No. 19A1035

IN THE SUPREME COURT OF THE UNITED STATES

DEPARTMENT OF JUSTICE, APPLICANT

v.

HOUSE COMMITTEE ON THE JUDICIARY

REPLY IN SUPPORT OF APPLICATION FOR A STAY

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As the government has explained, the ordinary meaning and context of the phrase "judicial proceeding" in Federal Rule of Criminal Procedure Rule 6(e)(3)(E)(i) includes only a proceeding before a court -- not an impeachment trial before a legislative body. Respondent barely addresses that text, and instead argues (Opp. 14-15) that the Senate exercises some sort of judicial power in an impeachment trial. Working backward, respondent concludes (Opp. 16) that "judicial proceeding" in the Rule must encompass "all proceedings of a judicial nature." That ill-defined and sweeping conception has no limiting principle; it would encompass not just impeachments before a legislative body, but also proceedings such as formal rulemaking hearings before an agency, commercial arbitration, and union grievances, all of which also could be described in the same sense as partaking "of a judicial nature." And to the extent respondent relies (Opp. 19) on "nearly 50 years of case law," that case law is not from this Court, which

has expressly acknowledged that it has yet to address whether "judicial proceeding" includes anything "other than garden-variety civil actions or criminal prosecutions." United States v. Baggot, 463 U.S. 476, 479 n.2 (1983).

Nor has respondent adequately addressed the serious constitutional problems with its expansive definition of "judicial proceeding." Respondent appears to concede (Opp. 20-25) the existence of those problems, and defends the court of appeals' purported solution -- a novel impeachment-specific disclosure regime -- as an example of Rule 6(e)'s "flexibility." See Opp. 20-25. Respondent's preferred definition would require not just flexibility, but a near-rewriting of the Rule: the provision allowing courts to set time, manner, and other conditions on disclosure would be rendered wholly inapplicable to congressional requests for grand-jury information, and the ordinary standard an applicant must satisfy to demonstrate a particularized need for the requested information would be lowered to a virtual rubber stamp. Nothing in the Rule's text or history supports that result.

Given all that, the government's application does not raise a mere request for "error correction" (Opp. 13), but rather an important question that warrants this Court's review. And as the government has explained, it will suffer irreparable harm absent a stay because once the requested grand-jury records here are disclosed to respondent, their secrecy will irrevocably be lifted.

Contrary to respondent's assertion (Opp. 27), that is not merely an "abstract" interest; it is a concrete interest in maintaining the confidentiality of these grand-jury records unless Rule 6(e) expressly authorizes a breach of their secrecy. To the extent respondent relies (Opp. 26) on its own "confidentiality protocols" to protect that secrecy, it concedes that it retains full control to modify or even eliminate those protocols by "further vote" of the committee itself. And respondent's suggestion (Opp. 29) that a stay would harm the public interest is misguided. Not only does the public have an interest in protecting grand-jury secrecy, but respondent has provided no basis to conclude that it has urgent need of the requested materials for a hypothetical second impeachment.

I. THERE IS A REASONABLE PROBABILITY THAT THIS COURT WILL GRANT CERTIORARI

Respondent does not dispute that the issue here presents an "important question of federal law." Sup. Ct. R. 10(c); cf. Baggot, 463 U.S. at 479 n.2. Instead, respondent argues (Opp. 10-11) that further review is not reasonably probable because this case does not implicate a circuit conflict, and the issue arises only rarely. But those factors do not lessen the need for this Court's review when, as here, the court of appeals' decision is in tension with this Court's precedents and raises substantial separation-of-powers concerns. E.g., Trump v. Mazars USA, LLP, No. 19-715 (cert. granted Dec. 13, 2019).

II. THERE IS AT LEAST A FAIR PROSPECT THAT THE COURT WILL REVERSE THE DECISION BELOW

A. Respondent barely addresses the text of Rule 6(e), and does not seriously deny that the ordinary meaning of "judicial proceeding" is a proceeding before a court, not a legislative body. Nor does it address the consistent usage of "judicial proceeding" elsewhere in the Federal Rules of Criminal Procedure, including in Rule 53, to mean a proceeding in court. And although respondent attempts to argue (Opp. 18) that the other uses of "judicial proceeding" in Rule 6(e) could be stretched to apply to an impeachment proceeding before a legislative body, even the court of appeals did not adopt those arguments, instead acknowledging that "Rule 6(e)'s other references" to the term "contemplate a judicial court," Stay Application Appendix (App.) 13a.

