No. 19-635

IN THE

Supreme Court of the United States

DONALD J. TRUMP,

Petitioner,

v.

CYRUS R. VANCE, JR., IN HIS OFFICIAL CAPACITY AS DISTRICT ATTORNEY OF THE COUNTY OF NEW YORK, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF FORMER DEPARTMENT OF JUSTICE OFFICIALS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici previously served in the Department of Justice (DOJ), including the Office of Legal Counsel (OLC), a component of DOJ responsible for providing legal advice to the President and executive branch agencies. As former DOJ officials, *amici* are familiar with the positions that DOJ has taken over time on questions related to the amenability of the President to criminal process while in office, and they have a strong interest in ensuring that DOJ's views are accurately presented to this Court. While DOJ has taken the position that the President is immune from indictment and criminal prosecution while in office, it has never taken the position that presidential immunity prevents compliance with a pre-indictment third-party grand jury subpoena simply because the grand jury's investigation relates to the President. To the contrary, DOJ memoranda and briefs—including a number of OLC opinions—have repeatedly emphasized the propriety of grand jury investigations related to the President even while he is in office, and they have also suggested that the President himself could have to comply with judicial subpoenas while in office.

A full listing of *amici* is provided in the Appendix.

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[1] The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

On August 29, 2019, the Manhattan District Attorney's Office served a grand jury subpoena on the accounting firm Mazars USA LLP ("Mazars") for a variety of financial records relating to the President and entities owned by the President. The President sued in federal court seeking to enjoin Mazars from complying with the subpoena. According to the President, he enjoys an absolute immunity from all criminal process—an immunity so sweeping that it not only prevents him from being indicted or criminally prosecuted while in office, but also prevents a third party like Mazars from complying with a pre-indictment grand jury subpoena simply because the matters under investigation pertain to the President.

In making this claim, the President relies heavily on a number of Department of Justice (DOJ) memoranda and briefs concerning the President's amenability to criminal process. According to the President, it "has been the consistent position of the Justice Department for nearly 50 years" that the President cannot "be subjected to criminal process" until "he leaves office." Pet'r Br. 16; *see id.* at 20-21, 23, 29-30, 32-34, 37, 39, 42 (citing various Department memoranda).

That contention is demonstrably false. The DOJ memoranda and briefs upon which the President relies do not stand for nearly so broad a proposition. To the contrary, they consistently explain that any claim of presidential immunity must be subject to a balancing test that weighs the importance of the criminal process at issue against any effect on the President's ability to fulfill his constitutional functions. Applying that standard, some of these documents have taken the position that a sitting President is immune from

indictment and criminal prosecution—a question not presented by this case and on which *amici* take no position. *See* Pet. App. 25a (noting that the question "of whether the President may be *indicted* . . . is not presented by this appeal"). The Department has never even suggested, let alone concluded, that presidential immunity bars a third party from complying with a pre-indictment grand jury subpoena simply because the investigation relates to the President. Even in this case, the Solicitor General has not taken such a radical position, arguing that "this Court need not resolve that question to decide this case," DOJ Br. 25, and instead arguing that the fact that this case involves a *state* grand jury subpoena requires the District Attorney to satisfy some "heightened standard of need," *id.* at 26.

Indeed, the Department's position has consistently been much more limited than the President acknowledges. In a 1973 memorandum considering the President's amenability to judicial subpoenas more generally, the Office of Legal Counsel (OLC) endorsed "Chief Justice Marshall's view that the president is not exempt from judicial process, in particular the judicial power to compel anyone to give testimony." Memorandum from Robert G. Dixon, Jr., Assistant Att'y Gen., Office of Legal Counsel, *Re: Presidential Amenability to Judicial Subpoenas* 5 (June 25, 1973) ("Judicial Subpoenas Memo"). Though the memorandum suggested that the President's special role in our constitutional system may merit accommodations—like being permitted to testify by way of deposition or through written interrogatories, for instance—the memorandum pointedly disclaimed any across-the-board immunity from judicial subpoena for the President. Rather, it explains, "the subpoenaing of a President involves a number of complex issues depending on the

circumstances in which and the purposes for which the subpoena is issued." *Id.* at 13.

