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 *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE NEW YORK CIVIL LIBERTIES UNION, IN SUPPORT OF RESPONDENTS

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The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 2 million members and supporters dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The New York Civil Liberties Union (NYCLU) is a statewide affiliate of the national ACLU.

This case raises a fundamental question under the rule of law: Whether the President is entitled to absolute immunity from a grand jury subpoena directed to his accountants for his personal financial records, when those records are unrelated to any official duties of the President but are directly relevant to the grand jury's investigation.

Founded in 1920, the ACLU has long taken the position that no person is above the law, including the President, and has participated in all of the Court's most important cases on presidential immunity. *See Clinton v. Jones*, 520 U.S. 681 (1997); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982); *United States v. Nixon*, 418 U.S. 683 (1974).

STATEMENT OF THE CASE

This case follows the issuance of two subpoenas *duces tecum* by the Manhattan District Attorney in August 2019 as part of an ongoing grand jury investigation. The first subpoena sought

[1] The parties have submitted blanket letters of consent to the filing of *amicus curiae* briefs. No counsel for any party has authored this brief in whole or in part, and no party or its counsel has made a monetary contribution intended to fund the preparation or submission of this brief.

"documents and communications" from the Trump Organization related to the alleged payment of "hush money" to two women. The second subpoena was served on Mazars USA, an accounting firm that worked for the President and his business entities (the "Mazars subpoena"), and sought a variety of financial records, including "tax returns and related schedules, in draft, as filed, and amended form." *See generally Trump v. Vance*, 941 F.3d 631, 635 n.5 (2d Cir. 2019). One month later, the President filed this action in federal district court asserting a broad presidential immunity from state judicial process. The complaint sought a declaratory judgment that the Mazars subpoena is "invalid and unenforceable" while the President is in office, and a permanent injunction staying the subpoena for the remainder of the President's term. *Id.* at 636.[2]

Citing *Younger v. Harris*, 401 U.S. 37 (1971), the district court dismissed the complaint on abstention grounds, noting the pendency of state grand jury proceedings. *Trump v. Vance*, 395 F. Supp. 3d 283 (S.D.N.Y. 2019). The Second Circuit reversed that ruling. The panel unanimously noted that *Younger* abstention rests on principles of comity and that "comity is a two-way street." *Trump*, 941 F.3d at 638. The court then concluded, on balance, that abstention was inappropriate when "a county prosecutor, however competent, has opened a criminal investigation that involves the sitting

[2] After initially turning over some documents to the grand jury, the Trump Organization has likewise declined to produce any of the President's personal tax records in response to the subpoena it received. The President has nonetheless sought relief only from the Mazars subpoena in this case. *Id.* at 635.

President, and the President has invoked federal jurisdiction." *Id.*[3]

On the merits, the Second Circuit found the President's claim of absolute immunity unsupported by history or reason. Rejecting the President's effort to distinguish *United States v. Nixon*, 418 U.S. 683 (1974), "[t]he most relevant precedent for present purposes," the court wrote:

> The President has not persuasively explained why, if executive privilege did not preclude enforcement of the subpoena issued in *Nixon*, the Mazars subpoena must be enjoined despite seeking no privileged information and having no relation to the President's performance of his official duties.

Trump, 941 F.3d at 640-41.

Like other courts to consider issues of presidential immunity, the Second Circuit accepted as given the President's unique role in the constitutional order. But again, it noted, the President has failed to explain "why any burden or distraction the third-party subpoena causes would rise to the level of interfering with the duty to 'faithfully execute[]' the laws," U.S. Const. art II, § 3, or otherwise subordinate federal law in favor of state process." *Id.* at 643.

The court ended its opinion by emphasizing the narrowness of the issue before it:

> This appeal does not require us to decide whether the President is immune

[3] That determination has not been questioned in this Court.

> from indictment and prosecution while in office, nor to consider whether the President may lawfully be ordered to produce documents for use in a state criminal proceeding. We accordingly do not address those issues. The only question before us is whether a state may lawfully demand production by a third party of the President's personal financial records for use in a grand jury investigation while the President is in office.

Id. at 646. On that narrow question, the court's unequivocal answer was yes.

SUMMARY OF ARGUMENT

The President's resistance to the Mazars subpoena cannot overcome centuries of this Court's precedent. This is a narrow case involving a state grand jury subpoena issued to the President's accounting firm seeking the President's personal records, which are relevant to a criminal investigation targeting third-parties and, possibly, the President. The President asks this Court to insulate his personal records from discovery by recognizing a nearly boundless version of presidential immunity that would allow a sitting President to refuse to provide relevant evidence in a criminal investigation and that would immunize not only a President's official conduct, but his purely personal conduct as well. The Court has never interpreted presidential immunity so expansively. To the contrary, the Court has repeatedly limited presidential immunity in ways that are inconsistent with the President's position in this case.

