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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

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

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INTEREST OF THE UNITED STATES

This case involves a subpoena issued by a state grand jury 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 safeguarding the prerogatives of the Office of the President. 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. *E.g.*, *Clinton* v. *Jones*, 520 U.S. 681 (1997); *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982). The United States also has a substantial interest in protecting the autonomy of the federal government from potential interference by the States, and it has participated as amicus curiae in other cases that have presented issues concerning the

immunity of federal officials from action by the States. *E.g.*, *Dawson* v. *Steager*, 139 S. Ct. 698 (2019); *Jefferson County* v. *Acker*, 527 U.S. 423 (1999). In this case, the United States participated as an amicus curiae in the courts below.

STATEMENT

1. The New York County District Attorney has opened a grand-jury investigation into potential crimes under New York law. Pet. App. 3a-4a. Although the scope of that investigation is secret, the District Attorney's statements indicate that President Donald J. Trump is a subject of that investigation. In the court of appeals, the District Attorney represented "that the grand jury is investigating *not only the President*, but also other persons and entities." *Id.* at 22a (emphasis added). And in this Court, the District Attorney states (Br. in Opp. 26) that, while his "investigation extends beyond [the President]," "the President could * * * also be implicated in wrongdoing."

On August 29, 2019, the District Attorney served a subpoena on behalf of the grand jury on Mazars USA, LLP, President Trump's personal accounting firm. Pet. App. 4a-5a. The subpoena demands that Mazars produce a wide range of financial records relating to the President and organizations affiliated with him—including personal "[t]ax returns and related schedules, in draft, as-filed, and amended form," with respect to "Donald J. Trump." *Id.* at 5a n.5. The subpoena copies, almost word for word, a subpoena issued by the Committee on Oversight and Reform of the U.S. House of Representatives—the subpoena at issue in *Trump* v. *Mazars USA, LLP*, cert. granted, No. 19-715 (Dec. 13, 2019). Pet. App.

123a-126a. The principal difference between the subpoenas is that the District Attorney's subpoena also expressly seeks the President's tax returns. See *id.* at 124a.

2. On September 19, 2019, the President, in his personal capacity, sued the District Attorney and Mazars in federal district court, seeking declaratory and injunctive relief on the ground that the President's records are immune from state criminal process while he remains 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 relied on *Younger* v. *Harris*, 401 U.S. 37 (1971), under which federal courts ordinarily abstain from hearing suits to enjoin ongoing state criminal proceedings. Pet. App. 41a-43a. The court stated 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 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 at hand. *Id.* at 93a. The court explained that, under its proposed balancing test, a "lengthy imprisonment" of a sitting President for "murder" would "perhaps" violate the Constitution, but that, for example, a "charge of failing to pay state taxes" would not do so. *Id.* at 33a, 82a. Applying that balancing test, the court concluded that the President's records are not immune from the subpoena in this case, because responding to it "would likely not create * * * catastrophic intrusions * * * 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 dismissal of the complaint under *Younger*. Pet. App. 13a-14a. The court noted that *Younger* abstention reflects a policy of "comity" between federal and state courts. *Id.* at 9a (citation omitted). It then 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, the District Attorney "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 the standard "has little bearing on a subpoena that, as here, does not seek any information subject to executive privilege." *Ibid.* Although the District Attorney also had argued that the subpoena satisfied the heightened standard proposed by the United States, the court did not adopt that alternative argument. See *id.* at 27a-28a; Vance C.A. Br. 35.

SUMMARY OF ARGUMENT

A. "The President occupies a unique position in the constitutional scheme." *Nixon* v. *Fitzgerald*, 457 U.S. 731, 749 (1982). The Constitution vests the entirety of the executive power in the President, and it entrusts him with vast and vital public responsibilities. This Court has long understood that, to enable the President to discharge his critical constitutional duties, 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.

This Court's cases on presidential immunity have involved federal judicial process, but under both Article II and the Supremacy Clause, the President's immunity from state judicial process must be even broader. In Article II, the Framers contemplated that the President would exercise his nationwide powers in the interests of the whole Nation, without any risk of interference by individual States. And in the Supremacy Clause, the Framers denied the States any power whatever "to retard, impede, burden, or in any manner control" the activities of the federal government. *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 436 (1819).

B. State grand-jury subpoenas for a sitting President's personal records pose serious risks to the independent functioning of the Office of the President. State prosecutors could use such subpoenas to harass the President in retaliation for the President's official policies. Such subpoenas could also subject the President to significant burdens, threatening to divert the President's time and energy from his singularly important public duties.

The structural features of state criminal justice systems heighten those dangers. Local prosecutors, who represent local electorates, have strong incentives to respond to the interests of their own communities, but no comparable incentives to consider the effects of their subpoenas on the Nation as a whole. And unlike federal prosecutors, local prosecutors are not subject to the centralized supervision of the Attorney General. Allowing state grand-jury subpoenas for the President's personal records thus opens the door for communities to use such subpoenas to register their disapproval of the President's policies.

C. In *United States* v. *Nixon*, 418 U.S. 683 (1974), this Court held that a federal criminal trial subpoena for a sitting President's official records must satisfy a heightened standard of need. *Id.* at 713. This Court should, at a minimum, apply the same standard to a state grand-jury subpoena for a sitting President's personal records. A heightened showing of need is necessary to diminish the risks that state grand-jury subpoenas pose to the Office of the President.