Moreover, even as the Department has taken the position that the President is immune from indictment and criminal prosecution while in office given his unique role in our constitutional scheme, it has never suggested that that immunity allows the President to prevent a third party from complying with a pre-indictment grand jury subpoena. To the contrary, DOJ has repeatedly indicated that the President can be susceptible to at least some criminal process while in office. For instance, in a different 1973 memorandum concluding that the President is immune from indictment and criminal prosecution, OLC rejected the notion that "the President is absolutely immune from the jurisdiction of the courts in regard to any kind of claim." Memorandum from Robert G. Dixon, Jr., Assistant Att'y Gen., Office of Legal Counsel, *Re: Amenability of the President, Vice President and other Civil Officers to Federal Criminal Prosecution while in Office* 24 (Sept. 24, 1973) ("Criminal Prosecution Memo"). Rather, OLC explained, the "proper approach is to find the proper balance between the normal functions of the courts and the special responsibilities and functions of the Presidency." *Id.*

Indeed, another Department of Justice office—the Watergate Special Prosecutor's office—concluded that even if the President is immune from indictment while in office, his immunity does not preclude naming the President as an "unindicted co-conspirator under the traditional grand jury power to investigate and charge conspiracies that include co-conspirators who are not legally indictable," U.S. Reply Br., *United States v. Nixon*, 418 U.S. 683 (1974), Nos. 73-1766 and 73-1834, 1973 WL 159436, at *16 (Jaworski Brief) (emphasis omitted). In that way, the Department has explicitly

condoned grand jury investigations of the President, even if any indictment resulting from such an investigation must be postponed until after the President has left office.

Finally, a 2000 OLC memorandum reiterating the Department's position that the President is immune from indictment and criminal prosecution equally reaffirmed that the Department's position "did not depend upon a broad contention that the President is immune from all judicial process while in office." *A Sitting President's Amenability to Indictment and Criminal Prosecution*, 24 Op. O.L.C. 222, 239 n.15 (Oct. 16, 2000) ("Moss Memorandum"). In fact, even though OLC concluded that the President was immune from indictment while in office, it nonetheless indicated that "[a] grand jury could continue to gather evidence throughout the period of immunity." *Id.* at 257 n.36. That observation was critical to the Department's reasoning. As the memorandum explained, postponing indictment until after a President has left office will not lead to "a prejudicial loss of evidence in the criminal context" *because* of the continued work of the grand jury while the President is in office. *Id.*

Thus, none of the various memoranda and briefs produced by DOJ concerning the President's immunity from criminal process suggests that presidential immunity "bar[s] the enforcement of a state grand jury subpoena directing a third party to produce non-privileged material, even when the subject matter under investigation pertains to the President." Pet. App. 15a. Rather, if this Court were to follow the DOJ approach, it would ask whether requiring Mazars to comply with the subpoena in this case would prevent the President from fulfilling his constitutional functions.

The answer to that question is plainly no. The President is not required to do anything in response to

this subpoena because it is directed at Mazars, not him. Moreover, Mazars' compliance with the subpoena will not require the same energy and attention as responding to criminal charges or preparing for trial—if it requires any attention of the President at all. Further, the stigma associated with complying with a subpoena is far less than the stigma of criminal indictment, and less even than being named as an unindicted coconspirator—something the Department has made clear is permissible while the President is in office.

In short, while *amici* may have a diversity of views about how exactly questions about presidential immunity should be analyzed and in what contexts immunity will apply, they all agree on this: applying the same standard the Department has consistently applied in analyzing questions of this type, presidential immunity should not preclude Mazars from complying with the subpoena at issue in this case.

ARGUMENT

I. THE DEPARTMENT OF JUSTICE HAS NEVER TAKEN THE POSITION THAT PRESIDENTIAL IMMUNITY PREVENTS A GRAND JURY SUBPOENA OF A THIRD PARTY FOR THE PRESIDENT'S FINANCIAL RECORDS.

Between 1973 and 2000, the Department of Justice was repeatedly asked to address questions related to the President's immunity from criminal process. While several of those documents concluded that the President enjoys immunity from indictment and criminal prosecution while in office, none of them took the much more radical position that the President asserts here: that presidential immunity bars a third party from complying with a pre-indictment grand jury subpoena as part of an investigation related to the

President. To the contrary, a number of those documents specifically explained that the President is amenable to judicial subpoenas more generally, and that the President can be subject to a grand jury investigation while in office. Thus, the President's unprecedented assertion of an absolute immunity from all criminal process finds no support in the DOJ memoranda and briefs upon which the President seeks to rely.

1. June 25, 1973 Memorandum

In 1973, Robert G. Dixon, Jr., Assistant Attorney General for the Office of Legal Counsel, wrote a memorandum addressing the legality of judicial subpoenas directed to the President. The memorandum rejected, as lacking precedent, "the proposition that the constitutional doctrine of the separation of powers precludes *vel non* the issuance of judicial subpoenas to the President." Judicial Subpoenas Memo at 7. Rather, the memorandum endorsed "Chief Justice Marshall's view that the President is not exempt from judicial process, in particular the judicial power to compel anyone to give testimony." *Id.* at 5.