Respondent nevertheless defends its definition of "judicial proceeding" as including a Senate impeachment trial by referring to the Constitution and Federalist Papers. See Opp. 14-15. Even if everything respondent asserted were true, however, it would have no bearing on the meaning of "judicial proceeding" as that term is used in the Federal Rules of Criminal Procedure, either when the relevant text of Rule 6(e) was promulgated in 1946 or when it was reenacted in 1977. Moreover, respondent draws the wrong lessons from its constitutional sources. Respondent emphasizes (Opp. 14) the Constitution's use of "try" and "Judgment" and "convicted" to describe impeachment proceedings; but this

Court already has rejected the contention that a Senate impeachment trial "must be in the nature of a judicial trial." Nixon v. United States, 506 U.S. 224, 229 (1993). Likewise, respondent invokes (Opp. 14) Article III's provision that "[t]he Trial of all Crimes, except in Cases of Impeachment; shall be by Jury," U.S. Const. Art. III, § 2, Cl. 3; but the reason for that exception is precisely because "Cases of Impeachment" are not constitutionally within "[t]he judicial Power" vested in federal courts, Art. III, § 1.

Respondent's reliance (Opp. 15) on a supposed "[h]istory" of disclosure to Congress is misplaced. As the government has explained (Stay Appl. 23-24), the historical examples predating Rule 6(e)'s enactment either did not involve impeachments or did not involve court orders to disclose secret grand-jury records. For example, respondent cites (Opp. 15-16) an 1811 incident in which "a grand jury in Mississippi forwarded to the House its presentment of charges against a federal judge for use in an impeachment investigation." But as Judge Rao observed, that 1811 incident "did not involve compulsory process, judicial involvement of any sort, or even secret grand jury materials." App. 52a n.9. Respondent continues to parrot that history without attempting to explain its supposed relevance to the Rule's meaning.

Respondent's contention (Opp. 16) that "judicial proceeding" within the meaning of Rule 6(e) "encompasses all proceedings of a judicial nature" also lacks any limiting principle. Many non-

judicial proceedings could be said to partake of a "judicial nature," such as formal rulemaking hearings under the Administrative Procedure Act, 5 U.S.C. 553 and 556, or commercial arbitration, cf. 9 U.S.C. 4, or even union grievances, cf. 29 U.S.C. 185. Respondent does not explain why its reading of "judicial proceeding" would encompass impeachment trials but not those other types of proceedings.

Respondent defends its capacious reading by relying on "lower courts" that have purportedly "long given the term 'judicial proceeding' a 'broad interpretation.'" Opp. 16 (citation omitted). Even assuming that is true, this Court has invoked precisely the opposite interpretive principle, making clear that courts should not authorize release of grand-jury materials "[i]n the absence of a clear indication in a statute or Rule * * * that a breach of [grand-jury] secrecy has been authorized." United States v. Sells Engineering, Inc., 463 U.S. 418, 425 (1983). Respondent does not identify any "clear indication" in Rule 6(e) or elsewhere that a Senate impeachment trial is a "judicial proceeding" for purposes of breaching grand jury secrecy.

Respondent cites lower-court decisions upholding the disclosure of grand-jury matters in connection with bar disciplinary proceedings, police disciplinary proceedings, and tax court proceedings. See Opp. 16. This Court, of course, has not endorsed those cases. See Baggot, 463 U.S. at 479 n.2. And in

any event they do not support respondent's position here. A bar disciplinary proceeding is a proceeding in court, and so would qualify as a "judicial proceeding" under any definition of the term. See United States v. Bates, 627 F.2d 349, 351 (D.C. Cir. 1980) (per curiam) ("[D]isciplinary proceedings of lawyers, where bar committees act as an arm of the court, are a function which has been assigned to the judiciary from time immemorial."). Likewise, a tax court proceeding is a proceeding in an entity that Congress -- which enacted the relevant text of Rule 6(e) -- expressly designated a "court," 26 U.S.C. 7441; that is constitutionally treated as a court for some purposes, see Freytag v. Commissioner of Internal Revenue, 501 U.S. 868, 890 (1991); and whose decisions are subject to judicial review by an Article III court, 26 U.S.C. 7482(a)(1). None of those is true of the Senate or an impeachment trial in that chamber.

As for a police disciplinary hearing, courts have authorized disclosure of grand-jury matters with respect to such judicially reviewable administrative proceedings on the ground that they are preliminary to an eventual judicial proceeding -- not because they are judicial proceedings in their own right. See Special Feb. 1971 Grand Jury v. Conlisk, 490 F.2d 894, 897 (7th Cir. 1973) ("The statutory scheme involved here plainly contemplates judicial review of the board's findings, and we must therefore conclude * * * that the police board hearing is 'preliminary' to judicial

review."); see also Bradley v. Fairfax, 634 F.2d 1126, 1129 (8th Cir. 1980) (observing that "revocation hearings are not judicial proceedings" and so "disclosure under Rule 6(e)(3)[] can only rest on the attenuated reasoning that a parole revocation hearing is 'preliminary to' a judicial proceeding"). A Senate impeachment proceeding obviously is not preliminary to an eventual court proceeding. See Nixon, 506 U.S. at 235.