The District Attorney has not made that heightened showing in this case. The District Attorney has copied his subpoena, almost word for word, from one issued by the Committee on Oversight and Reform of the U.S.

House of Representatives. Pet. App. 123a-126a. The District Attorney fails to explain why exactly the same information demanded by a congressional committee, ostensibly for the purpose of investigating federal legislation, also happens to be essential to the investigation of a state crime. Nor has he detailed his efforts to obtain the evidence elsewhere or explained why evidence covered by the presidential immunity is still needed. The District Attorney's subpoena therefore violates the Constitution.

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 such records no differently than a subpoena for any other private records. In the court's view, the District Attorney was not even required to show that he had a particularized need for the President's personal records or that he could not obtain the desired evidence elsewhere.

The court of appeals' decision is incorrect. The Constitution protects the Office of the President against the risk of interference by the States. Local grand-jury subpoenas seeking a sitting President's personal records pose a serious risk of such interference, because they could both harass the President and distract him from his constitutional duties. Local prosecutors have structural incentives to respond to the interests of their own electorates, and lack structural incentives to account for the compelling constitutional interests of the Presidency. If Article II and the Supremacy Clause allow subpoenas for a sitting President's personal records

at all, they do so only where prosecutors make a heightened showing of need for the information sought. And in this case, the District Attorney has not made any such showing.

A. The Constitution Protects The Independence Of The Office Of The President From The States

1. Article II guarantees the independence of the Office of the President

"The President occupies a unique position in the constitutional scheme." *Nixon* v. *Fitzgerald*, 457 U.S. 731, 749 (1982). The Constitution vests the legislative power in a plural Congress and the judicial power in a plural Judiciary, but the entirety of the executive power in a single President. U.S. Const. Art. II, § 1. The Constitution entrusts the President with vast and vital public responsibilities, including taking care that the laws are faithfully executed; commanding the Armed Forces; nominating, appointing, and removing officers; making treaties; recommending, signing, and vetoing bills; sending and receiving ambassadors; and granting pardons and reprieves. Art. I, § 7, Cls. 2-3 and Art. II, §§ 2-3. The Constitution vests the President with unremitting official responsibilities; by contrast, Congress is required to assemble only "once in every Year," Art. I, § 4, Cl. 2, may "adjourn from day to day," Art. I, § 5, Cl. 1, and retains "a Quorum to do Business" even in the absence of up to half its membership, *ibid.* And the President must speak and act not just for a single district or State, but for all the people of the United States. The President is, in short, the "sole indispensable man in government." Philip B. Kurland, *Watergate and the Constitution* 135 (1978).

The Founders understood Article II to protect the "independent functioning" of the President's unique office, "free from risk of control, interference, or intimidation by other branches." *Fitzgerald*, 457 U.S. at 760-761 (Burger, C.J., concurring). For example, during the First Congress, Vice President John Adams and Senator Oliver Ellsworth argued that "the President, personally, was not the subject to any process whatever," for that would "put it in the power of a common justice to exercise any authority over him and stop the whole machine of Government." *Journal of William Maclay* 167 (Edgar S. Maclay ed., 1890). President Thomas Jefferson likewise argued that the federal courts had no authority to issue subpoenas to a sitting President: "would the executive be independent of the judiciary, if he were subject to the *commands* of the latter, & to imprisonment for disobedience; if the several courts could bandy him from pillar to post, keep him constantly trudging from north to south & east to west, and withdraw him entirely from his constitutional duties?" Letter from Thomas Jefferson, U.S. President, to George Hay, U.S. Dist. Att'y for Va. (June 20, 1807), *reprinted in* 10 *The Works of Thomas Jefferson* 404 n.1 (Paul Leicester Ford ed., 1905). And Justice Joseph Story wrote that the President holds certain "incidental powers" that "are necessarily implied from the nature of [his] functions"; that "[a]mong these, must necessarily be included the power to perform them, without any obstruction or impediment whatsoever"; and that, as a result, the President is not "liable to arrest, imprisonment, or detention" while in office. 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1563, at 418-419 (1833) (Story).

Although this Court has not gone as far as some of those sources suggest, it has accepted "the essence of the constitutional principle," *Clinton* v. *Jones*, 520 U.S. 681, 714 (1997) (Breyer, J., concurring in the judgment), and has relied on those sources in concluding that the President enjoys a constitutional immunity from actions of federal courts that would threaten to undermine his independence or interfere with his functions, *Fitzgerald*, 457 U.S. at 750 n.31. The Court has described that immunity as "a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history." *Id.* at 749.

For example, the Court has observed that "in no case would a court be required to proceed against the president as against an ordinary individual." *Cheney* v. *United States District Court*, 542 U.S. 367, 381-382 (2004) (brackets, citation, and ellipsis omitted). It has held that a court may not enjoin the President in "the performance of his official duties." *Mississippi* v. *Johnson*, 71 U.S. (4 Wall.) 475, 501 (1867). It also has recognized the President's "absolute immunity from damages liability predicated on his official acts." *Fitzgerald*, 457 U.S. at 749. It has recognized a qualified presidential privilege protecting the confidentiality of presidential communications, holding that a sitting President may be required to respond to a federal criminal trial subpoena for such communications only where there is a "demonstrated, specific need" for the requested records. *United States* v. *Nixon*, 418 U.S. 683, 713 (1974). And it has recognized that, although a sitting President is not absolutely immune from a civil suit in federal court for purely private conduct, "[t]he 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." *Clinton*, 520 U.S. at 707; see *Cheney*, 542 U.S. at 385-386 (similar). Further, although this Court has never confronted the question, the Department of Justice has long understood that a President is absolutely immune from arrest, indictment, and criminal prosecution while he remains in office. *A Sitting President's Amenability to Indictment and Criminal Prosecution*, 24 Op. O.L.C. 222 (2000); Memorandum from Robert G. Dixon, Assistant Att'y Gen., Office of Legal Counsel (Sept. 24, 1973).

