual about requiring a court to comply with the Constitution when exercising its discretion under a general provision like Rule 6(e)(3)(E). A court obviously could not, for example, invoke Rule 6(e)(3)(E) to impose conditions that violated a criminal defendant's due process rights. *Cf. Dennis v. United States*, 384 U.S. 855, 870-75 (1966). Nor could it condition disclosure in a manner that

invaded the Executive Branch's Article II powers. The existence of such constitutional constraints does not, as DOJ presumes, trigger the canon of constitutional avoidance. Br. 35. It simply means that the authority conferred by Rule 6(e)(3)(E)—like that given by countless other broadly worded provisions—must be exercised in a manner consistent with the Constitution.

Finally, DOJ goes astray when it suggests that authorizing disclosure of grand-jury material to the House without ongoing judicial control "would be an invitation for abuse." Br. 35. That is a policy argument, not a constitutional concern. And it is a bad policy argument at that. As the court of appeals emphasized, the House has preserved the confidentiality of the Watergate Roadmap for nearly half a century. Pet. App. 21a-22a. Nor does DOJ cite any instance of Congress mishandling the grand-jury material it has received in other impeachments over the years. In fact, DOJ offers no basis for impugning the responsibility or integrity of a coordinate branch of government. And to the extent DOJ relies on the mere theoretical possibility of abuse, the same could be said of the provisions of Rule 6 authorizing the disclosure of grand-jury material to Executive Branch officials other than the prosecutors handling the matter before the grand jury. *See, e.g.*, Fed. R. Crim. P. 6(e)(3)(D).

2. DOJ also asserts that allowing the House to seek grand-jury material under Rule 6(e) would invade the prerogatives of the House and Senate by requiring courts to determine the likelihood that the House would vote to impeach and to scrutinize the particular theories the House intends to pursue.

Br. 38. Experience shows otherwise. Courts considering the House's requests for grand-jury material have been sensitive to the constitutional issues and have taken care to avoid impeding the House's sole power of impeachment or the Senate's sole power to try impeachments. In the case involving Judge Hastings, for example, the Eleventh Circuit avoided "the area reserved to the House by the Constitution" by refraining from any "expression of the propriety or impropriety of an impeachment." *In re Request for Access to Grand Jury Materials Grand Jury No. 81-1*, 833 F.2d 1438, 1446 (11th Cir. 1987). Here, too, the lower courts refrained from "second-guess[ing] the manner in which the House plans to proceed with its impeachment investigation." Pet. App. 26a.

DOJ appears to concede that the separation-of-powers problems it posits have never arisen. But it asserts that the lower courts have avoided those problems only by failing to hold the House's applications to a sufficiently stringent version of *Douglas Oil's* "particularized need" standard. Br. 36-42. There are three problems with that argument.

First, it is not a constitutional-avoidance argument at all. DOJ does not suggest that applying Rule 6(e)(3)(E)(i) in the context of an impeachment would create any doubt about the constitutionality of any provision of Rule 6. Instead, it asserts only that application of the *Douglas Oil* standard would need to account for the special considerations that apply in the impeachment context. But the *Douglas Oil* standard is not the text of the rule; it is a judge-made guide for the exercise of the broad discretion the rule confers. The need to adjust such a guide to accom-

modate constitutional concerns is no reason to depart from the plain meaning of Rule 6.

Second, this Court has emphasized that the *Douglas Oil* standard *already* includes the necessary flexibility. It is "highly flexible" and "adaptable to different circumstances." *Sells Eng'g*, 463 U.S. at 445. "[T]he standard itself" thus "accommodates any relevant considerations, peculiar to government movants, that weigh for or against disclosure in a given case." *Id.*; *see Illinois v. Abbott & Assocs.*, 460 U.S. 557, 568 n.15 (1983). It gives courts ample room to recognize the differences between a House request for grand-jury material in an impeachment investigation and an application from a private civil litigant.

Third, DOJ's argument rests on a distortion of the *Douglas Oil* standard. DOJ does not cite the Court's most recent and most detailed application of the *Douglas Oil* standard, *United States v. John Doe, Inc. I*, 481 U.S. 102 (1987). The omission is telling, because *Doe* refutes DOJ's assertion that *Douglas Oil* requires courts to undertake intrusive inquiries into the likelihood of an impeachment, the merits of the theories the House plans to pursue, or the importance of the evidence sought to those theories.

In *Doe*, a district court authorized DOJ to share grand-jury material with attorneys in the Civil Division and the Southern District of New York so they could consult about a possible civil suit under the False Claims Act. 481 U.S. at 105-06. The purpose of the requested disclosure was "to make a decision on whether to proceed with a civil action." *Id.* at 113. The court placed *no* restrictions on which

grand-jury materials DOJ could disclose for that purpose. *Id.* at 105-06.

