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.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
JOSEPH H. HUNT
Assistant Attorney General
JEFFREY B. WALL
Deputy Solicitor General
HASHIM M. MOOPPAN
Deputy Assistant Attorney General
VIVEK SURI
Assistant to the Solicitor General
MARK R. FREEMAN
SCOTT R. MCINTOSH
GERARD SINZDAK
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether and in what circumstances Article II and the Supremacy Clause of the United States Constitution allow a state grand jury to issue a subpoena to a third-party custodian for the personal records of the sitting President of the United States.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution:

Miscellaneous:

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INTEREST OF THE UNITED STATES

This case involves a state grand jury's issuance of a subpoena to a third-party custodian for the personal records of the sitting President of the United States. The United States has a substantial interest in protecting the Office of the President and the powers and duties vested in that office by Article II of the Constitution. The United States has participated as amicus curiae in other cases that have presented related issues concerning the President's amenability to suit or compulsory process. In this Court, the United States participated as amicus curiae in *Clinton* v. *Jones*, 520 U.S. 681 (1997), which involved a President's amenability to civil litigation in federal court during his tenure for conduct that preceded his tenure. The United States also

participated as amicus curiae in *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982), which involved a President's immunity from civil actions for damages based on the President's conduct in office. In the lower courts, the United States participated as amicus curiae in *Trump* v. *Mazars USA, LLP*, 940 F.3d 710 (D.C. Cir. 2019), and *Trump* v. *Deutsche Bank AG*, No. 19-1540 (2d Cir. filed May 24, 2019), which concern the enforceability of congressional subpoenas seeking financial records related to the President from third-party custodians. Similarly, the United States participated as amicus curiae in *United States* v. *Poindexter*, 732 F. Supp. 142 (D.D.C. 1990), regarding the amenability of a former President to a criminal subpoena relating to his conduct in office. And in this case, the United States participated in the district court and the court of appeals as amicus curiae addressing application of federalism-based abstention doctrines and constitutional principles governing a state grand jury subpoena seeking the President's personal records.

The United States also has a substantial interest in protecting the autonomy of the federal government from potential interference by the States. The United States has participated as amicus curiae in numerous other cases that have presented issues concerning the scope of federal officials' immunity from action by the States. See, *e.g.*, *Dawson* v. *Steager*, 139 S. Ct. 698, 702 (2019).

STATEMENT

1. Cyrus R. Vance, the District Attorney of the County of New York, has opened a grand-jury investigation into potential crimes under New York law. Pet. App. 3a-4a. On August 29, 2019, the District Attorney served a subpoena *duces tecum* on behalf of the grand

jury on President Donald J. Trump's accounting firm, Mazars USA LLP. *Id.* at 4a. The subpoena demanded that Mazars produce a wide range of financial records relating to the President and organizations affiliated with him—including the personal "[t]ax returns and related schedules, in draft, as-filed, and amended form" belonging to "Donald J. Trump." *Id.* at 5a n.5. The subpoena is almost a word-for-word copy of two subpoenas issued by committees of the House of Representatives for the same documents. *Id.* at 123a-126a.

2. On September 19, 2019, the President sued the District Attorney and Mazars in federal district court, seeking declaratory and injunctive relief on the ground that the President was immune from the subpoena while he remained in office. Pet. App. 6a-7a. The district court dismissed the complaint. *Id.* at 30a-95a.

The district court first declined to exercise jurisdiction over the suit. Pet. App. 41a-61a. The court explained that, under this Court's decision in *Younger* v. *Harris*, 401 U.S. 37 (1971), federal courts ordinarily abstain from hearing suits to enjoin ongoing state criminal prosecutions. Pet. App. 41a-43a. The court of appeals concluded that this case satisfied the criteria for *Younger* abstention, stating that the President could instead seek relief from "New York courts." *Id.* at 60a.

