No. 19-1328

IN THE

Supreme Court of the United States

UNITED STATES DEPARTMENT OF JUSTICE,

Petitioner,

v.

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

Respondent.

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

BRIEF IN OPPOSITION

Annie L. Owens
Joshua A. Geltzer
Mary B. McCord
INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION
GEORGETOWN UNIVERSITY LAW CENTER
600 New Jersey Ave. NW
Washington, D.C. 20001

Douglas N. Letter
General Counsel
Counsel of Record
Todd B. Tatelman
Megan Barbero
Josephine Morse
Adam A. Grogg
Jonathan B. Schwartz
OFFICE OF GENERAL COUNSEL
U.S. HOUSE OF REPRESENTATIVES
219 Cannon House Building
Washington, D.C. 20515
(202) 225-9700
douglas.letter@mail.house.gov

QUESTION PRESENTED

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Rules

Legislative Materials

Other Authorities

INTRODUCTION

The D.C. Circuit unanimously concluded that a Senate impeachment trial is a "judicial proceeding" under Federal Rule of Criminal Procedure 6(e)(3)(E)(i). That holding accords with the view of every court—indeed, every *judge*—to consider the issue. It also accords with the position the Department of Justice (DOJ) had long taken, across many administrations, before abruptly reversing itself here. And just a few months ago, DOJ successfully argued that even when there is a conflict on an important question about the scope of Rule 6(e), this Court's review is not warranted because such questions "should be addressed in the first instance by the criminal-rules committee." Br. in Opp'n 18, *McKeever v. Barr*, 140 S. Ct. 597 (2020) (mem.) (No. 19-307).

DOJ effectively concedes all of this. Pet. 28-29. How, then, can it maintain that certiorari is warranted? At bottom, the petition offers just one answer: according to DOJ, the interpretation of Rule 6(e) that has governed in the lower courts for nearly half a century raises "separation-of-powers concerns." *Id.* at 28. But the newfound separation-of-powers theory on which DOJ stakes its petition is curious indeed. DOJ does not claim to be defending any interest of the Executive Branch. Instead, it purports to fear that courts hearing Rule 6(e) requests from the House of Representatives could tread on *Congress's* authority by second-guessing the House's impeachment theories or limiting its use of grand-jury material. *Id.* at 19-24.

DOJ has things backwards. The only threat to Congress's constitutional prerogatives comes from DOJ's newly minted position, which would *categorically* deny Congress access to grand-jury material for use

in impeachments—thereby treating a core constitutional function less favorably than routine civil and criminal litigation. What's more, DOJ's purported separation-of-powers concerns are hypothetical. DOJ does not suggest that the lower courts in this case (or any other) have invaded Congress's authority in any way. DOJ's speculation that courts might overstep their bounds in the future scarcely justifies this Court's intervention now.

Lacking a plausible claim that this case satisfies the Court's traditional certiorari standards, DOJ devotes the bulk of its petition to arguing that the lower courts—joined, until this case, by DOJ itself—have uniformly misinterpreted Rule 6(e)(3)(E)(i). They have not. A Senate impeachment trial fits comfortably within the plain meaning of "judicial proceeding." The Constitution empowers the Senate to "try" impeachments and render a "[j]udgment." U.S. Const., Art. I, § 3, cls. 6-7. Since the Founding, therefore, it has been recognized that the Senate has a "judicial character" when it sits "as a court for the trial of impeachments." *The Federalist No. 65*, at 337 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001). In fact, the Senate formally convenes as a "Court of Impeachment." *See* 166 Cong. Rec. S289 (daily ed. Jan. 21, 2020) (statement of the Chief Justice). And this Court, too, has long recognized that the Senate "exercises the judicial power of trying impeachments." *Kilbourn v. Thompson*, 103 U.S. 168, 191 (1880). A trial before a body exercising judicial power and sitting as a court of impeachment is a "judicial proceeding" under even DOJ's restrictive understanding of that term.

STATEMENT OF THE CASE

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

A. Legal background

The question presented turns on the interaction between the constitutional provisions governing impeachment and the rules of grand-jury secrecy.

1. The Constitution vests the Senate with the "sole Power to try all Impeachments." U.S. Const., Art. I, § 3, cl. 6. At every turn, the Constitution makes clear that an impeachment trial is not ordinary legislative activity. Article I directs that Senators must "be on Oath or Affirmation." *Id.* It further provides that "the Chief Justice shall preside" when the President is tried and that "no Person shall be convicted without the Concurrence of two thirds of the Members present." *Id.* Article I also prescribes the consequences of a "Judgment in Cases of Impeachment." *Id.*, Art. I, § 3, cl. 7. And Article III

exempts "Cases of Impeachment" from the general requirement that the "Trial of all Crimes" must be "by Jury." *Id.*, Art. III, § 2, cl. 3.

Consistent with the constitutional design, the Senate "convene[s] as a Court of Impeachment" when it tries an impeachment. 166 Cong. Rec. S289 (daily ed. Jan. 21, 2020) (statement of the Chief Justice). As required by Article I, Senators take a special oath to "do impartial justice according to the Constitution and laws." *Id.* at S290. And at the conclusion of the trial, the "Presiding Officer directs judgment to be entered in accordance with the judgment of the Senate." *Id.* at S938 (daily ed. Feb. 5, 2020) (statement of the Chief Justice).

2. The rules governing grand-jury secrecy are set forth in Federal Rule of Criminal Procedure 6, which codifies longstanding common-law practice.

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

Rule 6(e), which took effect in 1946, "continues the traditional practice of secrecy on the part of members of the grand jury, except when the court permits a disclosure." Fed. R. Crim. P. 6(e) advisory comm. 1944 note. The rule imposes a general obligation of secrecy on grand jurors, prosecutors, and other enumerated persons. Fed. R. Crim. P. 6(e)(2). It then sets forth a series of exceptions to that general rule. Rules 6(e)(3)(A) and (D), for example, allow grand-jury material to be shared without a court order in various circumstances involving other government officials—including those of a "state, state subdivision, Indian tribe, or foreign government"—for federal criminal law enforcement and threat prevention. Rule 6(e) also provides for court-authorized disclosures. Most of these disclosures are to government officials—for example, "when sought by a foreign court or prosecutor for use in an official criminal investigation," or when the material "may disclose a violation of State, Indian tribal, or foreign criminal law." Fed. R. Crim. P. 6(e)(3)(E)(iii)-(iv).

