No. 19A-_____

IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES DEPARTMENT OF JUSTICE, APPLICANT

v.

COMMITTEE ON THE JUDICIARY, UNITED STATES HOUSE OF REPRESENTATIVES

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# APPLICATION FOR A STAY PENDING THE FILING AND DISPOSITION OF A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND REQUEST FOR AN ADMINISTRATIVE STAY

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NOEL J. FRANCISCO
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

## PARTIES TO THE PROCEEDING

Applicant is the United States Department of Justice. Respondent is the Committee on the Judiciary of the United States House of Representatives.

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Pursuant to Rule 23 of the Rules of this Court and the All Writs Act, 28 U.S.C. 1651, the Solicitor General, on behalf of applicant United States Department of Justice (DOJ), respectfully applies for a stay of the mandate of the United States Court of Appeals for the District of Columbia Circuit (App., infra, 1a-75a), pending the timely filing and disposition of the government's forthcoming petition for a writ of certiorari and any further proceedings in this Court. The government also respectfully requests an administrative stay while the Court considers this application.*

* Counsel for respondent has informed the government that "the House of Representatives Committee on the Judiciary opposes the application for a stay pending certiorari, and intends to file an opposition. Out of respect for the Court, the Committee does not oppose an administrative stay of seven days, from May 11, 2020."

This case presents a straightforward legal question: whether a Senate impeachment trial is a "judicial proceeding" under Rule 6(e)(3)(E)(i) of the Federal Rules of Criminal Procedure, such that a district court may authorize a breach of grand-jury secrecy in connection with an impeachment. See Fed. R. Crim. P. 6(e)(3)(E)(i) ("The court may authorize disclosure * * * of a grand-jury matter: (i) preliminarily to or in connection with a judicial proceeding."). The court of appeals answered yes, and thus affirmed the district court's order to disclose to respondent, in connection with a Senate impeachment trial of the President, all portions of special counsel Robert S. Mueller, III's report on possible Russian interference in the 2016 election that were redacted to protect secret grand-jury matters, along with the underlying grand-jury transcripts and exhibits. Absent a stay of the court's mandate, the government will have to disclose those materials on May 11, 2020, which would irrevocably lift their secrecy and possibly frustrate the government's ability to seek further review.

As this Court long has recognized, "the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings." Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 218 (1979). Absent assurances of secrecy, "many prospective witnesses would be hesitant to come forward voluntarily," and those who do come forward "would be less likely to testify fully and

frankly." Id. at 219. For those and other reasons, this Court has explained that lower 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).

In authorizing a breach of grand-jury secrecy here, the court of appeals relied on the exception in Rule 6(e)(3)(E)(i) that allows courts to authorize disclosure "preliminarily to or in connection with a judicial proceeding." But that provision is not a "clear indication" that grand-jury secrecy may be breached preliminarily to or in connection with an impeachment proceeding. The ordinary meaning of "judicial proceeding" is a proceeding before a court -- not an impeachment trial before elected legislators. The court of appeals' interpretation defies that ordinary meaning, and creates needless contradictions with the other instances of "judicial proceeding" in Rule 6(e)(3) itself. See Fed. R. Crim. P. 6(e)(3)(F) and (G). The court's expansive definition also is inconsistent with the limited nature of historical exceptions to grand-jury secrecy.

Even worse, the court of appeals' interpretation either creates substantial constitutional difficulties or, to avoid those difficulties, requires rewriting or rendering ineffective other parts of the Rule's operation, with no basis in the Rule's text or

this Court's precedents. For example, the Rule expressly empowers a court to authorize disclosure of grand-jury matters "at a time, in a manner, and subject to any other conditions that it directs." Fed. R. Crim. P. 6(e)(3)(E). Yet a federal court likely could not, consistent with the Speech or Debate Clause, U.S. Const. Art. I, § 6, Cl. 1, impose such conditions on the House or Senate -- much less enforce those conditions by contempt, see Fed. R. Crim. P. 6(e)(7). The court of appeals' solution to that problem was to hold those provisions in Rule 6(e) inapplicable in the context of an impeachment. See App., infra, 21a-22a.

Likewise, the court of appeals' interpretation would create serious constitutional difficulties with the ordinary requirement that a party seeking disclosure of secret grand-jury materials in connection with a judicial proceeding demonstrate a particularized need for the materials. The particularized-need analysis requires a court to assess the "contours of the" legal theory in the judicial proceeding and to weigh the claimed need for the grand-jury information against the strong public interest in grand-jury secrecy. Douglas Oil, 441 U.S. at 229. Yet in the case of a request for such information by a House of Congress or one of its committees in connection with an impeachment trial, that standard would require courts to scrutinize specific legal theories of impeachment and second-guess a coordinate Branch's assessment of materiality, in likely violation of the House's "sole Power of

Impeachment" and the Senate's "sole Power to try all Impeachments," U.S. Const. Art. I, § 2, Cl. 5, and § 3, Cl. 6. Recognizing that problem, the court of appeals fashioned a lower impeachment-specific standard that requires a House of Congress merely to show that the requested materials may be "relevant" to impeachment, see App., infra, 18a-19a -- in contravention of this Court's precedents rejecting a "relevance" standard under Rule 6(e).

