No. 19-635

IN THE
Supreme Court of the United States

DONALD J. TRUMP, President of the United States,
Petitioner,

v.

CYRUS R. VANCE, JR., in his official capacity as District Attorney of the County of New York; MAZARS USA, LLP,
Respondents.

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

BRIEF FOR PETITIONER

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QUESTION PRESENTED

The District Attorney for the County of New York is conducting a criminal investigation that, by his own admission, targets the President of the United States for possible indictment and prosecution during his term in office. As part of that investigation, he served a grand-jury subpoena on a custodian of the President's personal records, demanding production of nearly ten years' worth of the President's financial papers and his tax returns. That subpoena is the combination—almost a word-for-word copy—of two subpoenas issued by committees of Congress for these same papers. The Second Circuit rejected the President's claim of immunity and ordered compliance with the subpoena.

The question presented is: Whether this subpoena violates Article II and the Supremacy Clause of the United States Constitution.

PARTIES TO THE PROCEEDING

Petitioner is Donald J. Trump, President of the United States. He was the plaintiff in the district court and appellant in the court of appeals.

Respondents are Cyrus R. Vance, Jr., in his official capacity as District Attorney of the County of New York, and Mazars USA, LLP. Respondents were defendants in the district court and appellees in the court of appeals.

TABLE OF CONTENTS

Page

TABLE OF CITED AUTHORITIES

Page(s)

Cases

Constitutional Provisions, Statutes and Rules:

Other Authorities:

OPINIONS BELOW

The opinion of the Second Circuit is reported at 941 F.3d 631 and is reproduced in the Appendix to the Petition ("App.") at 1a-29a. The opinion of the Southern District of New York is reported at 395 F. Supp. 3d 283 and is reproduced at App. 30a-95a.

JURISDICTION

The judgment of the Second Circuit was entered on November 4, 2019. The petition for a writ of certiorari was filed on November 14, 2019, and was granted on December 13, 2019. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved in this case are: U.S. Const. art. I, §3, cl. 7; U.S. Const. art. II, §1, cl. 1, §2, §3, §4; U.S. Const. art. VI, cl. 2. They are reproduced in the Appendix to the Petition at 127a-29a.

STATEMENT OF THE CASE

A. Background

For years, the President's political opponents have not hidden their desire to investigate and expose his personal finances. His finances in general, and tax returns in particular, were a prominent issue in the 2016 presidential campaign. They became a priority of the Democratic Party both before and after the 2018 elections. *See* Richard Rubin, *Trump's Tax Returns in*

the Spotlight if Democrats Capture the House, Wall St. J. (Oct. 3, 2018), on.wsj.com/2GmBW63; J.M. Reiger, *Democrats Plan To Request President Trump's Tax Returns in 2019. Here's How They'll Do It*, Wash. Post (Dec. 18, 2018), wapo.st/3aCAWJ3. When the 116th Congress convened, the President's personal finances were the subject of several hearings in the House of Representatives. *See, e.g.,* Hearing Before the House Committee on Oversight and Reform, 116th Cong. (Feb. 27, 2019), bit.ly/38C97yA.

Shortly after those hearings, in April 2019, the House Oversight Committee issued a subpoena to the President's accounting firm, Mazars USA, LLP. *See Trump v. Mazars USA, LLP*, 940 F.3d 710, 716-17 (D.C. Cir. 2019), *cert. granted* --- S. Ct. ---, No. 19-715 (Dec. 13, 2019). Mazars is responsible for, among other things, preparing financial statements for the President and his businesses, as well his personal tax returns. *See id.* In a letter released by its Chairman, the Committee claimed to be investigating a number of issues relating to "the President's representations of his financial affairs." *Id.* at 716. In a memorandum, the Chairman added that the Committee wanted the records to examine, among other things, whether the President was violating the Emoluments Clauses of the U.S. Constitution and federal financial disclosure laws. *See id.* at 716-17. The legality of the subpoena was quickly challenged, and it has repeatedly been stayed as part of that litigation—most recently by this Court. *See* Order, *Trump v. Mazars USA, LLP,* No. 19A545 (Nov. 25, 2019).

That same month, two other House committees served subpoenas on Deutsche Bank AG, one of the President's lenders. The subpoenas, among other things, sought the President's tax returns. The committees claimed that they needed those returns as part of an investigation into money laundering and foreign influence in the bank and real estate sectors. *Trump v. Deutsche Bank AG*, 943 F.3d 627, 657-58 (2d Cir. 2019), *cert. granted* --- S. Ct. ---, No. 19-760 (Dec. 13, 2019). Again, the legality of those subpoenas was challenged in court. They also have repeatedly been stayed as part of that litigation, including most recently by this Court. *See* Order, *Trump v. Deutsche Bank,* No. 19A640 (Dec. 13, 2019). Deutsche Bank revealed to the Second Circuit that it does not have any of the President's returns. *See Deutsche Bank*, 940 F.3d 146, 151 (2d Cir. 2019).

At roughly the same time, the House Ways and Means Committee subpoenaed the President's federal tax returns from the Treasury Department. But the Treasury Department declined to disclose the returns because the Committee lacked a legitimate legislative purpose. The committee's purpose for demanding the President's returns was transparently political. *See generally Congressional Committee's Request for the President's Tax Returns Under 26 U.S.C. §6103(f)*, 43 Op. O.L.C. 1, 2019 WL 2563046 (June 13, 2019). For example, then-Minority Leader Nancy Pelosi in 2017 called for the Committee "to demand Trump's tax returns from the Secretary of the Treasury" and to "hold a committee vote to make those tax returns public." *Id.* at 8 & n.9 (citation omitted). The current committee chairman, Congressman Richard Neal,

similarly explained that it "is not about the law, this is about custom and practice. It's a settled tradition [that] candidates reach the level of expectation that they're supposed to release their tax forms." *Id.* at 9 & n.12 (citation omitted). This dispute is also embroiled in litigation. *See* Doc. 1, *Comm. on Ways & Means v. U.S. Dept. of Treasury*, No. 19-cv-1974 (D.D.C.). To date, the Committee has been unable to secure these tax documents.

The New York Legislature has also joined in the effort to obtain and publicize the President's tax records. Just before the President's inauguration, Senator Brad Hoylman (D-Manhattan) introduced Senate Bill S8217. It would have required candidates for President to publicly disclose their federal income tax returns from the last five years, or else their names would not appear on the New York ballot and they could not receive New York's electoral votes. Lest anyone be confused about the target of S8217, Senator Hoylman named it the Tax Returns Uniformly Made Public Act, or TRUMP Act.

When the TRUMP Act failed to pass, Senator Hoylman quickly devised another plan to expose the President's finances. Working with Assembly Member Buchwald (D-Westchester), he introduced Assembly Bill A7426 and Senate Bill S5572—the Tax Returns Uphold Transparency and Honesty Act, or TRUTH Act. The bill would have required the Commissioner to publish the President's state income tax returns from the last five years. Although it covered other statewide candidates, the President was the target of the TRUTH Act; after introducing the legislation, the

proponents held a press conference in front of a large banner that said "#ReleaseTheReturns." Kaleb H. Smith, *Lawmakers say: "Release the returns,"* The Legislative Gazette (May 2, 2017), bit.ly/37sNBfs. Hoylman remarked: "If lawmakers in Washington won't force President Trump to release his returns, lawmakers in Albany should instead." *Id.*

When the TRUTH Act failed to pass, Senator Hoylman and Assembly Member Buchwald devised a third way to target the President. By this time, the House Ways and Means Committee and the Treasury Department were disputing whether the President's federal returns should be disclosed to Congress. So Senator Hoylman and Assembly Member Buchwald devised legislation that would use the Committee's request for the President's federal returns as grounds for New York to disclose his state returns to Congress. They named the legislation the Tax Returns Released Under Specific Terms Act, or TRUST Act. It passed on party lines. 2019 N.Y. S.B. 6146 (May 19, 2019); 2019 N.Y. A.B. 7750 (May 19, 2019). The Committee has been enjoined from invoking this provision without notifying the President. *See Trump v. Comm. on Ways & Means*, No. 1:19-cv-02173 (CJN), 2019 WL 6138993 (D.D.C. 2019).

