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; MAZARS USA, LLP,
Respondents.

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

BRIEF FOR *AMICI CURIAE* WASHINGTON STATE TAX PRACTITIONERS IN SUPPORT OF RESPONDENT VANCE

Dirk Giseburt*
Davis Wright Tremaine LLP
920 Fifth Avenue, Ste. 3300
Seattle, WA 98104
(206) 757-8049
dirkgiseburt@dwt.com

Counsel for *Amici Curiae*
*Counsel of Record

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QUESTION PRESENTED

Whether a state grand jury subpoena directing a third party to produce material that pertains only to unofficial and non-privileged conduct by a President and various private parties must be quashed under Article II or the Supremacy Clause of the Constitution.

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BRIEF OF *AMICI CURIAE*
WASHINGTON STATE TAX PRACTITIONERS
IN SUPPORT OF RESPONDENT VANCE

INTEREST OF THE *AMICI CURIAE*

Amici curiae ("Practitioners")[1] are lawyers practicing state and local tax law in Washington State. Practitioners regularly represent taxpayers of all kinds in investigations and audits of their tax returns by state and local tax agencies. Practitioners also regularly apply this Court's Due Process Clause and Commerce Clause precedents in defending against the jurisdictional claims of tax agencies.

Practitioners coalesced as an initiative to help inform this Court of the broader factual and legal contexts in which disputes involving taxation arise and to correct the occasionally incomplete, inaccurate, or exaggerated characterization of those contexts by parties in the Court's cases. Practitioners have filed amicus briefs with the Court previously in *North Carolina Dep't of Revenue v. Kimberley Rice Kaestner 1992 Family Trust*, 139 S. Ct. 2213 (2019), and *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018). In the prior cases, Practitioners supported the taxpayers' positions. In this case, Practitioners support the

[1] No counsel for a party authored this brief in whole or in part, nor made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or its counsel made a monetary contribution to its preparation or submission. Petitioner and Respondents have filed Blanket Consents to the filing of *amicus curiae* briefs with the Clerk of the Court.

position of the agency investigating potential taxpayer abuses.

Practitioners join this brief solely as individuals and not as representatives of the law firms or associations with which they are affiliated. Each Practitioner is currently in private practice. Among them are Practitioners who have served in the past as President of the Washington State Bar Association; who have served in the past as chair of the Association's State and Local Taxes Committee; or who have taught state and local taxation at the University of Washington School of Law. Their experience is not limited to representing taxpayers; two have worked in the past for the Washington State Department of Revenue as a former Assistant Director for Interpretation and Appeals and as a Special Assistant to the Director. A full list of *amici* appears in Appendix A.

The Petitioner frames the Question Presented as whether the President's "personal records" should be immunized from state criminal investigation, arguing that failure to do so would open "the floodgates" for investigation of this and other Presidents by all the state and local prosecutors in the country. Petitioner's Br. at 28. Practitioners hope that, informed by experience in representing taxpayers in audits and investigations by not only the taxpayers' home jurisdictions but also remote States and municipalities, their views may assist the Court in this case.

SUMMARY OF ARGUMENT

1. The Petitioner characterizes the subject matter of the subpoena as his "personal records," his "personal financial information," his "private records," and his "sensitive private records." While these characterizations may be accurate for purposes of contrasting with "official records," *see, e.g., Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 454 (1977), or "Presidential records," *see* 44 U.S.C. § 2201, the terms do not capture the fact that the tax returns and supporting documentation covered by the subpoena are inherently imbued with a public character as well. Financial records of this type are the bread and butter of tax audits. "There can be little expectation of privacy where records are handed to an accountant, knowing that mandatory disclosure of much of the information therein is required in an income tax return." *Couch v. United States*, 409 U.S. 322, 335 (1973).

Moreover, tax returns and supporting documentation have a latent intersection with the criminal law. In Practitioners' experience, taxpayers are well aware that their choices in managing their books and records carry potential civil and criminal penalties. The nomenclature of "private records" should not distract the Court from the fact that a criminal taxpayer investigation is a normal and foreseeable, if uncommon, dimension of business and economic activity.