Because the court of appeals' interpretation defies the ordinary meaning of the term "judicial proceeding," creates tension with this Court's precedents, and rewrites or sets aside other aspects of the Rule in an attempt to avoid substantial constitutional concerns, there is a reasonable probability that this Court will grant certiorari and a fair prospect that it will reverse the decision below. And absent a stay, the government would suffer irreparable harm -- for it would have to turn over the grand-jury records, thereby irrevocably surrendering their secrecy and possibly frustrating further judicial review of the merits of this dispute. By contrast, respondent has not identified any urgent requirement for the requested materials in connection with an imminent Senate impeachment trial, and so would suffer no prejudice from a stay.

Accordingly, this Court should stay the mandate of the court of appeals pending the timely filing and disposition of the government's petition for a writ of certiorari and any further

proceedings in this Court. In addition, because the court of appeals will issue its mandate on May 11, 2020, this Court should issue an administrative stay while it considers this application. Respondent has indicated that it "does not oppose an administrative stay of seven days, from May 11, 2020." Page 1 n.*, supra.

STATEMENT

1. In May 2017, then-Deputy Attorney General Rod J. Rosenstein appointed Robert S. Mueller, III as special counsel to investigate possible Russian interference in the 2016 presidential election. The special counsel released his report on the investigation in March 2019. Most of the report is public, but it contains some redactions, including to protect grand-jury materials. Under Federal Rule of Criminal Procedure 6(e), any "matter occurring before the grand jury" must be kept secret, except for certain expressly enumerated exceptions in Rule 6(e)(3). Fed. R. Crim. P. 6(e)(2). On the day the redacted Mueller report was made public, DOJ announced that it would "provide the Chairman and Ranking Members of the House and Senate Committees on the Judiciary, the members of the 'Gang of Eight,' and one designated staff person per member" the ability to review the report with only the grand-jury information redacted. C.A. App. 450. DOJ explained that under Rule 6(e), the Attorney General lacks "discretion to disclose grand-jury information to Congress." Id. at 448.

More than four months later, respondent petitioned the district court for "all portions" of the report that were redacted under Rule 6(e), including "any underlying [grand jury] transcripts or exhibits," as part of its impeachment investigation into the President. App., infra, 92a (citation omitted). As relevant here, respondent argued that the district court could authorize disclosure of those grand-jury materials under the exception to grand-jury secrecy in Rule 6(e)(3)(E)(i), which states that a "court may authorize disclosure -- at a time, in a manner, and subject to any other conditions that it directs -- of a grand-jury matter: (i) preliminarily to or in connection with a judicial proceeding." Fed. R. Crim. P. 6(e)(3)(E)(i). Congress directly enacted the language of the "judicial proceeding" exception. See Act of July 30, 1977 (1977 Act), Pub. L. No. 95-78, § 2(a), 91 Stat. 319-320. Respondent argued that a Senate impeachment trial is a "judicial proceeding" within the meaning of the Rule. In the alternative, respondent argued that the district court had inherent authority to release the requested materials, even if none of the exceptions to grand-jury secrecy in Rule 6(e)(3) applied.

2. The district court granted the petition in relevant part. App., infra, 76a-150a. As relevant here, the court explained that under McKeever v. Barr, 920 F.3d 842 (D.C. Cir. 2019), cert. denied, 140 S. Ct. 597 (2020), it lacked inherent

authority to release grand-jury materials outside the enumerated exceptions in Rule 6(e)(3). App., infra, 94a n.14. But the court also observed that in Haldeman v. Sirica, 501 F.2d 714 (D.C. Cir. 1974) (en banc), the court of appeals denied a writ of mandamus seeking to prohibit a district court from authorizing disclosure of grand-jury materials to Congress in connection with the impeachment of President Nixon. App., infra, 113a-115a. Neither the Haldeman district court nor the court of appeals clearly explained the ground for disclosure there. See id. at 114a-115a. In later holding that district courts lacked inherent authority to release grand-jury materials outside the exceptions set forth in Rule 6(e)(3), McKeever distinguished Haldeman on a variety of grounds, including by stating in a footnote that the court "read Haldeman * * * as fitting within the Rule 6 exception for 'judicial proceedings.'" McKeever, 920 F.3d at 847 n.3. The district court here held that under McKeever, Senate impeachment proceedings therefore qualify as "judicial proceedings" within the meaning of Rule 6(e). App., infra, 115a.

The district court further explained that respondent, like any other petitioner seeking disclosure of grand-jury records under one of the court-authorized exceptions in Rule 6(e)(3)(E), would have to demonstrate a "particularized need" for the grand-jury materials. App., infra, 137a. But the court then held that respondent had demonstrated a particularized need for all of the

material in the Mueller report redacted under Rule 6(e), as well as the grand-jury materials underlying those redactions, merely because they were "relevant" to the House's asserted investigation. Id. at 140a, 146a; see id. at 139a-149a.

The district court ordered the government to provide to respondent "all portions of the Mueller Report that were redacted pursuant to Rule 6(e) and any underlying transcripts or exhibits referenced in the portions of the Mueller Report that were redacted pursuant to Rule 6(e)." App., infra, 149a-150a. The court also invited respondent "to file further requests articulating its particularized need for additional grand jury information requested in the initial application." Id. at 150a. The court ordered disclosure within five days of its order. See id. at 149a.