To be sure, as the memorandum discussed, Marshall concluded that there were circumstances in which a President could refuse to comply with a subpoena. For example, "[i]f the President should feel that the document contains matters that should not be disclosed, *i.e.*, if he should claim Executive privilege, that . . . would be a matter to be determined on the return of the subpoena, but not prior to its issuance." *Id.* at 2. Likewise, "the official duties of the President might make it difficult, if not impossible, for him to comply with [a] judicial subpoena," *id.*, but that too would not prevent a subpoena from issuing. As Chief Justice Marshall explained: "The guard furnished to this high officer to protect him from being harassed by

vexatious and unnecessary subpoenas, is to be looked for in the conduct of a court after those subpoenas have been issued; not in any circumstance which is to precede their being issued." *Id.* (quoting *United States v. Burr*, 25 Fed. Cas. 30, 34 (C.C.D. Va. 1807)).

The memorandum went on to describe the misdemeanor trial of Aaron Burr in 1807, in which President Jefferson was subpoenaed. Though Jefferson declined to appear in person, "he instructed the prosecutor to communicate to the court those documents which in the prosecutor's judgment could be communicated without injury." *Id.* at 3. Addressing that subpoena, Chief Justice Marshall explained that it "is not controverted" that "the president of the United States may be subpoenaed, and examined as a witness, and required to produce any paper in his possession." *Id.* at 3 (quoting *United States v. Burr*, 25 Fed. Cas. 187, 191 (C.C.D. Va. 1807)). To be sure, Marshall cautioned that although the president is "subject to the general rules which apply to others," there needed to be a "very strong" justification for subpoenaing him, *id.* at 3 (quoting *Burr*, 25 Fed. Cas. at 191-92), and he "may have sufficient motives for declining to produce a particular paper, and those motives may be such as to restrain the court from enforcing its production," *id.* But nowhere did Marshall suggest that the President enjoyed blanket immunity from judicial subpoenas for documents. And, as the memorandum described, President Jefferson went on to "authorize[] the partial release of the document at issue, deleting certain passages, and attach[ing] a certificate to the effect that his duties and public interest forbade him to make that passage public." *Id.* at 4.

Building on this early example, Dixon's memorandum concluded that "the President is not exempt from judicial process, in particular the judicial power to

compel anyone to give testimony." *Id.* at 5; *see id.* at 6 ("Chief Justice Marshall 'opined that in proper circumstances a subpoena could be issued to the President of the United States.'" (quoting *Branzburg v. Hayes*, 408 U.S. 665, 688 n.26 (1972))). To be sure, Dixon noted that some had argued that the President may not be subject to a "mandatory or injunctive" suit "in connection with matters relating to his faithful execution of the laws." *Id.* at 7 (citing *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1866)). But even accepting that proposition as true (which, notably, Dixon's memorandum did not), the memorandum still concluded that "[i]mmunity from suit in a court . . . does not necessarily carry with it an exemption from the duty to testify in a judicial proceeding." *Id.* at 6-7.

Dixon included two caveats in his memorandum to "protect[] high government officials from harassing subpoenas." *Id.* at 9. First, "the existence of judicial power to subpoena the President does not mean that a court is required to proceed against him without regard to his overriding duties to the public at large." *Id.* at 7. Thus, Dixon explained that high government officials including the President may have immunity from in-person testimony and might be permitted to testify "by way of deposition" or "by written interrogatories," in order to avoid being hamstrung in fulfilling their official duties. *Id.* at 8. Second, subpoenas of high government officials should be "subject . . . to greater scrutiny than those addressed to ordinary citizens," and officials should not be required to testify if they can show they have "no relevant knowledge, or that the information [they have] is privileged." *Id.* at 9. "Instead, a district court should require the subpoenaing party to set forth the evidence he expects to obtain, and should not insist upon a witness' attendance

if it appears that he cannot give any relevant testimony." *Id.*

The core conclusion of this memorandum is clear: the President can be subject to judicial subpoena even while in office. Although the President has some immunity beyond that of an ordinary citizen to prevent the disclosure of material subject to executive privilege, and may otherwise argue that compliance with certain subpoenas would inhibit his ability to perform his official duties, he enjoys no absolute immunity from judicial subpoenas. As the memorandum explained, "[t]he real problem . . . lies not in the existence *vel non* of the basic subpoena power, as in fashioning rules which properly take into consideration the President's special status and the particular circumstances of the case." *Id.* at 13.

2. September 24, 1973 Memorandum

A few months later, Assistant Attorney General Dixon wrote a second memorandum considering the amenability of the President, Vice President, and other civil officers to federal criminal prosecution while in office. Dixon concluded that most civil officers, including the Vice President, were amenable to criminal prosecution while in office. Criminal Prosecution Memo at 17, 40. With regard to the President, however, Dixon explained:

> [U]nder our constitutional plan it cannot be said either that the courts have the same jurisdiction over the President as if he were an ordinary citizen *or that the President is absolutely immune from the jurisdiction of the courts in regard to any kind of claim*. The proper approach is to find the proper balance between the normal functions of the courts and

> the special responsibilities and functions of the Presidency.

