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.

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

BRIEF AMICI CURIAE OF VIRGINIA, CALIFORNIA, CONNECTICUT, DELAWARE, THE DISTRICT OF COLUMBIA, HAWAII, ILLINOIS, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEVADA, NEW JERSEY, NEW MEXICO, OREGON, AND WASHINGTON IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICI CURIAE

"Perhaps the clearest example of traditional state authority is the punishment of local criminal activity." *Bond* v. *United States*, 572 U.S. 844, 858 (2014) (quotation marks omitted). In separate briefs, the President of the United States (in his individual capacity) and the Department of Justice ask this Court to carve a hole out of that authority by creating an entirely new presidential immunity from all forms of state court criminal process—including enforcement of a grand jury subpoena directed to a third party. Their argument, however, is built on a premise that is without historical support and flips "Our Federalism" on its head: that state and local prosecutors are rogue actors who will pursue baseless criminal investigations against sitting Presidents purely for political gain and that state courts will simply allow them to do so. The States have a strong interest in rebutting that argument and ensuring that the Court's resolution of this matter reflects the usual and appropriate respect for the role of States as independent sovereigns in our federal system.

SUMMARY OF ARGUMENT

The President's brief paints an alarming picture. Affirming the Second Circuit's decision, he insists, will lead to a Chief Executive "*hobbled* by the whims of local officials" driven by an "irresistible and widespread" temptation to pursue criminal proceedings purely for

political gain. Trump Br. 26, 28 (emphasis added). "The risk that politics will lead state and local prosecutors to *relentlessly harass* the President," he warns, "is simply too great to tolerate." *Id.* at 16 (emphasis added). Nothing short of absolute immunity from all state court process will prevent "the floodgates [from] open[ing]" and "States and localities . . . [being] *unleashed* to proceed criminally against [him]." *Id.* at 28 (emphasis added).

But those are all empirical claims, and the President offers no real-world evidence. Unable to offer a single example of the kind of harassing prosecution he claims will be ubiquitous, the President's brief relies on conjecture and the paradoxical assertion that the fact that this case is the first of its kind proves that presidential immunity has long been accepted. Trump Br. 26, 28. For its part, the Department of Justice offers up a handful of instances of localities taking action against Presidents or Vice Presidents. But most of DOJ's examples involve neither investigation nor prosecution, and even those that do can hardly be said to threaten the kind of untenable distraction from duties DOJ describes. See DOJ Br. 18–19.

The President's and DOJ's inability to back up their dire warnings about state and local prosecutors run amok exposes the fatal flaw at the core of their immunity argument. State-level prosecutors are not reckless political actors eager to waste taxpayer dollars and scarce resources on baseless prosecutions of the President, with no purpose other than indeterminate political gain. On the contrary, they are dedicated

public servants guided by legal and ethical principles to whom this Court has repeatedly afforded (and instructed lower courts to afford) a presumption of good faith. There is no justification for fashioning an entirely new rule of constitutional law based on factually groundless—and normatively troubling—speculation that prosecutors will suddenly abandon their professional obligations in favor of naked partisanship.

There is likewise no reason to disregard two centuries of precedent emphasizing the States' traditional authority over local crimes and the respect due them as independent sovereigns. The President and DOJ insist that a "paramount" federal interest must prevail in this case, but they fail to demonstrate how the grand jury subpoena at issue "impede[s]" or "burden[s]" operation of the national government. DOJ Br. 12, 14 (citations omitted). To the contrary: because it is common ground that the subpoena at issue does not concern the President's official conduct or compel him to take any action whatsoever, it leaves the President's Article II responsibilities—and the workings of the federal government more broadly—entirely unaffected.

Devoid of its two foundational pillars—the unsupported assertions that state-level prosecutors will be driven purely by politics and that a grand jury subpoena directed to the President's agent "prostrat[es] [the federal government] at the foot of the states" (Trump Br. 25 (quotation marks omitted))—the argument for immunity collapses. This Court has already rejected a different President's claim that subjecting him to *any* judicial process impermissibly impeded

performance of his constitutionally assigned functions. See *Clinton* v. *Jones*, 520 U.S. 680 (1997). And where the Court has recognized a need for some kind of immunity—whether qualified or absolute—its decisions have been grounded on the need to avoid tempering the President in the discharge of his *official* duties or chilling the candor of *government* deliberations. See, *e.g.*, *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982); *United States* v. *Nixon*, 418 U.S. 683 (1974). Because this grand jury subpoena seeks information related to the President's unofficial conduct (and thus does not reach any material protected by executive privilege), those concerns simply do not apply.

Neither the President nor DOJ offers any valid reason for casting off the longstanding presumption of regularity afforded to state criminal proceedings and the respect owed the States as independent sovereigns. This Court should reject their norm-defying arguments and maintain the trust it has always had in States' ability to operate criminal proceedings appropriately. Any other course would upset the constitutional balance of power between the States and the federal government this Court has steadfastly protected.

