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

BRIEF OF BOSTON UNIVERSITY SCHOOL OF LAW PROFESSORS SEAN J. KEALY AND JAMES J. WHEATON AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF AMICI CURIAE

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[1] Amici file this brief pursuant to the parties' blanket consents lodged with the Clerk. Pursuant to this Court's Rule 37.6, we note that no part of this brief was authored by counsel for any party, and no person or entity other than the amici curiae law professors (including through funds available to them as faculty members) made any monetary contribution to the preparation or submission of the brief.

STATEMENT OF THE CASE

The grand jury subpoena served by the Respondent on Mazars USA LLP (Mazars) on August 29, 2019 (the subpoena) sought records related to Petitioner as well as to a trust, a foundation, five limited liability companies (LLCs), and three corporations (together, excluding Petitioner, the Named Entities). *Trump v. Vance*, 941 F.3d 631, 635-636 n.5 (2d Cir. 2019). However, the subpoena also requested documents possessed by Mazars and relating to "any related parents, subsidiaries, affiliates, joint ventures, predecessors, or successors" (together with the Named Entities, the Covered Entities). *Id.*

SUMMARY OF ARGUMENT

As this case has proceeded thorough the courts, scant attention has been paid to a basic flaw in Petitioner's efforts to prevent the enforcement of the subpoena. The subpoena encompasses some records that may belong to Petitioner, but most of the records responsive to the subpoena are the sole property of the business entities to which they relate. They do not belong to Petitioner. He has no right to object to their production, nor does he possess any other cognizable legal interest in preventing enforcement of the subpoena as to the records of those entities.

Over the years, according to financial disclosures filed by Petitioner himself, at least hundreds of business entities have been created to operate or hold ownership

interests in various business enterprises with which Petitioner is or has been affiliated. Under the state laws that govern those entities, the respective entities themselves, but not Petitioner or any other owner, own the financial, tax and other business records of those entities. Only the entities possess the ability to object to subpoenas for their records. However, none of them are even parties to this litigation. Moreover, there is no alternative basis for finding that Petitioner is somehow a "person in interest" and therefore entitled to ignore the separate entity status of the Covered Entities.

In fact, Petitioner has utilized and asserted the separateness of the Covered Entities and other business entities over the years to insulate himself and others from liability, to segregate the businesses for bankruptcy purposes, and to garner tax advantages associated with certain business forms and tax elections. The entities have served the precise separateness purpose for which they were formed. That separateness may not be ignored now just because the fact of their separate legal status is legally inconvenient to Petitioner.

Nothing in this Court's prior jurisprudence or Congressional enactments justifies the extension to the Covered Entities of any rights Petitioner might be thought to have as an individual. This case is unlike *Hobby Lobby*, which turned on a unique statutory expansion of Constitutional rights. Instead, this proceeding is more akin to cases finding that business entities, because of their separateness, do not possess Constitutional protections that may be available to their individual owners. Additionally, in statutes such as the Right to Financial Privacy Act, Congress has shown its willingness to exclude most business entities

(and therefore all or virtually all of the Covered Entities) from statutory privacy protections.

Finally, ignoring the separateness of the entities and permitting Petitioner to bring them within a shield from criminal process he claims for himself would undermine federalism and inappropriately impair comity and the criminal investigatory abilities of state law enforcement officials. Under Petitioner's logic, this Court should declare immune from both prosecution and criminal investigation every business entity, as well as every individual, with which or whom a President associates. Doing so would effectively and illegitimately immunize each of those separate legal persons. It would cripple the ability to investigate potential crimes by those in a President's circle for the duration of any President's terms of office. In some cases, because statutes of limitation will certainly not be tolled during the Presidency, that immunization would become permanent.

For all of these reasons, even if this Court limits the enforcement of the subpoena as to Petitioner himself, it should affirm the decision of the court below as it relates to the Covered Entities.

ARGUMENT

I. MOST RECORDS SUBJECT TO THE GRAND JURY SUBPOENA ARE NOT PETITIONER'S RECORDS AT ALL.

Even though the subpoena seeks records of numerous business entities, the Petitioner's brief falsely characterizes the business entity records subject to

the subpoena at least fifteen times as "his records," "personal records," "his private records" or some variant thereof. He likewise refers to tax returns of the business entities numerous times as "his" or "personal" or using similar terms. The amicus brief of the United States makes the identical legal errors, conflating the records and tax documents of the Covered Entities with the records of Petitioner as an individual and his individual tax returns.

