[ORAL ARGUMENT SCHEDULED JAN. 3, 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

On Appeal from a Final Order of the U.S. District Court for the District of Columbia (No. 1:19-gj-48) (Hon. Beryl Howell, Chief District Judge)

SUPPLEMENTAL BRIEF OF THE COMMITTEE ON THE JUDICIARY OF THE UNITED STATES 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

Douglas N. Letter, *General Counsel*
Todd B. Tatelman, *Deputy General Counsel*
Megan Barbero, *Associate General Counsel*
Josephine Morse, *Associate General Counsel*
Adam A. Grogg, *Assistant General Counsel*
William E. Havemann, *Assistant General Counsel*
Jonathan B. Schwartz, *Attorney*

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Page(s)

U.S. Constitution and Statutes

Legislative Materials

Other Authorities

GLOSSARY

Committee	Committee on the Judiciary of the United States House of Representatives
DOJ	United States Department of Justice
FOIA	Freedom of Information Act

INTRODUCTION

On December 18, 2019, the United States House of Representatives adopted two Articles of Impeachment against President Donald J. Trump for abuse of power and obstruction of Congress. H. Res. 755, 116th Cong. (2019). The House's vote was based on compelling evidence that the President solicited the interference of a foreign government in the 2020 Presidential election and—consistent with his past efforts to undermine investigations into foreign election interference—ordered defiance of lawful Congressional subpoenas. The Committee on the Judiciary of the United States House of Representatives (Committee) submits this supplemental brief in response to the Court's orders asking the parties to address whether (1) the Committee has Article III standing, (2) the Articles of Impeachment moot this case, and (3) this Court's expedited consideration remains necessary.

The Department of Justice (DOJ) has never disputed that the Committee has standing to bring this application for grand-jury materials. The Constitution and Federal Rule of Criminal Procedure 6(e) give the Committee the right to obtain grand-jury material for use in impeachment proceedings, and the withholding of material that the Committee is legally entitled to obtain is a quintessential injury. This Court can redress that injury by affirming the district court's carefully tailored order. A wide range of individuals have standing to seek grand-jury materials, and a committee of the House of Representatives exercising the House's "sole Power of Impeachment," U.S. Const., Art. I, § 2, cl. 5, does not lack standing that every other litigant possesses.

The House's impeachment of President Trump does not moot this case. To the contrary, the current status of the impeachment proceedings underscores the continuing controversy regarding the withheld grand-jury material, and increases the need for this Court to rule expeditiously. As the Committee explained in its principal brief, the Committee continues to seek the withheld material for use in impeachment—both because the material bears on the current Articles of Impeachment and could accordingly be used in a Senate trial on those Articles, and because the Committee is continuing to conduct its inquiry into whether the President committed other impeachable offenses. Expedited consideration of DOJ's appeal is now even more essential to prevent the Trump Administration from obstructing Congress in its efforts to obtain the information it needs to carry out its constitutional responsibilities.

ARGUMENT

I. THE COMMITTEE HAS ARTICLE III STANDING.

To have Article III standing, a plaintiff "must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). The Committee satisfies each requirement. The Committee needs the requested grand-jury material for use in the ongoing impeachment proceedings, and it suffers an injury from the withholding of that material. This Court can redress that injury by affirming Chief Judge Howell's order.

A. Denying The Committee Access To Information To Which It Is Entitled Is A Cognizable Injury.

The Committee requires information to exercise its constitutional impeachment function, and Rule 6(e) provides a mechanism for the Committee to obtain grand-jury materials for that purpose. Depriving the Committee of the material it seeks is an Article III injury.

1. The Constitution assigns the House the "sole Power of Impeachment." U.S. Const., Art. I, § 2, cl. 5. The Constitution also endows the House with investigative power that "may be exercised by a committee." *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 505 (1975). The House delegated to the Committee authority to conduct investigations regarding Presidential impeachment. *See Jefferson's Manual* §§ 605, 730, H. Doc. No 114-192, at 324, 471 (2017); H. Res. 660, § 4, 116th Cong. (2019). Accordingly, as this Court has recognized, "[t]he investigative authority of the … Committee with respect to presidential conduct has an express constitutional source." *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 732 (D.C. Cir. 1974) (en banc).