3. The district court denied the government's subsequent motion for a stay of the order pending appeal. See App., infra, 153a-159a. The court of appeals, however, entered an administrative stay of the district court's order, id. at 160a, and later ordered that administrative stay to "remain in place pending further order of the court," id. at 162a.

4. The court of appeals subsequently affirmed. App., infra, 1a-75a.

a. As relevant here, the court of appeals held that impeachment is a "judicial proceeding" under Rule 6(e) based on its previous decisions in McKeever and Haldeman. See App., infra,

10a-12a. The court explained that the McKeever footnote "necessarily interpreted Haldeman to involve an application of Rule 6(e)'s 'judicial proceeding' exception," and the footnote's "interpretation of Haldeman was essential to this court's reasoning in McKeever." Id. at 12a.

Independent of circuit precedent, the court of appeals stated that the "constitutional text confirms that a Senate impeachment trial is a judicial proceeding" and that the Framers "understood impeachment to involve the exercise of judicial power." App., infra, 12a. The court of appeals also relied on a purported "historical practice" of Congress's having "repeatedly obtained grand jury material to investigate allegations of election fraud or misconduct by Members of Congress." Id. at 13a. The court recognized that none of those examples involved court-ordered disclosure in connection with an impeachment, but found them probative of a more general "common-law tradition, starting as early as 1811, of providing grand jury materials to Congress to assist with congressional investigations." Id. at 14a. Finally, the court stated that "[s]ince Rule 6(e) was enacted, federal courts have authorized the disclosure of grand jury materials to the House for use in impeachment investigations involving two presidents and three federal judges." Ibid.

The court of appeals rejected the government's argument that "reading Rule 6(e) to encompass impeachment proceedings would

create separation-of-powers problems" because "the particularized need standard * * * would invite courts to 'pass judgment on the legal sufficiency of a particular impeachment theory.'" App., infra, 15a (brackets and citation omitted). The court dismissed that concern because "in the impeachment context" the particularized-need standard requires only that "the requested grand jury materials [be] relevant to the impeachment investigation." Ibid. The court found that respondent had satisfied that lower "relevance" standard for obtaining the requested materials here. See id. at 15a-26a. The court acknowledged that the House already had impeached the President and the Senate already had tried and acquitted him, but said its conclusion that the materials are relevant to an impeachment inquiry "remains unchanged" because "if the grand jury materials reveal new evidence of impeachable offenses, the Committee may recommend new articles of impeachment." Id. at 16a.

b. Judge Rao dissented. In her view, Rule 6(e)(3)(E) allows a court only to authorize disclosure of grand-jury materials; it does not allow a court to compel disclosure. App., infra, 38a-53a. She then concluded that respondent lacked Article III standing to obtain an order compelling DOJ, which maintains custody of the grand-jury records, to turn over the records. Id. at 53a-75a.

Judge Rao agreed with the panel majority, however, that impeachment is a "judicial proceeding" within the meaning of Rule 6(e) on the ground that impeachment "has always been understood as an exercise of judicial power." App., infra, 34a; see id. at 53a n.10. She also agreed with the panel majority that respondent could show a particularized need for the materials here under a lower and more "flexible" standard applicable to impeachment proceedings. Id. at 35a. Judge Rao nevertheless stated that the case should be remanded "for the district court to address whether authorization [of disclosure] is still warranted," given that the House already had impeached the President and the Senate already had tried and acquitted him. Id. at 36a.

c. In a brief concurring opinion, Judge Griffith expressed his disagreement with the dissent's "distinction between authorization and compulsion." App., infra, 28a.

5. Because the court of appeals' opinion and judgment did not contain a "further order" vacating the administrative stay, App., infra, 162a, that stay will remain in place until the court issues its mandate. On May 1, 2020, the court denied the government's motion to stay its mandate pending the government's forthcoming petition for a writ of certiorari, but directed the clerk "to withhold issuance of the mandate until May 11, 2020, to permit the Department a reasonable time to seek a stay from the Supreme Court." Id. at 163a.

ARGUMENT

The government respectfully requests that this Court grant a stay of the court of appeals' mandate pending the timely filing and disposition of a petition for a writ of certiorari and any further proceedings in this Court. The government also respectfully requests an administrative stay while the Court considers this application. Absent an administrative stay, the court of appeals will issue its mandate on May 11, 2020, which in turn will force the government to turn over the grand-jury materials -- thereby lifting their secrecy and rendering this dispute largely academic. Respondent has indicated that it "does not oppose an administrative stay of seven days, from May 11, 2020." Page 1 n.*, supra.

A stay pending the filing and disposition of a petition for a writ of certiorari is appropriate when there is "(1) 'a reasonable probability' that this Court will grant certiorari, (2) 'a fair prospect' that the Court will then reverse the decision below, and (3) 'a likelihood that irreparable harm will result from the denial of a stay.'" Maryland v. King, 567 U.S. 1301, 1302 (2012) (Roberts, C.J., in chambers) (brackets and citation omitted); see Hollingsworth v. Perry, 558 U.S. 183, 190 (2010) (per curiam). All of those requirements are met here.

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

At least four Justices are likely to conclude that further review is warranted of the question whether "judicial proceeding" in Rule 6(e)(3)(E)(i) includes a Senate impeachment trial. As explained below, that interpretation not only contravenes the ordinary meaning of "judicial proceeding," but would create serious separation-of-powers concerns with ordinary application of the Rule's other provisions to impeachment proceedings. In light of those serious flaws, the court of appeals' interpretation of the Rule presents an "important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c).