Each year during his Presidency, Petitioner has filed Form 278e with the Office of Government Ethics. The most recent form was filed effective May 16, 2019 and lists more than 500[2] separate legal entities, most of which are corporations and LLCs. *See Trump, Donald J. 2019 Annual 278.pdf*, oge.app.box.com/s/e32qrrfvyxk9cgrvteo7diicwd11pac4. The form details the ownership of each entity in a way that results in the conclusion that these legal entities–as well as entities that no longer exist or that are not included in Petitioner's filed 2019 form, but as to which Mazars

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2 This number must be significantly fewer than the total number of Covered Entities. Petitioner's 2019 Form 278e reflects only entities that met the financial reporting requirements for the period covered by that annual report. Thus, it does not list entities the records of which may be within the subpoena's scope but that (i) existed in prior years covered by the subpoena but that did not exist as of the report's effective date, (ii) have been formed since the report's effective date, (iii) continue to exist but may not have met a financial reporting threshold for the purposes of Form 278e but that may have generated records subject to the subpoena in other years, or (iv) were otherwise omitted from Form 278e by Petitioner. For perspective, a website search conducted on the New York business entity records site on February 28, 2020 yielded a total of 313 active and inactive entities beginning with the name "Trump." *See* www.dos.ny.gov/corps/bus_entity_search.html.

may have responsive records–constitute an equivalent number of Covered Entities for the purposes of the subpoena.

In this case, President Trump is the sole plaintiff and petitioner. Not a single Covered Entity is a party, or has objected to the subpoena.[3] This failure, coupled with the indisputable fact that Petitioner has no ownership or other legally cognizable interest in any Covered Entity records held by Mazars that may be responsive to the subpoena, means that even if this Court declines to permit the enforcement of the subpoena as to Petitioner as an individual, there is no legal basis for rejecting the subpoena's enforcement as to any other legal person within its ambit.

A. The Covered Entity Records Subject to the Subpoena Do Not Belong to Petitioner.

At oral argument in the court below, the issue of Petitioner's failure to distinguish himself from the Covered Entities was raised momentarily, when one of the panel engaged in this exchange with counsel to Petitioner:

> Court: You are ignoring the corporate form, these are entities that have, clearly have, an existence, they operate, they conduct business . . .

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[3] None of the parties appears to have raised standing as an issue below, but this failure may implicate standing and therefore jurisdiction issues. *See Maricopa-Stanfield Irrigation & Drainage Dist. v. United States*, 158 F.3d 428, 433 (9th Cir. 1998), *cert. denied*, 526 U.S. 1130 (1999).

> Counsel: That is true, they are also wholly owned by the President, they do hold his personal records . . .

See Trump v. Vance Oral Argument, C-Span, Oct. 23, 2019, www.c-span.org/video/?465172-1/circuit-hears-oral-argument-president-trumps-tax-returns-audio-only&start=402, beginning at 06:42.

The court below never returned to this issue during argument, and did not address it in its opinion; nor is the issue of the separateness of the Covered Entities from Petitioner as an individual addressed in any briefs filed in this case at the time of this brief's preparation. The Court must consider the issue, however, because as to the Covered Entities, the distinction is dispositive of Petitioner's challenges to the subpoena.

1. State Law Governs Ownership of the Records, and the Records of the Covered Entities Are Not Petitioner's.

A review of the list of Covered Entities included in Petitioner's May 2019 OGE Form 278e, when compared to publicly available databases available on the websites of the States of Delaware, Florida and New York, shows that the Covered Entities were incorporated or formed[4] primarily in those three states, and that they break down approximately as follows:

Delaware Corporations	153
Delaware LLCs	201
Delaware Limited Partnerships	10

[4] LLCs and limited partnerships are not corporations and therefore not incorporated. Rather, under the laws of various states, they are "formed" or "organized."

Florida LLCs	6
Florida Corporations	2
New York Corporations	35
New York LLCs	48
New York Limited Partnerships	2
Total	**457**

Thus, Delaware, Florida, and New York entities by far constitute the great bulk of the Covered Entities.

Irrespective of the state of incorporation or LLC or partnership formation, the applicable state corporate, LLC and partnership statutes would make clear that the records of those entities, including their tax and other financial records, belong to the entity. Business entity statutes universally provide that owners of the entities have only those limited rights to access and copy those records–but not to own them–that are prescribed by statute. *See, e.g.*, MODEL BUS. CORP. ACT §§ 16.01(b) & (c) (corporations shall maintain accounting and financial records), § 16.02(b) (shareholder may inspect and copy required "records of the corporation", including "financial statements of the corporation" and "accounting records of the corporation") (emphasis added); UNIF. LTD. LIAB. CO. ACT § 410 (2006) (last amended 2013) (LLC members and managers have rights to inspect and copy "any record maintained by the company regarding the company's activities, affairs, financial condition, and other circumstances").