The Court has repeatedly reaffirmed the basic principal that no person—not even the President—is above the law. This guiding principle led Chief Justice Marshall to reject President Jefferson's resistance to a subpoena *duces tecum* in connection with the prosecution of Aaron Burr. It led the Court unanimously to reject President Nixon's attempt to shield his *official* communications from a subpoena that was issued in connection with a criminal investigation arising from the Watergate scandal. And it caused the Court, again unanimously, to reject President Clinton's effort to defer while in office a civil proceeding filed against him for conduct outside of his official duties. Many sitting Presidents have provided evidence in criminal proceedings, both voluntarily and in response to subpoena or court order.

In the rare circumstances in which the Court has recognized presidential immunity, it has engaged in a functional balancing of interests, weighing litigants' interest in fair trials against the public's interest in ensuring government officials are free to exercise their public duties. This is consistent with the approach the Court has taken in immunity cases involving other government officials, such as judges, legislators, and prosecutors. Because the Court's immunity analysis considers only the chilling effect on a government actor's *official* duties, the Court has never once found that a sitting President, or any other government official, enjoys immunity with respect to conduct that is beyond the scope of his official duties.

The President offers no compelling reason to depart from this precedent and history. His claimed immunity from prosecution has no bearing here—he

has not been arrested, indicted, or imprisoned. The sole issue is whether his accounting firm may be compelled to turn over his personal records. His conclusory assertions about the burdens the Mazars subpoena will place on him—none of which he identifies with any particularity—are insufficient to justify granting him immunity, as the Court made clear when it rejected President Nixon's similarly "generalized" assertions of burden. And because this case involves only personal records, there is no basis for imposing a higher standard of need.

Finally, it is immaterial that the Mazars subpoena was issued by a state grand jury, rather than a federal grand jury. The Supremacy Clause does not bar a state from seeking a President's personal records if they are relevant to a state criminal investigation. The President's fears about rogue prosecutors are purely speculative and, as the Court recognized in *Clinton v. Jones*, insufficient to justify granting him immunity.

The decision of the United States Court of Appeals for the Second Circuit should therefore be affirmed.

ARGUMENT

I. THIS COURT'S WELL-SETTLED PRECEDENT DOES NOT SUPPORT THE PRESIDENT'S CLAIM TO ABSOLUTE IMMUNITY.

This Court has carefully defined the scope and limits of presidential immunity in a series of cases dating back more than two hundred years. The expansive view of presidential immunity that

President Trump now asserts is unsupported by this Court's controlling precedent.

As the Second Circuit noted, this case does not involve the indictment and prosecution of the President; it does not involve a civil proceeding against the President; it does not involve official acts by the President; it does not even involve a subpoena directed *to* the President. The only issue presented is whether *evidence* relating to the President's private affairs can be discovered in connection with a criminal *investigation* by a state grand jury. It is unknown at this point whether the President is a target of that grand jury and what that might mean while the President remains in office. What is known is that the grand jury is investigating possible criminal activity by other individuals and entities.[4]

Given that fact, the President does not challenge the grand jury investigation as such, nor could he. He does not and cannot claim that other potential targets of the grand jury are immune from indictment and prosecution because of their personal association with him. And he does not claim that the financial records maintained by his accountants are irrelevant to the grand jury's investigation. Instead, he claims that the grand jury may not obtain those records simply because he is President. Advancing a boundless view of absolute presidential immunity, he contends that nothing about his private life is subject to state judicial process while he is in office, regardless of the purpose for which the evidence will

[4] "The parties agree for purposes of this case that the grand jury is investigating whether several individuals and entities have committed violations of New York law." *Trump*, 941 F.3d at 635.

be used and against whom. The Second Circuit properly rejected this unprecedented claim.

A. No Person, Including the President, Is Above the Law.

This Court has repeatedly held that no person is above the law. "All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it." *United States v. Lee*, 106 U.S. 196, 220 (1882).

The President nonetheless argues that his "unparalleled responsibilities" grant him absolute immunity from any "state criminal process while in office," Pet. Br. at 16, 20, even where that "process" consists only of a subpoena for records directed to his accountant. According to the President, this claimed immunity is a function of his office and its "unique status" within our constitutional framework. *Id.* at 25. It therefore applies categorically in his view. The needs of the criminal justice system are irrelevant and the burdens on the President can simply be presumed to prevail in all cases, without any need for a particularized showing.

Under the President's theory, it does not matter that the records that were subpoenaed involve his personal finances rather than his presidential duties. It does not matter that the subpoena was served on a third-party custodian rather than the President himself. And it does not matter that the grand jury that issued the subpoena is investigating others beside the President. Indeed, on President Trump's theory, it would not matter how grave the crimes being investigated are, or how essential his evidence is to bringing the perpetrators to justice. None of that matters because the

President's proposed rule does not contemplate any balancing of interests. The President claims he can ignore, and direct his agents to ignore, any and all efforts by a state grand jury to gather evidence relevant to a presumptively legitimate criminal investigation regardless of facts or circumstances, simply because he is President.