Id. at 24 (emphasis added).

In Dixon's view, the President is immune from indictment and criminal prosecution during his term in office owing to the unique role of the President and the impact an indictment would have on his ability to carry out his duties as the nation's chief executive. But the focus of Dixon's memorandum was indictment and criminal prosecution, not other types of criminal process. *See, e.g.*, *id.* at 30 ("The spectacle of an indicted President still trying to serve as Chief Executive boggles the imagination."). Nowhere in the memorandum was there mention of whether a grand jury could carry out a pre-indictment investigation that touched upon the President's conduct *outside* of his official duties, let alone whether a grand jury could subpoena documents from a third party related to that investigation.

Dixon was also clear that when attempting to find the "proper balance between the normal functions of the courts and the special responsibilities and functions of the Presidency," *id.* at 24, the question of whether a sitting President can be indicted was itself a close question. Considering whether "criminal proceedings [would] unduly interfere in a direct or formal sense with the conduct of the Presidency," *id.* at 27, Dixon concluded that "the duties of the Presidency" have "become so onerous that a President may not be able fully to discharge the powers and duties of his office if he had to defend a criminal prosecution," *id.* at 28. Thus, "in view of the unique aspects of the Office of the President, criminal proceedings against a President should not go beyond a point where they could result in so serious a physical interference with the President's performance of his official duties that it would amount to an incapacitation." *Id.* at 29. The

memorandum explained that this "physical interference consideration" would be less "serious regarding minor offenses leading to a short trial and a fine," but "in more serious matters, . . . which could require the protracted personal involvement of the President in trial proceedings, the Presidency would be derailed if the President were tried prior to removal." *Id.*

The memorandum also considered whether "initiation or prosecution of criminal proceedings, as a practical matter, [would] unduly impede the power to govern, and also be inappropriate, prior to impeachment, because of the symbolic significance of the Presidency." *Id.* at 30. Noting that the suggestion that the President "is above the process of any court or the jurisdiction of any court," *id.* (quoting *Johnson*, 71 U.S. (4 Wall.) 475 (oral argument of Attorney General Stanbery)), "may be an overstatement," Dixon nonetheless reasoned that "[t]o wound [the President] by a criminal proceeding is to hamstring the operation of the whole governmental apparatus, both in foreign and domestic affairs," *id.* This was especially so because a criminal trial and appeal could "drag out for months." *Id.* at 31.

3. October 5, 1973 Memorandum

Next, on October 5, 1973, Solicitor General Robert Bork filed a memorandum in the United States District Court for the District of Maryland regarding the indictment of Vice President Spiro Agnew, arguing that the President "would not be subject to the ordinary criminal process" owing to "the crucial nature of his executive powers." Memorandum for the United States Concerning the Vice President's Claim of Constitutional Immunity at 6, *In re Proceedings of the Grand Jury Impaneled December 5, 1972: Application of Spiro T. Agnew, Vice President of the United States*, No. 73-965 (D. Md. Oct. 5, 1973) (Bork Memorandum). According to Bork, this result followed from the unique

"scope of . . . powers" under Article II of the Constitution "that only [the President] can perform unless and until it is determined that he is to be shorn of those duties by the Senate." *Id.* at 17.

Importantly, however, Bork's memorandum made clear that by "immunity from the criminal process," Bork meant that "the President is immune from *indictment and trial* prior to removal from office." *Id.* at 20 (emphasis added). Bork's memorandum did not address the President's (or any other officer's) immunity from grand jury investigations and subpoenas prior to indictment, let alone a grand jury subpoena directed to a third party.

4. July 1974 Brief

A year later, the Watergate Special Prosecutor's office again addressed the amenability of the President to criminal process. That office similarly concluded that the scope of any immunity must be determined based on a functional analysis of whether the criminal process at issue would inhibit the President from performing his constitutionally assigned functions. In response to President Nixon's challenges to the actions of the Watergate grand jury, the Special Prosecutor submitted a brief to this Court explaining that "[i]t is an open and substantial question whether an incumbent President is subject to indictment." Jaworski Br. 24. The brief expressed skepticism regarding the President's argument in that case that "the lodging of an indictment against an incumbent President would 'cripple an entire branch of the national government and hence the whole system,'" *id.* at 32 (internal citation omitted); *see id.* ("our constitutional system has shown itself to be remarkably resilient" and "has endured through periods of great crises, including several when our Presidents have been personally disabled for long periods of time").