The district court also "articulate[d] an alternative holding" rejecting the President's claim of immunity on "the merits." Pet. App. 61a. The court reasoned that the scope of the President's "immunity from criminal process" turned on a "weighing of the competing interests" under the circumstances of the case at hand. *Id.* at 93a. The court explained that, under that balancing test, a "lengthy imprisonment" of a sitting President on

"a charge of murder" would "perhaps" violate the Constitution, but that, for example, subjecting a sitting President to a "charge of failing to pay state taxes" would not do so. *Id.* at 33a, 82a. Applying its balancing test, the Court concluded that the President lacks immunity from the subpoena in this case, because responding to the subpoena "would likely not create * * * catastrophic intrusions on the President's personal time and energy * * * or threaten the 'dramatic destabilization' of the nation's government." *Id.* at 82a.

3. The court of appeals affirmed in part, vacated in part, and remanded the case for further proceedings. Pet. App. 1a-29a.

The court of appeals vacated the portion of the district court's judgment that dismissed the complaint under *Younger*. Pet. App. 14a. The court of appeals recognized that *Younger* abstention reflects a policy of "comity" between federal and state courts. *Id.* at 9a (citation omitted). The court explained that "*Younger*'s policy of comity" has no application "where 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." *Id.* at 12a (citation and internal quotation marks omitted). The President's "novel and serious claims," the court summed up, are "more appropriately adjudicated in federal court." *Id.* at 13a.

The court of appeals then construed the district court's discussion of the merits "as an order denying the President's motion for a preliminary injunction," and it affirmed that decision. Pet. App. 14a. The court of appeals concluded that "presidential immunity does not

bar the enforcement of a state grand jury subpoena directing a third party to produce non-privileged material, even when the subject matter under investigation pertains to the President." *Id.* at 15a. The court first rejected the President's claim of absolute immunity from the subpoena, emphasizing that "[t]he subpoena at issue is directed not to the President, but to his accountants." *Id.* at 20a. The court also rejected the United States' argument that, at a minimum, any state prosecutor seeking to subpoena the President's personal records "must make a heightened showing of need for the documents sought." *Id.* at 27a. The court reasoned that the United States drew that standard "from cases concerning when a subpoena can demand the production of documents protected by executive privilege," and it concluded that the standard "has little bearing on a subpoena that, as here, does not seek any information subject to executive privilege." *Ibid.*

ARGUMENT

This case involves the first attempt in our Nation's history by a local prosecutor to subpoena personal records of the sitting President of the United States. The court of appeals blessed that attempt, holding that a court should treat a subpoena for the President's personal records no differently than any other subpoena. In the court's view, the District Attorney was not even required to show that he had a particularized need for the evidence sought in the subpoena or that the evidence could not be obtained elsewhere.

That decision is wrong. Article II of the Constitution protects the President's discharge of his constitutional functions from obstruction or interference. And the Supremacy Clause protects the autonomy of the federal

government from the States. State grand jury subpoenas seeking the President's personal records raise serious constitutional concerns under both Article II and the Supremacy Clause. Leaving local prosecutors with unfettered authority to issue such subpoenas creates a serious risk that those prosecutors—prioritizing local concerns and disregarding significant federal interests—may subject the President to highly burdensome demands for information. Leaving local prosecutors with such unfettered authority also raises the risk that prosecutors could use subpoenas to harass the President as a result of opposition to his policies. If Article II and the Supremacy Clause allow such subpoenas at all, they do so only where the prosecutors make a heightened showing of need for the information sought.

The decision of the court of appeals warrants this Court's review. This Court has traditionally acted with great respect for the Office of President of the United States. This Court—not a lower federal court—should decide whether the type of intrusion on the Presidency at issue in this case is permissible.

