[ORAL ARGUMENT HELD JANUARY 3, 2020]
[DECISION ISSUED MARCH 10, 2020]

No. 19-5288

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE:

APPLICATION OF THE COMMITTEE ON THE JUDICIARY,
U.S. HOUSE OF REPRESENTATIVES, FOR AN ORDER AUTHORIZING
THE RELEASE OF CERTAIN GRAND JURY MATERIALS

OPPOSITION OF THE COMMITTEE ON THE JUDICIARY TO THE DEPARTMENT OF JUSTICE'S MOTION TO STAY MANDATE PENDING PETITION FOR WRIT OF CERTIORARI

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This Court should deny the Department of Justice's (DOJ) motion to stay the issuance of the mandate in this case.

DOJ cannot make the required showing under Federal Rule of Appellate Procedure 41(d) that the Supreme Court is likely to review and reverse this Court's decision. Indeed, this case is a particularly poor candidate for Supreme Court review. This Court upheld the disclosure of a limited amount of grand-jury material and addressed a legal issue unlikely to recur with any frequency: whether a Senate impeachment trial is a "judicial proceeding" for purposes of Federal Rule of Criminal Procedure 6(e)(3)(E)(i). In a ruling that does not conflict with the decisions of any other Circuit, all three judges on the panel agreed that a Senate trial is a "judicial proceeding" under Rule 6(e)(3)(E)(i)—the very issue that DOJ claims needs the Supreme Court's attention. And by following the holdings of cases that for decades have authorized the disclosure of grand-jury materials to Congress for use in impeachments as well as DOJ's own longstanding position on this issue, this Court's decision preserves, rather than upsets, separation-of-powers principles.

Nor can DOJ show good cause for a stay of the mandate. DOJ's only claim of irreparable harm is that once the grand-jury material is disclosed, its secrecy cannot be restored. But this purported harm is present in any case involving an application for grand-jury material. And the Committee has adopted confidentiality protocols that both the district court and this Court found to be sufficient.

By contrast, the Committee and the public suffer grave injury every day that Chief Judge Howell's order is prevented from taking effect. Over a year ago, the Committee began investigating whether President Trump committed impeachable offenses related to Russian interference in the 2016 election, as detailed in Special Counsel Robert Mueller's March 2019 Report. There is no reason to further delay the Committee's receipt of this material, which the district court ordered disclosed by October 30, 2019. DOJ's eleventh-hour request to stay the mandate pending the filing of a petition for certiorari—which now is not due until August 2020[1]—would result in additional, unnecessary delay and harm to the Committee and the public.

ARGUMENT

To obtain a stay of the mandate pending a petition for a writ of certiorari, DOJ must show that the "petition would present a substantial question and that there is good cause for a stay." *See* Fed. R. App. P. 41(d)(1). As with any stay, "[t]he grant of a motion to stay the mandate is far from a foregone conclusion." *Al-Marbu v. Mukasey*, 525 F.3d 497, 499 (7th Cir. 2008) (Ripple, J., in chambers) (quotation marks omitted); *see also Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985) (per curiam) (on a motion for a stay, the movant bears the "burden of showing that exercise of the court's extraordinary injunctive powers is warranted"). "Instead, the party seeking the stay must demonstrate both a reasonable probability of

[1] *See* Supreme Court Order (Mar. 19, 2020), https://www.supremecourt.gov/orders/courtorders/031920zr_d1o3.pdf.

succeeding on the merits and irreparable injury absent a stay." *Al-Marbu*, 525 F.3d at 499 (Ripple, J., in chambers) (citation and quotation marks omitted). DOJ can make neither showing here.

Even if DOJ was able to make "the required showing, [the Court's] decision to grant the stay is a matter of discretion." *Khulumani v. Barclay Nat'l Bank Ltd.*, 509 F.3d 148, 152 (2d Cir. 2007). Any doubt "should inure to the benefit of those who oppose grant of the extraordinary relief which a stay represents." *Williams v. Zbaraz*, 442 U.S. 1309, 1316 (1979) (Stevens, J., in chambers).

I. SUPREME COURT REVIEW IS UNWARRANTED AND UNLIKELY

To demonstrate success on the merits under Rule 41, DOJ must show "a 'reasonable probability' that four justices will vote to grant certiorari," as well as a "'fair prospect' that five justices will vote to reverse the Panel's judgment." *United States v. Silver*, 954 F.3d 455, 458 (2d Cir. 2020) (per curiam) (quoting *Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers)). But Supreme Court review of this case is both unwarranted and unlikely. Certiorari review is a matter of discretion and "will be granted only for compelling reasons." S. Ct. R. 10. No such reasons exist here.