But even if the President were immune from indictment, the Special Prosecutor's brief concluded that the President "nevertheless may be named as an *unindicted* co-conspirator under the traditional grand jury power to investigate and charge conspiracies that include co-conspirators who are not legally indictable." *Id.* at 16. While the brief conceded that "indictment would require the President to spend time preparing a defense and, thus, would interfere to some extent with his attention to his public duties, . . . naming the President as an unindicted co-conspirator cannot be regarded as equally burdensome." *Id.* at 20. Though a "grave and solemn step" that "may cause public as well as private anguish," that action is not "constitutionally proscribed." *Id.* at 23.[2]

This brief further underscores the Department of Justice's long-standing position that presidential immunity does not impose an absolute bar to the President being susceptible to criminal process. Indeed, by accepting the propriety of naming the President as an unindicted coconspirator, the brief necessarily contemplated that the President would be subject to grand jury investigations while in office.

5. January 2000 Memorandum

In 2000, Assistant Attorney General for the Office of Legal Counsel Randolph D. Moss issued an opinion

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[2] An internal memorandum authored by members of the Special Prosecutor's office earlier that same year reached a similar result, concluding that it would be acceptable for a grand jury to issue a "presentment setting out in detail the most important evidence and the Grand Jury's conclusions that the President has violated certain criminal statutes and would have been indicted were he not President." Memorandum from Carl B. Feldbaum, et al., to Leon Jaworski 17 (Feb. 12, 1974) ("Watergate Memorandum").

that discussed the prior DOJ opinions and briefs described above as well as intervening Supreme Court decisions. The Moss Memorandum "concluded that the indictment or criminal prosecution of a sitting President would impermissibly undermine the capacity of the executive branch to perform its constitutionally assigned functions." Moss Memorandum at 222.

In reaching that conclusion, the Moss Memorandum first reviewed the earlier DOJ memoranda and briefs described above. In stark contrast to the President's brief before this Court, the Moss Memorandum accurately characterized those earlier DOJ statements as not having endorsed any sweeping immunity of the President from all forms of criminal process.

The Moss Memorandum began by reviewing Dixon's Criminal Prosecution Memo and Bork's brief, concluding that both "recognized that the President is not above the law . . . [but] that the President occupies a unique position within our constitutional order." *Id.* at 236. The Criminal Prosecution Memo, according to Moss, explained that "the accusation or adjudication of the criminal culpability of the nation's chief executive by *either a grand jury returning an indictment or a petit jury returning a verdict* would have a dramatically destabilizing effect upon the ability of a coordinate branch of government to function." *Id.* (emphasis added). The Moss Memorandum noted that "the Department's 1973 analysis did not depend upon a broad contention that the President is immune from all judicial process while in office" and indeed that the 1973 analysis "specifically cast doubt upon such a contention." *Id.* at 239 n.15.

The Moss Memorandum went on to discuss three Supreme Court cases decided after 1973 that might have affected the Department's conclusions regarding the President's amenability to criminal process.

Highlighting its focus on indictment and prosecution, the Moss Memorandum reasoned that even though none of these cases "directly addresse[d] the questions whether a sitting President may be *indicted, prosecuted, or imprisoned*," the memorandum suggested they were "relevant" to those questions. *Id.* at 237 (emphasis added). The memorandum concluded that these precedents were consistent with the Department's view that "(1) the proper doctrinal analysis requires a balancing between the responsibilities of the President as the sole head of the executive branch against the important governmental purposes supporting the *indictment and criminal prosecution* of a sitting President; and (2) the proper balance supports recognition of a temporary immunity from *such* criminal process while the President remains in office." *Id.* at 238 (emphasis added).

Consistent with its characterization of DOJ's embrace of a balancing approach, the Moss Memorandum described this Court's decision in *United States v. Nixon* as both underscoring "the importance of . . . confidentiality of Presidential communications in performance of the President's responsibilities," *id.* at 239 (quoting *Nixon*, 418 U.S. at 711), and still recognizing that that interest must be weighed against the judicial "need to develop all relevant facts in the adversary system," *id.* at 240 (quoting *Nixon*, 418 U.S. at 709). Ultimately, the *Nixon* Court "concluded that the President's generalized interest in confidentiality did not suffice to justify a privilege from all criminal subpoenas." *Id.*