Although neither this Court nor another court of appeals has directly addressed whether a "judicial proceeding" includes a Senate impeachment, cf. United States v. Baggot, 463 U.S. 476, 479 n.2 (1983), this Court has described "judicial proceeding" in the Rule as referring to "some identifiable litigation, pending or anticipated," id. at 480 (emphasis added), and has emphasized that "[i]n the absence of a clear indication in a statute or Rule, we must always be reluctant to conclude that a breach of [grand-jury] secrecy has been authorized," United States v. Sells Engineering, Inc., 463 U.S. 418, 425 (1983). The court of appeals' expansive definition of "judicial proceeding" is in serious tension with those statements.

To be sure, setting forth the permissible exceptions to grand-jury secrecy under Rule 6(e) ordinarily is best left to the Criminal Rules Committee, not this Court. But that course is inappropriate when, as here, a court reads an exception into the Rule that either raises substantial separation-of-powers concerns or, to avoid those concerns, requires rewriting or disregarding other aspects of the Rule's text and operation. Under those circumstances, resolution of the issue is more appropriately undertaken by this Court, and not left to the Rules Committee.

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

The court of appeals' holding that "judicial proceeding" in Rule 6(e) includes a Senate impeachment trial contravenes the ordinary definition of that term, requires the term to carry different meanings within Rule 6(e) itself, and is in tension with this Court's precedents and the history of disclosures under the judicial-proceeding exception to grand-jury secrecy. More fundamentally, the court of appeals' interpretation would raise serious separation-of-powers concerns because it would mean that federal courts could impose conditions on Congress's use of grand-jury materials in impeachment trials, enjoin and possibly hold in contempt Members of Congress for violating those conditions, and scrutinize specific legal theories of impeachment to assess Congress's "particularized need" for the materials. That cannot be right, as the court of appeals itself recognized. Yet instead

of abandoning the interpretation of "judicial proceeding" that gives rise to those problems, the court fashioned an impeachment-specific disclosure regime that lacks a basis in the Rule's text or this Court's precedents. There is thus at least a fair prospect that this Court will reverse the court of appeals' decision below.

A. A Senate Impeachment Is Not A "Judicial Proceeding" Under Rule 6(e)

1. As this Court long has recognized, "the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings." Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 218 (1979). Absent assurances of secrecy, "many prospective witnesses would be hesitant to come forward voluntarily," and those who do come forward "would be less likely to testify fully and frankly." Id. at 219. Targets of the proceeding might "try to influence individual grand jurors." Ibid. And "persons who are accused but exonerated by the grand jury" could be "held up to public ridicule." Ibid. "The grand jury as a public institution serving the community might suffer if those testifying today knew that the secrecy of their testimony would be lifted tomorrow." United States v. Procter & Gamble Co., 356 U.S. 677, 682 (1958). "For all of these reasons, courts have been reluctant to lift unnecessarily the veil of secrecy from the grand jury." Douglas Oil, 441 U.S. at 219.

Accordingly, 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." Sells Engineering, 463 U.S. at 425. Rule 6(e), which "codifies the traditional rule of grand jury secrecy," ibid., enumerates five narrow exceptions under which a court may authorize disclosure. The only one at issue here concerns disclosure "preliminarily to or in connection with a judicial proceeding." Fed. R. Crim. P. 6(e)(3)(E)(i). That language, which Congress directly enacted, see 1977 Act § 2(a), 91 Stat. 319-320, largely echoes the text of the original Rule, see Fed. R. Crim. P. 6(e) (1946), which itself "codifie[d] the traditional rule of grand jury secrecy," Sells Engineering, 463 U.S. at 425.

The term "judicial proceeding" in Rule 6(e) means a proceeding taking place before a court. That is -- and always has been -- the ordinary meaning of the term. See Black's Law Dictionary 1398 (10th ed. 2013) ("[a]ny court proceedings; any proceeding initiated to procure an order or decree, whether in law or equity"); Black's Law Dictionary 669 (2d ed. 1910) ("[a] general term for proceedings relating to, practiced in, or proceeding from, a court of justice"). Treating a Senate impeachment trial -- a proceeding before elected legislators -- as a "judicial proceeding" departs from that ordinary meaning.

Other textual indicia in Rule 6(e) confirm that "judicial proceeding" in Rule 6(e)(3)(E)(i) carries its ordinary meaning. The only other uses of "judicial proceeding" in Rule 6(e)(3)

unambiguously refer to proceedings in a court. See Fed. R. Crim. P. 6(e)(3)(F) and (G). Subparagraph (G) states that "[i]f the petition to disclose arises out of a judicial proceeding in another district, the petitioned court must transfer the petition to the other court unless the petitioned court can reasonably determine whether disclosure is proper." Fed. R. Crim. P. 6(e)(3)(G); see Fed. R. Crim. P. 6(e)(3)(E) advisory committee's note (1983 Amendment) (referring to "the federal district court where the judicial proceeding giving rise to the petition is pending" and to "the grand jury court and judicial proceeding court"). And subparagraph (F) states that when a court receives a petition to disclose a grand-jury matter in connection with a judicial proceeding, "the court must afford a reasonable opportunity to appear and be heard to * * * the parties to the judicial proceeding." Fed. R. Crim. P. 6(e)(3)(F)(ii).