The Court has repeatedly explained that immunity "will not place the President 'above the law.'" *Fitzgerald*, 457 U.S. at 758; see *Cheney*, 542 U.S. at 382; *Nixon*, 418 U.S. at 715. Rather, the law itself grants the President immunity in order to promote "the public interest" and to account for "the paramount necessity of protecting the Executive Branch" from acts "that might distract it from the energetic performance of its constitutional duties." *Cheney*, 542 U.S. at 382. Presidential immunity leaves in place a wide range of "alternative remedies and deterrents" to presidential wrongdoing, including "constant scrutiny by the press," "the need to maintain prestige as an element of Presidential influence," the "desire to earn reelection," and, ultimately, "impeachment." *Fitzgerald*, 457 U.S. at 757-758. Indeed, the immunity at issue in this case expires when the President leaves office.

2. The Constitution grants the Office of the President heightened protection from the States

The President's immunity from state judicial process must provide greater protection than his immunity from federal judicial process. That follows from the

general rule that the States may not burden the operations of the federal government, from the nature of the Presidency in particular, and from this Court's cases.

In *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), this Court announced the "great principle" that "the States have no power" to "retard, impede, burden, or in any manner control" the operations of the federal government. *Id.* at 426, 436. That principle derives from the Supremacy Clause, U.S. Const. Art. VI, Cl. 2; "[i]t 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*, 17 U.S. (4 Wheat.) at 427. That principle also flows from the structure of the Constitution. "[T]he government of the Union * * * is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one State may be willing to control its operations, no State is willing to allow others to control them." *Id.* at 405.

Time and again, this Court has reaffirmed that elementary rule. For instance, the Court has explained that "the sphere of action appropriated to the United States is as far beyond the reach of judicial process issued by a State judge or a State court as if the line of division was traced by landmarks and monuments visible to the eye." *Covell* v. *Heyman*, 111 U.S. 176, 183 (1884) (citation omitted). It has explained that the Constitution guarantees "the entire independence of the General Government from any control by the respective States." *Farmers & Mechanics Savings Bank* v. *Minnesota*, 232 U.S. 516, 521 (1914). And it has emphasized the "fundamental importance" of the "seminal principle of our law" that protects the federal government from

"regulation by a subordinate sovereign." *Hancock* v. *Train*, 426 U.S. 167, 178-179 (1976).

That principle applies with unique force to state action that burdens the President. The President is "elected by all the people." *Myers* v. *United States*, 272 U.S. 52, 123 (1926). He speaks for all, acts for all, and "is rather more representative of them all than are the members of either body of the Legislature whose constituencies are local and not countrywide." *Ibid.* No one State may properly burden the President of the whole United States.

Founding-era sources confirm that the Framers were especially concerned about protecting the Presidency from interference by the States. James Wilson urged the Constitutional Convention to make "the Executive * * * as independent as possible * * * of the States." 1 *The Records of the Federal Convention of 1787*, at 69 (Max Farrand ed., 1911). He and James Madison successfully opposed a proposal to vest the power to impeach the President in state legislatures, on the ground that it "would open a door for intrigues agst. [the President] in States where his administration tho' just might be unpopular, and might tempt him to pay court to particular States whose leading partizans he might fear." *Id.* at 86. And the Framers ultimately adopted a provision barring the President from receiving any "Emolument" from any State, U.S. Const. Art. II, § 1, Cl. 7—a unique restriction imposed on no other federal official—so that the States could not compromise "the independence intended for him by the Constitution," *The Federalist* No. 73, at 494 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). Those concerns make it all the more important to protect the Presidency from the risk of interference by the States.

This Court's cases reinforce that view. In cases involving the President's protection from federal process, the Court has emphasized that the federal courts constitute a coordinate branch of the federal government. For example, in *Nixon*, the Court stated that the Presidency and the Judiciary are "co-equal branches" and that resolution of a claim of executive privilege required the Court to "balance" the "competing interests" of both branches. 418 U.S. at 707. In *Clinton*, the Court again emphasized that the Presidency and the Judiciary are "coequal branches" and that "interactions between the Judicial Branch and the Executive, even quite burdensome interactions," do not "necessarily rise to the level of constitutionally forbidden impairment." 520 U.S. at 699, 702. A state judiciary, by contrast, is not coordinate or coequal to the Presidency. There is no occasion to balance the state courts' competing interests, for even "vital state interests must give way" to "paramount" federal ones under the Supremacy Clause. *Gade* v. *National Solid Wastes Management Ass'n*, 505 U.S. 88, 108 (1992) (citation omitted). And a burdensome interaction between a state judiciary and the President *does* amount to a forbidden impairment, for it is "inconceivable" that state law 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).

