No. 19-1328

In the Supreme Court of the United States

DEPARTMENT OF JUSTICE, PETITIONER

v.

HOUSE COMMITTEE ON THE JUDICIARY

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, Statutes and rules:

Statutes and rules—Continued: Page

Miscellaneous:

Miscellaneous—Continued: Page

In the Supreme Court of the United States

No. 19-1328

DEPARTMENT OF JUSTICE, PETITIONER

v.

HOUSE COMMITTEE ON THE JUDICIARY

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

The Committee's belated embrace of "the plain meaning of 'judicial proceeding'" is a welcome shift, even if the Committee does not really mean it. Br. 13. Below, the Committee persuaded the lower courts that Rule 6(e) should be "given a broad interpretation." Resp. C.A. Br. 25 (citation omitted). In particular, the court of appeals held that the term "'judicial proceeding'" should be "interpreted broadly" and, "[s]o understood, * * * encompasses a Senate impeachment trial." Pet. App. 13a. Before this Court, the Committee retreats from that approach, insisting instead that this Court should adhere to the "plain meaning" and "fair reading" of the term. Br. 16, 26 (citations omitted). But even the court of appeals appeared to recognize that "the ordinary meaning of the term 'judicial proceeding' does not include a proceeding conducted before a legislative body." Pet. App. 13a. A *judicial* proceeding is one before a judge in a court—exactly the usage one

would expect in the Federal Rules of Criminal Procedure, which after all govern proceedings before judges in courts. See Fed. R. Crim. P. 1(a).

The Committee does not actually attempt to show that the ordinary meaning of "judicial proceeding" encompasses a Senate impeachment trial. After scouring 150 years' worth of English usage in everything from state-court cases to news articles, the Committee has found only a single instance in which "judicial proceeding" was used to describe an impeachment trial before the adoption of Rule 6(e). See Br. 24 n.3. The Committee instead notes that, at the time of Rule 6(e)'s adoption, "judicial proceeding" included "proceedings in 'a court of justice.'" Br. 16 (quoting *Black's Law Dictionary* 986-987 (4th ed. 1951)). That very source distinguished between "courts of justice" and "courts for the trial of impeachments," *Black's* 425, but the Committee collapses the distinction and treats "'judicial proceeding'" as any proceeding before any body that can be characterized as "sit[ting] as a court" or taking "judicial action," Br. 16.

Having subtly broadened the term beyond its ordinary meaning, the Committee amasses extensive evidence that the Senate's role in impeachment has been described in judicial-sounding terms from the Constitution forward. That is undoubtedly true: impeachment proceedings have a judicial character, see *The Federalist No. 65*, at 396 (Alexander Hamilton) (Rossiter ed., 1961), and accordingly terms like "court" are sometimes used in an atypical sense to describe them. But that is not the *ordinary meaning* of those terms. And it is certainly not the usual understanding of a "judicial proceeding," which is something that happens in a court of law presided over by a judge exercising only judicial

power. Simply put, even when it tries impeachments, the United States Senate is not a "court of justice" that holds "judicial proceedings" governed by laws like Rule 6(e).

The Committee has identified no evidence that the framers of Rule 6(e) adopted an anomalous understanding of the term "judicial proceeding." With respect to the remainder of the Rules, the Committee concedes that some of the other references cannot possibly refer to impeachment proceedings. The Committee says those usages refer only to subsets of traditional judicial proceedings—but none of that gets the Committee to a *broader* reading that includes legislative proceedings. As for history, the Committee still has not identified a single pre-1944 example in which Congress used secret grand-jury materials in an impeachment investigation. The Committee is correct that in the past 76 years a few courts have authorized such use, but most of those decisions contained no meaningful analysis of Rule 6(e)'s text, context, or history, and they certainly did not establish a uniform, clear understanding of the Rule that Congress could be understood to have ratified. They thus provide no basis for ignoring the ordinary meaning of "judicial proceeding," let alone for finding the "clear indication" necessary to breach grand-jury secrecy, *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418, 425 (1983).