A. The Court Of Appeals Erred In Upholding A Local Grand Jury Subpoena For A President's Personal Records Without Requiring, At A Minimum, A Heightened Showing Of Need

1. Article II and the Supremacy Clause protect the Presidency from interference by the States

a. "The President occupies a unique position in the constitutional scheme." *Nixon* v. *Fitzgerald*, 457 U.S. 731, 749 (1982). The Constitution vests the legislative and judicial powers in collective bodies, but the entirety of the "executive Power" in a single person—the President of the United States. U.S. Const. Art. II, § 1. It

entrusts him with vast and critical responsibilities—charging him alone with "tak[ing] Care that the Laws be faithfully executed," U.S. Const. Art. II, § 3, making him alone the "Commander in Chief of the Army and Navy of the United States," U.S. Const. Art. II, § 2, Cl. 1, and empowering him to represent the United States as its "sole organ * * * in the field of international relations," *United States* v. *Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936). In contrast to Congress—which is required to assemble only "once in every Year," U.S. Const. Art. I, § 4, and which "may adjourn from day to day," U.S. Const. Art. I, § 5, Cl. 1—the President is never out of session. The President, in short, is the "sole indispensable man in government." *Clinton* v. *Jones*, 520 U.S. 681, 713 (1997) (Breyer, J., concurring in the judgment) (citation omitted). Any interference with the performance of his duties "would raise unique risks to the effective functioning of government." *Fitzgerald*, 457 U.S. at 751.

Justice Story explained long ago that the Presidency carries with it certain "incidental powers" that are "necessarily implied from the nature of the functions" vested in it, and that "[a]mong these, must necessarily be included the power to perform [those functions], without any obstruction or impediment whatsoever." 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1563, at 418-419 (1833) (*Commentaries*). Following Justice Story's "persuasive" analysis, this Court has held that the Presidency carries with it certain privileges and immunities as "functionally mandated incident[s] of the President's unique office." *Fitzgerald*, 457 U.S. at 749. For example, the Court has held that a President enjoys "absolute immunity from damages liability predicated on his official acts." *Ibid.*

The Court also has held that the President may be required to respond to a federal criminal trial subpoena for documents protected by executive privilege only where there is a "demonstrated, specific need" for the records requested. *United States* v. *Nixon*, 418 U.S. 683, 713 (1974). Similarly, the Court has held that it "has no jurisdiction of a bill to enjoin the President in the performance of his official duties." *Mississippi* v. *Johnson*, 71 U.S. (4 Wall.) 475, 501 (1867). The Court likewise has held that the President's "'constitutional responsibilities and status are factors counseling judicial deference and restraint'" in ordering "civil discovery" against the President. *Cheney* v. *United States Dist. Court*, 542 U.S. 367, 385-386 (2004) (brackets and citation omitted). And it has held that, even when a private party sues a sitting President in federal court for purely private conduct, the "high respect that is owed to the office of the Chief Executive * * * should inform the conduct of the entire proceeding, including the timing and scope of discovery." *Jones*, 520 U.S. at 707.

In addition, although this Court has never confronted the question, the Department of Justice has long taken the position that Article II prohibits the arrest, indictment, or criminal prosecution of a sitting President. See 24 Op. O.L.C. 222, 247-248 (2000); Memorandum from Robert G. Dixon, Assistant Att'y Gen., Office of Legal Counsel (Sept. 24, 1973); see also 24 Op. O.L.C. 222 at 257 n.36 (discussing federal grand-jury investigations of sitting Presidents). That conclusion is consistent with Justice Story's observation that a sitting President is not "liable to arrest, imprisonment, or detention." *Commentaries* 419.

b. Quite apart from Article II, the Supremacy Clause—which provides that the Constitution, laws, and

treaties of the United States constitute "the supreme Law of the Land," U.S. Const. Art. VI, Cl. 2—bars state and local governments from taking actions that would interfere with the federal government's autonomy or exercise of its constitutional functions. "It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence." *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819). The Court has thus recognized that the Supremacy Clause deprives the States of the power "to retard, impede, burden, or in any manner control" the federal government's exercise of its constitutional functions. *Id.* at 436. It has explained that any state action that "impairs the efficiency of the[] agencies of the Federal government to discharge the[ir] duties" would be "absolutely void." *Davis* v. *Elmira Sav. Bank*, 161 U.S. 275, 283 (1896). And it has said that it would be "inconceivable" that a state law or policy could "be interposed as an obstacle to the effective operation of a federal constitutional power." *United States* v. *Belmont*, 301 U.S. 324, 332 (1937).