As relevant here, Rule 6 has since its adoption allowed a court to authorize disclosure of grand-jury material "preliminarily to or in connection with a judicial proceeding." Fed. R. Crim. P. 6(e)(3)(E)(i); *see Federal Rules of Criminal Procedure*, 327 U.S. 821, 837-38 (1946). This Court has held that parties seeking grand-jury material under that provision "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.

3. Throughout our Nation's history, grand-jury investigations have uncovered official misconduct potentially warranting impeachment. As early as 1811, for example, the territorial legislature in Mississippi forwarded a grand-jury presentment of charges against a federal judge to the House for an impeachment investigation. *See* 3 *Hinds' Precedents of the House of Representatives* § 2488, at 984-85 (1907).

Recognizing the compelling constitutional and public interests served by impeachment, courts have long authorized the disclosure of grand-jury material for use in impeachment investigations. In 1945, while Rule 6 was under consideration, a district court ordered "that all transcripts of testimony, together with all the exhibits introduced into evidence before [a] … grand jury, be made available to the Committee on Judiciary" for use in the impeachment investigations of two federal judges. *Conduct of Albert W. Johnson and Albert L. Watson, United States District Judges, Middle District of Pennsylvania: Hearing Before Subcomm. of the H. Comm. on the Judiciary*, 79th Cong., pt. 1, at 63 (1945) (*Johnson & Watson Hearings*) (reproducing the district court's order).

Only a handful of impeachments have occurred since Rule 6 was adopted, but many of them have involved disclosure of grand-jury material. Courts relied on Rule 6(e)'s "judicial proceeding" exception to authorize the disclosure of grand-jury material for use in the investigations of Presidents Nixon and Clinton. Pet. App. 14a-15a. They did the same in connection with three of the five other impeachment trials between Rule 6's adoption and the investigation at issue here. *Id.* at 14a; *see Impeachment*, U.S.

Senate, https://perma.cc/9BVA-CE2N. To our knowledge, no court has ever held that Rule 6(e)'s "judicial proceeding" exception excludes impeachment trials. And DOJ itself had taken the same position for decades, until this case. Pet. App. 138a-39a n.30.

B. The present controversy

1. In July 2016, the Federal Bureau of Investigation (FBI) began investigating Russian interference in the then-upcoming Presidential election. In May 2017, the Acting Attorney General appointed Robert Mueller as Special Counsel to continue the FBI's work and to investigate other "matters arising directly from the investigation," including whether the President had obstructed justice. Robert Mueller, *Report on the Investigation into Russian Interference in the 2016 Presidential Election*, Vol. I at 8 (2019) (Mueller Report), https://perma.cc/6E3T-MD7T.

In March 2019, Special Counsel Mueller issued a report finding that President Trump's conduct raised serious "questions about whether he had obstructed justice" by attempting to impede the Russia investigation and related law enforcement proceedings initiated by the Special Counsel. Mueller Report, Vol. II at 1. But Special Counsel Mueller stopped short of determining whether President Trump had committed criminal obstruction of justice, in part because he did not want to "preempt constitutional processes for addressing presidential misconduct"—that is, impeachment. *Id.* (citing U.S. Const., Art. I, § 2, cl. 5; *id.*, Art. I, § 3, cl. 6).

2. In April 2019, the Attorney General released a redacted version of the Mueller Report to Congress

and the public. Many of the redactions cover grand-jury material subject to Rule 6(e). Pet. App. 90a-93a.

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

Judiciary Committee Chairman Jerrold Nadler then issued protocols to protect the confidentiality of any grand-jury material obtained. C.A. App. 122-23. These protocols, which are based on those used to protect grand-jury material during the Nixon impeachment investigation, limit staff access to grand-jury material; require storage of such material in a secure location; and provide that such material may not be publicly disclosed absent a majority vote by the Committee. *Id.*

3. In July 2019, the Committee filed an application in the U.S. District Court for the District of Columbia. The application invoked both Rule 6(e)(3)(E)(i)'s "judicial proceeding" exception and the court's inherent authority as the court that had supervised the Mueller grand jury. The Committee requested three categories of grand-jury material: (1) the portions of the Mueller Report redacted under Rule 6(e); (2) any grand-jury transcripts or exhibits referenced in those redactions; and (3) grand-jury transcripts or exhibits that relate directly to certain

individuals and events described in the Mueller Report. Pet. App. 103a-04a. DOJ opposed the application, reversing "its longstanding position regarding whether impeachment trials are 'judicial proceedings.'" *Id.* at 138a n.30.

4. In October 2019, the district court granted the Committee's application in part. Pet. App. 82a-181a.

a. The district court first concluded that "impeachment trials are judicial in nature and constitute judicial proceedings" under Rule 6(e). Pet. App. 117a. The court grounded that interpretation of "judicial proceeding" in "historical practice, the Federalist Papers, the text of the Constitution, and Supreme Court precedent," *id.*, as well as "[b]inding D.C. Circuit precedent," *id.* at 131a.[1]

b. The court then determined that the Committee had demonstrated particularized need under the *Douglas Oil* test. Pet. App. 164a-65a. The court noted that it "would be difficult to conceive of a more compelling need" than the national interest in conducting an impeachment inquiry "based on all the pertinent information." *Id.* at 166a (quotation marks omitted). After reviewing the record, including a

---

[1] The court also noted that DOJ's "'evolved' legal position may be estopped" because DOJ had successfully argued to the D.C. Circuit "*just last year*" that circuit precedent established that "an impeachment proceeding may qualify as a 'judicial proceeding' for purposes of Rule 6(e)." Pet. App. 138a-39a n.30 (quoting DOJ Br. at 37, *McKeever v. Barr*, 920 F.3d 842 (D.C. Cir. 2019) (No. 17-1549), *cert. denied*, 140 S. Ct. 597 (2020)). But because the court rejected DOJ's new position on the merits, it did not decide whether that position was barred by judicial estoppel as well. *Id.*

sealed declaration from DOJ describing some of the withheld Rule 6(e) material, *see id.* at 5a-6a, the court concluded that specific features of this case make the Committee's need "especially particularized and compelling," *id.* at 167a. The court found, for example, that grand-jury testimony would "shed[] light on inconsistencies or even falsities" in testimony by witnesses in the House's investigation. *Id.* at 169a.