2. The Petitioner's fear that, if the decision below is not reversed, he will be the subject of potentially thousands of local grand jury investigations is exaggerated. He does not take into

account this Court's record of policing the limits of state tax jurisdiction. For example, to support state power to tax a nonresident person or business without placing an undue burden on interstate commerce under the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, this Court requires that "the tax [be] applied to an activity with a substantial nexus with the taxing state." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). Presumably the power to impose tax penalties on a nonresident is similarly limited.

In its most recent decision elaborating on this limitation, the Court held that such a nexus "'is established when the taxpayer . . . "avails itself of the substantial privilege of carrying on business" in that jurisdiction.'" *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2099 (2018) (quoting *Polar Tankers, Inc. v. City of Valdez*, 557 U.S. 1, 11 (2009)). The President is not subject to tax (or related tax penalties) on business activities except in those locations where he is "carrying on business." This rule means the impetus for a criminal investigation based on tax compliance, similar to the grand jury proceeding in the present case, is actually limited to a much smaller universe of jurisdictions than claimed.

The Court in *Wayfair* also noted that the Commerce Clause nexus requirement is closely related "to the due process requirement that there be 'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.'" *Id.* at 2093 (quoting *Miller Brothers Co. v. Maryland*, 347 U.S. 340, 344-45 (1954)). Local criminal investigations relating to the President as a taxpayer would need to rest at least on

a "minimum connection" between his related private, unofficial activities and the State.

Given these jurisdictional rules, it appears the asserted rationale for an absolute temporary immunity from criminal investigation is overblown.

ARGUMENT

I. The Petitioner's Tax Returns and Supporting Records Have an Inherent "Public" Character as Well as Their "Private" or "Personal" Nature.

A. The subject matter of the subpoena is always potentially reviewable by the government under routine circumstances.

The Petitioner characterizes the subject matter of the subpoena as his "personal records," Petitioner's Br. at i, 8, 32, 34; his "personal financial information," *id.* at 15, 19; his "private records," *id.* at 17; his "personal documents," *id.* at 30, 47; and his "sensitive financial records." Petition at 5. The Respondent similarly states the subpoena seeks the Petitioner's "purely private" documents as opposed to "privileged or confidential official documents." Respondent's Br. at 39.[2]

As accurate as the labels "personal" and "private" may be, the Court should not take this nomenclature at face value. The documents in question have a latent "public" character arising from

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[2] The Second Circuit's opinion leads with the neutral term "financial records," *see* Appendix to the Petition ("Pet. App.") at 2a, 5a, but also uses the terms "private tax returns and financial information" and "*private* and *non-privileged* documents," Pet. App. 18a, 19a, apparently as distinguished from official documents. *See also* Pet. App. 28a ("personal records"), 28a ("personal financial records").

the relationship between a taxpayer and taxing authorities.

The subpoena covers tax returns and related schedules; financial statements "prepared, compiled, reviewed, or audited" by Respondent Mazars USA, LLP; agreements related to the "preparation, compilation, review, or auditing" of tax returns or financial statements; "underlying, supporting, or source documents" relating to the foregoing; and "work papers, memoranda, notes, and communications" relating to the foregoing. Pet. App. 5a-6a n.5 (quoting the subpoena issued August 29, 2019, by Respondent Vance to Respondent Mazars USA, LLP).

In Practitioners' experience, the scope of this subpoena is not surprising. For example, in a notice of a Washington State "limited scope audit" of business excise tax returns that one of our clients received in January 2020, the categories of documents requested covered the same ground as the first four categories in the Mazars subpoena, leaving out the final category of "work papers," etc. In addition to the taxpayer's excise tax returns,[3] the audit requested:

- Supporting documents used to file excise tax returns;

[3] Washington State does not impose a personal or corporate income tax, but rather a broad-based gross receipts tax called the business and occupation tax. *See, e.g., Tyler Pipe Inds., Inc. v. Washington Dep't of Revenue*, 483 U.S. 232, 234-39 (1987). An excise tax audit in Washington is the equivalent of a combined income tax and sales/use tax audit in other States.