The implications of that position are striking. During the 2016 campaign, the President famously predicted that he would not lose a single vote if he shot someone in the middle of Fifth Avenue. *See* Katie Reilly, *Donald Trump Says He "Could Shoot Somebody" and Not Lose Voters*, Time (Jan. 23, 2016), https://time.com/4191598/donald-trump-says-he-could-shoot-somebody-and-not-lose-voters/. That observation prompted a member of the Second Circuit panel below to ask whether the President could be prosecuted in office for a murder committed before assuming office. The President's lawyer responded that he could not be. *See* Anne E. Marimow & Jonathan O'Connell, *In Court Hearing, Trump Lawyer Argues A Sitting President Would Be Immune From Prosecution Even If He Were To Shoot Someone*, Wash, Post (Oct. 23, 2019), https://www.washingtonpost.com/local/legal-issues/ny-based-appeals-court-to-decide-whether-manhattan-da-can-get-trumps-tax-at-returns/2019/10/22/8c491346-ef6e-11e9-8693f487e46784aa_story.html.[5]

The President's theory in this case goes far beyond his claimed immunity from prosecution.

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[5] *See also* Oral Argument, *Trump v. Vance*, 941 F.3d 631 (No. 19-3204), http://www.ca2.uscourts.gov/decisions/isysquery/452596aa-90cc-4a01-97ed-b3ceeedd66f8/197/doc/19-3204.mp3.

Even if evidence of his personal records were necessary to bring another person to justice for murder, the President insists that his asserted absolute immunity would prevail. *But see United States v. Nixon*, 418 U.S. at 713 (rejecting claim of executive privilege where evidence of White House deliberations was relevant to a criminal trial); *Nixon v. Sirica*, 487 F.2d 700, 711 (D.C. Cir. 1973) (holding that "the President is not above the law's commands").

Donald Trump's current status as President of the United States does not *per se* place him beyond the law's reach. The law has said otherwise for more than two centuries.

B. The Absolute Immunity That the President Seeks Goes Beyond Anything That This Court Has Previously Recognized.

Two clear principles emerge from this Court's past cases on presidential immunity, and each is inconsistent with the President's claims here. First, the President, like any other citizen, can be required to produce relevant evidence in a criminal proceeding subject to appropriate safeguards that acknowledge the special nature of his office. Second, the doctrine of presidential immunity is intended to protect the office of the presidency, not the President himself for acts taken purely in his personal capacity. Whether or not immunity is justified in a particular case depends on a functional analysis. And that means that the President, like other officials who enjoy functional immunity, is not entitled to immunity for acts taken outside the scope of his official duties.

Over 200 years ago, Chief Justice Marshall upheld a subpoena *duces tecum* to President Jefferson in connection with the prosecution of Aaron Burr. *United States v. Burr,* 25 Fed. Cas. 30 (C.C.D. Va 1807). Burr, who was then on trial for treason, sought a letter written to President Jefferson that he thought would exonerate him by calling into question the credibility of his principal accuser. Jefferson resisted, even though he had acknowledged the existence of the letter in a communication to Congress.

Marshall began his opinion by noting that only the king was exempt under common law from the general requirement binding on everyone else to provide relevant evidence in a judicial proceeding pursuant to court order. Writing a mere three decades after the Declaration of Independence, Marshall explained why a rule applicable to the king did not apply to the President. In particular, he noted, the English maxim that the "king can do no wrong" was inconsistent with the founding principles of the American republic. *Id.* at 34.

George Hay, the United States Attorney prosecuting the *Burr* case, agreed:

> I never had the idea of clothing the President . . . with these attributes of divinity . . . . That high officer is but a man; he is but a citizen; and, if he knows anything in any case civil or criminal, which might affect the life, liberty, or property of his fellow citizens . . . it is his duty to . . . go before a Court, and declare what he knows.

T. Carpenter, *The Trial of Colonel Aaron Burr* 90-91 (1807), cited in Raoul Berger, *The President, Congress, and the Courts*, 83 Yale L.J. 1111, 1111 n.1 (1974). Even counsel for President Jefferson in the Burr case admitted: "We do not think that the President is exalted above legal process . . . if the President possesses information of any nature which might tend to serve the cause of Aaron Burr, a subpoena should be issued to him, notwithstanding his elevated position." *Id.* at 75.

Summarizing this legal consensus in a second opinion written several months later (when Burr was facing misdemeanor charges), Chief Justice Marshall wrote: "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." *United States v. Burr*, 25 Fed. Cas. 187, 191 (C.C.D. Va. 1807).

Closer to our own time but in an equally fraught political environment, the Court unanimously rejected President Nixon's claim of absolute privilege in response to a subpoena *duces tecum* from the Watergate Special Prosecutor seeking, *inter alia,* designated recordings of Oval Office conversations that were deemed material to an ongoing grand jury investigation. *United States v. Nixon*, 418 U.S. 683. As in *Burr,* the Court acknowledged the President's ability to assert particularized privilege claims subject to judicial review if he chose to do so. But reaffirming that "the public . . . has a right to everyman's evidence," *id.* at 709 (internal citations omitted), the Court held that "neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified

Presidential privilege of immunity from judicial process under all circumstances," *id.* at 706.[6]

Indeed, sitting Presidents have provided evidence in criminal proceedings throughout American history, both voluntarily and in response to court order. As the Court has previously chronicled: "President Monroe responded to written interrogatories . . . President Ford complied with an order to give a deposition in a criminal trial . . . President Clinton [] twice [gave] videotaped testimony in criminal proceedings . . . and President Grant gave a lengthy deposition in a criminal case." *Clinton v. Jones*, 520 U.S. 681, 704-05 (1997).

