No. 20A63

In the Supreme Court of the United States

DONALD J. TRUMP, President of the United States,

Applicant,

v.

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

Respondents.

On Application for Stay

REPLY IN SUPPORT OF EMERGENCY APPLICATION FOR A STAY PENDING THE FILING AND DISPOSITION OF A PETITION FOR WRIT OF CERTIORARI

Jay Alan Sekulow
Stuart J. Roth
Jordan Sekulow
CONSTITUTIONAL LITIGATION AND ADVOCACY GROUP, P.C.
1701 Pennsylvania Ave, NW, Ste. 200
Washington, DC 20006
(202) 546-8890
jsekulow@claglaw.com

William S. Consovoy
Cameron T. Norris
Alexa R. Baltes
Bijan M. Aboutorabi
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
(703) 243-9423
will@consovoymccarthy.com

Patrick Strawbridge
CONSOVOY MCCARTHY PLLC
Ten Post Office Square
8th Floor South PMB #706
Boston, MA 02109

Counsel for President Donald J. Trump

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION & SUMMARY OF ARGUMENT

Whether the Court should grant a stay is not a close question. The President of the United States requests the opportunity to seek certiorari before his confidential financial records are disclosed to the grand jury and potentially the public. Once the records are produced, the status quo can never be restored. The District Attorney's boilerplate reasons for why the grand jury needs these records immediately thus do not outweigh the irreparable harm that the President will suffer absent interim relief. Regardless, the Court can largely solve concerns over additional delay by accelerating the due date for the President's certiorari petition. In sum, the Court should grant a short extension of a stay that has been in place for over a year so that the President can seek review before an unprecedented subpoena is enforced against him.

The stay also should be granted because the Court is likely to grant certiorari and reverse. This highly factual dispute should be resolved through the kind of streamlined evidentiary process typically used when grand-jury subpoenas are challenged on overbreadth and bad-faith grounds. But the District Attorney wants the lower courts' departure from that approach upheld without further review. So he asks this Court to disregard the President's factual allegations, to draw reasonable inferences against the President, to credit his own self-serving characterization of the investigation, and to treat the presumption of validity as an independent obstacle that must be overcome at the pleading stage. Few (if any) plaintiffs could survive that gauntlet. The District Attorney is thus correct that the Court has rejected "claims of immunity" in this setting. Opposition ("Opp.") at 1. He just misapprehends which party is actually seeking immunity at this point.

Try as he might, the District Attorney cannot explain why it is implausible for the President to allege that his Second Amended Complaint (SAC) raises overbreadth and bad-faith issues sufficient to survive a motion to dismiss: a local prosecutor copied a broad congressional subpoena that purports to be focused on exclusively federal issues. Even the District Attorney acknowledges that the claims are plausible if the President's allegation as to the investigation's limited scope is accepted as true. The Second Circuit's rejection of that pleaded fact indisputably violates the Federal Rules. But the subpoena is plausibly invalid even if the investigation is as sweeping as the District Attorney claims. Its near limitless reach—in time, scope, and geographic reach—has all the hallmarks of a fishing expedition. And the fact that the subpoena was issued to a third-party custodian while tensions were running high between the Trump Organization and the District Attorney, and for dubious reasons of efficiency, only makes the allegation of bad faith that much more plausible.

There is no doubt that overbreadth and bad-faith challenges are traditionally difficult to mount. But this is an unprecedented subpoena to the sitting President. And this is hardly a "'run-of-the-mill'" request for documents. Opp. 23. In all events, the President's case should not be short-circuited because lower courts are convinced that he won't succeed. He is entitled to the same benefit of liberal pleading rules as "'every other citizen' who is faced with a subpoena." Opp. 13 (quoting *Trump v. Vance*, 140 S. Ct. 2412, 2430 (2020)). The Court should grant a stay to ensure that the President's overbreadth and bad-faith claims receive the "'particularly meticulous'" review that they deserve. *Vance*, 140 S. Ct. at 2430.

