No. _____

IN THE

Supreme Court of the United States

DONALD J. TRUMP, President of the United States,

Petitioner,

v.

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

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The District Attorney for the County of New York is conducting a criminal investigation that, by his own admission, targets the President of the United States for possible indictment and prosecution during his term in office. As part of that investigation, he served a grand-jury subpoena on a custodian of the President's personal records, demanding production of nearly ten years' worth of the President's financial papers and his tax returns. That subpoena is the combination—almost a word-for-word copy—of two subpoenas issued by committees of Congress for these same papers. The Second Circuit rejected the President's claim of immunity and ordered compliance with the subpoena.

The question presented is: Whether this subpoena violates Article II and the Supremacy Clause of the United States Constitution.

PARTIES TO THE PROCEEDING AND RELATED PROCEEDINGS

The parties to the proceeding below are as follows:

Petitioner is Donald J. Trump, President of the United States. He was the plaintiff in the district court and appellant in the court of appeals.

Respondents are Cyrus R. Vance, Jr., in his official capacity as District Attorney of the County of New York, and Mazars USA, LLP. Respondents were defendants in the district court and appellees in the court of appeals.

The related proceedings below are:

1) Trump v. Vance, No. 19-cv-8694 (S.D.N.Y.) – Judgment entered October 7, 2019; and

2) Trump v. Vance, No. 19-3204 (2d Cir.) – Judgment entered November 4, 2019.

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President Donald J. Trump respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the Second Circuit is not yet reported, but it is available at 2019 WL 5687447 and is reproduced in the Appendix ("App.") at 1a-29a. The opinion of the Southern District of New York is reported at 395 F. Supp. 3d 283 and is reproduced at App. 30a-95a.

JURISDICTION

The judgment of the Second Circuit was entered on November 4, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent constitutional provisions involved in this case are listed below and reproduced at App. 127a-29a.

U.S. Const. art. I, § 3, cl. 7

U.S. Const. art. II, § 1, cl. 1; § 2; § 3; § 4

U.S. Const. art. VI, cl. 2

INTRODUCTION

For the first time in our nation's history, a state or local prosecutor has launched a criminal investigation of the President of the United States and subjected him to coercive criminal process. The subpoena issued by the New York County District Attorney seeks reams of President Trump's private financial records for the express purpose of deciding whether to indict him for state crimes. The Court should grant certiorari to decide the important and unsettled issue this dispute raises: whether the District Attorney's issuance of criminal process demanding the President's records violates the immunity that he holds under Article II and the Supremacy Clause of the Constitution.

This immunity question is plainly important. Every time a President has asked the Court to review an unprecedented use of legal process against the occupant of the office, it has done so. The Supreme Court has stressed the "importance" of questions concerning presidential immunity. *Clinton v. Jones*, 520 U.S. 681, 689 (1997). It has granted certiorari to decide these questions even in "'one-of-a-kind cases'" in which there was no "conflict among the Courts of Appeals." *Id*. The Court has even taken the rare step of granting certiorari before judgment to review the President's claim "because of the public importance of the issues presented." *United States v. Nixon*, 418 U.S. 683, 686-87 (1974). The Court, in short, does not "'proceed against the president as against an ordinary individual'" and extends him the "high degree of

respect due the President of the United States." *Id.* at 708, 715.

Thus, when the President argues that novel legal process directed at him will lead to the "diversion of his energies," the Court takes the claim quite seriously given "the singular importance of the President's duties." *Nixon v. Fitzgerald*, 457 U.S. 731, 751 (1982). The Court's approach to cases of this type is not out of concern for any "particular President," but for "the Presidency itself." *Trump v. Hawaii*, 138 S. Ct. 2392, 2418 (2018). When the Executive Branch argues that legal process raises "serious risks for the institution of the Presidency," as it has argued here, the Court grants certiorari to give those "representations" the "respectful and deliberate consideration" they indisputably deserve. *Jones*, 520 U.S. at 689-90.

The Court should follow that approach in this case. The Department of Justice supported the President below. The Second Circuit acknowledged that this dispute raises "novel and serious claims," Appendix ("App.") 13a, and that "the Supreme Court has not had occasion to address this [immunity] question," App. 21a. Indeed, the Court's previous immunity cases identified the key elements of this case—targeting a President for criminal investigation through coercive process issued by a local official—as an unresolved issue, and carefully reserved the question. The Court should decide it now.

The decision below is not only important, however. It is incorrect. There has been broad

bipartisan agreement, for decades if not centuries, that a sitting President cannot be subjected to criminal proceedings. That consensus follows from the Constitution's text, history, and structure, as well as from precedent. The Framers recognized the clear need for a strong Chief Executive, and they fashioned a process for investigating and removing him in a manner that would embody the will of the people. A lone county prosecutor cannot circumvent this arrangement. That the Constitution would empower thousands of state and local prosecutors to embroil the President in criminal proceedings is unimaginable. State criminal process interferes with the President's ability to execute his duties under Article II, violates the Supremacy Clause, and is irreconcilable with our constitutional design.

This subpoena subjects the President to criminal process under any reasonable understanding of the concept. It demands the President's records, names him as a target, and was issued as part of a grand-jury proceeding that seeks to determine whether the President committed a state-law crime. That the grand-jury subpoena was issued to a third-party custodian does not alter the calculus. If it did, every local prosecutor in the country could easily circumvent presidential immunity.

Whether compliance with *this* subpoena will burden the President is the wrong question. The Court has always taken a categorical approach to presidential immunity. The Court asks whether this *kind* of legal process violates the Constitution. But the President should prevail even under a case-specific

approach. The subpoena is highly intrusive to the President, as it seeks nearly a decade of his sensitive financial records. And the District Attorney cannot explain why this subpoena—which he admits to copying from two unrelated congressional investigations—is relevant to the allegations he is investigating. Indeed, politically motivated subpoenas like this one are a perfect illustration of why a sitting President should be categorically immune from state criminal process.

In other words, the subpoena cannot come close to the heightened-need showing that *United States v. Nixon* requires. The Second Circuit incorrectly held that *Nixon* only applies to executive-privilege claims. In all presidential-immunity cases—not just those where privilege is invoked—"a court … must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch." *Fitzgerald*, 457 U.S. at 754. In this context, that balance is struck by requiring the prosecutor to show, at a minimum, that the "evidence sought" is "directly relevant to issues that are expected to be central" and "not available with due diligence elsewhere." *In re Sealed Case*, 121 F.3d 729, 754-55 (D.C. Cir. 1997). This subpoena fails that standard as a matter of law.

STATEMENT OF THE CASE

A. Background

In April 2019, following hearings regarding the President's financial holdings and business ventures, the Oversight Committee of the U.S. House of Representatives issued a subpoena to the President's accounting firm, Mazars USA, LLP. *See Trump v. Mazars USA, LLP*, 940 F.3d 710, 716 (D.C. Cir. 2019). Mazars was responsible for, among other things, preparing financial statements for businesses owned by President Trump, as well his personal tax returns. *Id.* at 716. The Committee claimed to be investigating a number of issues, including the President's past financial transactions, possible violations of the Emoluments Clauses of the U.S. Constitution and federal financial disclosure laws. *Id.* The legality of the Mazars subpoena quickly became embroiled in litigation, and the subpoena has been stayed ever since. *Id.* at 717-18.[1]

During that same timeframe, the House Ways and Means Committee subpoenaed the President's federal tax returns from the Treasury Department. The Treasury Department declined to disclose the President's returns, citing previous statements suggesting that the Committee lacked a legitimate

[1] This litigation remains ongoing. The D.C. Circuit recently denied the President's petition for rehearing en banc, CADC Doc. #1815681, *Trump v. Mazars USA, LLP*, No. 19-5142 (D.C. Cir.), but the President has indicated that he will petition this Court for certiorari, CADC Doc. #1812461, at 12, *Trump v. Mazars USA, LLP*, No. 19-5142 (D.C. Cir.).

legislative purpose. *See Congressional Committee's Request for the President's Tax Returns Under 26 U.S.C. § 6103(f)*, 43 Op. O.L.C. __, __ (June 13, 2019). That subpoena's legality is similarly embroiled in litigation. *See* Doc. 1, *Comm. on Ways & Means v. U.S. Dept. of Treasury*, No. 19-cv-1974 (D.D.C.). The Committee therefore has been unable, to date, to secure these tax documents.

News subsequently broke that the District Attorney of New York County had opened its own investigation into the President's business dealings, including certain payments made in 2016. *See* Dan Mangan & Chris Eudaily, *Trump's Ex-Lawyer Michael Cohen Cooperating with New York Prosecutors in Probe of Whether Trump Organization Falsified Records*, CNBC (Sept. 11, 2019), cnb.cx/2pgvfh4. The District Attorney's investigation came a year after the Democrats had taken "back the majority" of the House of Representatives and in the face of dismay over their failure "to get their hands on the long-sought after documents." Lisa Hagen, *Congress Returns, Trump Investigations Resume*, U.S. News & World Report (Sept. 9, 2016), bit.ly/2NGeLIt. There was optimism that "it may be more difficult to fend off a subpoena in a criminal investigation with a sitting grand jury." William K. Rashbaum & Ben Protess, *8 Years of Trump Tax Returns Are Subpoenaed by Manhattan D.A.*, New York Times (Sept. 16, 2019), nyti.ms/34YW4FN.

As part of that investigation, the District Attorney served a grand jury subpoena on the Trump Organization that demanded documents and

communications concerning the President. App. 110a-16a. The subpoena was entitled "Investigation into the Business and Affairs of John Doe (2018-00403803)." App. 110a. The Trump Organization began complying. But a dispute arose over the subpoena's scope.

The District Attorney declined to resolve the dispute by negotiation and compromise. He instead sought to bypass the President by subpoenaing Mazars. App. 117a-22a. That subpoena—also entitled "Investigation into the Business and Affairs of John Doe (2018-00403803)"—names the President personally and demands production of his personal records (including his tax returns). *Id.*

The District Attorney's subpoena to Mazars is copied, virtually word-for-word, from the one the Oversight Committee issued to Mazars. App. 123a-26a. The only difference is that the Oversight Committee did not seek the President's tax returns. App. 124a. That portion of the District Attorney's subpoena instead mirrors the subpoena the House Ways and Means Committee sent to the Treasury Department. In other words, the District Attorney cut and pasted from two congressional subpoenas to craft his request to Mazars.

Unsurprisingly, then, the grand jury subpoena to Mazars is not tailored to the 2016 payments and business records he claims to be investigating. It seeks reams of the President's confidential information, reaches back to 2011, and asks for documents—like those relating to a hotel in Washington, D.C.—that

have nothing to do with New York. App. 119a-20a. The District Attorney nevertheless refused to narrow the subpoena, allow more time for negotiations, or even stay its enforcement while the parties litigated its validity.[2]

B. Proceedings Below

On September 19, the President filed this federal action. The complaint challenges the Mazars subpoena as violating the temporary immunity a sitting President holds under Article II and the Supremacy Clause of the Constitution. The President also sought an emergency injunction to stay enforcement of the subpoena. *See* App. 37a-38a. The Executive Branch filed a statement of interest in support of the President.

The District Attorney agreed to stay enforcement of the Mazars subpoena until September 25 so that the parties could brief and argue the President's motion on a highly expedited basis. Ultimately, the parties agreed to stay enforcement of the subpoena until 1:00 pm on October 7. App. 38a-39a.

On October 7, at 8:47 am, the district court issued a 75-page opinion denying the President's requests for injunctive relief and dismissing his

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[2] Throughout this litigation, Mazars has consistently represented that "this action is between Appellant [the President] and Appellee Vance," and it therefore "takes no position on the legal issues raised by [the President]." *See* CA2 Doc. 96.

complaint. App. 30a. Specifically, the court held that the President's immunity claim must be pursued in state court under *Younger v. Harris*, 401 U.S. 37 (1971), and dismissed the complaint on that basis. App. 41a-61a.

As an "alternative" holding, the district court denied the President's immunity claim on "the merits." App. 61a. According to the district court, the President's temporary immunity from criminal process—including indictment and imprisonment—while in office must be assessed on a case-by-case basis. App. 93a. As a result, although the President might be immune from "lengthy imprisonment" or "a charge of murder," he might not be immune from a shorter prison sentence or prosecution for lesser crimes such as "failing to pay state taxes, or of driving while intoxicated." App. 33a, 82a. In so holding, the court "reject[ed]" the contrary views of the Department of Justice over the last 50 years even though they "have assumed substantial legal force." App. 70a-71a. Applying its novel balancing test, the district court held that the President is not immune from this subpoena while in office. App. 61a-62a, 93a.

Because Mazars was set to comply with the subpoena within hours of the district court's decision, the President filed a notice of appeal and an emergency motion for stay with the Second Circuit. App. 96a; CA2 Doc. 8. Within an hour, the Second Circuit granted the President's motion—highlighting the "unique issues raised by this appeal." App. 98a-99a. The court issued an expedited briefing schedule, set oral argument for October 23, and informed the

parties that the stay would only "remain[] in effect until argument is completed." App. 100a-02a. The Executive Branch filed an amicus brief supporting the President's position, arguing that "the district court erred in … declining to halt the District Attorney's enforcement of the subpoena against the President's personal records." CA2 Doc. 83 at 8.

On October 18, after briefing was complete and the District Attorney continued to oppose any further stay of the subpoena, the President filed an emergency motion for stay pending appeal. App. 103a-04a. As things stood, Mazars would have been required to comply with the subpoena immediately after oral argument ended, presumably before the Second Circuit could take the matter under submission and issue a ruling. The President asked the Second Circuit to stay the subpoena until it resolved the President's appeal. *See id.*

On October 21, the parties reached an agreement. The District Attorney would forbear enforcement of the Mazars subpoena between the date of oral argument in the Second Circuit and 10 calendar days after the Second Circuit issued its ruling so long as any petition for certiorari would be filed in the Supreme Court within that timeframe. The agreement also required the President to immediately withdraw all pending motions for a stay in the Second Circuit. The parties further agreed that, if the President petitioned for certiorari, the District Attorney would then continue to forbear enforcement of the subpoena until a final disposition from the Supreme Court, but only if the President asked for the

case to be heard and decided this Term. App. 106a-08a. In accordance with this agreement, the President thus respectfully asks the Court to hear and decide the case this Term should certiorari be granted.

At oral argument, the District Attorney made clear that he is targeting the President in a criminal investigation for the purpose of possible indictment. Because, in the District Attorney's view, any presidential immunity is not triggered until indictment, there is "no basis to object *at this point*." OA 31:35-37, cs.pn/2CAtWfM (emphasis added). But even if the investigation reaches the point of indictment, the District Attorney would not recognize absolute immunity for a sitting President:

> It's hard for me to say that there could be no circumstance under which a President could ever imaginably be criminally charged or perhaps tried.… You can invent scenarios where you can imagine that it would be necessary or at least perhaps a good idea for a sitting President to be subject to a criminal charge even by a state while in office.

OA 30:12-21; 37:56-38:08.

On November 4—twelve days after argument—the Second Circuit issued its opinion. App. 1a. It first disagreed with the district court's dismissal of the complaint under *Younger* and vacated that part of the judgment. The President's "novel and serious claims," in the Second Circuit's view, "are more appropriately

adjudicated in federal court." App. 13a-14a. But the Second Circuit affirmed what it construed as the district court's denial of a preliminary injunction. In particular, it held that the President is unlikely to prevail on his claim that he is "absolutely immune from all stages of state criminal process while in office, including pre-indictment investigation, and that the Mazars subpoena cannot be enforced in furtherance of any investigation into his activities." App. 14a-15a.

The Second Circuit aligned itself with what it called the district court's "thorough and thoughtful decision" resolving the immunity issue against the President. App. 7a. "With the benefit of the district court's well-articulated opinion," it held "that any presidential immunity from state criminal process does not bar the enforcement of [this] subpoena." App. 28a. According to Second Circuit, it thus had "no occasion to decide ... the precise contours and limitations of presidential immunity from prosecution," and was "express[ing] no opinion on the applicability of any such immunity under circumstances not presented here." App. 15a. It instead framed the holding as "only 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." App. 15a. The Second Circuit remanded the case "for further proceedings consistent with this opinion." App. 29a.

REASONS FOR GRANTING THE PETITION

The Second Circuit "decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. Rule 10(c). This petition presents a critically important question about the existence and scope of a sitting President's temporary immunity from state criminal process. The Constitution's text, structure, and history all confirm that the District Attorney's grand-jury subpoena for the President's records violates Article II and the Supremacy Clause. The Second Circuit erred in holding otherwise. The Court should grant review and reverse the decision below.

I. Whether the President is absolutely immune is an important and unsettled issue of federal law that the Court should resolve.

This petition involves an indisputably important issue. The Court has "long recognized the 'unique position in the constitutional scheme'" that the Presidency occupies. *Clinton v. Jones*, 520 U.S. 681, 698 (1997). Article II vests "[t]he executive Power" in one "President of the United States of America." U.S. Const. art. II, § 1, cl. 1. Article II thus gives the President vast authority over foreign and domestic affairs. He must, among other things, command the armed forces, negotiate treaties, appoint and remove federal officers, and "take Care that the Laws be faithfully executed." U.S. Const. art. II, §§ 2-3. In short, the President is "the chief constitutional officer of the Executive Branch,

entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity." *Nixon v. Fitzgerald*, 457 U.S. 731, 750 (1982).

The President, accordingly, is different from all other constitutional officers. He is "the only person who is also a branch of government." Jay S. Bybee, *Who Executes the Executioner?*, 2-SPG NEXUS: J. Opinion 53, 60 (1997). "Unlike federal lawmakers and judges," in other words, "the President is at 'Session' twenty-four hours a day, every day. Constitutionally speaking, the President never sleeps. The President must be ready, at a moment's notice, to do whatever it takes to preserve, protect, and defend the Constitution and the American people." Akhil Reed Amar & Neal Kumar Katyal, *Executive Privileges and Immunities: The Nixon and Clinton Cases*, 108 Harv. L. Rev. 701, 713 (1995).

The "'power to perform'" these critical tasks, in turn, is "'necessarily implied'" from the vesting of them in the President. *Fitzgerald*, 457 U.S. at 749 (quoting 3 J. Story, *Commentaries on the Constitution of the United States* § 1563 (1st ed. 1833)). It is therefore imperative that the President not be "distract[ed] ... from his public duties, to the detriment of not only the President and his office but also the Nation that the Presidency was designed to serve." *Id.* at 753. In order to perform his constitutionally assigned functions, the President must be "free from risk of control, interference, or intimidation by other branches," *id.* at 760-61 (Burger, C.J., concurring), as well as from such intrusion by the States. For these reasons, this Court has rigorously scrutinized legal

process issued to the President to ensure that it does not result in the "diversion of his energies." *Id.* at 751 (majority opinion).

To that end, the Court reviews presidential claims of immunity or privilege without concern for circuit splits, percolation, or other criteria that ordinarily inform its decision whether to grant certiorari. In *United States v. Nixon*, for example, the Court granted certiorari even in the absence of judgment from the court of appeals given "the public importance of the issues presented and the need for their prompt resolution." 418 U.S. 683, 686-87 (1974). In *Clinton v. Jones*, the Court granted review even assuming that the dispute was a "'one-of-a-kind case'" that presented a "novel constitutional question." 520 U.S. at 689-90. The decision to grant certiorari was a marker of the presidential immunity question's "importance"—it was not a "judgment concerning the merits of the case." *Id.* at 689. The case's importance was bolstered by the "representations made on behalf of the Executive Branch" that the Eighth Circuit's ruling "was 'fundamentally mistaken' and created 'serious risks for the institution of the Presidency.'" *Id.* at 689-90.