DOJ argued that the sweeping authorization was "altogether appropriate" because of "the legitimate and limited purpose of [its] disclosure request." U.S. Br. 44, *Doe*, *supra* (No. 85-1613). This Court agreed, emphasizing the flexibility of the *Douglas Oil* standard. *Doe*, 481 U.S. at 112-13. In so doing, the Court did not engage in any of the inquiries that DOJ now insists *Douglas Oil* requires. The Court did not ask, for example, "how firm" the chances of a civil suit had been when the disclosure was sought (Br. 37); the "'contours' of the particular theories" being considered for the civil case (Br. 38); or whether DOJ "truly need[ed]" to share every piece of evidence in the grand-jury record to have effective consultations (Br. 38). There is thus no basis for DOJ's assertion that applying *Douglas Oil* in the impeachment context requires any dilution of the flexible standard that applies in other circumstances.

3. DOJ closes its brief with a direct attack on the lower courts' application of the *Douglas Oil* standard. Br. 41-42. DOJ could have asked this Court to review that fact-bound question, but it did not—presumably because the application of *Douglas Oil* to the particular factual circumstances of this case plainly would not have warranted this Court's review. And having secured a grant of certiorari by asking the Court to review a clean legal question, DOJ should not be permitted to smuggle in another issue that "is not 'fairly included' in the question presented." *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 31 (1993).

In any event, DOJ's arguments are meritless. The set of grand-jury materials at issue here is limited and narrowly tailored to the disclosure of potential impeachable offenses. It consists of the material quoted in, or directly referenced by, the Special Counsel's report. The Special Counsel had been specifically charged with investigating potential Presidential misconduct. Mueller Report, Vol. I at 8. The report concluded that there are "questions" about whether the President "obstructed justice." *Id.*, Vol. II at 1. It was prepared with the expectation that the House would review it and in explicit deference to the House's impeachment power. *Id.* And the district court specifically found, after reviewing an *ex parte* description of some of the material at issue, that the redacted grand-jury material is essential to understanding the Special Counsel's conclusions and determining whether witnesses in the House's own investigation lied. Pet. App. 167a-69a.

II. In the alternative, the district court's order was a permissible exercise of its inherent authority.

In the alternative, the judgment below should be affirmed because the district court's order was a proper exercise of its inherent authority to disclose material to the House for use in impeachment. For all the reasons discussed above, the House *must* have the ability to access grand-jury material to fulfill its constitutional functions. *See supra* pp. 36-37. If the Court determines that the rule does not expressly authorize that disclosure, then courts should be allowed to disclose to the House under their long-standing inherent authority. That conclusion is consistent with the text, context, and history of Rule 6.

Any other result would hamstring the House in the exercise of its impeachment function. And holding that disclosures to the House fall within the courts' inherent authority would also obviate DOJ's constitutional concerns about the application of other provisions of Rule 6 in the context of impeachments (to the extent those concerns have merit at all).

This inherent-authority question is before the Court because the Committee is entitled to "defend its judgment on any ground properly raised below." *Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979); *see* Pet. App. 106a-07a; Comm. C.A. Br. 28 n.1. Ordinarily, this Court might leave this alternative ground for consideration on remand. But that is not a viable option here because the D.C. Circuit recently split with other circuits and held that district courts lack inherent authority to disclose grand-jury material. *McKeever v. Barr*, 920 F.3d 842, 850 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 597 (2020). That circuit precedent would make a remand futile. Accordingly, if the Court disagrees with the D.C. Circuit's interpretation of Rule 6(e), it should affirm on the alternative ground that the district court's order was a valid exercise of its inherent authority.

1. Rule 6(e) "codifies" the traditional common-law rule of grand-jury secrecy. *Sells Eng'g*, 463 U.S. at 425; *Douglas Oil*, 441 U.S. at 218 n.9. Indeed, when Rule 6(e) was promulgated, the Advisory Committee explained that the "rule continues the traditional practice of secrecy on the part of members of the grand jury, except when the court permits a disclosure." Fed. R. Crim. P. 6(e) advisory comm. 1944 note (citing several cases in which courts exercised inherent authority to disclose grand-jury

material). The rule is thus "but declaratory of" the longstanding principle that "disclosure [is] committed to the discretion of the trial judge." *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 399 (1959). It does not abrogate that power in circumstances not addressed by the rule.

A court's inherent supervisory authority over a grand jury has long included the power to release sealed grand-jury materials, which "rests in the sound discretion of the [district] court." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 233 (1940); *cf. Pittsburgh Plate Glass*, 360 U.S. at 399 ("[T]he federal trial courts as well as the Courts of Appeals have been nearly unanimous in regarding disclosure as committed to the discretion of the trial judge."). Before the adoption of Rule 6(e), it was commonly recognized that district courts' release of grand-jury materials "is wholly proper when the ends of justice require it." *Socony-Vacuum Oil*, 310 U.S. at 234. And as explained above, that common-law authority included the authority to disclose grand-jury material to the House and Senate for use in impeachments and investigations of the conduct of their Members. *See, e.g.*, *Johnson & Watson Hearings* at 63; *see also supra* pp. 29-33 (discussing additional examples).