ARGUMENT

I. The balance of equities strongly favors a stay.

The fundamental question before this Court is whether the President deserves the chance to seek certiorari before his confidential records are disclosed to the grand jury and perhaps the public. The District Attorney says that the President does not because, even without interim relief, he won't suffer irreparable harm. Opp. 31-34. That argument is meritless. Emergency Application for Stay ("Appl.") 32-37.

To begin, the District Attorney misreads *Church of Scientology of California v. United States*, 506 U.S. 9 (1992). In his view, the availability of "'meaningful relief'" after his papers are produced to the grand jury means that the President won't suffer "*irreparable*" harm, even though the "'*status quo ante*'" cannot be restored. Opp. 32 (quoting *Church of Scientology*, 506 U.S. at 12). He confuses irreparable harm with mootness. True, where a court can fashion some relief, the case is not moot. *Church of Scientology*, 506 U.S. at 12-13. But any post-disclosure remedy would be "partial"—*i.e.,* "too late to prevent, or to provide a fully satisfactory remedy." *Id*. at 13. Thus, the President's injury *is* irreparable given that, "but for the grant of equitable relief, there is a substantial chance that upon final resolution of the action the parties cannot be returned to the positions they previously occupied." *Brenntag Int'l Chemicals, Inc. v. Bank of India*, 175 F.3d 245, 249 (2d Cir. 1999). By contrast, the District Attorney's cases both involve monetary harm which, unlike disclosure of confidential records, is rarely irreparable. *See Conkright v. Frommert*, 556 U.S. 1401, 1403 (2009) (Ginsburg, J., in chambers); *Sampson v. Murray*, 415 U.S. 61, 90 (1974).

The District Attorney's response to the threat of public disclosure also is unavailing. To his credit, the District Attorney acknowledges that public release of the records *would* moot the case since it destroys any semblance of confidentiality. Opp. 32-33. But he then engages in misdirection by focusing on whether there will be a breach of grand-jury secrecy instead of addressing the various ways the documents could be lawfully released. All the District Attorney will say is that public disclosure by his office while this litigation is ongoing is not "*likely* to manifest." Opp. 33. But that unenforceable assurance isn't comforting. He could altogether eliminate the concern by promising to protect the records from all avenues for disclosure. Having declined to do so, the District Attorney cannot deny that the President *will certainly* suffer the quintessential irreparable harm—mootness—if the District Attorney publicizes the records himself in a grand-jury report, for example, or if he surrenders the records to a third party who releases them. Appl. 33-34. The District Attorney's refusal to protect the records from public disclosure during the pendency of this case is both telling and legally important.

The District Attorney's argument that the President "lacks substantial privacy interests" in his financial records is equally meritless. Opp. 33. "A person's interest in maintaining the privacy of his 'papers and effects' is of sufficient importance to merit constitutional protection." *Church of Scientology*, 506 U.S. at 13. It is likewise protected under state laws and rules. *See, e.g.*, 8 N.Y.C.R.R. §29.10(c). That privacy interest isn't defeated because those records are shared with a third-party custodian. *Carpenter v. United States*, 138 S. Ct. 2206, 2219-20 (2018). To be sure, a custodian

must comply with *lawful* demands. *Couch v. United States*, 409 U.S. 322, 335 (1973). But "everyone agrees" that this subpoena to Mazars "'is functionally a subpoena issued to the President.'" Opp. 34 (quoting *Vance*, 140 S. Ct. at 2425 n.5).

The District Attorney counters that the alleged leak of *some* of the records to the New York Times undermines his privacy interest. Opp. 33. But there's been no confirmation that the newspaper has any of these records. Regardless, unauthorized release of the President's tax records should only diminish this Court's confidence in grand-jury secrecy. *See Vance*, 140 S. Ct. at 2450 (Alito, J., dissenting). Those who leak tax documents likewise "could face felony charges," Opp. 33, and thus "do so at their peril," *Vance*, 140 S. Ct. at 2427 (majority op.); *see* 26 U.S.C. §§7213, 7216(a); N.Y. Tax Law §1825; N.Y.C. Admin. Code §11-1797(e).