The Court's solicitude is attributable to the fact that the President—both as a litigant and as a constitutional officer—is no "'ordinary individual.'" *Nixon*, 418 U.S. at 708 (quoting *United States v. Burr*, 25 F. Cas. 187, 192 (C.C.D. Va. 1807) (Marshall, C.J.)). The Court has always understood the "high degree of respect due the President of the United States," *id.* at 715, and it has consistently recognized the office's

"singular importance" in maintaining "the effective functioning of government," *Fitzgerald*, 457 U.S. at 751.

The Court should do the same here. For the first time in our Nation's history, a local prosecutor has issued criminal process—this grand-jury subpoena—directed at a sitting President, as part of a criminal investigation into the President himself. Whether the Constitution permits an assertion of this kind of authority over the Chief Executive raises a momentous question of first impression about the scope of Presidential immunity. The President's "novel and serious," App. 13a, immunity claim is no less worthy of review than those raised in *Nixon*, *Fitzgerald*, and *Jones*.

If anything, the Court's intervention is more urgently needed here. The earlier cases all involved the imposition of federal process. But the concerns associated with exposing the President to state process are far more serious. That is true as a practical matter given the sheer number of state and local prosecuting offices. The potential for abuse is also graver given that, unlike their federal counterparts, state and local prosecutors are not under centralized control and, in many cases, have assumed office by local election. In fact, the District Attorney's criminal subpoena threatens the balance of power between the national and state governments. "Because the Supremacy Clause makes federal law 'the supreme Law of the Land,' Art. VI, cl. 2, any direct control by a state … over the President, who has principal responsibility to ensure that those laws are

'faithfully executed,' Art. II, § 3," implicates concerns far beyond—and far more acute—than those raised in previous immunity cases. *Jones*, 520 U.S. 691 n.13. For state and local prosecutors, the President is an "easily identifiable" and often politically expedient target. *Fitzgerald*, 457 U.S. at 751-53.

In sum, as the Executive Branch explained in its amicus briefs below, the President's immunity claim involves "serious," "significant," and "weighty constitutional issues." CA2 Doc. 83 at 8; D.Ct. Dkt. 32 at 6. Every time that a President has asked this Court to hear an important and unsettled claim of immunity under the Constitution, it has granted certiorari. The Court should do the same here.

II. The Second Circuit incorrectly decided this important immunity question.

A. The District Attorney's subpoena violates the absolute immunity that the President holds from state criminal process while in office.

Under Article II, the Supremacy Clause, and the overall structure of our Constitution, the President of the United States cannot be "subject to the criminal process" while he is in office. Memorandum for the U.S. Concerning the Vice President's Claim of Constitutional Immunity 17, *In re Proceedings of the Grand Jury Impaneled Dec. 5, 1972*, No. 73-cv-965 (D. Md.) (Bork Memo). The requirement for immunity is especially clear when the criminal process originates, as it did here, from a state

or local prosecutor. No court—until this case—has ever suggested otherwise.

That the President cannot be indicted, prosecuted, or imprisoned while in office should not be controversial. *See Fitzgerald*, 457 U.S. at 749 (citing 3 Story § 1536). As explained, the President has vast and ceaseless duties in domestic and foreign affairs. *See supra* 14-15. "It is *his* responsibility to take care that the laws be faithfully executed." *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 493 (2010). Because "the President is a unitary executive," when "the President is being prosecuted, the presidency itself is being prosecuted." Akhil Reed Amar & Brian C. Kalt, *The Presidential Privilege Against Prosecution*, 2-SPG NEXUS: J. Opinion 11, 12 (1997).

Thus, as the Office of Legal Counsel has repeatedly explained, the criminal prosecution of a sitting President violates Article II. "To wound [the President] by a criminal proceeding is to hamstring the operation of the whole governmental apparatus, both in foreign and domestic affairs." Memorandum from Robert G. Dixon, Jr., Asst. Att'y Gen., O.L.C., *Re: Amenability of the President, Vice President, and Other Civil Officers to Federal Criminal Prosecution While in Office* 30 (Sept. 24, 1973) (Dixon Memo). Those wounds go beyond physical constraints on the President's liberty, diversion of the President's attention from his official duties, or demands on the President's time. Criminal prosecution comes with a "distinctive and serious stigma"—and the "stigma and opprobrium associated with a criminal charge" could "undermin[e] the President's leadership and efficacy

both here and abroad." *A Sitting President's Amenability to Indictment and Criminal Prosecution*, 24 O.L.C. Op. 222, 249-51 (Oct. 16, 2000) (Moss Memo).

Other provisions of the Constitution bolster this understanding. By its terms, Article II only authorizes the President's "remov[al]" via "Impeachment." U.S. Const. art. II, § 4. A sitting President "convicted" by the Senate can *then* be "liable and subject to Indictment, Trial, Judgment, and Punishment, according to Law." *Id.* art. I, § 3, cl. 7. The Constitution's use of the past-tense "convicted" reinforces that the President cannot be subject to criminal process *before* that juncture. *See* Bybee 54-65.

Any other rule is untenable. It would allow a single prosecutor to circumvent the Constitution's specific rules for impeachment. *See Kendall v. U.S. ex rel. Stokes*, 37 U.S. 524, 610 (1838). The Constitution's assignment of the impeachment power to the House of Representatives, and its supermajority requirement for removal by the Senate, ensure that "the process may be initiated and maintained only by politically accountable legislative officials" who represent a majority of the entire nation. Moss Memo 246; *see* Dixon Memo 32; *see also* Amar & Kalt 12 ("The President is elected by the entire polity and represents all 260 million citizens of the United States of America. If the President were prosecuted, the steward of *all* the People would be hijacked from his duties by an official of *few* (or none) of them.").

Moreover, the Framers' debates at the Philadelphia Convention "strongly suggest an understanding that the President, as Chief Executive, would not be subject to the ordinary criminal process." Bork Memo 6. The Framers understood "that the nation's Chief Executive, responsible as no other single officer is for the affairs of the United States, would not be taken from duties that only he can perform unless and until it is determined that he is to be shorn of those duties by the Senate." *Id.* at 17. Oliver Ellsworth and John Adams, for example, believed 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). Later, Thomas Jefferson opined that if, through compulsory process, "the several courts could bandy [the President] from pillar to post, keep him constantly trudging from north to south & east to west," they could "withdraw him entirely from his constitutional duties." 9 The Writings of Thomas Jefferson 60 (Paul Leicester Ford ed., 1898).

When the Framers discussed the possibility of subjecting a President to criminal process, they agreed that it would occur *after* impeachment and removal from office. *See, e.g.*, Federalist No. 69, at 416 (Alexander Hamilton) (Rossiter ed., 1961) ("The President … would be liable to be impeached, tried, and, upon conviction … would *afterwards* be liable to prosecution and punishment in the ordinary course of law." (emphasis added)); 2 Farrand, *Records of the Federal Convention* 500 (rev. ed. 1966) (Gouverneur

Morris: "A conclusive reason for making the Senate instead of the Supreme Court the Judge of impeachments, was that the latter was to try the President *after* the trial of the impeachment." (emphasis added)); Federalist No. 77, at 464 (Alexander Hamilton) (discussing impeachment and "*subsequent* prosecution in the common course of law" (emphasis added)).

The rationale for presidential immunity from indictment and prosecution applies equally when, as here, the President is targeted for criminal investigation and then served with compulsory process. Article II requires that "*all aspects of criminal prosecution* of a President must follow impeachment" and that "removal from office must precede *any form of criminal process* against an incumbent President." *Nixon v. Sirica*, 487 F.2d 700, 757 (D.C. Cir. 1973) (MacKinnon, J., concurring in part and dissenting in part) (emphasis added). Allowing the sitting President to be targeted for criminal investigation—and to be subpoenaed on that basis—would, like an indictment itself, distract him from the numerous and important duties of his office, intrude on and impair Executive Branch operations, and stigmatize the presidency.

Moreover, allowing a single prosecutor to investigate a sitting President through the issuance of criminal process no less invades Congress's impeachment authority than the filing of a criminal charge. Investigation of wrongdoing by the President is a "NATIONAL INQUEST." The Federalist No. 65, at 397 (Alexander Hamilton). "If this be the design of

it, who can so properly be the inquisitors for the nation as the representatives of the nation themselves." *Id.*; *see also Mazars*, 940 F.3d at 750 (Rao, J., dissenting).

The constitutional prohibition on subjecting a sitting President to criminal process is especially strong when applied to state and local governments. *See Jones*, 520 U.S. at 691 n.13. The Supremacy Clause exists to ensure that States are unable to "defeat the legitimate operations" of the federal government. *M'Culloch v. Maryland*, 17 U.S. 316, 427 (1819). "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." *Id.* Subjecting a sitting President to state criminal process would "prostrat[e]" the federal government "at the foot of the states." *Id.* at 432.

As the Fifth Circuit told an Alabama grand jury when it attempted to investigate a Justice Department lawyer:

> Both the Supremacy Clause and the general principles of our federal system of government dictate that a state grand jury may not investigate the operation of a federal agency…. [T]he investigation … is an interference with the proper governmental function of the United States ... [and] an invasion of the sovereign powers of the United States of America. If the [State] had the power to

> investigate …, it has the power to do additional acts in furtherance of the investigation; to issue subpoenas to compel the attendance of witnesses and the production of documents, and to punish by fine and imprisonment for disobedience. When this power is asserted by a state sovereignty over the federal sovereignty, it is in contravention of our dual form of government and in derogation of the powers of the federal sovereignty. The state having the power to subpoena … could embarrass, impede, and obstruct the administration of a federal agency. No federal agency can properly function if its employees are being constantly called from their duties ….

United States v. McLeod, 385 F.2d 734, 751-52 (5th Cir. 1967). Giving every state and local prosecutor in the country the unfettered authority that the District Attorney claims here to issue criminal process to a sitting President implicates all these concerns.

This is true as a principle of sovereignty and without regard to the extent of the burden the state interference imposes on federal operations. *See North Dakota v. United States*, 495 U.S. 423, 437-38 (1986) ("States may not directly obstruct the activities of the Federal Government."); *M'Clung v. Silliman*, 19 U.S. 598, 605 (1821) (a state court cannot issue a mandamus to an officer of the United States because that officer's "conduct can only be controlled by the

power that created him"). That said, the practical threat that state criminal process poses to a President cannot be overstated. State and local prosecutors have massive incentives to target him with investigations and subpoenas to advance their careers, enhance their reelection prospects, or make a political statement. Unleashing all fifty states and thousands of local governments to conduct their own broad-ranging criminal investigations of a sitting President is unimaginable. It would overrun the right of the people to "a vigorous Executive." Amar & Kalt 20-21.

The foregoing principles resolve this dispute in favor of immunity here. The District Attorney served the sitting President, through his custodian, with compulsory criminal process. There is no dispute that the President is a target of this grand jury investigation. *See, e.g.*, App. 22a (explaining "that the grand jury is investigating *not only the President*, but also other persons and entities." (emphasis added)); App. 117a-120a (naming the President and seeking his personal records). Indeed, the most that the Second Circuit would say is that "it is unclear whether the President will be indicted." App. 22a. The district court was likewise only willing to say that the grand jury "may or may not ultimately target [i.e., indict] the President." App. 53a.

As the record stands, then, the legal dispute must be resolved on the understanding that the District Attorney's subpoena was issued to support "a finding that it is probable that the President has committed a crime." *Sirica*, 487 F.2d at 758 (MacKinnon, J., concurring in part and dissenting in

part). That insinuation, even if it is made "obliquely," would "vitiate the sound judgment of the Framers that a President must possess the continuous and undiminished capacity to fulfill his constitutional obligations." *Id.* Granting a sitting President immunity from criminal process ensures that this does not happen.

The Second Circuit's reasons for reaching a different conclusion are misplaced. To begin, the Second Circuit made a key conceptual error by focusing on whether *this* subpoena interferes with the President's execution of his duties under Article II. App. 18a-19a & n.12, 21a. Presidential immunity does not turn on the idiosyncratic burdens (or lack thereof) of a particular subpoena. This Court always takes a categorical approach to presidential immunity.

This Court did not inquire, for example, whether Mr. Fitzgerald's suit alone "would raise unique risks to the effective functioning of government." *Fitzgerald*, 457 U.S. at 751. The Court recognized that "the President would be an easily identifiable target for suits for civil damages" and, collectively, those civil suits "could distract a President from his public duties, to the detriment of not only the President and his office but also the Nation that the Presidency was designed to serve." *Id.* at 753. Similarly, this Court did not scrutinize whether the suit brought by Ms. Jones would—in and of itself—"create[] serious risks for the institution of the Presidency." *Jones*, 520 U.S. at 689. Rather, the Court surveyed the "200-year history of the Republic" and then asked whether "this particular case—*as well*

as the potential additional litigation that an affirmance of the Court of Appeals judgment might spawn—may impose an unacceptable burden on the … office." *Id*. at 701-02 (emphasis added).

There is no basis for framing a narrower immunity inquiry here. The question, therefore, is *not* whether this criminal subpoena will burden or distract the President. It is whether allowing every state or local prosecutor to target the President for criminal investigation via the issuance of compulsory process would cross the constitutional barrier erected by Article II and the Supremacy Clause. It clearly would.

The Second Circuit's reliance on precedent to reject the President's immunity claim fares no better. App. 15a-16a. The court principally relies on *United States v. Nixon*. App. 16a-24a. But that reliance is misplaced. The kind of legal process at issue here is distinguishable from *Nixon* in several respects.

First, *Nixon* involved federal—not state—process. *See* 418 U.S. at 707 (stressing how presidential immunity would "gravely impair the role of the courts under Art. III"). The difference is material. The President's asserted privilege created a conflict between coequal branches of government. *Nixon* had no occasion to consider the "contravention of our dual form of government" or the "derogation of the powers of the federal sovereignty" that would result from a state exercising direct control over the President of the United States. *McLeod*, 385 F.2d at 752. Moreover, as the Executive Branch explained

below: "In contrast to a United States Attorney, who is accountable to the Attorney General and to the President, who in turn is accountable to the Nation as a whole, a local prosecutor is accountable to a small and localized electorate." CA2 Doc. 83 at 15.

Second, the subpoena upheld in *Nixon* asked the President to provide evidence in someone else's criminal proceeding; the President was not himself a target. 418 U.S. at 710. Indeed, the *Nixon* Court refused to decide whether a grand jury could name a sitting President as an unindicted coconspirator—an issue on which the Court had originally granted the United States' cross-petition for certiorari. *See* 418 U.S. at 687 n.2.

The differences between treating the President as a witness in a criminal proceeding and treating him as a target in a criminal proceeding are important. Only the latter carries the "distinctive and serious stigma," the "public … allegation of wrongdoing," and "the unique mental and physical burdens" that are "placed on a President facing criminal charges." Moss Memo 249-52; *see also* Alberto R. Gonzales, *Presidential Powers, Immunities, and Pardons*, 96 Wash. U. L. Rev. 905, 940 n.153 (2019). Those are the concerns that drive the inquiry into whether the President should be immune.

Third, the *Nixon* subpoena involved another person's criminal *trial*—not a grand jury investigation. The Second Circuit dismissed this distinction solely due to the comparable importance of trial juries and grand juries. App. 22a-24a. But the

dispute is not over the important function served by grand juries. The point is that a trial triggers additional (and competing) constitutional rights held by the criminal defendant. That is why the Court stressed that criminal defendants enjoy Fifth and Sixth Amendment rights that stake a constitutional claim, even vis-à-vis the President, to the "production of all evidence at a criminal trial." *Nixon*, 418 U.S. at 711. Those concerns are simply not present in a grand jury investigation.

Fourth, *Nixon* neither considered nor decided a claim of presidential immunity. App. 18a-19a & n.14. This Court labeled its analysis: "THE CLAIM OF PRIVILEGE." *Id.* at 703. Under that heading, the Court briefly explained that the President was arguing that "the separation of powers doctrine precludes judicial review of a President's claim of privilege." *Id.* Later, the Court noted that one argument supporting the President's claim for "absolute privilege rests on the doctrine of separation of powers …[, which] insulates the President from a judicial subpoena." *Id.* at 706. The Second Circuit read this to be an assertion of immunity from criminal process separate from the claim of executive privilege—*i.e.*, the argument that the President raises here. App. 19a n.14. But, especially given that the Court addressed the argument in a section concerning the President's "claim of privilege," the better reading is that the only "immunity" claim raised was an argument that courts have no power to review the invocation of privilege; that is, as soon as a President asserts privilege, no court has the power to overcome that claim.

The President's reading is confirmed by the Court's treatment of the Government's cross-petition, which "raised the issue whether the grand jury acted within its authority in naming the President as a coconspirator." 418 U.S. 687 n.2. The Court found resolution of the issue "unnecessary to resolution of the question whether the claim of privilege is to prevail," and therefore dismissed the cross-petition as improvidently granted. *Id.* In other words, because the Court concluded that President Nixon was a mere third-party witness, only raising a claim of privilege, the Court did not need to decide any broader immunity question. That is why this "Court's analysis focused almost entirely on privilege." App. 19a.

The Second Circuit also points to *Jones* and *Burr*. But neither case considered—let alone decided—this issue. In *Jones*, as the Second Circuit recognized, the Court merely reiterated that "'the President is subject to judicial process in appropriate circumstances.'" App. 15a (quoting *Jones*, 520 U.S. at 703). But it never decided whether subjecting the President to judicial process is appropriate in *this kind* of case. Indeed, the Court was careful to leave open whether a civil suit brought in state court would be constitutionally permissible, and it flagged the violation of the Supremacy Clause that the President raises here. *See id.* at 691 & n.13.

The Second Circuit also highlights that, as in *Jones*, the Mazars subpoena has no "relation to the President's performance of his official functions." App. 17a; *see also* App. 18a ("These documents do not implicate, in any way, the performance of his official

duties."). But that cannot be a relevant consideration here unless the Second Circuit was deciding the issue it claimed to leave open, *viz.*, "whether the President is immune from indictment and prosecution while in office." App. 28a. If presidential immunity turns on official versus unofficial conduct, a sitting President could be indicted, prosecuted, and imprisoned for "failing to pay state taxes, or of driving while intoxicated." App. 82a. *Jones* certainly did not decide that issue.

Burr also did not address the issue presented here. In that case, Chief Justice Marshall, sitting as a trial judge, subpoenaed President Jefferson to produce a private letter to prove the innocence of the criminal defendant (Aaron Burr)—not to prove Jefferson's guilt. *See Burr*, 25 F. Cas. at 32. Chief Justice Marshall explained that while "[t]he court would not lend its aid to motions obviously designed to manifest disrespect to the government," it was appropriate to issue a subpoena "for papers to which the accused may be entitled, and which may be material in his defence." *Id.* at 35; *see also* Akhil Reed Amar, *Nixon's Shadow*, 83 Minn. L. Rev. 1405, 1408 (1999). In a later opinion, the Chief Justice noted that, had President Jefferson himself objected to the subpoena, rather than delegate all authority over the task to an attorney, "all proper respect would have been paid" to the objection. 25 F. Cas. at 192.

To be sure, then, the Second Circuit is correct that *Burr* "upheld the issuance of a subpoena *duces tecum* to President Jefferson." App. 15a. But, like *Jones*, it did not decide this kind of immunity case.

That is why the Second Circuit ultimately, and correctly, acknowledges that "the Supreme Court has not had occasion to address *this* question." App. 21a (emphasis added).

Finally, the Second Circuit determined that the fact that the subpoena was issued to the President's accountants instead of to him directly mattered to the immunity inquiry: "The subpoena at issue is directed not to the President, but to his accountants; compliance does not require the President to do anything at all." App. 20a. But that distinction is legally and factually untenable.