The quest to obtain the President's tax returns took root in California too. On July 30, 2019, Governor Gavin Newsom signed into law the Presidential Tax Transparency and Accountability Act, also known as SB27. That law required all candidates for President to disclose their previous five years of tax returns as a condition of appearing on a primary ballot. But it was

preliminarily enjoined by a federal court, *see Griffin v. Padilla*, 408 F. Supp. 3d 1169 (E.D. Cal. 2019), and the California Supreme Court later invalidated it, *see Patterson v. Padilla*, 451 P.3d 1171 (Cal. 2019).

Toward the end of the summer, Respondent District Attorney of New York County began pursuing yet another investigation into President Trump's business dealings. App. 3a-4a. It appears that this investigation is focused on certain payments made in 2016. *See id.*; *see also* Dan Mangan & Chris Eudaily, *Trump's Ex-Lawyer Michael Cohen Cooperating with New York Prosecutors in Probe of Whether Trump Organization Falsified Records*, CNBC (Sept. 11, 2019), cnb.cx/2pgvfh4.[1]

The District Attorney opened his investigation at a time when the President's political opponents had grown increasingly frustrated with their inability "to get their hands on the long-sought after documents." Lisa Hagen, *Congress Returns, Trump Investigations Resume*, U.S. News & World Report (Sept. 9, 2016), bit.ly/2NGeLIt. There was renewed optimism that a criminal investigation would not face the obstacles that had stymied earlier efforts to expose the President's financial records. There was hope that "it

[1] These payments were first disclosed publicly in January 2018, were discussed in public congressional testimony in April 2019, and were ultimately the subject of a federal campaign-finance investigation that was completed in July 2019—right before the District Attorney activated his investigation. *See* Tom Winter & Rich Schapiro, *Judge Orders Release Of Docs Tied To Michael Cohen's Hush-Money Payments To Stormy Daniels*, NBC News (July 17, 2019), nbcnews.to/2tTVsEr.

may be more difficult" for the President "to fend off a subpoena in a criminal investigation with a sitting grand jury." William K. Rashbaum & Ben Protess, *8 Years of Trump Tax Returns Are Subpoenaed by Manhattan D.A.*, N.Y. Times (Sept. 16, 2109), nyti.ms/34YW4FN.

The District Attorney served a grand jury subpoena on the Trump Organization that demanded numerous records concerning the President and his financial interests. App. 110a-16a. The subpoena was entitled "Investigation into the Business and Affairs of John Doe (2018-00403803)." App. 110a. It sought, among other things, records concerning the President from a three-year period—most of which post-dated his election. App. 112a-14a. It also sought records concerning certain payments (including form W2s and 1099s)—but not tax returns. App. 114a. In an effort to work cooperatively, the Trump Organization began complying with the subpoena and produced thousands of pages of responsive documents.

Shortly after receiving an initial production, however, the District Attorney complained that it did not include the President's tax returns. The Trump Organization responded by pointing out that the tax returns did not fall within the terms of the subpoena and were irrelevant to the investigation. Rather than negotiate over the subpoena's scope or justify the need for the returns, the District Attorney circumvented the President and his business by sending a subpoena to Mazars. App. 117a-22a. This subpoena—which is likewise entitled "Investigation into the Business and Affairs of John Doe (2018-00403803)"—names the

President personally and demands production of a broad swath of his personal records (including his tax returns) from a much longer period than the subpoena to the Trump Organization. App. 117a-20a.

The Mazars subpoena is copied, virtually word-for-word, from the one that the Oversight Committee issued to Mazars. The only difference is that the Oversight Committee did not ask for the President's tax returns. That portion of the District Attorney's subpoena instead tracks the subpoena the House Ways and Means Committee sent to the Treasury Department. In other words, the District Attorney largely cut and pasted his demand from two congressional subpoenas. According to the District Attorney, he decided to copy the two congressional subpoenas because it was more "expeditious." Brief in Opposition to Certiorari ("BIO") 5 n.2.

When the President's lawyers learned of this subpoena, they immediately raised objections to the District Attorney. They explained that the subpoena went far beyond the scope of an investigation about 2016 payments, was an inappropriate attempt to circumvent their objections, and raised constitutional issues. In response, the District Attorney refused to withdraw the subpoena or negotiate to narrow it. He also refused to stay enforcement so the parties could negotiate further or litigate the dispute if they were truly at an impasse.

B. Proceedings Below

On September 19, 2019, the President filed this action challenging the Mazars subpoena as a violation of the temporary immunity that a sitting President enjoys under Article II and the Supremacy Clause of the Constitution. The President sought an emergency injunction to stay enforcement of the subpoena. App. 37a-38a. The Department of Justice filed a statement of interest in support of the President. Mazars filed a letter with the district court stating that because "this action is between Plaintiff [the President] and … Vance," it "takes no position on the legal issues raised by [the President]." D. Ct. Doc. 26.

The parties ultimately agreed to a short stay of enforcement and proceeded to brief and argue the preliminary injunction under a "compressed briefing schedule." App. 7a. During briefing and argument in the district court, the District Attorney reiterated that his office is "seeking the books and records … of the President" to investigate "business transactions that … includ[e] the President" and potential "crimes at the behest of [the President]." D. Ct. Doc. 16 at 12-13, 22, 19. At argument, the District Attorney even expressed concern that he would run out of time to bring "charges" against "the president himself" before he "is out of office." D. Ct. Doc. 38 at 40.

The morning that the stay of enforcement was set to expire, the district court issued a 75-page opinion denying the President's request for injunctive relief and dismissing his complaint. App. 30a. The court held that the President's immunity claim must

be pursued in state court under *Younger v. Harris*, 401 U.S. 37 (1971), and dismissed the complaint on that ground. App. 41a-61a. In an "alternative" holding, the district court denied the President's immunity claim on "the merits." App. 61a.

According to the district court, the President's absolute immunity from criminal process—including indictment and imprisonment—while in office must be assessed on a case-by-case basis. App. 93a. As a result, although the President might be immune from "lengthy imprisonment" or "a charge of murder," he might not be immune from a shorter prison sentence or prosecution for lesser crimes such as "failing to pay state taxes, or of driving while intoxicated." App. 33a, 82a. The district court "reject[ed]" the contrary views of the Justice Department even though those views "have assumed substantial legal force." App. 70a-71a. Applying its balancing test, the district court held that the President is not immune from this subpoena while in office. App. 61a-62a, 93a.

Because Mazars was due to comply with the subpoena within hours of the district court's decision, the President immediately filed a notice of appeal and an emergency motion for stay with the Second Circuit. App. 96a; CA2 Doc. 8. The Second Circuit granted the stay, issued an expedited briefing schedule, and then scheduled oral argument to be heard within sixteen days. App. 100a-02a. The Justice Department filed an

amicus brief supporting the President's position. CA2 Doc. 83 at 8.[2]

At oral argument before the Second Circuit, the District Attorney again made clear he is targeting the President in a criminal investigation for the purpose of possible indictment. Because, in his view, any potential immunity is not triggered until indictment, there is "no basis to object *at this point*." CA2 OA 31:35-37, cs.pn/2CAtWfM (emphasis added). But even if the investigation reaches the point of indictment, the District Attorney would not recognize immunity for a sitting President:

> It's hard for me to say that there could be no circumstance under which a President could ever imaginably be criminally charged or perhaps tried.… You can invent scenarios where you can imagine that it would be necessary or at least perhaps a good idea for a sitting President to be subject to a criminal charge even by a state while in office.

CA2 OA 30:12-21; 37:56-38:08.