This Court has accordingly held, for example, that federal officers acting in their official capacity are immune from state writs of mandamus and state writs of habeas corpus. See *Tarble's Case*, 80 U.S. (13 Wall.) 397, 407-412 (1872); *McClung* v. *Silliman*, 19 U.S. (6 Wheat.) 598, 604-605 (1821). It also has suggested that although Article II does not make a sitting President immune from civil litigation in *federal* court, the Supremacy Clause may well grant the President such an immunity in *state* court. See *Jones*, 520 U.S. at 691.

2. A state grand jury subpoena for the President's personal records raises serious concerns of interference with the Presidency

This Court has calibrated the scope of the President's constitutional privileges and immunities in proportion to "the dangers of intrusion on the authority and functions of the Executive Branch." *Fitzgerald*, 457 U.S. at 754. Allowing state grand juries to subpoena the President's personal records risks intrusion upon the functions of the Presidency in at least two ways.

First, allowing such subpoenas risks exposing the President to unduly burdensome demands for information. A grand jury "can investigate merely on suspicion that the law is being violated, or even just because it wants assurances that it is not." *United States* v. *Morton Salt Co.*, 338 U.S. 632, 642-643 (1950). "As a necessary consequence of its investigatory function, the grand jury paints with a broad brush." *United States* v. *R. Enters., Inc.*, 498 U.S. 292, 297 (1991). In New York, for example, "given the ranging, exploratory nature and operation of a Grand Jury," a witness who seeks to quash a grand jury subpoena "must demonstrate 'that a particular category of documents can have no conceivable relevance to any legitimate object of investigation.'" *Virag* v. *Hynes*, 430 N.E.2d 1249, 1253 (N.Y. 1981) (citation omitted). A grand jury subpoena could thus impose substantial burdens on the President's time, attention, and discharge of his constitutional duties.

That risk is heightened when the subpoena is issued by a local rather than a federal prosecutor. A U.S. Attorney is accountable to the Attorney General and the President, who in turn is accountable to the Nation as a whole. Thus, under the constitutional structure, a federal prosecutor is positioned to balance the interests in

obtaining evidence against the effect of a subpoena on the functioning of the Executive Branch. In contrast, there are more than 2300 district attorneys across the United States, the vast majority of whom are locally elected, often by voters in a single county. See Gov't C.A. Amicus Br. 8-9. Those local prosecutors are accountable to small and localized electorates. They have strong incentives to respond to the particularized interests and views of their local communities, but no comparable incentives to accord the requisite weight to the effect of their local decisions on the Nation as a whole. Their decisions may be influenced by "state attachments, state prejudices, state jealousies, and state interests." *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347 (1816). Accordingly, as a matter of constitutional structure, they are not positioned to balance the benefits and burdens of subjecting the President to an extraordinary demand.

Second, allowing subpoenas for the President's personal records risks exposing the President to harassment. "[A] President must concern himself with matters likely to 'arouse the most intense feelings.'" *Fitzgerald*, 457 U.S. at 752 (citation omitted). "In view of the visibility of his office and the effect of his actions on countless people, the President would be an easily identifiable target" in response to his official policies. *Id.* at 753.

Once again, that risk is heightened where the subpoena is issued by a local prosecutor. Our Nation's history demonstrates that state and local officials are sometimes affirmatively "hostile" to federal policies and federal officers, particularly during "periods of national stress." *Willingham* v. *Morgan*, 395 U.S. 402, 405 (1969). If there were no constitutional limits on a state or local prosecutor's authority to issue subpoenas, so

that the federal courts were "powerless to interfere at once for [the President's] protection," "the operations of the general government may at any time be arrested at the will of one of its members." *Tennessee* v. *Davis*, 100 U.S. 257, 263 (1880).

