No. 19-635

IN THE

Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT
OF THE UNITED STATES,

Petitioner,

v.

CYRUS R. VANCE, JR., IN HIS OFFICIAL CAPACITY AS DISTRICT ATTORNEY OF THE COUNTY OF NEW YORK; MAZARS USA, LLP,

Respondents.

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

REPLY BRIEF

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REPLY BRIEF FOR PETITIONER

The President—supported by the Solicitor General—seeks this Court's review of a decision denying him absolute immunity. The Court traditionally grants review under these circumstances. The District Attorney's Brief in Opposition ("BIO") nevertheless urges the Court to deny certiorari here because, in his view, the Second Circuit's decision is correct. He is wrong. The decision below is deeply flawed. More importantly, the Court hears these cases because of the importance of the issue and the respect due the President and the Executive Branch—not based on a prediction as to who will ultimately prevail on the merits. This case should be no exception. The Court should grant the petition.

I. The petition raises important federal questions that warrant review.

The District Attorney acknowledges (at 1) that "this Court has in the past granted review to decide important and unanswered questions of presidential immunity." Indeed, this Court traditionally grants review when the Chief Executive presses a claim of absolute immunity. Petition ("Pet.") 16-18. The Court should adhere to that practice. The Second Circuit's decision "resolves grave and important questions regarding Article II and the Supremacy Clause. It upholds a state criminal subpoena that has no historical precedent. And it poses a serious threat to the autonomy of the Office of the President of the United States." Brief of the United States as Amicus Curiae Supporting Petitioner ("SG Br.") 22. Those concerns "merit ... respectful and deliberate consideration." *Clinton v. Jones*, 520 U.S. 681, 690 (1997). The District Attorney

may see this as just an "ordinary investigation of financial improprieties" that should receive no special consideration. BIO 1. But that is not how this Court approaches petitions by the President. Pet. 16-17.

The District Attorney's *only* argument for opposing certiorari is that, in his view, the case raises no "substantial, open questions regarding presidential immunity." BIO 11. But the Solicitor General disagrees. The Second Circuit did too, concluding that the President makes "serious claims," App. 13a, concerning an issue that "the Supreme Court has not had occasion to address," App. 21a. The district court similarly explained that "the precise constitutional question this action presents ... has not been presented squarely in any judicial forum, and thus has never been definitively resolved." App. 68a. The District Attorney himself agreed that "no court has ruled on the precise issue presented here." CA2 Doc. 99 at 34. In short, "this Court has never had occasion to determine the precise scope of the President's immunity from such an assertion of criminal jurisdiction." SG Br. 12.

The District Attorney adds that review is nonetheless unwarranted because the Second Circuit's ruling is "plainly correct under a straightforward application of this Court's precedent." BIO 1. But even if that were true, this Court rejected that argument as a reason to deny review in *Jones*. Pet. 16. Review was justified because the lower courts had rejected President Clinton's absolute-immunity claim and because the Executive Branch raised red flags over "the potential impact of the precedent established by the Court of Appeals." *Jones*, 520 U.S. at 690. Those same factors prove the "importance"—and hence establish the reason for review—of this case as well. *Id.* at 689.

Regardless, the District Attorney's argument fails on its own terms. In particular, he argues that *United States v. Nixon*, 418 U.S. 683 (1974), forecloses the President's claim of immunity. BIO 15-19. That is incorrect. Pet. 27-30; *infra* 4-9. But even if he were right, application of the *Nixon* standard independently justifies review. Pet. 34-36; SG Br. 5-20; *infra* 9-11. Whether a state grand jury's subpoena for the President's records can be upheld without a "heightened showing of need" is an important issue. SG Br. 6.[1] Indeed, whether *any* subpoena for a President's personal records can be upheld without that showing is an important and recurring issue. Pet. 6; SG Br. 21 n*; *Trump v. Mazars USA, LLP*, 2019 WL 5991603, at *1 (D.C. Cir. 2019) (Katsas, J., dissenting from denial of rehearing en banc).