These widely adopted model and uniform entity statutes make clear that entity records belong to the entity alone, and that the entity's owners have carefully circumscribed access to them (and by implication, no ownership rights at all in those records just as they

have none in any other entity-owned property). Indeed, the statutes in the three states highlighted above that govern the Covered Entities incorporated or formed in those states are in accord. *See* DEL. GEN. CORP. L., DEL. CODE ANN. tit. 8, § 220 (2019) (shareholder has prescribed rights to inspect, copy and make extracts from the "corporation's . . . books and records") (emphasis added); DEL. LTD. LIAB. CO. ACT, DEL. CODE ANN. tit. 6, §§ 18-305(a)(1) & (a)(2) (2019) (LLC must maintain records regarding its business and financial condition and copies of "the limited liability company's" federal, state and local tax returns for each year) (emphasis added), §§ 18-305(a) & (b) (governing right to obtain or examine those and other LLC records by LLC members and managers); DEL. LTD. P'SHIP ACT, DEL. CODE ANN. tit. 6, § 17-305 (2019) (governing right to examine limited partnership records); FLA. REV. LTD. LIAB. CO. ACT, FLA. STAT. ANN. § 605.0410 (2020) (based on Uniform Limited Liability Company Act, each member may inspect and copy each "record maintained by the company regarding the company's activities, affairs, financial condition, and other circumstances"); FLA. BUS. CORP. ACT, FLA. STAT. ANN. § 607.1601 (2020) (required records of Florida corporation), § 607.1602 (shareholder's inspection and copying rights related to "records of the corporation") (emphasis added); N.Y. Bus. Corp. L. § 624(e) (McKinney 2020) (obligating New York corporations to prepare and furnish certain financial information of the corporation to shareholders); N.Y. LTD. LIABILITY CO. L. §§ 1102(a)(5) & (b) (McKinney 2020) (New York LLC must make available for member inspection any financial statements "maintained by the limited liability company" and "the limited liability company's" federal, state and local tax returns for three most

recent fiscal years) (emphasis added); N.Y. REV. LTD. P'SHIP ACT § 121-106 (McKinney 2020) (providing for records of partnership required to be maintained and partner access under certain conditions).

The claim by Petitioner's counsel at oral argument in the court below that Petitioner owns the entities, and that they therefore hold "his personal records," is specious. First, the records do not belong to Petitioner; they belong solely to the entities. None of the records are "his" at all.

Second, it may be true that certain entity-owned records necessarily bear Petitioner's name, or some financial or tax information that ultimately relates directly to Petitioner. Yet those records are still corporate, LLC or partnership records, and not records of Petitioner as an individual. For example, tax returns of entities that benefit from "pass-through" taxation will always contain information relating to the taxes of their owners. IRS Form 1065, *see* https://www.irs.gov/pub/irs-pdf/f1065.pdf, which is the entity level federal tax return filed by partnerships and LLCs taxed as partnerships, includes as part of the filing Forms K-1 that show the names of each tax partner and their individual allocated shares of certain tax attributes of the tax partnership. However, notwithstanding that those forms as prepared and furnished to Petitioner each year by certain of the Covered Entities may contain tax information that ultimately appears in or is incorporated into Petitioner's individual returns, the Forms K-1 are still entity level tax records of the respective Covered Entities, as a component of the entity tax filings. The identical analysis applies to Forms K-1 representing similar allocations to shareholders by corporations or LLCs that have elected "S

corporation" status, and that are part of a corporate return on IRS Form 1120-S, *See* https://www.irs.gov/pub/irs-pdf/f1120s.pdf.

2. The Covered Entities Are Legal Persons Distinct from Petitioner, and Petitioner Has No Right to Assert Claims That Belong Solely to the Entities.

Each Covered Entity is a distinct legal person, with its own right to sue and be sued, subject to service of process distinct from any service upon its owners, and with its own right to hold property (including entity records) legally considered to be separate and apart from the property of its owners. *See, e.g.*, DEL. LTD. LIAB. CO. ACT, DEL. CODE ANN. tit. 6, § 18-201(b) (2019) (separate entity), § 18-105 (separate amenability to service of process); FLA. REV. LTD. LIAB. CO. ACT, FLA. STAT. ANN. § 605.0109 (2020) (LLC right to sue and be sued in its own name), § 605.0108 (LLC "is an entity distinct from its members"), § 605.0110 ("A member of a limited liability company has no interest in any specific limited liability company property"); N.Y. LTD. LIABILITY CO. L. § 610 (McKinney 2020) ("member of a limited liability company is not a proper party to proceedings by or against a limited liability company"), § 202(a) (LLC may sue or be sued).

Moreover, state business entity laws provide for the sole and very limited circumstance in which an owner may litigate a claim on the entity's behalf: the derivative action, which is itself limited to extraordinary circumstances not at issue here. *See, e.g.*, DEL. GEN. CORP L., DEL. CODE ANN. tit. 8, § 327 (providing for Delaware corporate derivative actions); DEL. LTD. LIAB.

