No. 19-1328

In the Supreme Court of the United States

DEPARTMENT OF JUSTICE, PETITIONER

v.

HOUSE COMMITTEE ON THE JUDICIARY

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

REPLY BRIEF FOR PETITIONER

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This case presents the important question whether the provision in Federal Rule of Criminal Procedure 6(e) permitting a court to authorize a breach of grand-jury secrecy "preliminarily to or in connection with a judicial proceeding" also permits disclosure in connection with a Senate impeachment proceeding. Fed. R. Crim. P. 6(e)(3)(E)(i). As the government has explained, the ordinary meaning of "judicial proceeding" and the history of that limited exception to grand-jury secrecy do not support court-authorized disclosure in connection with an impeachment trial before a legislative body. Even more important, the court of appeals' decision creates substantial separation-of-powers concerns with the ordinary application of Rule 6(e) in the impeachment context; and its attempt to mitigate those concerns in effect rendered certain portions of the Rule's text inapplicable to impeachment proceedings

and lowered the traditional "particularized need" standard to a virtual rubber stamp.

Respondent barely disputes those necessary consequences of the decision below. To the contrary, it embraces them—and contends, improbably, that it is the government's position that would create separation-of-powers problems because it would "deprive Congress of a source of information about misconduct." Br. in Opp. 32. That contention is incorrect. Interpreting the text of Rule 6(e) according to its ordinary meaning does not violate the separation of powers; it honors it by giving effect to text that Congress directly enacted (and retains the power to amend). If respondent is dissatisfied that the Rule permits court-authorized disclosure only in connection with judicial proceedings, it should ask Congress, of which it is a part, to rewrite the Rule—not ask the court of appeals to do that work. The court's rewriting—and the separation-of-powers concerns it was intended to mitigate—are precisely why this Court, and not the advisory rules committee, should address this important issue.

A. The Decision Below Is Incorrect

1. a. As the government has explained (Pet. 11-19), the ordinary meaning of "judicial proceeding" in Rule 6(e) does not include an impeachment trial before a legislative body. Like the court of appeals, respondent principally relies (see Br. in Opp. 20-22) on constitutional text and writings suggesting that an impeachment would be a "trial" of a "crime" resulting in a possible "judgment" of "conviction." But as the government has explained (Pet. 14-15), even if a Senate impeachment trial partakes of a judicial character, it does not answer the question whether an impeachment before a legislative body is a "judicial proceeding" as that

term is used in Rule 6(e). Emblematic of respondent's misguided approach is its reliance (Br. in Opp. 22) on *Kilbourn* v. *Thompson*, 103 U.S. 168 (1881), in which this Court observed that "[t]he Senate also exercises the judicial power of trying impeachments." *Id.* at 191. That observation does not imply that an impeachment is a "judicial proceeding" any more than *Kilbourn*'s observation that "the President is so far made a part of the legislative power, that his assent is required to the enactment of all statutes and resolutions of Congress," would imply that the President is a legislator. *Ibid.*

In any event, as the government has explained (Pet. 14), this Court already has rejected the contention that the constitutional text or structure implies that a Senate impeachment trial "must be in the nature of a judicial trial." *Nixon* v. *United States*, 506 U.S. 224, 229 (1993). Respondent does not even cite *Nixon*, much less reconcile the Court's holding there with respondent's view that the constitutional text somehow compels the conclusion that a Senate impeachment trial is a "judicial proceeding."

b. The government also has explained (Pet. 15-19) that historical practice, both before and after the Rule's adoption, does not support court-authorized disclosure under the judicial-proceeding exception in connection with an impeachment. Like the court of appeals, respondent relies (Br. in Opp. 26) on a 1945 disclosure of certain grand-jury materials in connection with an investigation of two federal district judges. But as with many of the other examples of disclosure, respondent identifies no evidence that the disclosure there was contested by anyone, including the targets of the investigation. 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). That isolated incident therefore does not alter the historical understanding of the scope of the judicial-proceeding exception or the meaning of that term as incorporated in the Rule.