To inform its ongoing investigations of President Trump's offenses, the Committee seeks grand-jury material in and underlying the Mueller Report. As discussed in the Committee's principal brief (Comm. Br. 36-41), this material pertains to misconduct central to the impeachment proceedings—including President Trump's solicitation of Ukraine's interference in the 2020 Presidential election, and his pattern

of soliciting foreign election interference and obstructing government investigations of his misconduct. The withholding of that material injures the Committee. Indeed, there is no "more significant wound than … interference with Congress' ability to detect and deter abuses of power within the Executive branch for the protection of the People of the United States." *Comm. on the Judiciary v. McGahn*, — F. Supp. 3d —, No. 19-cv-2379, 2019 WL 6312011, at *28 (D.D.C. Nov. 25, 2019), *appeal pending*, No. 19-5331 (D.C. Cir.).

Congress suffers an obvious injury where, as here, it is deprived of information needed to carry out its constitutional functions. Congress cannot perform its functions "wisely or effectively in the absence of information." *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927). Hence, when Congress "does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it." *Id.* This is true when Congress seeks information to inform legislation or oversight. *See United States v. Am. Tel. & Tel. Co.* (*AT&T I*), 551 F.2d 384, 391 (D.C. Cir. 1976) ("It is clear that the House as a whole has standing to assert its investigatory power[.]"). And it is especially true when the House seeks information to inform impeachment. In *Senate Select Committee*, this Court observed that the House Judiciary Committee had a *stronger* claim to seek information needed for impeachment than the Senate committee plaintiff in that case, which sought information for legislation and whose standing the Court never doubted. *See* 498 F.2d at 732.

District judges in this Circuit have uniformly held that Congress has standing to seek judicial enforcement of a request for information made pursuant to Congress's constitutional powers. As one three-judge district court panel explained, it is "well established that a legislative body suffers a redressable injury when that body cannot receive information necessary to carry out its constitutional responsibilities." *U.S. House of Representatives v. U.S. Dep't of Commerce*, 11 F. Supp. 2d 76, 86 (D.D.C. 1998) (Lamberth, J.). Other district judges within this Circuit have held similarly in the context of suits to enforce Congressional subpoenas.[1]

2. Rule 6(e) authorizes court-ordered disclosures where an applicant seeks grand-jury material "preliminarily to … a judicial proceeding." Fed. R. Crim. P. 6(e)(3)(E)(i). The Committee requested the withheld material in accordance with Rule 6(e), and the district court held that the Committee is entitled to the material under the Rule. JA730-36. The Committee's continued lack of access to the material is a quintessential informational injury sufficient to confer standing.

[1] *See McGahn*, 2019 WL 6312011, at *29-30 (K.B. Jackson, J.) ("the Judiciary Committee has alleged an actual and concrete injury to its right to compel information" relevant to the Committee's impeachment, legislative, and oversight powers); *Comm. on Oversight & Gov't Reform v. Holder*, 979 F. Supp. 2d 1, 21 (D.D.C. 2013) (A.B. Jackson, J.) (the Committee was injured when it "requested a particular set of documents in the course of an official investigation" and was denied that material); *Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 68 (D.D.C. 2008) (Bates, J.) ("*AT&T I* is on point and establishes that the Committee has standing" to obtain information from the Executive Branch by subpoena).

As the Supreme Court explained in *FEC v. Akins*, "[a] plaintiff suffers an 'injury in fact' when the plaintiff fails to [receive] information which must be … disclosed pursuant to a statute." 524 U.S. 11, 21 (1998). Every member of the Court in *Akins* agreed that a party's "inability to obtain information" to which it is legally entitled constitutes an injury in fact. *Id.*; *see id.* at 30-31 (Scalia, J., dissenting) ("A person demanding provision of information that the law requires the agency to furnish … can reasonably be described as being 'aggrieved' by the agency's refusal to provide it"). This Court accordingly has recognized that a plaintiff is injured by "the denial of information he believes the law entitles him to." *Shays v. FEC*, 528 F.3d 914, 923 (D.C. Cir. 2008); *see, e.g.*, *ASPCA v. Feld Ent., Inc.*, 659 F.3d 13, 23 (D.C. Cir. 2011).

