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

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether an impeachment trial before a legislative body is a "judicial proceeding" under Rule 6(e)(3)(E)(i) of the Federal Rules of Criminal Procedure.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-81a) is reported at 951 F.3d 589. The opinion of the district court (Pet. App. 82a-179a) is reported at 414 F. Supp. 3d 129.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 2020. The petition for a writ of certiorari was filed on June 1, 2020, and was granted on July 2, 2020. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Three versions of Federal Rule of Criminal Procedure 6(e)—as originally promulgated in 1946, as directly enacted by statute in 1977, and as it exists today—are reproduced in the appendix to the petition. Pet. App. 182a-190a.

STATEMENT

1. "Since the 17th century, grand jury proceedings have been closed to the public, and records of such proceedings have been kept from the public eye." *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 218 n.9 (1979). In addition to ensuring that those under investigation do not flee or attempt to "influence individual grand jurors," that rule of secrecy safeguards the willingness of witnesses to testify "fully and frankly" as well as "voluntarily," and "assure[s] that persons who are accused but exonerated by the grand jury will not be held up to public ridicule." *Id.* at 219. This Court has accordingly stressed that "the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings," and "courts have been reluctant to lift unnecessarily the veil of secrecy from the grand jury." *Id.* at 218-219.

Federal Rule of Criminal Procedure 6(e) "codifies the traditional rule of grand jury secrecy." *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418, 425 (1983). Originally adopted in 1946, the Rule has been repeatedly amended both by this Court, in its rulemaking capacity, and by Congress, which established the basic framework of the current Rule by direct enactment in 1977. See Act of July 30, 1977 (1977 Act), Pub. L. No. 95-78, § 2(a), 91 Stat. 319-320. In its present form, the Rule generally prescribes that all non-witness participants in the grand jury "must not disclose a matter occurring before the grand jury." Fed. R. Crim. P. 6(e)(2)(B). It then provides a detailed list of exceptions to that general rule of secrecy. Many of those exceptions address sharing of grand-jury materials within the Executive Branch without leave of court, such as disclosures to "an attorney for the government for use in performing that

attorney's duty," Fed. R. Crim. P. 6(e)(3)(A)(i), or to certain national-security officials to address grave national-security threats, Fed. R. Crim. P. 6(e)(3)(D).

In addition, a final subparagraph of exceptions provides that a "court may authorize disclosure—at a time, in a manner, and subject to any other conditions that it directs"—in five enumerated circumstances. Fed. R. Crim. P. 6(e)(3)(E). This case concerns the scope of one such exception: when disclosure is made "preliminarily to or in connection with a judicial proceeding." Fed. R. Crim. P. 6(e)(3)(E)(i). That exception has been part of the Rule since its adoption in 1946, and was included in Congress's direct enactment in 1977. See 1977 Act § 2(a), 91 Stat. 319-320.

Rule 6 also sets out a procedure for adjudicating petitions for grand-jury materials under the "judicial proceeding" exception. A petition invoking that exception "must be filed in the district where the grand jury convened," and the "court must afford a reasonable opportunity to appear and be heard to," among others, "the parties to the judicial proceeding." Fed. R. Crim. P. 6(e)(3)(F)(ii). When "the petition to disclose arises out of a judicial proceeding in another district," the court that oversaw the grand jury "must transfer the petition to the other court," and provide the other court with "a written evaluation of the need for continued grand-jury secrecy," unless the petitioned court can itself "reasonably determine whether disclosure is proper." Fed. R. Crim. P. 6(e)(3)(G).

Parties invoking the "'judicial proceeding'" exception must, under this Court's precedent, demonstrate a "particularized need" for the grand-jury material in the proceeding at issue. *Sells Engineering*, 463 U.S. at 443 (quoting *Douglas Oil*, 441 U.S. at 217-224). Under that

standard, "[p]arties seeking grand jury transcripts under Rule 6(e) 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. The showing of need must be "strong," *Sells Engineering*, 463 U.S. at 443, and the particularized-need standard is not met "merely by alleging that the materials [a]re relevant to an actual or potential * * * action," *Illinois* v. *Abbott & Associates, Inc.*, 460 U.S. 557, 568 (1983); accord *United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 682 (1958) ("relevancy and usefulness" are an insufficient basis for disclosure).

"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." *United States* v. *Baggot*, 463 U.S. 476, 480 (1983). "If the primary purpose of disclosure is not to assist in preparation or conduct of a judicial proceeding, disclosure under" the judicial-proceeding exception "is not permitted." *Ibid.* The particularized-need standard ensures that, even where the exception applies, the veil of secrecy is lifted only "discretely and limitedly." *Douglas Oil*, 441 U.S. at 221 (quoting *Procter & Gamble*, 356 U.S. at 683).

2. 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 provided the Attorney General a confidential two-volume report on the investigation in March 2019. In April 2019, the Attorney General made the vast majority of

the report public, subject only to limited redactions, including redactions that protect grand-jury materials.

On the day the redacted Mueller report was made public, the Department of Justice announced that it would provide certain Members of Congress and staff the ability to review a version of the report that contained no redactions other than those necessary to protect grand-jury information. C.A. App. 450 (providing such access to 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). That enabled congressional review of "98.5% of the report, including 99.9% of Volume II, which discusses the investigation of the President's actions." *Id.* at 221. (Volume I, by contrast, focuses on the allegations of Russian interference in the 2016 presidential election. See Pet. App. 3a.) The Department explained that under Rule 6(e), the Attorney General lacks "discretion to disclose grand-jury information to Congress." C.A. App. 448.

3. In July 2019, respondent, the House Judiciary Committee, applied to the district court for, among other things, "all portions" of the report that were redacted under Rule 6(e), including "any underlying [grand-jury] transcripts or exhibits," as part of its investigation into whether to recommend that the full House of Representatives impeach the President. Pet. App. 103a (citation omitted). As relevant here, respondent argued that the court could authorize disclosure because a Senate impeachment trial would qualify as a "judicial proceeding" within the meaning of Rule 6(e)(3), and the Committee's inquiry would be "preliminar[y]" to such a trial. Fed. R. Crim. P. 6(e)(3)(E)(i). In the

alternative, respondent argued that the 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.

In opposing respondent's request, the government submitted an *ex parte*, *in camera* declaration describing the limited Rule 6(e) redactions made to six pages of the portion of the report that related to the investigation of the President's actions. See C.A. App. 726-729 (public version of declaration). The district court did not receive or review any of the Rule 6(e) redactions to the portion of the report addressing allegations of Russian interference, nor did it receive or review any of the grand-jury transcripts underlying the redactions.