Finally, the District Attorney argues that the President's harm is outweighed by the grand jury's immediate need for these documents. Opp. 34-36. But he offers no explanation for why maintaining the status quo was acceptable for the past year, but suddenly the investigation will be jeopardized if a stay remains in place during the short time needed for this Court to decide whether to grant review. The President has agreed to expedited review at every stage of this case—including filing a certiorari petition in the first appeal *ten days* after the Second Circuit issued its opinion. The President, accordingly, is prepared to file a certiorari petition on any schedule the Court deems appropriate.

Ultimately, the District Attorney's objection has little to do with the urgent needs of the grand jury. Like the district court, he simply believes that the President

doesn't deserve "yet one more layer of discretionary review." Opp. 36. But that is this Court's decision to make. The confidentiality of the President's records shouldn't be destroyed before the Court reaches that judgment.

II. The Court is likely to hear this important case.

This dispute is over the *first* state subpoena issued to a sitting President. The Court unanimously granted the President the opportunity to challenge the subpoena on remand as overbroad and lacking a good-faith basis. Yet the district court quickly dismissed the case without any review of the subpoena or its supporting affidavit, any evidentiary process, or any hearing to evaluate whether the District Attorney is exceeding his legal authority. And it did so after wrongly accusing the President of relitigating immunity. The Court is likely to review the Second Circuit's validation of this rush to judgment. Appl. 13-17.

The District Attorney chiefly responds that this case is unimportant because it arises under the state law. Opp. 12-13. But he's wrong twice over. Both claims that the President raised on remand implicate "Article II requirements, not just statutory or state-law requirements." *Vance*, 140 S. Ct. at 2433 n.1 (Kavanaugh, J., concurring in the judgment). Indeed, the Court relied extensively on federal law in explaining that "grand juries are prohibited from engaging in arbitrary fishing expeditions" or issuing subpoenas "motivated by a desire to harass or … conducted in bad faith." *Id.* at 2428 (majority op.) (cleaned up). Any "such harassment" of the President raises an issue of constitutional dimension. *Id.*

The President's claims are important even if they did sound in state law. Overbreadth and bad faith may be "'protections available to every other citizen' who

is faced with a subpoena." Opp. 13 (quoting *Vance*, 140 S. Ct. at 2430). But the District Attorney overlooks his own concession that "'these protections ... apply with special force to a President, in light of the office's unique position as the head of the Executive Branch.'" *Vance*, 140 S. Ct. at 2428 (cleaned up). As Justice Kavanaugh put it, "this Court has repeatedly declared—*and the Court indicates again today*—that a court may not proceed against a President as it would against an ordinary litigant." *Id.* at 2432 (emphasis added). It is understandable why the District Attorney portrays this case as a mine-run subpoena dispute that is unworthy of the Court's attention. But there's nothing routine about this case or how it was handled on remand.

Last, the District Attorney wisely concedes the President was given no chance to test the subpoena via the kind of process "any other individual" would be afforded. Appl. 15-16; *see* Opp. 14-15. He has no choice. In any other case the trial court would "require that the Government ... state on the record that there is an investigation being conducted by the grand jury, indicate in general terms the nature of the investigation, and demonstrate that the records sought bear some relation to that investigation." *In re Seiffert*, 446 F. Supp. 1153, 1155 n.5 (N.D.N.Y. 1978). In other words, the District Attorney would be "required to make some preliminary showing … that each item is at least relevant to an investigation being conducted by the grand jury and properly within its jurisdiction, and is not sought primarily for another purpose." *In re Grand Jury Proceedings*, 486 F.2d 85, 93 (3d Cir. 1973). The President isn't advocating for a "'heightened need standard.'" Opp. 15 (quoting *Vance*, 140 S. Ct. at 2431). He's seeking basic fairness.

The District Attorney counters that the President should have moved to quash the subpoena instead of bringing "a collateral civil §1983 complaint." Opp. 15. But this Court held that, even aside from immunity, "a President would be entitled to the protection of federal courts." *Vance*, 140 S. Ct. at 2428; *accord id*. at 2433 (Kavanaugh, J., concurring in the judgment). The District Attorney thus ignores that the President needed to file a *civil* action—not a *criminal* motion—to challenge a state grand-jury subpoena in federal court. *See id.* at 2428-29 (majority op.).