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

Finally, the court held that the Committee's request was appropriately tailored, at least as to the first two categories of requested material—the material quoted and referenced in the Mueller Report. Adopting the Committee's proposal, the court ordered a "focused and staged disclosure" of those two categories, Pet. App. 165a, to be followed, if

necessary, by disclosure of the third category upon a separate showing of particularized need, *id.* at 178a.[2]

4. The D.C. Circuit affirmed. Pet. App. 1a-81a. Although the panel was divided on other issues not relevant here, Judges Rogers, Griffith, and Rao all agreed that an impeachment trial is a "judicial proceeding" under Rule 6(e)(3)(E)(i). Pet. App. 27a; *see id.* at 37a (Rao, J., dissenting).

a. Like the district court, the D.C. Circuit concluded that this interpretation of "judicial proceeding" was compelled by circuit precedent, "traditional tools of statutory construction," "constitutional text," and "historical practice." Pet. App. 11a-15a. The D.C. Circuit also readily concluded that the district court had acted within its broad discretion in finding particularized need. Analyzing the *Douglas Oil* factors, the court emphasized the narrow scope of the disclosure, which includes "only those materials that the Special Counsel found sufficiently relevant to discuss or cite in his Report," which he prepared "with the expectation that Congress would review it." *Id.* at 16a-17a.

The D.C. Circuit further concluded that "the Committee's particularized need for the grand jury materials remains unchanged" following events that occurred while the appeal was pending. Pet. App. 17a. In December 2019, the House adopted two

---

[2] The district court noted, Pet. App. 107a-08a & n.14, that the Committee's alternative argument for disclosure under the court's inherent authority was foreclosed by the D.C. Circuit's recent holding that courts have "no authority outside Rule 6(e) to disclose grand jury matter." *McKeever*, 920 F.3d at 850.

Articles of Impeachment charging President Trump with abuse of power and obstruction of justice in connection with a scheme to coerce Ukraine to investigate a political rival. The President was acquitted after a Senate trial. But the Committee "has continued and will continue" its impeachment investigation concerning the Russia investigation, H. Rep. No. 116-346, at 159 n.928 (2019), and the grand-jury material at issue here "remains central to the Committee's ongoing inquiry," Comm. C.A. Supp. Br. 17; *see* Pet. App. 4a-5a. The D.C. Circuit thus noted that "[t]he Committee has repeatedly stated that if the grand jury materials reveal new evidence of impeachable offenses, the Committee may recommend new articles of impeachment." Pet. App. 17a.

b. In her dissent, Judge Rao "agree[d] with the majority" that a "Senate impeachment trial … has always been understood as an exercise of judicial power." Pet. App. 37a. Judge Rao explained that "[t]he Framers understood [the Impeachment] clause to vest in the Senate a 'distinct' non-legislative power to act in a 'judicial character as a court for the trial of impeachments.'" *Id.* (quoting *The Federalist No. 65*, at 337 (Alexander Hamilton)). And she stressed that this Court "has consistently recognized the Senate as a court of impeachment parallel to the federal courts." *Id.* (citing *Mississippi v. Johnson*, 71 U.S. 475, 500-01 (1866), and *Kilbourn*, 103 U.S. at 191). But Judge Rao dissented on other grounds, relying primarily on her view that the district court could only authorize—not compel—DOJ to disclose grand-jury materials. *Id.* at 41a-81a.

c. Judge Griffith joined the majority opinion and filed a brief concurrence responding to Judge Rao's dissent. Pet. App. 29a-33a.

5. On May 20, 2020, this Court granted DOJ's application for a stay pending the filing and disposition of a petition for a writ of certiorari.

REASONS FOR DENYING THE WRIT

The D.C. Circuit's unanimous conclusion that a Senate impeachment trial is a "judicial proceeding" under Rule 6(e) does not warrant this Court's review. It accords with the decisions of every judge who has ever considered the issue. It is also consistent with the position DOJ had maintained for nearly half a century before this case. And any questions raised by DOJ's recent about-face can and should be addressed in the first instance through the rules-amendment process, not this Court's certiorari jurisdiction—just as DOJ itself successfully argued in *McKeever*.

The D.C. Circuit's decision is also clearly correct. A trial before the Senate sitting as a court of impeachment falls squarely within the plain meaning of "judicial proceeding." Experience refutes DOJ's assertion that adhering to that plain meaning is inconsistent with other provisions of Rule 6 or with the separation of powers. To the contrary, it is DOJ's new position that would threaten the separation of powers by putting Congress in a worse position than litigants seeking grand-jury material for run-of-the-mill civil and criminal cases—a result DOJ previously dismissed as "fatuous." C.A. App. 258.

Finally, even setting aside Rule 6(e), the district court's order was justified as an exercise of its inherent authority to order disclosure of grand-jury

materials. As other circuits have recognized, Rule 6(e) did not displace that longstanding common-law authority, which readily encompasses a limited disclosure to enable the House to fulfill its constitutional responsibilities.

I. Lower courts have uniformly held that an impeachment trial is a "judicial proceeding."

1. The D.C. Circuit's unanimous decision joins an unbroken line of authority approving the disclosure of grand-jury material for use in impeachment proceedings. Since the adoption of Rule 6(e), "federal courts have authorized the disclosure of grand jury materials to the House for use in impeachment investigations involving two [P]residents and three federal judges." Pet. App. 14a. We are aware of no court that has denied such a request.

In 1974, Judge Sirica—at DOJ's urging—ordered disclosure of the so-called "Watergate Roadmap" grand-jury report to the House Judiciary Committee for use in its impeachment investigation of President Nixon. *In re Report & Recommendation of June 5, 1972 Grand Jury*, 370 F. Supp. 1219, 1230-31 (D.D.C. 1974) (*Watergate Roadmap Case*). Sitting en banc, the D.C. Circuit unanimously expressed its "general agreement" with Judge Sirica's analysis. *Haldeman v. Sirica*, 501 F.2d 714, 715 (D.C. Cir. 1974) (en banc). The D.C. Circuit recently confirmed—again, at DOJ's urging—that *Haldeman* held that the disclosure of the Watergate Roadmap "fit[] within the Rule 6 exception for 'judicial proceedings.'" *McKeever v.*

Barr, 920 F.3d 842, 847 n.3 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 597 (2020).[3]

In 1998, the D.C. Circuit granted Independent Counsel Kenneth Starr's motion for an order authorizing disclosure of grand-jury material to the House in connection with President Clinton's impeachment. Order, *In re Madison Guar. Sav. & Loan Ass'n*, Div. No. 94-1 (D.C. Cir. Spec. Div. July 7, 1998) (per curiam) (reprinted at C.A. App. 267).[4]

In 1987, the Eleventh Circuit affirmed a district court order authorizing disclosure of grand-jury material to the Committee for use in the impeachment of Judge Alcee Hastings. *In re Request for Access to Grand Jury Materials Grand Jury No. 81-1*, 833 F.2d 1438, 1440 (11th Cir. 1987) (*Hastings*).