4. The district court granted respondent's application in substantial part. Pet. App. 82a-179a.

a. As relevant here, the district court held that a Senate impeachment trial qualifies as a "judicial proceeding" within the meaning of Rule 6(e)(3)(E)(i). The court acknowledged that it had previously reached the opposite conclusion, applying "a plain reading of the term 'judicial proceeding.'" Pet. App. 134a n.27 (citation omitted); see *In re Application to Unseal Dockets Related To the Independent Counsel's 1998 Investigation of President Clinton*, 308 F. Supp. 3d 314, 319 n.4 (D.D.C. 2018) ("Consideration by the House of Representatives, even in connection with a constitutionally sanctioned impeachment proceeding, falls outside the common understanding of 'a judicial proceeding.'") (citation omitted), vacated in part and remanded, No. 18-5142 (D.C. Cir. May 13, 2020). But the court asserted that the D.C. Circuit had recently interpreted an "ambigu[ous]" prior precedent, *Haldeman* v. *Sirica*, 501

F.2d 714 (D.C. Cir. 1974) (per curiam) (en banc), "to include impeachment proceedings within the 'judicial proceeding' exception, and that reading now controls." Pet. App. 134a & n.27 (quoting *McKeever* v. *Barr*, 920 F.3d 842, 847 n.3 (D.C. Cir. 2019), cert. denied, 140 S. Ct. 597 (2020)).[1]

The district court also concluded that the government's "plain-meaning" reading—that "judicial proceeding[s]" are limited to proceedings "'in a judicial forum before a judge or a magistrate'"—was inconsistent with a "broad interpretation given to the term 'judicial proceeding'" in other contexts. Pet. App. 115a-117a. The court asserted that "impeachment trials are judicial in nature," *id.* at 117a (citation omitted), noting that the Constitution uses terminology borrowed from the judicial setting to describe impeachment proceedings, *id.* at 117a-123a. The court also cited historical examples which, in its view, showed that "Congress was af-

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[1] In *Haldeman*, 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. 501 F.2d at 716; see Pet. App. 132a-135a. Neither the district court nor the court of appeals in *Haldeman* clearly explained the ground for disclosure there. See Pet. App. 133a-134a. But when the court of appeals later held in *McKeever* that district courts lack inherent authority to release grand-jury materials outside the exceptions set forth in Rule 6(e)(3), the court distinguished *Haldeman* in part by saying that it "read *Haldeman* * * * as fitting within the Rule 6 exception for 'judicial proceedings.'" *McKeever*, 920 F.3d at 847 n.3. The district court reasoned that *McKeever* not only required denial of respondent's request to release the materials as an exercise of purported "inherent authority," Pet. App. 107a n.14, but also established that Senate impeachment trials qualify as "judicial proceeding[s]" within the meaning of Rule 6(e), *id.* at 134a-135a.

forded access to grand jury material prior to the enactment of Rule 6(e) in 1946," and that "Rule 6(e) was meant to codify this practice." *Id.* at 127a.

The district court acknowledged that respondent, like any other applicant 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 records. Pet. App. 163a-164a. The court concluded, though, that respondent had demonstrated a particularized need for the records at issue because they were "relevant" to the House's asserted investigation. *Id.* at 167a, 174a; see *id.* at 166a-175a. The court so held even with respect to certain information that respondent had expressly "conceded it did not need." *Id.* at 24a.

The district court thus 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)." Pet. App. 178a-179a. 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 179a.

b. The district court ordered disclosure within five days of its order. See Pet. App. 178a-179a. The court denied the government's motion for a stay of the order pending appeal, D. Ct. Doc. 55 (Oct. 29, 2019), but the court of appeals entered and then extended an administrative stay of the order "pending further order of the court," C.A. Doc. 1813216, at 1 (Oct. 29, 2019); C.A. Doc. 1816378, at 2 (Nov. 18, 2019).

5. The court of appeals affirmed. Pet. App. 1a-81a.

a. As relevant here, the court of appeals held that a Senate impeachment trial is a "judicial proceeding" under Rule 6(e). Pet. App. 11a. The court initially relied on its previous decisions in *McKeever* and *Haldeman*. See *id.* at 10a-12a. The court reasoned that a footnote in *McKeever* "necessarily interpreted *Haldeman* to involve an application of Rule 6(e)'s 'judicial proceeding' exception," and that the footnote's "interpretation of *Haldeman* was essential to th[e] court's reasoning in *McKeever*." *Id.* at 12a; see p. 7 n.1, *supra*.

The court of appeals also reached the same conclusion independent of circuit precedent. The court first asserted 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." Pet. App. 12a-13a. And then turning to the Rule's text, the court stated that "[t]he term 'judicial proceeding' has long and repeatedly been interpreted broadly" to allow disclosure in "'judicial and quasi-judicial contexts' outside of Article III court proceedings." *Id.* at 13a (citation omitted). The court afforded "little significance" to the fact that Rule 6(e)'s other uses of the term "may contemplate a judicial court proceeding," reasoning that "'the presumption of consistent usage "readily yields" to context.'" *Ibid.* (citation omitted).

The court of appeals observed that "historical practice reflects at least one example of a court-ordered disclosure of grand jury materials to the Committee" that occurred before this Court formally adopted Rule 6(e) in 1946. Pet. App. 14a. It also believed that Congress had "repeatedly obtained grand jury material to investigate allegations of election fraud or misconduct by

Members of Congress"—though it acknowledged that those examples did not involve impeachment, and also failed to establish that they even involved secret materials. *Ibid.* 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 dismissed concerns that "reading Rule 6(e) to encompass impeachment proceedings would create separation-of-powers problems." Pet. App. 15a. The court appeared to accept that the provision of Rule 6(e) allowing a district court to impose "conditions" on the disclosure of grand-jury materials (such as a prohibition on further dissemination), Fed. R. Crim. P. 6(e)(3)(E), could not constitutionally be applied to a congressional committee because of the Speech or Debate Clause, U.S. Const. Art. I, § 6, Cl. 1. See Pet. App. 23a. And the court likewise acknowledged that the ordinary particularized-need standard would be constitutionally problematic "in the impeachment context." *Id.* at 15a. It nevertheless concluded that those concerns could be "mitigate[d]" by adopting a lower standard requiring "only [that] the requested grand jury materials [be] relevant to the impeachment investigation," *ibid.*, and by trusting that respondent and its members probably would not choose to make the grand-jury materials public, see *id.* at 21a.

Applying that impeachment-specific framework here, the court of appeals found that respondent had satisfied the lower "relevance" standard for obtaining the requested materials. See Pet. App. 16a-28a. The court acknowledged that the House already had impeached the President and that the Senate already had

acquitted him, but observed that, "if the grand jury materials reveal new evidence of impeachable offenses, the Committee may recommend new articles of impeachment." *Id.* at 17a.

b. Judge Rao dissented. Pet. App. 34a-81a. 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. *Id.* at 41a-58a. She then concluded that respondent lacked Article III standing to obtain an order compelling the Department of Justice, which maintains custody of the grand-jury records, to turn them over. *Id.* at 58a-81a.