Presumably, then, the District Attorney thinks the President needed to go to state court if he wanted "the prosecutor to provide general information about the subject of the grand jury's investigation under appropriately protective procedures." Opp. 15. But the Federal Rules are well-equipped to handle this kind of dispute. The District Attorney can answer the SAC, the district court can fashion an appropriate evidentiary process, and the case can been resolved on summary judgment. Appl. 36. Nothing in *Vance* requires the President to choose between the protection of federal court and the safeguards "available to every other citizen" challenging a subpoena. *Vance*, 140 S. Ct. at 2430.

The problem is not the forum. It's the misuse of the Federal Rules to deny the President a genuine opportunity to litigate claims that are obviously plausible. That error is reason enough to grant certiorari. *See infra* 9-15. But the end result makes the case for review especially strong. The lower courts should not be allowed to deny the President basic access to the "general" information needed "to make the necessary showing" and then penalize him at the pleadings stage for not having it. *United States*

v. R. Enterprises, Inc., 498 U.S. 292, 301 (1991). That ruling warrants "'particularly meticulous'" review by this Court. *Vance*, 140 S. Ct. at 2430.

III. The decision below is unsustainable.

As explained, the Second Circuit contorted and misapplied the standard for assessing whether the President stated claims under Rule 12(b)(6). In particular, it refused to accept pleaded facts as true, declined to give the President the benefit of reasonable inferences, rejected plausible legal claims in favor of speculative alternatives that the court deemed more likely, and imposed a heightened pleading standard. In so ruling, the Second Circuit has diverged from *every* relevant lower-court ruling. Appl. 25-27. The District Attorney is unable to rehabilitate this indisputably erroneous decision.

The District Attorney doesn't dispute that the President's claims survive if the investigation is limited to the Cohen payments. He instead argues that the SAC doesn't allege "that the grand jury's investigation is focused *exclusively* on the Cohen payments." Opp. 18. In the District Attorney's view, the pleaded fact that the Cohen payments are "the focus" of the investigation means something materially different than "the investigation is *solely* about those payments." Opp. 19. But this is the kind of hair-splitting at the pleading stage that this Court has firmly rejected. Appl. 23. The Federal Rules "are designed to discourage battles over mere form of statement." *Johnson v. City of Shelby*, 574 U.S. 10, 11 (2014) (per curiam). The Second Circuit's rejection of that admonition heralds a return to "the hypertechnical, code-pleading regime of a prior era." *Ashcroft v. Iqbal* , 556 U.S. 662, 678 (2009).

The District Attorney's attempt to substantiate the untenable distinction he needs to draw illustrates the point. According to him, the SAC's recognition that "the investigation trains on *multiple* 'business transactions'" is an acknowledgment that it is broader than the Cohen payments. Opp. 19. But he ignores that the Cohen payments themselves involved multiple business transactions. App. 14. Similarly, the District Attorney argues that a New York Times article quoted in the SAC "suggest[s] that the investigation could well encompass more than the Cohen payments." Opp. 19. But what the article says is that the grand jury's investigation began with the Cohen payments and that it's "'unclear if'" the scope has since "'expanded.'" Opp. 19 n.6. How the District Attorney believes this contradicts the SAC's allegation that the investigation remains limited to the Cohen payments is mystifying. Appl. 26-27.

But even if crediting the President's allegation about the investigation's scope requires an inference to be drawn, that inference is plainly "reasonable." *Iqbal*, 556 U.S. at 678. The District Attorney, as noted, doesn't dispute that the investigation was limited to the Cohen payments when it began. He doesn't dispute that the subpoena issued to the Trump Organization was *exclusively* focused on the Cohen payments. And he doesn't dispute that the Cohen payments are the *only* subject his office has ever publicly acknowledged as being the subject of the investigation. App. 71-72. He nevertheless argues that it's "unreasonable" to infer that the investigation remains confined to its original scope. According to the District Attorney, grand jury investigations are "extremely broad" by "nature," grand juries "paint with a broad

brush," and "complex financial investigations" can "easily expand over time." Opp. 20, 21 (cleaned up).