The Freedom of Information Act (FOIA) provides an especially apt analogy. When the government "denies requests for information under" FOIA, the denial "constitutes a sufficiently distinct injury to provide standing to sue." *Pub. Citizen v. DOJ*, 491 U.S. 440, 449 (1989). Indeed, "those requesting information" under FOIA need only show "that they sought and were denied" the information. *Id.* And "[a]nyone whose request for specific information has been denied has standing to bring an action; the requester's circumstances—why he wants the information, what he plans to do with it, what harm he suffered from the failure to disclose—are irrelevant to his standing." *Zivotofsky ex rel. Ari Z. v. Sec'y of State*, 444 F.3d 614, 617-18 (D.C. Cir. 2006). The same reasoning applies to requests for information under Rule

6(e), which, like other Federal Rules, "ha[s] the force of law." *Deaver v. Seymour*, 822 F.2d 66, 70 n.9 (D.C. Cir. 1987).

To prevail on the *merits*, an applicant who seeks grand-jury material preliminarily to a judicial proceeding must establish a "particularized need" for the material. *Douglas Oil Co. of Cal. v. Petrol Stops Nw.*, 441 U.S. 211, 223 (1979). But the merits question whether an applicant has shown the requisite need does not bear on the applicant's standing to make a Rule 6(e) request. The fact that an applicant's request "is not guaranteed to be granted, because a court may find a valid justification for denying him access, in no way destroys his standing to seek the documents." *Carlson v. United States*, 837 F.3d 753, 759 (7th Cir. 2016); *see In re Special Grand Jury 89-2*, 450 F.3d 1159, 1174 (10th Cir. 2006) (rejecting the government's standing argument on the ground that it was "really directed at the merits of [plaintiffs'] claim—whether they have established adequate reasons to lift grand-jury secrecy").

3. Courts rarely question Article III standing when adjudicating Rule 6(e) applications. That is because, when an applicant seeks information to which it claims entitlement under the Rule, the Rule itself establishes that the applicant suffers an injury by the denial of the information. "[T]he violation of a procedural right granted by statute"—such as a right to obtain information—can "constitute injury in fact." *Spokeo*, 136 S. Ct. at 1549 (citing *Akins*, 524 U.S. at 20-25). We are aware of no case in which an applicant for grand-jury material under Rule 6(e) was found to lack standing.

This Court recently adjudicated a request by a historian for grand-jury material, with no suggestion that the historian was required to show anything other than that he sought the information and was denied it. *See McKeever v. Barr*, 920 F.3d 842, 843 (D.C. Cir. 2019), *petition for cert. filed* (U.S. Sept. 5, 2019) (No. 19-307). The Supreme Court has similarly considered applications for grand-jury material by various parties without questioning standing. *See, e.g.*, *United States v. John Doe, Inc. I*, 481 U.S. 102, 104 (1987) (request by government attorneys); *Dennis v. United States*, 384 U.S. 855, 868 (1966) (request by criminal defendant).

In the rare cases where courts have inquired about standing in the Rule 6(e) context, courts have easily found it. In an application for material by a historian, for example, the Seventh Circuit explained that the plaintiff's "injury-in-fact is the denial of access to government documents that he has a right to seek" and that "there is no need for [him] to show that he has any particular connection to the grand jury proceeding." *Carlson*, 837 F.3d at 758-59. The Tenth Circuit has applied similar reasoning. *See In re Special Grand Jury 89-2*, 450 F.3d at 1171 (noting that there "would be nothing advisory about a decision either granting or denying the requested relief" for Rule 6(e) material).

Because Rule 6(e) applications are made pursuant to the Chief Judge's ongoing supervision of the grand jury, *see* Local Civil Rule 40.7(c), it is in any event counterintuitive to evaluate Rule 6(e) requests in terms of Article III's case-or-controversy requirement at all. A district court's supervision of the grand jury is "far

removed from the essential attributes of the judicial power with which Article III is principally concerned." *United States v. Seals*, 130 F.3d 451, 457 (D.C. Cir. 1997) (quotation marks omitted); *see also United States v. Williams*, 504 U.S. 36, 47 (1992). To take an analogous example, it is not apparent that Congress directly invokes a district court's Article III jurisdiction by asking the court to issue "an order requiring [an] individual to give testimony" before Congress under the protection of immunity pursuant to 18 U.S.C. § 6005(a). For similar reasons, it is not apparent that Congress directly invokes a district court's Article III jurisdiction by asking the court for the release of grand-jury material under Rule 6(e). In fact, where no party contests disclosure, applications for disclosure of Rule 6(e) material may be *ex parte* "when the government is the petitioner." *See* Fed. R. Crim. P. 6(e)(3)(F).