A President's duty to respond to a subpoena in connection with a pending criminal proceeding against a third-party is thus firmly established as a matter of both principle and practice. Here, of course, the Mazars subpoena was not directed to the President—it was directed to his accountants. If the President can be subpoenaed directly to provide evidence in a criminal proceeding, surely his accountants may be as well.

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[6] The President contends that *Nixon* is distinguishable because it involved a "claim of privilege" and did not address the "claim of presidential immunity" raised here. Pet. Br. at 43-44. That President Nixon failed to raise a "claim of presidential immunity" that had been definitively rejected more than a century and a half earlier by Chief Justice Marshall's opinion in *Burr* hardly bolsters President Trump's legal position. President Nixon advanced a claim grounded in an executive privilege doctrine that this Court has recognized. *See United States v. Nixon,* 418 U.S. at 703-07. President Trump's immunity claim is tethered to nothing, because there is no basis even to assert executive privilege for private records having nothing to do with the President's official duties.

In *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), this Court first recognized the President's absolute immunity from civil damages arising from his official acts in a suit brought against then-former President Nixon by a whistleblower who claimed he had been unconstitutionally fired. In *Clinton*, 520 U.S. at 695, the Court held that the broad immunity conferred by *Fitzgerald* nonetheless had its limits, and those limits are defined by the scope of the President's official duties. The Court, therefore, unanimously rejected President Clinton's contention that he should be immune from civil proceedings for actions taken in his personal capacity as long as he was in office.

It is true that *Fitzgerald* and *Clinton v. Jones* were both civil cases that did not involve criminal investigations, but the Court's approach to immunity has not materially differed between the civil and criminal contexts. The substantial weight that the President places on this distinction is thus unwarranted. For example, in *Ex Parte Virginia*, 100 U.S. 339 (1880), the Court considered a claim of absolute judicial immunity raised by a county judge who had been indicted for racial discrimination in jury selection. In rejecting that claim, the Court focused on the fact that the act of jury selection was not quintessentially judicial in nature. In later describing that decision, the Court observed that "the reach of the . . . analysis [in *Ex Parte Virginia*] was not in any obvious way confined" by the fact that it involved a criminal proceeding rather than a civil suit. *Forrester v. White*, 484 U.S. 219, 228 (1988).

Any grant of immunity necessarily involves a balancing of interests. On the one hand, there is the litigant's interest in a fair trial—whether it is a civil

plaintiff, a criminal defendant, or a public prosecutor—in which relevant evidence is not unnecessarily withheld. On the other hand, there is the public's interest in ensuring that government officials are not unduly chilled in the exercise of their public duties by the fear of civil liability or criminal prosecution. In striking that balance, the Court has been careful to caution that "immunities are grounded in the nature of the function performed, not the identity of the actor who performed it." *Clinton*, 520 U.S. at 695 (internal quotation marks omitted).

The Court's approach to presidential immunity in this regard is not fundamentally different than its approach to other types of official immunity. Thus, the Court's decision in *Nixon v. Fitzgerald* referenced the absolute immunity previously granted to legislators and judges, *see* 457 U.S. at 751-52, and the limits on those official immunities are instructive in understanding the limits that the Court has placed on presidential immunity.

Legislators are entitled to absolute immunity for their "legislative acts," but that immunity does not extend to non-legislative acts. *See Davis v. Passman*, 442 U.S. 228, 246 (1979) (Congressman's termination of employee regarded as administrative, not legislative act under the Speech and Debate Clause); *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951) (legislators are entitled to absolute immunity when "acting in the sphere of legitimate legislative activity").

Judges are entitled to absolute immunity for official acts within their statutory jurisdiction, but not for non-judicial acts. *Forrester,* 484 U.S. at 229

(judge was acting in an administrative capacity, and thus not entitled to absolute judicial immunity, when he demoted and dismissed a parole officer); *Stump v. Sparkman*, 435 U.S. 349, 362 (1978) ("the factors determining whether an act by a judge is a 'judicial' one relate to the nature of the act itself"); *Pierson v. Ray*, 386 U.S. 547, 554 (1967) (absolute immunity for judges applies "for acts committed within the judicial jurisdiction").

Prosecutors likewise enjoy absolute immunity for activities that are intimately associated with the judicial phase of criminal process, but not for investigative activities, and, *a fortiori*, not for acts in their personal capacity. *See Buckley v. Fitzsimmons,* 509 U.S. 259, 277 (1993) (prosecutors not entitled to absolute immunity when performing investigative functions); *Burns v. Reed,* 500 U.S. 478, 496 (1991) (prosecutor's absolute immunity does not apply when giving advice to the police).