Judge Rao agreed with the panel majority, however, that impeachment is a "judicial proceeding" within the meaning of Rule 6(e). Pet. App. 37a; see *id.* at 58a n.10. She also agreed that respondent could show a particularized need for the materials here under a lower and more "flexible" standard applicable to impeachment proceedings. *Id.* at 38a (citation omitted). She 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 acquitted him. *Id.* at 39a.

c. In a brief concurring opinion, Judge Griffith disagreed with the dissent's "distin[ction] between authorization and compulsion." Pet. App. 31a.

6. On May 20, 2020, this Court stayed the mandate of the court of appeals pending the filing and disposition of the government's petition for a writ of certiorari, as long as the petition was filed on or before June 1, 2020, at 5 p.m. Order, No. 19A1035. The government filed its petition within that time, and this Court granted the petition on July 2, 2020.

SUMMARY OF ARGUMENT

An impeachment trial occurring before a legislative body is not a "judicial proceeding" under Federal Rule of Criminal Procedure 6(e)(3)(E)(i).

A. The term "judicial proceeding" in Rule 6(e) carries its ordinary meaning: a proceeding occurring before a judge in a court. That ordinary meaning is confirmed by the usage of the same term elsewhere in Rule 6(e) and in the Federal Rules of Criminal Procedure. Those uses unmistakably do not extend to proceedings before elected legislators.

No reason exists to believe that the term carries a unique meaning in Rule 6(e)(3)(E)(i) that it bears nowhere else in the Rules or in ordinary English. In arguing otherwise, respondent and the court of appeals have invoked Founding-era materials concerning the correct constitutional characterization of impeachment, but those materials do not shed light on the proper interpretation of the words "judicial proceeding" in Rule 6(e). In any event, the history does not show that Senate impeachment trials are truly "judicial"; at most, it reflects that the Senate acts in a hybrid legislative-judicial role when evaluating articles of impeachment. Nothing suggests that the reference to ordinary "judicial proceeding[s]" in Rule 6(e) extends to this unique hybrid proceeding.

Indeed, the court of appeals appeared to agree that the ordinary meaning of "judicial proceeding" in Rule 6(e) does *not* encompass impeachment trials, but nevertheless suggested that the judicial-proceeding exception to grand-jury secrecy must be read "broadly." Pet. App. 13a. That was incorrect, for this Court has 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

[grand-jury] secrecy has been authorized." *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418, 425 (1983).

Especially given that need for clear evidence to justify a departure from the norm of grand-jury secrecy, historical practice cannot support the court of appeals' expansive reading. The court did not identify a single example predating the drafting of Rule 6(e) in 1944 in which a court authorized disclosure of secret grand-jury material to the House of Representatives in connection with an impeachment investigation. And while courts occasionally furnished grand-jury material to Congress for other, non-impeachment purposes (generally after the material was no longer secret), those examples cannot support the court's interpretation of "judicial proceeding" as including a Senate impeachment trial.

Nor is the court of appeals' approach supported by precedent allowing disclosures of grand-jury material during investigative proceedings outside of the Article III context, such as attorney-discipline proceedings or administrative adjudications. Such cases allowed disclosure not because the administrative hearings in question were themselves "judicial proceeding[s]" within the meaning of Rule 6(e), but rather because they were "preliminar[y] to" eventual judicial review. The same, of course, cannot be said of impeachment. See *Nixon* v. *United States*, 506 U.S. 224, 233-235 (1993).

B. The court of appeals' expansive reading of "judicial proceeding" also needlessly creates constitutional problems with the ordinary application of Rule 6(e).

To begin, when a district court authorizes disclosure of grand-jury matters, it may do so "at a time, in a manner, and subject to any other conditions that it directs." Fed. R. Crim. P. 6(e)(3)(E). That provision allows

courts to ensure that grand-jury disclosures initially justified as "preliminar[y] to or in connection with a judicial proceeding," Fed. R. Crim. P. 6(e)(3)(E)(i), do not end up being disseminated more widely for extra-judicial purposes. But a court likely is powerless to impose such conditions on Members of Congress. See *Senate Permanent Subcommittee on Investigations* v. *Ferrer*, 856 F.3d 1080, 1086 (D.C. Cir. 2017). 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 strong reason to doubt that such a congressional proceeding is a "judicial proceeding" as that term is used in the Rule.

In addition, determining whether there is a "particularized need" for grand-jury materials "'preliminarily to or in connection with'" a potential Senate impeachment trial, *Sells Engineering*, 463 U.S. at 442-443 (citation omitted), would enmesh federal courts in the consideration of impeachment. Making that determination would require courts to opine both on how likely the House of Representatives is to pass articles of impeachment, and also on how necessary the particular grand-jury materials sought are to achieve removal by the Senate. Yet such inquiries would raise serious constitutional concerns by entangling the Judiciary in the details of proceedings that the Constitution assigns to Congress. See *Nixon*, 506 U.S. at 233-235.

The court of appeals attempted to address those concerns by adopting a diluted version of the "particularized need" standard that examines only the "relevance" of the grand-jury materials to a possible impeachment. The court held that its standard was satisfied here—despite the Senate having already rejected two articles of impeachment—because respondent had indicated

that "if the grand jury materials reveal new evidence of impeachable offenses, [it] may recommend new articles of impeachment." Pet. App. 17a. But that standard seemingly would justify disclosure in *any* case involving a federal officer, and it flies in the face of this Court's repeated recognition that a mere relevance standard for disclosure is inappropriate because it would amount to "a virtual rubber stamp." *Sells Engineering*, 463 U.S. at 443-444. The Court need not, and should not, read Rule 6(e) to produce that result.

ARGUMENT

AN IMPEACHMENT TRIAL BEFORE A LEGISLATIVE BODY IS NOT A "JUDICIAL PROCEEDING" UNDER RULE 6(e)

The text of Federal Rule of Criminal Procedure 6(e)(3)(E)(i) refers to a "judicial proceeding." The ordinary meaning of a "judicial proceeding" is a proceeding before a judge in a court, not a proceeding before elected lawmakers in a legislative chamber. That plain meaning is confirmed by the use of the term elsewhere in the Federal Rules of Criminal Procedure. And this Court has stressed the need for clear authorization to depart from the traditional rule of grand-jury secrecy. Especially in light of that principle, the court of appeals erred in broadly construing Rule 6(e) to extend to a Senate impeachment trial. That construction is not supported by Founding-era characterizations of impeachment, historical practice predating Rule 6(e)'s enactment, or judicial precedent applying Rule 6(e) in other contexts. To conclude otherwise would not only give the term a meaning in Rule 6(e)(3)(E)(i) that it carries nowhere else in ordinary English or the Federal Rules, but would also give rise to substantial constitutional problems that the Rule fails to address.