ARGUMENT

This Court has long afforded a presumption of regularity to state criminal proceedings. And it has recognized that principles of comity and federalism weigh heavily against intrusion into areas of traditional State control, including the prosecution of local crimes.

The President and DOJ offer no compelling reason to abandon these bedrock principles in favor of a sweeping rule of immunity this Court has repeatedly rejected.

I. The President's claims are inconsistent with the authority of States as independent sovereigns

A. The presumption of regularity afforded to state criminal proceedings should be maintained

1. This Court has repeatedly emphasized that prosecutors' decisions are entitled to a "presumption of regularity," which courts "do not lightly discard." *Nieves* v. *Bartlett*, 139 S. Ct. 1715, 1723 (2019) (quotation marks omitted). "Examining the basis of a prosecution," the Court has explained, "threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry." *Wayte* v. *United States*, 470 U.S. 598, 607 (1985). Accordingly, absent "clear evidence to the contrary," courts presume that prosecutors "have properly discharged their official duties." *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996).

The Court has put its money where its mouth is, requiring litigants to meet a high burden before they may proceed with claims predicated on a prosecutor's bad faith. For example, a plaintiff asserting a claim for retaliatory prosecution under the First Amendment must "show more than the subjective animus of an officer and a subsequent injury; [he] must also prove as

a threshold matter that the decision to press charges was objectively unreasonable because it was not supported by probable cause." *Nieves*, 139 S. Ct. at 1723. And when a defendant claims that he has been subjected to a selective prosecution, he must show that "the Government declined to prosecute similarly situated suspects" even to meet the threshold for discovery. *Armstrong*, 517 U.S. at 458.

The Court has also made clear that the presumption of regularity is not limited to federal prosecutors. In *Armstrong*, which described the "latitude" afforded to prosecutors and the demanding standards applicable to selective prosecution claims, the Court made clear that the governing rule came from a case involving a *state* prosecution. See *Armstrong*, 517 U.S. at 465 (discussing *Ah Sin* v. *Wittman*, 198 U.S. 500 (1905)). And in *Nieves*, the Court once again emphasized the "presumption of regularity" in a case involving only state, not federal, officers. *Nieves*, 139 S. Ct. at 1723; see *id.* at 1721 (noting that "[t]he State ultimately dismissed the criminal charges against Bartlett"); cf. *Morris* v. *Matthews*, 475 U.S. 237, 254 (1986) (Blackmun, J., concurring) (recognizing that state criminal proceedings generally enjoy a presumption of regularity).

2. The President and DOJ would have the Court flip this longstanding presumption of regularity on its head. According to the President, this Court must *assume* that "politics [will] infect state and local decisionmaking" because "the temptation to prosecute [the President] for political benefit" is so great as to be "irresistible." Trump Br. 26. And despite briefly waving its

hand at the notion that prosecutors generally act in good faith (albeit without citing any of the Court's cases recognizing the presumption of regularity), see DOJ Br. 16, DOJ also contends that the temptation to weaponize criminal process against the President will be overwhelming. *Id.* at 15–17.

a. Neither the President nor DOJ offers any meaningful support for their eyebrow-raising assertion that state prosecutors uniquely cannot be trusted to act in good faith.

i. The President does not offer a single example of the type of tainted prosecution he now claims is inevitable. Instead, he cites numerous cases (most over a century old) in which federal courts stymied efforts by States to interfere with the *official* duties of federal officers. See, *e.g.*, Trump Br. 24–25, 30–31. Because the subpoena at issue seeks information related to the President's *unofficial* conduct, these cases are inapposite.

ii. For its part, DOJ musters two examples of the types of criminal investigations it fears. Neither comes close to proving the intended point.

First, DOJ refers to an indictment brought against Vice President Cheney late in his term. But it is unclear what work that example is doing because DOJ itself has acknowledged that Vice Presidents *are* subject to indictment and criminal prosecution while in office. See Randolph D. Moss, Asst. Att'y Gen., *A Sitting President's Amenability to Indictment and Criminal Prosecution*, 24 Op. O.L.C. 222, 222 (Oct. 16, 2000) (OLC Memo).

What is more, the incident involving Vice President Cheney actually undermines DOJ's assertion that the typical workings of the state criminal justice system are insufficient to protect high-ranking federal officials from politically motivated prosecutions. Just weeks after the indictment was issued, a state administrative judge dismissed it. *Cheney Indictment Dropped*, Los Angeles Times (Dec. 2, 2008). In doing so, the judge "chastised the southern Texas prosecutor who brought the case," *id.*, proving that those who pursue questionable prosecutions of high-ranking officials do so at their professional peril.[1]

Second, DOJ cites the example of an Arizona sheriff "investigating" President Obama's birth certificate. DOJ Br. 19. That example, of course, involved neither a prosecutor nor criminal process. What is more, as the article DOJ cites makes clear, the sheriff in question—"anticipat[ing] . . . criticism he was throwing away taxpayer money"—"farmed out the investigation to volunteers on his posse, which is funded through donations."