Regardless, even assuming Rule 6(e) applicants must establish Article III standing, the Committee has standing here for the reasons explained above.

B. The House's Sole Power Of Impeachment Underscores The Committee's Injury.

Any member of the public has standing to ask a court to disclose grand-jury material. We are aware of no plausible theory under which the Committee could be stripped of that standing on the ground that it has been authorized to seek information needed to fulfill the House's constitutional impeachment function.

1. The Constitution vests the House with the "sole Power of Impeachment" and the Senate with the "sole Power to try all Impeachments." U.S. Const., Art. I,

§ 2, cl. 5; *id.*, Art. I, § 3, cl. 6. As the Supreme Court has explained, these provisions prevent courts from imposing a "check" on how Congress conducts impeachments. *Walter Nixon v. United States*, 506 U.S. 224, 235 (1993). Preventing the Committee from obtaining information that it needs in an impeachment, but that could be sought by any other litigant, would obviously interfere with Congress's impeachment power. At a minimum, serious constitutional concerns would arise if Congress were barred from obtaining information it needs to decide whether to impeach the President and remove him from office.

The House must be able to gather the information it needs to carry out its solemn constitutional impeachment function. If Congress and the Supreme Court by Rule created an exclusive mechanism for access to grand jury material, it would make little sense to conclude that they did so knowing that this mechanism could not be used by Congress in an impeachment. To remain true to the constitutional scheme, any standing question here must be resolved in favor of jurisdiction.

2. DOJ does not dispute the Committee's standing in this case. Any argument that the Committee lacks standing would be wrong for the same reasons DOJ presumably declined to make that argument in the first place. But we briefly respond here to standing arguments that DOJ has pressed in other litigation.

First, in other litigation, DOJ has interpreted *Raines v. Byrd*, 521 U.S. 811 (1997), to hold that Congress lacks standing to redress institutional injuries inflicted by the Executive Branch. That interpretation is incorrect. The Supreme Court in *Raines*

concluded that individual legislators could not bring suit to redress an injury related to Congress's institutional role in lawmaking, because that interest belonged to Congress itself. *Id.* at 829. The problem in *Raines* was the mismatch between the plaintiffs—individual legislators—and the entity suffering the injury—Congress. No such mismatch exists here: The Committee was tasked with investigating whether President Trump committed impeachable offenses, and the Committee was authorized by the House to bring this application. *See* H. Res. 430, 116th Cong. (2019). Nothing about *Raines* indicates that Article III forecloses suits by Congress or a Congressional committee asserting its institutional prerogatives. Indeed, since *Raines*, the Supreme Court has recognized that a legislature had standing where it was "an institutional plaintiff asserting an institutional injury." *See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2664 (2015).

Second, DOJ in other litigation has argued that the Committee lacks standing to sue the Executive Branch in interbranch informational disputes. That argument is refuted by centuries of separation-of-powers jurisprudence and by this Court's precedent. This Court in *AT&T I* held that "[i]t is clear that the House as a whole has standing to assert its investigatory power" in a case against the Executive Branch. 551 F.2d at 391. The Court added that "the mere fact that there is a conflict between the legislative and executive branches" in a case involving an informational dispute "does not preclude judicial resolution of the conflict." *Id.* at 390. The first sentence of *AT&T I* made clear that the case was "a portentous clash between the executive

and legislative branches" involving a Congressional request for information, *id.* at 385, and the Court nonetheless concluded that the House had standing, *id.* at 391.