As an initial matter, the Second Circuit did *not* hold that issuing the subpoena to Mazars rendered the claim of immunity non-cognizable. It was clear that the "President has standing to challenge the Mazars subpoena." App. 20a n.15. That is of course right. The District Attorney sent the subpoena to Mazars precisely because it is the President's custodian. Mazars is meant to function, at least for the District Attorney's purposes, as the President—just without the inconvenience of having the subpoena resisted or having its legality tested in court. Allowing this type of behavior to defeat immunity would "frustrate … judicial inquiry." *Eastland v. U.S Servicemen's Fund*, 421 U.S. 491, 501 n.14 (1975); *see United States v. AT&T Co.*, 551 F.2d 384, 385 (D.C. Cir. 1976).

Rather, the Second Circuit seized on the third-party nature of the subpoena to substantiate its conclusion that compliance will not burden the

President because he will not have to physically "do anything." App. 20a. But immunity does not turn on whether the President will personally take charge of compliance. If it did, state and local prosecutors from around the country could criminally subpoena a sitting President's medical, legal, banking, and countless other personal papers held by third-party custodians without implicating immunity. In all these instances, the President would not have "to do or produce anything." For presidential immunity to mean anything, it cannot be so easily evaded. Subpoenas to custodians must be treated as though they were sent to the target directly.

It is also a hollow distinction. Even if the subpoena were sent to the President, it is unrealistic to assume that he would personally search through and compile documents responsive to this or any subpoena. And again, immunity does not turn on whether he would. In *Fitzgerald*, immunity turned on the burdens of "concern," "fear[]," and "distract[ion]." 457 U.S. at 752-53. The same burdens should be decisive here. What matters is that the District Attorney is targeting the President for criminal investigation and issuing compulsory process for his personal papers in an effort to build a case against him. The issue is whether this criminal process will create a "burden or distraction" that "would rise to the level of interfering with his duty to 'faithfully execute[ ]' the laws, U.S. Const. art. II, § 3, or otherwise subordinate federal law in favor of a state process." App. 21a. That issue cannot be avoided because the District Attorney sent the subpoena for

the President's papers to his accountants, rather than to him.

B. The subpoena is unconstitutional even if *Nixon* controls this dispute.

As explained, the Second Circuit's reliance on *Nixon* was erroneous. But even if *Nixon* controls this case, the subpoena is still invalid. That is because, under *Nixon*, the District Attorney still must have a "demonstrated, specific need" for the requested material. 418 U.S. at 713. In other words, he must "demonstrate that the Presidential material [is] 'essential to the justice of the (pending criminal) case.'" *Id.* (quoting *Burr*, 25 F. Cas. at 192). Other courts have interpreted the standard to mean that the "evidence sought must be directly relevant to issues that are expected to be central" and "not available with due diligence elsewhere." *In re Sealed Case*, 121 F.3d at 754-55. This stands in stark contrast to the ordinary rule that 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, 642-43 (1950).

In the Second Circuit's view, however, the heightened *Nixon* standard applies only when a President asserts a claim of executive privilege. App. 27a-28a. That is incorrect. *Nixon* itself acknowledged that "'in no case of this kind would a court be required to proceed against the president as against an ordinary individual.'" 418 U.S. at 708 (quoting *Burr*, 25 F. Cas. at 192). That is a strong signal that the

heightened standard applies without regard to the assertion of privilege.

Cheney v. U.S. District Court for D.C. illustrates the point. 542 U.S. 367 (2004). "Special considerations control," the Court explained, when the "autonomy" of the President's office is at stake. *Id.* at 385. It matters to the analysis whether, as in *Nixon*, the subpoena "'precisely identified' and 'specifically enumerated' the relevant materials" or, as in *Cheney*, the discovery requests asked for "everything under the sky." *Id.* at 387 (cleaned up). "The very specificity of the subpoena requests serves as an important safeguard against unnecessary intrusion into the operation of the Office of the President." *Id.*

The District Attorney cannot satisfy the heightened showing required under *Nixon*. The subpoena to Mazars is not tailored to the needs of this grand jury investigation. Indeed, the District Attorney did not even try to tailor it to investigative needs. He just photocopied congressional subpoenas relating to federal issues that New York County has no authority to investigate, and sent it to Mazars. This subpoena is, by definition, grossly overbroad and the District Attorney's claim that it "mirrored certainly the scope of what [he] needed from Mazars," D.Ct. Dkt. 38 at 30, is meritless on its face.

The District Attorney, moreover, has failed to even assert that his sweeping request for the President's private documents is *particularly* important or that the information he seeks is accessible *only* through those specific records—much

less that he *needs* these documents in order to file a criminal charge. *Cf. In re Sealed Case*, 121 F.3d at 754-55. To be sure, duplicating a congressional subpoena may be more "efficient." CA2 Doc. 99 at 46. But efficiency is no substitute for the demonstrated, *specific* need that is required of *any* subpoena that purports to compel production of documents from a sitting President. *See Nixon*, 418 U.S. at 713; *Cheney*, 542 U.S. at 387; *see also Burr*, 25 F. Cas. at 191-92.[3]

[3] At a minimum, this Court should vacate and remand for in-camera review. The Second Circuit rejected this argument as a matter of law and did not rely on sealed portions of the District Attorney's affidavit filed in district court to support its affirmance. App. 3a-4a & n.3; *see* D.Ct. Dkt. 17 at 2-4. Were the Court to adopt this approach, it should preserve the status quo while that review is conducted and any appeal is taken from the district court's decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED NOVEMBER 4, 2019

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 19-3204

DONALD J. TRUMP,

Plaintiff-Appellant,

-v.-

CYRUS R. VANCE, JR., IN HIS OFFICIAL CAPACITY AS DISTRICT ATTORNEY OF THE COUNTY OF NEW YORK, MAZARS USA, LLP,

Defendants-Appellees.[1]

October 23, 2019, Argued
November 4, 2019, Decided

Before: KATZMANN, Chief Judge, CHIN and DRONEY, Circuit Judges.

President Donald J. Trump filed suit in the United States District Court for the Southern District of New York seeking declaratory and injunctive relief to restrain the District Attorney of New York County from enforcing

1. The Clerk of Court is directed to amend the caption to conform to the above.

a grand jury subpoena served on Mazars USA LLP, a third-party custodian of the President's financial records. The district court (Marrero, *J.*) abstained from exercising jurisdiction and dismissed the President's complaint pursuant to *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971), but also ruled in the alternative that the President is not entitled to injunctive relief. On appeal, the President argues that abstention is not the course that should be taken here, and he asserts a temporary absolute presidential immunity that would forbid the grand jury from seeking his financial records in service of an investigation into conduct that predated his presidency. We agree that Younger abstention does not apply to the circumstances of this case. We hold, however, that any presidential immunity from state criminal process does not extend to investigative steps like the grand jury subpoena at issue here. We accordingly AFFIRM the district court's decision on the immunity question, which we construe as an order denying a preliminary injunction, VACATE the judgment of the district court dismissing the complaint on the ground of *Younger* abstention, and REMAND for further proceedings consistent with this opinion.

KATZMANN, *Chief Judge*:

This case presents the question of when, if ever, a county prosecutor can subpoena a third-party custodian for the financial and tax records of a sitting President, over which the President has no claim of executive privilege.[2] The District Attorney of New York County has issued a grand jury subpoena to an accounting firm that

2. Any references in this opinion to the President's privilege or lack thereof concerns only a President's executive privilege.

possesses a variety of such records because it performed accounting services for President Donald J. Trump and his organization. When the President sought injunctive relief in federal court to restrain enforcement of that subpoena, the district court (Marrero, *J.*) declined to exercise jurisdiction and dismissed the case under the doctrine of *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971). The district court also explained in an alternative holding why, in its view, there was no constitutional basis to temporarily restrain or preliminarily enjoin the subpoena at issue. On appeal, we conclude that *Younger* abstention does not extend to the circumstances of this case, but we hold that the President has not shown a likelihood of success on the merits of his claims sufficient to warrant injunctive relief. Construing the district court's discussion of the immunity question as an order denying a preliminary injunction, we **AFFIRM** that order, **VACATE** the judgment dismissing the complaint on the ground of *Younger* abstention, and **REMAND** for further proceedings consistent with this opinion.

BACKGROUND

The relevant facts are straightforward. The District Attorney of the County of New York has initiated a grand jury investigation that "targets New York conduct and has yet to conclude as to specific charges or defendants."[3]

3. The President's complaint is silent as to the nature of the grand jury investigation, but the District Attorney has described the investigation in further detail in a declaration filed in opposition to the President's motion for preliminary injunctive relief. The relevant portion of that declaration remains redacted from the public record; in any event, we need not rely on those further details here. It is enough

Joint App'x 46. The parties agree for purposes of this case that the grand jury is investigating whether several individuals and entities have committed criminal violations of New York law.

On August 1, 2019, the District Attorney served a subpoena *duces tecum* on behalf of the grand jury on the Trump Organization.[4] The subpoena sought "documents and communications" from the period between June 1, 2015 and September 20, 2018 relating to suspected "hush money" payments made to two women. Joint App'x 39, 48. At first, the Trump Organization cooperated with the subpoena and produced responsive documents. However, when "the President's attorneys"—private counsel retained by the President and apparently then acting on behalf of the Trump Organization—learned that the District Attorney interpreted the subpoena to require production of the President's personal tax returns, they "resisted" that interpretation. Joint App'x 21. Although the Trump Organization has apparently continued to produce limited tranches of documents in response to the August 1, 2019 subpoena, it has not produced any tax records.

On August 29, 2019, the District Attorney served another subpoena *duces tecum* on behalf of the grand jury on Defendant-Appellee Mazars USA LLP (the "Mazars

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for purposes of our analysis that the Mazars subpoena seeks evidence in service of an investigation into potential criminal conduct within the District Attorney's jurisdiction, a fact about the investigation which the district court treated as "uncontested." Joint App'x 76.

4. According to the President's complaint, the Trump Organization is wholly owned by the Donald J. Trump Revocable Trust, of which the President is the grantor and beneficiary.

subpoena"). Mazars is an accounting firm that possesses various financial records relating to the President's personal and business dealings, and the Mazars subpoena seeks a wide variety of financial records dating from January 1, 2011 to the present and relating to the President, the Trump Organization, and several related entities. Among the records sought in the August 29, 2019 subpoena are any "[t]ax returns and related schedules, in draft, as-filed, and amended form" within Mazars's possession.[5] Joint App'x 34. The subpoena set a return

5. The full document request is as follows:

> 1. For the period of January 1, 2011 to the present, with respect to Donald J. Trump, the Donald J. Trump Revocable Trust, the Trump Organization Inc., the Trump Organization LLC, the Trump Corporation, DJT Holdings LLC, DJT Holdings Managing Member LLC, Trump Acquisition LLC, Trump Acquisition, Corp., the Trump Old Post Office LLC, the Trump Foundation, and any related parents, subsidiaries, affiliates, joint ventures, predecessors, or successors (collectively, the "Trump Entities"):
>
> a. Tax returns and related schedules, in draft, as-filed, and amended form;
>
> b. Any and all statements of financial condition, annual statements, periodic financial reports, and independent auditors' reports prepared, compiled, reviewed, or audited by Mazars USA LLP or its predecessor, WeiserMazars LLP;
>
> c. Regardless of time period, any and all engagement agreements or contracts related to the preparation, compilation, review, or auditing of the documents described in items (a) and (b);

date of September 19, 2019. Only the Mazars subpoena is the subject of this action and appeal.[6]

On September 19, 2019, the President filed this action in the United States District Court for the Southern District of New York. The President's complaint asserted a broad presidential immunity from state criminal process

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> d. All underlying, supporting, or source documents and records used in the preparation, compilation, review, or auditing of documents described in items (a) and (b), and any summaries of such documents and records; and
>
> e. All work papers, memoranda, notes, and communications related to the preparation, compilation, review, or auditing of the documents described in items (a) and (b), including, but not limited to,
>
> i. All communications between Donald Bender and any employee or representative of the Trump Entities as defined above; and
>
> ii. All communications, whether internal or external, related to concerns about the completeness, accuracy, or authenticity of any records, documents, valuations, explanations, or other information provided by any employee or representative of the Trump Entities.

6. Mazars itself takes no position on the legal issues raised in this appeal.

and sought "[a] declaratory judgment that the [Mazars] subpoena is invalid and unenforceable while the President is in office;" "[a] permanent injunction staying the subpoena while the President is in office;" "[a] permanent injunction prohibiting the District Attorney's office from taking any action to enforce the subpoena, from imposing sanctions for noncompliance with the subpoena, and from inspecting, using, maintaining, or disclosing any information obtained as a result of the subpoena, until the President is no longer in office;" "[a] permanent injunction prohibiting Mazars from disclosing, revealing, delivering, or producing the requested information, or otherwise complying with the subpoena, until the President is no longer in office;" and temporary restraining orders and preliminary injunctions to the same effect during the pendency of the federal litigation. Joint App'x 26.

After a compressed briefing schedule, the able district court issued a thorough and thoughtful decision and order on October 7, 2019. *See Trump v. Vance*, 395 F. Supp. 3d 283 (S.D.N.Y. 2019). The court held that it was required to abstain from exercising jurisdiction under the Supreme Court's decision in *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971), and it dismissed the President's complaint on that ground. *Trump*, 395 F. Supp. 3d at 316. The court also articulated an alternative holding—to govern "in the event on appeal abstention were found unwarranted under the circumstances presented here"—in which it denied the President's motion for injunctive relief. *Id.* at 290. This appeal followed immediately on an expedited briefing schedule.

Appendix A

DISCUSSION

I. Standard of Review

"We review *de novo* the essentially legal determination of whether the requirements for abstention have been met." *Disability Rights N.Y. v. New York*, 916 F.3d 129, 133 (2d Cir. 2019).[7] Likewise, although the denial of a preliminary injunction is generally reviewable only for abuse of discretion, "[q]uestions of law decided in connection with requests for preliminary injunctions . . . receive the same *de novo* review that is appropriate for issues of law generally." *Am. Express Fin. Advisors Inc. v. Thorley*, 147 F.3d 229, 231 (2d Cir. 1998).

II. *Younger* Abstention

The district court dismissed the President's complaint on the basis that abstention was required under *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971). On appeal, the President and the United States argue that *Younger* abstention is unwarranted in the circumstances of this case. We agree.

"In the main, federal courts are obliged to decide cases within the scope of federal jurisdiction." *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 72, 134 S. Ct. 584, 187 L. Ed. 2d 505 (2013). "[O]nly exceptional circumstances

7. Unless otherwise indicated, in quoting cases, all internal quotation marks, alterations, emphases, footnotes, and citations are omitted.

justify a federal court's refusal to decide a case in deference to the States." *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 368, 109 S. Ct. 2506, 105 L. Ed. 2d 298 (1989) ("*NOPSI*"). Under *Younger* and its progeny, however, federal courts must decline to exercise jurisdiction in three such exceptional categories of cases: "First, *Younger* preclude[s] federal intrusion into ongoing state criminal prosecutions. Second, certain civil enforcement proceedings warrant[] abstention. Finally, federal courts [must] refrain[] from interfering with pending civil proceedings involving certain orders uniquely in furtherance of the state courts' ability to perform their judicial functions." *Sprint Commc'ns*, 571 U.S. at 78. *Younger* abstention is thus an "exception to th[e] general rule" that "a federal court's obligation to hear and decide a case is virtually unflagging," *id.* at 77, and the doctrine is also subject to exceptions of its own in cases of bad faith, harassment, or other "extraordinary circumstances," *Kugler v. Helfant*, 421 U.S. 117, 124, 95 S. Ct. 1524, 44 L. Ed. 2d 15 (1975).

As the district court recognized, *Younger* abstention is grounded "partly on traditional principles of equity, but . . . primarily on the 'even more vital consideration' of comity," which "includes 'a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.'" *NOPSI*, 491 U.S. at 364 (quoting *Younger*, 401 U.S. at 43-44). And as the Supreme Court has emphasized,

"[w]hen a federal court is asked to interfere with a pending state prosecution," those "established doctrines of equity and comity are reinforced by the demands of federalism, which require that federal rights be protected in a manner that does not unduly interfere with the legitimate functioning of the judicial systems of the States." *Kugler*, 421 U.S. at 123.

The demands of federalism are diminished, however, and the importance of preventing friction is reduced, when state and federal actors are already engaged in litigation. Recognition of this reality underlies legislative enactments like the federal officer removal statute, 28 U.S.C. § 1442(a)(1), which is grounded in a congressional decision that "federal officers, and indeed the Federal Government itself, require the protection of a federal forum." *See Willingham v. Morgan*, 395 U.S. 402, 407, 89 S. Ct. 1813, 23 L. Ed. 2d 396 (1969). It is also reflected in the Supreme Court's observation that allowing federal actors to access federal courts is "preferable in the context of healthy federal-state relations." *Leiter Minerals, Inc. v. United States*, 352 U.S. 220, 226, 77 S. Ct. 287, 1 L. Ed. 2d 267 (1957). We think this is strikingly so when the federal actor is the President of the United States, who under Article II of the Constitution serves as the nation's chief executive, the head of a branch of the federal government.

The Court's decision in *Leiter* is illuminating in this respect. There the Court held that the Anti-Injunction Act[8] does not bar the United States from seeking a stay

8. 28 U.S.C. § 2283 ("A court of the United States may not grant an injunction to stay proceedings in a State court except as

of state court proceedings. Consistent with the discussion above, the Court recognized that the Act was "designed to prevent conflict between federal and state courts." *Id.* at 225. The Court nevertheless reasoned that "[t]his policy is much more compelling when it is the litigation of private parties which threatens to draw the two judicial systems into conflict than when it is the United States which seeks a stay to prevent threatened irreparable injury to a national interest." *Id.* at 225-26. Indeed, the Court concluded that Congress would not have intended for the Act to preclude stay applications by the United States given "[t]he frustration of superior federal interests that would ensue from precluding the Federal Government from obtaining a stay of state court proceedings." *Id.* at 226.

Neither the Supreme Court nor this Court has had occasion to apply *Leiter*'s reasoning in the *Younger* context or to decide "when, if at all, abstention would be appropriate where the Federal Government seeks to invoke federal jurisdiction." *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 816 n.23, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976) (citing *Leiter*, 352 U.S. 220, 77 S. Ct. 287, 1 L. Ed. 2d 267). However, nearly every circuit to address the issue has either held or suggested that abstention is unwarranted in such circumstances.[9]

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expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.").

9. *See United States v. Morros*, 268 F.3d 695, 707-09 (9th Cir. 2001); *United States v. Composite State Bd. of Med. Exam'rs*, 656 F.2d 131, 135-38 (5th Cir. Unit B 1981); *cf. United States v. Pa., Dep't of Envtl. Res.*, 923 F.2d 1071, 1078-79 (3d Cir. 1991) (endorsing *Composite State Board* in the context of Declaratory Judgment Act);

We find these decisions persuasive, at least insofar as they counsel against abstention in this case. Specifically, we do not believe that *Younger*'s policy of comity can be vindicated where a county prosecutor, however competent, 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." Appellant Br. 13. "Comity is a two-way street, requiring a delicate balancing of sometimes-competing state and federal concerns," *Yeatts v. Angelone*, 166 F.3d 255, 261 (4th Cir. 1999), and on the facts before us, this balance tips in favor of exercising jurisdiction.[10]

In reaching the opposite conclusion, the district court cited our decision in *United States v. Certified Industries, Inc.* for the proposition that "a stay [should

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First Fed. Sav. & Loan Ass'n of Bos. v. Greenwald, 591 F.2d 417, 423-25 (1st Cir. 1979) (holding that abstention from adjudication of declaratory judgment action was unwarranted where federal agency was joined as defendant). *But see United States v. Ohio*, 614 F.2d 101, 105 (6th Cir. 1979) (holding that, even in "cases brought by the United States . . . , exercise of . . . jurisdiction must be tempered by the judicial doctrine of abstention whenever the interest of states in administering their own laws, as well as in deciding constitutional questions, would be unnecessarily hampered by federal judicial proceedings").