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[1] This incident also undermines DOJ's suggestion (at 20–21) that state *courts* cannot be trusted to fairly treat federal officials. The same is true of DOJ's criticism of a New York trial court for requiring President Trump to sit for a video deposition. *Id.* at 21. As DOJ acknowledges, the President was able to obtain relief from a higher court of the same State. *Id.* (citing 24973/2015 Docket cmt. No. 9, *Galicia* v. *Trump* (N.Y. Sup. Ct. Sept. 26, 2019)). And in the Georgia administrative matter DOJ describes, the judge decided the issue in President Obama's favor despite his absence from the hearing, and it does not appear that the request for contempt (made by the plaintiffs' counsel) was ever even considered. See *Farrar v. Obama*, No. 1215136-60, 1/26/12 Hr'g Tr. at 44. (Ga. Office of State Admin. Hr'gs 2012).

Jacques Billeaud, *Sheriff Joe Arpaio Closes Probe of Obama Birth Certificate*, Associated Press (Dec. 15, 2016). Far from unleashing the unchecked power of a sovereign State, the sheriff was unwilling to rely on the resources of his own office for fear of backlash over his overtly political effort. That sort of (literally) amateur operation hardly suggests an existential threat to the functioning of the Executive Branch.

iii. The remaining examples offered by the President and DOJ are even further afield. Although both refer to various actions of state or local legislative bodies, see Trump Br. 4–6; DOJ Br. 18, it should go without saying that state laws and resolutions are a far cry from criminal proceedings. The President and DOJ also refer to statements by various candidates for office suggesting that the President's conduct warranted investigation. See Trump Br. 26–27; DOJ Br. 19. Those references are puzzling at best, given DOJ's own previous insistence that "[i]mpugning the official objective of a formal . . . policy judgment . . . based on campaign trail statements is inappropriate and fraught with intractable difficulties." U.S. Br. at 66, *Trump* v. *Hawaii*, 138 S. Ct. 2392 (2018). Whatever merit that argument had in the case in which it was made, it clearly has more force here, where the campaign trail statements in question were not even made by the official (respondent Vance) whose judgment is under review.

b. In a game effort at reframing, the President and DOJ urge the Court to view the *absence* of historical experience to support their predictions as

bolstering the argument for immunity, rather than undermining it. See Trump Br. 28; DOJ Br. 22. As the President would have it, the fact that this grand jury subpoena is the first of its kind shows that state and local prosecutors have—until now—simply *assumed* that they lack the authority to proceed criminally against the President, which (in turn) suggests that the Federal Constitution forbids it. Trump Br. 28; see also DOJ Br. 22–23. That argument fails for multiple reasons.

i. For one thing, it strains credulity that the very same state and local prosecutors the President accuses of having a "reckless mania for self-promotion" (Trump Br. 26) would have been—until now—cowed solely by an unwritten and untested rule of immunity.

Nor is there reason to believe that any such widespread perception ever existed. Quite the contrary: Before this litigation, it had long been DOJ's publicly expressed view that a grand jury *may* investigate a President's alleged crimes during his term of office. Indeed, DOJ made precisely that point in one of the very authorities upon which the President most heavily relies. See OLC Memo, 24 Op. O.L.C. at 257 n.36 (stating that, although the President cannot be subjected to indictment and prosecution while in office, "[a] grand jury could continue to gather evidence throughout the period of immunity"); see also Trump Br. 20, 21, 29, 32, 37, 39, 42 (citing OLC Memo). With the federal government having publicly professed the view that Presidents *may* be investigated during their term of office,

one wonders where the widespread acceptance of immunity the President points to would have originated.

ii. The President's assertion that "the floodgates will open" (Trump Br. 28) if the Court affirms here fails for another reason as well. If the temptation to proceed against the President for political benefit will prove irresistible in localities with strong partisan affiliation, why would the same not already be true for *other* high-ranking federal officials, such as Cabinet members, Senators, or Representatives—officials who may be deeply unpopular in certain localities for the same reasons as the President? Indeed, DOJ specifically acknowledges that pursuing investigations of the President's associates might well advance a prosecutor's campaign against the President himself. See DOJ Br. 17 (noting that "[n]othing is so politically effective as the ability to charge that one's opponent *and his associates* are not merely wrongheaded, naïve, ineffective, but, in all probability, crooks" (emphasis added) (quoting *Morrison* v. *Olson*, 487 U.S. 654, 713 (1988) (Scalia, J., dissenting)).