Third, there is ample historical precedent regarding Congress's authority to seek and obtain disclosure of grand-jury materials. Congress has received grand-jury material for use in impeachments since at least 1811. *See* 3 Hinds' Precedents § 2488, at 984-85 (1907). And, since Rule 6(e) was promulgated in 1946, courts—including this Court—have repeatedly adjudicated Congressional requests for grand-jury materials for use in impeachment. *See, e.g.*, *Haldeman v. Sirica*, 501 F.2d 714 (D.C. Cir. 1974) (en banc); *In re Request for Access to Grand Jury Materials Grand Jury No. 81-1*, 833 F.2d 1438 (11th Cir. 1987); *In re Report & Recommendation of June 5, 1972 Grand Jury*, 370 F. Supp. 1219, 1230 (D.D.C. 1974). The courts have done so at the urging of DOJ itself, which has argued that the "'need' for the House to be able to make its profoundly important judgment on the basis of all available information is as compelling as any that could be conceived." JA258.

3. If the Committee were found to lack standing to request grand-jury material for use in impeachment, that would mean that all three branches of the Federal Government have been acting unconstitutionally for many decades. It cannot be correct that a Committee of Congress, operating at the height of the House's "sole" power of impeachment, lacks the authority to request material that *every other litigant* can seek, and lacks even the authority to invoke a court's jurisdiction to make that request. That argument is wrong—and it would be an extension of the mistaken

arguments DOJ has pressed in litigation attempting to insulate President Trump from Congressional oversight.

II. THIS CASE IS NOT MOOT.

The House's recent adoption of two Articles of Impeachment did not moot this case. "A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012) (quotation marks omitted). The Committee retains a substantial and urgent interest in obtaining the withheld material for use in the rapidly unfolding impeachment proceedings.

1. The first Article of Impeachment, "Abuse of Power," states that President Trump "solicited the interference of a foreign government, Ukraine, in the 2020 United States Presidential election." H. Res. 755, at 2; *see id.* at 2-5. It provides that President Trump's "actions were consistent with [his] previous invitations of foreign interference in United States elections." *Id.* at 5. As the Committee's accompanying impeachment report explains, those previous actions included the President's "inviting and welcoming Russian interference in the 2016 United States Presidential election." *Staff of the H. Comm. on the Judiciary, 116th Cong., Rep. on the Impeachment of Donald J. Trump, President of the United States* 132 (2019) (to be published as H. Rep. No. 116-346) (*Impeachment Report*), https://perma.cc/3S55-3HLG; *see id.* at 132-34.

The second Article, "Obstruction of Congress," states that President Trump "directed the unprecedented, categorical, and indiscriminate defiance of subpoenas

issued by the House of Representatives." H. Res. 755, at 6. President Trump's obstruction was "consistent with the President's previous efforts to undermine United States Government investigations into foreign interference in United States elections," *id.* at 7-8, and is part of a "broader pattern of misconduct," *Impeachment Report* at 167. That pattern includes the President's "endeavor to impede the Special Counsel's investigation into Russian interference with the 2016 United States Presidential election, as well as [his] sustained efforts to obstruct the Special Counsel after learning that he was under investigation for obstruction of justice." *Id.* at 167-68.

As the Committee explained in its impeachment report, it had no choice but to recommend these two Articles once it "received compelling evidence of [the President's] misconduct." *Id.* at 163. Given that "the President [has] abuse[d] power by asking and pressuring foreign powers to corrupt the upcoming election," waiting any longer to impeach on this evidence would have been "an abdication of duty." *Id.* at 163-64.

At a press conference following the House's adoption of the two Articles of Impeachment, Speaker Nancy Pelosi outlined the next stage of the House's decision-making, which depends in part on the procedures the Senate adopts for an impeachment trial. *See* Press Release, Speaker of the House, Transcript of Speaker Pelosi, Committee Chairs Press Availability Following Passage of Articles of Impeachment (Dec. 18, 2019), https://perma.cc/F6CZ-CTKP. Speaker Pelosi

expressed her hope that "resolution" of the procedures to be used in the Senate will occur "soon." *Id.*

2. The withheld grand-jury materials would inform the House's decision-making regarding the presentation of the Articles and evidence to the Senate. As the Committee's impeachment report explains, the withheld grand-jury material "would be utilized, among other purposes, in a Senate trial on these articles of impeachment." *Impeachment Report* at 167 n.928.

With respect to the first Article on abuse of power, as the Committee explained in its principal brief (Comm. Br. 39-41), the withheld Rule 6(e) material bears on the President's solicitation of interference by Ukraine in the 2020 U.S. Presidential election. Specifically, one redacted passage in the Mueller Report regarding Paul Manafort relates to the false theory that Ukraine rather than Russia was responsible for interfering in the 2016 election. *See* JA616. That is the same false theory that President Trump pressured the government of Ukraine to investigate—including by withholding vital military aid and an Oval Office meeting—and that President Trump believed would help him in the 2020 election.