And contrary to respondent's suggestion (Br. in Opp. 26), that Congress reenacted the "judicial proceeding" language in Rule 6(e) by statute in 1977 does not suggest that it ratified respondent's preferred reading of *Haldeman* v. *Sirica*, 501 F.2d 714 (D.C. Cir. 1974) (en banc) (per curiam), as having held that impeachment is a "judicial proceeding." For one thing, respondent provides no indication that Congress was even aware of that decision, let alone that it would have viewed a lower court's per curiam ruling merely denying a mandamus petition as having definitively resolved the underlying merits issue. To the contrary, the reenactment of the "judicial proceeding" text without modification suggests that Congress intended the text to retain the consistent meaning it has held since the Rule's adoption in 1946, which itself simply "codifie[d]" the "traditional rule of grand jury secrecy." *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418, 425 (1983). As the government has explained (Pet. 15-16), that traditional rule allowed disclosure only in ordinary court proceedings, such as to refresh the recollection of witnesses at trial or to set aside an indictment because of misconduct before the grand jury.

2. The government also has explained (Pet. 19-26) that if the court of appeals' interpretation of "judicial proceeding" in Rule 6(e) as including an impeachment

trial before a legislative body were correct, the ordinary application of Rule 6(e) would create substantial separation-of-powers concerns in at least two respects.

First, the Rule's provision allowing courts to set time, manner, and other conditions on disclosure would, if applied to impeachment, ostensibly permit federal courts to regulate a coordinate Branch's use of grand-jury materials, and to enjoin and possibly hold in contempt Members of Congress for violating those conditions. Respondent agrees (Br. in Opp. 28-29) that a court could not impose such conditions on the House's use of the grand-jury records here, but justifies that result by stating that Rule 6(e), "like countless other grants of authority, must be applied in a manner consistent with the Constitution." *Id.* at 28.

That misses the point. As this Court repeatedly has made clear, courts should be hesitant to adopt an interpretation of a statute or rule that would create a constitutional problem. *E.g.*, *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 842 (2018). Indeed, that principle counsels against adopting even the more natural meaning of a text if it would produce such a problem. It is even less defensible to adopt respondent's expansive and atextual interpretation of "judicial proceeding" that would create those difficulties—especially when the ordinary meaning does not. Cf. *Clark* v. *Martinez*, 543 U.S. 371, 382 (2005).

Respondent mistakenly relies (Br. in Opp. 28-29) on the fact that the time and manner restriction in Rule 6(e) was adopted in 1979, long after the adoption of the "judicial proceeding" language. If anything, that sequence reinforces the conclusion that the advisory rules committee did not view the existing "judicial proceed-

ing" language in the Rule as encompassing a Senate impeachment trial. Had the committee thought otherwise, it surely would have acknowledged, either in the Rule or commentary, the obvious unconstitutionality of applying that restriction in the context of an impeachment. That it did not do so reinforces the conclusion that it viewed the "judicial proceeding" language as referring only to proceedings in court.

Second, the government has explained (Pet. 21-26) that under the court of appeals' interpretation, the requirement that a petitioner seeking a breach of grand-jury secrecy demonstrate a "particularized need" for the requested materials would, if applied to impeachment, require federal courts to scrutinize specific legal theories of impeachment and to sit as evidentiary gatekeepers for impeachment proceedings. Respondent does not dispute (Br. in Opp. 29-32) the separation-of-powers problems that would arise were courts to undertake such an inquiry. Instead, it maintains that those concerns have not yet arisen. But as the government has explained (Pet. 24-26), the reason for that is courts—like the court of appeals here—appear to have avoided that searching inquiry by turning over nearly all of the requested materials with barely any inquiry at all. Perhaps previous decisions have done so because the Department of Justice mistakenly supported disclosure in those cases. See Pet. 18-19. But the court of appeals here did so by diluting the "particularized need" standard to a mere "relevance" standard, which has no basis in this Court's precedents or historical practice. See Pet. 24-25.