A. Text, History, And Precedent Demonstrate That "Judicial Proceeding" In Rule 6(e) Means A Proceeding Before A Court, Not A Legislative Body

1. a. "Since the 17th century, grand jury proceedings have been closed to the public, and records of such proceedings have been kept from the public eye." *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 218 n.9 (1979). Rule 6(e) "codifies" that "traditional rule of grand jury secrecy." *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418, 425 (1983). The Rule makes clear 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). And the Rule permits a court to authorize disclosure of secret grand-jury matters in five carefully limited exceptions. See Fed. R. Crim. P. 6(e)(3)(E). The only one at issue here involves court-authorized disclosure "preliminarily to or in connection with a judicial proceeding." Fed. R. Crim. P. 6(e)(3)(E)(i). That exception, which Congress directly codified, see 1977 Act § 2(a), 91 Stat. 319-320, echoes an exception contained in the original Rule, see Fed. R. Crim. P. 6(e) (1946) (disclosure permissible "only when so directed by the court preliminarily to or in connection with a judicial proceeding").

The term "judicial proceeding" in that exception means a proceeding taking place before a judge in a court. That is—and always has been—the ordinary meaning of the term. See *Black's Law Dictionary* 1398 (10th ed. 2014) ("[a]ny court proceeding; any proceeding initiated to procure an order or decree, whether in law or in 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"). Indeed, respondent has never disputed that the ordinary meaning of "judicial proceeding" is a *court* proceeding. See Br. in Opp. 20-21. And consideration by one legislative body (the Senate) of articles of impeachment passed by another legislative body (the House of Representatives) does not fit within that ordinary understanding of "judicial proceeding."

Nothing in Rule 6 suggests that "judicial proceeding" is used in an idiosyncratic sense that would encompass proceedings before elected lawmakers in legislative chambers. To the contrary, the other references to "judicial proceeding" in Rule 6(e) also use that term in its ordinary sense. 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) (emphasis added); see Fed. R. Crim. P. 6(e)(3)(E) advisory committee's note (1983 Amendments) (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) (emphasis added). Those subparagraphs would make little sense if "judicial proceeding" included a Senate impeachment trial. After all, the Senate is not an "other court" to which the petition may be transferred under subparagraph (G), and the House Judiciary Committee would

not be a "party" to any Senate impeachment trial under subparagraph (F) (even assuming a majority of the House of Representatives were to vote to impeach at all). It follows that the reference in subparagraph (E) to a "judicial proceeding" likewise refers only to a court proceeding, not Senate proceedings. See *IBP, Inc.* v. *Alvarez*, 546 U.S. 21, 34 (2005) (invoking "the normal rule" that "identical words used in different parts of the same [provision] are generally presumed to have the same meaning").

Other aspects of the Rules of Criminal Procedure reinforce the ordinary understanding of the term "judicial proceeding" as being limited to proceedings before judges in courts. The only other instance in which that term appears in the Rules indisputably refers to courts: "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." Fed. R. Crim. P. 53. That understanding of the term also is consistent with Rule 1, which explains that the Rules apply in numerous types of specified "proceedings"—all of which take place before courts, including "the United States district courts, the United States courts of appeals," "the Supreme Court of the United States," certain "proceeding[s] before a state or local judicial officer," and "[t]erritorial [c]ourts." Fed. R. Crim. P. 1(a)(1)-(4) (emphasis omitted); see Fed. R. Crim. P. 1(b)(2) (defining "'Court'" as "a federal judge performing functions authorized by law"); Fed. R. Crim. P. 1(b)(4) (defining "'Judge'" as a "federal judge or a state or local judicial officer").

b. The court of appeals did not dispute that the other uses of "judicial proceeding" in Rule 6(e), and in the

Criminal Rules more generally, all refer solely to court proceedings, but it nevertheless reasoned that this textual indicator was "of little significance because 'the presumption of consistent usage "readily yields" to context.'" Pet. App. 13a (quoting *Utility Air Regulatory Group* v. *EPA*, 573 U.S. 302, 320 (2014)). Nothing about the "context" of Subparagraphs (E), (F), and (G), however, suggests that "judicial proceeding" means different things in those adjoining provisions. To the contrary, subparagraphs (F) and (G) provide guidance about how to consider an application for release of grand-jury materials under the judicial-proceeding exception in subparagraph (E). That context *strengthens*, rather than weakens, the ordinary presumption that Congress used the term consistently.

Instead of endorsing the court of appeals' suggestion that "context" explains the inconsistent usage, respondent tries to deny that any inconsistency exists. With respect to the requirements in subparagraph (G) that apply "[i]f the petition to disclose arises out of a judicial proceeding in another district," Fed. R. Crim. P. 6(e)(3)(G), respondent observes that "not all disclosure petitions will involve a 'judicial proceeding' in 'another district.'" Br. in Opp. 25. That is true as far as it goes. The judicial proceedings might arise in the *same* district, or in *no* district if "the application arises out of a proceeding in a 'state court.'" *Ibid.* (quoting Fed. R. Crim. P. 6(e)(3)(E) advisory committee's note (1983 Amendments)). But the fact remains that the "judicial proceeding[s]" referred to in subparagraph (G) are unmistakably and exclusively court proceedings.

With respect to the requirement in subparagraph (F) that "the parties to the judicial proceeding" be served with the application to disclose grand-jury materials,

Fed. R. Crim. P. 6(e)(3)(F)(ii), respondent suggests that "[t]here is no obstacle to applying that provision to an impeachment," as the President can be served as a "'party' to the impeachment." Br. in Opp. 24. That rejoinder, however, overlooks the fact that the House Judiciary Committee would *not* be a "party" to any Senate impeachment proceeding that the full House of Representatives voted to initiate. In addition, that attempt to shoehorn an impeachment into the ordinary understanding of a "judicial proceeding" invites satellite litigation in the federal courts between the House and the President (or another impeachable officer) over how likely it is that the House will ultimately impeach and how necessary the requested grand-jury materials are to achieve removal in the Senate. See pp. 35-41, *infra*. "Judicial involvement in impeachment proceedings" is, at a minimum, "counterintuitive," *Nixon* v. *United States*, 506 U.S. 224, 235 (1993), and there is no evidence that the Rules Committee or Congress envisioned that kind of litigation.

c. Lacking support in the ordinary meaning of "judicial proceeding" or the parallel provisions of the Criminal Rules, the court of appeals went far afield by invoking descriptions of impeachment in the Constitution, the Federalist Papers, and other sources. Pet. App. 12a. The court noted, for example, that the Constitution refers to the Senate's "sole Power to try all Impeachments" and provides that, if the President is tried, "the Chief Justice shall preside." *Ibid.* (quoting U.S. Const. Art. I, § 3, Cl. 6.). And the court asserted that "[t]he Framers of the Constitution also understood impeachment to involve the exercise of judicial power," because "Alexander Hamilton referred to the Senate's 'ju-

dicial character as a court for the trial of impeachments.'" *Id.* at 12a-13a (quoting *The Federalist No. 65*, at 396 (Alexander Hamilton) (Clinton Rossiter ed., 1961)); see Br. in Opp. 21-22 (identifying similar language in other portions of the Federalist Papers). Respondent has further emphasized similar statements, made in the context of actual impeachments, referring to the Senate as a "Court of Impeachment." Br. in Opp. 22 (quoting 8 Annals of Cong. 2245 (1798)); see *ibid.* (identifying several additional examples). This entire line of reasoning is flawed in both premise and conclusion.