"The point of immunity for such officials is to forestall an atmosphere of intimidation that would conflict with their resolve to perform their designated functions in a principled fashion." *Clinton*, 520 U.S. at 693 (quoting *Ferri v. Ackerman*, 444 U.S. 193, 202 (1979)). So, too, this Court has cited the risk that a President might become "unduly cautious in the discharge of his official duties," *Nixon v. Fitzgerald*, 457 U.S. at 752 n.32, as the "central concern," underpinning a President's absolute immunity from civil damages for official acts, *Clinton*, 520 U.S. at 693-94.

Because the President occupies a unique position in our constitutional scheme, the Court's decision in *Nixon v. Fitzgerald* extended the

President's absolute immunity to acts that fall "within the outer perimeter of his official responsibility." 457 U.S. at 756. The Court has also recognized, however, that even those expansive boundaries have meaningful limits. *Id.* When called on to define those limits, the Court applied the same functional approach to analyzing the President's claim of absolute immunity in *Clinton v. Jones* that it had previously applied when analyzing the scope of other absolute immunities. *See, e.g.*, *Imbler v. Pachtman*, 424 U.S. 409, 423 (1976). As with legislators, judges, and prosecutors, the Court ruled that the President's immunity is tied to his official acts, and does not reach conduct in his personal capacity. *Clinton*, 520 U.S. at 694.

While there may be difficult cases at the margins, this case is not one of them. The Court has never once "suggested that the President, or any other official, has an immunity that extends beyond the scope of any action taken in an official capacity." *Clinton*, 520 U.S. at 694. Here, as in *Clinton v. Jones*, there can be no credible claim that the records subpoenaed from the President's accountant have anything to do with his official duties. The complaint in *Clinton v. Jones* rested on allegations of sexual harassment by President Clinton before he was President. The grand jury subpoena in this case seeks only President Trump's personal financial records unrelated to any official activities. Indeed, it is far from clear that a functional analysis is even necessary under these circumstances. *Clinton*, 520 U.S. at 694 ("when defining the scope of an immunity for acts clearly taken *within* an official capacity, we have applied a functional approach" (emphasis in original)).

Likewise, there is no basis for imposing a heightened standard of need for the personal records sought by the Mazars subpoena. In *United States v. Nixon*, the Court suggested that *official presidential records* are presumptively protected from disclosure by executive privilege that may be overcome only upon a showing that they are "essential to the justice of the (pending criminal) case." 418 U.S. at 713 (citing *United States v. Burr*, 25 Fed. Cas. at 192). Both the President and the United States, as *amicus curiae*, urge the Court to require such a showing in this case. But there is no basis for requiring a heightened showing where, as here, the materials sought are beyond the scope of the President's official duties and therefore neither privileged nor immune from disclosure. *See Clinton*, 520 U.S. at 694.

In *Nixon*, the need for a heightened showing was justified by "the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking." *United States v. Nixon*, 418 U.S. at 708. Those concerns are not present where the materials sought relate solely to personal activities. Indeed, the Court did not require any heightened showing to defeat President Clinton's claimed immunity from a lawsuit involving his personal conduct. Instead, the fact that President Clinton was being sued for acts taken beyond the scope of his official duties ended the analysis. There was no need for a more vigorous standard because there was no immunity or privilege to overcome.

The United States argues that "the threat of debilitating the President in office requires a heightened showing of need." U.S. Br. at 28. But the Court has specifically rejected the notion that such

an amorphous, generalized assertion is sufficient to invoke executive privilege, even where, unlike here, the records concerned Oval Office deliberative communications. *United States v. Nixon*, 418 U.S. at 713 ("We conclude that when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice."). At the very least, the President has the burden of showing that the absolute immunity he seeks—and the heightened standard he asks the Court to apply—is necessary to protect the Office of the Presidency and not his personal self-interest. President Clinton did not meet that burden in *Clinton v. Jones*, and President Trump has not met it here for reasons set forth more fully below.

II. THE PRESIDENT HAS NOT MADE ANY PARTICULARIZED SHOWING TO JUSTIFY IMMUNIZING HIS PERSONAL RECORDS FROM THE MAZARS SUBPOENA.

Generalized assertions about the President's unique constitutional status and responsibilities are insufficient to justify the absolute immunity President Trump seeks. Yet, that is the sum and substance of the President's claim on this record. Were that enough, the Court would not have reached the unanimous outcomes it did in *Clinton v. Jones* and *United States v. Nixon*.

The President offers three principal arguments in support of his claimed immunity. First, he maintains that a President's purported

immunity from indictment and prosecution while in office—an immunity question that this Court has never addressed—necessarily means that his personal records can never be subpoenaed from a third-party custodian as part of a grand jury investigation into other individuals and entities if there is any possibility that the investigation might also involve the President at some future undetermined point in some future undetermined way. Next, he contends that the Mazars subpoena will impermissibly interfere with his presidential duties. And finally, he argues that the Mazars subpoena is unenforceable because it was issued by a state grand jury. None of these arguments is persuasive.