The Committee also lacks any persuasive answer to the serious constitutional concerns its reading would create. Rule 6(e) allows access to secret grand-jury material only "*preliminarily to* or *in connection with*" litigation. Fed. R. Crim. P. 6(e)(3)(E)(i) (emphases added). Courts applying that provision when no case has yet been filed must necessarily predict whether one

will be filed in the future. Making the provision applicable to a Senate impeachment trial would thus require courts to assess how likely it is that the House will actually impeach. The Committee cannot dispute that entangling courts in impeachment fights in that way would be problematic, so it instead attempts to manufacture a constitutional avoidance argument of its own. But nothing in the Constitution requires that Congress have access to secret grand-jury material (as the first 150 years of our Nation's history demonstrate), let alone prohibits Congress from imposing limits on its own access. Congress remains free to modify those limits by amending Rule 6(e), but the Committee should not ask this Court to do the work for it.

Finally, the Committee argues this Court could resolve the case by holding district courts have inherent power to authorize disclosures, notwithstanding Rule 6(e)'s limits. That question is not presented here, because the Court declined the Committee's suggestion to add it at the certiorari stage. The Committee insists it can raise the argument as an alternative basis for affirmance, but that is incorrect: the district court made clear that it was *not* relying on inherent authority to order disclosure, so there is no exercise of such authority this Court could affirm as "proper." Br. 43. In any event, the plain text of Rule 6(e) forecloses courts from authorizing disclosures in circumstances not covered by its enumerated exceptions.

I. AUTHORIZATION OF DISCLOSURE PRELIMINARILY TO A "JUDICIAL PROCEEDING" DOES NOT AUTHORIZE DISCLOSURE TO THE HOUSE OF REPRESENTATIVES FOR AN IMPEACHMENT INVESTIGATION

A. The Ordinary Meaning Of "Judicial Proceeding" Is A Proceeding In A Court Of Justice, Not In The Senate

1. In construing Rule 6(e)'s reference to a "judicial proceeding," this Court "begin[s] by considering the ordinary understanding of the phrase" when it was enacted. *Wall* v. *Kholi*, 562 U.S. 545, 551 (2011). As the Committee acknowledges, contemporary dictionaries defined "'judicial proceeding'" as "a proceeding 'wherein judicial action is invoked and taken,' including proceedings in 'a court of justice.'" Br. 16 (quoting *Black's* 986-987). For example, *Black's* explained that "judicial proceeding" was "[a] general term for proceedings relating to, practiced in, or proceeding from, a court of justice." *Black's* 987 (capitalization and emphases omitted). Other dictionaries were similar. See Walter A. Shumaker & George Foster Longsdorf, *The Cyclopedic Law Dictionary* 612 (3d ed. 1940) ("A proceeding which takes place in or under the authority of a court of justice."). Accordingly, the common understanding of "judicial proceeding" in 1946 was a proceeding associated with an ordinary "court of justice." And contemporary usage confirmed that a "court of justice" was distinct from a legislative body, even a legislative body pursuing impeachment. See, *e.g.*, *Black's* 425 (distinguishing, in the definition of "[c]ourt," between "courts for the trial of impeachments" and "courts of justice"); see also *Kilbourn* v. *Thompson*, 103 U.S. 168, 190 (1881) (comparing Congress's means for compelling testimony from impeachment witnesses to the means available in the "courts of justice").

2. The Committee has virtually no direct evidence to support its broader reading of "judicial proceeding" in Rule 6(e). Indeed, it has identified just *one* instance in which an impeachment trial was described as a "judicial proceeding" before the drafting of Rule 6(e), despite a seemingly exhaustive search of 150 years' worth of dictionaries, newspapers, congressional debates, works of political theory, and state, federal, and foreign cases. See Resp. Br. 24 n.3 (quoting *Yancey* v. *Commonwealth*, 122 S.W. 123, 125 (Ky. Ct. App. 1909)). The Committee thus focuses instead (Br. 21-25) on *other* court-related terms that are sometimes used when discussing impeachment. For example, the Senate is sometimes described as a "Court of Impeachment," 166 Cong. Rec. S289 (daily ed. Jan. 21, 2020), and said to "exercise[] the judicial power of trying impeachments." *Kilbourn*, 103 U.S. at 191. The Committee contends that the use of those other judicial terms when describing impeachment is common, and thus a Senate impeachment trial should count as a "judicial proceeding."