In 1988, a district court granted the Committee's request for grand-jury material for use in the impeachment investigation of Judge Walter Nixon. H. Rep. No. 101-36, at 15 & n.46 (1989) (citing Order, *Nixon v. United States*, Civ. No. H88-0052(G) (S.D. Miss. Dec. 5, 1988) (unpublished)).

---

[3] One judge in *Haldeman* wrote separately, but he likewise approved the disclosure as "being made 'preliminarily to [and] in connection with a judicial proceeding.'" 501 F.2d at 717 (MacKinnon, J., concurring in part and dissenting in part) (brackets in original).

[4] The D.C. Circuit ordered disclosure under "Federal Rule of Criminal Procedure 6(e)(3)(C)(i)," C.A. App. 267, which is the judicial proceeding exception now codified at Rule 6(e)(3)(E)(i). *See* Fed. R. Crim. P. 6(e)(3)(C) advisory comm. note on 2002 amend.

In 2009, the Fifth Circuit upheld the disclosure of grand-jury material to the Committee for the impeachment investigation of Judge Thomas Porteous. Order, *In re Grand Jury Proceeding*, No. 09-30737 (5th Cir. Nov. 12, 2009), *summarily affirming In re Grand Jury Investigation of U.S. Dist. Judge G. Thomas Porteous, Jr.*, No. 09-4346 (E.D. La. Aug. 6, 2009).

2. With considerable understatement, DOJ acknowledges the "lack of a circuit conflict on the question presented." Pet. 28. In fact, DOJ cannot point to even a single dissenting opinion supporting its new position. Here, for example, Judge Rao emphatically agreed with her colleagues that "[a]n impeachment investigation is 'preliminar[y] to or in connection with a judicial proceeding,'" Pet. App. 35a, because a "Senate impeachment trial … has always been understood as an exercise of judicial power," *id.* at 37a.

DOJ asserts that the prior decisions uniformly holding that an impeachment trial is a judicial proceeding "are of questionable probative value because in each instance [DOJ] supported disclosure of the requested materials." Pet. 18. But DOJ errs in implying that courts were merely rubberstamping its view. "[G]rand jury records are court records," and "it is the district court, not the Executive or [DOJ], that controls access." Pet. App. 9a-10a. Even if DOJ does not object, Rule 6 requires the court to ensure that disclosure is authorized. *Id.* at 10a. DOJ's emphasis on its position in every prior case thus serves only to underscore its stark reversal, not to diminish the significance of the consensus in the lower courts.

II. The D.C. Circuit's decision does not warrant this Court's review.

The availability of the rules-amendment process to resolve any dispute about Rule 6(e) further confirms that this Court's review is unwarranted. DOJ provides no reason to conclude otherwise—indeed, it scarcely addresses this Court's traditional certiorari standards at all.

1. As DOJ acknowledges, "determining the permissible exceptions to grand-jury secrecy under Rule 6(e) ordinarily would be best left to the [criminal-rules-amendment process]." Pet. 29; *see* 28 U.S.C. §§ 2072-74. DOJ made precisely that point in *McKeever*, where this Court denied certiorari despite an acknowledged circuit split on the "important" and recurring question whether district courts have inherent authority "to release grand jury material outside those situations specifically enumerated" in Rule 6(e). 140 S. Ct. at 598 (Breyer, J., respecting the denial of certiorari); *see* Br. in Opp'n 9, 18-20, *McKeever*, 140 S. Ct. 597.

The same logic applies with even greater force here, where the question presented has not divided the lower courts and has arisen just six times in the more than 70 years that Rule 6 has been on the books. If DOJ disagrees with the lower courts' uniform interpretation of Rule 6(e), the "rulemaking procedures established by Congress" are available to consider proposed amendments. *Douglas Oil*, 441 U.S. at 231; *see* 28 U.S.C. § 2073. DOJ is especially well positioned to make such a proposal, because the head of the Criminal Division is an *ex officio* member of the advisory committee for criminal rules and the Deputy Attorney General is an *ex officio* member of

the Standing Committee on Rules. *See* Admin. Office of U.S. Courts, *Membership of the Committee on Rules of Practice and Procedure and Advisory Rules Committees* (Apr. 6, 2020), https://perma.cc/E9LH-KJYV. And the statutory rulemaking process would also be a more appropriate forum for considering DOJ's stated concern that the application of Rule 6(e)(3)(E)(i) to impeachments creates tension with other provisions of Rule 6. *See generally* Pet. 19-26.

Presumably attempting to distinguish what it argued in *McKeever*, DOJ asserts without citation or explanation that deferring to the rules-amendment process here would be inappropriate because the D.C. Circuit's decision purportedly creates "separation-of-powers concerns." Pet. 28-29. But the rules-amendment process is well suited to consideration of constitutional issues, which routinely arise—including in the context of Rule 6. *See* Fed. R. Crim. P. 6(e)(5) advisory comm. notes on 1983 amend.; *see also, e.g.*, Fed. R. Crim. P. 23(b) advisory comm. notes on 1983 amend.; Fed. R. Crim. P. 41(b)(4) advisory comm. notes on 2006 amend.

2. DOJ's petition devotes a scant three pages to explaining why the question presented warrants this Court's review, and most of that discussion simply rehashes DOJ's merits arguments. Pet. 26-28.

Notably, DOJ does not claim that the disclosure authorized by the district court would affect any ongoing prosecutions, investigations, or other law enforcement activities. Indeed, DOJ does not articulate *any* concrete interest that would be threatened by the disclosure at issue here. That is no surprise: The grand jury's work is finished, and the district court

authorized only a limited disclosure of the material directly referenced in the Mueller Report.