History confirms those constitutional concerns. This Court has observed that the lack of historical precedent for a challenged action is relevant to assessing its constitutionality in the context of separation of powers. See *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 505-506 (2010). For example, in *Fitzgerald*, the Court observed that before the 1970s, "fewer than a handful of damages actions ever were filed against the President." *Fitzgerald*, 457 U.S. at 752 n.31. That "history" provided "powerful support" for the Court's holding that the President enjoyed absolute immunity from private damages lawsuits for his official acts. *Ibid.* In this case, the historical precedents for the District Attorney's action are even weaker than the historical precedents for private damages lawsuits against the President. The United States is unaware of *any* precedent for the issuance of a state criminal subpoena for a sitting President's personal records, and the District Attorney and the courts below have never identified one.

3. A state grand jury subpoena for the President's personal records must, at a minimum, satisfy a heightened standard of need

Because there is no precedent for the District Attorney's grand jury subpoena for a sitting President's personal records, this Court has never had occasion to determine the precise scope of the President's immunity from such an assertion of criminal jurisdiction. In

Nixon, however, this Court held that although the President does not enjoy an absolute immunity from federal criminal trial subpoenas for information covered by executive privilege, such a subpoena is permissible only where there is a "demonstrated, specific need" for the information sought. 418 U.S. at 713. As the D.C. Circuit has concluded, the standard "govern[ing] grand jury subpoenas is no more lenient than the standard enunciated for trial subpoenas in *Nixon*." *In re Sealed Case*, 121 F.3d 729, 756 (1997).

The standard under *Nixon* is properly read to require two showings. First, the prosecutor must show that the evidence sought is "essential to the justice of the [pending criminal] case." *Nixon*, 418 U.S. at 713 (quoting *United States* v. *Burr*, 25 F. Cas. 187, 192 (C.C. Va. 1807) (No. 14,694) (Marshall, C.J.)) (brackets in original). That means that the evidence sought must be "directly relevant to issues that are expected to be central to the trial." *Sealed Case*, 121 F.3d at 754. Second, the prosecutor must show that "[t]he subpoenaed materials are not available from any other source." *Nixon*, 418 U.S. at 702. That means that "[e]fforts should first be made to determine whether sufficient evidence can be obtained elsewhere," that "the subpoena's proponent should be prepared to detail these efforts," and that such a subpoena is appropriate only as a "last resort." *Sealed Case*, 121 F.3d at 755-761.

This case, of course, differs from *Nixon* in several respects. *Nixon* involved a federal trial subpoena to the President for privileged official records in the course of the prosecution of third parties, while this case involves a state grand jury subpoena to the President's agent for the President's personal records in the course of an investigation into the President himself. Many of those

differences, however, make the subpoena in this case *more* constitutionally problematic, not less. It follows that the District Attorney in this case must, at a minimum, meet the heightened requirements under *Nixon* before obtaining the records he seeks.

First, and most fundamentally, *Nixon* involved a federal subpoena, while this case involves a state subpoena. As a doctrinal matter, this Court has often recognized that the Constitution may protect the Executive Branch from state interference to a greater degree than it protects the Executive Branch from federal interference. For example, it is well established that federal courts may direct writs to federal officers, see *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 169-173 (1803), but that state courts may not, see *McClung*, 19 U.S. (6 Wheat.) at 604-605. Similarly, this Court has held that the Constitution does not require a federal court to defer civil litigation against the President until after the end of his term, but recognized that "federalism and comity concerns, as well as the interest in protecting federal officials from possible local prejudice," may well support "a comparable claim" in "a state tribunal." *Jones*, 520 U.S. at 691 (footnote omitted). In addition, as a practical matter, the risk that state subpoenas would interfere with the Presidency is far greater than the risk that a federal subpoena would do so. As explained above, federal prosecutors are uniquely positioned under the Constitution to take account of both the benefits and burdens of a demand for information from the President. State prosecutors are not.