Respondent incorrectly argues (Br. in Opp. 30-31) that the court of appeals did not actually lower the

standard. The court itself acknowledged that it was doing so. See Pet. App. 19a-20a. And its application of the particularized-need standard to the facts here removes any doubt: the court authorized disclosure of secret grand-jury matters—including materials that respondent itself "conceded it did not need," *id.* at 24a—in connection with an impeachment that already had concluded or preliminarily to a hypothetical second impeachment that even respondent appears to concede is not imminent. That alone makes clear that the court of appeals improperly lowered the particularized-need standard to "a virtual rubber stamp." *Sells Engineering*, 463 U.S. at 444.

Finally, respondent's suggestion (Br. in Opp. 32) that adopting the ordinary meaning of "judicial proceeding" in Rule 6(e) "would infringe on Congress's constitutional authorities" is incorrect. Congress directly enacted the relevant text of Rule 6(e), see Act of July 30, 1977 (1977 Act), Pub. L. No. 95-78, § 2(a), 91 Stat. 319-320, and remains free to amend it to allow courts to authorize a breach of grand-jury secrecy in connection with impeachment proceedings. It has not done so. Any hindrance to respondent in the impeachment process posed by the longstanding and traditional rule of grand-jury secrecy, as reflected in the ordinary meaning of the text of Rule 6(e), is thus of Congress's own making—and entirely within Congress's power to eliminate.

B. The Decision Below Warrants Further Review

As the government has explained (Pet. 26-29), this case involves an important question of federal law that this Court should resolve. "The grand jury as a public institution serving the community might suffer if those testifying today knew that the secrecy of their testimony would be lifted tomorrow." *United States* v.

Procter & Gamble Co., 356 U.S. 677, 682 (1958). Breaching that secrecy too easily—as the decision below does—would be "destructive of the workings of our grand jury system" and "hostile to its historic status." *United States* v. *Johnson*, 319 U.S. 503, 513 (1943). Although no other court of appeals has addressed the question presented here, the decision below is in serious tension with this Court's precedents holding that exceptions to grand-jury secrecy should be construed narrowly, see *Sells Engineering*, 463 U.S. at 425, that "judicial proceeding" in Rule 6(e) refers to litigation, *United States* v. *Baggot*, 463 U.S. 476, 480 (1983), and that the particularized-need standard cannot be lowered to a mere "relevance" standard, *Sells Engineering*, 463 U.S. at 443-444.

Respondent suggests (Br. in Opp. 14, 17) that in *McKeever* v. *Barr*, 920 F.3d 842 (D.C. Cir. 2019), cert. denied, 140 S. Ct. 597 (2020), the government took the position that an impeachment is a "judicial proceeding" within the meaning of the Rule. That is incorrect. *McKeever* did not involve impeachment; the question was whether a district court has inherent authority to authorize the release of grand-jury records of historical interest. *Id.* at 844. The petitioner there relied on the court of appeals' prior decision in *Haldeman*, *supra*, which 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. In explaining why the *McKeever* petitioner's reliance on *Haldeman* was misplaced, the government argued that because *Haldeman* resolved only a mandamus petition, it did not definitively rule on the underlying legal interpretive issue. See Gov't C.A. Br. at 36-37, *McKeever*, *supra* (No.

17-5149) (June 4, 2018). In addition, the government observed that the D.C. Circuit "ha[d] subsequently treated *Haldeman* as standing only for the proposition that an impeachment proceeding *may* qualify as a 'judicial proceeding' for purposes of Rule 6(e)," as opposed to the proposition that a court has inherent power to authorize disclosure. *Id.* at 37 (emphasis added). Nothing about that qualified description of the mandamus denial in *Haldeman* purports to approve the underlying proposition that an impeachment is a "judicial proceeding" under Rule 6(e). At all events, unlike the court below, this Court is bound by neither *Haldeman* nor *McKeever*, and therefore should decide the question presented here de novo.

Respondent is mistaken to suggest (Br. in Opp. 18-19) that the government has no interest in preserving the secrecy of these particular grand-jury materials. The government's interest in secrecy is not just case-specific, but prophylactic. Completely apart from any harms that disclosure might cause in this case are the harms it could cause in future cases: absent up-front assurances of secrecy, "many prospective witnesses would be hesitant to come forward voluntarily," and those who do come forward "would be less likely to testify fully and frankly." *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 219 (1979). Those concerns are amplified when grand-jury secrecy is breached in a highly visible investigation, such as the one here.