Clinton, in particular, supports that analysis. Although the Court rejected a sitting President's claim of absolute immunity from civil litigation in federal court, it expressly reserved judgment regarding whether "a comparable claim might succeed in a state tribunal." *Clinton*, 520 U.S. at 691. The Court observed that "any direct control by a state court over the President" might

raise "quite different" concerns under "the Supremacy Clause," as well as concerns about "protecting federal officials from possible local prejudice." *Id.* at 691 & n.13. The Court's opinion thus confirms that presidential immunity from state process may exceed presidential immunity from federal process.

B. State Grand-Jury Subpoenas For A Sitting President's Personal Records Threaten The Independence Of The Office Of The President

Allowing state grand-jury subpoenas for a sitting President's records would expose the President to the risk of harassment and diversion of his time and energy from his official duties. That is so even when the subpoenas seek personal rather than official records and when they are directed to the President's third-party custodian rather than the President himself.

1. State grand-jury subpoenas expose the President to the prospect of harassment and threaten to divert his time and energy from his official duties

This Court's cases on presidential immunity have emphasized two risks that are pertinent here: harassment and diversion. The Court has explained that, because the President "must make the most sensitive and far-reaching decisions" on "matters likely to 'arouse the most intense feelings,'" he is "an easily identifiable target" for harassment. *Fitzgerald*, 457 U.S. at 752-753 (citation omitted). The Court also has explained that, "[b]ecause of the singular importance of the President's duties, diversion of his energies" from his official functions "would raise unique risks to the effective functioning of government." *Id.* at 751.

There are more than 2300 district attorneys across the United States. Bureau of Justice Statistics, U.S.

Dep't of Justice, *Prosecutors in State Courts, 2007—Statistical Tables* 1 (Dec. 2011). Allowing each of them to issue grand-jury subpoenas for a President's personal records would pose a serious risk of both harassment and diversion. A grand jury "can investigate merely on suspicion that the law is being violated, or even just because it wants assurance 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. Enterprises, 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). Given those features, a state prosecutor could easily deploy a grand-jury subpoena to harass the President. And even where a prosecutor acts in good faith, a broad subpoena could still impose substantial burdens on the President's time and attention, diverting him from his constitutional duties.

The risk of harassment is particularly serious when, as here, a State uses criminal process for the President's personal records to investigate the President himself, not just to obtain evidence for use in the prosecution of another. In routine criminal investigations, a prosecutor's legal and ethical obligations provide a sufficient check against the prospect of abuse. And those checks remain important when a prosecutor targets a sitting President. Even so, a criminal investigation of a

sitting President is far from routine. The Framers understood that the prosecution of "public men" may well "agitate the passions of the whole community," "divide it into parties, more or less friendly or inimical, to the accused," "connect itself with the pre-existing factions," and "inlist all their animosities, partialities, influence and interest on one side, or on the other." *The Federalist* No. 65, at 439 (Alexander Hamilton). Further, "[n]othing is so politically effective as the ability to charge that one's opponent and his associates are not merely wrongheaded, naive, ineffective, but, in all probability, 'crooks,'" and "nothing so effectively gives an appearance of validity to such charges as a [criminal] investigation." *Morrison* v. *Olson*, 487 U.S. 654, 713 (1988) (Scalia, J., dissenting).

The risk of diversion is likewise particularly serious when the State investigates the President himself. "The constitutional provisions governing criminal prosecutions make clear the Framers' belief that an individual's mental and physical involvement and assistance in the preparation of his defense * * * would be intense, no less so for the President than for any other defendant." 24 Op. O.L.C. at 251. Criminal investigations would consume the President's time and distract him from his duties to the American people, to the detriment of the Nation he serves.

2. *Subpoenas for a President's personal records pose particularly serious risks when issued by States*

The criminal-justice systems of the several States differ in important ways from the federal system. Those differences magnify the risks that state grand-jury subpoenas pose to the Office of the President.

a. Although the federal criminal-justice system is run by officials accountable to the Attorney General,

who in turn is accountable to the President, state systems are run by officials accountable to local constituencies. The Attorney General and U.S. Attorneys are appointed and removable by the President. They form part of the Executive Branch, "a forum attuned to the interests and the policies of the Presidency." *Morrison*, 487 U.S. at 712 (Scalia, J., dissenting). As a matter of constitutional structure, they likely would be neither willing nor able to issue subpoenas the purpose of which is to harass or unduly distract a sitting President.

In contrast, the vast majority of the more than 2300 district attorneys across the United States are elected—usually by small, localized electorates. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 533 (2001). Those electorates might strongly oppose the policies of the sitting President. A state prosecutor in a community where the President is unpopular thus would have significant incentives to win votes by investigating the President. Today, the District Attorney has sought to subpoena President Trump's tax returns. Tomorrow, prosecutors in other communities might seek to subpoena a President's college transcripts, job applications, health records, birth certificates, private emails, or cellphone logs.