Second, *Nixon* involved a trial subpoena, while this case involves a grand jury subpoena. Again, the risk that a grand jury subpoena would interfere with the

President's performance of the singular powers and responsibilities of his office is at least as great as the risk that a trial subpoena would do so. The grand jury enjoys "wide latitude to inquire into violations of criminal law. No judge presides to monitor its proceedings. It deliberates in secret and may determine alone the course of its inquiry." *United States* v. *Calandra*, 414 U.S. 338, 343 (1974). As the D.C. Circuit has therefore correctly held in the context of a grand jury subpoena for privileged materials, the "standard which governs grand jury subpoenas" must be "no more lenient than the need standard enunciated for trial subpoenas in *Nixon*." *Sealed Case*, 121 F.3d at 756.

Third, *Nixon* involved a subpoena issued during the course of a trial of third parties, while this case involves a state's subpoena for the President's personal records in the course of an investigation of the President himself. As the court of appeals observed, the District Attorney represents "that the grand jury is investigating *not only the President*, but also other persons and entities." Pet. App. 22a. Using compulsory criminal process against a sitting President to investigate him, in contrast to asking him to serve as a witness in the prosecution of third parties, involves more pointed and serious dangers of harassment and of diverting the President's attention from his official duties.

On the other side of the ledger, *Nixon* involved a subpoena for privileged materials relating to the President's official acts, while this case involves a subpoena for the President's personal records. A subpoena for privileged materials does raise some constitutional concerns that a subpoena for personal records does not; the former implicates "the protection of the confidenti-

ality of Presidential communications," with its "constitutional underpinnings," while the latter does not. *Nixon*, 418 U.S. at 705-706. But the distinction between the President's official acts and his personal acts is not, by itself, decisive. In a variety of settings, acts taken against the President as a person could still improperly undermine the Office of the President as an institution. For example, the Constitution protects a sitting President from criminal prosecution even for his personal conduct, because such prosecution would threaten the operation of the Executive Branch. See p. 8, *supra*. So too, this Court has recognized that the "high respect that is owed to the office of the Chief Executive" "should inform the conduct" of any federal lawsuit against a sitting President in his personal capacity. *Jones*, 520 U.S. at 707. And the Court has suggested that "any direct control by a state court over the President," even in a case involving the President's personal conduct, may raise concerns under "the Supremacy Clause." *Id.* at 691 n.13. In the present context, a state grand jury subpoena for a President's personal records can similarly raise a serious risk of interfering with the Presidency. See pp. 10-12, *supra*.

Separately, *Nixon* involved a subpoena to the President himself, while this case involves a subpoena to the President's agents for the President's records. Again, it is true that a subpoena to the President himself presents a special constitutional concern that a subpoena to his agents does not. Again, however, that distinction is not, by itself, decisive. As a general matter, this Court and other courts have recognized that a demand for information may in some circumstances raise constitutional concerns even if directed to a federal official's agent rather than to the official himself. See, *e.g.*,

Gravel v. *United States*, 408 U.S. 606, 613-622 (1972) (holding that a subpoena directed to a Senator's aide was properly analyzed under the Speech or Debate Clause); *Judicial Watch, Inc.* v. *United States Secret Serv.*, 726 F.3d 208, 225-229 (D.C. Cir. 2013) (explaining that a federal statute would raise constitutional concerns if it were interpreted to require disclosure of certain White House records, even where those records were in the possession of a different custodian).

And in these particular circumstances, the functional justifications for the President's protection from criminal subpoenas apply to subpoenas for the President's personal records even where those subpoenas are directed to the President's agents. That protection, as explained above, exists to safeguard the Presidency from the risk that such subpoenas would impose burdens that would divert the President's attention from his official duties, as well as the risk that such subpoenas could be used to harass the President. Those risks all remain just as real when the subpoena's recipient is the President's agent as when it is the President himself. That is especially so here, because the President has little choice in practice but to rely on third-party accountants and professionals to prepare and maintain his financial records. Under the court of appeals' contrary approach, Article II and the Supremacy Clause would leave thousands of district attorneys across the Nation free to subpoena a sitting President's accountants for his financial records, his doctors for his medical records, his lawyers for his legal records, and so on—again, all regardless of whether the prosecutor has any special need for the information and whether the information could be obtained elsewhere.