Finally, respondent incorrectly asserts (Opp. 16) that the "structure of Rule 6(e)" supports its capacious understanding of the judicial-proceeding exception to grand-jury secrecy because "[t]he other exceptions in Rule 6(e) permit disclosure of grand-jury material in circumstances comparable to this one." That the Rule enumerates in precise detail the exceptions to grand-jury secrecy -- but does not include impeachment among those exceptions -- is in fact a strong indication that courts may not authorize a breach of secrecy in connection with impeachment, no matter how "comparable" it might be to the other exceptions. See Illinois v. Abbott & Associates, Inc., 460 U.S. 557, 572-573 (1983) (although Congress "has the power to modify the rule of secrecy," that "rule is so important, and so deeply rooted in our traditions, that we will not infer that Congress has exercised such a power without affirmatively expressing its intent to do so").

Moreover, those other exceptions are not "comparable" to impeachment. Opp. 16. Respondent observes that they involve

situations in which "government officials seek the material for use in connection with their official duties." Opp. 16-17. But those other "officials" are uniformly and exclusively prosecutors and others whose official duties involve criminal law enforcement, or their designees in limited circumstances. See Fed. R. Crim. P. 6(e)(3)(A), (D), and (E). That the Rule contains a comprehensive list of permissible disclosures to executive officials with law enforcement responsibilities -- without any mention of Congress or legislative officials -- is compelling evidence that Rule 6(e) does not envision disclosures for use in congressional proceedings. See Abbott & Associates, 460 U.S. at 572-573.

B. Respondent also has no answer to the objection that its reading of Rule 6(e) creates substantial constitutional difficulties that can be avoided, if at all, only by adopting an impeachment-specific disclosure regime with no basis in the Rule's text or this Court's precedents. See Stay Appl. 24-32. The Rule states that when a district court authorizes disclosure of grand-jury matters, it generally does so "at a time, in a manner, and subject to any other conditions that it directs." Fed. R. Crim. P. 6(e)(3)(E). And this Court has held that a party asking a court to authorize disclosure of grand-jury matters must demonstrate a "particularized need" for the requested materials. United States v. Procter & Gamble Co., 356 U.S. 677, 683 (1958); see Abbott & Associates, 460 U.S. at 567 & n.14; Douglas Oil Co. v. Petrol Stops

Northwest, 441 U.S. 211, 222-223 (1979). Respondent does not explain how a court could, consistent with constitutional separation of powers, impose those time and manner restrictions on a House committee's use of secret grand-jury matters or engage in the searching review ordinarily required to assess an applicant's particularized need in the context of an impeachment.

Indeed, respondent does not dispute that the explicit time and manner provision in Rule 6(e) would be "invalid as applied to" its request here. Opp. 25. Instead, it says only that "[r]ecognizing that a rule must be applied consistent with the Constitution does not mean that the rule itself is unconstitutional." Ibid. That is a non sequitur. The government has never asserted that Rule 6(e) itself is unconstitutional. Rather, the government's contention -- which respondent has never disputed -- is that to be consistent with the constitutional separation of powers, respondent's reading of Rule 6(e) would require creating an atextual impeachment-specific exception to the express time-and-manner provision of the Rule. That necessary consequence of respondent's reading of the Rule strongly suggests that it is incorrect under usual interpretive principles. See Jennings v. Rodriguez, 138 S. Ct. 830, 842 (2018).

Likewise, respondent does not seriously dispute that the particularized-need standard ordinarily requires a searching inquiry, or that such an inquiry in the context of impeachment

would raise serious separation-of-powers concerns. See Opp. 22-25. Instead, respondent incorrectly relies on this Court's statement in Sells Engineering "that the particularized-need standard is 'highly flexible' and 'adaptable to different circumstances.'" Opp. 22 (citation omitted). As a threshold matter, that statement was made in support of the Court's observation that the standard for disclosure under Rule 6(e) "accommodates any relevant considerations, peculiar to Government movants," including that "disclosure to Justice Department attorneys poses less risk of further leakage or improper use." Sells Engineering, 463 U.S. at 445. That factor points against disclosure here, because unlike Justice Department attorneys, respondent -- the House Judiciary Committee -- is not bound by the confidentiality requirements of Rule 6(e), and may publicly disclose the grand-jury materials if it wishes by a simple majority vote of the committee. See Stay Appl. 33-34.