- Federal income tax returns;
- Trial balance and financial statements;
- Sales detail report;
- Expense detail report; and
- Supporting documents for all deductions and exemptions claimed.

Sometimes a client will ask, "Do I have to give them all of this?" The answer typically is, "Yes, you do." Occasionally there may be a reason to resist production of a specific set of document requests, such as lack of relevance to the particular business in question. In Practitioners' experience, however, most business clients understand that the scope of investigation is routine.

The scope of the government's interest in a taxpayer's financial records follows from the need to ascertain the reasonableness and accuracy of the taxpayer's reporting. It is typically authorized by express statute, such as Washington Revised Code § 82.32.070(1) (referring to the State Department of Revenue):

> Every taxpayer liable for any tax collected by the department must keep and preserve, for a period of five years, suitable records as may be necessary to determine the amount of any tax for which the taxpayer may be liable. Such records must include copies of all of the taxpayer's federal income tax and state

> tax returns and reports. All of the taxpayer's books, records, and invoices must be open for examination at any time by the department of revenue.

The New York statute authorizing audits for personal income tax is similar:

> Examination of books and witnesses.--(1) The tax commission for the purpose of ascertaining the correctness of any return, or for the purpose of making an estimate of taxable income of any person, shall have power to examine or to cause to have examined, by any agent or representative designated by it for that purpose, any books, papers, records or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the return or any officer or employee of such person, or the attendance of any other person having knowledge in the premises, and may take testimony and require proof material for its information, with power to administer oaths to such person or persons.

N.Y. Tax Law § 697(b).

The tax returns and supporting documentation covered by the Mazars subpoena are therefore inherently imbued with a public character. Financial records of this type are the bread and butter of tax audits. As the Respondent notes, "tax returns are

routinely submitted to federal and state agencies." Respondent's Br. at 49. These documents are of a type liable to be shared with the government from the moment of their creation.

While the Petitioner's tax and financial records might appropriately be called "personal" or "private" for purposes of contrasting with the terms "official records," *see, e.g., Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 454 (1977), or "Presidential records," *see* 44 U.S.C. § 2201, the documents are also "public." "There can be little expectation of privacy where records are handed to an accountant, knowing that mandatory disclosure of much of the information therein is required in an income tax return." *Couch v. United States*, 409 U.S. 322, 335 (1973).

Practitioners encourage the Court not to let its review of the constitutional issues be colored by the Petitioner's exaggerated language about the District Attorney's seeking "an enormous swath" or "a trove of the President's personal records." Petitioner's Br. at 15, 19. The scope of the subpoena is rather routine.

B. Tax and financial records inherently implicate the criminal law and are not "private" in any exclusive sense.

In Practitioners' experience, taxpayers are well aware that how they manage their books and records can carry potential civil and criminal penalties. In Washington, as one example, the form of return for the tax on the transfer of real property requires on its face that the parties certify the accuracy of the return on penalty of perjury. Wash. Dep't of Revenue, Real Estate Excise Tax Affidavit, Form 84 0001a (Dec. 6,

2019), https://dor.wa.gov/sites/default/files/legacy/Docs/forms/RealEstExcsTx/840001A_SingLoc.pdf. New York warns residents in a publication entitled "Frivolous Positions Under The Personal Income Tax" that failure to comply with the tax laws can result in criminal penalties. N.Y. St. Dep't of Taxation & Finance, Pub. 101 at 5 (Feb. 2010), https://www.tax.ny.gov/pdf/publications/income/pub101.pdf.

The vast majority of Practitioners' clients are very shy about taking positions that pose even minimal (but more than zero) risk of charges of "evasion" or "fraud." There is, however, the very occasional client who, upon learning that the facts lead to an unwanted tax liability, might say, "Why don't we just say this . . . ?" Practitioners' experience is that explaining the potential civil and criminal penalties usually prompts a change in approach.