That argument simply misses the point. No one disputes that people sometimes use judicial terminology when describing the unique nature of the Senate's role in impeachment. But it does not follow that the Senate's extraordinary role comes within the ordinary meaning of "judicial proceeding." The use of judicial terms in the specific context of impeachment is instead idiosyncratic, reflecting impeachment's particular history and function (see Gov't Br. 23) rather than the ordinary meaning of terms like "court" or "trial." And the fact that the terms carry a "specialized or peculiar meaning * * * in that context"—i.e., when talking about impeachment—does not establish that general statutes using such

terms incorporate that meaning or extend to impeachment. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 441 (2012) (*Reading Law*).

Dictionaries published contemporaneously with the adoption of Rule 6(e) make clear that the Committee is relying on idiosyncratic uses of judicial terms rather than their ordinary meaning. *Black's*, for example, observed that use of the term "court" in the context of a "legislative assembly" was based on Parliament's role as "a court of the king, nobility, and commons assembled." *Black's* 425 (capitalization omitted). It explained that "[t]races of this usage * * * still remain in the courts baron, the various courts of the trial of impeachments[,"] and "in the control exercised by * * * [state] legislatures * * * over the organization of courts of justice, as constituted in modern times." *Ibid.*; see 1 *Bouvier's Law Dictionary & Concise Encyclopedia* 695-696 (8th ed. 1914) (similar). And it observed that the use of "court" in that legislative context was distinct from the ordinary use of the term in "practice," where it described "[a]n organ of the government, belonging to the judicial department, whose function is the application of the laws to controversies brought before it and the public administration of justice." *Black's* 425 (capitalization omitted).

The Committee's position here is even weaker than the argument rejected in *Nix* v. *Hedden*, 149 U.S. 304 (1893), that tomatoes should be treated as fruits rather than vegetables under a tariff statute. The Court there recognized that, "[b]otanically speaking, tomatoes are the fruit of a vine" and thus covered by "the dictionar[y] defin[ition] [of] the word 'fruit'"; but the Court held

that, "in common parlance" and "in commerce," tomatoes were referred to as vegetables, and that "ordinary meaning" should govern under the tariff statute. *Id.* at 306-307. Here, the dictionary definition of "judicial proceeding" does not support the Committee in the first place, see pp. 5-6, *supra*, but in any event dictionary definitions or the use of judicial terms in the *specialized* context of impeachment does not show that a Senate impeachment trial comes within the *ordinary* meaning of those terms or is subject to general laws using them.

For example, Senators conducting an impeachment trial obviously are not subject to the law governing judicial recusal, which requires any "judge of the United States" to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. 455(a); see 28 U.S.C. 451 (providing a non-exhaustive list of covered judges). Yet the Committee offers no explanation why an impeachment trial should be treated as a "judicial proceeding" before a "court[] of the United States" for purposes of Rule 6(e), Br. 22 (citation omitted), but Senators should not be treated as "judge[s] of the United States" for purposes of 28 U.S.C. 455. Nor does it grapple with the incongruity of applying such general laws governing judicial proceedings to impeachment trials, which may be presided over by *non-lawyer* Senators when anyone besides the President is impeached. See U.S. Const. Art. I, § 3, Cl. 6.

3. Other provisions of the Federal Rules of Criminal Procedure confirm that Senate impeachment trials are not covered. Most obviously, the Rules apply by their terms to ordinary courts of justice. Every type of "proceeding" to which the definitional provisions explicitly refer occurs in such a court—including a "proceeding before a state or local judicial officer," "proceedings

in * * * the United States courts of appeals" or this Court, and "proceedings in" certain territorial courts. Fed. R. Crim. P. 1(a)(1)-(3). Moreover, the Committee appears to concede (Br. 28-29) that at least two of the Rules' other three uses of "judicial proceeding" cannot possibly refer to a Senate impeachment trial: the description of the transfer procedures applicable when a petition to disclose grand-jury material "arises out of a judicial proceeding in another district," Fed. R. Crim. P. 6(e)(3)(G), and the prohibition on "the broadcasting of judicial proceedings," Fed. R. Crim. P. 53. The Committee observes (Br. 28) that the references in Rules 6(e)(3)(G) and 53 govern only a subset of traditional court proceedings—but that at most shows that the Rules' context sometimes *narrows* the term "judicial proceeding," not that context ever *broadens* it to include impeachment trials.