Concerns about local officials and local politics are far from idle. In 2008, two towns in Vermont passed measures calling on police to arrest President George W. Bush and Vice President Dick Cheney. Andy Sullivan, *Vermont Towns Vote to Arrest Bush and Cheney*, Reuters, Mar. 4, 2008. The same year, a grand jury in Willacy County, Texas indicted Vice President Cheney for abusing inmates in private prisons—on the theory that he held stock in a company that ran private prisons. Martha Neil, *Vice President Cheney, Ex-AG Gonzales*

Indicted in South Texas Prison Abuse Case, A.B.A. J. Daily News, Nov. 19, 2008. During President Barack Obama's term, a sheriff in Arizona opened a police investigation into the authenticity of the President's birth certificate, "going so far as to send a deputy * * * to question officials." Jacques Billeaud, *Sheriff Joe Arpaio Closes Probe of Obama Birth Certificate*, Associated Press, Dec. 15, 2016. In the most recent election for Attorney General of New York, candidates "practically tripped over one another promising to take [President] Trump to court." Emma Platoff, *America's Weaponized Attorneys General*, The Atlantic, Oct. 28, 2018. The winning candidate explained that her decision to run for office was "about that man in the White House" and promised to use "every area of the law to investigate President Trump and his business transactions." Jeffery C. Mays, *N.Y.'s New Attorney General Is Targeting Trump. Will Judges See a 'Political Vendetta?,'* N.Y. Times, Dec. 31, 2018.

b. In addition, although federal courts supervise federal grand-jury subpoenas, state courts supervise state grand-jury subpoenas. This Court has expressed "confidence in the ability of our federal judges" to protect the interests of the Nation and the Nation's Executive Branch in cases involving a sitting President. *Clinton*, 520 U.S. at 709. "Accepted mandamus standards are broad enough to allow a court of appeals to prevent a lower court from interfering with a coequal branch's ability to discharge its constitutional responsibilities." *Cheney*, 542 U.S. at 382. If all else fails, this Court can step in to ensure that "appellate review, in deference to a coordinate branch of Government, [is] particularly meticulous." *Nixon*, 418 U.S. at 702.

In contrast, the Framers feared that "state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice" in state courts. *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347 (1816). They rejected proposals to empower state judges to try presidential impeachments, precisely because they feared that such "state functionaries" might pursue "local policy" and become "deeply interested in the * * * ruin of rivals" of their States. 2 Story § 769, at 242. Congress, sharing such fears, has authorized the removal, from state to federal court, of any "civil action or criminal prosecution" against a federal officer for acts under color of office. 28 U.S.C. 1442(a). This Court has cited the risk of "local prejudice" motivating that statute as a justification for the prospect of heightened protection of the President against process issued by state courts. *Clinton*, 520 U.S. at 691. Further, in the absence of a federal standard for immunity, this Court would have limited ability to police the state courts' decisions. In general, federal courts have "no authority to review state determinations of purely state law." *International Longshoremen's Ass'n* v. *Davis*, 476 U.S. 380, 387 (1986).

Again, those concerns are far from idle. During President Obama's term, activists in Georgia who contested the authenticity of his birth certificate obtained a subpoena ordering him to appear at an administrative hearing regarding his eligibility for the ballot. Order on Mot. to Quash Subpoenas at 2, *Farrar* v. *Obama*, No. 1215136-60 (Ga. Office of State Admin. Hr'gs, Jan. 20, 2012). President Obama moved to quash the subpoena on the ground that it "'require[d] him to interrupt duties as President of the United States' to attend a

hearing in Atlanta, Georgia." *Ibid.* But a state administrative law judge denied the motion, stating that President Obama had "fail[ed] to provide any legal authority" showing that a President could not "be compelled to attend a Court hearing." *Ibid.* The President disregarded the subpoena, prompting a (failed) request to hold him in contempt. 1/26/12 Tr. at 44, *Farrar*, *supra* (No. 1215136-60).

Similarly, during President Trump's term, a New York state court refused to quash a subpoena for the President's testimony in a state civil trial. See *Galicia* v. *Trump*, 109 N.Y.S.3d 857 (Sup. Ct. 2019). The court acknowledged that, in *Clinton*, this Court had said: "We assume that the testimony of the President, both for discovery and for use at trial, may be taken at the White House at a time that will accommodate his busy schedule." *Id.* at 860 (quoting *Clinton*, 520 U.S. at 691-692). But the court continued: "[T]his remark upon which [the President] rel[ies], given that it was prefaced with 'we *assume*' * * * must be interpreted as dicta and not a rigid procedural requirement for the taking of a president's deposition." *Ibid.* (brackets and citation omitted). It ordered the President to "appear for a videotaped deposition prior to the trial," *id.* at 861—which was slated to start a week later, *id.* at 859. The President was forced to obtain a stay from an appellate court. 24973/2015 Docket cmt. No. 9, *Galicia* v. *Trump* (N.Y. Sup. Ct. Sept. 26, 2019).

c. Finally, there is only one federal government, but there are 50 States. "If one State can do this, so can every other State." *Crandall* v. *Nevada*, 73 U.S. (6 Wall.) 35, 46 (1868). And so can every political subdivision. The cumulative burdens that could be imposed by 2300 district attorneys, each possessing the power to target the

President with criminal process, would pose a grave risk to the Presidency. The sheer number of district attorneys also increases the likelihood of finding at least one who is willing to target the President, or who simply gives inadequate weight to the extraordinary burdens imposed by a subpoena to the President.

3. The lack of historical precedent for the subpoena here underscores the constitutional concerns it poses

This Court has observed that "the lack of historical precedent" for an action intruding on the President's prerogatives provides a "telling indication" of the action's unconstitutionality. *Free Enterprise Fund* v. *Public Co. Accounting Oversight Board*, 561 U.S. 477, 505 (2010) (citation omitted). For example, in *Johnson*, "[i]t was admitted in the argument that the application [for an injunction against the President was] without a precedent; and this [wa]s of much weight against it," because "[t]he fact that no such application was ever before made in any case indicate[d] the general judgment of the profession that no such application should be entertained." 71 U.S. (4 Wall.) at 500. And in *Fitzgerald*, "the actual history of private lawsuits against the President"—"fewer than a handful of damages actions" before the 1970s—provided "powerful support" for absolute immunity from damages actions for the President's official acts. 457 U.S. at 752 n.31.