2. Rules of procedure ordinarily do not displace courts' traditional inherent authority on issues that the rules do not expressly address. Although the Federal Rules "set out many of the specific powers of a federal district court," they "are not all encompassing." *Dietz v. Bouldin*, 136 S. Ct. 1885, 1891 (2016). When a rule addresses some matters over which courts historically exercised inherent authority but not other, related matters, "the inherent power must

continue to exist to fill in the interstices." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 47 (1991); *see* Fed. R. Crim. P. 57(b) ("[W]hen there is no controlling law . . . [a] judge may regulate practice in any manner consistent with federal law, these rules, and local rules of the district."). For that reason, this Court does "'not lightly assume that Congress has intended to depart from established principles' such as the scope of a court's inherent power." *Chambers*, 501 U.S. at 47 (citation omitted). Instead, a rule abrogates courts' inherent authority only if it contains a "clear[] expression of purpose" to do so, *Link v. Wabash R. Co.*, 370 U.S. 626, 631-32 (1962), or when it conflicts with a court's exercise of that power, *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254 (1988).

3. If this Court determined that Rule 6(e)'s judicial-proceeding exception does not authorize the disclosure of grand-jury materials in impeachment investigations, the rule would not eliminate the district courts' inherent authority to make such disclosures. Although Rule 6(e) governs disclosure in the circumstances it specifically addresses, it neither contains a clear expression of an intent to abrogate district courts' inherent authority to disclose material in impeachments nor conflicts with district courts' exercise of such power.

Rule 6(e)'s text, which imposes a secrecy requirement on certain persons privy to grand-jury proceedings, does not prohibit district courts from disclosing grand-jury materials. Specifically, Rule 6(e)(2)(A) provides that "[n]o obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B)." Rule 6(e)(2)(B), in turn, states, "[u]nless these rules provide otherwise, the following

persons must not disclose a matter occurring before the grand jury." It then enumerates seven categories of persons who must keep grand-jury matters secret—including grand jurors, court reporters, and attorneys for the government. *Id.* District courts do not appear on that list. Accordingly, Rule 6(e) by its terms does not impose an obligation of secrecy on them. *Cf. Sells Eng'g, Inc.*, 463 U.S. at 425 (noting that grand-jury witnesses are not forbidden from disclosing grand-jury information because they do not appear in the list of enumerated persons in Rule 6(e)(2)).

A different provision of Rule 6—paragraph (e)(3)(E)—lists several scenarios in which a district court "may authorize disclosure." But that provision contains no language displacing courts' traditional discretion to disclose grand-jury information for impeachment investigations. Rather, it provides specific guidance for the most common instances in which the need for grand-jury material may arise. Indeed, as this Court has noted, since its adoption, Rule 6(e) has been updated from time to time in "recognition of the occasional need for litigants to have access to grand jury transcripts," *Douglas Oil*, 441 U.S. at 220, and in response to courts' continuing exercise of inherent authority to disclose such material in circumstances not previously addressed by the rule.

4. Reading Rule 6(e) to supplement, rather than displace, district courts' inherent authority accords with a recent express interpretation by the Advisory Committee, as well as the context in which the rule was adopted and reenacted.

When interpreting the Federal Rules, this Court has long recognized that "the construction given by

the [Advisory] Committee is 'of weight.'" *Schiavone v. Fortune*, 477 U.S. 21, 31 (1986) (quoting *Mississippi Pub. Corp. v. Murphree*, 326 U.S. 438, 444 (1946)). Here, the Advisory Committee recently confirmed that Rule 6(e) is not meant to eliminate district courts' inherent authority to disclose grand-jury materials in circumstances outside of the enumerated provisions of Rule 6(e)(3)(E). In 2011, DOJ proposed an amendment to Rule 6(e) that would have made express the authority of the courts to disclose certain historically significant grand-jury information. But the Advisory Committee rejected the amendment as unnecessary. The Committee explained that "[d]iscussion among the full Committee revealed consensus that, in the rare cases where disclosure of historically significant materials had been sought, district judges had reasonably resolved applications by reference to their inherent authority." Advisory Comm. on Crim. Rules, Minutes 7 (Apr. 2012), https://perma.cc/3WCA-TLBY.

Moreover, Congress reenacted Rule 6(e) in 1977, after district courts' inherent authority to disclose grand-jury material was already well entrenched. Because "Congress is understood to legislate against a background of common-law adjudicatory principles," *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991), there is no reason to think that Congress was eliminating this authority sub silentio, *see Link*, 370 U.S. at 631-32.

Given the House's established practice of obtaining grand-jury material for impeachment purposes, there is even less reason to believe that Congress intended to eliminate all means by which it could do so. Indeed, such an inference is extremely

difficult to credit. Just three years earlier, a district court had released grand-jury information to the House for use in its impeachment inquiry regarding President Nixon. *See supra* pp. 33-34. As shown above, Rule 6(e)(3)(E)(i) expressly authorizes such disclosures as preliminary to a judicial proceeding. But even if the rule did not contain such an express authorization, it is highly unlikely that Congress would have foreclosed *every* avenue for obtaining such information by also eliminating courts' inherent authority to release it. And, given the prominence of the events leading to President Nixon's resignation, it is even less probable that Congress would have done so without even mentioning it.

CONCLUSION

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

Respectfully submitted,

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