The Committee argues that any conflict with the third use—the notice requirement for the "parties to the judicial proceeding" in Rule 6(e)(3)(F)(ii)—could be eliminated by recaptioning this case to treat the President and the House as the "parties" to a hypothetical future impeachment trial. But the Committee's proposed recaptioning misses the point: the fact that every reference to a clearly identified "proceeding" in the Federal Rules of Criminal Procedure points to a proceeding in an ordinary court strongly indicates that the less explicit uses of "judicial proceeding" in Rule 6(e) do as well. To take a colloquial analogy: even if television viewers might be uncertain whether an upcoming story about the "umpires" who call "balls and strikes" will focus on people in masks or people in robes, that uncertainty would disappear if the story were set to air on

ESPN. Similarly here, a set of rules about how to conduct proceedings in regular courts before regular judges is unlikely to use "judicial proceeding" in anything other than its ordinary sense.

4. In addition to arguing that Senate impeachment trials are described in judicial-sounding language, the Committee goes further and maintains (Br. 17-21) that the Senate is exercising judicial power as a *constitutional* matter—and thus courts must treat an impeachment trial as a "judicial proceeding" for purposes of Rule 6(e). That argument fails at the threshold because the Committee points to no evidence that Rule 6(e) departs from the ordinary meaning of "judicial proceeding" in order to track the Constitution. Even if the Committee were correct that the Senate formally exercises "judicial" power as a constitutional matter, therefore, its interpretation of Rule 6(e) would not follow.

In any event, the Committee is wrong. As the Committee observes (Br. 18-19), some of the Founders may have subjectively expected the Senate to exercise judicial power when considering impeachments. But the Committee itself identifies the flaw in that "sort of reasoning." Br. 20 (citation omitted). Namely, "even assuming [some] Framers shared that outlook, * * * the Framers did not reduce th[ose] thoughts * * * to the printed page" of the Constitution. *Chiafolo* v. *Washington*, 140 S. Ct. 2316, 2326 (2020). The Constitution's plain terms state that "[t]he judicial Power of the United States"—all of it—"shall be vested" in the Article III courts, the "Judges" of which "shall hold their Offices during good Behaviour." U.S. Const. Art. III, § 1. In the end, the Framers "considered it essential that 'the judiciary remain[] truly distinct from both the

legislature and the executive.'" *Stern* v. *Marshall*, 564 U.S. 462, 483 (2011) (citation omitted).

The Committee ultimately retreats to the more limited argument that a Senate impeachment trial involves a "'partial intermixture' of the legislative and judicial powers." Br. 21 (citation omitted); see Gov't Br. 23. Viewed that way, an impeachment trial is like other "quasi-judicial[]" determinations that involve the application of executive or legislative power in an adjudicatory setting. See *Seila Law LLC* v. *Consumer Financial Protection Bureau*, 140 S. Ct. 2183, 2198 & n.2 (2020). But that hurts, rather than helps, the Committee's interpretation. As the government has explained (Br. 30-33), lower courts have consistently recognized that such hybrid proceedings are not themselves "judicial proceedings" within the meaning of Rule 6(e). Instead, they satisfy the Rule only if they are "preliminar[y] to" an eventual proceeding in an ordinary court, Fed. R. Crim. P. 6(e)(3)(E)(i). Because a Senate impeachment trial is not "preliminar[y]" to a proceeding in an ordinary court, that extensive body of precedent—which the Committee never acknowledges—cuts strongly against its position.

5. The Committee overcame all these problems below by successfully arguing that "judicial proceeding" should be "given a broad interpretation." Resp. C.A. Br. 25. But as the government has explained (Br. 24-25), this Court's decision in *Sells Engineering, supra*, forecloses that approach. Against the backdrop of the "traditional rule of grand jury secrecy," *Sells Engineering* held 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 this secrecy has been authorized." 463 U.S. at 425. The Court then applied that clear-

statement rule in concluding that the phrase "attorney for the Government" in Rule 6(e)(3)(A)(i) encompasses only government attorneys working on criminal matters before the grand jury, not attorneys in the Department of Justice's Civil Division. See *id.* at 427.