Most importantly for present purposes, the sources invoked are irrelevant to the question presented here. That question is not how properly to categorize a Senate impeachment trial under the Constitution or why such a trial is consistent with the separation of powers. Cf. *The Federalist No. 47*, at 301-303 (James Madison). Instead, the question is whether the phrase "judicial proceeding," as used in Rule 6(e)(3)(E), would ordinarily be understood to include an impeachment trial conducted before elected legislators. See, *e.g.*, *Wall* v. *Kholi*, 562 U.S. 545, 551 (2011) (holding that where a phrase is not defined, the Court "begin[s] by considering the ordinary understanding of the phrase").

That writers describing the unique nature of impeachment sometimes use language from the judicial context does not mean an impeachment trial comes within the ordinary understanding of "judicial proceeding," any more than saying that federal judges "call balls and strikes" means they come within the ordinary understanding of an "umpire." Indeed, the court of appeals itself recognized that administrative proceedings before *executive* agencies can also be described, in a

sense, as "judicial" or "quasi-judicial" because they involve individualized adjudication. Pet. App. 13a (citation omitted); cf. *Humphrey's Executor* v. *United States*, 295 U.S. 602, 628 (1935) (describing the Federal Trade Commission as acting "in part quasi-judicially"). But courts have appropriately recognized that those administrative proceedings are not themselves "judicial proceeding[s]" within the meaning of Rule 6(e)(3)(E)(i). See pp. 30-33, *infra*. The same is true with respect to impeachment, and that alone is a sufficient basis for rejecting the court of appeals' reliance on references to impeachment as "judicial."

Moreover, the court of appeals misunderstood the constitutional context even on its own terms. The Framers did not view impeachment to be "judicial" in anything like the ordinary sense. After all, the Constitution vests "[t]he judicial Power of the United States * * * in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. Art. III, § 1. "In establishing the system of divided power in the Constitution, 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) (quoting *The Federalist No. 78*, at 466 (Alexander Hamilton) (brackets in original)). Nevertheless, treating an impeachment trial as a truly "judicial" function of the federal government would improperly bring into conflict Article I's impeachment-trial provisions and Article III's Vesting Clause. See *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (in construing a law, "[a] court must * * * 'fit, if possible, all parts into an harmonious whole'") (citations omitted).

Instead, when terms like "judicial," "court," and "trial" are used in the context of impeachment, they primarily reflect that removing a federal official from office is not an ordinary legislative act, but rather a unique duty of Senators that requires a "sufficiently dignified" proceeding to provide "the necessary impartiality," *The Federalist No. 65*, at 398 (Alexander Hamilton).[2] In some sense, impeachment is "a hybrid of the legislative and the judicial, the political and the legal." *Senate Rules and Precedents Applicable to Impeachment Trials: Executive Session Hearings Before the Senate Committee on Rules and Administration*, 93d Cong., 2d Sess. 193 (1974) (statement of Sen. Mansfield).

Ultimately, then, "the true light in which [an impeachment trial] ought to be regarded" is "as a bridle in the hands of the legislative body upon the executive" in the event of the extraordinary occurrence of high crimes and misdemeanors, *The Federalist No. 65*, at 397, not as an ordinary "judicial proceeding." See *Nixon*, 506 U.S. at 234 (describing the reasons given in Federalist No. 65 for "why the Judiciary, and the Supreme Court in particular, were not chosen to have any role in impeachments"); *id.* at 235 n.2 (describing impeachment as "legislative action"). At an absolute minimum, the hybrid nature of impeachment for constitutional purposes defeats any attempt to characterize a

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[2] That is especially clear with respect to the fact that the Chief Justice presides when the President in particular is impeached. See Pet. App. 12a. After all, the Vice President or a Senator presides over Senate impeachment trials of other federal officials, and even respondent does not contend that the question whether impeachment is a "judicial proceeding" under Rule 6(e) depends on the identity of the impeached official.

Senate impeachment trial as a "judicial proceeding" within the ordinary meaning of that phrase in Rule 6(e).

2. Notably, the court of appeals itself appeared to acknowledge that "the *ordinary* meaning of the term 'judicial proceeding' does not include a proceeding conducted before a legislative body," but it responded that "'judicial proceeding' has long and repeatedly been interpreted broadly" and, "[s]o understood, * * * encompasses a Senate impeachment trial." Pet. App. 13a (emphasis added; citation omitted). The court erred at multiple levels.

a. Most fundamentally, 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 to an "attorney for the Government" does not authorize disclosure to an attorney in the Department of Justice'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 (emphasis added); see, *e.g.*, *In re Sealed Case*, 250 F.3d 764, 769 (D.C. Cir. 2001) (referring to "the Supreme Court's clear instruction in *Sells Engineering* that exceptions to Rule 6(e) must be narrowly construed") (citation omitted).[3]

[3] Accordingly, where an important need for an exception has arisen, Congress has amended Rule 6(e) to authorize it expressly. See, *e.g.*, Fed. R. Crim. P. 6(e)(3)(D) advisory committee's note

Thus, rather than construing Rule 6(e)(3)(E)(i) expansively, the court of appeals was required to look for "a clear indication" that the provision authorized disclosure of grand-jury materials in connection with impeachment inquiries. No such indication exists. Indeed, if concerns about grand-jury secrecy warranted reading "attorney for the Government" so stringently as to exclude attorneys in the Department of Justice's Civil Division, see *Sells Engineering*, 463 U.S. at 427, then they certainly preclude reading "judicial proceeding" so exorbitantly as to include the Senate's consideration of articles of impeachment.

b. Especially in light of *Sells Engineering*, the court of appeals' rationale for a broad reading of Rule 6(e) falls far short. Neither historical practice nor judicial precedent remotely suggests, much less clearly indicates, that a Senate impeachment trial constitutes a "judicial proceeding" within the meaning of Rule 6(e).

i. Contrary to the court of appeals' conclusion, historical practice confirms that the term "judicial proceeding" in Rule 6(e) carries its ordinary meaning. The court did not identify a single example predating the drafting of Rule 6(e) in 1944 in which a court authorized disclosure of secret grand-jury materials to Congress in connection with impeachment.