A. As an initial matter, the Court's decision does not conflict with a decision of the Supreme Court or any other Circuit. *See* S. Ct. R. 10(a), (c). On the primary legal question, the meaning of the term "judicial proceeding" in Rule 6(e)(3)(E)(i), the panel was unanimous. All three judges—including Judge Rao in dissent—agreed that

a Senate impeachment trial is a "judicial proceeding" for purposes of Rule 6(e)'s exception for disclosures of grand-jury material "preliminarily to … a judicial proceeding." Op. 25-26; Rao Dissent 3-4. No Circuit has held otherwise, and this holding accords with decades of this Court's precedent as well as DOJ's own longstanding position. *See McKeever v. Barr*, 920 F.3d 842 (D.C. Cir. 2019); *Haldeman v. Sirica*, 501 F.2d 714 (D.C. Cir. 1974) (en banc). Tellingly, contrary to its common practice, DOJ eschewed seeking rehearing in this Court before announcing it would seek review in the Supreme Court.

B. Nor does this case present "an important question of federal law that has not been, but should be, settled by [the Supreme] Court." S. Ct. R. 10(c). The circumstances presented here are unlikely to arise regularly. Impeachments are rare events, and rarer still are impeachments involving grand-jury materials. Courts thus have not had occasion to address these issues with any frequency.

DOJ contends (Mot. 9) that the Court's decision poses a substantial issue for Supreme Court review because it "creates, rather than avoids, significant separation of powers issues." Not so. As this Court explained, since Rule 6(e) was enacted in 1946, "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." Op. 14. The Court's decision merely preserves the separation-of-powers status quo reflected in these earlier cases, including the House's well-established prerogative to obtain the information necessary to carry out its Article I functions. Until this

Administration, DOJ agreed that courts had authority to order disclosure of grand-jury materials for Congress's use in impeachment proceedings. *See, e.g.*, JA259. As the Court observed, "[i]t is only the President's categorical resistance and the Department's objection that are unprecedented." Op. 14.

DOJ separately claims (Mot. 12) that this case raises a substantial issue for Supreme Court review because it addresses a question "important to the functioning of the grand jury." It then speculates that disclosure of material in this case will deter future grand-jury witnesses from testifying fully and truthfully or will render them susceptible to improper influence. But these hypothetical risks are unlikely to materialize.

First, grand-jury proceedings involving matters that also may be relevant to impeachment proceedings are few and far between. There is no serious risk that future witnesses before grand juries will believe that disclosure of material to Congress in this case would have any bearing on the secrecy of their own testimony in mine-run proceedings. Grand-jury witnesses testify under oath and can be prosecuted for perjury if they do not tell the truth. DOJ offers no reason to think witnesses would break that oath based on the remote possibility that portions of their testimony could one day be disclosed to Congress during an impeachment investigation.

Second, the disclosures at issue here are exceedingly limited. Far from ordering DOJ to turn over the entire grand-jury file from the Special Counsel's investigation, the district court ordered a "focused and staged disclosure" of two narrow categories

of information: the "portions of the Mueller Report redacted pursuant to Rule 6(e) and any portions of grand jury transcripts or exhibits referenced in those redactions." Op. 7; JA64; *see also* Op. 22-23.

Third, the Committee has adopted protocols providing that, absent a further vote, any grand-jury material it receives will remain confidential. Two courts have now found those protocols sufficiently protective. *See* Op. 20; JA72-73. Despite DOJ's suggestion that the Committee will authorize reckless public disclosures (Mot. 12), "[t]he courts must presume that the committees of Congress will exercise their powers responsibly and with due regard for the rights of affected parties." *Exxon Corp. v. FTC*, 589 F.2d 582, 589 (D.C. Cir. 1978).

C. DOJ's remaining arguments were correctly rejected by Chief Judge Howell and this Court, and do not show that the Court "has so far departed from the accepted and usual course of judicial proceedings … as to call for an exercise of [the Supreme] Court's supervisory power." S. Ct. R. 10(a). Rather, DOJ is asking the Supreme Court to engage in error correction, which "is 'outside the mainstream of the Court's functions." Stephen M. Shapiro et al., Supreme Court Practice § 5.I.12(C)(3), at 352 (10th ed. 2013)).