As the D.C. Circuit emphasized, therefore, DOJ "has no interest in objecting to the release of these materials outside of the general purposes and policies of grand jury secrecy." Pet. App. 10a. DOJ repeats its appeal to those general purposes and policies here. Pet. 26-27. But those generic arguments do not justify this Court's review because they could be made in any case involving disclosure of grand-jury material. And here, the lower courts have already concluded, in a case-specific exercise of discretion that DOJ has not asked this Court to review, that those general interests "do not outweigh the Committee's compelling need for disclosure." Pet. App. 10a.

3. Ultimately, then, DOJ musters only a single reason why this Court should take up its request for error correction despite the lack of a split, the infrequency with which the question presented arises, and the availability of the rules-amendment process: DOJ asserts that the D.C. Circuit's decision raises "substantial separation-of-powers concerns." Pet. 28-29. But DOJ does not claim to be asserting the Executive Branch's own constitutional interests. Instead, it purports to be concerned that courts could tread on "the House's 'sole Power of Impeachment' and the Senate's 'sole Power to try all Impeachments'" by limiting or denying the House's requests for grand-jury materials under Rule 6(e). Pet. 21.

As we demonstrate below, there is no merit to DOJ's through-the-looking-glass attempt to invoke Congress's own constitutional responsibilities to categorically deny Congress the very evidence it needs to fulfill them. *See infra* Part III.B. But the

critical point for present purposes is that DOJ's purported separation-of-powers concerns are hypothetical. DOJ does not contend that the courts below—or any of the courts that have authorized similar disclosures in the past—invaded Congress's authority in any way. If the separation-of-powers concerns DOJ posits actually materialize in a future case, the Court can consider them in concrete form. But DOJ's speculation about problems that might arise in the future does not justify certiorari now.

III. The D.C. Circuit's decision is correct.

DOJ devotes the bulk of the petition to arguing that the D.C. Circuit erred in holding that an impeachment trial is a "judicial proceeding" for purposes of Rule 6(e). Pet. 11-26. But the text of the Constitution and an array of other authority—from this Court's precedent to the Federalist Papers to centuries of practice—confirms that an impeachment trial falls squarely within the ordinary meaning of that term. That conclusion is also the only one consistent with our constitutional structure. As the DOJ Special Prosecutor told the D.C. Circuit in the *Watergate Roadmap Case:* "It would be fatuous to contend that Rule 6(e) relegates the need of a Presidential impeachment inquiry to a lower priority than" a "civil antitrust inquiry," a "bar grievance," or a "police disciplinary investigation." C.A. App. 258.

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

It is common ground that the plain meaning of the term "judicial proceeding" includes, at minimum, "any court proceeding." Pet. 11 (alteration omitted) (quoting *Black's Law Dictionary* 1398 (10th ed.

2014)). The constitutional text, two centuries of practice, and this Court's decisions confirm that a Senate impeachment trial qualifies under even that most restrictive definition.[5]

1. Start with the constitutional text. Article I provides that "[t]he Senate shall have the sole Power to *try* all Impeachments." U.S. Const., Art. I, § 3, cl. 6 (emphasis added). It states that when the President "is *tried*, the *Chief Justice* shall preside." *Id.* (emphases added). It describes a "*Judgment* in *Cases* of Impeachment." *Id.*, Art. I, § 3, cl. 7 (emphases added). And it refers to "the *Party convicted*." *Id.* (emphasis added). Article III similarly describes an impeachment trial as a type of "*Trial* of all *Crimes*." *Id.*, Art. III, § 2, cl. 3 (emphases added). A *trial* for a *crime* at which the *Chief Justice* presides and during which the Senate *convicts* or acquits the accused and renders a *judgment* is a judicial proceeding.

That is exactly how the Framers understood things. They recognized that the Impeachment Clause "vest[s] in the Senate a 'distinct' non-legislative power to act in a 'judicial character as a court for the trial of impeachments.'" Pet. App. 37a (Rao, J., dissenting) (quoting *The Federalist No. 65*, at 337 (Alexander Hamilton)). Hamilton thus repeatedly described the Senate as "a court of impeachments." *The Federalist No. 66*, at 343 (Alexander Hamilton); *see The Federalist No. 81*, at 417 (Alexander

---

[5] This case thus presents no need to decide whether, as lower courts have concluded, the term also includes quasi-judicial proceedings or matters before other types of tribunals. *Cf. In re Sealed Motion*, 880 F.2d 1367, 1379-80 (D.C. Cir. 1989).

Hamilton). Madison similarly recognized it as the "sole depository of the judicial power in cases of impeachment." *The Federalist No. 47*, at 250 (James Madison).

2. Longstanding Senate practice reflects the same understanding. When the Senate took up its first impeachment in 1798, it "formed itself into a High Court of Impeachment, in the manner directed by the Constitution." 8 Annals of Cong. 2245 (1798). The Senate did likewise for the last impeachment trial before the adoption of Rule 6. *See* 80 Cong. Rec. 3489 (1936) (statement of the Vice President) ("The Sergeant at Arms will now make proclamation that the Senate is sitting as a Court of Impeachment.").

During the Clinton impeachment trial, Chief Justice Rehnquist ruled that Senators should not be referred to as jurors, because "the Senate is not simply a jury; it is a court in this case." S. Doc. No. 106-4, Vol. II at 1142 (1999). And to this day, the Senate continues to convene "as a Court of Impeachment" when it sits to try impeachments. 166 Cong. Rec. S289 (daily ed. Jan. 21, 2020) (statement of the Chief Justice); *see* Rule IV.1(d), Standing Rules of the Senate, 113th Cong. (2013). Thus, as one of President Trump's attorneys explained during President Trump's trial, the parties to an impeachment "are not [in] a legislative Chamber"; instead, they "are in court." 166 Cong. Rec. S580 (daily ed. Jan. 27, 2020) (statement of Kenneth Starr).

This Court's decisions have taken the same view. The Court has explained that the Senate "exercises the judicial power of trying impeachments." *Kilbourn*, 103 U.S. at 191. Like Hamilton and the Senate itself, the Court has also recognized that the Senate sits as

a "court of impeachment." *Mississippi*, 71 U.S. at 501; *see, e.g.*, *The Pocket Veto Case*, 279 U.S. 655, 672 n.1 (1929); *Chandler v. Judicial Council*, 382 U.S. 1003, 1004 (1966) (Black, J., dissenting); *see also Walton v. House of Representatives of Okla.*, 265 U.S. 487, 489 (1924) (same for state senate).