The District Attorney's argument (at 16, 19-20) that *Jones* forecloses the President's claim also is misplaced. Pet. 30-31. Both cases involve unofficial action. But *Jones* resolved the President's amenability to a civil suit in federal court—not a state criminal subpoena. Even if this case involved a "comparable claim" to the one in *Jones*, the Court expressly reserved there whether absolute immunity would apply had the case arisen from a proceeding before a "state tribunal" given the "federalism and comity concerns" that such a dispute would raise.

1. In passing, the District Attorney suggests that this question is not before the Court because the President "failed to raise the issue below." BIO 32 n.15. That is wrong. CA2 Doc. 121 at 26-27. It is also irrelevant. The Court's "traditional rule ... precludes a grant of certiorari only when 'the question presented was not pressed or passed upon below.'" *United States v. Williams*, 504 U.S. 36, 41 (1992). Because "this rule operates (as it is phrased) in the disjunctive, ... review of an issue not pressed" is permitted "so long as it has been passed upon" in the court of appeals. *Id.* The Second Circuit passed on this question. App. 27a-28a.

520 U.S. at 691. "Whether those concerns would present a more compelling case for immunity is a question that [was] not before [the Court]." *Id.*

II. The Second Circuit's decision is incorrect.

As explained, the decision to grant certiorari in a case like this turns on the Court's "appraisal of its importance" instead of a "judgment concerning the merits of the case." *Id.* at 689. But even if the ultimate merit of the President's claims matters, certiorari is warranted just the same. The subpoena is unconstitutional.

A. The President is entitled to immunity.

The District Attorney's argument against immunity hinges on his assertion that this case involves the "narrow question" of whether a state grand jury may subpoena the personal records of a sitting President if they are "relevant" to that investigation "and have no relation to official actions taken by the President during his time in office." BIO 1. That framing does not accurately reflect the circumstances that led the President to invoke immunity. This is about whether a state may target a sitting President for possible indictment and subpoena his personal records as part of that criminal investigation.

The District Attorney counters that the President has not been "*named* as a target." BIO 26 (emphasis added). But that is semantics. The petition characterizes the subpoena as having been issued "for the express purpose of deciding whether to indict him for state crimes" and "as part of a grand-jury proceeding that seeks to determine whether the President committed a state-law crime." Pet.

2, 4. In his brief, the District Attorney does not challenge these factual representations. He instead confirms that the basis for the investigation is the President's alleged conduct, BIO 2-5, that the President is "a subject of the investigation," BIO 12, that "the investigation extends *beyond* [the President]," and that "'it is *unclear* whether the President will be indicted,'" BIO 26 (emphasis added). The President's characterization of the subpoena's purpose and scope is the factual predicate that will control if review is granted. *See* S. Ct. R. 15.2.

Furthermore, it appears that the District Attorney is contemplating indicting the President *while in office*. After all, the District Attorney says that without expedited review the "criminal conduct may go unpunished, giving Petitioner a *de facto* victory," BIO 34, even though the President has offered to toll the limitations period, CA2 Doc. 80 at 58. The District Attorney continues that the President "could interpose any objections to, or assert any rights against, a potential indictment" should the grand jury proceed with "criminal charges." BIO 24 n.10. That would only matter, of course, if the grand jury pursues indictment of the President while he is still in office. In all, there can be no doubt that this investigation is about indicting the President, and the grand jury subpoena for his records is part of that pursuit. It is against this backdrop—and not the artificially narrow question the District Attorney has framed—that the Court must decide if these are "appropriate circumstances," *Jones*, 520 U.S. at 703, to temporarily shield the President from coercive criminal process.

In focusing myopically on whether the President was granted immunity in *other* settings, BIO 12-20, the District Attorney also skips a key step: analysis of the factors that the Court weighs in deciding whether a given legal process "risks intrusion upon the functions of the Presidency," SG Br. 10. This categorical inquiry begins by asking whether the President might be physically kept from "carry[ing] out his duties," *A Sitting President's Amenability to Indictment and Criminal Prosecution*, 24 O.L.C. Op. 222, 246 (Oct. 16, 2000) (Moss Memo), and ends there if it would, 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1563 (1833). If not, absolute immunity while in office is nevertheless required when "the public stigma and opprobrium ... could compromise the President's ability to fulfill his constitutionally contemplated leadership role with respect to foreign and domestic affairs," or when "the mental and physical burdens ... might severely hamper the President's performance of his official duties." Moss Memo 246; *see* Pet. 19-22.

