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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

The District Attorney's brief confirms that the President should have temporary immunity from this subpoena. He concedes that legal process aimed at unofficial acts of the President is barred by immunity if it interferes with the President's official duties. And he does not dispute that the President is a target of the grand jury and that, because these records belong to the President, he may test the subpoena's validity in federal court.

The District Attorney thus narrowly defends the decision below by arguing that *this* subpoena does not interfere with the President's execution of official duties. He is wrong twice over. First, what counts is whether a *category* of process—be it official damages actions, unofficial civil actions, or third-party criminal trial subpoenas—could impair the President's ability to faithfully execute his duties. Second, giving every state and local prosecutor this power inevitably would divert the President's time and energy, would give states and localities an avenue for retaliation against him when disagreements arise, and would stigmatize the office. The District Attorney asks the Court to bet that these risks will not materialize. The Constitution does not permit the Court to accept such a wager. The nation needs the President's undivided attention, especially in times of crisis. The Constitution does not tolerate the risk of interference this type of criminal process invites.

No precedent requires a different result. *United States v. Nixon*, 418 U.S. 683 (1974), and *Clinton v.*

Jones, 520 U.S. 681 (1997), involved federal process and did not risk the kind of distraction that this type of state process does. Nor does any interference with the grand jury's work override the need for immunity. The President's claim is narrow and any interference is minimal. Even if this were a close case, however, our constitutional design prioritizes safeguarding the presidency over the needs of the grand jury.

At the very least, the District Attorney needs to show that he has a heightened need for these records before being heard to complain about obstruction of the grand jury. Indeed, a heightened-need standard is necessary to implement the District Attorney's own mistaken test. After all, the only way to assess—short of discovery into the grand jury's work—whether the subpoena is too burdensome or issued in bad faith is to require the District Attorney to show he needs these records. The District Attorney concedes that he has not attempted to show heightened need. Nor could he given the inexplicable decision to copy a congressional subpoena.

In all events, the Court should not affirm on a case-specific basis without affording the President the opportunity to develop a factual record. There was no chance to do so below, any findings the district court made have been vacated, and the President is entitled to adduce evidence on heightened need, bad faith, and interference with official duties. Immunity should not turn on the facts of this case. But if it does, those facts should be found before judgment is entered.

I. This subpoena is barred by the President's immunity.

A. The District Attorney acknowledges that immunity can extend to process targeting unofficial acts.

The District Attorney spends considerable time (at 12-17) arguing that immunity extends only to "*official* conduct" and not to "private acts." But he eventually concedes (at 13) that immunity applies to all forms of legal process that "directly implicate or otherwise substantially interfere with a President's official duties." He thus agrees that process aimed at "unofficial, private conduct" is barred by immunity if it is "unreasonably burdensome" or "unduly distracts a President" from official duties. Brief for Respondent ("Resp.") 22-23. Cementing the point, the District Attorney declines to dispute that a "President is not amenable to criminal prosecution" for unofficial acts. Resp. 24-25. The President and the United States, in other words, are correct about what triggers immunity. Brief for Petitioner ("Pet.") 29-34; Amicus Brief of United States ("U.S.") 10-11.

Instead of disputing the relevant legal theory, the District Attorney argues (at 23) that the President must make "a case-specific showing that the process will interfere with Article II functions" because any "*potential* interference with the ability to perform official presidential functions" is insufficient. In the District Attorney's view, "a factually supported claim of *actual* interference with Article II functions" is what triggers immunity. *Id.*

The District Attorney's argument is erroneous. The Court uses a categorical, forward-looking inquiry to decide if the President is entitled to immunity. Pet. 36-37. "Article II provides an immunity from any process that would *risk* impairing the independence of his office or interfering with the performance of its functions." U.S. 5 (emphasis added). That is why the Court inquires 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 President's time and energy, and thereby impair the effective performance of his office." *Clinton*, 520 U.S. at 701-02 (emphasis added). The District Attorney does not address or reconcile his argument with this controlling precedent.