Another passage bears on a supposed "peace plan" promoted by Russian interests regarding the conflict in eastern Ukraine. That is the same conflict from which President Trump later withheld military aid—again as part of his effort to pressure Ukraine to interfere in the 2020 election. *See* JA612-13; JA615 n.949; JA616. These passages, and the grand-jury material supporting them, would be important to

the House's presentation of the evidence and the Senate's consideration of the first Article of Impeachment.

With respect to the second Article on obstruction of Congress, as the Committee has explained in its principal brief (Comm. Br. 37-39), the withheld material bears on whether President Trump obstructed Special Counsel Mueller's investigation into Russian interference in the 2016 election by, among other things, misrepresenting his knowledge of that interference in his responses to questions from the Special Counsel's Office. Understanding President Trump's efforts to obstruct the Mueller investigation, "and the pattern of misconduct they represent, sheds light on the particular conduct set forth in [the second] Article as sufficient grounds for the impeachment of President Trump." *Impeachment Report* at 167-68. As the Committee has explained, "[a]lthough the Second Article of Impeachment focuses on President Trump's categorical and indiscriminate obstruction of the House impeachment inquiry, the consistency of this obstruction with his broader pattern of misconduct is relevant and striking." *Id.* at 168. This pattern includes the fact that the President "sought to curtail the Special Counsel's investigation in a manner exempting his own prior conduct," and "instructed the White House Counsel to create a false record and make false public statements." *Id.* Understanding President Trump's history of obstruction would be important to the House's presentation of the evidence and the Senate's consideration of the second Article of Impeachment.

In addition, as Chief Judge Howell explained and the Committee noted in its principal brief (Comm. Br. 41), "numerous individuals" testified before or gave interviews to the Committee and other House committees about events "that are central to the impeachment inquiry." JA66. The record "suggests that the grand jury material referenced or cited in the Mueller Report may be helpful in shedding light on inconsistencies or even falsities in the testimony of witnesses called in the House's impeachment inquiry." *Id.* The Committee has a continued interest in determining whether witnesses made misrepresentations or omissions during its impeachment inquiry. That determination would bear on the Senate's consideration of the Articles of Impeachment that are the product of the Committee's inquiry.

3. The Committee's investigations did not cease with the House's recent impeachment vote. To the contrary, the Committee "has continued and will continue those investigations consistent with its own prior statements respecting their importance and purposes." *Impeachment Report* at 167 n.928.

The withheld material remains central to the Committee's ongoing inquiry into the President's conduct. If this material reveals new evidence supporting the conclusion that President Trump committed impeachable offenses that are not covered by the Articles adopted by the House, the Committee will proceed accordingly—including, if necessary, by considering whether to recommend new articles of impeachment. The Committee's interest in obtaining the withheld material

pursuant to its ongoing impeachment investigations plainly suffices to preserve a live case or controversy.

4. Even if the Court believes that the House's impeachment of President Trump would otherwise moot this case, the capable-of-repetition-yet-evading-review doctrine would prevent the Trump Administration from evading this Court's review by running out the clock on impeachment.

DOJ's withholding of grand-jury material during the impeachment inquiry that culminated in the two current Articles of Impeachment was "in its duration too short to be fully litigated prior to its cessation or expiration." *Del Monte Fresh Produce Co. v. United States*, 570 F.3d 316, 322 (D.C. Cir. 2009) (quotation marks omitted). The Committee has been prevented from obtaining the withheld material for eight months. *See* JA190-91 (subpoena issued April 19, 2019). During this time, the Committee had no choice but to refer Articles of Impeachment to the House based on the evidence of impeachable misconduct to which it had access, rather than awaiting the outcome of this litigation.