The Moss Memorandum also addressed *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), and *Clinton v. Jones*, 520 U.S. 681 (1997), a pair of cases concerning the President's immunity from civil suits concerning his official and unofficial acts, respectively. Regarding

suits against the President for *official* acts, the Moss Memorandum explained, "[t]he [*Fitzgerald*] Court endorsed a rule of absolute immunity, concluding that such immunity is 'a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history.'" Moss Memorandum at 240 (quoting *Fitzgerald*, 457 U.S. at 749). By contrast, in *Clinton v. Jones*, the Court "declined to extend the immunity recognized in *Fitzgerald* to civil suits challenging the legality of a President's unofficial conduct," and the Court permitted civil proceedings to go forward against President Clinton. *Id.* at 242. Though this Court acknowledged that "the doctrine of separation of powers places limits on the authority of the Federal Judiciary to interfere with the Executive Branch," *id.* (quoting *Jones*, 520 U.S. at 697-98), it did not believe that doctrine should preclude the civil action at issue because "if properly managed by the District Court," the case was "highly unlikely to occupy any substantial amount of [the President's] time," *id.* at 243 (quoting *Jones*, 520 U.S. at 702). Indeed, "the testimony of the President, both for discovery and for use at trial, may be taken at the White House at a time that will accommodate his busy schedule, and that, if a trial is held, there would be no necessity for the President to attend in person." *Id.* (quoting *Jones*, 520 U.S. at 691-92). And, the Moss Memorandum noted, the Court reasoned that "courts frequently adjudicate civil suits challenging the legality of official presidential action," and "courts occasionally have ordered Presidents to provide testimony and documents or other materials." *Id.*

Synthesizing these precedents, the Moss Memorandum drew the lesson that the same "balancing analysis relied on in the 1973 OLC memorandum has

since been adopted as the appropriate mode of analysis . . . for resolving separation of powers issues found in the Court's recent cases." *Id.* at 244. Applying that balancing analysis, the Moss Memorandum concluded specifically that "*indicting and prosecuting* a sitting President would 'prevent the executive from accomplishing its constitutional functions' and that this impact cannot 'be justified by an overriding need' to promote countervailing and legitimate government objectives." *Id.* at 245 (emphasis added).

The Moss Memorandum explained that the President should be immune from indictment and prosecution for two reasons. First, "the severity of the burden imposed upon the President by the stigma arising both from the initiation of a criminal prosecution and also from the need to respond to such charges through the judicial process would seriously interfere with his ability to carry out his constitutionally assigned functions." *Id.* at 249. Distinguishing the civil proceeding at issue in *Jones*, the memorandum explained that "[t]he peculiar public opprobrium and stigma that attach to criminal proceedings" and their "likely effect on presidential respect and stature both here and abroad, cannot fairly be analogized to that caused by initiation of a private civil action." *Id.* at 250.

Second, "the unique mental and physical burdens that would be placed on a President *facing criminal charges and attempting to fend off conviction and punishment*" are "different in kind and far greater in degree than those of responding to civil litigation." *Id.* at 251-52 (emphasis added). As the memorandum explained, criminal defendants typically attend their own trial, have a right to confront witnesses, have a right to counsel (with whom they must communicate and plan a defense), and overall require a defendant's "personal attention and attendance at specific times

and places, because the burdens of criminal defense are much less amenable to mitigation by skillful trial management" than civil litigation. *Id.* at 251-53. In short, according to the Moss Memorandum,

> unlike private civil actions for damages—or the two other judicial processes with which such actions were compared in *Clinton v. Jones* (subpoenas for documents or testimony and judicial review and occasional invalidation of the President's official acts*, see* 520 U.S. at 703-05)—criminal litigation uniquely requires the President's *personal* time and energy, and will inevitably entail a considerable if not overwhelming degree of mental preoccupation.

Id. at 254. The memorandum then balanced "the burdens imposed by *indictment and criminal prosecution* on the President's ability to perform his constitutionally assigned functions" against the "legitimate governmental objective[]" of "the expeditious initiation of criminal proceedings." *Id.* at 255 (emphasis added).

Notably, the Moss Memorandum expressly contemplated the permissibility of a grand jury collecting evidence while a President was in office in order to enable prosecution of the President once he was no longer in office. Regarding any statutes of limitations that might hinder such a course, the memorandum suggested that courts could toll the running of such statutes while the President remained in office, or that "Congress could overcome any such obstacle by imposing its own tolling rule." *Id.* at 256. Regarding the possibility that a delay in prosecution might make any ultimate prosecution less successful, the memorandum concluded that "when balanced against the overwhelming cost and substantial interference with the functioning of an entire branch of government, these potential costs of delay, while significant, are not

controlling." *Id.* at 257. Most importantly, the memorandum stated forthrightly that "*[a] grand jury could continue to gather evidence throughout the period of immunity*, even passing this task down to subsequently empaneled grand juries if necessary." *Id.* at 257 n.36 (emphasis added). Indeed, the fact that a grand jury could continue to investigate the President while he served in office was a critical reason why there was "less reason to fear a prejudicial loss of evidence in the criminal context" even if indictment were delayed until after the President left office. *Id.*