CO. ACT, DEL. CODE ANN. tit. 6, § 18-1001 (providing for Delaware LLC derivative actions).

Petitioner's misguided effort to assert claims that belong solely to the Covered Entities violates every principle of separateness established by state business entity statutes. In fact, as discussed further below, Petitioner's attempt to ignore the intentional legal and financial separateness of the Covered Entities flies in the face of arguments and strategies that Petitioner and his advisors have implemented and insisted upon over the years.

In addition, the Federal Rules of Civil Procedure make clear that even if an ultimate owner, Petitioner is not a "party in interest" with a right to assert any claims the Covered Entities might have related to the subpoena. Fed. R. Civ. P. 17(a) allows a real party in interest to advance claims, but simply put, corporate shareholders, partnership partners, trust beneficiaries, and LLC members and managers are not among the enumerated categories of persons who may sue in their own names on behalf of another. Likewise, FED. R. CIV. P. 17(b) dictates that an entity's capacity to sue or be sued is determined exclusively by the entity's capacity under state business entity law. None of these state laws permit Petitioner to sue to quash the subpoena to the extent it seeks records of Covered Entities.

3. Having Consistently and Aggressively Benefitted from His Legal Separation from the Covered Entities, Petitioner Should Not Now Be Permitted to Ignore Their Separateness.

The obvious explanation for the existence of more than 500 different Covered Entities as of May 2019 is furnished by Petitioner's desire that he be separated for legal and financial purposes from the liabilities of the businesses operated by the Covered Entities, and that those businesses be separated from each other so that the liabilities or bankruptcy of any one will not taint the success of any other. At the same time, generally available tax strategies used by Petitioner and the Covered Entities have allowed certain tax benefits to the ultimate owners of the entities, including Petitioner, without risking the liability shield and bankruptcy separateness made possible by the complex structure of the Covered Entities. Each of these uses of the separate entities may be justified on financial, tax and legal bases, but each also militates against pretending that the Covered Entities are not now to be treated as separate from Petitioner because doing so is suddenly inconvenient.

a. In Other Proceedings, Petitioner Has Affirmatively Asserted the Separate Status of the Covered Entities as a Shield, and Explicitly Denied That the Entities are His "Alter Ego".

Boiled to its essence, the contention of Petitioner in his brief, and of his counsel at oral argument below, reduces to an unfounded assertion that "ownership" entitles Petitioner to ignore the separate entity status of

the corporations, limited liability companies and limited partnerships that comprise the Covered Entities. For this limited purpose, Petitioner apparently considers every one of the entities his "alter ego," so that their property (including their subpoenaed records) and the rights related to that property should be capable of appropriation by Petitioner as if they were "his."

Petitioner desires that outcome solely for the purpose of suppressing the subpoena, but in the past has shown no apparent interest in applying that standard for any other purpose. In a parallel litigation universe over the years, Petitioner has consistently fought any "alter ego" characterization.

Not every business within the ambit of Petitioner's entrepreneurship has been successful, and some have even been subject to claims of fraud and resulted in substantial federal and state court litigation. Anticipating those possibilities, Petitioner has done what every rational businessperson would do. First, he and his professional advisors have ensured that each business is isolated from his personal finances and the finances of other business enterprises by organizing each as one or more newly formed business entities. Virtually every one of these entities benefits from a liability shield that insulates the obligations of the entity (contractual and tort) from the assets of Petitioner, as a presumably ultimate owner, and from each of the other separately incorporated or formed entities.

Second, when confronted with litigation specific to certain businesses, Petitioner has combatted efforts to "pierce" the liability shield of any business by steadfastly opposing theories on which other parties

might have tried to impose damages on Petitioner in his individual capacity, or on the unaffected businesses. Two cases are illustrative of this approach.

In *Makaeff v. Trump University LLC*, 2011 WL 1872654, *2 (S.D. Cal. May 16, 2011), the court referenced the motion to dismiss filed by the defendant by noting that "Trump points out that Plaintiffs do not allege he is the 'alter ego' of Trump University or he is vicariously liable for the actions of Trump University and its agents."

Similarly, in a New York state proceeding in which the state was the plaintiff, a New York court rejected a piercing the veil theory that would have allowed the state to pursue action against Petitioner as an individual, finding at the behest of Petitioner that "petitioner has failed to establish" its "theory of piercing the corporate veil." *New York v. The Trump Entrepreneur Initiative LLC*, 2014 WL 5241483, *10 (N.Y. Sup. Oct. 8, 2014), *aff'd*, 26 N.Y.S.3d 66 (2016).