3. DOJ builds its textual argument around the premise that "the ordinary meaning of 'judicial proceeding' means a court proceeding." Pet. 12. But DOJ all but ignores the powerful evidence that when the Senate sits to try an impeachment, it *is*—and is widely recognized to be—a court. Indeed, the very dictionary on which DOJ relies confirms that understanding. *See id.* at 11. The second edition of *Black's Law Dictionary* defined "courts of the United States" to include "[t]he senate of the United States, sitting as a court of impeachment." *Black's Law Dictionary* 292 (2d ed. 1910). The current edition likewise specifies that the "U.S. Senate" is a "court for the trial of impeachments." *Black's Law Dictionary* 451 (11th ed. 2019).

DOJ suggests (Pet. 13-14) that this plain-meaning interpretation is in "tension" with *United States v. Baggot*, where this Court stated that the judicial proceeding exception contemplates "litigation." 463 U.S. 476, 480 (1983). But "litigation" is an apt description for a Senate trial in which the parties file briefs, present arguments and evidence, and are subject to a judgment. And in any event, *Baggot*'s passing reference to litigation did not purport to define "judicial proceeding"—an issue the Court explicitly declined to address. *Id.* at 479 n.2.

DOJ also objects that the Senate cannot be a court because it is a body of "elected legislators" and the Constitution vests the judicial power of the United States in the Article III courts. Pet. 8-9; *see id.* at 12, 14. Critics of the Constitution likewise objected that giving the Senate the power to try impeachments "confounds legislative and judiciary authorities in the same body." *The Federalist No. 66*, at 342. Hamilton and Madison did not respond, as DOJ would, that impeachment trials are not "judicial." Instead, they freely acknowledged that "[t]he Senate, which is a branch of the legislative department, is also a judicial tribunal for the trial of impeachments." *The Federalist No. 47*, at 252. But they explained that the constitutional separation of powers allows for this "partial intermixture" of the legislative and judicial powers "for special purposes" like impeachment. *The Federalist No. 66*, at 342.

4. DOJ also argues that the phrase "judicial proceeding" or its equivalent appears in three other provisions of the Federal Rules of Criminal Procedure; that it cannot include an impeachment trial in those provisions; and that it therefore cannot include an impeachment trial in Rule 6(e)(3)(E)(i) either. Pet. 12-13. But DOJ is simply wrong about the first provision, and the other two make clear that they address only a subset of "judicial proceedings."

DOJ first cites Rule 6(e)(3)(F)(ii), which requires a court that receives a disclosure application to afford "the parties to the judicial proceeding" an opportunity to be heard. There is no obstacle to applying that provision to an impeachment. In this case, the Committee served its application on the President (the other "party" to the impeachment), *see* Certificate

of Service (July 30, 2019), Dkt. No. 3, and the President could have appeared in the district court, just as past subjects of impeachment have done. *See, e.g.*, *In re Grand Jury Investigation of U.S. Dist. Judge G. Thomas Porteous, Jr.*, No. 09-4346 (E.D. La. Aug. 6, 2009) (noting opposition filed by Judge Porteous).

DOJ next invokes Rule 6(e)(3)(G), which directs that "[i]f the petition to disclose arises out of a judicial proceeding in another district," the petitioned court generally "must transfer the petition to the other court." But the word "if" expressly contemplates that not all disclosure petitions will involve a "judicial proceeding" in "another district." Rule 6(e)(3)(G) does not apply, for example, when the application arises out of a proceeding in a "state court." Fed. R. Crim. P. 6(e)(3)(E) advisory comm. notes on 1983 amend. Yet no one doubts that state court suits are "judicial proceedings." *Id.* The same is true of impeachment trials.

Finally, DOJ cites Rule 53, which provides that "the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom." Pet. 13. But like Rule 6(e)(3)(G), Rule 53 obviously does not purport to cover *all* judicial proceedings—it has no application, for example, to civil suits or state-court litigation. And the fact that context makes clear that Rule 53 reaches only a subset of "judicial proceedings" provides no reason to depart from that term's plain meaning in Rule 6(e)(3)(E)(i).

5. Finally, DOJ appeals to "historical practice," asserting that no court had authorized disclosure of

grand-jury material for use in an impeachment "before the advent of Rule 6(e)." Pet. 15. But in 1945, when the original version of Rule 6(e) was pending before Congress, a district court ordered disclosure of grand-jury material to the Judiciary Committee for use in the impeachment investigation of two federal judges. *Johnson & Watson Hearings*, pt. 1, at 63. Excerpts of grand-jury testimony were read into the record during those impeachment proceedings. *Id.*, pt. 1, at 84-91; *id.*, pt. 2, at 929-46. It is implausible that Congress would have understood the rule it was approving to preclude the very type of court-ordered disclosure on which it was actively relying in ongoing impeachment proceedings.[6]

Moreover, shortly before Congress reenacted Rule 6(e) by statute in 1977, *see* Pub. L. No. 95-78, § 2, 91 Stat. 319, the D.C. Circuit upheld the district court's disclosure of the Watergate Roadmap to the Committee in *Haldeman*. Congress was assuredly aware of that high-profile decision and its own use of the Watergate Roadmap when it readopted Rule 6(e)'s "judicial proceeding" language without change.

---

[6] DOJ dismisses the Johnson and Watson case, asserting that it "did not involve a 'court-ordered disclosure' at all." Pet. 17 (quoting Pet. App. 56a). Not so. The order by Judge William Smith of the Middle District of Pennsylvania directing the disclosure is reproduced in the record of the impeachment proceedings. *Johnson & Watson Hearings*, pt. 1, at 63. The statement by Judge Rao that DOJ quotes was making an entirely different point. She recognized that Judge Smith had ordered disclosure, but she believed that the relevant material was in the court's custody, so that the order did not compel "another branch, but simply … the court's deputy clerk." Pet. App. 56a.

B. DOJ's new position would create separation-of-powers problems, not avoid them.

Venturing beyond Rule 6(e)'s text, DOJ asserts that interpreting the "judicial proceeding" exception to include impeachment trials creates two separation-of-powers problems—neither of which implicates the Executive Branch. Pet. 19-24. Decades of experience refute those claims. In fact, the separation of powers would be threatened only if DOJ succeeded in its novel effort to deny Congress the evidence necessary to fulfill its constitutional duties.