Here, the United States is unaware of *any* precedent for the issuance of a state criminal subpoena for a sitting President's personal records. Past Presidents have faced allegations of wrongdoing to which their personal records could have been relevant. For instance, President Ulysses Grant faced persistent allegations of corruption, President Richard Nixon faced Watergate, and President Bill Clinton faced Whitewater. Yet it appears

that no state prosecutor has ever thought to issue a subpoena for a sitting President's personal records. That is a strong signal that such a subpoena raises serious constitutional problems.

4. *State grand-jury subpoenas continue to pose risks to the Office of the President when they seek personal records in the hands of a third-party custodian*

a. State grand-jury subpoenas pose constitutional concerns even when they involve the President's personal rather than his official records. As the Framers understood, "[t]he interest of the man" is often "connected with the constitutional rights of the place." *The Federalist* No. 51, at 349 (James Madison). Acts taken against an individual as a private person can impair that individual's exercise of a public office. For example, the Arrest Clause protects legislators from civil arrests for private conduct while attending and traveling to and from sessions of Congress. U.S. Const. Art. I, § 6, Cl. 1. Article II similarly protects a sitting President from arrest, indictment, and criminal prosecution for private conduct. 24 Op. O.L.C. at 247-248. And this Court has recognized that "the Executive's 'constitutional responsibilities and status are factors counseling judicial deference and restraint' in the conduct of litigation against it," *Cheney*, 542 U.S. at 385 (brackets and citation omitted), including in civil suits against the President in his personal capacity, *Clinton*, 520 U.S. at 707.

Demands for a President's personal records similarly risk interfering with the President's official functions. A subpoena for personal records can be deployed to harass a President in response to his official policies, or have the effect of subjecting a President to unwarranted burdens, diverting his time, energy, and attention from his public duties. That is especially true

"[b]ecause the Presidency is tied so tightly to the persona of its occupant," making "the line between official and personal * * * both elusive and difficult to discern." *In re Lindsey*, 158 F.3d 1263, 1286 (D.C. Cir.) (Tatel, J., concurring in part and dissenting in part), cert. denied, 525 U.S. 996 (1998).

b. State grand-jury subpoenas also pose constitutional concerns even when (as here) they are directed to the President's agents rather than to the President himself. "The general rule of the law is, that what one does through another's agency is to be regarded as done by himself." *Ford* v. *United States*, 273 U.S. 593, 623 (1927) (citation omitted). A person who holds records "in a representative capacity as custodian" thus usually "'assume[s] the rights, duties and privileges'" of his principal with respect to those records. *Bellis* v. *United States*, 417 U.S. 85, 89-90 (1974) (citation omitted). Indeed, the Court has held that "a Member [of Congress] and his aide are to be 'treated as one'" for purposes of determining whether a grand-jury subpoena directed to a congressional aide violates the Speech or Debate Clause. *Gravel* v. *United States*, 408 U.S. 606, 616 (1972) (citation omitted). So too, the D.C. Circuit has explained that interpreting the Freedom of Information Act, 5 U.S.C. 552, to cover requests for records of visitors to the White House would raise "serious separation-of-powers concerns," irrespective of whether the requester seeks the records from the President himself or attempts an "end run[]" by directing the request to the federal agency that is the custodian of the records. *Judicial Watch, Inc.* v. *United States Secret Service*, 726 F.3d 208, 216, 225 (2013).

The same reasoning applies here. The risks that subpoenas could harass the President and divert his attention from his official duties are just as real when the subpoenas are directed to the President's agents as when they are directed to the President himself. That is especially so when, as here, the President necessarily must rely on expert third parties to oversee, manage, and report on his financial holdings. Indeed, even if he were the personal recipient of the subpoena, he would not personally compile the requested documents; instead, he would rely on third-party agents like those at issue in this case. As a practical matter, therefore, the subpoenas are indistinguishable from ones directed to the President, and should be treated as such for federalism and separation-of-powers purposes. "The Constitution deals with substance, not shadows." *Salazar* v. *Buono*, 559 U.S. 700, 723 (2010) (Roberts, C.J., concurring) (citation omitted).

C. At A Minimum, State Grand-Jury Subpoenas For The President's Personal Records Must Satisfy A Heightened Standard Of Need, Which The District Attorney Has Not Met Here

Because no state prosecutor has ever before issued a subpoena for a sitting President's personal records, this Court has never had occasion to determine the precise scope of a President's immunity from such a subpoena. In discerning the scope of that immunity, the Court should ensure that the "provision for defence" is "made commensurate to the danger of attack." *The Federalist* No. 51, at 349. Although the dangers just discussed may well support an absolute immunity from state criminal process, this Court need not resolve that question to decide this case. At a minimum, a state grand-jury subpoena for a sitting President's personal records must

satisfy a heightened standard of need—a standard the District Attorney has not satisfied here.