So where are all the state subpoenas directed at high-ranking federal officials? And where are all the efforts to prosecute them for unofficial conduct in state court? The explanation cannot be that those officers *also* were assumed to be immune from criminal process, because it has long been established that they have no such immunity. See OLC Memo, 24 Op. O.L.C. at 222; cf. U.S. Const. art. I, § 6, cl. 1 (recognizing limited Speech and Debate immunity). Yet a survey of federal officials convicted of crimes since the early 1920s

reveals that only *seven* of the approximately 100 prosecutions were pursued by state or local officials. Three of those prosecutions involved traffic-related fatalities or drunk driving and three others involved disorderly conduct or prohibited sex acts—hardly facts suggesting an effort to bring the weight of the state criminal justice system to bear against federal officials in service of political ends.[2]

3. Politically motivated prosecutions are anathema to the American criminal justice system. That foundational principle—not a widespread but unstated acceptance of immunity—best explains the absence of historical support for the groundless, harassing state prosecutions the President fears. This Court should not create a new rule of constitutional law for this case based on the unsupported assumption that state officials will begin regularly violating that norm if the

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[2] This survey is based on information in the *World Heritage Encyclopedia Edition List of American Federal Politicians Convicted of Crimes* (http://self.gutenberg.org/articles/eng/list_of_american_federal_politicians_convicted_of_crimes) and the *Congressional Misconduct Database* (https://www.govtrack.us/misconduct). The seven state convictions are: Senator Ted Kennedy's conviction in Massachusetts for leaving the scene of an accident in 1969; Representative Andrew J. Hinshaw's California conviction for bribery in 1976; Representative Herbert Burke's 1978 conviction in Florida for drunken disorderly conduct and resisting arrest; Representative John Hinson's 1981 conviction in Washington, D.C. for attempted oral sodomy (then illegal in the District); Representative Bill Janklow's South Dakota conviction for vehicular manslaughter in 2003; Senator Larry Craig's misdemeanor conviction for disorderly conduct in Minnesota in 2007; and Representative Vito J. Fossella's 2008 conviction in Virginia for driving under the influence.

decision below is affirmed. See *Clinton* v. *Jones*, 520 U.S. 681, 701 (1997) (rejecting immunity where the absence of past civil actions against the President for unofficial conduct made it "unlikely that a deluge of such litigation will ever engulf the Presidency").

B. In situations involving only the President's personal conduct, federalism and comity concerns outweigh any federal interest

This Court has repeatedly held that the President is not immune from judicial process. See *Clinton*, 520 U.S. at 703; *United States* v. *Nixon*, 418 U.S. 683, 706 (1974). In seeking a different result here, the President and DOJ rely heavily on the fact that, unlike prior cases, this one involves a subpoena issued by a state grand jury overseen by a state court. Trump Br. 40; DOJ Br. 14–15. But that factual difference does not compel a different outcome. To the contrary, the special role of the States as independent soveriegns in the federal system reinforces the conclusion that there is no constitutional rule immunizing the President from all forms of criminal process.

1. "The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." *Texas* v. *White*, 74 U.S. 700, 725 (1869). "States are not mere political subdivisions of the United States," and "[s]tate governments are neither regional offices nor administrative agencies of the Federal Government." *New York* v. *United States*, 505 U.S. 144, 188 (1992). And because "[t]he States . . . retain 'a residuary and inviolable sovereignty,'" *Alden* v. *Maine*, 527

U.S. 706, 715 (1999) (quoting *The Federalist* No. 39, at 245), the Framers of our Constitution "intended that the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts," *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 293 (1980). For that reason, there has been a "longstanding public policy against federal court interference with state court proceedings." *Younger* v. *Harris*, 401 U.S. 37, 43 (1971).

As with all power-separating rules, the reason for shielding the States from federal intrusion is, ultimately, a functional one: "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *United States* v. *Lopez*, 514 U.S. 549, 552 (1995).

2. a. These bedrock principles illustrate why the President's plea for a constitutionally based immunity from state criminal process specifically is deeply unsound. As this Court has emphasized, "the punishment of local criminal activity" is "[p]erhaps the clearest example of traditional state authority." *Bond* v. *United States*, 572 U.S. 844, 858 (2014) (quotation marks omitted). Because the subpoena at issue stems from an investigation into potential local crimes, enjoining its enforcement would "intrude upon the police power of

the States," *id.* at 863—something this Court has repeatedly refused to countenance.[3]

The intrusion here would be far from costless. As respondent explains (at 45–46), the grand jury's investigation involves numerous individuals and corporate actors who are not President of the United States and who have no claim whatsoever to any immunity. For that reason, preventing the grand jury from receiving the information covered by the subpoena could seriously compromise the State's ability to hold third parties accountable for potential crimes. Alternatively, the information contained in the subpoenaed records could be exculpatory, and respondent's inability to obtain it could prolong an investigation where no crimes were committed. As DOJ previously has recognized, "the consequences of any prejudicial loss of evidence . . . in the criminal context are . . . grave, given the . . . stakes for both the [government] and the defendant in criminal litigation." OLC Memo, 24 Op. O.L.C. at 257 (citing *Nixon*, 418 U.S. at 711–13).

b. The President and DOJ argue that a State's critical interest in prosecuting local crimes must yield to a paramount federal interest in ensuring that operation of the national government is not impeded.