DOJ contends (Mot. 7) that the Court erroneously ignored the "ordinary meaning" of Rule 6(e) in favor of the text of the Constitution when it unanimously concluded that the term "judicial proceeding" encompasses Senate trials. However, the Court analyzed the text of both the Constitution *and* the Rule, explaining that

"[t]he term 'judicial proceeding' has long and repeatedly been interpreted broadly," Op. 13, and that "the presumption of consistent usage" of a term across different parts of the same statute "readily yields to context," *id.* (quoting *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 320 (2014)); *see also In re Sealed Motion*, 880 F.2d 1367, 1379-80 (D.C. Cir. 1989) (per curiam) (the term "judicial proceeding" in Rule 6(e) "has been given a broad interpretation," and may include "every proceeding of a judicial nature before a court or official clothed with judicial or quasi judicial power") (quotation marks omitted)). And it properly interpreted the Rule's text in light of historical practice, *see* Op. 13-14, describing a "common-law tradition, starting as early as 1811, of providing grand jury materials to Congress to assist with congressional investigations," Op. 14, that Rule 6(e) was enacted to "codif[y][,]" Op. 13 (quoting *United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 425 (1983)).

DOJ argues (Mot. 10-11) that the Court also erred when it tailored the "particularized-need" test to the context of impeachment. But the Court explained that the particularized-need "standard is 'highly flexible' and 'adaptable to different circumstances,' and courts have required a line-by-line or witness-by-witness determination only in cases where grand jury materials are needed in a future trial to impeach or refresh the recollection of a specific witness." Op. 18 (quoting *Sells Eng'g*, 463 U.S. at 445). Following that Supreme Court guidance, this Court reasonably adapted the particularized-need standard to the special context of impeachment, where the Constitution prevents a court from "micromanaging the evidence"

Congress determines it needs to impeach. Op. 18. On this issue too, the panel was unanimous: Judge Rao agreed in her dissent that "[i]mpeachment is one such circumstance to which the standards for particularized need must be uniquely adapted." Rao Dissent 5.

Tailoring the particularized-need standard also did not, as DOJ suggests (Mot. 11), lead the Court to hold that the Committee is entitled to "all relevant materials" for its impeachment investigation. As explained above, the Court affirmed the district court's carefully reasoned order that DOJ release only two narrow categories of information. To the extent that DOJ is contending that the Court erred when it concluded that the district court did not abuse its discretion in *applying* the particularized-need test, that claim is a fact-bound determination that obviously does not warrant Supreme Court review. *See* Op. 15-16; S. Ct. R. 10.

II. DOJ CANNOT ESTABLISH GOOD CAUSE FOR A STAY

To obtain a stay of the mandate, DOJ also must show "good cause" in the form of irreparable harm. Fed. R. App. P. 41(d)(1); *Al-Marbu*, 525 F.3d at 499 (Ripple, J., in chambers). But DOJ has failed to show that it would be irreparably harmed absent a stay of the mandate. In fact, further delay would irreparably harm the Committee and the public.

A. DOJ Will Not Be Irreparably Harmed Absent A Stay

The Court recognized that DOJ "has no interest in objecting to the release of these materials outside of the general purposes and policies of grand jury secrecy."

Op. 10. Yet DOJ's sole argument for irreparable harm is that "once grand jury material has been disclosed, a court 'cannot restore the secrecy that has already been lost.'" Mot. 13 (quoting *Sells Eng'g*, 463 U.S. at 422 n.6). That is true of *every* case involving the disclosure of grand-jury material and is therefore insufficient, without more, to justify the extraordinary remedy of a stay of the mandate. *Cf. United States v. Silver*, 954 F.3d 455, 460 (2d Cir. 2020). Moreover, as pointed out above, it is entirely speculative as a practical matter that this extremely limited disclosure of grand-jury material in an unusual factual context will have any measurable impact on the ability of the many future federal grand juries throughout the country to obtain the information they need.

Contrary to DOJ's contention that the concerns about harm are "particularly acute" in this case (Mot. 13), there are good reasons to conclude that any harm to grand juries in general from a disclosure here will be quite limited. As noted, the district court ordered a "focused" disclosure of only a narrow class of materials, Op. 6; JA64, and the Committee has adopted protocols providing that, absent a further vote, any grand-jury material it receives will remain confidential. These protocols resemble those adopted decades ago by the Committee to protect the Watergate Roadmap grand-jury report, which the Committee has not released more than 45 years after receiving it. *See* Op. 20-21. In addition, DOJ has already disclosed to the Committee certain non-Rule 6(e) materials that were redacted in the public version of

the Mueller Report, and DOJ does not assert that those disclosures have resulted in any harm.