10. Our conclusion is unaltered by the fact that the President is represented by private counsel. The same was true in *Nixon v. Fitzgerald*, 457 U.S. 731, 102 S. Ct. 2690, 73 L. Ed. 2d 349 (1982), and *Clinton v. Jones*, 520 U.S. 681, 117 S. Ct. 1636, 137 L. Ed. 2d 945 (1997), and those cases nevertheless raised fundamental questions involving immunity and the separation of powers.

not be] automatically granted simply on the application of the United States" because it is "necessary to inquire 'whether the granting of an injunction [i]s proper in the circumstances of this case.'" 361 F.2d 857, 859 (2d Cir. 1966) (quoting *Leiter*, 352 U.S. at 226). This proposition, while true, does not weigh in favor of abstention. Instead, *Certified Industries* merely reiterated *Leiter*'s holding that the Anti-Injunction Act neither precludes nor compels a stay of state court proceedings on the application of the United States. The same is true here: *Younger* neither precludes nor compels the issuance of an injunction in the circumstances of this case. Indeed, as discussed below, we ultimately conclude that an injunction is not warranted.

Our conclusion that *Younger* abstention is not applicable here is not intended, in any way, to denigrate the competence of New York's courts to adjudicate federal claims. To the contrary, we are confident that New York's courts approach federal constitutional claims with the same care and thoughtfulness as their federal counterparts.

The district court astutely noted that this case highlights "the complexities and uncharted ground that the *Younger* doctrine presents." *Trump*, 395 F. Supp. 3d at 301. Legitimate arguments can be made both in favor of and against abstention here. Because *Younger*'s policy of comity cannot be vindicated in light of the state-federal clash before us, and because the President raises novel and serious claims that are more appropriately adjudicated in federal court, we conclude that abstention does not extend to the circumstances of this case. We

therefore respectfully vacate the district court's judgment dismissing the President's complaint.[11]

III. Injunctive Relief

Having concluded that abstention is not the route to be taken here, we proceed to consider the district court's alternative holding that the President failed to demonstrate his entitlement to injunctive relief. Because the district court clearly intended its discussion of the President's request for injunctive relief to "obviate a remand" in the event we disagreed with its decision to abstain, we will construe that discussion as an order denying the President's motion for a preliminary injunction. For the reasons that follow, we affirm that decision.

A party seeking such relief must "show (a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." *Citigroup Glob. Markets, Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 (2d Cir. 2010). The district court reasoned that the President failed to show that (1) he was likely to succeed on the merits, (2) he would suffer irreparable harm in the absence of the injunction, or (3) an injunction would be in the public interest. *Trump*, 395 F. Supp. 3d at 304, 315-16. Because we conclude that the President is unlikely to

11. As we hold that abstention is not called for because of the reasons above, we need not address the other arguments against abstention raised by the President and the United States.

succeed on the merits of his immunity claim, we agree with the district court that he is not entitled to injunctive relief.

The President relies on what he described at oral argument as "temporary absolute presidential immunity"—he argues that he is absolutely immune from all stages of state criminal process while in office, including pre-indictment investigation, and that the Mazars subpoena cannot be enforced in furtherance of any investigation into his activities. We have no occasion to decide today the precise contours and limitations of presidential immunity from prosecution, and we express no opinion on the applicability of any such immunity under circumstances not presented here. Instead, after reviewing historical and legal precedent, we conclude only 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.

We begin with the long-settled proposition that "the President is subject to judicial process in appropriate circumstances." *Clinton v. Jones*, 520 U.S. 681, 703, 117 S. Ct. 1636, 137 L. Ed. 2d 945 (1997). Over 200 years ago, Chief Justice Marshall, sitting as the trial judge in the prosecution of Aaron Burr, upheld the issuance of a subpoena *duces tecum* to President Jefferson. *United States v. Burr*, 25 F. Cas. 30, 34-35, F. Cas. No. 14692D (C.C.D. Va. 1807) (No. 14,692D) (Marshall, *C.J.*); *see also United States v. Burr*, 25 F. Cas. 187, 191, F. Cas. No. 14694 (C.C.D. Va. 1807) (No. 14,694) (Marshall, *C.J.*) (explaining that it was "not controverted" that "the

president of the United States may be subpoenaed, and examined as a witness, and required to produce any paper in his possession"); *Clinton*, 520 U.S. at 703-04 & 704 n.38 (endorsing Marshall's position). Consistent with that historical understanding, presidents have been ordered to give deposition testimony or provide materials in response to subpoenas. *See Clinton*, 520 U.S. at 704-05 (collecting examples). In particular, "the exercise of jurisdiction [over the President] has been held warranted" when necessary "to vindicate the public interest in an ongoing criminal prosecution." *Nixon v. Fitzgerald*, 457 U.S. 731, 754, 102 S. Ct. 2690, 73 L. Ed. 2d 349 (1982).

The most relevant precedent for present purposes is *United States v. Nixon*, 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974). There, a subpoena directed President Nixon to "produce certain tape recordings and documents relating to his conversations with aides and advisers" for use in a criminal trial against high-level advisers to the President. *Id.* at 686. Nixon objected on two grounds: first, that the communications memorialized in the requested materials were privileged; second, that the separation of powers "insulates a President from a judicial subpoena in an ongoing criminal prosecution." *Id.* at 705-06. The Supreme Court unanimously disagreed, noting that "neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances." *Id.* at 706. The Court explained that "a generalized claim of the public interest in confidentiality of nonmilitary and nondiplomatic discussions" was

insufficient to justify non-compliance with a subpoena "requiring the production of materials for use in a criminal prosecution." *Id.* at 707, 710. The Court noted that privileges "are not lightly created nor expansively construed, for they are in derogation of the search for truth." *Id.* at 710. And this was true even of executive privilege, a doctrine "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *Id.* at 708.

The President has not persuasively explained why, if executive privilege did not preclude enforcement of the subpoena issued in *Nixon*, the Mazars subpoena must be enjoined despite seeking no privileged information and bearing no relation to the President's performance of his official functions. The *Nixon* Court explained that even the President's weighty interest in candid and confidential conversations with his advisers could not justify a blanket privilege that would "cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts." *Id.* at 712.

Here, none of the materials sought by the Mazars subpoena implicates executive privilege. *Cf. Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 384, 124 S. Ct. 2576, 159 L. Ed. 2d 459 (2004) ("In light of the fundamental and comprehensive need for every man's evidence in the criminal justice system . . . the Executive Branch [must] first assert privilege to resist disclosure. . . ."). Nor does the subpoena seek information regarding the President's "action[s] taken in an official capacity." *Clinton*, 520 U.S. at 694. The subpoena seeks only the

President's private tax returns and financial information relating to the businesses he owns in his capacity as a private citizen. These documents do not implicate, in any way, the performance of his official duties.[12] We find no support in the *Nixon* Court's conclusion—that even documents exposing the President's confidential, official conversations may properly be obtained by subpoena—for the proposition that a President's *private* and *non-privileged* documents may be absolutely shielded from judicial scrutiny. *Cf. id.* at 693-94 (noting that the President's immunity from damages for acts taken in his official capacity "provides no support for an immunity for *unofficial* conduct").[13]

Tellingly, although Nixon asserted both a claim of executive privilege *and* of presidential immunity from

12. We note that the past six presidents, dating back to President Carter, all voluntarily released their tax returns to the public. While we do not place dispositive weight on this fact, it reinforces our conclusion that the disclosure of personal financial information, standing alone, is unlikely to impair the President in performing the duties of his office.

13. Chief Justice Marshall recognized "a privilege . . . to withhold private letters of a certain description," but only because "[l]etters to the president in his private character, are often written to him in consequence of his public character, and may relate to public concerns. Such a letter, though it be a private one, seems to partake of the character of an official paper, and to be such as ought not on light ground to be forced into public view." *Burr*, 25 F. Cas. at 192. Here, there is no contention that any of the documents sought by the Mazars subpoena relate in any way to the President's "public character" and so there is no reason to give them the heightened protection afforded to "official paper[s]."

judicial process, the Court's analysis focused almost entirely on privilege. That the Court felt it unnecessary to devote extended discussion to the latter argument strongly suggests that the President may not resist compliance with an otherwise valid subpoena for private and non-privileged materials simply because he is the President. *Cf. Nixon v. Sirica*, 487 F.2d 700, 713, 159 U.S. App. D.C. 58 (D.C. Cir. 1973) (per curiam) ("[The President] concedes that he, like every other citizen, is under a legal duty to produce relevant, non-privileged evidence when called upon to do so.").[14]

It is true that the President "occupies a unique position in the constitutional scheme," *Fitzgerald*, 457 U.S. at 749, and we are mindful of the Supreme Court's admonition that a court should not "proceed against the president as against an ordinary individual," *Nixon*, 418 U.S. at 708 (quoting *Burr*, 25 F. Cas. at 192). For example, historical practice suggests that a court may not compel the President to personally attend trial or give live testimony in open court. *See Clinton*, 520 U.S. at 692 n.14. In the context of a subpoena, the "timing and scope" of any production from the President must be informed by "[t]he high respect

14. At oral argument, the President suggested that Nixon either did not think to, or deliberately chose not to, raise an argument of presidential privilege. That is not accurate. *See Nixon*, 418 U.S. at 706 (noting that "[t]he second ground asserted by the President's counsel in support of the claim of absolute privilege" is "that the independence of the Executive Branch . . . insulates a President from a judicial subpoena in an ongoing criminal prosecution"); *see also Sirica*, 487 F.2d at 708 ("Counsel argue, first, that, so long as he remains in office, the President is absolutely immune from the compulsory process of a court . . . .").

that is owed to the office of the Chief Executive." *Id.* at 707. And in holding that a former president was entitled to "absolute immunity from damages liability predicated on his official acts," the Supreme Court quoted with approval Justice Story's conclusion that the President is not "liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office." *Fitzgerald*, 457 U.S. at 749 (quoting 3 J. Story, Commentaries on the Constitution of the United States § 1563, pp. 418-19 (1st ed. 1833)).

But we are not faced, in this case, with the President's arrest or imprisonment, or with an order compelling him to attend court at a particular time or place, or, indeed, with an order that compels the President *himself* to do anything. The subpoena at issue is directed not to the President, but to his accountants; compliance does not require the President to do anything at all.[15]

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15. The President resists this distinction, arguing that "courts treat a subpoena to a third-party custodian as if it was issued directly to the aggrieved party." Reply Br. 18 n.7. We do not think that is quite right. When the objection to a subpoena pertains to the information sought, there is little difference between the custodian and the true party in interest, and either may resist enforcement. *See* 9A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2459 (3d ed. 2008) (noting that a party may object to a subpoena directed to another person if "the objecting party claims some personal right or privilege with regard to the documents sought"). That is why the President has standing to challenge the Mazars subpoena: because he argues that his personal records are absolutely privileged from criminal discovery, no matter who has custody of them. Nonetheless, in assessing the impact of the subpoena on the office of the President, we cannot ignore the fact that compliance would not require him to do anything.

The President argues that this case is distinguishable from *Nixon* and related cases because this subpoena comes from a state rather than a federal court. While the Supreme Court has not had occasion to address this question, it has noted in passing that "any direct control by a state court over the President" may "implicate concerns" under the Supremacy Clause. *Clinton*, 520 U.S. at 691 n.13. But, as already discussed, this subpoena does not involve "direct control by a state court over the President." Although the subpoena is directed to the President's custodian, no court has ordered the President to do or produce anything. Nor has the President explained why any burden or distraction the third-party subpoena causes would rise to the level of interfering with his duty to "faithfully execute[]" the laws, U.S. CONST. art. II, § 3, or otherwise subordinate federal law in favor of a state process. *Cf. Clinton*, 520 U.S. at 705 n.40 (noting that although the President "may become distracted or preoccupied by pending litigation," such distractions "do not ordinarily implicate constitutional separation-of-powers concerns"). So while the President may be correct that state courts lack the authority to issue him orders—a question we have no need to address today—that provides no basis to enjoin the enforcement of a subpoena issued to a third party simply because the President is implicated in the subject matter of the investigation.

The President also argues that this case is unlike *Nixon* because he is a "target" of the investigation, which carries a "distinctive and serious stigma" that is not present when the President is merely a witness in another person's trial. Appellant Br. 29-30. We are not persuaded

by this distinction. The President has not been charged with a crime. The grand jury investigation may not result in an indictment against any person, and even if it does, it is unclear whether the President will be indicted. The District Attorney represents, and the President does not contest, that the grand jury is investigating not only the President, but also other persons and entities. Even assuming, without deciding, that a formal criminal charge against the President carries a stigma too great for the Constitution to tolerate, we cannot conclude that mere investigation is so debilitating. Indeed, that contention is hard to square with *Nixon*. Although that case concerned a trial subpoena, rather than one issued by a grand jury, the grand jury had previously named President Nixon an unindicted coconspirator. *See Nixon*, 418 U.S. at 687. Surely that designation carries far greater stigma than the mere revelation that matters involving the President are under investigation. It is true that the Supreme Court did not decide whether it was appropriate for the grand jury to so name President Nixon, an issue on which it originally granted certiorari. *See id.* at 687 n.2. But the fact that Nixon was ordered to comply with a subpoena seeking documents for a trial proceeding on an indictment that named him as a conspirator strongly suggests that the mere specter of "stigma" or "opprobrium" from association with a criminal case is not a sufficient reason to enjoin a subpoena—at least when, as here, no formal charges have been lodged.

Nor can we accept the President's suggestion that a grand jury investigation is less pressing or important than a criminal trial. It is true, as the President points

out, that the grand jury process does not involve the *same* "constitutional dimensions" as a criminal trial. *Id.* at 711 (citing the Sixth Amendment's guarantees of confrontation and compulsory process and the Fifth Amendment's guarantee of due process). But the grand jury has a central role in our system of federalism nonetheless. In the federal context, "[g]rand jury proceedings are constitutionally mandated" for the "prosecutions for capital or other serious crimes, and its constitutional prerogatives are rooted in long centuries of Anglo-American history." *Branzburg v. Hayes*, 408 U.S. 665, 687, 92 S. Ct. 2646, 33 L. Ed. 2d 626 (1972). "[T]he grand jury is similarly guaranteed by many state constitutions," *id.*, including New York's, N.Y. CONST. art. I, § 6. Indeed, "the longstanding principle that the public has a right to every man's evidence . . . is *particularly* applicable to grand jury proceedings." *Branzburg*, 408 U.S. at 688 (emphasis added). Accordingly, the grand jury's "investigative powers are necessarily broad." *Id.; see also Cheney*, 542 U.S. at 384 (interpreting *Nixon* to require that "privilege claims that shield information from *a grand jury proceeding* or a criminal trial are not to be expansively construed" (emphasis added)).

We are thus hesitant to interfere with the "ancient role of the grand jury." *Branzburg*, 408 U.S. at 686. Our concern is heightened by the fact that the grand jury in this case is investigating not only the President, but also other persons and entities. Assuming, again without deciding, that the President cannot be prosecuted while he remains in office, it would nonetheless exact a heavy toll on our criminal justice system to prohibit a state from

even *investigating* potential crimes committed by him for potential later prosecution, or by other persons, not protected by any immunity, simply because the proof of those alleged crimes involves the President. Our "twofold aim" that "guilt shall not escape or innocence suffer," *Nixon*, 418 U.S. at 709, would be substantially frustrated if the President's temporary immunity were interpreted to shield the conduct of third parties from investigation.

We do not hold, contrary to the President's characterization, that "a State can criminally prosecute the President so long as it *also* prosecutes other people." Appellant Br. 37. We have no reason to address that subject, since at this point any prosecution of any person—as opposed to investigation—is purely hypothetical. Rather, we hold only that presidential immunity does not bar a state grand jury from issuing a subpoena in aid of its investigation of potential crimes committed by persons within its jurisdiction, even if that investigation may in some way implicate the President.

Moreover, the President concedes that his immunity lasts only so long as he holds office and that he could therefore be prosecuted after leaving office. There is no obvious reason why a state could not begin to investigate a President during his term and, with the information secured during that search, ultimately determine to prosecute him after he leaves office. The President claims to find support for his position in two memoranda from the Justice Department's Office of Legal Counsel ("OLC"), which concluded that the President may not be prosecuted. *See* Memorandum from Robert G. Dixon,

Jr., Asst. Att'y Gen., O.L.C., *Re: Amenability of the President, Vice President and other Civil Officers to Federal Criminal Prosecution while in Office* (Sept. 24, 1973) ("Dixon Memo"); *A Sitting President's Amenability to Indictment and Criminal Prosecution*, 24 O.L.C. Op. 222 (Oct. 16, 2000) ("Moss Memo").[16] Both memoranda, however, are directed almost exclusively to the question of whether the President may be *indicted*—an issue, again, that is not presented by this appeal. Neither concludes that a sitting President may not be *investigated*; to the contrary, the Moss Memo explicitly approves of a grand jury "continu[ing] to gather evidence throughout the period of immunity, even passing this task down to subsequently empaneled grand juries if necessary." Moss Memo, 24 O.L.C. Op. at 257 n.36. We therefore find it unnecessary to consider whether OLC's reasoning is persuasive, for even if it is correct, a grand jury that simply "gather[s] evidence" during the President's term commits no constitutional violation. That is all that the Mazars subpoena seeks to do.[17]

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16. The President appropriately does not argue that we owe any deference to the OLC memoranda, for "[t]he federal Judiciary does not . . . owe deference to the Executive Branch's interpretation of the Constitution." *Pub. Citizen v. Burke*, 843 F.2d 1473, 1478, 269 U.S. App. D.C. 145 (D.C. Cir. 1988).

17. The President also claims to draw support for his broad view of presidential immunity from a memorandum filed by the Solicitor General in litigation concerning a grand jury that was investigating Vice President Spiro Agnew. *See* Memorandum for the U.S. Concerning the Vice President's Claim of Constitutional Immunity, *In re Proceedings of the Grand Jury Impaneled Dec. 5, 1972*, No. 73-cv-965 (D. Md.) ("Bork Memo"). The Bork Memo was

The President argues that the District Attorney has gone beyond the mere "gathering" of evidence because a subpoena is "a form of coercive process backed up by the State's contempt power." Appellant Br. 35. We find this distinction unpersuasive. A subpoena is a perfectly ordinary way of gathering evidence; it strains credulity to suggest that a grand jury is permitted only to request the voluntary cooperation of witnesses but not to compel their attendance or the production of documents. *See Branzburg*, 408 U.S. at 688 ("[T]he grand jury's authority to subpoena witnesses is not only historic, but essential to its task."). More importantly, the subpoena is not directed to the President and so it cannot "coerc[e]" him at all. It is Mazars, not the President, that would be cited for contempt in the event of non-compliance. *Cf. Sirica*, 487 F.2d at 711 (concluding that an order compelling President Nixon to produce documents requested by a subpoena for *in camera* examination "is not a form of criminal

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submitted in opposition to the Vice President's motion to enjoin the grand jury investigation and so could be broadly read to suggest presidential immunity from such investigation. Bork Memo at 3. Elsewhere, however, the Bork Memo refers more specifically to the President's immunity "from indictment and trial." *Id.* at 20. And because the Bork Memo was chiefly concerned with refuting the Vice President's claim of immunity, and brought up the President's immunity only for the sake of contrast, we are reluctant to read into it an unspoken assumption that the President cannot be the subject of a criminal subpoena—particularly since that conclusion would be in great tension with, if not a direct contradiction of, *Nixon* and *Burr*. In any event, even if the Bork Memo could be read to suggest that the President is immune from any stage of criminal investigation, that is plainly not the position of the Department of Justice, as reflected in the Moss Memo and the government's amicus brief here.

process"). This case therefore presents no concerns about the constitutionality of holding a sitting President in contempt.