On November 4—twelve days after argument—the Second Circuit issued its opinion. App. 1a. It first

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[2] The parties eventually negotiated an agreement under which the District Attorney would forebear enforcement of the Mazars subpoena until final disposition from this Court if Petitioner agreed to seek review from this Court on a highly expedited basis. App. 106a-08a.

disagreed with the district court's dismissal of the suit under *Younger*. App. 8a-14a. As the Second Circuit explained, abstention is unjustified when the action is brought by "the President of the United States, who under Article II of the Constitution serves as the nation's chief executive, the head of a branch of the federal government." App. 10a. It did "not believe that *Younger*'s policy of comity can be vindicated where a county prosecutor, however competent, has opened a criminal investigation that involves the sitting President, and the President has invoked federal jurisdiction 'to vindicate the superior federal interests embodied in Article II and the Supremacy Clause.'" App. 12a (quotation omitted).[3]

But the Second Circuit nevertheless affirmed the district court's denial of a preliminary injunction on the ground that "any presidential immunity from state criminal process does not extend to investigative steps like the grand jury subpoena at issue here." App. 2a. The President, the court held, is therefore unlikely to prevail on his claim that he is "absolutely immune from all stages of state criminal process while in office, including pre-indictment investigation, and that the Mazars subpoena cannot be enforced in furtherance of any investigation into his activities." App. 15a. In the Second Circuit's view, these are, broadly speaking, "'appropriate circumstances'" to enforce a subpoena for the President's documents under the Constitution.

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[3] The District Attorney has expressly abandoned any challenge to that aspect of the Second Circuit's decision. BIO 10-11 n.6.

App. 15a (quoting *Clinton v. Jones*, 520 U.S. 681, 703 (1997)).

In reaching this conclusion, the Second Circuit praised the district court's "thorough and thoughtful decision" rejecting the President's immunity claim. App. 7a. "With the benefit of the district court's well-articulated opinion," it held "that any presidential immunity from state criminal process does not bar the enforcement of [this] subpoena." App. 28a. According to the Second Circuit, it thus had "no occasion to decide ... the precise contours and limitations of presidential immunity from prosecution," and was "express[ing] no opinion on the applicability of any such immunity under circumstances not presented here." App. 15a. It limited the holding "only" to the determination "that presidential immunity does not bar the enforcement of a state grand jury subpoena directing a third party to produce non-privileged material, even when the subject matter under investigation pertains to the President." App. 15a.

The Second Circuit saw *United States v. Nixon*, 418 U.S. 683 (1974), as the "most relevant precedent for present purposes." App. 16a. Under *Nixon*, in the Second Circuit's view, "the President may not resist compliance with an otherwise valid subpoena for private and non-privileged materials simply because he is the President." App. 19a. The court rejected the argument that making the President a "'target' of the investigation" makes this case different from *Nixon*. App. 21a. "The President has not been charged with a crime. The grand jury investigation may not result in an indictment against any person, and even if it does,

it is unclear whether the President will be indicted." App. 22a.

That this subpoena is from a state prosecutor—unlike "*Nixon* and related cases"—also was not a basis for reaching a different result in the Second Circuit's view. App. 21a. Though conceding that "the Supreme Court has not had occasion to address" whether the President is immune from state criminal process, the court held that it need not pass on the issue. App. 21a. That was because, in the court's view, "this subpoena does not involve 'direct control by a state court over the President.'" *Id.* (quoting *Clinton*, 520 U.S. at 691 n.13). Since the subpoena targeted Mazars, "no court has ordered the President to do or produce anything." App. 21a. And since the District Attorney does not seek "the President's arrest or imprisonment" or "compel[] him to attend court at a particular time or place," App. 20a, the Second Circuit was unconvinced that enforcement of the subpoena would "interfer[e]" with the President's execution of his official duties or otherwise "subordinate federal law in favor of a state process." App. 21a. The Second Circuit's ruling was driven, in large part, by its conclusion that the Mazars subpoena does not force "the President *himself* to do anything." App. 20a.

The Second Circuit also rejected the argument that, under *Nixon*, the District Attorney at least had to establish a heightened need for the documents the subpoena seeks. App. 27a-28a. According to the court, that standard applies only when the President has invoked executive privilege. App. 27a-28a. The Second Circuit thus upheld the entire subpoena based solely

on the fact that "the Mazars subpoena seeks evidence in service of an investigation into potential criminal conduct within the District Attorney's jurisdiction." App. 3a-4a n.3. The court did not rely on the "portion" of the District Attorney's declaration that is "redacted from the public record." *Id*.

The Second Circuit thus held that the President is "not entitled to preliminary injunctive relief." App. 29a. It affirmed the "district court's order denying the President's request for a preliminary injunction," it vacated the "judgment of the district court dismissing the complaint on the ground of *Younger* abstention," and it remanded "for further proceedings consistent with this opinion." *Id*. This Court granted certiorari on December 13, 2019.

SUMMARY OF ARGUMENT

This case marks the first time in our country's history that a local prosecutor has sought to subject the sitting President of the United States to criminal process. The District Attorney seeks to compel the production of an enormous swath of the President's personal financial information as part of an ongoing grand jury investigation into the President's conduct. Throughout these proceedings, the District Attorney has pointedly refused to eliminate the President as a target for indictment. Indeed, he has not ruled out indicting—or even trying—the President during his term in office.

There is a reason why this is unprecedented. The Constitution vests in the President—and in him

alone—the Executive Power of the United States. It grants him unparalleled responsibilities to defend the nation, manage foreign and domestic affairs, and execute federal law. The President cannot effectively discharge those duties if any and every prosecutor in this country may target him with criminal process. The Constitution gives to Congress, through its power of impeachment, the sole right to prosecute the sitting President for wrongdoing. Once he leaves office, the President may be subjected to criminal process—but not before then. Text, structure, and history all lead inexorably to this understanding. That is why this has been the consistent position of the Justice Department for nearly 50 years.

The need for temporary presidential immunity is particularly acute when it comes to state and local prosecutors. The Supremacy Clause prohibits state and local officials from using their powers to "defeat the legitimate operations" of the national government. *McCulloch v. Maryland*, 17 U.S. 316, 427 (1819). Local officials thus cannot exercise their power to hinder the Chief Executive in the performance of the duties that he owes to the undivided nation. The risk that politics will lead state and local prosecutors to relentlessly harass the President is simply too great to tolerate. The President must be allowed to execute his official functions without fear that a State or locality will use criminal process to register their dissatisfaction with his performance.

A prosecutor crosses a constitutional line when, as here, he initiates compulsory criminal process upon the President as part of a grand jury proceeding that

targets him. Like indictment itself, criminal process of this kind will inevitably distract the President from his unique responsibilities and burden his ability to act confidently and decisively while in office. It also stigmatizes the President in ways that will frustrate his ability to effectively represent the United States in both domestic and foreign affairs.

This grand-jury subpoena for the President's tax returns and other financial records includes both offending features. First, there is no dispute that the subpoena itself targets the President—it names him personally and seeks his private records. The District Attorney has also repeatedly confirmed the grand jury is investigating the President's conduct and may well charge him while he is in office. The Second Circuit's emphasis on the fact that the subpoena was sent to Mazars, not the President, was misplaced. This Court has long recognized that, under these circumstances, the target of the subpoena has standing to challenge its legality even when he or she is not the subpoena's recipient. The subpoena must be treated as though it was sent directly to the President.

The Second Circuit's focus on who might bear the *physical* burden of compliance for *this* subpoena was also mistaken. The burdens justifying immunity go far beyond the President's personal involvement in compiling and transmitting responsive materials. Nor does immunity turn on the individual burden imposed by any particular subpoena. For immunity purposes, what matters is the cumulative effect of permitting *every* state and local prosecutor to take the same steps the District Attorney did. That is an easy assessment

here: a President besieged with criminal process from hostile local jurisdictions cannot effectively serve the national interest.

The Court's precedent bolsters this conclusion. In *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982), this Court determined that the burdens of civil damages suits against former Presidents for official acts were so great that permanent immunity was needed. The toll that criminal process—for official and unofficial acts alike—exacts from the President is even heavier and thus compels temporary immunity. The Second Circuit concluded that *Clinton* and *Nixon* required a different result. But those cases arose from federal proceedings—a point that was emphasized in both decisions. Indeed, *Clinton* expressly reserved whether the President should be immune from state process while in office given the many concerns that it raises. Further, *Clinton* involved civil litigation for unofficial acts and *Nixon* involved a third-party trial subpoena. The case for immunity from state criminal process is far stronger than in those circumstances.