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[3] See, *e.g.*, *Bond*, 572 U.S. at 858; *Cuomo* v. *Clearing House Ass'n, LLC*, 557 U.S. 519, 534–35 (2009); *Gonzales* v. *Oregon*, 546 U.S. 243, 270–74 (2006); *Solid Waste Agency of Northern Cook Cty.* v. *U.S. Army Corp of Eng'rs*, 531 U.S. 159, 174 (2001); *Jones* v. *United States*, 529 U.S. 848, 850 (2000); *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 475 (1996); *United States* v. *Bass*, 404 U.S. 336, 350 (1971); *Rewis* v. *United States*, 401 U.S. 808, 812 (1971).

Trump Br. 24–25, 30–31; DOJ Br. 12–14. True enough. But there is no impediment here.

Unlike this case, the precedents on which the President and DOJ rely concerned interference with *official* federal acts. For example, in *McCullough* v. *Maryland*, 17 U.S. (Wheat.) 316 (1819), this Court rejected the proposition that States could impose a direct burden on a quintessentially federal institution by taxing the national bank. And in numerous other cases cited, courts disallowed efforts by States to enjoin federal officials in the discharge of their duties, or to investigate or punish federal officers for the performance of *official* acts. See, *e.g.*, Trump Br. 24–25, 30–31; DOJ Br. 12–14.

This case is worlds away from those precedents. The grand jury subpoena at issue here does not threaten any interference with the President's official acts—indeed, it does not even involve them. Rather, the challenged subpoena seeks information about events predating the President's time in office, when he was a private citizen and a resident of New York. In addition, because the subpoena is directed to a corporate entity associated with the President, not the President himself, it does not purport to compel the President to do anything at all. For that reason, the subpoena cannot be said to yield *any* state-court control over the President—direct or otherwise.

Seeking to paper over that glaring problem, the President insists—in a single parenthetical clause—that "[s]ubjecting the President to criminal process" has precisely the same "effect" *regardless* of whether

that process is "for official or unofficial acts." Trump Br. 25. But that claim "sound[s] more of *ipse dixit* than reasoned explanation." *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 543 (1985). This Court should require far more before casting aside its traditional reluctance to intrude on areas of state concern, particularly given that the President and DOJ have not shown how this subpoena constitutes state-court control over the President.

II. This Court's precedents foreclose the President's claim of immunity

Lacking any compelling reason to distinguish this case based on the state-court origins of the subpoena, the argument for immunity collapses under the weight of this Court's precedents.

1. a. This Court's decision in *Clinton* v. *Jones* has already rejected nearly all of the arguments the President and DOJ urge in favor of immunity. In *Clinton*, as here, a President relied on precedents recognizing immunity from claims based on *official* acts. This Court dismissed the President's effort to elide the distinction between official and private conduct, explaining that it had "*never* suggested that the President, or any official, has an immunity that extends beyond the scope of any action taken in an official capacity." *Clinton*, 520 U.S. at 694 (emphasis added).

President Clinton also raised the same dire warning about "the potential additional litigation that an affirmance of the Court of Appeals judgment might spawn," contending that such litigation would "impose

an unacceptable burden on the President's time and energy, and thereby impair the effective performance of his office." *Clinton*, 520 U.S. at 701–02. This Court rejected that argument for two reasons, both of which are relevant here.

First, the Court observed that the President's "predictive judgment" about the likely impact of permitting the case against him to proceed "f[ou]nd[ ] little support in . . . history." *Clinton*, 520 U.S. at 702. Noting that only three lawsuits had ever been filed against a sitting President based on private conduct, the Court reasoned that, "[i]f the past is any indicator, it seems unlikely that a deluge of such litigation will ever engulf the Presidency." *Id.* The Court also expressed confidence that both procedural rules and the possibility of sanctions would "provide[ ] a significant deterrent to litigation directed at the President in his unofficial capacity for purposes of political gain or harassment." *Id.* at 708–09.[4]

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[4] The *Clinton* Court did not regard the absence of historical support for non-official damages claims against the President as "a strong signal that such [claims] raise[ ] serious constitutional problems." DOJ Br. 23. As *Clinton* explained in distinguishing *Nixon v. Fitzgerald*, 457 U.S. 731 (1982)—which DOJ cites in support of its argument here, see DOJ Br. 22—*Fitzgerald* was "able to discount the lack of historical support for the proposition that official-capacity actions against the President posed a serious threat to the office on the ground that a right to sue federal officials for damages as a result of constitutional violations had only recently been recognized." *Clinton*, 520 U.S. at 702 n.36 (citing *Fitzgerald*, 457 U.S. at 753 n.33). Here, in contrast, as with the suit in *Clinton*, the State of New York did not require any decision of this Court to authorize a criminal investigation of its citizens