Finally, contrary to respondent's argument (Br. in Opp. 19), this Court, and not the advisory rules committee, should address the question presented here in light of the importance of impeachment and the serious separation-of-powers concerns raised by the court of

appeals' decision. See Pet. 28-29. Respondent dismisses those concerns, essentially on the ground that respondent *won* below. See Br. in Opp. 19-20 (arguing that the government need not be concerned that "courts could tread on" Congress's powers because the court did not do so in this case). That makes no sense. A court's second-guessing of the House's theories of impeachment implicates the separation of powers whether or not the court ultimately authorizes disclosure. The court of appeals' interpretation of "judicial proceeding" as including an impeachment trial necessarily entangles lower courts in that exercise, without any indication from Congress that it intended to subject its impeachment investigations to that sort of inquiry. And the court's attempt to mitigate those concerns by lowering the particularized-need standard to a mere "relevance" standard cannot be reconciled with this Court's precedents or historical practice. Those issues are more appropriately addressed by this Court, not the advisory rules committee.

C. The Breach Of Grand-Jury Secrecy Here Cannot Be Upheld As An Exercise Of The District Court's Inherent Authority

In a footnote in its brief in the court of appeals, respondent purported to preserve an argument that the district court had inherent authority to order disclosure of the grand-jury materials here even if Rule 6(e) itself does not authorize disclosure. See Resp. C.A. Br. 28 n.1. The district court had rejected that argument, see Pet. App. 107a n.14, and the court of appeals did not address it, cf. *id.* at 11a.

To the extent respondent would like to renew that argument in this Court as an additional question for review (see Br. in Opp. 32-35), the argument is without

merit. See *Pitch* v. *United States*, 953 F.3d 1226, 1234-1236 (11th Cir. 2020) (en banc); *McKeever*, 920 F.3d at 845. Congress made clear that disclosure of grand-jury matters is prohibited "[u]nless these rules provide otherwise." Fed. R. Crim. P. 6(e)(2)(B); 1977 Act § 2(a), 91 Stat. 319-320 (enacting that language by statute). Rule 6(e)(3) contains most of the exceptions to secrecy that "these rules provide" (two others are in Rules 16(a)(1)(B)(iii) and 26.2(f)(3)), and subparagraph (E) is the only provision of "these rules" listing circumstances under which a district court may authorize disclosure. Those carefully defined exceptions to grand-jury secrecy make clear that the circumstances listed in subparagraph (E) of Rule 6(e)(3) are the *only* circumstances in which a district court may order disclosure.

As this Court has recognized in other contexts, when "Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *Andrus* v. *Glover Construction Co.*, 446 U.S. 608, 616-617 (1980). That principle has special force here, given this Court's description of Rule 6 as "one of those 'few, clear rules which were carefully drafted and approved by this Court and by Congress to ensure the integrity of the grand jury's functions.'" *United States* v. *Williams*, 504 U.S. 36, 46 (1992) (citation omitted); see *id.* at 46 n.6.

Indeed, any argument that district courts retain inherent authority to authorize disclosure of grand-jury matters outside the enumerated exceptions in Rule 6(e)(3)(E) would render the list of those exceptions largely superfluous, and the entirety of Rule 6(e)(3) merely precatory. Moreover, such an argument would contravene this Court's admonition that a district court's

inherent power "does not include the power to develop rules that circumvent or conflict with the Federal Rules of Criminal Procedure." *Carlisle* v. *United States*, 517 U.S. 416, 426 (1996); see *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 254 (1988). Taken to its logical conclusion, respondent's alternative argument would allow courts to authorize disclosure of grand-jury matters not just in circumstances unaddressed by Rule 6(e), but in circumstances when that rule would otherwise affirmatively prohibit disclosure. Respondent's alternative argument thus has even less merit than its argument that "judicial proceeding" includes an impeachment trial before a legislative body.

Respectfully submitted.

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