The Committee has no persuasive response. The requirement of a "clear indication" before breaching grand-jury secrecy, 463 U.S. at 425, was no mere "passing statement," Resp. Br. 26. That standard was important to this Court's conclusion that civil Department of Justice attorneys were nevertheless not "attorney[s] for the Government." And while the Committee implies (*ibid.*) the Court should overrule the "clear indication" requirement as atextual, that too is wrong. Given that Rule 6(e) sought to "codif[y] the traditional rule of grand jury secrecy," *Sells Engineering*, 463 U.S. at 425, the Court's clear-indication requirement simply applies the longstanding interpretive canon that provisions should "not be interpreted as changing the common law unless they effect the change with clarity." *Reading Law* 318 (describing this canon as the "better view"). All that said, wholly apart from the clear-indication requirement, the best interpretation of "judicial proceeding" is that the term does not extend to Senate impeachment trials. Indeed, even the courts below seemed to acknowledge as much as a matter of ordinary meaning. See Pet. App. 13a; *id.* at 115a-116a.

B. Giving Rule 6(e) Its Ordinary Meaning Would Not Create Constitutional Concerns, But Avoid Them

The Committee's reading would also create serious constitutional concerns. See Gov't Br. 33-42. The Committee has no meaningful answer to those concerns, so it tries to counterbalance them by asserting (Br. 35)

that "Rule 6(e) would violate the Constitution" if "judicial proceeding" were not read to include an impeachment trial. That is incorrect.

1. Nothing in the Constitution mandates that the House must have access to secret grand-jury materials in order to carry out its role in impeachments. Grand juries carry out criminal investigations by serving subpoenas for documents and testimony on investigatory targets and other witnesses, subject to appropriate privileges and limitations; the House has similar powers when carrying out an impeachment investigation. See *Kilbourn*, 103 U.S. at 190 (explaining that congressional chambers have an implied Article I power to "compel the attendance of witnesses, and their answer to proper questions, in the same manner and by the use of the same means that courts of justice can"). Although the House might prefer to subpoena a pre-assembled collection of materials from the grand jury rather than subpoenaing third parties directly, it is not plausible to assert (Br. 36) that "the House cannot carry out its impeachment function" without this one narrow source of evidence.

The Committee speculates that the government's interpretation "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.'" Br. 37 (citation omitted). But there is no basis for the implicit (and carefully hedged) suggestion that the House would be unable to collect from third parties evidence that the grand jury had separately considered: "Evidence obtained independently of the grand jury proceeding does not ordinarily constitute a 'matter occurring before the grand jury,' even if the same witness or similar evidence has been or will be

presented to the grand jury." 1 Sara Sun Beale et al., *Grand Jury Law & Practice* § 5.6, at 5-40 (2d ed. 2018) (citation omitted).

Notably, any burden Rule 6(e) imposes on the House's collection of evidence was adopted by Congress itself. See Act of July 30, 1977, Pub. L. No. 95-78, § 2, 91 Stat. 319-321. Congress undoubtedly may exercise its express Article I legislative authority to limit its own chambers' exercise of implied Article I investigative authority. And that is particularly obvious where Congress merely authorizes the other branches to treat information as confidential. Congress has done exactly that elsewhere. See, *e.g.*, 28 U.S.C. 1365(a) (providing that a statute purporting to authorize the Senate to seek civil enforcement of its subpoenas "shall not apply" where an executive-branch official resists such a subpoena on the ground of executive privilege). In short, the Constitution allows Congress to obtain grand-jury materials, but it neither requires that result nor prevents Congress from limiting its own implied Article I investigatory authority.

2. In contrast, the Committee cannot seriously dispute the constitutional concerns its reading produces. As the government has explained (Br. 35-41), courts confronted with impeachment-based requests for grand-jury materials under Rule 6(e) would have to predict whether a Senate trial is actually likely to occur. That prediction would turn in part on whether particular charges have merit and whether they rise to the level of "high Crimes and Misdemeanors." U.S. Const. Art. II, § 4. Given that "the Judiciary * * * w[as] not chosen to have any role" in impeachment trials, *Nixon* v. *United States*, 506 U.S. 224, 234 (1993), forcing courts

to make such assessments would raise serious constitutional concerns.