Second, and "[o]f greater significance," the Court explained that the President "err[ed] by presuming that interactions between the Judicial Branch and the Executive, even quite burdensome interactions, necessarily rise to the level of constitutionally forbidden impairment of the Executive's ability to perform its constitutionally mandated functions." *Clinton*, 520 U.S. at 702. Returning to the distinction between official and unofficial acts, the *Clinton* Court reasoned that "[t]he burden on the President's time and energy that is a mere byproduct of . . . review [of unofficial acts] surely cannot be considered as onerous as the direct burden imposed by judicial review and the occasional invalidation of his official actions." *Id.* at 705. The Court also noted that "Presidents and other officials face a variety of demands on their time . . . some private, some political, and some as a result of official duty. While such distractions may be vexing to those subjected to them, they do not ordinarily implicate constitutional . . . concerns." *Id.* at 705 n.40.

b. *Clinton* does not stand alone. Instead, the Court's decision in *United States* v. *Nixon* also rejected many of the same arguments the President and DOJ now advance.

Most importantly, the *Nixon* Court rejected the *exact* argument for absolute immunity that the President renews here: "that the independence of the Executive Branch within its own sphere insulates a President from a judicial subpoena in an ongoing criminal

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and thus the absence of historical support cannot be explained away.

prosecution." 418 U.S. at 706 (citations omitted). That independence, the Court unanimously concluded, could not "sustain an absolute, unqualified Presidential privilege of immunity from judicial process." *Id.*

The *Nixon* Court also emphasized another issue of direct relevance here: the special importance of evidence in criminal cases. "The need to develop all relevant facts in the adversary system," the Court explained, "is both fundamental and comprehensive," and "[w]ithout access to specific facts a criminal prosecution may be totally frustrated." *Nixon*, 418 U.S. at 709, 713. For that reason, the Court concluded that "the generalized interest in confidentiality" could not "prevail over the fundamental demands of due process of law in the fair administration of criminal justice." *Id.*

2. The President and DOJ offer no persuasive rejoinder to the Court's reasoning in *Clinton* and *Nixon.*

a. Both the President and DOJ rely primarily on the fact that this case arises from state rather than federal proceedings. See Trump Br. 40–41; DOJ Br. 14–15. To be sure, in *Clinton*, the Court observed that it was "not necessary to consider or decide whether a comparable claim might succeed in a state tribunal." *Clinton*, 520 U.S. at 691. But that statement merely reflected the nature of the Court's analysis—specifically, its focus "on the doctrine of separation of powers that restrains each of the three branches of the Federal Government from encroaching on the domain of the other two." *Id.* The *Clinton* Court did not say that the President's claim of immunity would prevail in state

court. And for the reasons we have already explained, principles of comity and federalism counsel rejection of the President's effort to obtain any state court-specific form of immunity. See Part I, *supra*.[5]

b. The other grounds offered to distinguish *Clinton* are no more persuasive.

i. Both the President and DOJ note that criminal proceedings impose " 'burdens' that are 'fundamentally different in kind from those imposed by the initiation of a civil action.' " Trump Br. 41–42 (quoting OLC Memo, 24 Op. O.L.C. at 249); see also DOJ Br. 17 (describing "an individual's mental and physical involvement and assistance in the preparation of [a criminal] defense"). The President also points to the "distinctive and serious stigma" of criminal proceedings and the

[5] In *Clinton*, this Court identified two issues that might inform the analysis of presidential immunity in the context of a state-court proceeding: "local prejudice" and "direct control by a state court over the President." 520 U.S. at 691 & n.13. As described in Part I(B), *supra*, the latter concern is inapplicable here because the subpoena does not compel the President to take any action whatsoever. As for the need to insulate federal officials from local prejudice, there is no "support in . . . history," *id.* at 702, for such a concern with respect to criminal investigations. See Part I(A), *supra.* Indeed, such concerns are doubly misplaced because (unlike with private lawsuits) there are two levels of protection guarding against improper investigative actions—prosecutors, who are constrained by ethical standards and professional norms in their evidence-gathering function, and the state judiciary, which is more than capable of reining in any investigative techniques that cross the line. Moreover, given the Second Circuit's holding rejecting *Younger* abstention in this case and permitting the President to seek relief in a federal forum, see Pet. App. 8a–13a, any objection based on potential "local prejudice" is particularly inapt.

threat they pose to "'the President's ability to act as the Nation's leader in both the domestic and foreign spheres.'" Trump Br. 32 (quoting OLC Memo, 24 Op. O.L.C. at 249).