As even the court of appeals recognized (App., infra, 13a), those other provisions in Rule 6(e)(3) plainly refer to court proceedings. Indeed, subparagraphs (F) and (G) would make little sense if "judicial proceeding" in those provisions applied to a Senate impeachment trial. It follows that "judicial proceeding" also refers only to a court proceeding in subparagraph (E) as well. See Environmental Defense v. Duke Energy Corp., 549 U.S. 561, 574 (2007) (describing the "natural presumption that identical words used in different parts of the same act are intended to have the

same meaning") (citation omitted). To be sure, as the court of appeals observed (App., infra, 13a), the presumption that a term carries the same meaning throughout a single statute may "break[] down where Congress uses the same [term] in a statute in multiple conflicting ways." Return Mail, Inc. v. United States Postal Service, 139 S. Ct. 1853, 1865 (2019). But giving "judicial proceeding" its ordinary meaning throughout Rule 6(e) does not create any such "conflict[]." Ibid. To the contrary, it is the court of appeals' insistence that "judicial proceeding" carry different meanings within Rule 6(e)(3) that "needlessly produces a contradiction in the statutory text." Shapiro v. McManus, 136 S. Ct. 450, 454 (2015).

Other aspects of the Criminal Rules reinforce the ordinary meaning of the term "judicial proceeding." The only other instance in which that term appears in the Rules of Criminal Procedure indisputably refers to courts. See Fed. R. Crim. P. 53 ("Except as otherwise provided by a statute or these rules, the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom.").

Consistent with the term's ordinary meaning, this Court likewise has described "judicial proceeding" in Rule 6(e)(3) as referring to litigation. In Baggot, supra, the Court held that disclosure of grand-jury materials was "not appropriate for use in

an IRS audit of civil tax liability" under the judicial-proceeding exception in Rule 6(e)(3)(E)(i), in part "because the purpose of the audit is not to prepare for or conduct litigation." 463 U.S. at 480; see ibid. ("the Rule contemplates only uses related fairly directly to some identifiable litigation, pending or anticipated"). Although Baggot did not expressly address the question whether a "judicial proceeding" could include a Senate impeachment trial, see id. at 479 n.2, the Court's reasoning in that case is inconsistent with the court of appeals' decision here. An impeachment trial is not aimed at preparing for or conducting litigation. To the contrary, the Senate's exercise of its "sole Power to try all Impeachments," U.S. Const. Art. I, § 3, Cl. 6, generally is not subject to judicial review at all. Cf. Walter Nixon v. United States, 506 U.S. 224, 235 (1993).

The court of appeals reasoned that "[t]he constitutional text confirms that a Senate impeachment trial is a judicial proceeding" because the Framers "understood impeachment to involve the exercise of judicial power." App., infra, 12a. There is good reason to doubt that view. Cf. U.S. Const. Art. III, § 1 (vesting all of "the judicial Power of the United States" in the courts); Walter Nixon, 506 U.S. at 229 (rejecting the contention that a Senate impeachment trial "must be in the nature of a judicial trial"). Regardless, the question here is not whether a Senate impeachment trial shares features with the exercise of judicial

power as a constitutional matter. Rather, the question is whether a Senate impeachment trial is a "judicial proceeding" as that term is used in the Federal Rules of Criminal Procedure, and in Rule 6(e)(3)(E)(i) in particular. The court thus asked and answered the wrong question.

The court of appeals also mistakenly thought that "judicial proceeding" in Rule 6(e)(3) should be "interpreted broadly." App., infra, 13a. This Court has made clear that exceptions to grand-jury secrecy must be interpreted narrowly, not broadly. In Sells Engineering, for example, this Court held that the authorization in Rule 6(e)(3)(A)(i) for disclosure of grand-jury materials to an "attorney for the Government" does not authorize disclosure to an attorney in DOJ's Civil Division, but instead is limited to "those attorneys who conduct the criminal matters to which the materials pertain." 463 U.S. at 427. The Court explained that its narrow interpretation of the term "attorney for the Government" was warranted because "[i]n the absence of a clear indication in a statute or Rule, we must always be reluctant to conclude that a breach of [grand-jury] secrecy has been authorized." Id. at 425. The court of appeals' expansive reading of "judicial proceeding" in Rule 6(e)(3)(E)(i) contravenes that principle as well.

2. Historical practice confirms that the term "judicial proceeding" in Rule 6(e) carries its ordinary meaning. Before the advent of Rule 6(e), courts authorized the disclosure of secret

grand-jury materials only in relatively limited circumstances, all of which related to ordinary court proceedings. This Court, for example, approved the disclosure of grand-jury testimony to refresh the recollection of witnesses at trial, see United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 233-234 (1940), and courts of appeals recognized their authority to pierce grand-jury secrecy where there was a basis to set aside an indictment because of misconduct before the grand jury, see, e.g., Schmidt v. United States, 115 F.2d 394, 395-396 (6th Cir. 1940); Murdick v. United States, 15 F.2d 965, 968 (8th Cir. 1926), cert. denied, 274 U.S. 752 (1927); Atwell v. United States, 162 F. 97 (4th Cir. 1908). When Rule 6(e) "codifie[d] the traditional rule of grand jury secrecy" in 1946, Sells Engineering, 463 U.S. at 425, it codified those limited exceptions, creating an express authorization for district courts to disclose grand-jury matters "preliminarily to or in connection with a judicial proceeding or * * * at the request of a defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury." Fed. R. Crim. P. 6(e) (1946).