In fact, *Nixon* provides an independent basis for invalidating the District Attorney's subpoena. In that decision, and in those applying it, the courts have held that there must be a "demonstrated, specific need" for the material sought in a subpoena directed at the President. *Nixon*, 418 U.S. at 713. The threat to the Presidency posed by this compulsory criminal process requires a standard of review at least as rigorous, and the District Attorney cannot remotely make that showing. His subpoena was copied almost word-for-word from subpoenas issued by Congress for

unrelated reasons. The District Attorney seeks, in other words, a trove of the President's personal financial records for reasons unconnected to his investigation—or even to the State of New York. This Court should not validate such an inappropriate demand.

ARGUMENT

I. The President is absolutely immune from state criminal process while in office.

The sitting President's immunity from criminal process is rooted in the Constitution's text, structure, and history. It is confirmed by this Court's precedent. The need for this immunity is even more stark when the process is initiated at the state or local level. The Supremacy Clause does not permit interference with the President's fulfillment of the obligation he owes to the entire nation. This subpoena—from a grand jury that is considering whether to indict the President—is the kind of criminal process that must wait until the he leaves office. That it was served on the President's custodian instead of on him directly is no basis for denying this claim. The President is the grand jury's target and it is demanding his records. He will bear all of the burdens that have justified immunity in the past, and that justify it here.

A. The sitting President has immunity from criminal process.

The powers of the President and the exclusive methods for his removal from office are set forth in the Constitution. The "text, structure, and traditions" of

these provisions, *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995), demonstrate that the President is immune from state criminal process while in office. Immunity is "a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history." *Fitzgerald*, 457 U.S. at 749.

"The executive Power," under the Constitution, is vested in one "President of the United States of America." U.S. Const. art. II, §1, cl. 1. Article II vests "the entire 'executive Power' in a single individual." *Clinton*, 520 U.S. at 710 (Breyer, J., concurring). This makes the President "the only person who is also a branch of government." Jay S. Bybee, *Who Executes the Executioner?*, 2-SPG NEXUS: J. Opinion 53, 60 (1997); *see also* Randolph D. Moss, Asst. Att'y Gen., *A Sitting President's Amenability to Indictment and Criminal Prosecution*, 24 O.L.C. Op. 222, 246-47 (Oct. 16, 2000) ("Moss Memo").

His "unique status under the Constitution" gives the President immense power over foreign and domestic affairs. *Fitzgerald*, 457 U.S. at 750. Among his many duties, *the President* "shall be Commander in Chief of the Army and Navy of the United States," U.S. Const. art. I, §2, and it is "*his* responsibility to take care that the laws be faithfully executed," *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 493 (2010). The Constitution, then, has "entrusted the President with supervisory and policy responsibilities of utmost discretion and sensitivity." *Fitzgerald*, 457 U.S. at 750. "In times of peace or war, prosperity or economic crisis, and tranquility or unrest, the President plays

an unparalleled role in the execution of the laws, the conduct of foreign relations, and the defense of the Nation." Moss Memo 247.

As a result, the President cannot be criminally prosecuted while in office. "Constitutionally speaking, the President never sleeps. The President must be ready, at a moment's notice, to do whatever it takes to preserve, protect, and defend the Constitution and the American people." Akhil Reed Amar & Neal Kumar Katyal, *Executive Privileges and Immunities: The* Nixon *and* Clinton *Cases*, 108 Harv. L. Rev. 701, 713 (1995). The President's "'power to perform'" all these tasks is, in turn, "'necessarily implied'" from the grant of them to him. *Fitzgerald*, 457 U.S. at 749 (quoting 3 Joseph Story, *Commentaries on the Constitution of the United States* §1563, 418-19 (1st ed. 1833)). "To wound him by a criminal proceeding is" thus "to hamstring the operation of the whole governmental apparatus, both in foreign and domestic affairs." Memorandum from Robert G. Dixon, Jr., Asst. Att'y Gen., O.L.C., *Re: Amenability of the President, Vice President, and Other Civil Officers to Federal Criminal Prosecution While in Office* 30 (Sept. 24, 1973) ("Dixon Memo"). It "would place into the hands of a single prosecutor and grand jury the practical power to interfere with the ability of a popularly elected President to carry out his constitutional functions." Moss Memo 246.

The remedy for wrongdoing by the President is impeachment, not criminal prosecution. U.S. Const. art. II, §§1, 4. That is why the Constitution provides that only *after* he is "convicted" by the Senate may the President then be "liable and subject to Indictment,

Trial, Judgment, and Punishment, according to Law." *Id*. art. I, §3. The President is thus "beyond the reach of any other department except in the mode prescribed by the constitution through the impeaching power." *Kendall v. U.S. ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 610 (1838). "No single prosecutor, judge, or jury should be able to accomplish what the Constitution assigns to the Congress." Brett M. Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 Minn. L. Rev. 1454, 1462 (2009).

This was also how the Framers understood the Constitution. "The President," Alexander Hamilton explained, "would be liable to be impeached, tried, and, upon conviction … would *afterwards* be liable to prosecution and punishment in the ordinary course of law." Federalist No. 69, at 414 (Clinton Rossiter ed. 1961) (emphasis added). The President is "at all times liable to impeachment, trial, [and] dismission from office," but any other punishment is to be achieved only "by *subsequent* prosecution in the common course of law." Federalist No. 77, at 462-63 (A. Hamilton) (emphasis added).

Oliver Ellsworth and John Adams agreed with Hamilton. In their view, "'the President, personally, was not the subject to any process whatever…. For [that] would … put it in the power of a common justice to exercise any authority over him and stop the whole machine of Government.'" *Fitzgerald*, 457 U.S. at 750 n.31; *see also* 2 Records of the Federal Convention of 1787, at 500 (Max Farrand ed., 1911). Thomas Jefferson later opined that the Constitution would not

tolerate the President being "'subject to the commands of the [judiciary], & to imprisonment for disobedience; if the several courts could bandy him from pillar to post, keep him constantly trudging from north to south & east to west,'" they could "'withdraw him entirely from his constitutional duties.'" 9 The Writings of Thomas Jefferson 60 (Paul Leicester Ford ed., 1898).

In sum, evidence from the Founding "strongly suggest[s] ... that the President, as Chief Executive, would not be subject to the ordinary criminal process." Memorandum for the U.S. Concerning the Vice President's Claim of Constitution Immunity, *In re Proceedings of the Grand Jury Impaneled Dec. 5, 1972*, No. 73-cv-965, at 6 (D.Md.) ("Bork Memo") Under our Constitution, "congressional investigation must take place in lieu of criminal investigation when the President is the subject of investigation." Brett M. Kavanaugh, *The President and the Independent Counsel*, 86 Geo. L.J. 2133, 2158 (1998). There is no reason to depart from this settled understanding.

B. The President's immunity applies with special force to state and local criminal process.

The Constitution's prohibition on criminally prosecuting the sitting President is at its apex when it comes to state and local governments. Under the Supremacy Clause, the "Constitution … shall be the supreme law of the land." U.S. Const. art. VI. The States thus cannot "defeat the legitimate operations" of the federal government. *McCulloch v. Maryland*, 17

U.S. (4 Wheat.) 316, 427 (1819). They have "no power" "to retard, impede, burden, or in any manner control" the President, Congress, or the Judicial Branch. *Id.* at 436. "It is of the very essence of supremacy, to remove all obstacles" to federal "action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence." *Id.* at 427. Indeed, it is "manifest that the powers of the National government could not be exercised with energy and efficiency at all times, if its acts could be interfered with and controlled for any period by officers or tribunals of another sovereignty." *In re Tarble*, 80 U.S. (13 Wall) 397, 409 (1871).