When a tax position becomes the subject matter of a criminal investigation, naturally the scope of the documentary investigation is at least as broad as in an administrative audit. For example, in *Couch*, the summons to the taxpayer's accountant called for production of

> 'All books, records, bank statements, cancelled checks, deposit ticket copies, workpapers and all other pertinent documents pertaining to the tax liability of the above taxpayer.'

Couch, 409 U.S. at 323 (quoting App. 59-60). If the means of obtaining such documents does not violate

the Fourth or Fifth Amendments or some other privilege, their "divulgence . . . is a necessary part of the process of law enforcement and tax investigation." *Id.* at 329.

The nomenclature of "private records" should therefore not distract from the fact that a criminal taxpayer investigation is a foreseeable, if uncommon, dimension of business and economic activity. Indeed, when tax and financial records are prepared and possessed by an accountant "and are the kind usually prepared by an accountant working on the tax returns of his client," *Fisher v. United States*, 425 U.S. 391, 411 (1976), for Fifth Amendment purposes they are not the client's "'private papers'" at all. *Id.* at 414 (quoting *Boyd v. United States*, 116 U.S. 616, 635 (1886)).

II. Given the Jurisdictional Limits on State and Local Taxation, the Petitioner's Fears of Multiple Simultaneous Local Investigations Are Unrealistic and Do Not Justify Absolute Temporary Immunity from State Criminal Investigation.

The Petitioner argues that he and all other Presidents should be granted absolute temporary immunity from state and local criminal investigation for fear that allowing enforcement of this one subpoena would produce uncontrolled, continuous, and distracting local criminal proceedings that would undermine his effectiveness as Executive.

> For immunity purposes, what matters is the cumulative effect of permitting *every*

> state and local prosecutor to take the same steps the District Attorney did.

Petitioner's Br. at 17. Further,

> The idea that the Constitution would empower thousands of state and local prosecutors to embroil the sitting President in criminal proceedings is *unimaginable*.

Id. at 26 (emphasis added). *See also id.* at 28 ("the floodgates will open"); *id.* at 37 ("every state and local prosecutor across the country [could] target the President"); *id.* at 39 ("'a deluge' of process from state and local prosecutors will 'engulf the Presidency'") (quoting *Clinton v. Jones*, 520 U.S. 681, 702 (1997)).

This Court need not try to imagine "the cumulative effect of permitting *every* state and local prosecutor" to subpoena the President's tax records and supporting documents. As the Respondent notes, the subject matter of prosecutors' investigations has a jurisdictional limitation. "State prosecutors generally may only bring prosecutions within their jurisdictions and so are inherently limited in the investigations they can launch." Respondent's Br. at 35.

The Petitioner does not acknowledge this limitation, and, specifically with respect to the type of investigation in this case, the Petitioner's argument does not take into account this Court's record of policing the limits of state tax jurisdiction. The Commerce Clause and the Due Process Clause, U.S. CONST. amend. XIV, supply important guardrails that

reduce the potential for harassing tax-based investigations of the President.

For Commerce Clause purposes, to support a State's power to tax a nonresident person or business without placing an undue burden on interstate commerce, this Court requires that "the tax [be] applied to an activity with a substantial nexus with the taxing state." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). Presumably the power to impose tax penalties on a nonresident is similarly limited.

In its most recent decision elaborating on this limitation, the Court held that such a nexus "'is established when the taxpayer . . . "avails itself of the substantial privilege of carrying on business" in that jurisdiction.'" *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2099 (2018) (quoting *Polar Tankers, Inc. v. City of Valdez*, 557 U.S. 1, 11 (2009)). The President is not subject to tax (or related tax penalties) on business activities except in those locations where he is "carrying on business." This rule means the impetus for a criminal investigation based on questions relating to tax compliance, similar to the grand jury proceeding in the present case, is actually limited to a much smaller universe of jurisdictions than claimed.