Nixon v. Fitzgerald illustrates the District Attorney's error. The plaintiff in that case obviously would have prevailed if immunity turned on a "case-specific" showing of interference. President Nixon had been out of office for years by the time the case was decided. Holding *him* liable for civil damages in *that* case could not have impaired *his* exercise of official duties. He prevailed because the Court focused on whether this category of process—civil damages for official acts—created a risk that "a President," "the President's office," and "the Presidency" would be hampered if this kind of litigation were permitted. 457 U.S. 731, 751-53 (1982). The Court focused on if "personal vulnerability frequently *could* distract a President from his public duties"—not whether it *would* in that case. *Id.* at 753 (emphasis added).

The District Attorney's test also fails on its own terms. Under his approach, the President would need to make a winning "case specific" immunity argument in each and every case if state and local prosecutors from many jurisdictions simultaneously embroil the President in criminal proceedings. Immunity would be unavailable in *every* case because no *one* subpoena (in the District Attorney's mistaken view) "would unduly interfere with [the President's] ability to carry out his official duties." Resp. 48. That would be so even if five or ten or twenty different local prosecutors issued subpoenas similar to the one at issue here.

This logic is flawed. Immunity does not turn on whether the interference with the President's official duties stems from one legal proceeding or from many. The cumulative effect of multiple proceedings cannot be disregarded. Yet, under the District Attorney's test, it seemingly must be.

The Court has reached varying judgments as to whether a certain category of process would interfere with the President's official duties. *Compare Clinton*, 520 U.S. at 708, *with Fitzgerald*, 457 U.S. at 751-53, 758. But the Court has always reached that judgment by forecasting what could happen in the category of cases at issue if immunity were denied—not on the burdens attendant to allowing that specific dispute to go forward. So too here.

B. This category of process interferes with the President's official duties.

The premise of the President's immunity claim—*viz.*, that he is a grand-jury target and he is the subpoena's ultimate recipient—is not seriously contested. That category of legal process interferes with the President's official duties and, accordingly, violates Article II and the Supremacy Clause. Pet. 28-39. The District Attorney's contrary arguments all miss the mark.

The District Attorney notes (at 29 & n.10) that only the President "described" himself "as a 'target' of the grand jury investigation at issue" and that the subpoena "does not identify petitioner (or anyone else) as a 'target'" of the grand jury. It is unfortunate that the District Attorney chooses to play word games on an issue of such importance. The President plainly is not a third party. The District Attorney already conceded the President is "a subject of the investigation." Respondent Brief in Opposition 12. And, even as he plays coy, the District Attorney cannot help but acknowledge (at 29) that he convened the grand jury to investigate "petitioner and multiple other persons and entities" and (at 31) that this is a "[c]riminal investigation of a President's private conduct." The District Attorney has been given many chances to disclaim that he is targeting the President for possible indictment. He has pointedly refused to do so. That the President is a target is not a contested issue. Pet. 34-35; U.S. 2.

The District Attorney also does not contest that this subpoena should be treated as if it were issued to the President directly. He erroneously argues (at 50) that the burden on the President is diminished here because Mazars is tasked with compliance. *Infra* 23. But the District Attorney (at 50) acknowledges that the "underlying documents" are the President's and he "has standing to challenge a subpoena seeking them." The concession is wise. Pet. 35-36; U.S. 24-25.

Instead of contesting the factual premise of the President's claim, the District Attorney challenges its legal merit. Specifically, he argues (at 26) that the justifications for "immunity from prosecution do not apply to grand jury investigations into unofficial conduct." The President, the argument goes, won't be deluged with "vexatious and harassing investigations" if every state and local prosecutor can target him with criminal subpoenas because they can all "be trusted to exercise their investigatory power responsibly when it comes to a President." Resp. 32. This is not a safe assumption, Pet. 26-28, as the Framers understood, U.S. 17.