The Court has enforced this principle when faced with overreach from state and local officials. It has not hesitated to step in when necessary to prevent "the operations of the general government" from being "arrested at the will of one of its members." *Tennessee v. Davis*, 100 U.S. 257, 263 (1879); *see id.* at 263 (a state court cannot try a federal officer for charges arising from the execution of his duties); *Tarble*, 80 U.S. at 411-12 (a state court cannot order the release of a resident held in federal custody); *McClung v. Silliman*, 19 U.S. (6 Wheat.) 598, 605 (1821) (a state court cannot issue a mandamus to an officer of the United States because that officer's "conduct can only be controlled by the power that created him"); *Ohio v. Thomas*, 173 U.S. 276, 284 (1899) (prohibiting state criminal prosecution of a federal officer for violating food regulations because "in the performance of that duty he was not subject to the direction or control of the legislature of Ohio"); *Johnson v. Maryland*, 254 U.S. 51, 57 (1920) ("immunity of the instruments of

the United States from state control in the performance of their duties" prohibits prosecution of a post officer for violating a state license law). These cases all stand for the same inviolable proposition: "the activities of the Federal Government are free from regulation by any state." *Mayo v. United States*, 319 U.S. 441, 445 (1943).

As a consequence, the Supremacy Clause—both independent of and in conjunction with Article II—bars states and localities from criminally prosecuting the sitting President. For most federal officials, the protection the Supremacy Clause affords them from state interference applies only when they undertake official acts. But the scope of constitutional protection by necessity must be broader for the President given his unique status and unrelenting duties. *See supra* 19-21; *Fitzgerald,* 457 U.S at 748-53. Subjecting the President to criminal process—for official or unofficial acts—would have the effect of "arresting all the measures of the government, and of prostrating it at the foot of the states." *McCulloch*, 17 U.S. at 432; *see* Bybee 60. The "right of all the People to a functioning government," after all, "trumps the right of only a few of them to have an instant prosecution." Akhil Reed Amar & Brian C. Kalt, *The Presidential Privilege Against Prosecution*, 2-SPG NEXUS: J. Opinion 11, 14 (1997).

The consequences to our federal system if any state or locality (or all of them at once) could initiate criminal process against the sitting President would be disastrous. According to the Department of Justice, there are "over 2,300 prosecutors offices in the United

States." Bureau of Justice Stat., Prosecutors Offices, bit.ly/2RAkUqp. The idea that the Constitution would empower thousands of state and local prosecutors to embroil the sitting President in criminal proceedings is unimaginable.

Any hope that politics wouldn't infect state and local decisionmaking would be misplaced. "In all but four states, prosecutors are elected to office," and "many largely run unopposed in counties with strong political-party identification, places where politics are so ingrained that decisions are made well ahead of the voting booth." Juleyka Lantigua-Williams, *Are Prosecutors the Key to Justice Reform?* The Atlantic (May 18, 2016), bit.ly/2v2lZzt. The President's status as an "easily identifiable target," *Fitzgerald*, 457 U.S. at 752-53, makes the temptation to prosecute him for political benefit irresistible and widespread. As two authors bluntly put it: "Does anyone really think, in a country where common crimes are usually brought before state grand juries by state prosecutors, that it is feasible to subject the president—and thus the country—to every district attorney with a reckless mania for self-promotion?" Charles L. Black Jr. & Philip Bobbit, *Impeachment: A Handbook* 112 (Yale Univ. Press 2018).

The Court need look no further than New York for confirmation that national politics can drive the agenda of local prosecutors. The Attorney General of New York took office last year following a campaign where she promised to "begin … an investigation into the Trump Administration with respect to his finances in the State of New York" and bring "the days

of Donald Trump … to an end." Letitia James, Inside Politics, CNN Tr. (Mar. 12, 2019), cnn.it/2TZLk7F; Letitia James, Now This Opinions at 2:32-2:37 (Sept. 14, 2018), bit.ly/30HdqFZ. James promised that, if elected, she "would join with law enforcement and other attorneys general across this nation in removing this president from office." *Id.* at 2:09-2:16. More recently, New York Mayor Bill De Blasio—who until September was *himself* running for the Democratic nomination for President—reportedly urged local prosecutors to begin a criminal investigation of the President's businesses, calling the President "a con-artist" and claiming that "his refusal to release his tax returns says more than enough about what he is trying to hide." *See* Dan Mangan, *New York Mayor de Blasio referred Trump Organization information to district attorney because of possible crime*, CNBC (Jan. 10, 2020), cnb.cx/3aDnynM.

There is ample reason to worry that the District Attorney's prosecutorial judgment is likewise tainted by political considerations. He has, among other things, framed his investigation as part of a broader narrative about "impeachment," the President's non-compliance "with [congressional] subpoenas," and the President's decision not to disclose his tax returns. CA2 Doc. 99 at 14, 16; *see* D. Ct. Doc. 33 at 2 ("The Plaintiff himself, before taking office, agreed to make [his tax returns] public, and every prior president for the past forty years has done so" (footnote omitted)); D. Ct. Doc. 38 at 43 ("I suppose it's … possible that the State of New York could be annexed by Ukraine …."). This Court need not "'exhibit a naiveté from which ordinary citizens are free.'" *Dept. of Commerce v. New*

York, 139 S. Ct. 2551, 2575 (2019). Our constitutional system does not—and indeed cannot—abide a rule that would allow the nation's choice for President to be hobbled by the whims of local officials serving local constituencies with local priorities.

There is a reason why this case appears to be the first time a state or local prosecutor has opened a criminal proceeding about the sitting president, let alone issued a grand-jury subpoena for his personal records. That the States "avoided use of this highly attractive power" suggests strongly that "the power was thought not to exist." *Printz v. United States*, 521 U.S. 898, 905 (1997); *see Mississippi v. Johnson*, 71 U.S. 475, 500 (1866); *Free Enter. Fund,* 561 U.S. at 505; *Franklin v. Massachusetts*, 505 U.S. 788, 827 (1992) (Scalia, J., concurring in part and concurring in the judgment). If the Court upholds this subpoena, however, the floodgates will open. States and localities where this (as well any future) President is unpopular will be unleashed to proceed criminally against the Executive. The Court should not allow that to happen.

C. State grand jury subpoenas are the kind of criminal process to which immunity should apply.

The Second Circuit disclaimed any intent "to decide today the precise contours and limitations of presidential immunity from prosecution." App. 15a. It instead claimed to be deciding that absolute immunity is unavailable "under [the] circumstances ... presented here." App. 15a. By "here," the court meant that, in its view, "presidential immunity does not bar the

enforcement of a state grand jury subpoena directing a third party to produce non-privileged material, even when the subject matter under investigation pertains to the President." App. 15a. The Second Circuit was mistaken for several reasons.

To begin, there was no reason for the court to avoid acknowledging that the President is not "'liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office.'" *Fitzgerald*, 457 U.S. at 749 (quoting Story, *supra*, at 418-19). That is plainly correct. Moss Memo 246-60. It is also clear that the President cannot be indicted or tried while in office. *Id.*; *see* Bork Memo 20; Dixon Memo 26-32."The spectacle of an indicted President still trying to serve as Chief Executive boggles the imagination." Dixon Memo 30. The district court's suggestion that a state or locality could indict, try, convict, and imprison the President for "failing to pay state taxes, or [for] driving while intoxicated," App. 82a, was profoundly mistaken. The Second Circuit should have said so—especially in light of the District Attorney's pointed refusals below to rule out an indictment before the President left office.

The only question, then, is whether this grand-jury subpoena raises those concerns. It does. Putting the President on trial or imprisoning him obviously interferes with his ability to perform his official duties. But like the fact of indictment itself, making the President a target of a grand jury and issuing criminal process for his records also crosses the line. Issuing that process for those records will inevitably distract, burden, and stigmatize the President in ways

that justify affording him immunity while he is in office.

This Court has already held that "personal vulnerability" arising from official-capacity civil suits would "distract a President from his public duties," *Fitzgerald*, 457 U.S. at 753. The same is true when the President is targeted with criminal process from a grand jury. "Like civil suits, criminal investigations take the President's focus away from his or her responsibilities to the people." Kavanaugh, 93 Minn. L. Rev. at 1461. They "are time-consuming and distracting." *Id*. In truth, a criminal subpoena like this one burdens the President *more* than an official-capacity civil suit. "[C]riminal litigation uniquely requires the President's personal time and energy, and will inevitably entail a considerable if not overwhelming degree of mental preoccupation." Moss Memo 254. Portraying this grand-jury subpoena as involving something other than "criminal litigation" blinks reality.