The Advisory Committee notes accompanying the Rule accordingly explained that Rule 6(e) "continues the traditional practice of secrecy on the part of members of the grand jury, except when the court permits a disclosure." Fed. R. Crim. P. 6(e) advisory committee's note (1944 Adoption). The only cases

those notes cite as examples of what the Advisory Committee had in mind involved attempts to lift grand-jury secrecy in connection with proceedings occurring before courts. See ibid. (citing Schmidt, supra; Atwell, supra; and United States v. American Medical Association, 26 F. Supp. 429 (D.D.C. 1939)). That historical practice confirms that the term "judicial proceeding" refers to a proceeding occurring before a court.

The court of appeals' reliance (App., infra, 13a) on a history of Congress's having "obtained grand jury material to investigate allegations of election fraud or misconduct by Members of Congress" was misplaced. As the court itself acknowledged (id. at 14a), nearly all of the examples that predate the enactment of Rule 6(e) did not involve impeachment proceedings. Accordingly, they do not shed light on the question whether the "judicial proceeding" exception to grand-jury secrecy extends to impeachments. And the only pre-Rule example the court of appeals identified as involving an impeachment investigation -- in which the House Judiciary Committee obtained certain grand-jury materials in connection with the possible impeachment of two federal judges in 1945 -- did not involve a "court-ordered disclosure" at all. Id. at 51a (citation omitted).

The court of appeals' reliance (App., infra, 14a) on historical examples postdating the adoption of Rule 6(e) was similarly misplaced. Those examples are of questionable probative

value because in each instance DOJ supported disclosure of the requested materials. The government has reconsidered that position, however, in light of the plain text of Rule 6(e) and the serious separation-of-powers concerns implicated by the court of appeals' contrary interpretation, as described below. And in any event, if Congress has not authorized courts to disclose grand-jury materials in connection with impeachment proceedings, no amount of prior mistaken Executive Branch acquiescence in such disclosure can overcome that lack of authorization.

### B. The Court Of Appeals' Interpretation Would Create Substantial Constitutional Difficulties With The Ordinary Application Of Rule 6(e)

Interpreting the "judicial proceeding" exception to grand-jury secrecy in Rule 6(e)(3)(E)(i) as including a Senate impeachment trial also would create substantial constitutional difficulties. The court of appeals attempted to avoid those difficulties by adopting an impeachment-specific disclosure regime that departs from how the Rule ordinarily applies.

1. Rule 6(e) recognizes the importance of grand-jury secrecy, and reflects Congress's "judgment that not every beneficial purpose, or even every valid governmental purpose, is an appropriate reason for breaching grand jury secrecy." Baggot, 463 U.S. at 479-480. To that end, a critical feature of Rule 6(e) is 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). In Douglas Oil, for example, the district court authorized a disclosure of grand-jury materials subject to multiple conditions: that they be available "only to counsel"; that they be used "solely for the purpose of impeaching" or "refreshing the recollection" of witnesses; that counsel must not "further reproduc[e]" the materials; and that counsel must return the materials to the government "upon completion of the purposes authorized" by the district court's order. 441 U.S. at 217. This Court endorsed that approach, emphasizing that "if disclosure is ordered, the court may include protective limitations on the use of the disclosed material." Id. at 223. The authority to impose such conditions -- enforceable by contempt, see Fed. R. Crim. P. 6(e)(7) -- is essential for a district court to ensure that grand-jury secrecy is lifted only "discretely and limitedly," Procter & Gamble, 356 U.S. at 683.

A federal court is likely powerless, however, to impose such conditions on Members of Congress -- much less to enforce them by contempt. As the D.C. Circuit has explained, "the separation of powers, including the Speech or Debate clause, bars [a] court from ordering a congressional committee to return, destroy, or refrain from publishing" information that has come into its possession. Senate Permanent Subcommittee on Investigations v. Ferrer, 856 F.3d 1080, 1086 (D.C. Cir. 2017). Accordingly, although this Court

has never decided the question, it is, at a minimum, constitutionally doubtful whether a federal court could impose on the Representatives or Senators involved in an impeachment proceeding any of the "protective limitations on the use of the disclosed material" that this Court contemplated in Douglas Oil. 441 U.S. at 223. Notably, respondent has never claimed otherwise.

That one of the express tools for protecting grand-jury secrecy in Rule 6(e)(3)(E) likely would be unconstitutional as applied to impeachment proceedings is, by itself, a compelling reason to doubt that such a congressional proceeding is a "judicial proceeding" as that term is used in the Rule. Cf. Jennings v. Rodriguez, 138 S. Ct. 830, 842 (2018) ("When 'a serious doubt' is raised about the constitutionality of an act of Congress, 'it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'"); INS v. St. Cyr, 533 U.S. 289, 299-300 (2001). The court of appeals itself acknowledged (App., infra, 21a-22a) that "courts lack authority to restrict the House's use of the materials or withdraw them if improvidently issued or disseminated," but ignored that its interpretation created rather than avoided that serious constitutional problem.