The Committee argues that courts can avoid those concerns by giving the House or its Members a blank check and not "second-guess[ing]" their requests. Br. 40 (citation omitted). The court of appeals agreed, adopting a circular standard that will always be met (because it is necessarily true that "*if* the grand jury materials reveal new evidence of impeachable offenses," the House "*may*" adopt articles of impeachment). Pet. App. 17a (emphases added). But that solves the constitutional problem only at the expense of Rule 6(e)'s text, which permits disclosures "preliminarily to or in connection with a judicial proceeding." Fed. R. Crim. P. 6(e)(3)(E)(i). Applying that standard before a judicial proceeding is underway necessarily requires a district court to weigh the "likelihood of litigation" in the future. *United States* v. *Baggot*, 463 U.S. 476, 482 n.6 (1983).

This Court's decision in *United States* v. *John Doe, Inc. I*, 481 U.S. 102 (1987), is not to the contrary. The Committee observes (Br. 41-42) that the Court there performed no forward-looking prediction about the likelihood of litigation in affirming the disclosures at issue. But by the time the Department of Justice sought leave to make disclosures in that case, it had already determined that "respondents had violated § 1 of the Sherman Act," and by the time of this Court's decision "the complaint * * * had been filed." *John Doe, Inc. I*, 481 U.S. at 104, 106. That the challenged disclosures were "preliminar[y] to or in connection with" litigation, Fed. R. Crim. P. 6(e)(3)(E)(i), was thus self-evident on the record before the Court.

Adding to the problems that the Committee's reading creates, courts likely would be powerless to enforce

any limitations on further dissemination of material released for impeachment investigations. Gov't Br. 33-35. The Committee asserts that it will store any grand-jury material "in a secure location" and "strictly limit staff access." Br. 9-10. But that does not address the concern that, on the Committee's reading, Members of Congress themselves are entitled to demand access to secret grand-jury materials without any "second-guess[ing]" by a court, *id.* at 40 (citation omitted), then selectively disclose that material in ways that harm their political opponents—and the only mechanism Rule 6(e) provides for preventing such abuses would be unconstitutional in that scenario.

The Committee contends (Br. 39) that the same "theoretical possibility of abuse" exists from disclosures to "Executive Branch officials other than the prosecutors handling the matter before the grand jury." But Rule 6(e) provides for such disclosures expressly and, more importantly, courts can enforce Rule 6(e)'s secrecy requirements against such officials without violating the Constitution. See Fed. R. Crim. P. 6(e)(3)(D)(i)-(ii) and (7). Nor are courts powerless to impose limitations when they authorize disclosures to "a foreign court or prosecutor." Fed. R. Crim. P. 6(e)(3)(E)(iii). Such disclosures can be made only "at the request of the government," and courts can therefore require the government to take responsibility for ensuring through diplomatic and other means that any necessary limitations are followed. *Ibid.* There is no comparable means of enforcing limitations on the disclosures the Committee's reading authorizes—highlighting how awkwardly that reading fits into the broader structure of the Rules.

C. The Few Historical Examples Of Congress's Obtaining Grand-Jury Materials Cannot Override The Ordinary Meaning Of Rule 6(e)

The Committee argues that its reading is justified by historical examples in which the House or Senate obtained access to grand-jury materials. But that sparse history is not nearly probative enough to overcome the ordinary meaning of "judicial proceeding," let alone provide the "clear indication" *Sells Engineering* requires.

1. The Committee identifies (Br. 30-31) only a single example predating the drafting of Rule 6(e) in which the House considered information from a grand jury in connection with an impeachment investigation: an 1811 incident involving a territorial judge in Mississippi. And even that solitary example does not support the Committee's position, because it did not involve materials subject to the traditional rules of grand-jury secrecy at all. Instead, it involved only a "copy of a presentment" alleging the judge had engaged in certain misconduct. 3 Asher C. Hinds, *Hinds' Precedents of the House of Representatives of the United States* § 2488, at 985 (1907). Contrary to the Committee's assertion (Br. 31), presentments were not subject to secrecy requirements; indeed, they often took the form of public "reports" and "were concerned with matters as diverse as maintaining street lamps, bridge repair and the state of public morality" as well as "the conduct of public officials." 1 Susan W. Brenner & Lori E. Shaw, *Federal Grand Jury: A Guide to Law and Practice* § 3:4, at 85 (2d ed. 2006) (*Federal Grand Jury*). Accordingly, when the Advisory Committee drafted Rule 6(e) in 1944, there is no evidence that the "traditional rule of grand jury secrecy" the Rule "codifie[d]" had *ever* been

waived to allow use of secret grand-jury materials in an impeachment investigation. *Sells Engineering*, 463 U.S. at 425.