In short, the Moss Memorandum, like the DOJ documents before it, does not cast doubt on the President's amenability to a grand jury subpoena, let alone the propriety of a subpoena pertaining to the President that is issued to a third party. The memorandum was squarely focused on "indictment and criminal prosecution," not on grand jury investigations. *See, e.g.*, *id.* at 222 ("A Sitting President's Amenability to Indictment and Criminal Prosecution"); *see also id.* at 222-60 (referring to "indictment and criminal prosecution" 15 times). Indeed, the Moss Memorandum on multiple occasions cites sources explaining that the President is susceptible to some judicial subpoenas. *See, e.g.*, *id.* at 239 n.15 (citing D.C. Circuit case which rejected the assertion that the President is absolutely immune from judicial subpoenas); *id.* at 240 (citing *United States v. Nixon* for the proposition that "the President's generalized interest in confidentiality did not suffice to justify a privilege from all criminal subpoenas"); *id.* at 253 n.29 (citing an earlier non-public OLC memorandum for the conclusion that "a judicial subpoena in a criminal case may be issued to the President, and any challenge to the subpoena must be based on the nature of the information sought rather than any immunity from process belonging to the

President" (quoting Memorandum from Douglas W. Kmiec, Assistant Attorney General, Office of Legal Counsel, to Arthur B. Culvahouse, Jr., Counsel to the President, *Re: Constitutional Concerns Implicated by Demand for Presidential Evidence in a Criminal Prosecution* 2 (Oct. 17, 1988)); *id.* at 254 (noting that *Clinton v. Jones* contemplated subpoenas for documents or testimony from the President). More importantly, the memorandum specifically contemplates that "[a] grand jury could continue to gather evidence throughout the period of immunity" from indictment. *Id.* at 257 n.36. Thus, far from casting doubt on the permissibility of grand jury subpoenas related to Presidential conduct, the Moss Memorandum repeatedly suggests that such subpoenas are not precluded by any presidential immunity.[3]

[3] The Solicitor General cites the Moss Memorandum for a broader proposition: that "[c]riminal investigations would consume the President's time and distract him from his duties to the American people, to the detriment of the Nation he serves." DOJ Br. 17. But the Solicitor General fails to acknowledge that the Moss Memorandum explicitly contemplated grand jury investigations of a sitting President. *See* Moss Memorandum at 257 n.36. Moreover, the passage of the Moss Memorandum that the Solicitor General quotes says only that "an individual's mental and physical involvement and assistance in the preparation of his defense . . . would be intense" in the context of "criminal *prosecutions*," *id.* at 251 (emphasis added), and does not speak to grand jury subpoenas (especially grand jury subpoenas to third parties).

II. APPLYING THE BALANCING TEST DESCRIBED IN THE DEPARTMENT'S MEMORANDA AND BRIEFS FOR CASES INVOLVING THE AMENABILITY OF PRESIDENTS TO JUDICIAL PROCESS TO THIS CONTEXT WOULD NOT PRECLUDE MAZARS FROM COMPLYING WITH THIS THIRD-PARTY SUBPOENA.

As described in the previous section, when faced with questions regarding whether presidential immunity can prevent judicial process in cases involving the President, the Department has applied a balancing test that takes into consideration both the importance of the judicial process and the effect any particular action might have on the President's ability to fulfill his constitutional function. *See* DOJ Br. 10 ("the President enjoys a constitutional immunity from actions of federal courts that would threaten to undermine his independence or interfere with his functions"). That test has led the Department to conclude that a President is immune from indictment or criminal prosecution while in office. Even if a similar test were to apply to the pre-indictment third-party grand jury subpoena at issue here, it is clear that presidential immunity should not prevent Mazars from complying.

First, the Department's position regarding the President's immunity from indictment and prosecution was premised in part on "the unique mental and physical burdens that would be placed on a President facing criminal charges and attempting to fend off conviction and punishment." Moss Memorandum at 253. As the Bork Memorandum described, indictment and prosecution of a sitting President are incompatible with the President's constitutional role because they would "temporar[ily] disab[le]" the President from fulfilling his constitutional duties. Bork Memorandum at

18; *see* Criminal Prosecution Memo at 29 ("criminal proceedings against a President should not go beyond a point where they could result in so serious a physical interference with the President's performance of his official duties that it would amount to an incapacitation"); Moss Memorandum at 254 ("criminal litigation uniquely requires the President's *personal* time and energy, and will inevitably entail a considerable if not overwhelming degree of mental preoccupation"). Even "indictment alone," according to the Moss Memorandum, "will spur the President to devote some energy and attention to mounting his eventual legal defense." *Id.* at 259.