Just these two examples of Petitioner and related business entities wielding the corporate or LLC veil as a shield, and asserting Petitioner's immunity from personal claims against him because of the separateness and limited liability provided by business entities, demonstrate the brazen nature of Petitioner's inconsistent assertions with regard to the Covered Entities in this case.

b. Petitioner Has Used the Separate Status of the Covered Entities to Benefit from the Federal Bankruptcy System.

In six different federal bankruptcy proceedings spanning from filing dates of 1991 through 2009,[5] various entities affiliated with Petitioner (presumably some of which are Covered Entities or would be but for the termination of their legal existence), initiated federal bankruptcy proceedings. The actual number of entities that constituted the bankrupts in those proceedings greatly exceeded six, because in some of the bankruptcies as many as 28 different entities filed bankruptcy petitions that were consolidated into single proceedings. *See, e.g.*, Case No. 04-46898-JHW, Joint Administrative Order issued by the United States Bankruptcy Court for the District of New Jersey, Nov. 21, 2004 (28 different corporations and LLCs); Case No. 09-13654-JHW, Joint Administrative Order issued by the United States Bankruptcy Court for the District of New Jersey, Feb. 17, 2009 (10 different entities).

The separation of businesses in which Petitioner has been involved from himself as an individual, and from other business enterprises, is a rational bankruptcy and debtor protection strategy. There was no reason, for example, for Petitioner to risk the economic value and income stream of successful businesses:

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[5] The Trump Taj Mahal in 1991, the Trump Castle Hotel & Casino in 1992, the Trump Plaza Casino in 1992, the Trump Plaza Hotel in 1992, the Trump Hotels and Casino Resorts in 2004 and the Trump Entertainment Resorts in 2009. *See Donald Trump's Bankruptcies*, August 1, 2016, www.snopes.com/news/2016/08/01/donald-trumps-bankruptcies/.

perhaps 401 N. Wabash St. in Chicago, the 40 Wall Street building, Trump Tower or a golf property, unless Petitioner and those more successful entities had been contractually compelled (as loan guarantors or providers of additional collateral) to do so by secured creditors of the entities that ended up petitioning for bankruptcy. The very separateness of all the other businesses made it possible for certain businesses to seek bankruptcy without having the assets of legally "related" but also legally separate non-bankrupt companies drawn into the bankruptcy estates. This approach provided substantial economic benefits to Petitioner at the time of each bankruptcy, and renders unacceptable the pretense that the separateness of the Covered Entities is irrelevant (but only temporarily) for the purpose of this and other proceedings pending in the federal courts.

c. Petitioner Has Received Presumed Tax and Financial Benefits from Asserting and Maintaining the Separateness of the Covered Entities.

The entire structure of the Covered Entities, as revealed by Petitioner's Form 278e, is designed to take advantage of the tax benefits of partnership pass-through taxation (or similar treatment that is available when an LLC has only one member and so is recognized as "disregarded" for tax purposes, *see* Internal Revenue Service, Single Member Limited Liability Companies, Internal Revenue Service, last updated Feb. 19, 2020, www.irs.gov/businesses/small-businesses-self-employed/single-member-limited-liability-companies). The use of hundreds of Covered Entities furnishes other benefits, as observed in the preceding two subsections, but the ability to use losses realized in one

entity, for example, to offset net income from other businesses, is the principal tax benefit of separating each business enterprise into a legal silo while maintaining tax flexibility.

Nothing illegal by Petitioner or the Covered Entities is implied by the complexity of the Covered Entity structure or the use by Petitioner or others of that kind of structure to maximize tax advantages while minimizing legal liability. Petitioner has regularly asserted as "smart" his effective use of the federal tax system to avoid paying more tax than owed, including in a Presidential debate. *See, e.g.,* "Trump responds to leaked IRS return, says he is best suited to fix country's 'complex tax laws,'" Fox News, Oct. 2, 2016, www.foxnews.com/politics/trump-responds-to-leaked-irs-return-says-he-is-best-suited-to-fix-countrys-complex-tax-laws. However, it is inappropriate, having intentionally utilized complex but legal separation structures to gain the dual advantages of beneficial tax treatment and limited liability, conveniently to disregard the legal separateness of the Covered Entities from Petitioner as an individual just because he may be the ultimate beneficial owner of most or all of the Covered Entities. Petitioner's tax structuring may have been smart from the perspective of tax minimization, but unabashedly claiming that the businesses are separate from him only when that claim is to Petitioner's advantage is too smart by half, and is legally indefensible.

B. Neither *Hobby Lobby* Nor Other Case or Statutory Law Permits Petitioner to Assert the Hypothetical Subpoena Objections of the Covered Entities.

Ultimately, access to the documents of the Covered Entities may lead to the disclosure of information concerning Petitioner, but this reality is irrelevant to the validity of the subpoena as it relates to the Covered Entities.