Allowing the grand jury to target the President and subpoena his personal documents likewise would impair the Chief Executive's "energetic performance of [his] constitutional duties." *Cheney v. U.S. Dist. Court for Dist. Of Columbia*, 542 U.S. 367, 382 (2004). As the Fifth Circuit informed a grand jury in Alabama that was criminally probing a Justice Department lawyer:

> Both the Supremacy Clause and the general principles of our federal system of government dictate that a state grand

> jury may not investigate the operation of a federal agency…. [T]he investigation … is an interference with the proper governmental function of the United States … [and] an invasion of the sovereign powers of the United States of America. If the [State] had the power to investigate …, it has the power to do additional acts in furtherance of the investigation; to issue subpoenas to compel the attendance of witnesses and the production of documents, and to punish by fine and imprisonment for disobedience. When this power is asserted by a state sovereignty over the federal sovereignty, it is in contravention of our dual form of government and in derogation of the powers of the federal sovereignty. The state having the power to subpoena … could embarrass, impede, and obstruct the administration of a federal agency. No federal agency can properly function if its employees are being constantly called from their duties ….

United States v. McLeod, 385 F.2d 734, 751-52 (5th Cir. 1967); *see also United States v. Owlett*, 15 F. Supp. 736, 741 (D. Pa. 1936) (enjoining state investigation and subpoenas to federal officers because of the need to "protect the United States of America from an invasion of its sovereignty or from vexatious interruptions of its functions" and "confusion and a multiplicity of suits").

If a state grand jury cannot target officials from a federal agency, *a fortiori* it cannot target the Chief Executive for criminal prosecution. The President, as this Court has explained, must "concern himself with matters likely to arouse the most intense feelings," and thus must have the leeway to "deal fearlessly and impartially with the duties of his office." *Fitzgerald*, 457 U.S. at 752. Allowing state grand juries to target him in this fashion will hinder the President's ability to do so.

Further, "the distinctive and serious stigma of indictment and criminal prosecution ... threaten the President's ability to act as the Nation's leader in both the domestic and foreign spheres." Moss Memo 249. That is the case here too. All "criminal proceedings" carry a "peculiar public opprobrium and stigma" that justify immunity. *Id.* at 250. Allowing every state and locality to target the President for prosecution and issue criminal process for his personal records will "undermine the capacity of the executive branch to perform its constitutionally assigned functions." *Id.* 222.

The Second Circuit also emphasized that the subpoena neither demands "privileged information" nor documents "bearing ... relation to the President's performance of his official functions." App. 17a. But the unavailability of executive privilege is reason for concern—not a justification for denying immunity. *See Trump v. Mazars USA, LLP*, 941 F.3d 1180, 1181 (D.C. Cir. 2019) (Katsas, J., dissenting from denial of rehearing en banc). The fact that this criminal process

involves unofficial acts is no basis for deny immunity either. *See supra* 19-28. If that were dispositive, then the President could be indicted and tried for unofficial acts. Only the district court and the District Attorney have staked out that position. It is instead one of many factors that must be considered in deciding whether immunity is proper. Unlike in *Clinton*, it does not tip the balance against temporary immunity here. "The burdens imposed on a sitting President by the initiation of criminal proceedings (whether for official or unofficial wrongdoing)" justify granting temporary immunity. Moss Memo 247.

Last, the Second Circuit expressed reluctance "to interfere with the ancient role of the grand jury." App. 23a (citation omitted); *see also* BIO 18. But the court and the District Attorney overstate the level of interference that granting immunity would bring. The immunity—unlike in *Fitzgerald*—would expire when the President leaves office. Especially given that the statute of limitations would likely be tolled, *see* Moss Memo 256 & n.33, the suggestion that temporary immunity would place the President "above the law" is misplaced, BIO 36 (citation omitted). And it ignores the other means of checking presidential wrongdoing. *See Fitzgerald*, 457 U.S. at 757-58.

In sum, allowing state grand juries to target the President would "undermin[e] the President's leadership and efficacy both here and abroad." *Id.* at 251. That would, in turn, redound "to the detriment of not only the President and his office but also the Nation that the Presidency was designed to serve." *Fitzgerald*, 457 U.S. at 753. "When … the President is

being prosecuted, the presidency itself is being prosecuted." Amar & Kalt 12. That is why "*all aspects* of criminal prosecution of a President must follow impeachment" and that "removal from office must precede *any form of criminal process* against an incumbent President." *Nixon v. Sirica*, 487 F.2d 700, 757 (D.C. Cir. 1973) (MacKinnon, J., concurring in part and dissenting in part) (emphases added). Because the President cannot be subjected to any form of "criminal process" while he in office, Bork Memo 20, the Second Circuit should have invalidated the grand-jury subpoena.

D. The Mazars subpoena violates the President's immunity from criminal process.

The Second Circuit asserted that none of these concerns are implicated here because the subpoena "is directed not to the President, but to his accountants." App. 20a. But neither lower court denied that the President is a target of the grand jury. There is a good reason why. He is obviously a target. *See, e.g.*, App. 22a (explaining "that the grand jury is investigating not only the President, but also other persons and entities"); App. 117a-20a (naming the President and seeking his personal records). The most the Second Circuit would say is that "it is unclear whether the President will be indicted." App. 22a. Similarly, the district court was only willing to say that the grand jury "may or may not ultimately target [i.e., indict] the President." App. 53a. Even in this Court, the District Attorney concedes that the basis for the investigation is the President's alleged conduct, BIO 2-5, that the

President is "a subject of the investigation," BIO 12, that the "investigation extends *beyond* Petitioner," and that "it is *unclear* whether the President will be indicted," BIO 26 (emphasis added).[4]

Nor did the lower courts contest the President's right to challenge the Mazars subpoena in federal court—even though it was issued to his accounting firm. As the Second Circuit explained, the "President has standing to challenge the Mazars subpoena." App. 20a n.15. A subpoena to a custodian is the functional equivalent of a subpoena to the investigation's target. *See Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 501 n.14 (1975); *accord Mazars*, 940 F.3d at 752 (Rao, J. dissenting) (noting the majority did not "question President Trump's standing"). There is no dispute, then, that the President is entitled to bring this suit to challenge a criminal subpoena for *his* records that arises from a state proceeding threatening *him* with criminal prosecution.

The Second Circuit's reliance on the ostensible third-party character of this subpoena is an attempt to draw a narrow distinction. In the court's view,

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[4] The District Attorney did not dispute the assertion in the petition for certiorari that the subpoena was issued "for the express purpose of deciding whether to indict him for state crimes" and "as part of a grand-jury proceeding that seeks to determine whether the President committed state-law crimes." Pet. 2, 4. His "failure to contest these factual assertions at the certiorari stage waived [the] right to do so at the merits stage." *District of Columbia v. Wesby*, 138 S. Ct. 577, 584, n.1 (2018) (discussing S. Ct. R. 15.2).

immunity is unwarranted because Mazars—not the President—will bear the burden of compliance with the subpoena. "Although the subpoena is directed to the President's custodian," the Second Circuit noted, "no court has ordered the President to do or produce anything." App. 21a; *see* App. 20a ("compliance does not require the President to do anything at all"). But the Second Circuit's reasoning is flawed at each step of the analysis.

Most importantly, the Second Circuit asked the wrong question. When it comes to absolute immunity, the issue is not whether only *this particular* subpoena will excessively burden the President. This Court always takes a categorical approach to presidential immunity.

Take *Fitzgerald*, for example. This Court did not inquire whether Mr. Fitzgerald's suit alone "would raise unique risks to the effective functioning of government." 457 U.S. at 751. It recognized that "the President would be an easily identifiable target for suits for civil damages" and that, collectively, those civil suits "could distract a President from his public duties, to the detriment of not only the President and his office but also the Nation that the Presidency was designed to serve." *Id*. at 753.