The District Attorney's reliance (at 34-35) on the presumption of regularity is misplaced. The issue here is not bad faith *per se*, but the undeniable fact that state and local prosecutors necessarily place greater emphasis on state and local interests than national ones. U.S. 18-19. That usually is not a federal concern. But criminally targeting the President with coercive process is not an "'ordinary'" circumstance. *Nixon*, 418 U.S. at 708. He is the officeholder that the Constitution assigns "matters likely to 'arouse the

most intense feelings,'" *Fitzgerald*, 457 U.S. at 752; U.S. 16-17. Article II therefore ensures that federal courts are available to protect the national interest in a presidency unencumbered by criminal subpoenas issued to protect local interests.

The presumption of regularity is particularly misplaced given the broad mandate of a grand jury. The District Attorney asserts (at 35-38) that state courts, jurisdictional limitations, and ethical rules can curb any impulse to inappropriately investigate the President. But the state-court system is designed to keep grand-jury investigations from being "hindered" by legal challenges to grand-jury subpoenas. *Virag v. Hynes*, 430 N.E.2d 1249, 1253 (N.Y. 1981). Therefore, state courts can quash a grand-jury subpoena only if the recipient proves it has "'no conceivable relevance'" to an investigation. *Id*.

As for "jurisdictional limitations," it is not at all clear that they constrain the scope of a subpoena—as opposed to merely providing a basis for dismissing a subsequent indictment. *See Application of Di Cocco,* 354 N.Y.S.2d 990, 994-95 (1975) ("A witness is not entitled to challenge the authority of the grand jury provided it has de facto organization and existence."); *In re Criminal Investigation No. 1*, 542 A.2d 413, 416 (Md. Ct. Spec. App. 1988) (concluding that "a subject under investigation by a grand jury" has "no right" to challenge the grand jury's authority "until … an indictment is handed down"). Indeed, this case shows how little protection ordinary grand jury rules afford the President. This subpoena was copied verbatim from one utilized in a congressional investigation of

issues far beyond the District Attorney's jurisdiction. The suggestion that state law affords the President adequate protection from overzealous state and local prosecutors is simply meritless.

Thus, allowing state and local prosecutors to follow the District Attorney's lead will produce all the harms that justify immunity. Subpoenas of this type will distract the President from official duties, render him cautious in executing those duties, and stigmatize the office. Pet. 29-34. For at least four reasons, the District Attorney's objections are misplaced.

First, the District Attorney (at 48-50) focuses on physical burdens of compliance.[1] But the diversion of mental focus is important and must be considered. Pet. 30-32, 37-38. The President has immense and unique responsibilities. Pet. 20-21; U.S. 8-11. He is on duty every minute of every hour of every day. Thus, unlike "the other branches" where "the Constitution divides [authority] among many," the President is "a single, constitutionally indispensable, individual [with] ultimate authority." *Clinton*, 520 U.S. at 712 (Breyer, J., concurring in the judgment). That is especially true in times of national crisis. In those moments, more than any other time, the nation requires the President's undivided attention.

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[1] The District Attorney (at 48) partly bases his argument about the lack of a physical burden on the fact that the subpoena "does not require [the President] to appear at a hearing or testify under oath." Even if that's true, the subpoena could force him to choose between invoking his right to do so, N.Y. Crim. Proc. L. §190.50(5), and focusing on official duties.

Issuing criminal process to the President to evaluate whether he should be indicted can "have the effect of ... diverting his time, energy, and attention from his public duties." U.S. 23. As Justice Breyer has explained: "a lawsuit that significantly distracts an official from his public duties can distort the content of a public decision just as can a threat of potential future liability" for official acts. *Clinton*, 520 U.S. at 721. The concern should apply with special force to a grand-jury subpoena. Pet. 38. The District Attorney never tries to explain why a threat of criminal prosecution coupled with a coercive subpoena for a litany of records would not distract the President from his official duties. The omission is telling.