Instead, any established practice of judicial authorization of grand-jury disclosures was confined to relatively limited circumstances, all of which related to or-

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(2002 Amendments) (describing statutory changes, post-9/11, that "permit[] an attorney for the government to disclose grand-jury matters involving foreign intelligence or counterintelligence to other Federal officials, in order to assist those officials in performing their duties").

dinary 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 asserted the authority to pierce grand-jury secrecy where there was a basis to set aside an indictment pending in federal court on the ground 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, 100-101 (4th Cir. 1908). When the Advisory Committee on Rules of Criminal Procedure sought to "codif[y] the traditional rule of grand jury secrecy" in 1944, *Sells Engineering*, 463 U.S. at 425, it also codified those limited exceptions: it created 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 the 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 cases those notes cite as examples all involved attempts to lift grand-jury secrecy in connection with proceedings occurring before judges in courts. See *ibid.* (citing *Schmidt*, *supra*; *Atwell*, *supra*; and *United States* v. *American Medical Association*, 26 F. Supp. 429 (D.D.C. 1939)). The historical

practice predating Rule 6(e)'s adoption on which the Advisory Committee expressly relied in no way suggests that the term "judicial proceeding" extends to an impeachment trial before elected legislators.

The court of appeals cited (Pet. App. 14a) an 1811 incident in which the House of Representatives received a "copy of a presentment against" a territorial judge, which led to an inquiry "looking to the impeachment" of the judge. 3 Asher C. Hinds, *Hinds' Precedents of the House of Representatives of the United States* §§ 2487, 2488, at 983, 985 (1907) (emphasis omitted). But that incident "did not involve compulsory process, judicial involvement of any sort, or even secret grand jury materials." Pet. App. 57a n.9 (Rao, J., dissenting); see *id.* at 128a n.25 (district court observing that in this instance "the grand jury information was presumably no longer secret").

The court of appeals also cited (Pet. App. 14a) a 1945 incident in which the House Judiciary Committee obtained grand-jury materials in connection with the possible impeachment of two federal judges. But that occurrence post-dated the submission to this Court of the final draft of the proposed Rule 6(e)(3). See Report of the Advisory Committee on Rules of Criminal Procedure 7-8 (June 1944). It therefore cannot be part of the "traditional rule of grand jury secrecy" that the Advisory Committee had attempted to "codif[y]." *Sells Engineering*, 463 U.S. at 425-426. And its probative value is further reduced by the fact that the targets of the investigation sought to cooperate with the Committee, and therefore mounted no objection. Cf. *Conduct of Albert W. Johnson and Albert L. Watson: Hearing Before Subcommittee of the House Committee on the Judiciary*, 79th Cong., 1st Sess. 4 (1946) (letter from Judge

Johnson discussing the grand-jury proceedings and explaining that he had "willingly complied" with all of the investigators' requests for evidence).

The court of appeals also invoked (Pet. App. 14a) examples of Congress's having "obtained grand jury material to investigate allegations of election fraud or misconduct by Members of Congress." But those examples did not involve impeachment *at all*, and thus shed no light on whether a Senate impeachment trial would have been considered a "judicial proceeding" at the time of Rule 6(e)'s adoption. Nor was the history of disclosure uniform. For example, in one instance in which the House of Representatives sought secret grand-jury materials, see 6 Clarence Cannon, *Cannon's Precedents of the House of Representatives of the United States* § 399, at 565 (1935), the district judge declined to provide them, explaining that the requested evidence "had been impounded, and he thought he could not go any further," 65 Cong. Rec. 8865 (1924) (statement of Sen. Borah).[4]

Finally, the court of appeals relied on three district court decisions and two appellate court decisions authorizing impeachment-related disclosure of grand-jury materials *after* Rule 6 went into effect in 1946. See Pet. App. 14a-15a. The court of appeals thought those deci-

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[4] Moreover, many of these non-impeachment examples do not even appear to have involved *secret* grand-jury materials. One incident, for instance, involved a grand-jury report that was "a matter of public record" that could be "consulted by anyone," which the House obtained "[n]ot through the Department of Justice, and not through the action of a court," but instead through "members of the press." 65 Cong. Rec. 3973 (1924) (statement of Sen. Graham); see 6 Clarence Cannon, *Cannon's Precedents of the House of Representatives of the United States* § 402, at 575 (1935).

sions were an "established practice deserv[ing] 'significant weight'" in its analysis. *Id.* at 15a (quoting *NLRB* v. *Noel Canning*, 573 U.S. 513, 524 (2014)). But five lower-court cases over the course of nearly 75 years does not amount to the sort of "established practice" that would shed significant light on the meaning of even an ambiguous phrase, let alone provide a basis for attributing an idiosyncratic meaning to a phrase as clear as "judicial proceeding." Cf. *Noel Canning*, 573 U.S. at 524, 529 (placing "significant weight upon historical practice" that included "thousands of intra-session recess appointments") (citation and emphasis omitted). And that is especially true given that, in at least some of those examples, the applicability of Rule 6(e) was not actively litigated, with the parties focusing instead on other issues. See, *e.g.*, *In re Request for Access to Grand Jury Materials No. 81-1*, 833 F.2d 1438, 1440-1441 (11th Cir. 1987) (noting that the court of appeals "d[id] not have before us an issue concerning the interpretation of th[e] ['judicial proceeding'] language of [then-Rule] 6(e)(3)(C)(i)" because the parties and district court were in agreement on it); see also pp. 6-7 & n.1, *supra* (describing the unclear basis of the orders in the *Haldeman* litigation).[5]

ii. Also contrary to the court of appeals' conclusion, judicial precedent further confirms that the term "judicial proceeding" in Rule 6(e) carries its ordinary meaning. Specifically, this Court has understood "judicial

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[5] The Department of Justice supported disclosure in each of the instances identified in the paragraph above. The government has reconsidered its position on the question, however, in light of the text and context of Rule 6(e) as well as the serious separation-of-powers concerns implicated by the court of appeals' contrary interpretation, see pp. 33-42, *infra*.

proceeding" in Rule 6(e)(3) to refer to litigation. In *United States* v. *Baggot*, 463 U.S. 476 (1983), 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." *Id.* at 480; see *ibid.* ("[T]he Rule contemplates only uses related fairly directly to some identifiable litigation, pending or anticipated."). In doing so, the Court was clearly referring to "litigation" of the sort that occurs in a court, not the Senate's consideration of impeachment.

The court of appeals went astray by relying on lower-court decisions that it characterized as authorizing disclosure of grand-jury materials for "judicial and quasi-judicial contexts outside of Article III court proceedings," such as attorney-disciplinary proceedings and similar matters. Pet. App. 13a (citation and internal quotation marks omitted); see *id.* at 112a-113a (citing, among other cases, *Doe* v. *Rosenberry*, 255 F.2d 118 (2d Cir. 1958)). At the outset, this Court has never endorsed the cases cited by the court of appeals (most of which predate this Court's decision in *Sells Engineering*); indeed, the Court has pointedly declined to address the "knotty question" of whether Rule 6(e)(3)(E)(i) covers *anything* beyond "garden-variety civil actions [and] criminal prosecutions." *Baggot*, 463 U.S. at 479 n.2. Regardless, even assuming those cases are correct, they have uniformly treated an eventual proceeding before a *court* as a necessary predicate for making a disclosure "preliminarily to or in connection with a judicial proceeding" under Rule 6(e)(3)(E)(i). They thus confirm rather than refute that "judicial proceeding" carries its ordinary meaning in Rule 6(e).