A. Whatever Immunity the President May Have From Criminal Prosecution Does Not Warrant the Relief He Seeks Here.

The President's legal argument begins with the proposition that a sitting President cannot be criminally prosecuted. Pet Br. at 19-23. Regardless of the validity of that proposition, this case does not involve a criminal prosecution and the arguments for recognizing a President's immunity from prosecution do not apply here, where the only issue is whether a grand jury may obtain a President's relevant personal records to aid a valid criminal investigation implicating others.

The President relies on a quote from Joseph Story, who wrote in his *Commentaries on the Constitution* that the President "cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of his duties." *See* 3 Joseph Story,

Commentaries on the Constitution of the United States, § 1563, 418-19 (1st ed. 1833), quoted in *Nixon v. Fitzgerald*, 457 U.S. at 749. He also cites two memos from the Department of Justice's Office of Legal Counsel ("OLC") that similarly assert that a sitting President is immune from indictment and trial. *See* Randall D. Moss, Ass't Att'y Gen., *A Sitting President's Amenability to Indictment and Criminal Prosecution*, 24 O.L.C. Op. 222 (Oct. 16, 2000) ("Moss Memo"); Robert G. Dixon, Jr., Ass't Att'y Gen., O.L.C., *Re: Amenability of the President, Vice-President, and Other Civil Officers for Federal Criminal Prosecution While in Office* (Sept. 24, 1973) ("Dixon Memo").

Those authorities might be relevant if the President had been arrested, detained, imprisoned, indicted, or put on trial. He has not been. This case involves only a subpoena for documents from a third party, and nothing more. The difference is dispositive. Story reasoned that the powers granted to the President in Article II of the Constitution "necessarily included the power to perform them," § 1563, which would be substantially hindered if the President were arrested, imprisoned or detained while in office, *id*. His concern was one of incapacitation. The OLC memos echo that concern. *See* Dixon Memo at 28 ("A necessity to defend a criminal trial and attend court in connection with it . . . would interfere with the President's unique official duties."); Moss Memo at 253 ("[A] criminal prosecution would require the President's personal attention and attendance at specific times and places.").

In addition, the OLC memos argue that impeachment is a more appropriate response to

allegations of wrongdoing by a sitting President because the Constitution expressly provides for impeachment, and because the political judgment to remove an elected President from office is more appropriately made by the people's political representatives than by a randomly selected criminal jury. *See* Dixon Memo at 32; Moss Memo at 258.

None of these concerns is present here. The Mazars subpoena does not threaten the President with removal from office and it is not incapacitating. The President attempts to obscure these critical distinctions by treating the grand jury subpoena as a form of criminal prosecution. That tautology breaks down, however, once removal and incapacitation are taken out of the equation.

Indeed, the most remarkable thing about the President's reliance on the OLC memos is his disregard of OLC's most pertinent conclusion. Seemingly anticipating the issue presented in this case, OLC carefully distinguished between *indictment* of a sitting President and pre-indictment *investigation* when it observed 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 Memo at 257 n.36.

If that is true with regard to a criminal investigation of the President, it is even more true with regard to an investigation of the President's associates and business entities, who have no plausible claim to any immunity. *See Dennis v. Sparks*, 449 U.S. 24, 30 (1980) (judicial immunity does not extend to a judge's alleged co-conspirators). The President's interests are not the only interests at

stake here. If there is evidence bearing on the potential criminal liability of other targets, the grand jury is entitled to receive it so that, if appropriate, charges can be filed and tried in a timely fashion before memories become stale and the statute of limitation lapses. Equally important, the grand jury's deliberations will be necessarily compromised if it is denied access to potentially exculpatory evidence. Under either scenario, "[w]ithout access to specific facts a criminal prosecution may be totally frustrated." *United States v. Nixon*, 418 U.S. at 713.

Article II of the Constitution does not grant the President unilateral power to shape the course of judicial proceedings in this manner. "[L]ike every other citizen, [the President] is under legal duty to produce relevant, non-privileged evidence when called upon to do so," a duty that even President Nixon recognized in the midst of the Watergate investigation. *Nixon v Sirica*, 487 F.2d at 713.

B. The Mazars Subpoena Imposes No Burden On the President's Constitutional Duties, and Certainly None That Is Sufficient to Support the Absolute Immunity He Claims.

The President argues that compliance with the Mazars subpoena "will inevitably distract, burden, and stigmatize the President in ways that justify affording him immunity while he is in office." Pet. Br. at 29-30. This Court should reject that conclusory claim, just as it rejected an equally generalized claim of absolute privilege in *United States v. Nixon*:

> To read the Art. II powers of the President as providing an absolute privilege as against a subpoena

> essential to enforcement of criminal statutes on no more than a generalized claim of the public interest in confidentiality of nonmilitary and nondiplomatic discussions would upset the constitutional balance of "a workable government" and gravely impair the role of the courts under Art. III.