1. DOJ first observes that Rule 6(e)(3)(E) allows a district court to authorize disclosure "at a time, in a manner, and subject to any other conditions that it directs." Pet. 19 (quoting Fed. Rule Crim. P. 6(e)(3)(E)). DOJ notes that, under the Speech or Debate Clause, a district court would likely be unable to enforce some conditions on the disclosure of grand-jury material to Congress. *Id.* at 20. It could not, for example, hold a Member of Congress in contempt for revealing that material in a Committee meeting or on the House floor. *Cf. Gravel v. United States*, 408 U.S. 606, 615-16 (1972). But nothing about that result creates any separation-of-powers concern or tension between Rule 6(e)(3)(E) and the Constitution.

A court authorizing disclosure of grand-jury material for use in an impeachment investigation retains full authority to determine the "time" and "manner" of disclosure, as the district court did here. Fed. R. Crim. P. 6(e)(3)(E). For example, a court could order that grand-jury material be produced for *in camera* inspection by Members and their staff on the court's premises. And while the Speech or Debate Clause might prevent a court from imposing or

enforcing other conditions, there is nothing unusual about requiring a court to comply with the Constitution and other applicable laws when exercising its discretion under a general provision like Rule 6(e)(3)(E).

A court obviously could not, for example, invoke Rule 6(e)(3)(E) to impose conditions that violated a criminal defendant's due process rights. *Cf. Dennis v. United States*, 384 U.S. 855, 870-75 (1966). Nor could it condition disclosure in a manner that invaded the Executive Branch's Article II powers. The possibility of such conflicts does not, as DOJ contends, trigger the canon of constitutional avoidance or suggest that Rule 6(e)(3)(E) creates any "serious constitutional problem." Pet. 21. It simply means that Rule 6(e)(3)(E), like countless other grants of authority, must be applied in a manner consistent with the Constitution.

Nor is there any anomaly in authorizing disclosure in a context where district courts would have limited authority to enforce certain conditions. To the contrary, Rule 6(e)(3)(E)(iii) authorizes courts to disclose grand-jury material to "a foreign court or prosecutor for use in an official criminal investigation." A court's ability to impose and enforce certain conditions on such a disclosure to an arm of a foreign government is likely to be subject to severe legal and practical limitations.

DOJ's reliance on Rule 6(e)(3)(E)'s reference to "conditions" is unpersuasive for another reason. That language was added in 1979, decades after the "judicial proceeding" exception was adopted. Fed. R.

Crim. P. 6(e)(1), (e)(3)(C) advisory comm. notes on 1979 amend.[7] The rules committee explained that its intent was simply to "give[] express recognition to the fact that if the court orders disclosure, it may determine the circumstances of the disclosure." Fed. R. Crim. P. 6(e)(3)(C) advisory comm. notes on 1979 amend. This language thus codified existing practice, which, as we have already explained, included court-ordered disclosures to Congress for impeachment proceedings.

2. DOJ also asserts that allowing the House to seek grand-jury material under Rule 6(e) would invade the prerogatives of the House and Senate by "requir[ing] federal courts to scrutinize particular theories of impeachment and weigh the significance of particular evidence under those theories." Pet. 21. Experience shows otherwise. Courts have repeatedly considered and granted the House's requests for grand-jury material without second-guessing its sole power of impeachment or displacing the Senate's function as the sole trier of impeachments. Courts do not invade the House's impeachment powers simply by assessing the need for grand-jury materials based on the nature and scope of the House's impeachment investigation. In *Hastings*, for example, the Eleventh Circuit was careful to avoid "the area reserved to the

---

[7] *See* H. Comm. on the Judiciary, 96th Cong., *Rules of Criminal Procedure for the U.S. District Courts* 6 (Comm. Print 1979). The 1979 language ("in such manner, at such time, and under such conditions as the court may direct") was modified to the current language ("at any time, in any manner, and subject to any other conditions that it directs") in 2002, when the provision was moved from Rule 6(e)(3)(C) to Rule 6(e)(3)(E).

House by the Constitution," and thus refrained from any "expression of the propriety or impropriety of an impeachment." 833 F.2d at 1446. Here, too, the lower courts refrained from "second-guess[ing] the manner in which the House plans to proceed with its impeachment investigation." Pet. App. 26a.

DOJ appears to concede that the separation-of-powers problems it purports to fear have never arisen. But it asserts that the lower courts in this case avoided those problems only by failing to hold the House's application to an appropriately stringent version of the "particularized need" standard articulated in *Douglas Oil*. *See* Pet. 24-26. There are two problems with that argument.

First, it reveals that DOJ's separation-of-powers argument is, in truth, a quarrel with the way the lower courts applied the *Douglas Oil* standard here. DOJ could have asked this Court to review that question directly, but it did not—presumably because the application of the *Douglas Oil* standard to the particular circumstances of this case plainly does not warrant this Court's review. *Cf. United States v. John Doe, Inc. I*, 481 U.S. 102, 116 (1987) (emphasizing that "wide discretion must be afforded to district court judges in evaluating whether disclosure is appropriate"). DOJ's apparent intention to try to relitigate that deeply fact-bound question before this Court provides still more reason to deny the petition.

Second, DOJ's arguments about the *Douglas Oil* standard are unpersuasive even on their own terms. That standard is "highly flexible" and "accommodates any relevant considerations, peculiar to government movants, that weigh for or against disclosure in a

given case." *Sells Eng'g*, 463 U.S. at 445. It thus gives courts ample room to recognize the differences between a Congressional request for grand-jury material in an impeachment investigation and a run-of-the-mill application from a private litigant in a civil case.

DOJ seriously errs in asserting that the lower courts diluted the *Douglas Oil* standard to a "virtual rubber stamp." Pet. 10. As an initial matter, the district court *did not* authorize disclosure of all the material the Committee sought. Pet. App. 180a-81a. Further, its order authorizing disclosure of the limited set of grand-jury material directly referenced in the Mueller Report is narrower than the disclosures allowed in past impeachment investigations. In *Hastings*, for example, the Eleventh Circuit authorized disclosure of "all the confidential records" of the grand jury. *Hastings*, 833 F.2d at 1439.