2. The Committee therefore relies (Br. 31-32) on Congress's use of information from grand juries in investigations of its own members. Again, though, the few examples it offers do not support its position. For example, the Committee identifies (*ibid.*) instances in 1902 and 1924 in which the House undertook investigations based on grand jury "report[s]." But once more, such reports were *public* documents not subject to secrecy rules. See 65 Cong. Rec. 3973 (1924) ("Mr. GRAHAM of Illinois. * * * Is the report of a grand jury in a Federal district court made a matter of public record or is it held private? Mr. GRAHAM of Pennsylvania. Unless it is ordered to be sealed it is made a matter of public record and can be consulted by anyone."); *Federal Grand Jury* § 3:4.

The Committee also relies on two occasions in 1924 in which the Attorney General offered to turn over all evidence the Department of Justice had gathered in investigations of several Members, which the Committee asserts "includ[ed] the evidence presented to the grand jury." Br. 32; see *id.* at 31-32 & n.6. But the fact that evidence is *presented* to the grand jury does not make it subject to secrecy requirements, so long as it was collected independently of the grand jury and its disclosure would not reveal the course of the grand jury's investigation. See pp. 13-14, *supra*. The Committee identifies nothing in those cases suggesting that such secrecy applied, and the Attorney General's willingness to provide the material is thus irrelevant to the question here.

Moreover, the Committee acknowledges that when Congress asked the judge who had presided over one of those grand juries to provide "documentary evidence" from the grand jury directly, he refused. Br. 31 n.6 (citation omitted). It is therefore left to assert (Br. 31) that the judge provided "the names of the witnesses who had testified before the grand jury." That assertion depends on an ambiguous statement in the congressional record that the investigating committee obtained "some of the[] names" of witnesses from a "reply to [a] telegram" that appears to have come from the judge. 65 Cong. Rec. at 8864 (statement of Sen. Borah). Even granting the Committee's reading, this extremely limited disclosure is the only example it has identified of Congress's having received secret grand-jury material in *any* context before the drafting of Rule 6(e). The Committee's claim of a "common-law tradition" of such disclosures, Br. 32 (quoting Pet. App. 14a), is simply a mirage.[*]

3. Lacking any meaningful support from before Rule 6(e) was drafted, the Committee invokes (Br. 33-34) several subsequent impeachment investigations that made use of grand-jury materials. Those examples are no more helpful.

The Committee first points to a disclosure of grand-jury material in 1945, after Rule 6(e) had been drafted but before it took effect. The Committee asserts (Br. 33) it is "highly implausible that Congress, in allowing

---

[*] Amicus Constitutional Accountability Center relies (Br. 13-14) on the use of grand-jury material in a 1921 investigation of election fraud, but the material was made available to Congress only after being used as evidence at a public trial in Michigan. See 61 Cong. Rec. 7787 (1921).

Rule 6(e) to take effect, understood itself to be precluding the very type of court-ordered disclosure on which it was actively relying." But given that the targets of that impeachment investigation voluntarily cooperated with the House's collection of evidence from all available sources, see Gov't Br. 27-28, there is no indication that Congress focused on the unusual use of grand-jury material. In any event, as the Committee itself elsewhere notes, "[t]he Court interprets legal texts based on their 'plain terms,' not speculation about the drafters' 'expected applications.'" Br. 20 (citation omitted).

The Committee also relies (Br. 34) on a handful of cases since Rule 6(e) went into effect in which lower courts have authorized disclosures for impeachment purposes. But those five examples, spread out over 76 years, do not suggest that Congress adopted a specialized meaning of "judicial proceeding" by merely codifying Rule 6(e) in 1977 and amending other aspects of Rule 6(e) on subsequent occasions. To be sure, it may matter when Congress reenacts a statutory term against the backdrop of a sufficiently "broad and unquestioned" "judicial consensus" about that term's meaning. *Jama* v. *Immigration & Customs Enforcement*, 543 U.S. 335, 349 (2005). But the few decisions the Committee identifies provide no basis for concluding Congress ratified "judicial proceeding" in anything other than its ordinary sense, especially given the decisions' incomplete or even inscrutable reasoning. See, *e.g.*, *McKeever* v. *Barr*, 920 F.3d 842, 847 n.3 (D.C. Cir. 2019) ("[O]ur opinion in '*Haldeman* . . . contains no meaningful analysis of Rule 6(e)'s terms'" and "is ambiguous as to its rationale."), cert. denied, 140 S. Ct. 597 (2020); Gov't Br. 29; see also *Federal Grand Jury* § 3:7, at 11 (observing that the "conclusion that an impeachment

trial is a 'judicial proceeding' no longer seems valid"). There is no reason to think that Congress did, or this Court should, rest its view of Rule 6(e) on a few largely unreasoned statements from lower courts.