The Court in *Wayfair* also noted that the Commerce Clause nexus requirement is closely related "to the due process requirement that there be 'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.'" *Id.* at 2093 (quoting *Miller Brothers Co. v. Maryland*, 347 U.S. 340, 344-45

(1954)). Local criminal investigations relating to the President as a taxpayer would need to rest on a "minimum connection" between his business activities and the State.

In last Term's decision in *North Carolina Dep't of Revenue v. Kimberley Rice Kaestner 1992 Family Trust*, 139 S. Ct. 2213 (2019), the Court reiterated that the "minimum connection" required for tax jurisdiction under the Due Process clause derives "from the familiar test of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945)." *Id.*, 139 S. Ct. at 2220. *International Shoe*'s "minimum contacts" inquiry "focuses on the reasonableness of the government's action." *Id.* (citing *Quill Corp. v. North Dakota*, 504 U.S. 298, 307 (1992)). A President will not be subjected to a tax-based criminal investigation in a State unless the President, in a "private" economic activity, has "derive[d] 'benefits and protection' from associating with [that] State." *Id.* (quoting *International Shoe*, 326 U.S. at 319).

In this case, as the Second Circuit noted (but the Petitioner omits to acknowledge), the potential criminal conduct of the President and others relating to the tax compliance of the President and the Trump Organization business entities was "within the District Attorney's jurisdiction, a fact about the investigation which the district court treated as 'uncontested.'" Pet. App. 3a-4a n.3. The Petitioner was a resident of New York State during the tax years in question. No other State or locality could ground its jurisdiction to investigate the Petitioner on that basis, except as he may change his State of residence.

The Petitioner pairs these ill-founded concerns about exposure to thousands of local criminal investigations with a dubious flip-side: the Petitioner also implicitly argues that the District Attorney has exceeded his proper jurisdictional reach by "including entire categories of documents—like those relating to a hotel in Washington, D.C.—that have nothing to do with New York." Petitioner's Br. at 48. The point is at odds with decades of this Court's state tax cases. From all that appears, there is no basis for assuming in fact that Trump Organization activities in New York have "nothing to do" with the hotel in Washington. It is conceivable, perhaps, that the Trump Organization allows the Washington property complete independence and enjoys no exchange of value with it, along the lines of the "unrelated business enterprises" at issue in *Allied-Signal, Inc. v. Dir., Div. of Taxation*, 504 U.S. 768, 788 (1992) (internal quotation marks and citation omitted). But the possibility of a "unitary business" comprising the Trump Organization and its commonly owned affiliates, as described in *Container Corp. of America v. Franchise Tax Bd.,* 463 U.S. 159 (1983), and *Allied-Signal*, 504 U.S. at 778-88, and the potential attendant tax liabilities of the Trump Organization in New York, are inherently reasonable topics of inquiry.

The Petitioner's overblown argument that affirming the Second Circuit's decision will enable universal local criminal jurisdiction over the President's "private" business conduct is not a sound basis for creating the new doctrine of absolute presidential immunity requested by the Petitioner. Existing jurisdictional rules substantially allay the concern.

CONCLUSION

For the foregoing reasons, *Amici Curiae* Washington State Tax Practitioners respectfully request that the Court affirm the decision below.

Respectfully submitted,

DIRK GISEBURT*
DAVIS WRIGHT TREMAINE LLP
920 Fifth Avenue
Suite 3300
Seattle, WA 98104
(206) 757-8049
dirkgiseburt@dwt.com

Counsel for *Amici Curiae*

* Counsel of Record

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APPENDIX

APPENDIX A

LIST OF *AMICI CURIAE* WASHINGTON STATE TAX PRACTITIONERS

Michelle DeLappe
Foster Garvey PC*
Seattle, Washington

Garry G. Fujita
Eisenhower Carlson PLLC*
Tacoma, Washington

Dirk Giseburt
Davis Wright Tremaine LLP*
Seattle, Washington

Michele G. Radosevich
Davis Wright Tremaine LLP*
Seattle, Washington

**Affiliations listed for identification purposes only.*