Second, the District Attorney never addresses the concern that letting state and local prosecutors harness this authority might keep the President from "'deal[ing] fearlessly and impartially'" with the States. *Fitzgerald*, 457 U.S. at 752; Pet. 32. States and localities often disagree with the choices made by the President. He must make hard decisions about where to deploy scarce resources for matters ranging from the routine to the controversial. The prospect of states and localities registering their disagreement through investigations could "render [the President] unduly cautious in the discharge of his official duties." *Fitzgerald*, 457 U.S. at 752 n.32. The "threat of an indictment is enough to intimidate" any official "and jeopardize his independence." *United States v. Helstoski*, 635 F.2d 200, 205 (3d Cir. 1980). This is precisely a situation, then, in which a state or locality could "attempt[] to dictate how a federal officer carries out an official function." Resp. 15.

Third, the District Attorney claims (at 27-28) that this type of criminal process does not "impose any cognizable stigmatic burdens on a President either" because, unlike indictment, a grand-jury subpoena is a "signal[] only that an investigation is underway"—not "an 'official pronouncement' of wrongdoing." A criminal target, the District Attorney claims (at 28), should be bursting with pride to have the opportunity to fulfill his "civic obligation to participate fully in a grand jury investigation."

This one-sided logic blinks reality—at least when it comes to officeholders and other well-known targets. The existence of the criminal investigation is used to score political points and damage the target's reputation. This dispute is a case study. The political motivation for issuing this subpoena is transparent. Pet. 1-8, 27-28. Even while asking this Court to assume that a sitting President cannot be prosecuted, the District Attorney makes thinly veiled threats to bring an indictment. Resp. 25-26 & n.8-n.9. The point of this grand-jury investigation is to stigmatize and politically harm the President. The "public stigma and opprobrium" this kind of process carries justifies immunity. Moss Memo at 246.

Contrary to the District Attorney's suggestion (at 29), grand jury secrecy is unlikely to solve this problem. Secrecy is not an absolute rule. *Douglas Oil Co. v. Petrol Stops Nw.*, 441 U.S. 211, 219-20 (1979). That is certainly true in New York. *Matter of Dist. Atty. of Suffolk Cty.*, 448 N.E.2d 440, 443-44 (N.Y. 1983); *People v. Fetcho*, 698 N.E.2d 935, 938 (N.Y. 1998). And, in New York, "secrecy" is not "imposed

upon a witness before a grand jury either as to the fact that he has testified or as to the testimony given by him." *People v. Minet*, 73 N.E.2d 529, 533 (N.Y. 1947); N.Y. Crim. Proc. L. §190.25(4). It is also "very difficult to preserve [the] secrecy" of criminal allegations when the President is involved. Moss Memo 259; *e.g.*, Pet. 6.

Fourth, the District Attorney (at 32-33) argues that the subpoena's unprecedented nature cuts in his favor because it shows that state and local prosecutors act responsibly. But the Court has been clear that lack of precedent is evidence that the novel assertion of authority lacks historical roots—not that there has been 230 years of voluntary abstinence. Pet. 28; U.S. 22-23. That this Court has, time and again, needed to stop "state grand juries ... from targeting federal officials for *official acts*," Resp. 36, should confirm that all bets are off once state and local prosecutors are assured that they can target a sitting President given their natural focus on issues of local concern to the detriment of the national interest.

C. *Clinton* and *Nixon* do not require a different result.

The District Attorney repeatedly cites *Clinton* and *Nixon* as key precedent supporting affirmance. He argues (at 48) that immunity should be denied in this case since "the potential burdens of the Subpoena are minimal … when compared with the judicial processes this Court has ratified" in those cases. But the premise is flawed. The burdens associated with

this process are more severe than those involved in *Clinton* and *Nixon*.