II. RESPONDENT'S INHERENT AUTHORITY ARGUMENT DOES NOT PROVIDE AN ALTERNATIVE BASIS FOR AFFIRMING THE DECISION BELOW

Finally, the Committee contends (Br. 43-49) that this Court could resolve the case by holding that district courts have inherent authority to release grand-jury materials. The Court declined the Committee's suggestion at the certiorari stage (Br. in Opp. 34-35) to add that question presented, but the Committee insists the argument remains live as an alternative ground for affirmance. That is incorrect for two reasons.

A. As an initial matter, this Court cannot affirm the district court's order as "a proper exercise of its inherent authority" (Resp. Br. 43) because the order indisputably was *not* an exercise of inherent authority. The court recognized that under circuit precedent it lacked inherent authority to authorize disclosures beyond the circumstances permitted by Rule 6(e), and accordingly did not indicate how it might have applied any such inherent authority on the facts of this case. See Pet. App. 106a-107a. There is thus no exercise of inherent authority for this court to affirm.

Nor is it a foregone conclusion how the district court would have applied any inherent authority it had. Courts that have recognized such inherent authority apply a non-exhaustive nine-factor balancing test to decide whether disclosure is appropriate despite Rule 6(e)'s general secrecy requirement. See *Carlson* v. *United States*, 837 F.3d 753, 757 (7th Cir. 2016); *Craig* v. *United States*, 131 F.3d 99, 106 (2d Cir. 1997). The

Committee never says whether it would have this Court affirm by applying that multi-faceted test or by adopting a different, unarticulated one. See Br. 43-49. Either way, the absence of decisions below makes the question inappropriate for a Court "of review, not of first view." *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005). And all the more so given that this Court has recently denied certiorari on this issue in two cases where it was actually decided. See *Pitch* v. *United States*, No. 20-224 (Oct. 19, 2020); *McKeever* v. *Barr*, 140 S. Ct. 597 (2020).

B. In any event, as the D.C. Circuit itself has persuasively explained, district courts lack authority to authorize disclosures of secret grand-jury material beyond the circumstances permitted by the rules. See *McKeever*, 920 F.3d at 844-850. Rule 6(e)(2)(B) states that non-witness participants in the grand jury "must not disclose a matter occurring before the grand jury" "[u]nless these rules provide otherwise." Fed. R. Crim. P. 6(e)(2)(B). Other provisions then list exceptions to that secrecy requirement, identifying who can disclose material from the grand jury, who can receive it, and what it may be used for. See, *e.g.*, Fed. R. Crim. P. 6(e)(3)(A)-(E).

Rule 6(e)(3)(E) provides the only instances in which a "court may authorize disclosure" of grand-jury matters. Fed. R. Crim. P. 6(e)(3)(E). Its carefully defined exceptions operate as "an affirmative limitation on the availability of court-ordered disclosure of grand jury materials." *Baggot*, 463 U.S. at 479-480. Congress would have had no need to state that courts may authorize disclosures in the specific circumstances described in Rule 6(e)(3)(E) if courts retained inherent authority to authorize disclosure in *all* circumstances. See *Andrus* v. *Glover Construction Co.*, 446 U.S. 608, 616-617

(1980) (When "Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent."). Indeed, to allow district courts to disclose whenever they believe disclosure would "make good public policy * * * would render the detailed list of exceptions merely precatory and impermissibly enable the court to 'circumvent' or 'disregard' a Federal Rule of Criminal Procedure." *McKeever*, 920 F.3d at 845 (quoting *Carlisle* v. *United States*, 517 U.S. 416, 426 (1996)). Like its primary argument, the Committee's alternative argument simply attempts to evade Rule 6(e)'s plain text.

* * * * *

The judgment of the court of appeals should be reversed.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General

NOVEMBER 2020