None of these concerns is implicated by requiring Mazars to comply with the grand jury subpoena at issue here. Generally speaking, complying with a subpoena will not consume the President's *personal* time and energy in the way that responding to criminal charges and mounting a legal defense would. That is likely why the Department has repeatedly emphasized that the President is not immune from all judicial subpoenas, and can even be required to personally testify with the proper accommodations. *See, e.g.*, Judicial Subpoenas Memo at 3 ("That the president of the United States may be subpoenaed, and examined as a witness, and required to produce any paper in his possession, is not controverted." (quoting *Burr*, 25 Fed. Cas. at 191)); *see also Jones*, 520 U.S. at 708 (permitting a civil *trial* to go forward against the President concerning his unofficial conduct despite the fact that a trial "may consume some of the President's time and attention"). Moreover, in this case, there should not be *any* effect on the President's personal energy and attention, given that it is a third-party accounting firm, not the President, who must comply with the subpoena and the President has not suggested that the

requested documents are covered by any privilege. As the court below reasoned, "no court has ordered the President to do or produce anything" and so "any burden or distraction the third-party subpoena causes" would hardly "rise to the level of interfering with [the President's] duty to 'faithfully execute[]' the laws." Pet. App. 21a (quoting U.S. Const. art. II, § 3).

Second, the Department's position on the President's immunity from indictment and prosecution was also influenced by the perceived "stigma arising . . . from the initiation of a criminal prosecution." Moss Memorandum at 249. But significantly the Department has concluded that the President is immune from indictment and prosecution because of "[t]he *peculiar public opprobrium and stigma* that attach" to indictment and prosecution. *Id.* at 250 (emphasis added). The Department has never suggested that the President is immune from criminal process simply because it might produce some amount of stigma. Indeed, the Department has taken the position that the President *can* be named as an unindicted coconspirator, *see* Jaworski Br. 16, notwithstanding the stigma and opprobrium that surely follow from that circumstance.

Here, there is no reason to think that the stigma that might follow from Mazars complying with this subpoena is sufficiently great that it would warrant barring Mazars from compliance. The President suggests that this subpoena carries a stigma because, in his view, it reveals that he is the "target[]" of the grand jury investigation, and the investigation may result in "indictment and prosecution during his term in office." Pet'r Br. i. But as the court below explained, "[t]he President has not been charged with a crime," and "[t]he grand jury investigation may not result in an indictment against any person, and even if it does, it is unclear whether the President will be indicted." Pet.

App. 22a. Indeed, the District Attorney has represented that the grand jury is also investigating other persons and entities besides the President. *Id.*

Moreover, even if the President were the sole subject of the grand jury investigation, the Department has specifically contemplated that a President can be the target of a grand jury investigation while in office. As described above, the Moss Memorandum explained that "*[a] grand jury could continue to gather evidence throughout the period of immunity*, even passing this task down to subsequently empaneled grand juries if necessary." Moss Memorandum at 257 n.36 (emphasis added). Meanwhile, this Court has explained that "the grand jury's authority to subpoena witnesses is not only historic, but essential to its task." *Branzburg*, 408 U.S. at 688 (internal citations omitted). As the court below reasoned, "it strains credulity to suggest that a grand jury is permitted only to request the voluntary cooperation of witnesses but not to compel their attendance or the production of documents." Pet. App. 26a.

To be sure, the Solicitor General cautions that "[a] subpoena for personal records *can* be deployed to harass a President in response to his official policies, or have the effect of subjecting a President to unwarranted burdens, diverting his time, energy, and attention from his public duties." DOJ Br. 23 (emphasis added). But the Solicitor General does not seriously contend—nor could he—that *this* subpoena is intended to harass the President, or that the President's time and energy will be diverted in a non-trivial way from his public duties while a third party complies with it.

Instead, the Solicitor General argues that state criminal subpoenas should be subject to a heightened standard of justification that requires the District Attorney to show a "demonstrated, specific need," a

theory that is not based on any of the Department's prior memoranda or briefs, let alone this Court's precedents. Indeed, the "demonstrated, specific need" language for which the Solicitor General advocates comes from this Court's decision in *United States v. Nixon*, 418 U.S. at 713, but as the Solicitor General acknowledges, that case applied this heightened standard in the context of a subpoena for the "President's *privileged official records* [that] would compromise the confidentiality of the President's communications with his advisors," DOJ Br. 28 (emphasis added), *not* in the context of a subpoena for the President's *private* records, let alone a subpoena of those records from a third-party accounting firm.

Even if such a standard did apply, the reasons that the Solicitor General gives for why the District Attorney has not met the standard here—like failing to show why "the immediate production of the President's records is critical to the grand jury's investigation" and "why he needs the President's personal records now, rather than at the end of the President's term," *id.* at 32—ignore the Department's prior position that the President is susceptible to judicial subpoenas and that a grand jury can continue to gather evidence during a President's term, Moss Memorandum at 257 n.36.

In short, the same considerations that led the Department to conclude that the President is immune from indictment and criminal prosecution while in office make clear why presidential immunity poses no bar to Mazars complying with the pre-indictment grand jury subpoena at issue here.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed.

Respectfully submitted,

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