Though—like indictment—compliance with the Mazars subpoena will not deprive the President of liberty, the other factors strongly support immunity. Pet. 19-26. The District Attorney argues that the stigma of this criminal process should be irrelevant and that the concern is "overblown" in any event. BIO 25-26. But the President's unique constitutional status undermines both objections. The President cannot effectively discharge his vast domestic and international duties under the cloud created by a local prosecutor demanding his personal records and threatening criminal prosecution. Pet. 14-15.

Nor can there be any doubt that the mental burdens created by being embroiled in this type of criminal process interfere with the President's ability to focus on his official duties. Pet. 28; SG Br. 10. The District Attorney responds that such burdens are minimal here because the subpoena targets unofficial conduct and was issued to the President's accountants instead of to him directly. BIO 18-20. But it is the criminal nature of the subpoena, when accompanied by threat of indictment, that creates the distraction—not the official or unofficial nature of the allegations. That physical compliance with the grand jury's demand would fall to the custodian does not eliminate the distraction. SG Br. 16-17.[2]

The District Attorney's contention (at 15-20) that *Nixon* forecloses this argument is likewise off target. Pet. 27-30. To be sure, the parties dispute how to define President Nixon's status—as a third-party witness or an unindicted coconspirator. The President has the better of the argument, SG Br. 15, but it doesn't matter. What is not debatable is that the Special Prosecutor in *Nixon* disclaimed any intent to indict the President. Moss Memo 237-38 n.14. The District Attorney's reliance on *Jones* (at 19-20) is also misplaced. Pet. 30-31. As noted, the burden of being mired in a compulsory criminal process under

2. The broader effort to avoid the constitutional implications of this case by portraying the subpoena as "directed at a third party whose compliance will in no way implicate the balance of federal and state power" is baseless. BIO 27-28. The President's unchallenged standing to contest the validity of this subpoena, App. 20a n.15, means that the immunity issue must be decided as if the Mazars subpoena were issued to him directly. Pet. 32; *Trump v. Mazars USA, LLP*, 940 F.3d 710, 752-53 (D.C. Cir. 2019) (Rao, J., dissenting).

threat of indictment differs in kind from the mental strain of being a defendant in civil litigation. Moss Memo 250-54. This process could not be less like "a garden-variety investigation of purely private conduct." BIO 33.

More fundamentally, the District Attorney's position has two inherent defects he cannot overcome. First, he asks the Court to give decisive weight to the unofficial nature of the allegations. But that would mean that the President can be *indicted* for such conduct—an issue the District Attorney badly wants to avoid. His refrain that indictment is "wholly distinct from whether the President can be the subject of an investigatory subpoena," BIO 16-17, is nonresponsive if the official/unofficial distinction is a sufficient basis for deciding this case. Pet. 31.

Second, the District Attorney has no answer to the special problems created by giving the power to ensnare the Chief Executive in compulsory criminal process to every state and local prosecutor in the country. Pet. 23-25. His assertion that this concern "does not materially alter the immunity analysis," BIO 26, is unpersuasive, SG Br. 8-14. Respect for state police power is a foundational principle. But so is a vigorous Chief Executive who can execute his official duties without obstruction from "thousands of district attorneys across the Nation" armed with criminal subpoenas "for his financial records, ... his medical records, … his legal records, and so on...." SG Br. 17. Whatever the scope of presidential immunity from process issued by federal prosecutors under the supervision of federal courts, giving this authority to their state and local counterparts violates Article II and the Supremacy Clause.