1. This Court's Holding in *Hobby Lobby* Has No Bearing Upon the Issues Before the Court.

In *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), this Court determined that certain protections of the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-2000bb-4, should be available to closely held corporations. The Court noted the applicability of that statute to "persons," and the Dictionary Act's inclusion of corporations within the scope of a statutory "person," 1 U.S.C. § 1. The Court also pointed out the absence of any indication that Congress intended to require the owners of a close corporation to make an election between their statutorily enhanced free exercise rights and the liability protections afforded by state business entity laws. 573 U.S. at 684-685.

This case presents no such choice between the subpoena and conflicting legal rights. No statute entitles Petitioner to the kind of financial privacy that appears to be at the core of his arguments that the entity records are "his." None of the entity records relates to his official actions as President, and none are the subject of a claim of executive or any other kind of privilege. If this Court holds properly that the

subpoena is enforceable at least with respect to the records of the Covered Entities, no personal right of Petitioner as an individual–much less in his official capacity–will be forgone.

Nor would a Court decision that leaves the subpoena in place–to the extent of its reach to the Covered Entities–create inconsistency between the purposes of business entity statutes and the valid interests of Petitioner. To the contrary, a decision that invokes purported personal privacy rights or personal claims of records ownership to invalidate the subpoena for business entity records would itself create that kind of conflict. Such an outcome would undercut the consistency of state legislation that shields business owners from liability with the principle that simultaneously bars business owners from pretending to be one and the same as the entities for different purposes. Petitioner used the Covered Entities precisely to lock in the financial separateness of the entities from himself. He is now bound by that election.

2. This Court has Consistently Recognized the Distinction Between Entities and Their Owners.

The statute-specific result in *Hobby Lobby* contrasts sharply with this Court's analysis in other cases where no statutory basis for extending the "rights" of owners to business entities was present. The scope of a general right to privacy for example, does not extend to corporations. *See FCC v. AT&T Inc.*, 562 U.S. 397, 403-404 (2011) (corporations do not have a right to "personal privacy"). This Court's jurisprudence in the Fifth Amendment area makes this argument more starkly.

The case now before the Court presents a situation in which third-party custodians of corporate and LLC records are being asked to produce those records in response to a grand jury subpoena. In this context, this Court has held consistently that the Fifth Amendment privilege against self-incrimination does not apply to the owner of the business entity, even if the owner is the sole owner of the entity. In *Fisher v. United States*, 425 U.S. 391 (1976), the Court limited any assertion of privilege by an owner to the act of production by that individual, and not the business records themselves.[6] Likewise, in *United States v. Doe*, 417 U.S. 85 (1984), the Court held that the subpoenaed documents of a sole proprietorship were not privileged, but that the act of production by the proprietor did implicate self-incrimination. In *Doe*, the Court left undisturbed the appellate court's holding that different reasoning might apply to the production of entity records[7] because in a sole proprietorship the records could be considered the records of an owner (as distinct from the situation with a corporation, partnership, LLC or other collective entity). Even then, the Court extended protection only to the act of production by the sole proprietor. That situation does not obtain here, where Petitioner is not being compelled to produce anything, and where the records in the hands of Mazars are not privileged in any sense.

In addition, *Doe* involved a sole proprietorship, a situation not present in the case now before the Court,

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[6] In fact, the Court also observed that accountant work papers belong to the accountant, and are not at all records of the taxpayer. 425 U.S. at 409.

[7] A sole proprietorship is not an entity.

where the entities the records of which are subject to the subpoena belong only to Mazars itself (as work papers as in *Doe*), or to the entities, the owners of which have availed themselves of the separateness inherent in choosing separation by forming a business entity with a state-provided liability shield. In these situations, the Court's well settled precedents deny corporate officers and owners the ability to claim that entity records may be withheld because of an individual's Fifth Amendment rights. *See Bellis v. United States*, 417 U.S. 85, 100 (1974) ("[i]t is well-settled that no privilege may be claimed by the custodian of corporate records, regardless of how small the corporation may be"); *Grant v. United States*, 227 U.S. 74 (1913) (sole shareholder may not withhold corporate books); *Wilson v. United States*, 221 U.S. 361 (1911) (corporate officer cannot assert privilege in order to withhold corporate books). *Bellis* is particularly instructive, because it involved a small partnership, and the Court held that the privilege did not extend to partnership records even though the partner himself may have been the target of the grand jury investigation. In fact, the Court in *Bellis* analyzed precisely the same kinds of state law partnership act provisions involving the entity's separate rights to hold property and to be sued of the type discussed earlier in this brief. 417 U.S. at 97. Similarly, in *Grant*, the custodian of the corporate records was the sole shareholder of the corporation, yet the records were not deemed "his." 227 U.S. at 77.