The disclosure here is also narrower than the one this Court upheld under the *Douglas Oil* standard in *Doe*. There, a court authorized DOJ to share grand-jury material with attorneys in the Civil Division and placed *no* restrictions on which portions of the grand-jury record could be disclosed. 481 U.S. at 105-06. DOJ argued that the sweeping authorization was "altogether appropriate" because of "the legitimate and limited purpose of [its] disclosure request"—to allow the Civil Division to consult on an enforcement action under the False Claims Act. U.S. Br. 44, *Doe*, 481 U.S. 102 (No. 85-1613). This Court agreed, explaining that DOJ would have no incentive to disclose "portions of the record that were not relevant to the advisory task that [the Civil Division attorneys] were being asked to perform." 481 U.S. at

116 n.9. Here, the district court authorized a far more tailored disclosure in service of a far greater public purpose.

3. The understanding of Rule 6(e) that has governed in the lower courts for decades thus raises no constitutional difficulty. Instead, it is DOJ's new position that would infringe on Congress's constitutional authorities. DOJ would deprive Congress of a source of information about misconduct by Executive Branch officials that has long been vital in impeachment proceedings. It would render grand-jury material uniquely and categorically off-limits—in contrast to other sensitive information, such as classified material, that Congress routinely receives—at the very moment when Congress seeks to perform one of its core constitutional functions.

DOJ's position would also treat impeachment less favorably than ordinary criminal prosecutions, civil litigation, and even foreign court proceedings—a result that DOJ itself previously dismissed as untenable. That result would severely undermine the constitutional design, which relies on impeachment as an essential check on official misconduct. It would also violate fundamental separation-of-powers principles, which establish that one branch may not "impair another in the performance of its constitutional duties." *Clinton v. Jones*, 520 U.S. 681, 701 (1997) (quotation marks omitted).

IV. The district court's order was also a permissible exercise of its inherent authority.

Even apart from Rule 6(e), the district court's disclosure was justified as an exercise of its inherent authority to disclose grand-jury material. If the Court

grants certiorari, the House will advance that argument as an alternative ground for affirmance.

1. It is well established that district courts exercise some supervisory authority over the grand jury. That authority has long included the power to release sealed grand-jury materials, which "rest[s] in the sound discretion of the [district] court" and "is wholly proper when the ends of justice require it." *Socony-Vacuum Oil Co.*, 310 U.S. at 233. And courts exercising that inherent authority released grand-jury information to Congress for use in impeachment. *See Johnson & Watson Hearings*, pt. 1, at 63.

Although the D.C. and Eleventh Circuits have concluded otherwise, at least two courts of appeals have held that district courts retain their inherent authority to order disclosure of grand-jury materials outside of Rule 6(e)'s enumerated exceptions, and others have suggested as much in dicta. *See Carlson v. United States*, 837 F.3d 753, 766-67 (7th Cir. 2016); *In re Craig*, 131 F.3d 99, 103 (2d Cir. 1997); *In re Biaggi*, 478 F.2d 489, 492-93 (2d Cir. 1973); *see also In re Special Grand Jury 89-2*, 450 F.3d 1159, 1178 (10th Cir. 2006); *In re Grand Jury Proceedings*, 417 F.3d 18, 26 (1st Cir. 2005); *but see Pitch v. United States*, 953 F.3d 1226, 1229 (11th Cir. 2020) (en banc); *McKeever*, 920 F.3d at 850. Among other things, those courts have emphasized that nothing in the text of Rule 6 purports to eliminate courts' established authority to order disclosure. *Carlson*, 837 F.3d at 766-67.

2. The district court thus properly authorized disclosure to the Committee even if an impeachment trial is not a "judicial proceeding" under Rule 6(e)(3)(E)(i). Ordinarily, the Court might decline to

consider such an alternative ground for affirmance. Here, though, there are two reasons why the Court should take up that question if it grants certiorari on the question presented in the petition.

First, the two issues are intertwined. It would raise serious separation-of-powers concerns if the House were categorically denied access to grand-jury material. *See supra* Part III.B. That problem could be avoided either by confirming that disclosure is permitted under Rule 6(e)(3)(E)(i) or by holding that district courts have inherent authority to disclose grand-jury material outside the confines of Rule 6. Similarly, DOJ's concerns about the application of other provisions of Rule 6 in the context of impeachments would be obviated if courts could order disclosure under their inherent authority.

Second, the D.C. Circuit's recent decision in *McKeever* bars any further litigation of the inherent-authority issue in the lower courts in this case. That would foreclose the Court's usual approach of leaving potential alternative grounds for affirmance to be considered, if necessary, on remand.

3. The inherent-authority issue will be before the Court if it grants certiorari because the Committee would be entitled to "defend its judgment on any ground properly raised below." *Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979); *see* Pet. App. 106a-07a; Comm. C.A. Br. 28 n.1. But to ensure that the Court will receive full briefing on that issue, it might wish to add the following question if it grants certiorari: "Whether a district court has inherent authority to authorize the disclosure of grand-jury materials for use in an impeachment investigation." *See, e.g.*, *Kansas v. Garcia*, 139 S. Ct.

1317 (2019) (mem.) (adding a question presented that would have been an alternative ground for affirmance); *Hernandez v. Mesa*, 137 S. Ct. 291 (2016) (mem.) (same); *United States v. Texas*, 136 S. Ct. 906 (2016) (mem.) (same).

To be clear, however, neither the "judicial proceeding" issue nor the inherent authority issue warrants this Court's review. Instead, as in *McKeever*, any change that might be necessary or desirable on either issue "should be addressed in the first instance by the criminal-rules [amendment process]." Br. in Opp'n 18, *McKeever*, 140 S. Ct. 597. The Court should thus simply deny the petition outright.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Annie L. Owens
Joshua A. Geltzer
Mary B. McCord
INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION
GEORGETOWN UNIVERSITY LAW CENTER
600 New Jersey Ave. NW
Washington, D.C. 20001

Douglas N. Letter
General Counsel
Counsel of Record
Todd B. Tatelman
Megan Barbero
Josephine Morse
Adam A. Grogg
Jonathan B. Schwartz
OFFICE OF GENERAL COUNSEL
U.S. HOUSE OF REPRESENTATIVES
219 Cannon House Building
Washington, D.C. 20515
(202) 225-9700
douglas.letter@mail.house.gov

June 15, 2020