1. Precedent supports requiring a heightened showing of need before a state grand jury may issue a subpoena for the President's personal records

A series of precedents—Chief Justice Marshall's decisions while presiding over the federal criminal trials of Aaron Burr, this Court's decision in *United States* v. *Nixon*, *supra*, and the D.C. Circuit's decisions in *In re Sealed Case*, 121 F.3d 729 (1997), and *Senate Select Committee on Presidential Campaign Activities* v. *Nixon*, 498 F.2d 725 (1974) (en banc)—provide benchmarks for determining the appropriate scope of the President's immunity from the state grand-jury subpoena in this case. Although those decisions rejected the proposition that the President enjoyed absolute immunity from a federal subpoena for privileged official records, they made clear that such a subpoena must satisfy a higher standard than a subpoena to a private individual—a principle that also applies to state criminal process for the President's private records.

During two federal criminal trials of Aaron Burr, Chief Justice Marshall issued subpoenas for the production of confidential official letters in President Jefferson's possession. *United States* v. *Burr*, 25 F. Cas. 187, 192 (C.C.D. Va. 1807) (No. 14,694); *United States* v. *Burr*, 25 F. Cas. 30, 30 (C.C.D. Va. 1807) (No. 14,692d). But in doing so, Chief Justice Marshall stated that "[i]n no case of this kind would a court be required to proceed against the president as against an ordinary individual," because "[t]he objections to such a course are so strong and so obvious, that all must acknowledge them." *Burr*, 25 F. Cas. at 192. He continued: "[O]n objections being made by the president to the production of a paper, the

court would not proceed further in the case without such an affidavit as would clearly shew the paper to be essential to the justice of the case." *Ibid.* In the end, President Jefferson never fully complied with the subpoenas. *Nixon* v. *Sirica*, 487 F.2d 700, 781-788 (D.C. Cir. 1973) (Wilkey, J., dissenting).

In *Nixon*, a federal prosecutor sought to subpoena President Nixon's White House tapes for use in a criminal trial of the President's associates. 418 U.S. at 686-687 & n.3. The Court repeated Chief Justice Marshall's assurance that "in no case of this kind would a court be required to proceed against the president as against an ordinary individual." *Id.* at 708 (brackets and citation omitted). It held that the subpoena at issue was permissible only because the prosecutor had shown that the materials sought were "essential to the justice of the pending criminal case." *Id.* at 713 (brackets and citation omitted).

In *Sealed Case*, the Independent Counsel sought to enforce a federal grand-jury subpoena seeking privileged materials from the White House Counsel. 121 F.3d at 734. The D.C. Circuit explained that, under *Nixon*, "overcoming the presidential privilege require[s] something more" than the showing needed for an "ordinary" subpoena; it requires a "demonstrated, specific need" for the materials sought. *Id.* at 754. The court continued that the "standard which governs grand jury subpoenas" must be "no more lenient than the need standard enunciated for trial subpoenas in *Nixon*." *Id.* at 756. The court explained that "[t]he necessary breadth of the grand jury's inquiries * * * means that grand jury subpoenas may well represent a much more frequent threat" to the Presidency. *Ibid.*

Meanwhile, in *Senate Select Committee*, a Senate committee sought to subpoena President Nixon's White House tapes for use in a congressional investigation. 498 F.2d at 726-729. The D.C. Circuit concluded that, in order to obtain those privileged materials, the committee was required to show that "the subpoenaed evidence [wa]s demonstrably critical to the responsible fulfillment of the Committee's functions"—a showing the committee failed to make. *Id.* at 731; see *id.* at 733.

This case, of course, presents the risk of a different type of intrusion than the type of intrusion emphasized in *Burr*, *Nixon*, *Sealed Case*, and *Senate Select Committee*. Those cases primarily involved the risk that a federal subpoena for a President's privileged official records would compromise the confidentiality of the President's communications with his advisors. This case, by contrast, involves the risk that a state criminal subpoena for a President's personal records could harass the President or impose unwarranted burdens upon him, diverting him from his official duties.

But either way, the threat of debilitating the President in office requires a heightened showing of need. A heightened standard would mitigate the risk of harassment: the stronger the prosecutor's showing of need, the lower the likelihood that the prosecutor has issued the subpoena for an improper purpose. A heightened standard also would reduce the risk of subjecting the President to unwarranted burdens: it ensures that a prosecutor may take the extraordinary step of seeking evidence from the President only when that evidence is essential. Further, a heightened standard would ensure that the protection of the President is not left to state courts and state prosecutors applying state-law standards: it provides a basis for federal courts to intervene

upon the issuance of an improper subpoena. And to the extent it is appropriate to weigh state interests against federal interests, a heightened standard accommodates the state interest in administering criminal laws.

2. The District Attorney has not satisfied the minimum constitutional standard

Courts have formulated heightened standards for subpoenas to the President in different ways: "essential to the justice of the case," *Burr*, 25 F. Cas. at 192; "demonstrated, specific need," *Nixon*, 418 U.S. at 713; "strict standard of need," *Sealed Case*, 121 F.3d at 756; and "demonstrably critical," *Senate Select Committee*, 498 F.2d at 731. In the context of state grand-jury subpoenas for the President's personal records, this Court should at least require a stringent showing. The prosecutor must show that the evidence is "directly relevant to issues that are expected to be central to the trial." *Sealed Case*, 121 F.3d at 754. The prosecutor must identify "specific [charging] decisions that cannot responsibly be made without access to materials uniquely contained in the [requested records]"; it is not enough to show only that the materials "may possibly have some arguable relevance to the subjects [the grand jury] has investigated." *Senate Select Committee*, 498 F.2d at 733. In addition, the prosecutor must show that sufficient evidence is "not available from any other source." *Nixon*, 418 U.S. at 702. "Efforts should first be made to determine whether sufficient evidence can be obtained elsewhere," "the subpoena's proponent should be prepared to detail these efforts," and a subpoena for the President's records is appropriate only as a "last resort." *Sealed Case*, 121 F.3d at 755, 761.