In short, weighing both sides of the ledger, a local grand jury's subpoena seeking the President's personal records clearly involves sufficiently serious risks of interference with the President's performance of his constitutional duties to justify application of the heightened standard under *Nixon*.

4. The court of appeals' reasons for rejecting a heightened standard are flawed

The court of appeals rejected the United States' contention as amicus curiae that the District Attorney must at a minimum satisfy the heightened standard under *Nixon* in order to obtain personal records of the President through a grand jury subpoena. Pet. App. 27a-28a. The District Attorney had argued in the alternative that the subpoena in this case satisfied that heightened standard, but the court did not rely on that argument. See *ibid.* The upshot of the court's decision is thus that the United States Constitution allows the District Attorney in this case and other district attorneys in future cases to issue criminal subpoenas for a sitting President's personal records, even if the prosecutors have no particularized need for the evidence they seek and even if they could easily obtain the same evidence from other sources. That holding is incorrect.

The court of appeals reasoned that *Nixon*'s heightened standard is inapplicable to this case because *Nixon* involved "the production of documents protected by executive privilege," while this case involves a subpoena that "does not seek any information subject to executive privilege." Pet. App. 27a. Elsewhere in its opinion, the court similarly emphasized that "[t]he subpoena at issue is directed not to the President, but to his accountants." *Id.* at 20a. In so reasoning, the court attached decisive weight to distinctions between *Nixon*

and this case that the court believed cut in the District Attorney's favor, but disregarded numerous other distinctions that cut in the opposite direction. See pp. 12-15, *supra*. Most notably, the court failed to give any weight at all to the distinct risks posed when state and local prosecutors, as opposed to federal prosecutors, issue subpoenas for a sitting President's personal records. That failure is particularly puzzling, because the court had already acknowledged, in the course of analyzing abstention under *Younger* v. *Harris*, 401 U.S. 37 (1971), the serious federalism concerns raised "where a county prosecutor" opens "a criminal investigation that involves the sitting President." Pet. App. 12a.

The court of appeals also emphasized the interest of the "criminal justice system" in ensuring that "'guilt shall not escape or innocence suffer.'" Pet. App. 23a-24a (citation omitted). In *Nixon*, however, this Court already "weigh[ed]" the public interest in the "fair administration of criminal justice" against the public interest in the unimpeded performance of "the President's responsibilities." 418 U.S. at 711-712. After balancing those interests, the Court concluded that a criminal trial subpoena for the President's privileged records would be permissible only where the subpoena's proponent makes a heightened showing of need. That standard *already* accommodates "the fundamental demands of due process of law in the fair administration of criminal justice," because it enables a prosecutor to obtain material from the President where it is "'essential to the justice of the pending criminal case.'" *Id.* at 713 (citation and brackets omitted).

5. The District Attorney has not established that he has satisfied the applicable constitutional standard

As noted above, the court of appeals did not hold that the District Attorney had satisfied the heightened standard set out in *Nixon*. See p. 18, *supra*. And the district court's cursory analysis upholding the subpoena fell well short of what the *Nixon* standard properly demands when a state grand jury subpoenas the President's personal records. The court failed to require the District Attorney to establish a "demonstrated, specific need" for the President's personal records. *Nixon*, 418 U.S. at 713; see *Sealed Case*, 121 F.3d at 754-755. Rather than evaluate whether the records thus were "'essential to the justice of the pending criminal case'" and were "not available from any other source," *Nixon*, 418 U.S. at 702, 713 (citation and brackets omitted), the court concluded that the grand jury could subpoena the records merely because they "may" reveal "unlawful conduct by third persons and possibly the President," Pet. App. 93a. The court never analyzed, much less found, whether the President's personal records were demonstrably and directly relevant to assertedly illegal conduct that is central to the grand jury's investigation, or whether any centrally important information in those records could be obtained from a different source or needed to be obtained immediately rather than after the end of the President's term. The court did note that the running of the statute of limitations could weigh in favor of immediate production, but the court never found that

any applicable statute would expire before the President's term ends, and it failed to account for the possibility of tolling. See *id.* at 84a-85a.[*]