The United States, as amicus curiae, argues that while the President may not be absolutely immune from a state grand jury's subpoena power, any prosecutor seeking to exercise that power must make a heightened showing of need for the documents sought. But the government draws this test from cases concerning when a subpoena can demand the production of documents protected by executive privilege. *See In re Sealed Case*, 121 F.3d 729, 753, 326 U.S. App. D.C. 276 (D.C. Cir. 1997) (considering "what type of showing of need the [prosecutor] must make . . . *in order to overcome the privilege*") (emphasis added); *id.* at 754 ("A party *seeking to overcome a claim of presidential privilege*" must make a showing of "demonstrated, specific need") (emphasis added); *see also Nixon*, 418 U.S. at 713 ("The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial."). Even assuming that *Nixon* imposes a heightened standard in such cases, *but see Cheney*, 542 U.S. at 386 (interpreting *Nixon* to require subpoenas seeking to overcome executive privilege to satisfy only the same "exacting standards" applicable to all criminal subpoenas), that has little bearing on a subpoena that, as here, does not seek any information subject to executive privilege.

The United States suggests, without elaboration, that "[t]he heightened standards set forth in *Nixon* . . . are no less appropriate" and "indeed may be even more

necessary" when applied to the President's personal records. U.S. Br. 23. We do not see how this is so. Surely the exposure of potentially sensitive communications related to the functioning of the government is of greater constitutional concern than information relating solely to the President in his private capacity and disconnected from the discharge of his constitutional obligations. *Cf. Clinton*, 520 U.S. at 696 ("With respect to acts taken in his 'public character'—that is, official acts—the President may be disciplined principally by impeachment, not by private lawsuits for damages. But he is otherwise subject to the laws for his purely private acts.").

We emphasize again the narrowness of the issue before us. This appeal does not require us to consider whether the President is immune from indictment and prosecution while in office, nor to consider whether the President may lawfully be ordered to produce documents for use in a state criminal proceeding. We accordingly do not address those issues. The only question before us is whether a state may lawfully demand production by a third party of the President's personal financial records for use in a grand jury investigation while the President is in office. With the benefit of the district court's well-articulated opinion, we hold that any presidential immunity from state criminal process does not bar the enforcement of such a subpoena.

Considering the foregoing, the President has neither demonstrated that he is likely to prevail on, nor raised sufficiently serious questions going to the merits of, his

immunity claim, and so he is not entitled to preliminary injunctive relief.[18]

CONCLUSION

For the reasons above, we **AFFIRM** the district court's order denying the President's request for a preliminary injunction, **VACATE** the judgment of the district court dismissing the complaint on the ground of *Younger* abstention, and **REMAND** for further proceedings consistent with this opinion.[19]

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18. Because the President has not shown that he is likely to succeed on the merits, we need not consider whether he has met the remaining requirements for the issuance of injunctive relief. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 23-24, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008).

19. Because the President's complaint seeks only declaratory and injunctive relief, on remand the district court may wish to consider, and the parties may wish to address, whether further proceedings are necessary in light of our disposition.

APPENDIX B — DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, DATED OCTOBER 7, 2019

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

19 Civ. 8694 (VM)

DONALD J. TRUMP,

Plaintiff,

- against –

CYRUS R. VANCE, JR., IN HIS OFFICIAL CAPACITY AS DISTRICT ATTORNEY OF THE COUNTY OF NEW YORK, AND MAZARS USA, LLP,

Defendants.

October 7, 2019, Decided
October 7, 2019, Filed

DECISION AND ORDER

VICTOR MARRERO, United States District Judge.

Plaintiff Donald J. Trump ("Plaintiff" or the "President"), filed this action seeking to enjoin enforcement of a grand jury subpoena (the "Mazars Subpoena") issued by Cyrus R. Vance, Jr., in his official capacity as the

District Attorney of the County of New York (the "District Attorney"), to the accounting firm Mazars USA, LLP ("Mazars"). (*See* "Complaint," Dkt. No. 1; "Amended Complaint," Dkt. No. 27.)[1]

INTRODUCTION

The President asserts an extraordinary claim in the dispute now before this Court. He contends that, in his view of the President's duties and functions and the allocation of governmental powers between the executive and the judicial branches under the United States Constitution, the person who serves as President, while in office, enjoys absolute immunity from criminal process of any kind. Consider the reach of the President's argument. As the Court reads it, presidential immunity would stretch to cover every phase of criminal proceedings, including investigations, grand jury proceedings and subpoenas, indictment, prosecution, arrest, trial, conviction, and incarceration. That constitutional protection presumably would encompass any conduct, at any time, in any forum, whether federal or state, and whether the President acted alone or in concert with other individuals.

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1. The Court notes a measure of ambiguity regarding whether the President purports to bring this suit in his official capacity as President. The President never explicitly states that he does so, yet his arguments depend on his status as the sitting President. Whether privately retained, non-government attorneys accountable only to the President as an individual are entitled to invoke an immunity allegedly derived from the office of the Presidency, raises questions not addressed here. In any event, the Court finds resolution of this ambiguity unnecessary to its analysis.

Hence, according to this categorical doctrine as presented in this proceeding, the constitutional dimensions of the presidential shield from judicial process are virtually limitless: Until the President leaves office by expiration of his term, resignation, or removal through impeachment and conviction, his exemption from criminal proceedings would extend not only to matters arising from performance of the President's duties and functions in his official capacity, but also to ones arising from his private affairs, financial transactions, and all other conduct undertaken by him as an ordinary citizen, both during and before his tenure in office.

Moreover, on this theory, the President's special dispensation from the criminal law's purview and judicial inquiry would embrace not only the behavior and activities of the President himself, but also extend derivatively so as to potentially immunize the misconduct of any other person, business affiliate, associate, or relative who may have collaborated with the President in committing purportedly unlawful acts and whose offenses ordinarily would warrant criminal investigation and prosecution of all involved.

In practice, the implications and actual effects of the President's categorical rule could be far-reaching. In some circumstances, by raising his protective shield, applicable statutes of limitations could run, barring further investigation and prosecution of serious criminal offenses, thus potentially enabling both the President and any accomplices to escape being brought to justice. Temporally, such immunity would operate to frustrate the administration of justice by insulating from criminal law

scrutiny and judicial review, whether by federal or state courts, not only matters occurring during the President's tenure in office, but potentially also records relating to transactions and illegal actions the President and others may have committed before he assumed the Presidency.

This Court cannot endorse such a categorical and limitless assertion of presidential immunity from judicial process as being countenanced by the nation's constitutional plan, especially in the light of the fundamental concerns over excessive arrogation of power that animated the Constitution's delicate structure and its calibrated balance of authority among the three branches of the national government, as well as between the federal and state authorities. Hence, the expansive notion of constitutional immunity invoked here to shield the President from judicial process would constitute an overreach of executive power.

The Court recognizes that subjecting the President to some aspects of criminal proceedings could impermissibly interfere with or even incapacitate the President's ability to discharge constitutional functions. Certainly lengthy imprisonment upon conviction would produce that result. But, as elaborated below, and contrary to the President's immunity claim as asserted here, that consequence would not necessarily follow every stage of every criminal proceeding. In particular that concern would not apply to the specific set of facts presented here to which the Court's holding is limited: the President's compliance with a grand jury subpoena issued in the course of a state prosecutor's criminal investigation of conduct and

transactions relating to third persons that occurred at least in part prior to the President assuming office, that may or may not have involved the President, but that at this phase of the proceedings demand review of records the President possesses or controls.

Alternatives exist that would recognize such distinctions and reconcile varying effects associated with a claim of presidential immunity in different criminal proceedings and at different stages of the process. The Court rejects the President's theory because, as articulated, such sweeping doctrine finds no support in the Constitution's text or history, or in germane guidance charted by rulings of the United States Supreme Court.

Questions and controversy over the scope of presidential immunity from judicial process, and unqualified invocations of such an exemption as advanced by some Presidents, are not new in the nation's constitutional experience. In fact, disputes concerning the doctrine arose during the Constitutional Convention in 1787 and the Framers' deliberations gave it some consideration. The underlying issues, however, were not explicitly articulated in the text of the charter that emerged from the Convention and thus have remained largely unresolved. Consequently, the only thing truly absolute about presidential immunity from criminal process is the Constitution's silence about the existence and contours of such an exemption, a void the President seeks to fill by the expansive theory he proffers.

Nonetheless, the Founders and courts and legal commentators have repeatedly expressed one overarching

concern about the breadth of the President's immunity from judicial process, a fear that served as a vital principle for subsequent court and scholarly review of the question: whether while in office the President stands above the law and absolutely beyond the reach of judicial process in any criminal proceeding. Shunning the concept of the inviolability of the person of the King of England and the bounds of the monarch's protective screen covering the Crown's actions from legal scrutiny, the Founders disclaimed any notion that the Constitution generally conferred similarly all-encompassing immunity upon the President. They gave expression to that rejection by recognizing the duality the President embodied as a unique figure, serving as head of the nation's government, but also existing as a private citizen.[2] As detailed below, the wisdom of that view has been tested before the courts on various occasions and has been roundly and consistently reaffirmed by the Supreme Court and lower courts.

In numerous rulings, the courts have circumscribed claims of presidential immunity in multiple ways. Specifically, they have held that such protection from

2. *See* Memorandum from Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel, *Re: Amenability of the President, Vice President and Other Civil Officers to Federal Criminal Prosecution While in Office* at 20 n.14 (Sept. 24, 1973) ("The Framers of the Constitutions made it abundantly clear that the President was intended to be a Chief Executive, responsible, subject to the law, and lacking the prerogatives and privileges of the King of England . . . and that the President would not be above the law, nor have a single privilege annexed to his character.") (citing sources).

judicial process does not extend to civil suits regarding private conduct that occurred before the President assumed office, to responding to subpoenas regarding the conduct of third-persons, and to providing testimony in court proceedings relating to private disputes involving third persons.

The notion of federal supremacy and presidential immunity from judicial process that the President here invokes, unqualified and boundless in its reach as described above, cuts across the grain of these constitutional precedents. It also ignores the analytic framework that the Supreme Court has counseled should guide review of presidential claims of immunity from judicial process. Of equal fundamental concern, the President's claim would tread upon principles of federalism and comity that form essential components of our constitutional structure and the federal/state balance of governmental powers and functions. Bared to its core, the proposition the President advances reduces to the very notion that the Founders rejected at the inception of the Republic, and that the Supreme Court has since unequivocally repudiated: that a constitutional domain exists in this country in which not only the President, but, derivatively, relatives and persons and business entities associated with him in potentially unlawful private activities, are in fact above the law.

Because this Court finds aspects of such a doctrine repugnant to the nation's governmental structure and constitutional values, and for the reasons further stated below, it ABSTAINS from adjudicating this dispute and DISMISSES the President's suit. In the alternative, in the

event on appeal abstention were found unwarranted under the circumstances presented here, the Court DENIES the President's motion for injunctive relief.

I. BACKGROUND

The Court begins by briefly recounting some facts that appear to be uncontested. The District Attorney is investigating conduct that occurred in New York State. As part of that investigation, the District Attorney served a grand jury subpoena on the Trump Organization, LLC (the "Trump Organization") on August 1, 2019. That subpoena seeks various documents and records of the Trump Organization covering the period from June 2015 through September 2018. The Trump Organization proceeded to respond, at least in part, to that subpoena without court involvement. On August 29, 2019, the District Attorney served the Mazars Subpoena on Mazars. The Mazars Subpoena seeks various documents and records, including tax returns of the President and possibly third persons, covering the period from January 2011 through the present. In mid-September, counsel for the President informed the District Attorney that the President would seek to prevent enforcement of and compliance with the Mazars Subpoena as it related to the production of tax records. The President has now done so through this action.

On September 19, 2019, the President filed the Complaint in this action. On the same day, the President filed an emergency motion for a temporary restraining order and a preliminary injunction. (*See* "Pl.'s Motion,"

Dkt. No. 6; "PL's Mem.," Dkt. No. 10-1[3]; "Consovoy Decl.," Dkt. No. 6-2.) Upon receipt of the President's motion and supporting documents, the Court directed the parties to confer on a briefing schedule and hearing date. Consistent with the Court's request, the parties submitted a joint letter with a proposed briefing schedule and hearing date, which the Court endorsed. (*See* Dkt. No. 4.) At the same time, the District Attorney agreed to stay enforcement of and compliance with the Mazars Subpoena until Wednesday, September 25, 2019 at 1:00 p.m. (*See id.*)

On September 23, 2019, the District Attorney filed a memorandum of law in opposition to the President's motion for injunctive relief and in favor of the District Attorney's motion to dismiss the Complaint. (*See* "September 23 Letter," Dkt. No. 15; "Def.'s Mem.," Dkt. No. 16; "Shinerock Decl.," Dkt. No. 17.)

On September 24, 2019, the President filed an opposition to the District Attorney's motion to dismiss and a reply in further support of the President's motion for injunctive relief. (*See* "Pl.'s Reply," Dkt. No. 22.)

On the same day, the United States filed a statement in support of the entry of a temporary restraining order. (*See* Dkt. No. 24.) Specifically, the United States supported

3. Citations to the memorandum of law in support of the President's motion for injunctive relief herein shall be citations to Dkt. No. 10-1. The Court notes, however, that the memorandum of law at that docket entry is an amended version of the memorandum of law originally filed with the Court at Dkt. No. 6-3. (*See* Dkt. No. 10.)

the granting of a temporary restraining order in order to afford the United States additional time to consider whether to participate in this action. (*See id.*)

Also on the same day, the Court received a letter from Mazars, which indicated that Mazars "takes no position on the legal issues raised by Plaintiff." (*See* Dkt. No. 26.)

The Court heard oral arguments from the President and the District Attorney on September 25, 2019. (*See* Dkt. Minute Entry dated 9/25/2019; Transcript ("Tr.").) At the conclusion of oral argument, the Court extended the stay of enforcement of and compliance with the Mazars Subpoena to September 26, 2019 at 5:00 p.m.; ordered the parties to meet and confer regarding their concerns, and to inform the Court by September 26, 2019 at 4:00 p.m. whether they had agreed upon a process for proceeding; and granted the request of the United States for additional time to consider whether to participate in the action. (*See* Dkt. No. 25.)

By letter dated September 26, 2019, the District Attorney informed the Court that the parties had agreed that the District Attorney would forbear from enforcement of the Mazars Subpoena until 1:00 p.m. two business days after the Court's ruling (or until 1:00 p.m. on Monday, October 7, 2019, whichever is sooner) and Mazars would gather and prepare responsive documents in the interim. (*See* Dkt. No. 28.)

By letter dated September 30, 2019, the United States indicated its intent to file a submission. (*See* Dkt. No. 30.)

On October 2, 2019, the United States filed a Statement of Interest, urging the Court not to abstain, but to exercise jurisdiction over this dispute and, following additional briefing, to reach the merits of the President's claimed immunity. (*See* "Statement of Interest," Dkt. No. 32.) By letter dated October 3, 2019, the District Attorney responded to the Statement of Interest. (*See* "Def.'s Response," Dkt. No. 33.)

II. DISCUSSION

A. ANTI-INJUNCTION ACT

The Court begins its analysis by considering the District Attorney's argument that the Anti-Injunction Act, 28 U.S.C. Section 2283 (the "AIA"), forecloses the injunctive relief the President seeks. (*See* Def.'s Mem. 5-6, 8-9.) Dating to the 18th century and designed "to forestall the inevitable friction between the state and federal courts that ensues from the injunction of state judicial proceedings by a federal court," *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 630, 97 S. Ct. 2881, 53 L. Ed. 2d 1009 (1977), the AIA provides that a "court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. The President has amended his complaint to clarify that he brings suit under 42 U.S.C. Section 1983 ("Section 1983") (*see* Amended Complaint ¶ 8), meaning this case fits

squarely into the first of the AIA's three exceptions.[4] *See Mitchum v. Foster*, 407 U.S. 225, 243, 92 S. Ct. 2151, 32 L. Ed. 2d 705 (1972) ("[Section] 1983 is an Act of Congress that falls within the 'expressly authorized' exception of [the AIA]."). Because *Mitchum* allows the Court to conclude that the AIA is no bar to injunctive relief here, the Court finds it unnecessary to reach the President's alternative arguments for the inapplicability of the AIA.

B. ABSTENTION

The District Attorney also submits that, under the abstention doctrine set forth in *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971), the Court must decline to exercise jurisdiction over the President's suit. (*See* Def.'s Mem. at 5-9.) *Younger* abstention is grounded in

> the notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of

4. The District Attorney argues that the President's claimed immunity is "too vague and amorphous" to be cognizable under Section 1983. (Def.'s Response at 2 (quoting *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 106, 110 S. Ct. 444, 107 L. Ed. 2d 420 (1989)).) The Court shares the District Attorney's doubts on this score. However, because the Court declines to exercise jurisdiction on other grounds, it will assume without deciding that the claim is properly brought under Section 1983. *See Spargo v. New York State Comm'n on Judicial Conduct*, 351 F.3d 65, 74 (2d Cir. 2003) (noting that federal courts may "choose among threshold grounds for disposing of a case without reaching the merits" (internal quotation marks omitted)).

> separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This ... is referred to by many as "Our Federalism" .... What the concept . . . represent[s] is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

401 U.S. at 44. Hence notwithstanding federal courts' "virtually unflagging obligation ... to exercise the jurisdiction given them," *Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800, 817, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976), *Younger* requires federal courts to decline jurisdiction when a plaintiff seeks to enjoin one of the following three kinds of state proceedings: (1) "ongoing state criminal prosecutions," (2) "certain civil enforcement proceedings," and (3) "civil proceedings involving certain orders . . . uniquely in furtherance of the state courts' ability to perform their judicial functions." *Sprint Communs., Inc. v. Jacobs*, 571 U.S. 69, 78, 134 S. Ct. 584, 187 L. Ed. 2d 505 (2013) (quoting *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 368, 109 S. Ct. 2506, 105 L. Ed. 2d 298 (1989) (internal quotation marks omitted)).

If the federal plaintiff seeks to enjoin one of these three types of proceedings, a federal court may consider three additional conditions that further counsel in favor of *Younger* abstention, first laid out in *Middlesex County Ethics Commission v. Garden State Bar Association. See* 457 U.S. 423, 432, 102 S. Ct. 2515, 73 L. Ed. 2d 116 (1982). The "*Middlesex* conditions" are "(1) [whether] there is a pending state proceeding, (2) that implicates an important state interest, and (3) the state proceeding affords the federal plaintiff an adequate opportunity for judicial review of his or her federal constitutional claims." *Falco v. Justices of the Matrimonial Parts of Supreme Ct. of Suffolk Cty.*, 805 F.3d 425, 427 (2d Cir. 2015).[5] Moreover, *Younger* also provides for an exception, pursuant to which a federal court may entertain a suit from which it must otherwise abstain, upon a showing of "bad faith, harassment, or any other unusual circumstance that would call for equitable relief" in federal court. 401 U.S. at 54.

For the reasons set forth below, the Court concludes that it must abstain under *Younger*.