Finally, any interests in maintaining grand-jury secrecy in this case are substantially diminished. DOJ has not asserted that disclosure would harm any pending law enforcement matters. The Mueller grand jury has concluded its work, and grand-jury secrecy is no longer necessary to protect many of the core values that it serves during active investigations, such as preventing flight by the targets of criminal investigations and protecting active witnesses. *See Douglas Oil of Cal. v. Petrol Stops Nw.*, 441 U.S. 211, 218-219 (1979). Moreover, much of the material related to the Special Counsel's investigation has already been released to the public, further minimizing the risk that "persons who are accused but exonerated by the grand jury" will face "public ridicule." *Id.* at 219; *see also* Op. 19-20.

B. Further Delay Irreparably Harms The Committee And The Public

By contrast, any further delay in receiving the materials would cause the Committee significant, irreparable harm by impairing the House's time-sensitive efforts to determine whether the President committed impeachable offenses. Because the inability to obtain crucial information interferes with the "sole Power of Impeachment" that the Constitution vests in the House, *see* U.S. Const., Art. I, § 2, cl. 5, a stay would risk subjecting the Committee to significant constitutional harm. *See Loving v. United States*, 517 U.S. 748, 757 (1996) ("[T]he separation-of-powers doctrine

requires that a branch not impair another in the performance of its constitutional duties.").

The Committee is suffering continuing harm from its inability to evaluate the information necessary for its investigation. The Committee requested these materials more than a year ago; and it has been six months since Chief Judge Howell ordered them disclosed to the Committee in a decision that this Court has now affirmed. As the Committee informed this Court in December, its investigation into President Trump's misconduct is ongoing, and the grand-jury material will inform its determination whether President Trump committed additional impeachable offenses in obstructing Special Counsel Mueller's investigation and whether to recommend new articles of impeachment. *See* Comm. Supp. Br. 17-18. This remains true today. The current pandemic notwithstanding, the Committee's investigation is not "dormant" (Mot. 2, 14). The Committee continues to exercise its investigative and oversight responsibilities; its staff are ready and able to review the requested grand-jury materials as soon as they are provided by DOJ; and the Committee remains able to convene formal hearings to further its investigation.

Further delay in this case would also harm the public by thwarting the Committee's ability to carry out its Article I functions. The "House, unlike the Senate, is not a continuing body." *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 512 (1975). The current House concludes in just eight months. Because DOJ's petition would not be due until early August, a stay here and the resultant additional delay

would gravely hamper the Committee from completing its investigation during this time-limited Congress. The public interest would be irreparably harmed if DOJ succeeds in running out the clock on the impeachment process.

CONCLUSION

Accordingly, this Court should deny DOJ's motion to stay the mandate. In the alternative, should this Court be inclined to grant DOJ's motion, it should condition any stay on the filing of a petition for a writ of certiorari within five days of the grant of a stay so that the Committee has the opportunity to file a prompt response, enabling the Supreme Court to deny certiorari before the end of its current term.

Respectfully submitted,

/s/ Douglas N. Letter

Douglas N. Letter
General Counsel
Todd B. Tatelman
Principal Deputy General Counsel
Megan Barbero
Josephine Morse
Adam A. Grogg

OFFICE OF GENERAL COUNSEL
U.S. HOUSE OF REPRESENTATIVES
219 Cannon House Office Building
Washington, D.C. 20515
(202) 225-9700
douglas.letter@mail.house.gov

Counsel for the Committee on the Judiciary of the U.S. House of Representatives

Annie L. Owens
Joshua A. Geltzer
Mary B. McCord
Daniel B. Rice

INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION
Georgetown University Law Center
600 New Jersey Avenue NW
Washington, D.C. 20001
(202) 662-9042
ao700@georgetown.edu

April 29, 2020

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing opposition complies with the requirements of Fed. R. App. P. 27(d)(1)(E) because it has been prepared in 14-point Garamond, a proportionally spaced font. I further certify that this opposition complies with the type volume limitation of Fed. R. App. P. 27(d)(2) because it contains 2885 words according to the count of Microsoft Word.

/s/ Douglas N. Letter
Douglas N. Letter

CERTIFICATE OF SERVICE

I certify that on April 29, 2020, I filed the foregoing document via the CM/ECF system of the United States Court of Appeals for the District of Columbia Circuit, which I understand caused service on all registered parties.

/s/ Douglas N. Letter
Douglas N. Letter