None of this converts the President's contrary allegations into "*unreasonable* inferences" or "*unwarranted* deductions of fact." Opp. 19 (quoting *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 971 (9th Cir. 2009)). Whether this issue is framed as a dispute over the reasonableness of factual inferences or the plausibility of legal claims, Appl. 23-27, the District Attorney's error is the same: the fact that the investigation *might* be broader than the Cohen payments doesn't defeat the President's allegation that it isn't. The District Attorney is right that grand jury investigations can be broad and often expand. But the issue here is whether *this* investigation expanded. General observations about grand juries don't make it "obvious" that this one expanded its investigation—let alone so obvious that the Second Circuit could reject the President's allegation as unreasonable or implausible. Opp. 22. In sum, the SAC is fairly read to plead that the investigation is limited to the Cohen payments and, consequently, there is nothing *obviously* defective about that factual allegation. The President has stated plausible overbreadth and bad-faith claims.

Similar defects render the Second Circuit's decision unsustainable even if the investigation were assumed to be broader than the President alleges. Appl. 28-31. Supposition about how grand jury investigations "normally" proceed does not make the SAC's overbreadth and bad-faith claims implausible. Opp. 20. Yet supposition is all the District Attorney has. To rule for him, the Second Circuit had to conclude that demanding essentially every financial record of a global corporation isn't even

plausibly overbroad "in a complex financial investigation like this one." Opp. 22. It had to conclude that subpoenaing every category of documents the corporation has isn't even plausibly overbroad because such sweeping demands are "characteristic of a financial investigation." *Id.* And it had to conclude that the "number and geographic reach of the entities implicated" isn't even plausibly overbroad since such an expansive demand is "not unusual or unreasonable in a complex financial investigation like this one." Opp. 24. This is a classic example of wrongly crediting a "lawful alternative explanation" over the plaintiff's claim because it "appeared more likely" to the court. *Houck v. Substitute Trustee Servs., Inc.*, 791 F.3d 473, 484 (4th Cir. 2015).

The same goes for the President's bad-faith claim. It apparently isn't even plausible that subpoenaing every record from Mazars in response to a refusal to turn over select tax returns lacked a good-faith basis because "subpoenas for tax returns frequently also seek underlying documents necessary to understand those returns." Opp. 28. Seeking all of those documents from Mazars instead of from the President directly doesn't even plausibly support an inference of bad faith, according to the District Attorney, because maybe the District Attorney was showing "respect for [the President's] official duties." *Id*. And copying a congressional subpoena wasn't even plausibly in bad faith, the District Attorney says, because Congress "sought generally the same documents that [his] Office needed." Opp. 29. This is all speculation, not a "plausible alternative explanation … so convincing that plaintiff's explanation is *im*plausible." *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

Finally, the District Attorney tries to hide all of these problems behind the "presumption of validity." Opp. 15-18. But his excessive reliance on the presumption is misplaced and illustrative of how far off track this case veered. First off, the District Attorney misunderstands the presumption's role. It is not a "*substantive ingredient*" of an overbreadth or bad-faith claim. Opp. 16. Rather, like any presumption, it dictates which party bears the burden of proof and how "difficult" that burden is. *R. Enterprises*, 498 U.S. at 300. Because of the presumption, a subpoena is overbroad if there's "no reasonable possibility" that a "category of materials" requested will yield "information relevant to the general subject of the grand jury's investigation." *Id.* at 301; *accord Virag v Hynes*, 54 N.Y.2d 437, 444 (1981). The presumption also requires "concrete evidence" of "bad faith" before a subpoena will be invalidated on that basis. *Virag*, 54 N.Y.2d at 443. In short, the presumption of validity is incorporated into the standards for overbreadth and bad faith—it is not an additional hurdle that must be overcome after showing violations of those standards.