In *Rosenberry*, for example, the relevant judicial proceeding occurred "before the Appellate Division" of the New York state courts; the bar disciplinary investigation at issue was not itself a "judicial proceeding," but disclosure was permissible because the investigation was made "preliminarily to" the judicial proceeding in the Appellate Division. 255 F.2d at 119-120; see *In re Federal Grand Jury Proceedings*, 760 F.2d 436, 438 (2d Cir. 1985) (explaining that the proceeding in *Rosenberry* was "ordered by the Appellate Division"). Other courts addressing grand-jury disclosures in connection with attorney discipline—including the D.C. Circuit itself—have likewise emphasized that disclosure is permissible because "the proceedings were designed to culminate in judicial review." *In re J. Ray McDermott & Co.*, 622 F.2d 166, 170 (5th Cir. 1980); see *United States* v. *Bates*, 627 F.2d 349, 351 (D.C. Cir. 1980) (per curiam) (explaining that "disciplinary 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," and such a proceeding "is not only preliminary to a judicial proceeding, it is part of a judicial proceeding") (emphasis omitted).

Notably, where the relationship between attorney-discipline proceedings and a court is attenuated, those proceedings do not qualify under the exception. See *In re Grand Jury 89-4-72*, 932 F.2d 481, 485 (6th Cir.) (holding that Michigan's attorney disciplinary scheme was "neither carried out before a judicial body, nor subject to sufficient judicial control" to qualify under Rule 6(e)(3)(E)(i)), cert. denied, 502 US. 958 (1991); cf. *Baggot*, 463 U.S. at 481 ("The fact that judicial redress may be sought [following a tax assessment], without more,

does not mean that the Government's action is 'preliminar[y] to a judicial proceeding.'") (brackets in original).

Similarly inapposite are the remaining lower-court decisions in other "judicial and quasi-judicial contexts" on which the court of appeals relied. Pet. App. 13a (citation omitted). For example, the D.C. Circuit has recognized that grand-jury investigations themselves are conducted "preliminarily to or in connection with a judicial proceeding." *In re Grand Jury*, 490 F.3d 978, 986 (2007) (per curiam). Likewise, *In re Sealed Motion* involved a unique statutory proceeding before a Special Division of the D.C. Circuit, which that court explained was a "judicial proceeding" under the Rule's plain language. 880 F.2d 1367, 1368-1370, 1379-1380 (1989) (per curiam). The authorization of disclosure in "administrative proceedings before the United States Tax Court," Pet. App. 13a, is similar. The Tax Court is an entity that Congress—which enacted the relevant text of Rule 6(e)—expressly established as a "court," 26 U.S.C. 7441; that is constitutionally treated as a court for some purposes, see *Freytag* v. *Commissioner*, 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, either generally or in the specific context of impeachment. See *Nixon*, 506 U.S. at 233-235.

Lower-court decisions involving administrative proceedings other than those in the Tax Court, see Pet. App. 13a, likewise authorized disclosure of grand-jury matters on the ground that such proceedings are *preliminary* to an eventual judicial proceeding because they are subject to judicial review—not on the ground that they are judicial proceedings in their own right. See *In re Special February 1971 Grand Jury*, 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") (citation omitted).

In sum, none of the foregoing examples supports the court of appeals' view that the term "judicial proceeding," as used in Rule 6(e)(3)(E)(i), is properly construed to include a legislative proceeding that is not preliminary to an eventual court proceeding but rather is committed to the legislative body itself.

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 the Senate's consideration of articles of impeachment also would create substantial constitutional difficulties. The court of appeals attempted to avoid those difficulties by creating an impeachment-specific disclosure regime that departs from how the Rule ordinarily applies, but that approach contravenes this Court's precedents and is not practicable even on its own terms.

1. 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 in

connection with a judicial proceeding 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." *United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 683 (1958).

A federal court is likely powerless, however, to impose such conditions on Members of Congress in connection with an impeachment—much less to enforce them by contempt. The D.C. Circuit has held that "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 (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. Respondent, unsurprisingly, 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 in the context of disclosures for impeachment proceedings is, by itself, a strong 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.'") (citation omitted).

More generally, the unique difficulties that would be associated with preventing further dissemination of grand-jury materials once they are disclosed to Members of Congress investigating impeachment also helps to explain why Rule 6 does not authorize such disclosures in the first place. As the Founders recognized, impeachment investigations concern matters "which may with peculiar propriety be denominated POLITICAL" and, "for this reason, will seldom fail to agitate the passions of the whole community, and to divide it into parties more or less friendly or inimical to the accused." *The Federalist No. 65*, at 396 (Alexander Hamilton). In that highly politicized context, turning over secret grand-jury materials to impeachment investigators without any mechanism for further judicial oversight would be an invitation for abuse. For the reasons discussed above, there is no persuasive reason to conclude that Rule 6(e) effected that result.

2. a. The court of appeals' interpretation of "judicial proceeding" also threatens the separation of powers in a second way: applying Rule 6(e) in the ordinary man-

ner to the Senate's consideration of articles of impeachment would entangle federal courts in a political process from which the Founders specifically sought to exclude them. See *Nixon*, 506 U.S. at 234 (describing "reasons why the Judiciary * * * w[as] not chosen to have any role in impeachments"); see also U.S. Const. Art. I, § 2, Cl. 5 (establishing the House of Representatives' "sole Power of Impeachment"); U.S. Const. Art. I, § 3, Cl. 6 (establishing the Senate's "sole Power to try all Impeachments").

This Court has repeatedly recognized that, even where Rule 6(e)(3)(E) permits disclosure of grand-jury matters, including under the "judicial proceeding" exception, a court may order disclosure only after it is satisfied that the requester has demonstrated a "particularized need" for the material sought in that specific case. See *Procter & Gamble*, 356 U.S. at 683; *Illinois* v. *Abbott & Associates, Inc.*, 460 U.S. 557, 567 & n.14 (1983); *Douglas Oil*, 441 U.S. at 222. Indeed, in re-enacting 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 preserve. S. Rep. No. 354, 95th Cong., 1st Sess. 8 & n.13 (1977).

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 (party must show with "particularity" that "there is a compelling necessity" for the requested grand-jury

records). This Court has emphasized 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.

In *Douglas Oil*, for example, the Court explained that the district court was required to assess the "contours of the conspiracy [plaintiffs] sought to prove in their civil actions" in order to weigh the claimed need for the grand-jury information against the strong public interest in grand-jury secrecy. 441 U.S. at 229. And the Court added in *Baggot* that district courts facing requests for disclosure in circumstances where the "judicial proceeding" has not yet commenced must conduct an additional inquiry, given that the Rule authorizes disclosure "only [for] uses related fairly directly to some identifiable litigation, pending or anticipated": namely, they must assess "how firm the * * * decision to litigate" is in order to determine whether the "investigation can be characterized as 'preliminar[y] to a judicial proceeding.'" 463 U.S. at 480, 482 n.6 (brackets in original); see *id.* at 482 n.6 ("declin[ing] in th[at] case to address" just "how firm the * * * decision to litigate must be" to qualify, "or whether it can ever be so regarded before the conclusion of a formal preliminary administrative investigation").