Petitioner's argument would turn more than a century of case law on its head by simply ignoring the separate status of the Covered Entities. In *Wilson*, this Court noted that

> [I]t would be a strange anomaly to hold that a state, having chartered a corporation to make use of certain franchises, could not, in the exercise of its sovereignty, inquire how these franchises has [sic] been employed, and whether they had been abused, and demand the production of the corporate books and papers for that purpose.

221 U.S. at 384. In other words, a state grand jury retained the power to investigate an entity's use of its state charter, a circumstance exactly parallel with how the Respondent here represents the State of New York in examining the way in which the Covered Entities may have employed or abused their state-granted privileges. Nonetheless, instead of recognizing that the subpoenaed records of the Covered Entities belong to the respective entities, Petitioner incorrectly asserts that the records are "his," and thereby endeavors to bypass this Court's prior recognition that entity records must be treated differently than records that belong to individuals. The claim is baseless as a matter of both state law and federal jurisprudence.

3. In Contrast with *Hobby Lobby*, Congress Has Rejected the Kind of Protection Petitioner Seeks.

Unlike in *Hobby Lobby*, when it has legislated in the financial privacy area, Congress has explicitly declined to extend financial privacy rights to entities, and evinced no intention to extend any entity rights that may exist to their individual owners.

In his original complaint in a companion case, Petitioner invoked the Right to Financial Privacy Act, 12 U.S.C. §§ 3401-3423 (RFPA), as the basis for a

statutory claim of privacy in "his" financial records. That claim was rejected by a lower court on the basis that Congress had issued the subpoena at issue, and that the statute did not apply to Congressional action. *Trump v. Deutsche Bank AG*, 943 F.3d 627, 645 (2d Cir. 2019). However, as to the Covered Entities, the court could just as easily have rejected the RFPA claim because that statute just does not provide any financial privacy rights to corporations, trusts or LLCs.

Rather, the statute contains its own definition of a protected "customer" as a "person," and defines "person" as limited to individuals and partnerships of five or fewer persons. 12 U.S.C. § 3401(4). Corporations are excluded from protection, and every court decision confronting the issue has held likewise that LLCs are also outside the protection of the RFPA. *See, e.g.*, *Hohman v. Eadie*, 894 F.3d 776 (6th Cir. 2018) (federal courts have no subject matter jurisdiction over RFPA claims involving LLCs), *cert. denied*, 139 S. Ct. 1205 (2019) (denied petition presented question of LLC's status as an RFPA "person"); *Exchange Point LLC v. SEC*, 100 F.Supp.2d 172 (S.D.N.Y. 1999) (LLC not a "person" under RFPA).

Notably, Congress has taken no action to alter this Congressional judgment that financial privacy that it deems worthy of protection for individuals need not be extended to corporations or LLCs of any size. Seemingly, that outcome embodies a judgment that entity financial privacy is not as important as individual privacy, and that the use of certain types of business entities may necessitate a voluntary tradeoff in privacy for both the entity and its owners.

II. ANY IMMUNITY TO CRIMINAL PROCESS TO WHICH PETITIONER MAY BE ENTITLED DOES NOT EXTEND TO THE COVERED ENTITIES.

Most of the arguments made by the Petitioner and Respondent focus on the extent to which a President should be immune to criminal process, but neither the parties nor the other amici whose briefs have been filed as of the date of preparation of this brief have addressed this question: even if the Court determines that Petitioner himself should be immune from criminal process while in office, to what extent should that immunity extend to the Covered Entities, and to other individuals associated with the Covered Entities? Because those entities and persons are not Petitioner, the answer should be obvious: not at all.

A. Nothing in the Constitution Permits a President to Confer Immunity Upon Hundreds of Business Entities and the Other Individuals Affiliated With Them.

Had Petitioner addressed the question, it is likely that his argument would have fallen along the following lines: first, that enforcing a subpoena that affects the Covered Entities and other persons with which or whom he is affiliated constitutes harassment that the Constitution should not endorse; second, that the distraction of dealing with the consequences of those subpoenas would impair his ability to perform Presidential functions; and third, that impeachment and post-impeachment criminal processes are the sole alternative remedies supported by the Constitution. Each of these arguments is insufficient to overcome the arguments against Petitioner's claim of overly expansive immunity.

Petitioner's ultimate position is that having chosen not to divest himself of his economic interests in the Covered Entities, and having elected not put those companies into a blind trust or other mechanism where he cannot influence them, they remain so closely tied to him that any investigation of the companies, or any individual other than him affiliated with the companies, necessarily draws him into a campaign of harassment.