1. Ongoing State Criminal Prosecution

Although the District Attorney views the Mazars Subpoena as part of an ongoing state criminal prosecution (*see* Def.'s Mem. at 6-7), the President disputes that

5. Federal courts previously treated the *Middlesex* conditions as dispositive of the abstention inquiry, but it is unclear how much weight they should be given after the *Sprint* Court's clarification that they are merely "additional factors" appropriately considered in an abstention inquiry. *See Falco*, 805 F.3d at 427.

contention. (*See* Pl.'s Reply at 10-11.) Hence the President denies the existence of either an "ongoing state criminal prosecution" under *Sprint* or a "pending state proceeding" per the first *Middlesex* condition. No party argues that there is a distinction between an "ongoing" proceeding and a "pending" one, and the Court finds no such distinction in the law. The Court consequently considers these two terms identical for the purpose of its abstention analysis and concludes that the Mazars Subpoena does qualify as part of an ongoing state criminal prosecution for *Younger* purposes -- though not necessarily a prosecution of the President himself.

In the spirit of comity, the Court begins its analysis by observing that New York law considers the issuance of a grand jury subpoena to be a criminal proceeding. C.P.L. Section 1.20(18) defines a "[c]riminal proceeding" to cover "any proceeding which . . . occurs in a criminal court and is related to a prospective, pending or completed criminal action, . . . or involves a criminal investigation." C.P.L. Section 10.10(1) explains that the "'criminal courts' of [New York] state are comprised of the superior courts and the local criminal courts." Finally, C.P.L. Section 190.05 defines a grand jury as "a body . . . impaneled by a superior court and constituting a part of such court." Because the Mazars Subpoena relates to a criminal investigation and was issued by the grand jury, which constitutes a part of a criminal court, the Court finds as a matter of New York law that the Mazars Subpoena constitutes a criminal proceeding.

State law aside, the President correctly notes that the United States Courts of Appeals are divided on whether the issuance of a grand jury or investigative subpoena constitutes a pending state proceeding for *Younger* purposes. *Compare Monaghan v. Deakins*, 798 F.2d 632, 637 (3d Cir. 1986)(holding that grand jury subpoenas do not constitute a pending state proceeding), *vacated in part*, 484 U.S. 193, 108 S. Ct. 523, 98 L. Ed. 2d 529 (1988), *with Craig v. Barney*, 678 F.2d 1200, 1202 (4th Cir. 1982) (abstaining because of "Virginia's interest in the unfettered operation of its grand jury system"), *Kaylor v. Fields*, 661 F.2d 1177, 1182 (8th Cir. 1981), *and Kingston v. Utah County*, 161 F.3d 17, *4 (10th Cir. 1998) (Table). The United States Court of Appeals for the Second Circuit appears not to have yet ruled on the question.

The President asks the Court to agree with the *Monaghan* Court and hold that no ongoing criminal prosecution exists here because a state grand jury does not "adjudicate anything" and "exists only to charge that the defendant has violated the criminal law." (Pl.'s Reply at 11 (internal quotation marks omitted).) He also cites *Google, Inc. v. Hood* for the proposition that "*Sprint* undermined prior cases applying *Younger* abstention to grand-jury subpoenas." (*Id.* (citing 822 F.3d 212, 224 & n.7 (5th Cir. 2016)).)

However, the *Sprint* Court did not address what makes a criminal proceeding an ongoing prosecution. Instead, it reaffirmed that *Younger* applies only to criminal prosecutions and state civil proceedings that are "akin to a criminal prosecution," and not to other

civil proceedings. *Sprint*, 571 U.S. at 80. Here, there is no doubt that grand jury proceedings are criminal in nature. Moreover, the *Hood* Court explicitly observed that abstention was merited where Texas law reflected that a grand jury was "an arm of the court by which it is appointed." 822 F.3d at 223. As noted above, New York law similarly considers grand juries a part of the criminal court that impanels them. *See also People v. Thompson*, 22 N.Y.3d 687, 985 N.Y.S.2d 428, 8 N.E.3d 803, 810 (N.Y. 2014) ("[G]rand jurors are empowered to carry out numerous vital functions independently of the prosecutor, for they 'ha[ve] long been heralded as the shield of innocence . . . and as the guard of the liberties of the people against the encroachments of unfounded accusations from any source.'") (quoting *People v. Sayavong*, 83 N.Y.2d 702, 635 N.E.2d 1213, 1215, 613 N.Y.S.2d 343 (N.Y. 1994) (internal quotation marks omitted)). The Second Circuit has further confirmed that "Grand Juries exist by virtue of the New York State Constitution and the Superior Court that impanels them; they are not arms or instruments of the District Attorney." *United States v. Reed*, 756 F.3d 184, 188 (2d Cir. 2014).

Although the Second Circuit has not explicitly addressed whether grand jury proceedings constitute an ongoing state prosecution under *Younger*, judges of this district have "routinely applied *Younger* where investigatory subpoenas have been issued," even prior to a "full-fledged state prosecution'" and outside of the criminal context. *Mir v. Shah*, No. 11 Civ. 5211, 2012 U.S. Dist. LEXIS 174685, 2012 WL 6097770, at *3 (S.D.N.Y. Dec. 4, 2012); *aff'd*, 569 F. App'x 48, 50-51 (2d

Cir. 2014) (affirming on basis that "abstention is still appropriate here under the *Sprint* framework"); *see also Mirka United, Inc. v. Cuomo*, No. 06 Civ. 14292, 2007 U.S. Dist. LEXIS 87385, 2007 WL 4225487, at *4 (S.D.N.Y. Nov. 27, 2007) ("Numerous courts have held that investigatory proceedings that occur pre-indictment and that are an integral part of a state criminal prosecution may constitute 'ongoing state proceedings' for *Younger* purposes."); *J. & W. Seligman & Co. Inc. v. Spitzer*, No. 05 Civ. 7781, 2007 U.S. Dist. LEXIS 71881, 2007 WL 2822208, at *5 (S.D.N.Y. Sept. 27, 2007) ("[T]he issuance of compulsory process, including subpoenas, in criminal cases, initiates an 'ongoing' proceeding for the purposes of *Younger* abstention."); *Nick v. Abrams*, 717 F. Supp. 1053, 1056 (S.D.N.Y. 1989) ("[C]ommon sense dictates that a criminal investigation is an integral part of a criminal proceeding. . . . Permitting the targets of state criminal investigations to challenge subpoenas ... in federal court prior to their indictment or arrest, therefore, would do . . . much damage to principles of equity, comity, and federalism . . . ."). The Court declines to contradict over thirty years' worth of settled and well-reasoned precedent of courts in this district and instead concludes that this case involves an ongoing state criminal prosecution.

2. The Second Middlesex Condition

The second *Middlesex* condition favors abstention if the pending state proceeding implicates an important state interest. *See Falco*, 805 F.3d at 427. The Court finds this condition satisfied. A state's interest in enforcement of its criminal laws undoubtedly qualifies as an important

state interest, particularly considering that *Younger* itself concerned a challenge to state criminal proceedings. *See Arizona v. Manypenny*, 451 U.S. 232, 243, 101 S. Ct. 1657, 68 L. Ed. 2d 58 (1981); *see generally Younger*, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669.

3. The Third Middlesex Condition

The third *Middlesex* condition favors abstention if "the state proceeding affords the federal plaintiff an adequate opportunity for judicial review of his or her federal constitutional claims." *Falco*, 805 F.3d at 427 (internal quotation marks omitted). "[A]ny uncertainties as to the scope of state proceedings or the availability of state remedies are generally resolved in favor of abstention. . . . [I]t is the plaintiff's burden to demonstrate that state remedies are inadequate." *Spargo*, 351 F.3d at 78. In this respect, federal courts may not "assume that state judges will interpret ambiguities in state procedural law to bar presentation of federal claims.'" *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 15, 107 S. Ct. 1519, 95 L. Ed. 2d 1 (1987).

The President argues that state proceedings are inadequate because "under current New York law, it does not appear that the President could move to quash a subpoena he did not receive." (Pl.'s Reply at 9.) However, the Court's review of New York law suggests otherwise. A non-recipient can challenge a subpoena under certain circumstances. *See Beach v. Oil Transfer Corp.*, 23 Misc. 2d 47, 199 N.Y.S.2d 74, 76 (Sup. Ct. Kings Cty. 1960) ("In situations where witnesses served with subpoenas are not parties, nevertheless, upon a claim of privilege,

the defendant being the party principally concerned by the adverse effect of the subpoenas served upon the witnesses and being the party whose rights are invaded by such process may apply to the court whose duty it is to enforce it, to set aside such process if it is invalid." (internal quotation marks omitted)); *see also In re Roden*, 200 Misc. 513, 106 N.Y.S.2d 345, 347-48 (Sup. Ct. N.Y. Cty. 1951) ("Any party affected by the process of the court or its mandate may apply to the court for its modification, vacatur, quashal or other relief he feels he is entitled to receive."); *accord Colfin Bulls Funding B, LLC v. Ampton Invs., Inc.*, No. 151885/2015, 62 Misc. 3d 1208[A], 2018 NY Slip Op 51959[U], 2018 N.Y. Misc. LEXIS 6761, 2018 WL 7051063, at *8 [Sup. Ct. N.Y. Cty. 2018] (quoting *In re Roden* for same proposition); *People v. Grosunor*, 108 Misc. 2d 932, 439 N.Y.S.2d 243, 246 (Crim. Ct. Bronx Cty. 1981) (same).

The preceding decisions indicate that the President can challenge the Mazars Subpoena in a state forum on the basis of his asserted immunity. At the very least, they reflect an ambiguity in state law that the Court must resolve in favor of abstention.[6]

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6. Even if the President could not challenge the Mazars Subpoena in state proceedings, it is unclear why he could not raise his constitutional arguments in a challenge to the subpoena served upon the Trump Organization (the "Trump Organization Subpoena"). As the President's counsel noted at oral argument, "there's not a document Mazars has that [the Trump Organization does not] have in [its] possession," Tr. 47:22-23. Counsel further stated that the Mazars Subpoena was prompted by the Trump Organization's refusal to comply with the Trump Organization Subpoena. Tr. 47:24-48:3. If the President views both subpoenas as

The President raises a closer question by arguing that, even if available, a state forum would "not be truly adequate" given that the federal and state governments are already in conflict. (Pl.'s Reply at 9.) As the President notes, some sources suggest that *Younger* is inapplicable to suits the federal government chooses to bring against state governments in federal court, on the theory that in those situations the federal-state conflict *Younger* seeks to preempt will occur even if the federal court abstains. *See United States v. Morros*, 268 F.3d 695, 707 (9th Cir. 2001); *United States v. Composite State Bd. of Med. Examiners*, 656 F.2d 131, 135-36 (5th Cir. 1981). The United States echoes these arguments, contending that the "principles of comity and federalism . . . lose their force when the federal government's own Chief Executive invokes federal constitutional law to challenge a state grand jury subpoena demanding his records." (Statement of Interest at 4.)

As an initial note, as pointed out above, the Court is not certain that attorneys privately retained by the person who is President can bring suit on behalf of the United States. Indeed, the Justice Department has filed a Statement of Interest on behalf of the United States pursuant to 28 U.S.C. Section 517, rather than formally intervening as a party, or explicitly stating that it is appearing on behalf of the President in connection with official presidential business implicating United States interests.

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attempts to criminally prosecute him, he could litigate his claimed immunity in a challenge to the Trump Organization Subpoena and incidentally render compliance with the Mazars Subpoena a moot point.

Even assuming that this action is brought by the federal government, however, the Supreme Court appears not to have addressed the impact of this consideration on *Younger* analysis, and there is precedent to the contrary. *See Colorado River*, 424 U.S. at 816 n.23 (declining to consider "when, if at all, abstention would be appropriate where the Federal Government seeks to invoke federal jurisdiction"); *United States v. Ohio*, 614 F.2d 101, 104 (6th Cir. 1979) ("Abstention from exercise of federal jurisdiction is not improper simply because the United States is the party seeking a federal forum."); *United States v. Oregon*, No. 10 Civ. 528, 2011 U.S. Dist. LEXIS 1107, 2011 WL 11426, at *5 (D. Or. Jan. 4, 2011) ("[T]he United States' role as plaintiff is not dispositive to this question. Comity principles can justify abstention even when the United States is the plaintiff."), *aff'd*, 503 F. App'x 525, 527 (9th Cir. 2013) (affirming abstention on basis that the distinction between the federal government and a private citizen "is not material given the [Supreme Court's] comity rationale" in *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 130 S. Ct. 2323, 176 L. Ed. 2d 1131 (2010)).

The Court cannot agree that the President's filing of this action renders the principles of comity and federalism a nullity. While the Second Circuit does not appear to have directly addressed this "difficult question with regard to federal-state relations" in the *Younger* context, it has denied "that a stay [should be] automatically granted simply on the application of the United States." *United States v. Certified Indus., Inc.*, 361 F.2d 857, 859 (2d Cir. 1966); *see also United States v. Augspurger*, 452 F. Supp.

659, 668 (W.D.N.Y. 1978) ("[T]he general rules of comity do apply even when the United States is the plaintiff.").

Instead, it is "necessary to inquire 'whether the granting of an injunction [is] proper in the circumstances of this case.'" *Certified Indus.*, 361 F.2d at 859 (quoting *Leiter Minerals, Inc. v. United States*, 352 U.S. 220, 226, 77 S. Ct. 287, 1 L. Ed. 2d 267 (1957)). This circumstantial test better accords with the vision of a federal court system "in which there is sensitivity to the legitimate interests of both State and National Governments . . . anxious though [the Court] may be to vindicate and protect federal rights and federal interests." *Younger*, 401 U.S. at 44. Automatically deferring to federal interests in suits brought by the federal government is as incompatible with our federalism as unthinkingly deferring to states' interests in state proceedings.[7]

Further, the President provides no compelling proof that New York courts would fail to adequately adjudicate

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7. The Court does not believe that the cases cited by the President compel a contrary conclusion. The *Composite State* Court specifically distinguished its set of facts from a case where, as here, "the state and federal governments are not in direct conflict" even though the federal government might have "an interest in the outcome of the action to the extent that a federal right is implicated." 656 F.2d at 136. And the *Morros* Court found that the federal-state conflict inhered where the two governments were locked in a contentious dispute spanning over ten years. *See* 268 F.3d at 708. By contrast, a direct or inherent conflict is not inevitable in this case, where the state grand jury has merely requested records pertaining to a broad set of facts and actors and may not ultimately target the President.

his immunity claim, relying instead on the unsubstantiated allegation that he would risk "local prejudice." (Pl.'s Reply at 9 (quoting *Clinton v. Jones*, 520 U.S. 681, 691, 117 S. Ct. 1636, 137 L. Ed. 2d 945 (1997)).) Absent a much more compelling showing, the Court declines to conclude that New York courts will treat the President with prejudice. Similarly, the United States misses the mark when it argues that "the state's interest in litigating such an unusual dispute in a state forum is minimal." (Statement of Interest at 8.) To the contrary, "[u]nder our federal system, it goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government. Because the regulation of crime is pre-eminently a matter for the States, we have identified a strong judicial policy against federal interference with state criminal proceedings." *Manypenny*, 451 U.S. at 243 (internal alterations, citations, and quotations omitted). The President's interest in adjudicating an alleged immunity from state criminal process in federal court, with respect to a state investigation that may or may not ultimately target the President, cannot outweigh the State interest without much stronger proof of State judicial inadequacy.[8]

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8. The United States also argues against abstention by analogizing to 28 U.S.C. Section 1442, which authorizes a federal officer to remove a state court action to federal court if she is directly sued "for or relating to any act under color of" her office. (Statement of Interest at 9.) But Mazars's duties and services with respect to the President's personal financial records do not appear to relate to any act taken under the color of the President's office, and no party argues otherwise. Nor has any party pointed to a federal defense that Mazars could bring, as might otherwise

Even if the law regarding suits brought by the federal government is ultimately unclear, the Court cannot disregard the principles underlying *Younger* on this basis alone. And in any event, "it remains unclear how much weight [the Court] should afford [the *Middlesex* conditions] after *Sprint*." *Falco*, 805 F.3d at 427. Because the Court finds that there is an ongoing state criminal prosecution, an important state interest is implicated, and the state proceeding would afford the President at least a procedurally adequate opportunity for judicial review of his federal claims, the weight of the Court's analysis under *Sprint* and the *Middlesex* conditions requires abstention.[9]

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justify removal under the statute. *See Watson v. Philip Morris Cos.*, 551 U.S. 142, 151, 127 S. Ct. 2301, 168 L. Ed. 2d 42 (2007); *Isaacson v. Dow Chem. Co.*, 517 F.3d 129, 139 (2d Cir. 2008). Far from being directed to a federal officer for her federal acts, the Mazars Subpoena requests private records from a private third party. The Court declines to upend its broader *Younger* analysis on the basis of an inapposite hypothetical.

9. The Court is sensitive to the President's argument that abstention under these circumstances might embolden state-level investigation of future Presidents, especially by elected prosecutors in jurisdictions strongly opposed to a given incumbent. However, the Court cannot conclude that this argument merits the exercise of jurisdiction here, where the District Attorney has subpoenaed a third party in a broad investigation that may not ultimately target the President. If future criminal investigations by state prosecutors more clearly target a President on politicized grounds or invade on the prerogatives of the Presidency, then either such exceptional circumstances or evidence that the investigations lacked a good-faith basis could potentially warrant the exercise of federal court jurisdiction to consider such a challenge.

4. The Bad Faith or Harassment Exception

Although the Court finds that a state criminal prosecution is ongoing and the *Middlesex* conditions further discourage the Court's exercise of jurisdiction, abstention may still be inappropriate if the President can demonstrate "bad faith, harassment, or any other unusual circumstance that would call for equitable relief." *Younger*, 401 U.S. at 54. "However, a plaintiff who seeks to head off *Younger* abstention bears the burden of establishing that one of the exceptions applies." *Diamond "D" Constr. Corp. v. McGowan*, 282 F.3d 191, 198 (2d Cir. 2002). To invoke the bad faith exception, "the party bringing the state action must have no reasonable expectation of obtaining a favorable outcome." *Id.* at 199 (internal quotation marks omitted). "[R]ecent cases concerning the bad faith exception have further emphasized that the subjective motivation of the state authority in bringing the proceeding is critical to, if not determinative of, this inquiry." *Id.*

The President argues that the Mazars Subpoena was issued in bad faith because it essentially copies two congressional subpoenas which cover subject matter allegedly exceeding the District Attorney's jurisdiction. The President also cites numerous statements by federal and state officials indicating their intent to investigate the President's finances and remove him from office. (*See* Amended Complaint ¶¶ 25-41.) The President further relies on *Black Jack Distributors, Inc. v. Beame* to claim that this evidence raises an inference that the District Attorney's "activities have a secondary motive" and are

"going beyond good faith enforcement of the [criminal] laws." (Pl.'s Reply at 10 (quoting 433 F. Supp. 1297, 1304-07 (S.D.N.Y. 1977)).)

The District Attorney acknowledges that the Mazars Subpoena is substantially identical to the congressional subpoenas, but he argues that the Mazars Subpoena remains appropriate because it would encompass documents relevant to the state's investigation and enable Mazars to produce those documents promptly, as Mazars had already begun collecting the same documents in order to respond to the congressional subpoenas. (Tr. 30:16-25.) The District Attorney adds that although the documents covered by the subpoenas may relate to matters of federal law, they nevertheless "certainly pertain to potential issues under state law," which would be the "exclusive focus" of his investigation. (Tr. 30:1-5.)