There is also "a reasonable expectation" that the Committee will "be subjected to the same action again." *Del Monte*, 570 F.3d at 322 (quotation marks and alteration omitted). The Committee has sought grand-jury materials for use in impeachments numerous times since Rule 6(e)'s enactment, including in the Nixon impeachment proceedings and the impeachments of Judge Hastings and Judge Porteous. The Committee is likely to do so again. When it does (unless DOJ changes its position

again) the Committee is likely to confront once more DOJ's theory that impeachment trials are not "judicial proceedings." *See Reid v. Hurwitz*, 920 F.3d 828, 834 (D.C. Cir. 2019) (finding the capable-of-repetition requirement satisfied where the event at issue occurred "multiple times … in the past"); *see also Del Monte*, 570 F.3d at 324 (the proper question is not "whether the precise historical facts that spawned the plaintiff's claims are likely to recur," but rather "whether the legal wrong complained of by the plaintiff is reasonably likely to recur"). The Court should resolve the validity of DOJ's theory now.

III. EXPEDITED CONSIDERATION REMAINS NECESSARY.

The House's vote to adopt Articles of Impeachment against President Trump underscores, rather than undermines, the Committee's urgent need for expedited consideration of this appeal. As discussed above, the grand-jury materials the Committee seeks would be critical in a Senate trial and in the Committee's ongoing impeachment investigations to determine whether additional Presidential misconduct warrants action by the Committee. The public has a significant interest "in immediately removing a sitting President whose continuation in office poses a threat to the Nation's welfare." *A Sitting President's Amenability to Indictment and Criminal Prosecution*, 24 Op. O.L.C. 222, 258, 2000 WL 33711291, at *27 (2000).

The extraordinary procedural posture of this case bears emphasis and supports the need for this Court's expedited consideration. The Committee subpoenaed the Attorney General for the withheld material in April 2019—eight months ago. When

the Attorney General did not produce the material, the Committee filed this application for the material in July—five months ago. After prompt briefing and argument on the application, Chief Judge Howell issued a thorough opinion rejecting DOJ's new interpretation of Rule 6(e) and ordering disclosure in October—two months ago. Recognizing that an "impeachment investigation involving the President of the United States" is "a matter of the most critical moment to the Nation," JA735-36 (quotation marks and alteration omitted), Chief Judge Howell immediately denied a stay pending appeal given the "serious infirmities" in DOJ's arguments, JA733.

After DOJ sought a stay pending appeal from this Court, this Court on October 29 issued an "administrative stay" to give itself time to consider DOJ's stay motion. The Court then extended that administrative stay, effectively converting the administrative stay into a stay pending appeal without any finding that the extraordinary relief of a stay was warranted. By the time of argument, this Court's administrative stay will have been in place for ten weeks. The Court extended this stay notwithstanding the Committee's representation (Stay Opp. 21) that it urgently needed the withheld material and that "[t]he Committee and the public will suffer irreparable harm if DOJ is permitted to run out the clock on impeachment."

The Committee continues to suffer harm with each additional day that it is denied access to the materials to which it is entitled under Rule 6(e). The Committee has already waited eight months. Because the House found compelling evidence of misconduct, the House had little choice but to impeach the President without the

benefit of the grand-jury material at issue here. But the Senate's impeachment trial is likely to begin soon, and the House and Senate should have full access to the needed information. The Committee's wait for the materials should end now.

CONCLUSION

The Court should promptly affirm the district court's order entering judgment in favor of the Committee.

Respectfully submitted,

/s/ Douglas N. Letter

Douglas N. Letter
General Counsel
Todd B. Tatelman
Deputy General Counsel
Megan Barbero
Associate General Counsel
Josephine Morse
Associate General Counsel
Adam A. Grogg
Assistant General Counsel
William E. Havemann
Assistant General Counsel
Jonathan B. Schwartz
Attorney

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

December 23, 2019

CERTIFICATE OF COMPLIANCE

1. This brief complies with the instructions in this Court's supplemental briefing orders of December 13, December 18, and December 19. The brief is 5,088 words, with 2,761 words dedicated to whether the Committee "has Article III standing," and 1,929 words dedicated to whether "the articles of impeachment render this case moot," "whether expedited consideration remains necessary," and whether the Committee "is still seeking the grand-jury materials at issue in this case in furtherance of its impeachment inquiry."

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word Professional Plus 2016 in 14-point Garamond type.

/s/ Douglas N. Letter
Douglas N. Letter

CERTIFICATE OF SERVICE

I certify that on December 23, 2019, I filed the foregoing Supplemental Brief of the Committee on the Judiciary of the U.S. House of Representatives 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