Neither case involved state process. This is a decisive distinction. Pet. 40-41; U.S. 17-22. State process raises "concerns that are quite different from the interbranch separation-of-powers questions" that federal process raises. *Clinton*, 520 U.S. at 691 n.13. But according to the District Attorney (at 16), the Supremacy Clause is inapplicable when unofficial acts are at issue. He acknowledges (at 16 n.6), however, that *Clinton* reserved that very issue when it comes to state process aimed at the President. The District Attorney's attempt to reconcile his position with that reservation misses badly. The Court was concerned, and rightly so, that letting states and localities target the President's unofficial acts risks interference with official duties in ways that federal process aimed at unofficial acts does not.

In both *Clinton* and *Nixon*, it mattered that the disputes were under the supervision of federal courts. Pet. 41; U.S. 19-20. The absence of such federal oversight here should have equal significance. A claim for immunity from federal process requires that the President's interests be balanced against the coequal role of Article III courts. *Nixon*, 418 U.S. at 707; *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 384-85 (2004). The Constitution, however, does not "balance" federal authority against state interests. Pet. 23-25. Federal courts are "reluctant to interfere with state criminal proceedings," but "'the sharp edge of the Supremacy Clause cuts across all such generalizations.'" *United States v. McLeod*, 385

F.2d 734, 745 (5th Cir. 1967). The District Attorney himself now accepts that the state system is not the appropriate forum when "a county prosecutor ... 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; Resp. Br. 37 n.13.

Further, the District Attorney does not—and cannot—dispute that the Attorney General's ability to manage the issuance of legal process is a feature that cannot be replicated at the state level. Pet. 41. The concern about an avalanche of criminal subpoenas targeting the President is not present in federal court. U.S. 17-18. The concern that the President will be deterred from vigorously fulfilling the responsibilities of his office for concern of political retribution likewise is diminished at the federal level.

In *Clinton*, the District Attorney notes (at 33), the Court deemed it "unlikely that a deluge of such litigation [would] ever engulf the Presidency." 520 U.S. at 702. Whether that prediction proved correct is far less clear than the District Attorney believes. *E.g.,* Neal Kumar Katyal, *The Public and Private Lives of Presidents*, 8 Wm. & Mary Bill of Rts. J. 677, 683 n.33 (2000); Susan Low Bloch, *Cleaning Up the Legal Debris Left in the Wake of Whitewater*, 43 St. Louis U. L.J. 779, 781 (1999); U.S. 21. Even if the prediction has been vindicated, however, the differences between that situation and this one counsel a different result. The Court should not deny the President's claim by gambling that state and local prosecutors will not

avail themselves of the power to target this and future Presidents with criminal process.

The potential stigmatic harms also are greater here given that *Clinton* involved civil litigation and the President was not a target in *Nixon*. Pet. 41-43. The District Attorney's claim (at 30) that stigmatic harms associated with finding that "the President had acted improperly or unlawfully" in a civil case exceed those associated with being a criminal target is *ipse dixit*. In the main, "stigma and shame are not salient in civil litigation," while a "criminal penalty is more powerful ... because of the unofficial penalties it drags along in its wake." Lawrence M. Friedman, *The Legal System: A Social Science Perspective* 136 (1975).

The District Attorney's attempt to brush aside the important distinction between being a criminal target and being issued a "third-party subpoena duces tecum" also should be rejected. *Nixon*, 418 U.S. at 686; *Clinton*, 520 U.S. at 718 (Breyer, J., concurring in the judgment) ("the President participated as a witness" in *Nixon*). Unlike here, the *Nixon* special prosecutor made clear that he was not considering an indictment of the President. Brett M. Kavanaugh, *The President and the Independent Counsel*, 86 Geo. L.J. 2133, 2158 (1998). He understood that impeachment—not prosecution—is the proper way to pursue presidential wrongdoing. *Id.* Any assertion that the President may have committed a crime—even if "obliquely urged"—will "effectively disable [him] in the discharge of his constitutional duties." *Nixon v. Sirica*, 487 F.2d 700,

758 (D.C. Cir. 1973) (MacKinnon, J.). The *Nixon* subpoena did not cross that line. This one does.[2]