These arguments simply ignore this Court's analysis in *Clinton*. As *Clinton* explained, compliance with judicial process for matters involving private acts *does not* "rise to the level of constitutionally forbidden impairment" because any "burden on the President's time and energy that is a mere byproduct of . . . review [of unofficial acts] surely cannot be considered as onerous as the direct burden imposed by judicial review and the occasional invalidation of his official actions." 520 U.S. at 702, 705. They also fail to appreciate this Court's conclusion that even "vexing" distractions that demand the President's time "do not ordinarily implicate constitutional . . . concerns." *Id.* at 705 n.40.

What is more, the President and DOJ's "distraction" and "stigma" arguments elide the critical distinction between a criminal *prosecution* and a grand jury *investigation*. As noted above, the OLC memorandum on which the President and DOJ rely concluded that Presidents are not amenable to indictment and prosecution during their terms. Whatever the merits of that position—which, as DOJ acknowledges, this Court has not adopted (DOJ Br. 11)—it does not follow that the same reasoning applies equally to the very different circumstances of a grand jury investigation.

To the contrary, it is clear that OLC's "distraction" and "stigma" arguments apply far differently—and significantly less powerfully—to investigation than they

do to prosecution. With respect to distraction, the OLC memorandum focused on the tradition that a defendant is present at his trial, and on courts' inability to accommodate the President's schedule when presiding over a criminal prosecution—issues that are foreign to the investigative phase of criminal proceedings. See OLC Memo, 24 Op. O.L.C. at 251–53 (distinguishing *Clinton*'s conclusion that the burdens of a civil action could be mitigated by docket management). With respect to stigma, OLC focused on the fact that "[a] criminal indictment . . . reflect[s] the official judgment of a grand jury," which "exposes the President to an official pronouncement that there is probable cause to believe he committed a criminal act." *Id.* at 249–50, 254. A criminal investigation, even one involving (typically secret) grand jury subpoenas, makes no such pronouncement.

ii. For his part, the President simply posits that OLC's conclusion is correct, see Trump Br. 29, and attempts to reason backward from that assumption, layering on the additional arguments that immunity extends to a grand jury investigation and may be asserted against a subpoena directed at a third party. But even if OLC's views about indictment and prosecution are correct, those views do not support the President's position on investigation. For one thing, the same OLC memo specifically concluded that the President *is not* immune from grand jury investigation. See OLC Memo, 24 Op. O.L.C. at 257 n.36. Nor does the memo's rationale necessarily extend as far as the President insists, both for the reasons just explained and

because OLC's analysis also rested on a third pillar that has no purchase in this case whatsoever: the fact that "the actual imposition of a criminal sentence of incarceration . . . would make it physically impossible for the President to carry out his duties," OLC Memo, 24 Op. O.L.C. at 246. Accordingly, whether or not OLC's view of the President's immunity from indictment and prosecution is valid, it does not support the additional arguments the President makes here.

c. The President's efforts to distinguish *Nixon* fare no better. First, the President contends that the *Nixon* Court did not decide the question of immunity. See Trump Br. 43–44. That is simply wrong. As described above, this Court acknowledged President Nixon's argument that "the independence of the Executive Branch within its own sphere insulates a President from a judicial subpoena in an ongoing criminal prosecution" and it unanimously and soundly rejected it. *Nixon*, 418 U.S. at 706 (citations omitted). That holding is dispositive here.

The President's account of the facts underlying *Nixon* is no more persuasive than his effort to rewrite this Court's opinion. Based on his own speculation that he is a target of respondent's investigation, the President claims that *Nixon* is inapposite because, in that case, President Nixon was a mere "witness." Trump Br. 42. Not so. This Court explained in *Nixon* that "[t]he President challenge[d] a subpoena served on him as a third party," 418 U.S. at 710, and further noted that the grand jury had "nam[ed] the President as an unindicted co-conspirator," *id.* at 687 n.2.

Those facts make the Court's opinion directly applicable here. As in *Nixon*, the President challenges a third-party subpoena seeking information relevant to an ongoing criminal proceeding. The only material difference is that, in this case, the President is not the subpoena recipient. That fact cuts *against* immunity, not in favor of it.

III. No heightened showing is required before the grand jury subpoena may be enforced

The President and DOJ argue that even if the President is not categorically immune from criminal process, respondent must make a heightened showing of need before he may obtain records from the President's agents. That argument fails as well.