And although the statements cited in the President's complaint certainly reflect that a number of New York State elected officials may wish the President's tenure in office to end, those statements do not reveal the "subjective motive" of the District Attorney in initiating these particular proceedings -- particularly when the District Attorney made none of these statements himself, and they cannot otherwise be attributed to him. To hold otherwise and impute bad faith to the District Attorney on the basis of statements made by various legislators and the New York Attorney General would be "incompatible with federal expression of 'a decent respect' for" the state authority's functions. *Glatzer v. Barone*, 614 F. Supp. 2d 450, 460 (S.D.N.Y. 2009).

This case is thus distinguishable from *Black Jack Distributors*, where the court's finding of bad faith relied on a police department's consistent and repeated use of arrest procedures that had been "long ago held invalid under New York law," pursuant to the head of the enforcement project's declaration that the department would "undertake activities knowing that they are illegal" and "despite all constitutional limitations . . . stop at nothing" to put the plaintiff out of business. 433 F. Supp. at 1306. The President has not shown that the District Attorney is acting with anywhere near the same level of disregard for the law at this point in the investigation.

Moreover, the President has not alleged that the District Attorney lacks any "reasonable expectation of obtaining a favorable outcome," *Diamond "D" Constr. Corp.*, 282 F.3d at 199, in the criminal prosecution of which the Mazars Subpoena is part -- a proceeding which, after all, need not necessarily lead to an indictment of the President himself. Indeed, the Declaration of Solomon Shinerock reflects that the District Attorney's investigation relates at least in part to "'hush money' payments to Stephanie Clifford and Karen McDougal, how those payments were reflected in the Trump Organization's books and records, and who was involved in determining how those payments would be reflected in the Trump Organization's books and records." (*See* Shinerock Decl. ¶ 9.)

The Declaration also reflects that a variety of investigations related to similar conduct are either ongoing or resolved, including a non-prosecution agreement between federal prosecutors and American

Media, Inc. related to an investigation of the lawfulness of the "hush money" payments; the conviction of Michael D. Cohen for tax fraud, false statements, and campaign finance violations during the period he was counsel to the President; and investigations by multiple other New York regulatory authorities concerning alleged insurance and bank fraud by the Trump Organization and its officers. (*See id.* ¶ 17.) None of these investigations necessarily involve the President himself, and the President fails to show that the District Attorney could not reasonably expect to obtain a favorable outcome in a criminal investigation that is substantially related to the topics and targets listed above. Barring a stronger showing from the President, the Court declines to impute bad faith to the District Attorney in relation to these proceedings.

5. The Extraordinary Circumstances Exception

Even if bad faith and harassment do not apply, a district court that would otherwise abstain under *Younger* may hear the federal plaintiff's claims if the claimant can prove that extraordinary or unusual circumstances justify enjoining the state court proceeding. *See Younger*, 401 U.S. at 54. "[S]uch circumstances must be 'extraordinary' in the sense of creating an extraordinarily pressing need for immediate federal equitable relief, not merely in the sense of presenting a highly unusual factual situation." *Kugler v. Helfant*, 421 U.S. 117, 124-25, 95 S. Ct. 1524, 44 L. Ed. 2d 15 (1975). The Second Circuit has construed *Kugler* and related Supreme Court precedent to require "(1) that there be no state remedy available to meaningfully,

timely, and adequately remedy the alleged constitutional violation; *and* (2) that a finding be made that the litigant will suffer 'great and immediate' harm if the federal court does not intervene" for the exception to apply. *Diamond "D" Const. Corp.*, 282 F.3d at 201.

As noted in Section II.B.3 *supra*, New York state courts appear to provide an at least procedurally adequate avenue for remedying the alleged constitutional violation at issue. While the Court is mindful of "the special solicitude due to claims alleging a threatened breach of essential Presidential prerogatives," *Nixon v. Fitzgerald*, 457 U.S. 731, 743, 102 S. Ct. 2690, 73 L. Ed. 2d 349 (1982), the President's claims nevertheless fail to demonstrate an "extraordinarily pressing need for immediate federal equitable relief." *Kugler*, 421 U.S. at 125. As described further in Section II.C.3.i *infra*, the President fails to show irreparable harm. The double jeopardy cases that the President cites are likewise inapposite to support his proposition that a claim of Presidential immunity would be "irreparably lost if . . . not vindicated immediately." (Pl.'s Reply at 8.) The President has not been the subject of any of the criminal proceedings he lists as grounds showing irreparable harm; he has not been indicted, arrested, or imprisoned, or even been identified as a target of the District Attorney's investigation -- let alone been tried once before, as required in the double jeopardy context.

Though the President and the United States devote significant attention to the President's unique constitutional position, these arguments reflect the highly unusual factual underpinning of this case rather

than the "extraordinarily pressing need for immediate federal equitable relief" demanded by *Kugler*. Far from requesting immediate relief, the United States asks that this Court schedule additional briefing on the merits of the President's claims.[10] (*See* Statement of Interest at 10.) The President's claim that his absolute immunity defense must be "vindicated immediately" also runs counter to his counsel's representations at oral argument that the President is not currently "seeking a permanent resolution of this dispute" but is instead merely asking for "an orderly process that allows the serious constitutional questions to be adjudicated carefully and thoughtfully[,] that preserves the [P]resident's right to be heard and allows him a reasonable chance to appeal any adverse decision that might alter the status quo." (Tr. 11:4, 10-14.)

The President fails to show that New York courts would not afford him such an orderly process, and his claim to absolute immunity simply does not demonstrate "an extraordinarily pressing need for immediate federal equitable relief" where the District Attorney has not identified the President as a target of the state investigation, let alone actually indicted him. On the contrary, the President's prophecies that he will be indicted and denied due process in state proceedings are, at best, speculative and unripe. The Second Circuit has previously held that "[t]he exceptional circumstances exception does not apply [where] the likelihood of immediate harm is

10. The Court denies this request, as the Court fails to see how further briefing on the merits of the President's immunity arguments would add to the parties' already extensive treatment of the subject, including a lengthy oral argument.

speculative." *See Miller v. Sutton*, 697 F. App'x 27, 28 (2d Cir. 2017). This Court now so holds.

For these reasons, the Court abstains from exercising jurisdiction over the President's suit.

C. PRESIDENTIAL IMMUNITY

Notwithstanding the Court's decision to abstain, and mindful of the complexities and uncharted ground that the *Younger* doctrine presents, the Court will proceed to examine the merits of the President's claimed immunity and articulate an alternative holding, so as to obviate a remand in the event on appeal the Second Circuit disagrees with the Court's abstention holding. For the reasons stated below, the Court would deny the motion of the President for a temporary restraining order and a preliminary injunction (collectively, "injunctive relief").

At the outset, the Court notes that the question it addresses in this Order is narrower than the one upon which the President urges the Court to focus. Based on the record before it, and as noted in the preceding section of the Court's decision, the Court finds no clear and convincing evidence that the President himself is the target -- or, at minimum, the sole target -- of the investigation by the District Attorney. Rather, the record before the Court indicates that the District Attorney is investigating a set of facts, and a number of individuals and business entities, in relation to which conduct by the President, lawful or unlawful, may or may not be a part. Accordingly, the question before the Court narrows to

whether the District Attorney may issue a grand jury subpoena to a third person or entity requiring production of personal and business records of the President and other persons and entities? The Court's answer to that question is yes.

1. Legal Standard

Temporary restraining orders and preliminary injunctions are among "the most drastic tools in the arsenal of judicial remedies." *Grand River Enter. Six Nations, Ltd. v. Pryor*, 481 F.3d 60, 66 (2d Cir. 2007) (per curiam). To obtain this extraordinary remedy,

> [a] party seeking a preliminary injunction must ordinarily establish (1) irreparable harm; (2) either (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits of its claims to make them fair ground for litigation, plus a balance of the hardships tipping decidedly in favor of the moving party; and (3) that a preliminary injunction is in the public interest.

New York ex rel. Schneiderman v. Actavis PLC, 787 F.3d 638, 650 (2d Cir. 2015) (internal quotation marks omitted). Because it is well-recognized that the legal standards governing preliminary injunctions and temporary restraining orders are the same, the Court addresses them together. *See AFA Dispensing Grp. B.V. v. Anheuser-Busch, Inc.*, 740 F. Supp. 2d 465, 471 (S.D.N.Y. 2010).

On the second element, the President advocates for the standard requiring "sufficiently serious questions going to the merits." (Pl.'s Reply at 17-18.) The Court finds, however, that the proper test here is the "likelihood of success" standard. The grand jury issued its subpoena in the course of an investigation into violations of New York law; the President's motion is thus an attempt to "stay government action taken in the public interest pursuant to a statutory . . . scheme." *Able v. United States*, 44 F.3d 128, 131 (2d Cir. 1995). It is of no consequence that the proposed injunction would not restrain the State's financial laws themselves: "As long as the action to be enjoined is taken pursuant to a statutory or regulatory scheme, even government action with respect to one litigant requires application of the 'likelihood of success' standard." *Id.*; *see also Plaza Health Labs., Inc. v. Perales*, 878 F.2d 577, 580-81 (2d Cir. 1989). Nevertheless, given the Court's holding on the other prongs of the preliminary injunction standard, the President would not prevail even under the different but no less stringent "sufficiently serious questions" analysis. *Citigroup Glob. Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 (2d Cir. 2010).

2. Parties' Arguments

The President advances two fundamental reasons for why he is entitled to injunctive relief. First, he argues that he will suffer an irreparable harm in the absence of injunctive relief, because "there will be no way to unring the bell once Mazars complies with the District Attorney's subpoena." (Pl.'s Mem. at 3.) Second, the President argues

that he has demonstrated a likelihood of success on the merits, because, according to the President, it is clear that "[n]o State can criminally investigate, prosecute, or indict a President while he is in office." (*Id.*)

The District Attorney counters that the President's motion for injunctive relief should be denied, because the President has failed to carry his burden of showing entitlement to the requested relief. The District Attorney primarily maintains that the President has failed to demonstrate that he will suffer irreparable harm in the absence of injunctive relief for three reasons. First, the District Attorney contends that compliance with the Mazars Subpoena could be "undone" if the Court were to find the Mazars Subpoena to be invalid and unenforceable. (Def.'s Mem. at 12-13.) Second, the District Attorney notes that both his office and the grand jury are obligated to maintain confidential any documents produced in response to the Mazars Subpoena. (*See id.* at 13.) Third, the District Attorney argues that no irreparable harm will ensue "if it becomes public that there is an ongoing criminal investigation that includes requests from third-parties about business transactions that relate to the President," in part because other entities have already been investigating conduct related to the President and those investigations have been public. (*Id.* at 13-14.)

The District Attorney also argues that the President has failed to demonstrate a likelihood of success on the merits. According to the District Attorney, there exists no law supporting a presidential immunity as expansive as the one claimed by the President in this action. (*See*

id. at 15.) Finally, the District Attorney argues that the balance of equities and public interest both weigh in favor of denying the requested injunctive relief, because there is a public interest in having the grand jury investigation at issue proceed expeditiously. (*See id.* at 19.)

3. Analysis

The Court is not persuaded that the immunity claimed by the President in this action is so expansive as to encompass enforcement of and compliance with the Mazars Subpoena. As such, the President has not satisfied his burden of showing entitlement to the "extraordinary and drastic remedy" of injunctive relief. *Grand River Enter.*, 481 F.3d at 66. The Court turns to each element of the preliminary injunction standard in turn.

i. Irreparable Harm

The first element is irreparable harm, which is "an injury that is not remote or speculative but actual and imminent, and 'for which a monetary award cannot be adequate compensation.'" *Dexter 345 Inc. v. Cuomo*, 663 F.3d 59, 63 (2d Cir. 2011) (quoting *Tom Doherty Assocs. v. Saban Entm't, Inc.*, 60 F.3d 27, 37 (2d Cir. 1995)). This high standard reflects courts' "traditional reluctance to issue mandatory injunctions." *North Am. Soccer League, LLC v. United States Soccer Fed'n, Inc.*, 883 F.3d 32, 38 n.8 (2d Cir. 2018) (quoting *Jacobson & Co., Inc. v. Armstrong Cork Co.*, 548 F.2d 438, 441 n.3 (2d Cir. 1977)).

Appendix B

The Court finds that enforcement of and compliance with the Mazars Subpoena would not cause irreparable harm to the President. The President urges the Court to find otherwise on the basis that public disclosure of his personal records would cause irreparable harm, first, to the confidentiality of the President's tax and financial records and, second, to the President's opportunity for judicial review of his claims in this action.

The Court is not persuaded that disclosure of the President's financial records to the office of the District Attorney and the grand jury would cause the President irreparable harm. The President relies on a number of cases to support his argument that mere disclosure -- without more -- of the documents requested by the Mazars Subpoena would cause irreparable harm, but none of those cases relate to ongoing criminal investigations, let alone to the disclosure of documents and records to a grand jury bound by law and sworn official oath to keep such documents and records confidential. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bishop*, 839 F. Supp. 68 (D. Me. 1993) (disclosure of plaintiff's business records to competitor by a former employee); *Providence Journal Co. v. Fed. Bureau of Investigation*, 595 F.2d 889 (1st Cir. 1979) (disclosure of FBI documents to plaintiff); *PepsiCo, Inc. v. Redmond*, No. 94 Civ. 6838, 1995 U.S. Dist. LEXIS 19380, 1996 WL 3965 (N.D. Ill. Jan. 2, 1996) (disclosure of plaintiff's trade secrets or confidential information to competitor defendant); *Metro. Life Ins. Co. v. Usery*, 426 F. Supp. 150 (D.D.C. 1976) (disclosure -- to a chapter of the National Organization for Women -- of certain forms and plans submitted by insurance companies to federal

offices); *Airbnb, Inc. v. City of New York*, 373 F. Supp. 3d 467, 2019 WL 91990 (S.D.N.Y. 2019) (disclosure of data regarding businesses' customers to Mayor's Office).

The Court agrees with the District Attorney that the grand jury is a "constitutional fixture." *United States v. Williams*, 504 U.S. 36, 47, 112 S. Ct. 1735, 118 L. Ed. 2d 352 (1992). As such, the Court finds that disclosure to a grand jury is different from disclosure to other persons or entities like those identified in the cases cited by the President. And because a grand jury is under a legal obligation to keep the confidentiality of its records, the Court finds that no irreparable harm will ensue from disclosure to it of the President's records sought here. *See, e.g., People v. Fetcho*, 91 N.Y.2d 765, 698 N.E.2d 935, 938, 676 N.Y.S.2d 106 (N.Y. 1998) ("[S]ecrecy has been an integral feature of Grand Jury proceedings since well before the founding of our Nation. . . . The reasons for this venerable and important policy include preserving the reputations of those being investigated by and appearing before a Grand Jury, safeguarding the independence of the Grand Jury, preventing the flight of the accused and encouraging free disclosure of information by witnesses.") (internal citation and quotation marks omitted); *People v. Bonelli*, 36 Misc. 3d 625, 945 N.Y.S.2d 539, 541 (N.Y. Sup. Ct. 2012) ("Grand Jury secrecy is of paramount public interest and courts may not disclose these materials lightly." (internal quotation marks omitted)).

Further, as explained in Section II.B.3 *supra*, the Court finds that a state forum exists for judicial review of the President's claim.

ii. Likelihood of Success on the Merits

Even if the President had made a sufficient showing that enforcement of the Mazars Subpoena and the President's compliance with it would cause the President irreparable harm -- and, to be clear, the Court finds it would not -- the Court would nonetheless deny the President's motion for injunctive relief because the President has failed to demonstrate a likelihood of success on the merits.

The Court disagrees with the President's position that a third person or entity cannot be subpoenaed requesting documents related to an investigation concerning potentially unlawful transactions and conduct of third parties in which records possessed or controlled by the sitting President may be critical to establish the guilt or innocence of such third parties, or of the President. The Court also rejects the President's contention that the Constitution, the historical record, and the relevant case law support such a presidential claim.

As a threshold matter, the. Court underscores several vital points. First, the President recognizes that the precise constitutional question this action presents -- the core boundaries of the President's immunity from criminal process -- has not been presented squarely in any judicial forum, and thus has never been definitively resolved. (*See* Amended Complaint ¶ 10 ("no court has had to squarely consider the question" of whether a President can be subject to criminal process while in office).)

Appendix B

The President urges the Court to conclude that the powers vested in the President by Article II and the Supremacy Clause necessarily imply that the President cannot "be investigated, indicted, or otherwise subjected to criminal process" while in office (Pl.'s Mem. at 9), and that "criminal process" encompasses investigations of third persons concerning matters that may relate to conduct or transactions of third persons, or of the President. (*Id.* at 8, 13.) As the Court reads the proposition, the President's definition of "criminal process" is all-encompassing; it would extend a blanket presidential and derivative immunity to all stages of federal and state criminal law enforcement proceedings and judicial process: investigations, grand jury proceedings, indictment, arrest, prosecution, trial, conviction, and punishment by incarceration and perhaps even by fine. The Court will proceed to canvas the various relevant authorities to assess that proposition.

a. Department of Justice Memoranda

As authority for the absolute immunity doctrine he proclaims, the President points to and rests substantially upon two documents issued by the Justice Department's Office of Legal Counsel ("OLC"). The first memorandum appeared in 2000. *See* Memorandum Opinion for the Attorney General, from Randolph D. Moss, Assistant Attorney General, Office of Legal Counsel, *A Sitting President's Amenability to Indictment and Criminal Prosecution* (Oct. 16, 2000) (the "Moss Memo"). The Moss Memo in turn contains a review and reaffirmation of an

OLC memorandum from 1973. *See* Memorandum from Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel, *Re: Amenability of the President, Vice President and Other Civil Officers to Federal Criminal Prosecution While in Office* (Sept. 24, 1973) (the "Dixon Memo"). In addition, the President relies upon a 1973 brief filed by Solicitor General Robert Bork in the United States District Court for the District of Maryland in connection with a federal grand jury proceeding regarding misconduct of Vice President Spiro Agnew.[11] *See* Memorandum for the United States Concerning the Vice President's Claim of Constitutional Immunity (filed Oct. 5, 1973), *In re Proceedings of the Grand Jury Impaneled December 5, 1972: Application of Spiro T. Agnew, Vice President of the United States*, No. 73 Civ. 965 (D. Md. 1973) (the "Bork Memo"). The Dixon, Moss, and Bork Memos are here referred to collectively as the "DOJ Memos." The gist of these documents is that a sitting President is categorically immune from criminal investigation, indictment, and prosecution.

The Court is not persuaded that it should accord the weight and legal force the President ascribes to the DOJ Memos, or accept as controlling the far-reaching proposition for which they are cited in the context of the

11. The Moss Memo reexamined and updated the Dixon and Bork Memos and essentially reaffirmed their conclusion that indictment and prosecution of a President while in office would be unconstitutional because "it would impermissibly interfere with the President's ability to carry out his constitutionally assigned functions and thus would be inconsistent with the constitutional structure." *See* Moss Memo at 223.

controversy at hand. As a point of departure, the Court notes that many statements of the principle that "a sitting President cannot be indicted or criminally prosecuted" typically cite to the DOJ Memos as sole authority for that proposition. Accordingly, the theory has gained a certain degree of axiomatic acceptance, and the DOJ Memos which propagate it have assumed substantial legal force as if their conclusion were inscribed on constitutional tablets so-etched by the Supreme Court. The Court considers such popular currency for the categorical concept and its legal support as not warranted.

Because the arguments the President advances are so substantially grounded on the supposed constitutional doctrine and rationale the DOJ Memos present, a close review of the DOJ Memos is called for. On such assessment, the Court rejects the DOJ Memos' position. It concludes that better-calibrated alternatives to absolute presidential immunity exist yielding a more appropriate balance between, on the one hand, the burdens that subjecting the President to criminal proceedings would impose on his ability to perform constitutional duties, and, on the other, the need to promote the courts' legitimate interests and functions in ensuring effective law enforcement attendant to the proper and fair administration of justice.