Last, the District Attorney (like the Second Circuit) mischaracterizes the relief the President seeks. His aim is neither to "shield ... third parties from investigation" nor stop the "grand jury [from] continuing to gather evidence throughout the period of any presidential immunity from indictment." BIO 9-10 (citations and quotations omitted). The complaint asks for this subpoena to be enjoined. D.Ct. Dkt. 27 at 19. The grand jury, accordingly, can continue its work. But issuing compulsory criminal process to the sitting President, when it is accompanied by threat of indictment, crosses a constitutional line. Honoring immunity may well make the grand jury's job harder. But that is the cost of having a President who is the "'sole indispensable man in government.'" *Jones*, 520 U.S. at 713 (Breyer, J. concurring in the judgment) (citations omitted); Moss Memo 256-57.

B. The subpoena does not, at a minimum, meet the heightened showing of need that *Nixon* requires.

The subpoena cannot be upheld even if the President is not absolutely immune. Pet. 34-36. "[A] local grand jury's subpoena seeking the President's personal records clearly involves sufficiently serious risks of interference with the President's performance of his constitutional duties to justify application of the heightened standard under *Nixon*." SG Br. 18. According to the District Attorney, however, that heightened standard does not apply because *Nixon* (unlike this case) involved an executive-privilege claim. BIO 31-32. That is incorrect. SG Br. 12-19.

"The heightened standard is at most," the District Attorney adds, "a particular application of the standards

applicable to *all* federal subpoenas issued under Federal Rule of Criminal Procedure 17(c)." BIO 31 n.14. But the inapplicability of Rule 17(c) would only make heightened protection under Article II that much more important. "In *Nixon*, the Court addressed the issue of executive privilege only after having satisfied itself that the special prosecutor had surmounted [Rule 17(c)'s] demanding requirements," *i.e.*, the "exacting standards of '(1) relevancy; (2) admissibility; (3) specificity.'" *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 386-87 (2004). "The very specificity of the subpoena requests" in *Nixon* was "an important safeguard against unnecessary intrusion into the operation of the Office of the President"—even by a federal prosecutor in federal court. *Id.* at 387.

If the Second Circuit's decision is upheld, however, the President is at the mercy of the State for any protection against sweeping prosecutorial demands for his personal records. The President would be entitled to *no* protection as a matter of federal law and, accordingly, state prosecutors could demand "everything under the sky" as far as the Constitution is concerned. *Id.* at 387. That is intolerable. Article II does not require the President "to bear the onus of critiquing the unacceptable discovery requests line by line." *Id.* at 388. The District Attorney must shoulder the heavy burden of establishing "a 'demonstrated, specific need' for the President's personal records." SG Br. 20 (quoting *Nixon*, 418 U.S. at 713).

The District Attorney cannot carry that burden. Pet. 35-36; SG Br. 20. He barely tries. Attempting to defend the indefensible, the District Attorney claims that he copied two congressional subpoenas instead of crafting a narrow

demand because that purportedly "minimizes the burden on third parties and enables expeditious production of responsive documents." BIO 5 n.2. But that is not a lawful justification for issuing a sweeping demand for the President's records that in most—if not all—respects have nothing do with issues within the criminal jurisdiction of New York County. Even accepting the District Attorney's explanation, then, the Mazars subpoena is "anything but appropriate." *Cheney*, 542 U.S. at 388.

But there is every reason to doubt this explanation. It just so happens that the District Attorney sought these sensitive records right when frustration in some quarters was mounting over the inability to obtain them through enforcement of congressional subpoenas. Pet. 6-7. And, in these proceedings, the District Attorney has been unable to suppress the political overtones of the Mazars subpoena—framing his investigation as part of a broader narrative about "impeachment," the President's non-compliance "with [congressional] subpoenas," and the President's decision not to disclose his tax returns. CA2 Doc. 99 at 14, 16; D.Ct. Dkt. 33 at 2 ("The Plaintiff himself, before taking office, agreed to make [his tax returns] public, and every prior president for the past forty years has done so" (footnote omitted)); D.Ct. Dkt. 38 at 43 ("I suppose it's … possible that the State of New York could be annexed by Ukraine …."). There is thus every reason to doubt that the subpoena was issued because the District Attorney had a specific, demonstrated need for these records as part of a good-faith "investigation into potential violations of state law." BIO 4.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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