Finally, the District Attorney's other examples (at 18-19) are distinguishable for the same reasons. *United States v. Burr* involved federal process, did not target the President, and implicated the trial rights of a criminal defendant. 25 F. Cas. 30 (C.C.D. Va. 1807); 25 F. Cas. 187 (C.C.D. Va. 1807). The subpoena to President Monroe engaged him as a defense witness in a Naval court martial, and neither the subpoena nor the President's partial compliance with it was challenged. *Sirica*, 487 F.2d at 710 n.42. President Ford came within feet of a woman charged with attempting to assassinate him, making him a "percipient witness." *United States v. Fromme*, 405 F. Supp. 578, 580-82 (E.D. Cal. 1975). The process was issued from a federal court and it did not make him a criminal target. *Id.* at 583.

D. The Constitution strikes the balance in favor of immunity.

The Court has employed a balancing approach that weighs all the factors for and against immunity when it comes to evaluating whether the President should be immune from federal process. But balancing is unwarranted when it comes to state process—the

[2] The District Attorney adds (at 30) that the harms were worse in *Nixon* because the controversy was over confidential communications. But the issue, for immunity purposes, is not the nature of the documents but the nature of the legal process. Regardless, many of the records subpoenaed here are also confidential. Pet. 38 & n.5.

Supremacy Clause does that work. *Supra* 13-14. Even if balancing is appropriate here, however, it weighs heavily in favor of immunity.

This subpoena involves (1) state process (2) arising from a criminal proceeding that (3) targets the President for possible indictment. All of those factors weigh in favor of immunity. The *only* factor weighing against immunity is that this grand-jury investigation targets unofficial conduct. But the District Attorney concedes that this factor is not dispositive (otherwise the President could be indicted, arrested, or jailed for unofficial conduct). In this case, unlike in *Clinton*, the unofficial nature of the dispute shouldn't tip the scales against immunity. The risk that this kind of criminal process will "harass the President and distract him from his constitutional duties" is much too great. U.S. 7.

This is especially true given the unique nature of the presidency. For others in the Executive Branch, official acts can be readily sorted from unofficial ones Not so for the President. U.S. 23-24. Even if this were a close call, then, the Court should err on the side of shielding the President from distractions. Not for his personal benefit; for a nation that needs "energetic, vigorous, decisive, and speedy execution of the laws by" its Chief Executive. *Clinton*, 520 U.S. at 712 (Breyer, J., concurring in the judgment).

The District Attorney's main response is that the immunity the President seeks is too broad to strike the balance in his favor. In his view, the President's claim of "*per se* immunity from

investigation," Resp. 1, would "substantially harm the public's interest in the proper administration of criminal justice," Resp. 45. Both prongs of the District Attorney's argument miss the mark.

The President has not sought immunity nearly as broad as the District Attorney suggests. He seeks to enjoin this subpoena because it seeks *his* records in a grand-jury proceeding that targets *him* for possible indictment. That is the scope of the dispute before the Court because the President has been cautious in raising immunity. He could have done so earlier in this investigation, but instead attempted to cooperate with the District Attorney (as he did with federal prosecutors). Pet. 7-8; Resp. 4. The President knows that immunity is "'not to be lightly invoked.'" *Cheney*, 542 U.S. at 389. He invoked it here to protect the office from interference and harassment only once the District Attorney issued an abusive subpoena. In reality, the subpoena is the only thing that is "sweeping and unprecedented" about this controversy. Resp. 1.