418 U.S. at 708.

Like anyone else whose records have been subpoenaed, the President has standing to challenge the Mazars subpoena. *See Trump*, 941 F.3d at 642 n.15. He can assert that the documents sought are privileged or that the scope of the subpoena is unreasonable. The courts can then evaluate those specific defenses on a case-by-case basis. That is the process prescribed in *Burr*, *Nixon*, and *Clinton v. Jones*. But it is not the process that the President has pursued in this case, which begins and ends with his claim of absolute immunity.[7]

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[7] The President highlights this Court's statement that "[i]n no case of this kind would a court be required to proceed against the president as against an ordinary individual." *United States v. Nixon*, 418 U.S. at 715 (quoting *United States v. Burr*, 25 F. Cas. at 192). Contrary to the President's suggestion, however, that statement is not an endorsement of absolute presidential immunity from criminal process. The Court explained that its statement "cannot be read to mean in any sense that a President is above the law, but relates to the singularly unique role under Art. II of a President's communications and activities, related to the performance of duties under that Article." *Id.* The statement thus has no bearing here, since the materials the Mazars subpoena seeks do not relate to the performance of the President's constitutional duties.

In considering whether to recognize even a limited claim of presidential privilege, the courts must weigh the "inroads of such a privilege on the fair administration of criminal justice." *United States v. Nixon*, 418 U.S. at 711-12. Some burdens on the President's time are an inescapable and tolerable "byproduct" of any litigation, even for the President. *Clinton*, 520 U.S. at 705-06.

Here, the scale tips decidedly against immunity. The President does not identify any specific burden imposed by the Mazars subpoena. He admits that he "would never personally undertake the laborious task of compiling, indexing, and producing responsive documents" even if the subpoena was served on him personally, Pet. Br. at 37, and he will of course have even less responsibility for his *accounting firm's* response. As the Second Circuit succinctly noted: "The subpoena at issue is directed not to the President, but to his accountants; compliance does not require him to do anything." *Trump*, 941 F.3d at 642. He need not respond; he need not appear; he need not even collect documents.

Nor can the President explain how the unspecified "distractions and mental burdens," Pet. Br. at 38, that purportedly accompany this subpoena intrude "on the authority and functions of the Executive Branch," *Nixon v. Fitzgerald*, 457 U.S. at 754. The Court has already held that generalized concerns about the disclosure of *official* presidential communications do not sufficiently affect the President's authority and functions to warrant immunity. *United States v. Nixon*, 418 U.S. at 706. The Mazars subpoena seeks only personal records. It does not require exposing any official presidential documents; it will not reveal any military,

diplomatic, or national security secrets; and it will not chill the President's ability to speak candidly with his advisors. The President does not identify a single aspect of his job that will be affected by the Mazars subpoena.

The President's concerns about stigma are woefully deficient as well. People, corporations, and governments are routinely compelled to provide evidence in connection with a criminal investigation. There is no stigma associated with such compulsion. Nor is a grand jury subpoena "a public allegation of wrongdoing," as the President contends. Pet. Br. at 42. The President has not been accused of any wrongdoing —he has been asked (through his accounting firm) to provide evidence that is relevant to a criminal investigation.

To the extent that there may be stigma attached to the fact that President's personal records are being sought by a criminal grand jury, that fact is already known. Preventing the grand jury from seeing the evidence will not make it disappear. And allowing the grand jury to see his personal records will not make them public. Grand juries are shrouded in secrecy precisely "to assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule." *Doubles Oil Co. of Ca. v. Petrol Stops Nw.*, 441 U.S. 211, 219 (1979).

In any event, the Constitution does not guarantee the President freedom from any stigma that may arise from allegations contained in civil and criminal filings. *See Clinton v. Jones*, *supra*. President Trump is not the first sitting President to face the prospect of such litigation-related stigma.

President Nixon, for example, was named as an unindicted co-conspirator in the Watergate indictment. *United States v. Nixon*, 418 U.S. at 687 n.2. Nor is this the first instance in which President Trump's connection to a court case has created the potential of stigma. Federal prosecutors accused President Trump of directing "illegal payments to ward off a potential sex scandal that threatened his chances of winning the White House in 2016," as part of a sentencing memo submitted in the case of Michael Cohen, the President's former personal lawyer. Sharon LaFraniere, Benjamin Weiser & Maggie Haberman, *Prosecutors Say Trump Directed Illegal Payments During Campaign*, N.Y. Times (Dec. 7, 2018), https://www.nytimes.com/2018/12/07/nyregion/michael-cohen-sentence.html. And President Trump has been named as a defendant in an ongoing defamation lawsuit related to an alleged sexual assault. *See* Jan Ransom, *E. Jean Carroll, Who Accused Trump of Rape, Sues Him for Defamation*, N.Y. Times (Nov. 4, 2019), https://www.nytimes.com/2019/11/04/nyregion/jean-carroll-sues-trump.html.

Most important, if documents produced in response to the subpoena in this case either contain evidence of criminal behavior by the President or lead to such evidence, any associated stigma would be a product of the criminal acts themselves, not the grand jury's investigation.