2. The court of appeals' interpretation of "judicial proceeding" as including a Senate impeachment trial creates yet another threat to the separation of powers: it requires federal

courts to scrutinize particular theories of impeachment and weigh the significance of particular evidence under those theories. As this Court has explained in Procter & Gamble and other cases, even when Rule 6(e) permits a court to authorize disclosure of grand-jury matters, only those matters for which the petitioner has demonstrated a "particularized need" may be disclosed. 356 U.S. at 683; see Illinois v. Abbott & Associates, Inc., 460 U.S. 557, 567 & n.14 (1983). In drafting the relevant text of Rule 6(e) in 1977, see 1977 Act § 2(a), 91 Stat. 319-320, the Senate Judiciary Committee expressly identified Procter & Gamble as one of the "prevailing court decisions" setting forth the requirements for disclosure that it wished to codify. S. Rep. No. 354, 95th Cong., 1st Sess. 8 & n.13 (1977). The particularized-need requirement applies to all petitions for disclosure under Rule 6(e)(3)(E), including requests for disclosure in connection with a judicial proceeding under Rule 6(e)(3)(E)(i). See, e.g., Douglas Oil, 441 U.S. at 222.

To demonstrate a particularized need, parties seeking disclosure "must show that the material they seek 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 their request is structured to cover only material so needed." Douglas Oil, 441 U.S. at 222; see Procter & Gamble, 356 U.S. at 682 (petitioning party must show with

"particularity" that "there is a compelling necessity" for the requested grand-jury records). That requirement is in considerable tension with the House's "sole Power of Impeachment" and the Senate's "sole Power to try all Impeachments." U.S. Const. Art. I, § 2, Cl. 5 and § 3, Cl. 6; see Walter Nixon, 506 U.S. at 235. This Court has explained that the inquiry required by the particularized-need analysis "cannot even be made without consideration of the particulars of the judicial proceeding with respect to which disclosure is sought." Baggot, 463 U.S. at 480 n.4. Accordingly, district courts facing requests for disclosure must carefully scrutinize the relationship between the legal claims in the "judicial proceeding" and the grand-jury materials sought. In Douglas Oil, for example, the Court explained that the district court, in assessing particularized need, was required to assess the "contours of the conspiracy respondents sought to prove in their civil actions" to weigh the claimed need for the grand-jury information against the strong public interest in grand-jury secrecy. 441 U.S. at 229.

By insisting that a Senate impeachment trial qualifies as a "judicial proceeding" under Rule 6(e), the court of appeals' interpretation would require federal courts to tread on perilous ground. Nothing in Rule 6(e) distinguishes between types of judicial proceedings; a House committee seeking disclosure of grand-jury materials in connection with a Senate impeachment trial

must therefore demonstrate a particularized need for the materials no less than would other petitioners seeking disclosure in connection with "garden-variety civil actions or criminal prosecutions." Baggot, 463 U.S. at 479 n.2. Accordingly, the petitioned court presumably would need to examine the "contours" of the particular theories of impeachment being considered by the House or one of its committees, and then make a determination about the degree of materiality of the grand-jury records -- granting access to what the House truly needs, but withholding portions that would be useful only as "general discovery." Douglas Oil, 441 U.S. at 229. The court would need to undertake the same analysis if the Senate or one of its committees sought disclosure of grand-jury records in connection with an ongoing impeachment trial as well.

It is unclear on what proper basis a federal court could make those assessments in the context of a proceeding that the Constitution commits exclusively to the Legislative Branch. Cf. Walter Nixon, 506 U.S. at 235. Indeed, such assessments would appear to require courts to pass judgment on the legal sufficiency of a particular impeachment theory or to second-guess the House or Senate's respective assessments of materiality -- just as courts do when assessing petitions for disclosure of grand-jury matters in connection with garden-variety civil and criminal proceedings. The constitutional hazards inherent in such an approach are obvious

-- and are a necessary consequence of the court of appeals' insistence that "judicial proceeding" in Rule 6(e)(3)(E)(i) must include a Senate impeachment trial, contrary to that term's ordinary meaning. Nor could that consequence be avoided by transferring the petition to the Senate to decide for itself -- as Rule 6(e)(3)(G) contemplates when the judicial proceeding occurs in some "other court" -- precisely because, as noted, that provision is inapplicable to congressional impeachment trials.

Rather than reconsidering its interpretation of "judicial proceeding" in the face of the serious constitutional difficulties its interpretation would create, the court of appeals crafted a lower particularized-need standard under Rule 6(e) specific to impeachment. See App., infra, 18a-19a. Under that standard, as long as a congressional committee represents that it is engaged in an impeachment inquiry, a district court should "hand off all relevant materials" without significant further consideration. Id. at 18a. That approach, the court of appeals concluded, would "avoid[] the potentially problematic second-guessing of Congress's need for evidence that is relevant to its impeachment inquiry." Id. at 19a.

The court of appeals' attempt to avoid those constitutional problems comes at the expense of this Court's precedents. This Court has repeatedly rejected a mere "relevance" standard for disclosure of grand-jury records -- including when governmental

parties seek disclosure. E.g., Sells Engineering, 463 U.S. at 443-444 (stating that the Executive Branch's "responsibility to protect the public weal" does not justify a rule making disclosure "permissible if the grand jury materials are relevant," as that would be "a virtual rubber stamp for the Government's assertion that it desires disclosure") (citations and internal quotation marks omitted); Abbott & Associates, 460 U.S. at 568 (holding that a State could not demonstrate a particularized need for material "merely by alleging that the materials were relevant to an actual or potential" action). The court of appeals neither explained how its diluted "relevance" standard is consistent with this Court's precedents nor provided a textual basis in the Rule for an impeachment-specific standard.