Likewise, in *Clinton*, the Court did not examine whether the suit brought by Ms. Jones would—in and of itself—"create[] 'serious risks for the institution of the Presidency.'" 520 U.S. at 689. It surveyed the "200-year history of the Republic" and then asked whether "this particular case—*as well as the potential*

additional litigation that an affirmance of the Court of Appeals judgment might spawn—may impose an unacceptable burden on the … office." *Id.* at 701-02 (emphasis added).

There is no justification for framing a narrower inquiry. "The issue is one of precedents and slippery slopes: we must ask not merely what would happen if [this subpoena] goes forth but what would happen if [others] can go forth and multiply." Amar & Katyal 714 n.52. And it is especially "perilous" to predict "whether a particular criminal prosecution" would "impede the capacity of the executive branch to perform its constitutionally assigned functions." Moss Memo 254. That is why "a categorical rule … is most consistent with the constitutional structure, rather than a doctrinal test that would require the court to assess whether a particular criminal proceeding is likely to impose serious burdens upon the President." *Id*. As explained above, allowing every state and local prosecutor across the country to target the President in this way will burden him, distract him, and degrade his ability to execute the manifold duties of his office. *See supra* 23-26.

Regardless, the Second Circuit miscalculated the burden of complying with this subpoena. Whether the subpoena was issued to his accountants or to him, the President himself would never personally undertake the laborious task of compiling, indexing, and producing responsive documents. That is not a basis for denying immunity. *Fitzgerald* would have come out the other way if it were. There too, the former President was not going to shoulder burdens of

physical compliance. He would have had no more day-to-day involvement in that *civil* dispute than the President will have in this *criminal* proceeding.

The distractions and mental burdens are what matter. Those impositions arise from the fact that he is a target of the grand-jury investigation and that his records are the subject of the criminal subpoena. As a target of a grand-jury proceeding, the President must consult with his attorneys, consider the need to assert available privileges,[5] and otherwise participate in his defense. The idea that *any* subject of criminal process will—or should—simply ignore it and go about his or her business is unreasonable. At the end of the day, "a President who is concerned about an ongoing criminal investigation is almost inevitably going to do a worse job as President." Kavanaugh, 93 Minn. L. Rev. at 1461.

The Second Circuit and District Attorney also exaggerated the scope of relief sought. This is neither an effort to "shield ... third parties from investigation" nor stop the "grand jury [from] continuing to gather evidence throughout the period of any presidential immunity from indictment." BIO 9-10 (citations omitted). Petitioners sought to enjoin the subpoena because it is directed at the President. The grand jury can otherwise continue its work and gather evidence

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[5] Some client-accountant communications, for example, may be conducted at the direction or assistance of attorneys and therefore fall within attorney-client and work-product privileges. *See, e.g.*, *United States v. Kovel* 296 F. 2d 918 (2d Cir. 1961) (Friendly, J.).

as it sees fit. But issuing compulsory criminal process to the sitting President, when accompanied by threat of indictment, crosses a constitutional line.

To be certain, the temporary immunity that the President enjoys makes the grand jury's work harder. But that concern must yield given "the overwhelming cost and substantial interference with the functioning of an entire branch of government" that embroiling the President in a state grand-jury proceeding would entail. Moss Memo 257; *see also Fitzgerald*, 457 U.S. at 749-53. It is the byproduct of having a system where the Chief Executive is the "sole indispensable man in government." *Clinton*, 520 U.S. at 713 (Breyer, J. concurring in the judgment) (citations omitted). "In the constitutional balance, the potential for prejudice caused by delay fails to provide an overriding need sufficient to overcome the justification for temporary immunity from criminal prosecution." Moss Memo 257 (quotation omitted).

II. *Clinton* and *Nixon* do not undermine the President's claim of immunity.

In rejecting the President's claim of immunity, the Second Circuit relied extensively on this Court's decisions in *Clinton* and *Nixon*. As both illustrate, "the President is subject to judicial process in appropriate circumstances." *Clinton*, 520 U.S. at 703. That doesn't mean, however, that it would be appropriate to subject the President to judicial process here. The differences between this case and *Clinton* and *Nixon* confirm that the Second Circuit erred.

The most obvious—and important—difference is that this case arises from state judicial process. In *Clinton*, the Court was careful to reserve the issue of whether the President should be immune—even from civil litigation for unofficial conduct that predates his time in office—in state court. Although it was "not necessary to consider or decide whether a comparable claim might succeed in a state tribunal," the Court noted the "federalism and comity concerns" that state-court litigation might raise and the need to protect the President from "possible local prejudice" that might exist. *Clinton*, 520 U.S. at 691. The Court cautioned that, under the Supremacy Clause, "any direct control by a state court over the President, who has principal responsibility to ensure that those laws are 'faithfully executed' may implicate concerns that are quite different from the interbranch separation-of-powers questions addressed here." *Id.* at 691 n.13. The issue reserved in *Clinton* is presented here in its starkest form—an inappropriate effort to draw the President into a state criminal proceeding.

Nixon likewise involved federal court litigation. The Court explained that not enforcing the subpoena against the President thus would create a separation-of-powers problem. It "would upset the constitutional balance of a workable government and gravely impair the role of the courts under [Article] III." *Nixon*, 418 U.S. at 707 (internal quotations omitted). Invalidating this subpoena does not raise any separation-of-powers problems. It preserves the supremacy of the national government.

The Court's differentiation of state process from federal process is not just a doctrinal point. There are important practical differences. Article III courts can be better trusted to protect the President from process initiated for "political gain or harassment," to quickly terminate "frivolous and vexatious litigation," and to "accommodate the President's needs" so the process does not interfere with his ability to execute the duties of his office. *Clinton*, 520 U.S. at 708-09. Similarly, the Attorney General can safeguard the President from an avalanche of federal criminal subpoenas that would impair his ability to focus on official duties. None of that is true of state criminal process. It would be open season on the President. There is every reason to worry that "a deluge" of process from state and local prosecutors will "engulf the Presidency." *Clinton*, 520 U.S. at 702.

Clinton and *Nixon* also are distinguishable for other reasons. "*Clinton v. Jones* indicated that the President is subject to *private* lawsuits to remedy individuals harmed" by unofficial conduct; the ruling did not address "*criminal* proceedings against the President[.]" Kavanaugh, 86 Geo. L.J. at 2159 (emphasis in original). Unlike in civil litigation, the State *itself* is condemning the President in a criminal proceeding. Perhaps the Court's prediction that civil litigation for unofficial acts would not "impose an unacceptable burden on the President's time and energy" is correct. *Id.* at 702; *but see id.* at 722-24 (Breyer, J., concurring in the judgment). But there is no basis for making that same assumption in this setting. Criminal process "imposes burdens" that are "fundamentally different in kind from those imposed

by the initiation of a civil action." Moss Memo 249. "*Clinton*'s reasoning," accordingly, "does not extend to the question whether a sitting President is constitutionally immune from criminal prosecution." *Id.*

Nor does the reasoning of *Nixon*. In that case, a special prosecutor issued a criminal subpoena to the President for White House recordings and documents. The information was sought in connection with the impending federal trial of certain individuals who had been indicted by a grand jury—but those individuals did not include the President. *Nixon*, 418 U.S. at 687-88. The Court upheld the trial subpoena, rejecting the President's claim of executive privilege. *See id.* at 703-16. The President thus was not a defendant—he was a witness. *See id.* at 710 ("In this case the President challenges a subpoena served on him as a third party"). That difference should be decisive.

A subpoena that has the purpose of "facilitating criminal proceedings against the President" is quite different than a subpoena for "evidence relevant to the criminal prosecution of *other* persons." Moss Memo 255 & n.32 (emphasis added).[6] Only the former is a "public … allegation of wrongdoing" and, as a result, triggers "the unique mental and physical burdens … placed on a President facing criminal charges." Moss Memo 249-52; *see* Alberto R. Gonzales, *Presidential*

[6] The federal subpoena that ordered President Jefferson to produce evidence for Aaron Burr's criminal trial is different from this case for the same reason. *See United States v. Burr*, 25 F. Cas. 30 (C.C.D. Va. 1807).