C. The President Is Not Immune from the Grand Jury Subpoena Because It Was Issued by a New York Grand Jury.

Given this Court's unanimous rejection of absolute immunity to the production of documents even when they recorded the President's official deliberations in the White House, *United States v. Nixon*, *supra*, the President is ultimately reduced to arguing that the Supremacy Clause compels a different result here because the Mazars subpoena was issued by a state grand jury rather than a federal grand jury. Pet. Br. at 23-39; *see also* Brief for United States as *Amicus Curiae*. It does not.

The purpose of the Supremacy Clause is to ensure that state action does not frustrate federal law. U.S. Const., art VI. Accordingly, under the Supremacy Clause (and the related preemption doctrine), states may not adopt policies or practices that are inconsistent with federal law, interfere with the enforcement of federal law, or regulate in areas where the federal government has demonstrated an intent to occupy the field. *See e.g.*, *Missouri v. Holland*, 252 U.S. 416 (1920) (state may not prevent U.S. officials from enforcing a federal treaty). None of those concerns are implicated here.

Indeed, the distance between this case and the proper application of the Supremacy Clause is best illustrated by the President's misplaced reliance on *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). In holding that the Bank of the United States was not subject to state taxation, Chief Justice Marshall emphasized that the Bank had been chartered by federal law, that the adoption of the

charter was a proper exercise of the federal government's lawmaking power under the Necessary and Proper Clause, that the power to tax was the power to destroy, and that the state's effort to tax the Bank therefore violated the Supremacy Clause. In short, *McCulloch* involved a state attempt to directly undermine an official act of the United States government. The same is true of every other Supremacy Clause case cited by the President, *see* Pet. Br. at 24-25, as his own descriptions of those cases make clear. It is not, however, an even remotely apt description of the facts in this case, which involve no interference with any federal program or law, but only a routine subpoena for personal records in connection with a presumptively legitimate state law investigation.

The President's assertion that the Supremacy Clause forbids state officials from taking any action that would impede his ability to fulfill his Article II responsibilities, either directly or indirectly, is similarly unpersuasive. First, as the Second Circuit correctly observed, this third-party subpoena does not involve any "direct control by a state court over the President." *Trump*, 941 F.3d at 642 (internal quotations omitted). Second, as explained above, *see supra*, pp. 23-27, this third-party subpoena does not impose any direct burdens on the President that might prevent him from performing his official duties.

The President does not even seriously contend otherwise. Instead, he argues that this subpoena should be quashed because it will otherwise encourage other prosecutors in other jurisdictions to initiate criminal proceedings that begin with subpoenas but might lead to indictment, and that the

cumulative effect of that speculative domino effect will cripple this and future Presidents absent a prophylactic grant of absolute immunity. President Trump is not the first President to raise such dire warnings about a slippery slope. *See* Brief for Petitioner, *Clinton v. Jones*, 520 U.S. 681 (1997) (No. 95-1853), 1996 WL 448096, at *23 ("if the Court allows private civil damages litigation to proceed against a sitting President . . . Presidents likely would become easily identifiable target[s] for private civil damages actions in the future. Those seeking publicity, financial gain or partisan political advantage would be altogether too willing to use the judicial system as an instrument to advance their private agendas at the expense of the public's interest in unimpeded constitutional governance." (internal quotation marks and citation omitted) (alteration in original)). But as in *Clinton v. Jones*, the President's "predictive judgment finds little support in either history or the relatively narrow compass of the issues raised in this particular case." 520 U.S. at 702.

The President points out, with apparent alarm, that there are 2300 local prosecutors across the nation who are not subject to any centralized control, ignoring the fact that only a handful of those prosecutors will have jurisdiction over a President's private acts (all that this case involves), even for a President like this one with extensive business holdings. Furthermore, President Trump asks this Court to disregard the presumption of regularity generally afforded government officials and assume, as a universal proposition, "that politics [will] infect state and local decisionmaking," Pet. Br. at 26, despite the oath that all prosecutors take to uphold

the Constitution. This Court should not indulge that assumption.

His floodgates argument rests on a single press release from the New York State Attorney General, Pet. Br. at 26-27, who did not even issue the subpoena in this case. It is also undercut by the President's acknowledgement that "this case appears to be the first time a state or local prosecutor . . . [has] issued a grand jury subpoena for [the] personal records" of a sitting President. *Id.* at 28.

Finally, the President's request for absolute immunity cannot be justified based on a hypothetical fear that local courts may be infected by political bias. The Second Circuit's discussion of *Younger* abstention makes clear that this and future Presidents will be able to seek appropriate relief from the federal courts where they can make a particularized showing of actual harm to the ability to function as President. That showing has simply not been made on this record.

In short, President Trump asks for extraordinary relief here—the right to block a request for evidence of his personal records, relevant to a bona fide criminal investigation of others. The last two times Presidents have asserted anything even remotely like the immunity the President seeks here, this Court unanimously rejected the claims, confirming that Presidents are not above the law. This Court should do the same.

CONCLUSION

The judgment below should be affirmed for the reasons stated herein.

Respectfully Submitted,

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