In his filings so far in this Court, the District Attorney has not argued that he has satisfied a heightened

standard of need. See Br. in Opp. 31-32. And although he argued to the court of appeals that he had made such a showing, the court did not adopt his argument. See Pet. App. 27a-28a. That is no surprise, because the circumstances surrounding the issuance of the subpoena raise serious questions about the subpoena's purpose.

The subpoena seeks President Trump's financial records—documents that others have demanded on a variety of grounds. One congressional committee claims to need them so that it can consider federal tax legislation; another, so that it can consider legislation on money laundering; yet another, so that it can investigate foreign interference in our elections; and a fourth, so that it can investigate whether the President has violated federal laws. See *Congressional Committee's Request for the President's Tax Returns Under 26 U.S.C. § 6103(f)* (O.L.C. June 13, 2019), slip op. 2; U.S. Amicus Br. at 2-4, *Trump* v. *Mazars USA, LLP*, No. 19-715 (filed Feb. 3, 2020). California has (unsuccessfully) tried to require the disclosure of the President's tax returns as a condition of ballot access. See *Patterson* v. *Padilla*, 451 P.3d 1171, 1172-1173, 1191 (Cal. 2019). Members of Congress, state officials, and private litigants have all sued the President under the Foreign Emoluments Clause, U.S. Const. Art. I, § 9, Cl. 8, sometimes with the avowed purpose of obtaining the returns in discovery. *Citizens for Responsibility & Ethics in Washington* v. *Trump*, 939 F.3d 131, 140 (2d Cir. 2019); *In re Trump*, 928 F.3d 360, 362-363 (4th Cir.), reh'g en banc granted, 780 Fed. Appx. 36 (4th Cir. 2019); *In re Trump*, 781 Fed. Appx. 1, 2 (D.C. Cir. 2019) (per curiam). And in one case, plaintiffs who allegedly suffered injuries while disrupting a campaign rally sought "expansive discovery" that encompassed the President's "tax returns" (as well as

the President's "medical records" and a "deposition" of the President "in Kentucky"). *In re Trump*, 874 F.3d 948, 952 (6th Cir. 2017).

Officials in New York have similarly targeted the President's financial records in a variety of ways. In 2016, soon after the presidential election, state legislators introduced a bill—the Tax Returns Uniformly Made Public Act, or TRUMP Act—to require disclosure of tax returns as a condition of ballot access. S.B. 8217, 2015-2016 Leg., Reg. Sess. (N.Y. 2016). In 2017, state legislators introduced a bill to require state officials to publish the President's state income tax returns from the last five years. S.B. 5572B, 2017-2018 Leg., Reg. Sess. (N.Y. 2017). And the state legislature has enacted a bill authorizing state officials to disclose the returns to congressional committees. N.Y. Tax Law § 697(f-1)(1) and (2) (McKinney Supp. 2020).

Now, the District Attorney claims that he needs the President's financial records for still another purpose—a criminal investigation. The District Attorney, however, has not tailored his subpoena to a criminal investigation. He has instead copied his subpoena, almost word for word, from one issued by the Committee on Oversight and Reform of the U.S. House of Representatives. Pet. App. 123a-126a. The Committee insists that it needs that information to investigate potential federal legislation that it might enact in the future. See Br. in Opp. at 4-5, *Mazars USA, LLP*, *supra* (No. 19-715) (filed Dec. 11, 2019). The District Attorney, however, insists that he needs exactly the same information to reconstruct state crimes that occurred in the past. That carbon-copy subpoenas are claimed to serve two markedly divergent purposes strongly suggests that neither is the real object.

At a minimum, the District Attorney has failed to explain how each of the subpoenaed personal records of the President is "critical" to "specific" charging decisions. *Senate Select Committee*, 498 F.2d at 732-733. To the extent the District Attorney's investigation focuses on the President himself, the District Attorney in all events lacks the power to indict the President before the end of the President's term. See pp. 9-11, *supra*. The District Attorney has never shown why, given that lack of authority, the immediate production of the President's records is critical to the grand jury's investigation. And to the extent the District Attorney's investigation focuses on third parties, the District Attorney has failed to demonstrate that *the President's* records are critical to an investigation into *a third party*.

Relatedly, the District Attorney has failed to show why he needs the President's personal records now, rather than at the end of the President's term. The District Attorney has not identified any applicable statute of limitations that would expire before the President's term ends. To the extent that any such statute of limitations exists, the District Attorney has not addressed the possibility of tolling the limitations period until the end of the term. Nor has the District Attorney shown any risk of spoliation of evidence. The records sought by the District Attorney are in the hands of a third-party accountant. And in any event, an order to preserve the evidence would presumably satisfy any concerns about spoliation.

Nor, finally, has the District Attorney shown that he is seeking the President's personal records as a "last resort." *Sealed Case*, 121 F.3d at 761. He has not detailed his efforts to obtain sufficient evidence elsewhere, and he has not "explain[ed] why evidence covered by the

presidential [immunity] is still needed." *Id.* at 755. In short, the subpoena is not "essential to the justice of the case." *Burr*, 25 F. Cas. at 192.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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