Yet the Second Circuit pointedly deployed the presumption of validity as an additional thumb on the scale against the President. App. 126-27. That double counts the presumption and, in effect, imposes a heightened pleading standard in violation of Rule 8. Appl. 31-32. The President's task was to plead facts plausibly alleging overbreadth and bad faith. He wasn't *further* required to allege facts that "would overcome" an overarching, independent "presumption of validity." App. 142.

Treating the presumption as an "element of overbreadth and bad-faith claims" was reversible error. Opp. 17.

Correctly understood, the presumption of validity was no basis for dismissing the President's claims. If the investigation's scope is limited to the Cohen payments, as the President alleged, not even the District Attorney believes that dismissal is warranted. *See supra* 9. And, if the investigation is broader, the President still has plausibly alleged overbreadth and bad faith in accordance with *R. Enterprises* and *Virag*. *See supra* 11-13. The presumption of validity doesn't immunize grand-jury subpoenas from challenge. The Second Circuit indisputably erred by treating the presumption as if it does.

* * *

The District Attorney invents a case that he hopes can be dismissed at the pleading stage. According to him, this is a complex and wide-ranging investigation into every Trump Organization practice everywhere it does business anywhere in the world. This local investigation is purportedly so broad that it generally mirrors a legislative inquiry being conducted into national and international matters by the House Oversight Committee. The District Attorney's problem is that none of these "facts" are drawn from the SAC. They are a mix of assertions made in his motion to dismiss and supposition by the lower courts. At this stage, however, the operative complaint must control.

The Second Circuit should not be allowed to rewrite the Federal Rules in the name of expediency—especially when a dispute involves the President. This won't be the last case where "it strikes a savvy judge that actual proof of [the alleged] facts

is improbable." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007). But Rule 12(b)(6) doesn't allow "dismissals based on a judge's disbelief of a complaint's factual allegations." *Neitzke v. Williams*, 490 U.S. 319, 327 (1989). Nor does it permit that judge to transform the plausibility standard into a "probability requirement." *Iqbal*, 556 U.S. at 678. But that is exactly what the Second Circuit did.

IV. The Court should preserve the status quo regardless of whether the appropriate relief is a stay or an injunction.

In passing, the District Attorney argues that the President needs an injunction rather than a stay. Opp. 10-11. But the District Attorney omits that he litigated this issue below and lost. App. 114. He offers no explanation for why the interim relief needed here differs from the relief that was needed (and granted by this Court) in the recent congressional-subpoena cases. And he doesn't respond to any of the President's other arguments concerning this issue. Appl. 37-38. In short, the District Attorney offers this Court no reason to disturb the conclusion below that a stay is sufficient to preserve the status quo in light of the parties' agreement. App. 114.

Regardless, the President meets the standard for an injunction too. Appl. 37-38. The District Attorney does not dispute that an injunction would be in aid of the Court's jurisdiction. He argues only that an injunction pending appeal shouldn't issue because the President lacks an "indisputably clear" legal right. Opp. 11 (citation and quotations omitted). But the decision below is incorrect on every level and warrants summary reversal. Appl. 17-32; *supra* 9-15. The President's overbreadth and bad-faith claims are indisputably plausible.

CONCLUSION

For all these reasons, and for those presented in the application, the President respectfully asks for a stay pending the filing and disposition of a petition for a writ of certiorari. The President further asks, in the alternative, that the Court treat the stay application as a petition for writ of certiorari, grant the petition, and summarily reverse the judgment below.

Dated: October 19, 2020

Respectfully submitted,

s/ William S. Consovoy

William S. Consovoy
Cameron T. Norris
Alexa R. Baltes
Bijan M. Aboutorabi
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
(703) 243-9423
will@consovoymccarthy.com

Patrick Strawbridge
CONSOVOY MCCARTHY PLLC
Ten Post Office Square
8th Floor South PMB #706
Boston, MA 02109

Jay Alan Sekulow
Stuart J. Roth
Jordan Sekulow
CONSTITUTIONAL LITIGATION AND ADVOCACY GROUP, P.C.
1701 Pennsylvania Ave, NW, Suite 200
Washington, DC 20006
(202) 546-8890
jsekulow@claglaw.com

Counsel for President Donald J. Trump