Respondent has made clear throughout the proceedings that the grand jury investigation has no fixed targets, and has taken the position that Petitioner is not now a target. Resp. Br. 29. Even if Petitioner correctly surmises that he may be one ultimate target of the investigation, it is just as likely that the grand jury will look at transactions involving potential criminal behavior by one or more Covered Entities, and by others associated with those entities who may be more directly involved with whatever behavior is assessed by the grand jury. Comity and the general principle that prosecutors and grand juries should be permitted to carry out their governmental functions demand that even if Petitioner elects subjectively to perceive as harassment those investigations as to other legal persons, the investigations should be allowed to proceed in order to allow the law enforcement function to continue as to persons not the President.

In its brief, the United States suggests that opening the door to tax and financial records might breed even more demands, for college transcripts and the like. SG Br. 18. Yet the critical issue presented here is not whether an unhinged prosecutor may launch a complete fishing expedition into even more aspects of a President's life that might be characterized

as harassment. Instead, the question before the Court is whether a President can extend his claimed aura of immunity to an unlimited number of other persons. If the only issue is embarrassment, then the Court could certainly invoke a process ensuring the protection of sensitive private information, such as medical records, in the way crafted by the Second Circuit in one of the companion cases. *See Trump v. Deutsche Bank AG*, 943 F.3d at 667-668.

Nor would the investigations necessarily impair a President's ability to perform his executive functions, even if they proceed to the point where they involve information from Covered Entity records that happens to include federal or state tax return information overlapping with Petitioner's personal tax returns. Petitioner is not being asked to produce a single record, of his own or of any of the Covered Entities, so production and review time by him is unnecessary. Petitioner need not consult with any of the Covered Entities, because prior to assuming office, he publicly resigned from all positions of authority with all of the Covered Entities. *See* DJT-Resignation-Signature-Page-With-Exhibit-a.pdf, assets.documentcloud.org/documents/3404759/DJT-Resignation-Signature-Page-With-Exhibit-a.pdf. Petitioner has offered only the naked assertion that the public availability of this kind of information would distract him from his duties, but as the court below noted, that flies in the face of common knowledge that every President of recent generations has managed to perform his executive duties even after making full public release of personal tax returns. 941 F.3d at 641 n.12. Moreover, every President, including Petitioner, has complied or attempted to comply with the Ethics in Government

Act of 1978, 5app U.S.C. §§ 101-505. Even Petitioner makes substantial disclosure about his financial affairs through his annual filing under the Ethics in Government Act, with no apparent disruption to his performance as President. *See Trump v. Mazars USA, LLP*, 940 F.3d 710, 734-735 (D.C. Cir. 2019).

Petitioner argues that impeachment, conviction and subsequent prosecution are the sole and proper alternatives to the subpoena, *see* Pet. Br. at 21-22, 34, but that shallow analysis ignores two salient facts. First, none of the Covered Entities, and none of their affiliated persons other than Petitioner, are subject to impeachment. Second, Respondent has made clear that delay in the grand jury proceedings may put certain crimes beyond the applicable periods of limitations. *See* Resp. Br. 46.

B. Extending Immunity to Such an Extent Would Inappropriately Impair the Ability of Prosecutors to Address Illegal Behavior.

Essentially, the result desired by Petitioner would allow Petitioner to shield not only hundreds of business entities from investigation, but also allow every director, officer, member, manager, partner, trustee and employee of every Covered Entity to defer, perhaps well beyond any limitations period, any criminal behavior that the grand jury investigation would reveal. In some cases, because statutes of limitation will certainly not be tolled during the Presidency, that immunization will become permanent. Evidence also would be lost due to the lapse of time and the unavailability of witnesses, or the impairment of their recollection years from now.

If the Court accedes to this approach in connection with potential criminal activity bearing no relationship to a President's official duties, then the implications of the success of Petitioner's immunity argument will be breathtaking. If prosecutors may not investigate those affiliated with a President for behavior unrelated to his or her office, then what official behavior by those in a President's official circle may be scrutinized? Every well-documented criminal investigation of executive behavior over the last five decades: Watergate, Iran/Contra, the Clinton investigation, the Valerie Plame disclosure and the Mueller investigation, for example, yielded indictments and convictions of persons associated with but who were not themselves the President. Immunity of the scope demanded by Petitioner, by insulating all those within his ambit, would irrevocably impair the ability of state and federal prosecutors to engage in legitimate investigations of potentially criminal actions.

Finally, the extension of immunity as envisioned by Petitioner may have unfortunate ethical consequences. No future President, knowing that a refusal to divest himself or herself of economic interests that might create conflicts of interest would forfeit an expansive shield of immunity, would do so knowing that this would deprive those around him or her from that immunity for the length of the Presidency. Perhaps Congress may not constitutionally require divestment, but this Court should not become the tool that makes the unique decision of the current President the standard procedure for all of his successors.

CONCLUSION

For the foregoing reasons, even if this Court limits the enforcement of the subpoena as to Petitioner himself, it should affirm the decision of the court below as it relates to the Covered Entities.

Respectfully submitted,

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