B. The Court Of Appeals' Decision Warrants This Court's Review

This Court has emphasized that the "high respect that is owed to the office of the Chief Executive" should "inform the conduct of the entire proceeding." *Jones*, 520 U.S. at 707. In light of that respect, this Court has explained that the federal judiciary should be receptive to reviewing cases where "[t]he Executive Branch, at its highest level, is seeking the aid of the courts to protect its constitutional prerogatives." *Cheney*, 542 U.S. at 385. The Court has thus held that "separation-of-powers considerations should inform" a federal court's "evaluation of a mandamus petition involving the President." *Id.* at 382. The Court has likewise consistently

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[*] In *Trump* v. *Mazars USA, LLP*, No. 19A545 (filed Nov. 15, 2019), the President has sought a stay in a case involving a broad congressional subpoena, similar to the grand-jury subpoena here, for the President's personal records. The United States filed an amicus curiae brief in the court of appeals in that case arguing that such a congressional subpoena of the President must be specifically and clearly authorized, must clearly identify with particularity a legitimate legislative purpose for seeking information from the President, and must satisfy a searching review of pertinence and necessity. Although a congressional subpoena does not raise concerns about federalism, the "threat to presidential autonomy and independence" posed by such a subpoena is "far greater than that presented by" the federal trial subpoena at issue in *Nixon*. *Trump* v. *Mazars USA, LLP*, No. 19-5142, 2019 WL 5991603, at *1 (D.C. Cir. Nov. 13, 2019) (Katsas, J., dissenting from the denial of rehearing en banc). Congress is "the President's constitutional rival for political power," and unlike prosecutors, it is not limited by rules of criminal procedure applied by "neutral judges." *Ibid.*

exercised its discretion to grant writs of certiorari to review cases concerning the President's claim of immunity. For example, in *Nixon*, this Court granted a writ of certiorari before judgment to review a claim of executive privilege, "because of the public importance of the issues presented and the need for their prompt resolution." 418 U.S. at 687. In *Fitzgerald*, the Court "granted certiorari to decide th[e] important issue" of "the scope of immunity available to a President." 457 U.S. at 741. And in *Jones*, the Court granted a writ of certiorari to review a "'one-of-a-kind case'" that involved "a novel constitutional question" without "any conflict among the Courts of Appeals," simply because the President's claim of immunity "merit[ed] [the Court's] respectful and deliberate consideration." 520 U.S. at 689-690.

This Court has also emphasized the importance of protecting the "distinct and independent character of the government of the United States" from "interference" by the States. *Tarble's Case*, 80 U.S. (13 Wall.) at 406. The Court has frequently granted review where action by the States threatens to interfere with the powers of the federal government and the functions of federal officers. See, *e.g.*, *Dawson* v. *Steager*, 139 S. Ct. 698 (2019) (intergovernmental tax immunity).

This Court should follow the same course here. The decision below resolves grave and important questions regarding Article II and the Supremacy Clause. It upholds a state criminal subpoena that has no historical precedent. And it poses a serious threat to the autonomy of the Office of the President of the United States. In evaluating that threat, the Court "must consider not only the [effects of the subpoena on] a particular President, but also the authority of the Presidency itself."

Trump v. *Hawaii*, 138 S. Ct. 2392, 2418 (2018). The decision warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
JOSEPH H. HUNT
Assistant Attorney General
JEFFREY B. WALL
Deputy Solicitor General
HASHIM M. MOOPPAN
Deputy Assistant Attorney General
VIVEK SURI
Assistant to the Solicitor General
MARK R. FREEMAN
SCOTT R. MCINTOSH
GERARD SINZDAK
Attorneys

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