More important, the purported flexibility of a standard cannot include lowering the standard to virtual nonexistence. As the government has explained (Stay Appl. 30-31), in recognition of the constitutional difficulties that would arise were the judiciary to "micromanag[e]" the House's impeachment investigation as part of the particularized-need inquiry, Opp. 23 (citation omitted), the court of appeals held that a district court should "hand off all relevant materials" to a congressional committee to

"avoid[] the potentially problematic second-guessing of Congress's need for evidence that is relevant to its impeachment inquiry." App. 18a-19a. That lowering of the particularized-need standard has no basis in this Court's precedents. Quite the contrary: this Court has expressly rejected a mere "relevance" standard for breaching grand-jury secrecy. Sells Engineering, 463 U.S. at 443-444; Abbott & Associates, 460 U.S. at 568.

Respondent does not dispute that the "relevance" standard contravenes this Court's precedents. Instead, respondent contends that the court of appeals did not actually "apply a 'mere "relevance" standard.'" Opp. 23 (citation omitted). In support of that mistaken contention, respondent observes that the district court has not yet authorized disclosure of "underlying grand-jury testimony and exhibits that relate to certain individuals and events described in the Mueller Report." Opp. 24. That the court of appeals did not have occasion to endorse an even lower standard for disclosure ("relat[ion] to certain individuals and events") does not disprove that it endorsed the "relevance" standard -- as its opinion expressly admits to doing. See App. 18a-19a. If anything, the lower courts seem poised to endorse even the lower "relate to" standard. See App. 150a (district court order inviting respondent "to file further requests" for the "additional grand jury information requested in the initial application"). Indeed, that the lower courts watered down the particularized-need

standard is best exemplified by their having authorized disclosure on the ground that "if the grand jury materials reveal new evidence of impeachable offenses," they would become relevant to hypothetical "new articles of impeachment." App. 16a (emphasis added). That circular reasoning would be true in every case, and would amount to "a virtual rubber stamp." Sells Engineering, 463 U.S. at 444; see Baggot, 463 U.S. at 480 ("[I]t is not enough to show that some litigation may emerge from the matter in which the material is to be used, or even that litigation is factually likely to emerge.").

III. THERE IS A LIKELIHOOD THAT IRREPARABLE HARM WILL RESULT FROM THE DENIAL OF A STAY, AND THE PUBLIC INTEREST FAVORS A STAY

As the government has explained (Stay Appl. 33-35), the government will suffer irreparable harm absent a stay because once the grand-jury materials have been disclosed, it is impossible to "restore the secrecy that has already been lost." Sells Engineering, 463 U.S. at 422 n.6. Although respondent says that it "has adopted confidentiality protocols to help maintain the secrecy of the materials," it acknowledges that the committee need only take "a further vote" to publicly release those materials if it desires. Opp. 26. And to the extent respondent suggests (Opp. 27) that the government's interest in protecting grand-jury secrecy evaporates once the "grand jury has concluded its work," that suggestion is incorrect and contradicts this Court's many explanations for grand-jury secrecy, including prophylactic ones

that outlive any particular investigation -- such as that "prospective witnesses would be hesitant to come forward voluntarily." Douglas Oil, 441 U.S. at 219. Those concerns are especially salient in high-profile investigations, like that of the special counsel here.

On the other side of the balance, respondent would not be prejudiced by a stay because it has not demonstrated any time-sensitive need for the requested materials. Respondent asserts that it "has made clear the urgency and gravity of its task" "[a]t every stage of this litigation." Opp. 28-29. But the citations provided in support of that assertion (Opp. 29 n.3) are isolated and conclusory statements with no factual basis. And the assertion is belied by subsequent developments: the House already has impeached the President, the Senate already has acquitted him, and neither respondent nor the House has provided any indication that a second impeachment is imminent.

IV. IN ADDITION, THE COURT COULD CONSTRUE THIS APPLICATION AS A PETITION FOR A WRIT OF CERTIORARI

Respondent suggests (Opp. 30-31) that in the alternative, the Court should grant the stay pending the expedited filing and disposition of a petition for a writ of certiorari. Although the government has no objection to expedited petition-stage proceedings, the principal question that the petition would raise -- whether an impeachment trial before a legislative body is a "judicial proceeding" under Rule 6(e)(3)(E)(i) -- has been

discussed at length in the briefing on this stay application. Accordingly, this Court could grant the stay, construe this stay application as a petition for a writ of certiorari, grant the petition, and set the case for argument at the earliest opportunity. E.g., Trump v. Deutsche Bank AG, 140 S. Ct. 660 (2019) (Nos. 19A640 and 19-760) (adopting that course). That would further expedite this case without needless duplicative briefing.

Respectfully submitted.

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