Powers, Immunities, and Pardons, 96 Wash. U. L. Rev. 905, 927 n.153 (2019) (same).[7]

Finally, *Nixon* did not consider (let alone deny) a claim of presidential immunity. This Court labeled its analysis: "THE CLAIM OF PRIVILEGE." 418 U.S. at 703. Under that heading, it briefly explained that the President was arguing that "the separation of powers doctrine precludes judicial review of a President's claim of privilege." *Id.* Later, the decision noted that one argument supporting the President's claim for "absolute privilege rests on the doctrine of separation of powers …[, which] insulates a President from a judicial subpoena." *Id.* at 706.

The Second Circuit understood this portion of the opinion to be addressing (and then rejecting) a claim of presidential immunity from criminal process separate from a claim of executive privilege—*i.e.*, the argument the President raises here. App. 18a-19a & n.14. But the Second Circuit should have taken this Court at its word that it was resolving the President's

[7] The *Nixon* subpoena (as well as the one in *Burr*) also involved the "special importance of evidence in *a criminal trial*" *Fitzgerald*, 457 U.S. at 754 n.37 (emphasis added). A criminal trial triggers additional and competing constitutional rights held by the criminal defendant. *Nixon* thus emphasized that criminal defendants enjoy Fifth and Sixth Amendment rights that stake a constitutional claim, even vis-à-vis the sitting President, to the "production of all evidence at a criminal trial." 418 U.S. at 711. Those competing constitutional rights are absent during a grand-jury investigation.

"claim of privilege," and nothing more than that.[8] The "immunity" claim raised in *Nixon* was an argument that courts have no power to review the invocation of privilege. In other words, once the President asserts privilege, no court has the authority to overrule that claim. *See Nixon*, 418 U.S. at 706-08.

Regardless, the Court should hesitate before it attributes precedential weight to *Nixon*'s purported resolution of this issue. As the Second Circuit agreed, "the Court's analysis focused almost entirely on privilege." App. 19a. The Court never grappled with the legal principles on which *Fitzgerald* and *Clinton* later turned. This Court wisely treats such omissions as a warning sign; "unexplained silences of [its] decisions lack precedential weight." *Plaut*, 514 U.S. at 232 n.6.

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[8] The Court's disposition of the government's cross-petition confirms this understanding. The cross-petition "raised the issue whether the grand jury acted within its authority in naming the President as a coconspirator." *Nixon*, 418 U.S. at 687 n.2. But the Court found resolution of that issue "unnecessary to resolution of the question whether the claim of privilege is to prevail," and thus dismissed the cross-petition as improvidently granted. *Id.* In other words, because the Court concluded that President Nixon was a mere third-party witness, only raising a claim of privilege, the Court did not need to decide any broader immunity issue. That is why the "Court's analysis focused almost entirely on privilege." App. 19a.

III. The District Attorney has not established a heightened need for the records that this subpoena demands.

Even if the President is not immune from this subpoena, it is still unenforceable. *Nixon* requires a prosecutor to prove a "demonstrated, specific need" for the material requested in a subpoena directed at the President. 418 U.S. at 713. That means the records must be "directly relevant to issues that are expected to be central" and "not available with due diligence elsewhere." *In re Sealed Case*, 121 F.3d 729, 754-55 (D.C. Cir. 1997). The District Attorney cannot meet that standard.

After resolving the President's immunity claim, the Second Circuit declined to engage in any further review of the subpoena. It rejected the argument that the heightened *Nixon* standard applies here. In the Second Circuit's view, that standard applies only if a President asserts executive privilege. App. 27a-28a. But that decision was incorrect. The heightened-need requirement applies to all compelled discovery of the President's papers.

This Court recognizes that "'in no case of this kind would a court be required to proceed against the president as against an ordinary individual.'" *Nixon*, 418 U.S. at 708 (quoting *Burr*, 25 F. Cas. at 192); *see Clinton*, 520 U.S. at 704 n.39 (same); *Cheney*, 542 U.S. at 381-82 (same). "The high respect that is owed to the office of the Chief Executive, though not justifying a rule of categorical immunity, is a matter that should inform the conduct of the entire proceeding, including

the timing and scope of discovery." *Clinton*, 520 U.S. at 707. Before enforcing the subpoena, the Court thus requires that the materials be "essential to the justice of the ... case" and that there is a "demonstrated, specific need" for them to be produced. *Nixon*, 418 U.S. at 713 (citation omitted).

This standard applies whether or not there is a claim of executive privilege. Only after the Court held that the special prosecutor had made a heightened showing of need did it "turn to the claim" of privilege. *Id.* at 703; *see Cheney*, 542 U.S. at 387. This Court, in other words, would not have needed to reach the issue of privilege if the special prosecutor had been unable to meet this standard.

But he met that standard. The Court explained that the special prosecutor had made "a sufficient showing" because the tape recordings and documents were "not available from any other source," *Nixon*, 418 U.S. at 702, and he had a "demonstrated," "essential," and "specific" need for them, *id.* at 713 (citation omitted). The Court held that this heightened need outweighed the President's "generalized interest in confidentiality" and upheld the subpoena. *Id.*

This Court followed the same path in *Cheney*. "Special considerations control," the Court explained, whenever the "autonomy" of the President's office is at stake—which is always the case "in the conduct of litigation against" the Chief Executive. 542 U.S. at 385. The court of appeals thus had "labored under the mistaken assumption that the assertion of executive privilege is a necessary precondition" to "separation-

of-powers objections" to discovery. *Id.* at 391. *Cheney* confirms that the heightened showing required by *Nixon* applies to all subpoenas that are directed at the President. The "standard which governs grand jury subpoenas is no more lenient than the need standard enunciated for trial subpoenas in *Nixon*." *In re Sealed Case*, 121 F.3d at 756.

At the certiorari stage, the District Attorney suggested that, at most, *Nixon*'s heightened standard is "a particular application of the standards applicable to *all* federal subpoenas issued under Federal Rule of Criminal Procedure 17(c)." BIO 31 n.14. But Rule 17(c)'s inapplicability would only make heightened protection under Article II that much more important. "In *Nixon*, the Court addressed the issue of executive privilege only after having satisfied itself that the special prosecutor had surmounted [Rule 17(c)'s] demanding requirements." *Cheney*, 542 U.S. at 386-87. "The very specificity of the subpoena requests" in *Nixon* was therefore "an important safeguard against unnecessary intrusion into the operation of the Office of the President"—even by a federal prosecutor in federal court. *Id.* at 387.

If the decision below is upheld, the President will be at the mercy of the State for protection against sweeping prosecutorial subpoenas for his personal documents. He would be entitled to no protection as a matter of federal law. The President should not have "*less* protection ... than would be afforded any litigant in a civil case." *Deutsche Bank AG*, 943 F.3d at 679 (Livingston, J., concurring in part and dissenting in part). As in *Nixon*, *Clinton*, and *Cheney*, he should

have far more. The Court should "take comparable considerations into account" here. *Mazars*, 941 F.3d at 1181 (Katsas, J., dissenting from denial of rehearing en banc).

The District Attorney cannot even come close to making a heightened showing of need for the records sought in the Mazars subpoena. That should not be a surprise. He did not even *try* to tailor his demand to the grand jury's investigative agenda. The District Attorney instead copied two congressional subpoenas involving federal issues that are flagrantly beyond the jurisdiction of New York County. *See supra* 8. The District Attorney's behavior is nothing like the approach that the special prosecutor took in *Nixon*. Here, the District Attorney asked for "everything under the sky," *Cheney*, 542 U.S. at 387, because he thought he could get away with it—not because of a heightened need for the volumes of documents he demanded.

For example, the subpoena demands nearly a decade's worth of the President's personal financial records, including entire categories of documents—like those relating to a hotel in Washington D.C.—that have nothing to do with New York. It also seeks personal records dating back to 2011, even though the purported focus of the grand jury investigation is on transactions from 2016. *See supra* 6. The contents of the subpoena are in no way tailored to the grand jury investigation involving the President's 2016 business records. The subpoena is "anything but appropriate." *Cheney*, 542 U.S. at 388.

CONCLUSION

The Court should vacate the judgment below with instructions to enter injunctive relief in favor of the President.

Respectfully submitted,

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