Finally, the court of appeals' conclusion that the requested materials were relevant to a House impeachment inquiry -- despite the House's already having impeached the President and the Senate's already having tried and acquitted him -- was particularly misguided. See App., infra, 16a. Although the court correctly observed that "the Committee may recommend new articles of impeachment," it did not explain how respondent had met its burden to show a particularized need for the requested materials in connection with any potential second impeachment, save for the circular observation that "if the grand jury materials reveal new evidence of impeachable offenses," they would be relevant to those

"new articles of impeachment." Ibid. That rationale would allow a district court to authorize breaching grand-jury secrecy "preliminarily to" a future impeachment proceeding whose probability of occurring is, as here, far too attenuated to satisfy Rule 6(e)(3)(E). As this Court explained in Baggot, "the Rule contemplates only uses [of grand-jury records] related fairly directly to some identifiable litigation, pending or anticipated. Thus, it 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." 463 U.S. at 480. That is yet another reason the court of appeals erred in affirming the district court's disclosure order here.

* * * * *

This case presents a choice between two readings of Rule 6(e). Under the first, "judicial proceeding" in Rule 6(e)(3)(E)(i) carries its ordinary meaning: a proceeding in court. That interpretation is consistent with the meaning that the term carries throughout the Federal Rules of Criminal Procedure (including elsewhere in Rule 6(e)(3) itself), and with the operation of the other parts of Rule 6(e). It also is consistent with the history of exceptions to grand-jury secrecy predating the Rule's adoption. And it is consistent with this Court's precedents describing "judicial proceeding" in the Rule as referring to litigation.

By contrast, under the second reading, "judicial proceeding" in Rule 6(e)(3)(E)(i) expands to include a proceeding before a congressional body. That interpretation would create needless contradictions with the definition and operation of the term elsewhere in Rule 6(e)(3). It also would be inconsistent with this Court's admonishment to read exceptions to grand-jury secrecy narrowly. And it would create serious separation-of-powers concerns that could be ameliorated, if at all, only by crafting an impeachment-specific disclosure regime with no basis in the Rule's text or this Court's case law.

Perhaps because it felt bound by circuit precedent, see App., infra, 13a, the court of appeals adopted the second reading. There is at least a fair prospect that this Court will adopt the first.

## III. THERE IS A LIKELIHOOD THAT IRREPARABLE HARM WILL RESULT FROM THE DENIAL OF A STAY

The government will suffer irreparable harm absent a stay. Once the government discloses the secret grand-jury records, their secrecy will irrevocably be lost. See Sells Engineering, 463 U.S. at 422 n.6 ("We cannot restore the secrecy that has already been lost."). That is particularly so when, as here, they are disclosed to a congressional committee and its staff. Indeed, as respondent acknowledged below, its own procedures will allow it to release these grand-jury materials to the public by a simple majority vote of the committee (not even the full House). See C.A. App. 426. And because such a vote almost certainly would be "an integral

part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to" matters "within the jurisdiction of [the] House," the Speech or Debate Clause would provide absolute immunity to House Members for such public disclosure. Gravel v. United States, 408 U.S. 606, 625 (1972).

Moreover, there is a serious question whether this case would become moot were the grand-jury materials disclosed to respondent. Sells Engineering suggested that such disclosure would not moot a case, but the basis for that suggestion was that access to the materials could be revoked and further disclosure prevented. 463 U.S. at 422 n.6; cf. Church of Scientology v. United States, 506 U.S. 9, 16 n.9 (1992). As explained above, that option is not viable here: once the materials are disclosed to respondent, courts likely would lack any authority to dictate how Congress may use those materials. At a minimum, disclosure of the materials to respondent would inject a substantial question of mootness into the case, which could frustrate this Court's review of the underlying merits. That is an additional reason the government would suffer irreparable harm absent a stay. See John Doe Agency v. John Doe Corp., 488 U.S. 1306, 1309 (1989) (Marshall, J., in chambers); Garrison v. Hudson, 468 U.S. 1301, 1302 (1984) (Burger, C.J., in chambers); see also Chafin v. Chafin, 568 U.S. 165, 178 (2013).

By contrast, respondent would not be prejudiced by a stay. Respondent has not asserted any time-sensitive need for the requested materials. Indeed, since the district court proceedings here, the House has impeached the President, the Senate has acquitted him, and other than asserting that the House Judiciary Committee "remains able" to hold hearings and continue its impeachment investigation, Resp. C.A. Opp. to Mot. to Stay Mandate 11 (Apr. 29, 2020), respondent has provided no indication that the House urgently needs these materials for any ongoing impeachment investigation. So even if a Senate impeachment trial were a "judicial proceeding," no such proceeding is sufficiently imminent that respondent should need immediate disclosure of the requested materials before this Court has had a chance to decide whether to grant further review and, if so, to conduct that review.

## CONCLUSION

This Court should stay the mandate of the court of appeals pending the timely filing and disposition of a petition for a writ of certiorari and any further proceedings in this Court. The Court also should issue an administrative stay while it considers this application.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

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