The District Attorney also overstates the costs of immunizing the President from this subpoena. He complains (at 45-46) that it might result in permanent immunity because of statute-of-limitations and loss of evidence problems. But those concerns are unfounded. Pet. 33; U.S. 32. He also worries (at 46) that granting immunity will impair the investigation "into conduct by other parties." This concern is likewise exaggerated. The President has not sought to enjoin *any* other actions taken by the grand jury nor has the

District Attorney identified other interference with the grand jury's work.[3]

The District Attorney thus has been—and will continue to be—able to "gather evidence throughout the period of immunity." Moss Memo 257 n.36. But this subpoena is not that. Gathering evidence refers to issuance of criminal process to others—not the President. It is an effort to "mitigate somewhat the effect of a particular *witness's* failed recollection or demise," Moss Memo 257 n.36 (emphasis added), not a loophole that allows the District Attorney to distract the President with demands on his time and energy. That is why then-Solicitor General Bork correctly indicated that, as to the President, immunity doesn't "distinguish between indictment and other phases of the 'criminal process.'" *Id*. at 232 n.10.

This is not to suggest that granting immunity to the President might not make the grand jury's task harder. But immunity is not limited to circumstances in which it is otherwise costless. The controlling issue is the need for the President to fulfill his duties to the American people. *Id*. at 257; Pet. 39.

Immunity does not place the President "above the law." Resp. 1. It "merely precludes" one specific "remedy for alleged misconduct in order to advance compelling public ends." *Fitzgerald*, 457 U.S. at 758;

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[3] At a minimum, these "costs" can be assessed in deciding whether the District Attorney can show a heightened need for these records—a showing that he concedes he has not yet even attempted to make. *Infra* 20-22.

U.S. 11. The Constitution is our supreme law. The District Attorney violated it by issuing this subpoena.

II. The District Attorney lacks a heightened need for these documents.

The District Attorney, at a minimum, needs to prove he has a heightened need for these documents before the subpoena is enforced. Pet. 45-48; U.S. 25-29. The District Attorney's arguments to the contrary (at 38-44) are mistaken.[4]

As with immunity, the District Attorney stakes out a broad legal position that he quickly abandons. Initially, he argues (at 39-40) that the heightened-need standard applies only if there is a "claim of privilege." In the District Attorney's view, "a showing of special need ... makes sense in the context of privilege" but not here. Resp. 41. That is incorrect. Pet. 45-47; U.S. 28-29.

But the District Attorney then concedes (at 40) that *Cheney* applied the heightened-need standard, even where the Executive did not invoke privilege, "to avoid unnecessary interference with official Executive Branch functions." Like immunity, the heightened-need standard helps ensure that legal process does not

[4] The United States, according to the District Attorney (at 38), "stops short" of supporting the President's immunity claim. This is not true. The United States notes (at 5) that "the President's immunity from state judicial process must be even broader" than "federal judicial process" and (at 25) that the "dangers" posed by subpoenas of this type "may well support an absolute immunity from state criminal process."

"harass the President or impose unwarranted burdens upon him, diverting him from his official duties." U.S. 28; Pet. 47-48. It thus applies with equal force to this situation.

As with immunity, the District Attorney (at 41-43) tries to salvage his legal position by advocating for a case-specific inquiry where the President must make a "*prima facie* showing of malice, harassment, or politically motivated conduct" before a heightened-need demonstration is required. That argument fails for the same reasons it failed in the immunity setting. The question is whether this *type* of process is one to which the heightened-need standard should apply. The District Attorney acknowledges (at 39) that the requirement has been applied to grand-jury subpoenas. He does not make any argument why applying it in that setting was erroneous.

Shifting the burden to the President also turns the rule on its head. The Court has made clear that—where the heightened-need requirement applies—the prosecutor bears the burden of meeting it. *Nixon*, 418 U.S. at 713; *In re Sealed Case*, 121 F.3d 729, 754 (D.C. Cir. 1997); U.S. 26-27. In light of the "'high respect that is owed to the office of the Chief Executive,'" this Court thus has rejected the idea that the President must make a *prima facie* showing. *Cheney*, 542 U.S. at 385-86. This "exacting" standard is carried by "the party requesting the information." *Id*. Accordingly, "precedent provides no support for the proposition that … the onus of critiquing the unacceptable … requests line by line" is borne by the President. *Id*. at

388. In fact, *Clinton* and *Fitzgerald* "suggest just the opposite." *Id.*

The District Attorney resists complying with the heightened-need standard because he cannot meet it. Pet. 48; U.S. 29-33. The only response he offers (at 50) is that the President has "failed to make a threshold showing that the Mazars Subpoena was issued in bad faith or with the intent to harass." That is incorrect, *infra* 22-23, but it is also irrelevant. A lack of malicious intent is not a proxy for heightened need. The District Attorney must convincingly explain why he *needs* these documents—not why the subpoena is otherwise lawful. His failure to even try to make this showing should be seen as a concession.