In light of that settled particularized-need requirement, treating the Senate's consideration of articles of impeachment as a "judicial proceeding" under Rule 6(e) would require federal courts to tread on perilous ground. Where the House of Representatives (or a component thereof) requests grand-jury materials in order to explore the possibility of impeachment, the district court would need to assess "how firm" the chances

are that the requester's investigation will ultimately lead a majority of the House to vote in favor of impeachment. *Baggot*, 463 U.S. at 482 n.6. If the chances are low, such that the Senate is unlikely ever to have cause to meet as a "Court of Impeachment," Br. in Opp. 22 (citation omitted), then the district court would have to find that the materials are not actually sought "preliminarily to * * * a judicial proceeding," Fed. R. Crim. P. 6(e)(3)(E)(i), even on the court of appeals' understanding of that term.

Moreover, even where the district court determines that there is a sufficiently strong chance that the full House will pass *some* articles of impeachment, the court then would need to examine the "contours" of the particular theories of impeachment being considered to assess which theories are most likely to result in Senate proceedings and how material various types of grand-jury records may be to those specific theories. *Douglas Oil*, 441 U.S. at 229. That analysis would be necessary so that the court could give the requester access to the grand-jury materials it would truly need to obtain the official's removal by the Senate, while withholding (as *Douglas Oil* requires) portions that would be useful only as "general discovery." *Ibid.*

It is unclear on what proper basis a federal court could make those assessments in the context of a proceeding in which "the Judiciary * * * w[as] not chosen to have any role." *Nixon*, 506 U.S. at 234. Indeed, such assessments would appear to require courts to pass judgment on the legal sufficiency of particular impeachment theories—taking the analysis that they typically perform when assessing petitions for disclosure of grand-jury matters in connection with garden-variety civil and criminal proceedings and transplanting it into

the context of charged and political proceedings that the Constitution assigned to Congress. See *id.* at 233-235. The constitutional pitfalls inherent in such an approach are obvious, and they provide further reason to doubt that the term "judicial proceeding" in Rule 6(e)(3)(E)(i) should be interpreted in a way that would force federal courts to hazard them.

In an attempt to mitigate the serious constitutional difficulties its interpretation would create, the court of appeals concluded that, under Rule 6(e)(3)(E)(i), courts should apply an impeachment-specific particularized-need standard that is significantly less demanding than the standard they ordinarily apply to disclosures sought in advance of a "judicial proceeding" before a court. See Pet. App. 19a-20a. Under that standard, as long as the congressional requester represents that it is engaged in an impeachment inquiry, a district court should "hand off all relevant materials to Congress without micromanaging the evidence." *Id.* at 19a. Using such a hands-off approach, the court of appeals reasoned, would "avoid[] the potentially problematic second-guessing of Congress's need for evidence that is relevant to its impeachment inquiry." *Id.* at 19a-20a.

That attempt to avoid the problems created by the court of appeals' expansive understanding of "judicial proceeding" is inconsistent with this Court's precedents. The Court repeatedly has rejected requests to adopt a mere "relevance" standard for particular types of "judicial proceeding[s]" that litigants have argued are entitled to special consideration—including when governmental parties seek disclosure for law-enforcement purposes. *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 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).

Although "Congress, of course, has the power to modify the rule of secrecy by changing the showing of need required for particular categories of litigants," this Court has explained that "the 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." *Abbott & Associates*, 460 U.S. at 572-573. "Congress has, on occasion, done precisely that," *id.* at 572 n.28—as when it "gave defendants a right to obtain copies of their prior statements before grand juries," *ibid.*, or authorized national-security-related disclosures in the wake of the September 11 attacks, see p. 24 n.3, *supra*—but it indisputably has *not* done so with respect to impeachment proceedings.

In nevertheless adopting a relevance standard here, the court of appeals invoked (Pet. App. 16a) this Court's statement that the particularized-need standard is "flexible" and "adaptable to different circumstances." *Sells Engineering*, 463 U.S. at 445. But that statement came in the context of explaining that a court may properly consider the "risk of further leakage or improper use" in determining whether to authorize disclosure. See *ibid.* As discussed above, that consideration weighs *against* treating a proceeding before Members

of Congress as a "judicial proceeding" under Rule 6(e). See pp. 33-35, *supra*.

b. Finally, the court of appeals' application of its relevance standard here highlights just how far it departed from this Court's particularized-need precedent in an attempt to avoid separation-of-powers concerns.

By the time the court of appeals ruled, the House already had adopted articles of impeachment against the President—and the Senate already had rejected them. See Pet. App. 35a (Rao, J., dissenting). That timing made it especially dubious that respondent was still pursuing the grand-jury materials in reasonable expectation that it would need them during the Senate's consideration of a (second) impeachment—as opposed to doing so for oversight or political reasons that all agree would provide no basis for disclosure under Rule 6(e)(3). See *id.* at 39a-40a. Rather than engage seriously with that concern, however, the court authorized a paradigmatic fishing expedition based on the truism that "if the grand jury materials reveal new evidence of impeachable offenses, the Committee may recommend new articles of impeachment." *Id.* at 17a (majority opinion). Nor did the court make any effort to ensure that it was authorizing the release only of materials that would actually be necessary for a hypothetical second Senate impeachment trial, as opposed to the sort of "general discovery" that this Court has said falls outside of Rule 6(e). *Douglas Oil*, 441 U.S. at 229. Indeed, the court of appeals approved the district court's disclosure of more than 240 redactions that no court had ever reviewed, see Pet. App. 24a-26a, as well as at least one piece of grand-jury information that even "the Committee conceded it did not need," *id.* at 24a.

That blank-check approach would appear to obligate future district courts to authorize breaching grand-jury secrecy "preliminarily to" hypothetical impeachment proceedings that have no realistic chance of ever occurring. It will *always* be true that *if* grand-jury materials reveal new evidence of impeachable offenses, a House committee conducting an impeachment investigation *may* recommend impeachment. If that is to be the only standard, then federal courts will be nothing more than "a virtual rubber stamp" for disclosure requests—a role this Court has rejected even in circumstances, unlike this one, where the court would retain robust authority to prevent further dissemination of the requested materials. *Sells Engineering*, 463 U.S. at 444.

The court of appeals believed its loose relevance standard was necessary to avoid judicial entanglement with impeachment. But there is a better, and more straightforward, way to avoid those serious separation-of-powers concerns: giving "judicial proceeding" in Federal Rule of Criminal Procedure 6(e)(3)(E)(i) its ordinary meaning, rather than straining to read it broadly enough to cover something that is fundamentally "legislative action." *Nixon*, 506 U.S. at 235 n.2.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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