1. The cases that have applied such a heightened showing—*Nixon* itself, *In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997), and *Senate Select Committee on Presidential Campaign Activities* v. *Nixon*, 498 F.2d 725 (D.C. Cir. 1974) (en banc)—all involved materials presumed to be protected by executive privilege. Following this Court's decision in *Nixon*, courts accordingly required those seeking privileged information to show a "demonstrated, specific need" for the materials in question. *In re Sealed Case*, 121 F.3d at 754.[6]

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[6] Even DOJ does not adopt the President's view (Trump Br. 46) that *Nixon* required a heightened showing by the prosecutor separate and apart from the claim of executive privilege. That is not surprising. The *Nixon* Court could not have been clearer that no more than compliance with Rule 17 was required to establish the validity of the subpoena itself. See 418 U.S. at 698 ("The subpoena *duces tecum* is challenged on the ground that the Special

Those holdings have no application here. As DOJ acknowledges (at 28), the risk posed by disclosure of the material sought in those cases is entirely different than the "risk" at issue here. In *Nixon* and the cases that followed, disclosure threatened to chill the candor of government officials in the performance of their duties "to the detriment of the decisionmaking process." *Nixon*, 418 U.S. at 705. As this Court explained, the need for confidentiality in government deliberations was "too plain to require further discussion." *Id.* Moreover, "both parties" accepted the position that "Presidential communications [we]re presumptively privileged." *Id.* at 708 (quotation marks omitted).

No such consensus exists about the "risks" DOJ points to in this case—*i.e.*, that "a state criminal subpoena for a President's personal records could harass . . . or impose unwarranted burdens upon him, diverting him from his official duties." DOJ Br. 28. As described, *supra*, the claimed threats of harassment and/or unwarranted burdens are wholly unsupported. For the same reasons the interests on which DOJ relies are insufficient to justify the President's absolute immunity from criminal process, they are insufficient to mandate a heightened showing.[7]

Prosecutor failed to satisfy the requirements of Fed. Rule Crim. Proc. 17(c), which governs the issuance of subpoenas *duces tecum* in federal criminal proceedings.").

[7] As described in Part I and footnote 8, *supra*, there is no basis for DOJ's suggestion that immunity is necessary to "ensure that the protection of the President is not left to state courts and state prosecutors." DOJ Br. 28.

Moreover, the President and DOJ fail to demonstrate that the ordinary rules of criminal process are inadequate guards against the possibility of harassing subpoenas. "It is generally recognized that it is improper to use a grand jury investigation to harass the witnesses or the subject of an investigation." 2 Sara Sun Beale et al., Grand Jury Law and Practice § 9:18 (2d ed. 2018); see also *United States* v. *R. Enterprises, Inc.*, 498 U.S. 292, 299 (1991) ("Grand juries . . . may [not] select targets . . . out of malice or an intent to harass."). Consistent with that general principle, multiple States have adopted rules precluding burdensome grand jury subpoenas and state courts have shown willingness to quash subpoenas when improper motive is suspected. See, *e.g.*, *Tiller* v. *Corrigan*, 286 Kan. 30, 46 (2008) (grand jury subpoena should be quashed if "targets were . . . selected and subpoenas issued out of malice or with intent to harass"); *People* v. *Spykstra*, 234 P.3d 662, 673 (Colo. 2010) ("Because the subpoenas were unreasonable and oppressive, we make the rule absolute and direct the district court to quash the subpoenas.").[8] These norms obviate the need for any heightened showing, particularly where, as here, the threat of harassment is entirely speculative.

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[8] See, *e.g.*, Colo. Rev. Stat. § 16-5-204(i)(II-III) (permitting a court to quash a subpoena where "[c]ompliance . . . would be unreasonable or oppressive [or] a primary purpose of the subpoena is to harass the witness"); Neb. Rev. Stat. § 29-1412.01(2)–(3) (same); cf. *In re Standard Jury Instructions in Criminal Cases*, No. 2014-02, 152 So. 3d 475, 489 (Fla. 2014) ("[T]he grand jury is the ultimate instrument of justice and should never be subverted to become the vehicle for harassment or oppression.").

2. Requiring a heightened showing of need is not only unnecessary, it would be affirmatively injurious. As the Court explained decades ago when it established the presumption of regularity applicable to prosecutorial decisionmaking, "[e]xamining the basis of a prosecution . . . threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry." *Wayte*, 470 U.S. at 607. Inverting the standard rules to require respondent to justify his information requests before a grand jury subpoena will be enforced invites precisely the sort of judicial second-guessing this Court has consistently avoided.

The detrimental impact of that second-guessing should not be understated. As described in Part I(B), constraining prosecutors' authority to compel documents and testimony would impede the truth-seeking function of the grand jury and the criminal justice system more broadly. If prosecutors cannot procure evidence because they are unable to meet the threshold showing, wrongdoers—including those with no claim to immunity—may not be held accountable for their crimes, while innocent parties may be not be relieved of the burdens of investigation because exculpatory evidence remains out of reach. Moreover, as respondent explains (at 47), the proposed heightened showing could convert the President's temporary immunity from prosecution during his time in office into a permanent immunity if evidence is lost before the President's term expires and prosecutors are consequently unable to meet their burden of proof. In short, there are no good reasons to require respondent to make a

heightened showing and multiple compelling reasons to maintain the status quo.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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