III. The judgment should not be affirmed even under the District Attorney's case-specific approach.

The District Attorney's case-specific test should be rejected. But even if it applied, the heightened-need standard is required. Absent discovery into grand jury proceedings, the way to assess whether this subpoena "impermissibly interferes with the ability to perform Article II functions or was issued in bad faith," Resp. 2, is to require the District Attorney to show that he actually needs these documents. If he cannot, then the subpoena necessarily imposes an undue burden on the President, creates a serious risk of harassment, and was likely issued in bad faith.

But the District Attorney flunks his own test even without imposing the heightened-need standard.

His bad faith is evident from the decision to copy a congressional subpoena involving issues that have nothing to do with his investigation. Pet. 48; U.S. 30-31. His suggestion (at 51) that this sweeping and reckless subpoena was issued to make things easier for Mazars—the only defense the District Attorney has ever given—finds no support in the record and does not establish good faith in any event. Issuing a transparently overbroad subpoena because it will make for a swifter production is the definition of bad faith.

Targeting the President with criminal process like this also interferes with the execution of his official duties. Letting a local prosecutor criminally pursue the President through coercive process stigmatizes the office. The President cannot represent the entire nation—domestically and internationally—under this type of cloud. The need to consult with attorneys, consider privilege objections, review documents that may be produced, and weigh the possible charges that might be brought will be a distraction. And all of this will only encourage other prosecutors to do the same. It is simply untenable. The Court should reverse the judgment below.

Under no circumstances, however, should the judgment be affirmed before allowing the President to develop a factual record if the Court adopts the case-specific test the District Attorney advances. Contrary to the District Attorney's contention (at 51), there is no finding of good faith here given the Second Circuit's reversal of the district court's abstention holding. *O'Connor v. Donaldson*,422 U.S. 563, 577 n.12 (1975);

Cohen v. United States, 578 F.3d 1, 19 (D.C. Cir. 2009) (Kavanaugh, J., dissenting). And neither the Second Circuit nor the District Attorney endorsed the district court's immunity analysis under which the President could be imprisoned while in office. If the Court holds that immunity turns on case-specific facts, a remand is required.

The District Attorney's suggestion (at 51) that the President had the chance "to adduce … relevant evidence" is confounding. The complaint was filed on September 19, 2019, and the preliminary-injunction motion was filed the next day. On September 23, the District Attorney filed an opposition supported by a partially-sealed declaration. The President replied on September 24, argument was held on September 25, and the court then took the matter under advisement. There was barely enough time to brief and argue the motion for a preliminary injunction—let alone adduce relevant evidence.

Remand is not needed because the subpoena is invalid under settled law. However, basic fairness and respect for "the Presidency itself," *Trump v. Hawaii*, 138 S. Ct. 2392, 2418 (2018), warrant giving the Chief Executive a chance to develop a factual record should the Court hold that a case-specific showing is needed to successfully challenge this subpoena.[5]

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[5] The Court should preserve the status quo if it vacates and remands for further proceedings. Absent such relief, the subpoena will become enforceable. Pet. 11 n.2. Interim relief preserving the status quo is appropriate. *E.g.*, Order, *Trump v.*

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This state grand-jury subpoena violates Article II and the Supremacy Clause of the Constitution. The Court should vacate the judgment with instructions to enter injunctive relief in favor of the President.

Respectfully submitted,

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Mazars USA, LLP, No. 19A545 (Nov. 25, 2019) (granting stay pending appeal).