The heavy reliance the President places on the DOJ Memos is misplaced for several reasons. First, though they contain an exhaustive and learned consideration of the constitutional questions presented here, the DOJ Memos do not constitute authoritative judicial interpretation of the Constitution concerning those issues. In fact, as the DOJ Memos themselves also concede, the precise

presidential immunity questions this litigation raises have never been squarely presented or fully addressed by the Supreme Court. *See* Moss Memo at 237; Dixon Memo at 21. Nonetheless, as elaborated in Section II.C.3.ii.c *infra*, insofar as the Supreme Court has examined some of the relevant presidential privileges and immunities issues as applied in other contexts, the case law does not support the President's and the DOJ Memos' absolute immunity argument to its full extremity and ramifications.

Second, the DOJ Memos address solely the amenability of the President to *federal* criminal process. Hence, because state law enforcement proceedings were not directly at issue in the matters that prompted the memos, as they are here, the DOJ Memos do not address the unique concerns implicated by a blanket assertion of presidential immunity from state criminal law enforcement and judicial proceedings.[12] That gap and its significant distinction would include due recognition of the principles of federalism and comity, and the proper balance between the legitimate interests of federal and state authorities in the administration of justice, as discussed above in the section addressing *Younger* abstention. *See Clinton v. Jones*, 520 U.S. 681, 691, 117 S. Ct. 1636, 137 L. Ed. 2d 945 (1997) (noting that in the context of state law enforcement proceedings, invocation of presidential privilege could implicate "federalism and comity concerns").

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12. The Moss Memo acknowledged that its analysis, and that of the Dixon Memo, focused solely on federal rather than state prosecution of a President while in office, and therefore did not consider "any additional concerns that may be implicated by state criminal prosecution of a sitting President." Moss Memo at 223 n.2.

State criminal law enforcement proceedings and judicial process, moreover, do not implicate one of the DOJ Memos' rationales justifying broad presidential immunity from federal criminal process: that by virtue of the President's functions as Chief Executive, giving him power over prosecution, invocation of privilege, and pardons in federal criminal proceedings against the President would be inappropriate and ineffective, as such process would turn the President into prosecutor and defendant at the same time.[13] *See* Dixon Memo at 26.

Third, the Memos' analyses are flawed by ambiguities (if not outright conflicts) on an essential point: the scope of presidential immunity as presented in the DOJ Memos and asserted here by the President's claim. For instance, the Dixon Memo refers to the immunity of a sitting President from "criminal proceedings," without explicitly defining what "proceedings" the rule would encompass. *See, e.g.*, Dixon Memo at 18. The Bork Memo, again without further elaboration, discusses the President's immunity from federal "criminal process" while in office. *See* Bork Memo at 3. Whether there is a difference between "criminal proceedings" and "criminal process" is a basic open question.

The Moss Memo, rather than addressing this uncertainty, compounds it by introducing a third

13. Of course, as the Watergate scandal and more recent events confirm, there are practical and legal constraints over a president's power to interfere with a federal law enforcement investigation of himself or his Office, without risking serious charges of obstruction of justice.

expression of the principle that, though not further defined, clearly suggests a narrower scope of presidential immunity than that expressed in the Dixon and Bork Memos. In particular, throughout, the Moss Memo's analysis refers to the exemption as not subjecting a President while in office to "indictment and criminal prosecution." *See, e.g.*, Moss Memo at 222. That articulation invites inquiry as to whether the rule it states would not apply to pre-indictment stages of criminal process such as investigations and grand jury proceedings, including responding to subpoenas.

On this crucial point the DOJ Memos may be at odds with one another. The specific circumstance that impelled the Dixon and Bork Memos was a grand jury investigation of Vice President Agnew, in which he objected to responding to a grand jury subpoena and argued that the Constitution prohibited investigation and indictment of an incumbent Vice President, and consequently that he could not be compelled to answer a subpoena. The Dixon and Bork Memos rejected that contention and concluded that the Vice President was not entitled to claim immunity from criminal process and prosecution. But both Memos went further and indicated that such a broad exemption would extend to the sitting President. Implicitly, therefore, as suggested by the context, the Dixon and Bork Memos would expand the scope of their reference to "criminal proceedings" and "criminal process" to cover presidential immunity from all pre-indictment phases of criminal law prosecutions, presumably including exemption from investigations, grand jury proceedings, and subpoenas.

The Moss Memo, however, by framing its analysis of the scope of the President's immunity from criminal law enforcement by reference specifically to "indictment or criminal prosecution," could be read to suggest that the exemption would not encompass investigations and grand jury proceedings, including responding to subpoenas. In fact, the Moss Memo expressly distinguishes the other two memos on this point.[14] Addressing concern over the potential prejudicial loss of evidence that could occur during a period of presidential immunity prior to indictment, the Moss Memo states that "[a] grand jury could continue to gather evidence throughout the period of immunity, even passing this task down to subsequently empaneled grand juries if necessary." Moss Memo at 257 n.36. Moreover, the Moss Memo disavows an interpretation of the Dixon and Bork Memos' analyses as positing "a broad contention that the President is immune from all judicial process while in office." Moss Memo at 239 n.15. It further notes that the Dixon Memo "specifically cast doubt upon such a contention" and explains that a broader statement by Attorney General Stanbury in 1867 "is presumably limited to the power of the courts to review *official* action of the President." *Id.* (emphasis added).

The Moss Memo thus stepped back from the extreme position advanced by Vice President Agnew, and that is repeated here by the President's argument, that immunity extends to all criminal investigations and grand jury proceedings, including responding to subpoenas.

14. *See* Moss Memo at 232 n.10 (noting that unlike the Dixon Memo, the Bork Memo "did not specifically distinguish between indictment and other phases of the 'criminal process'").

In fact, as the Moss Memo acknowledges, such a view has been rejected by longstanding case law. Supporting this observation, the Moss Memo quotes another OLC Memorandum, dating to 1988, which declared that "it has been the rule since the Presidency of Thomas Jefferson that a judicial subpoena in a criminal case may be issued to the President, and any challenge to the subpoena must be based on the nature of the information sought rather than any immunity from process belonging to the President." *Id.* at 253 n.29 (quoting Memorandum for Arthur B. Culvahouse, Jr., Counsel to the President, from Douglas W. Kmiec, Assistant Attorney General, Office of Legal Counsel, *Re: Constitutional Concerns Implicated by Demand for Presidential Evidence in a Criminal Prosecution* at 2 (Oct. 17, 1988)); *see also United States v. Burr*, 25 Fed. Cas. 30, F. Cas. No. 14692d, (No. 14,692) (C.C.D. Va. 1807) (Chief Justice Marshall noting that "[t]he guard, furnished to [the President] to protect him from being harassed by vexatious and unnecessary subpoenas, is to be looked for in the conduct of a court after those subpoenas have issued; not in any circumstances which is to [] precede their being issued"); *Clinton*, 520 U.S. at 704-05 ("It is also settled that the President is subject to judicial process in appropriate circumstances. ... We unequivocally and emphatically endorsed [Chief Justice] Marshall's position when we held that President Nixon was obligated to comply with a subpoena commanding him to produce certain tape recordings of his conversations with his aides. . . . As we explained, 'neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute unqualified Presidential

privilege of immunity from judicial process under all circumstances.'" (quoting *United States v. Nixon*, 418 U.S. 683, 706, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974) (internal citations omitted)); Memorandum from Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel, *Re: Presidential Amenability to Judicial Subpoena* (June 25, 1973) (noting the view expressed by Chief Justice Marshall in *Burr* that while the President's duties may create difficulties complying with a subpoena, this "was a matter to be shown upon the return of the subpoena as a justification for not obeying the process; it did not constitute a reason for not issuing it").

The uncertainties and inconsistencies these various statements manifest about an essential question of constitutional interpretation suggest that the DOJ Memos' position concerning presidential immunity from criminal law enforcement and judicial process cannot serve as compelling authority for the President's claim of absolute immunity, at least insofar as the argument would extend to pre-indictment investigations and grand jury proceedings such as those at issue in this case.

Finally, the DOJ Memos lose persuasive force because their analysis and conclusions derive not from a real case presenting real facts, but instead from an unqualified abstract doctrine conclusorily asserting a generalized principle, specifically the proposition that while in office the President is not subject to criminal process. Because the constitutional text and history on point are scant and inconclusive, the DOJ Memos construct a doctrinal foundation and structure to support a presidential

immunity theory that substantially relies on suppositions, practicalities, and public policy, as well as on conjurings of remote prospects and hyperbolic horrors about the consequences to the Presidency and the nation as a whole that would befall under any model of presidential immunity other than the categorical rule on which the DOJ Memos and the President's claim ultimately rest.

The shortcomings of formulating a categorical rule from abstract principles may be highlighted by various concrete examples demonstrating that other plausible alternatives exist that would not produce the dire consequences the DOJ Memos portray absent the absolute presidential exemption they propound. The indictment stage of criminal process presents such an illustration, raising fundamental questions, reasonable doubts, and feasible grounds for making exceptions to an unqualified presidential immunity doctrine. The Dixon Memo itself acknowledges as "arguable" the possibility of an alternative approach that would not implicate the concerns about the burdens and interferences with the President's ability to carry out official duties that are advanced to justify a categorical immunity rule: Permit the indictment of a sitting President but defer further prosecution until he or she leaves office. *See* Dixon Memo at 31. The Dixon Memo concludes that "[f]rom the standpoint of minimizing direct interruption of official duties . . . this procedure might be a course to be considered." *Id.* at 29. Nonetheless, the Dixon Memo rejects that alternative, declaring without further analysis or support that an indictment pending while the President remains in office would harm the Presidency virtually as much as an actual conviction. *Id.*

Appendix B

Perhaps the most substantial flaw in the DOJ Memos' case in favor of a categorical presidential immunity rule extending to all stages of criminal process is manifested in their expressions of absolutism that upon close parsing and deeper probing does not bear out. On this point, the DOJ Memos engage in rhetorical flair -- also embraced by the President's arguments -- that not only overstates their point, but does not consider the possibility of substantive distinctions which could reasonably address concerns about the burdens and intrusions that criminal proceedings against a sitting President could entail, and thus could support a practical alternative to a regime of absolute presidential immunity.

The thrust of the DOJ Memos' argument is that a doctrine of complete immunity of the President from criminal proceedings while in office can be justified by the consideration that subjecting the President to the jurisdiction of the courts would be unconstitutional because "it would impermissibly interfere with the President's ability to carry out his constitutionally assigned functions and thus would be inconsistent with the constitutional structure." Moss Memo at 223.

In support of that peremptory claim, the DOJ Memos -- and the President -- describe various physical and non-physical interferences associated with defending criminal proceedings that they contend could impair the ability of a President to govern, even possibly amounting to a complete functional disabling of the President. In particular, the DOJ Memos cite mental distraction, the effect of public stigma, loss of stature and respect, the need to assist in the preparation of a defense, the time commitment demanded

by personal appearance at a trial, and the incapacitation effected by an arrest or imprisonment if convicted. *See, e.g.*, Moss Memo at 249-54. Summarizing these potential impediments, the Dixon Memo concludes:

> [T]he President is the symbolic head of the Nation. To wound him by a criminal proceeding is to hamstring the operation of the whole governmental apparatus, both in foreign and domestic affairs. . . . [T]he spectacle of an indicted President still trying to serve as Chief Executive boggles the imagination.

Dixon Memo at 30. To a similar effect, the Moss Memo declares that

> the ordinary workings of the criminal process would impose burdens upon a sitting President that would directly and substantially impede the executive branch from performing its constitutionally assigned functions, and the accusation or adjudication of the criminal culpability of the nation's chief executive by either a grand jury returning an indictment or a petit jury returning a verdict would have a dramatically destabilizing effect upon the ability of a coordinate branch of government to function.[15]

15. The Court notes that in this statement the Moss Memo essentially implies that the scope of presidential immunity it urges would extend to grand jury proceedings, not only to "indictment and criminal prosecution," as expressed throughout the rest of the memo. The remark apparently contradicts expressions elsewhere

Moss Memo at 236.

A major problem with constructing a categorical rule founded upon hypothesizing and extrapolating from an abstract general proposition disembodied from an actual set of facts, is that the entire theoretical structure could collapse when it encounters a real-world application that shakes the underpinnings of the unqualified doctrine. To propound as a blanket constitutional principle that a President cannot be subjected to criminal process presupposes a faulty premise. Implicit in that pronouncement is the assumption that every crime -- and every stage of every criminal proceeding, at any time and forum, whether involving only one or many other offenders -- is just like every other instance of its kind.

The absolute proposition also presumes uniformity of consequences: that but for the application of absolute presidential immunity every one of these circumstances would give rise to every one of the alarming outcomes conjured by the DOJ Memos to justify unqualified presidential protection from any form of criminal process. But on deeper scrutiny of the rationale for the categorical doctrine, and by constructing alternatives that eliminate or substantially mitigate even the most extreme fears conjured, the assumptions underlying the categorical rule may prove both unjustified and wrong.

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in the memo suggesting that a sitting President could be the subject of grand jury investigations. *See, e.g., supra* pages 50-51.

In fact, not every criminal proceeding to which a President may be subjected would raise the grim specters the DOJ Memos portray as incapacitation of the President, as impeding him from discharging official duties, or as hamstringing "the operation of the whole governmental apparatus." Dixon Memo at 30. To be sure, some crimes and some criminal proceedings may involve very serious offenses that undisputably may demand the President's full personal time, energy, and attention to prepare a defense, and that consequently could justify recognition of broader immunity from criminal process in the particular case.

Nonetheless, not every criminal offense falls into that exceptional category. Some crimes may require months or even years to resolve, while others conceivably could be disposed of in a matter of days, even hours. To be specific, perhaps a charge of murder and imprisonment upon conviction would present extraordinary circumstances raising the burdens and interferences the DOJ Memos describe and thus justify broad immunity. But a charge of failing to pay state taxes, or of driving while intoxicated, may not necessarily implicate such concerns. Similarly, responding to a subpoena relating to the conduct of a third party, as is the case here, would likely not create the catastrophic intrusions on the President's personal time and energy, or impair his ability to discharge official functions, or threaten the "dramatic destabilization" of the nation's government that the DOJ Memos and the President depict. *See* Dixon Memo at 29 (acknowledging that "[t]he physical interference consideration . . . would not be quite as serious regarding minor offenses leading

to a short trial and a fine," and that "Presidents have submitted to the jurisdiction of the courts in connection with traffic offenses"). *See also*, Moss Memo at 254 (acknowledging that "[i]t is conceivable that, in a particular set of circumstances, a particular criminal charge will not in fact require so much time and energy of a sitting President so as materially to impede the capacity of the executive branch to perform its constitutionally assigned functions.").

As regards public stigma, vilification, and loss of stature associated with criminal prosecutions, again some criminal offenses undoubtedly could engender such consequences and would warrant significant weight in assessing a claim of immunity from criminal process, but others would not. Indeed, some civil wrongs, such as sexual harassment, could arouse much greater public opprobrium and cause more severe mental anguish and personal distraction than, for example, criminal possession of a marijuana joint. Moreover, as Paula Jones's lawsuit against President Clinton illustrated, civil charges of sexual misconduct filed against a sitting President could entail an extensive call on a President's time and energy, and potentially interfere with performance of official duties,[16] perhaps to a greater degree than some criminal charges that could be more readily resolved. And not

16. *See Clinton*, 520 U.S. at 701-02 ("As a factual matter, [President Clinton] contends that this particular case -- as well as the potential additional litigation that an affirmance . . . might spawn -- may impose an unacceptable burden on the President's time and energy and thereby impair the effective performance of his office.").

every crime and not every conviction necessarily results in a sentence requiring imprisonment.

In a similar vein, a criminal accusation involving the President alone cannot be considered in the same light as one entailing unlawful actions committed by other persons that in some way may also implicate potential criminal conduct by the President. This circumstance presents unique implications that demand recognizing and making finer distinctions. A grand jury investigation of serious unlawful acts committed by third persons may turn up evidence incriminating the sitting President. It would create significant issues impairing the fair and effective administration of justice if the proceedings had to be suspended or abandoned because the President, invoking absolute immunity from all criminal investigations and grand jury proceedings, refused to provide critical evidence he may possess that could, either during the investigation or at later proceedings, convict or exonerate any of the co-conspirators. In that instance, the President's claim of absolute immunity conceivably could enable the guilty to go free, and deprive the innocent of an opportunity to resolve serious accusations in a court of law.

The running of a statute of limitations in favor of the President or third persons during the period of immunity presents additional complexities and exceptional circumstances in these situations, similarly raising the prospect of frustrating the proper administration of justice.

A hypothetical combining all of these difficulties may illustrate how a real and compelling set of facts could undermine a blanket invocation of presidential immunity from all criminal process. Suppose that during the course of a criminal investigation of numerous third persons engaged in very serious crimes, some of the targets being high-ranking government officials, substantial evidence is uncovered indicating that the President was closely involved with those other persons in committing the offenses under investigation. The accusations come to light not long before the President's term is about to expire, leaving no time for the House of Representatives to present articles of impeachment, nor for the Senate to conduct a trial. But the applicable statute of limitations is also about to expire before the President leaves office.

On these facts, no persuasive argument could be made that an indictment of the President while in office, along with the co-conspirators -- thereby tolling the statute of limitations -- would present the severe burdens and interferences with the discharge of the President's duties that the DOJ Memos interpose. Balanced against the prospect of a number of powerful individuals going free and escaping punishment for serious crimes by virtue of the President asserting absolute immunity from criminal process, an alternative that would allow the indictment and prosecution to proceed under these circumstances may weigh against recognizing a categorical claim of presidential immunity.

The Dixon Memo acknowledges the special difficulties that criminal proceedings involving co-conspirators and

statute of limitations problems present. *See* Dixon Memo at 29, 32, 41. In response, the Dixon Memo dismisses such concerns as not sufficient to overcome the argument in favor of the President's absolute immunity. *See id.* On that point, the Dixon Memo remarks: "In this difficult area all courses of action have costs and we recognize that a situation of the type just mentioned could cause a complete hiatus in criminal liability." *Id.* at 32. But failure to do full and fair justice in any case should not be shrugged off as mere collateral damage caused by a claim of presidential privilege or immunity. If in fact criminal justice falls to an assertion of immunity, that verdict should be an absolutely last resort. It should be justified by exacting reasons of momentous public interest such as national security, and be reviewable by a court of law. Above all, its effect should not be to shield the President from all legal process, especially in circumstances where it may appear that a claim of generalized immunity is invoked more on personal than on official grounds, and work to place the President above the law. *See Nixon*, 418 U.S. at 706 (holding that "[a]bsent a claim of need to protect military, diplomatic, or sensitive national security secrets," a generalized interest in protecting the confidentiality of presidential communications in the performance of the President's duties must yield to the adverse effects of such a privilege on the fair administration of justice). As the *Nixon* Court declared under pertinent circumstances, "[t]he impediment that an absolute unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the courts under Art. III." *Id.* at 707; *see also Clinton*, 520 U.S. at 708.

Here, this Court is not persuaded that the President has met this rigorous standard.

b. Constitutional Text and History

The Court finds that the structure of the Constitution, the historical record, and the relevant case law support its conclusion that, except in circumstances involving military, diplomatic, or national security issues, a county prosecutor acts within his or her authority -- at the very least -- when issuing a subpoena to a third party even though that subpoena relates to purportedly unlawful conduct or transactions involving third parties that may also implicate the sitting President. No other conclusion squares with the fundamental notion, embodied in those sources, that the President is not above the law.

Turning first to the text of the Constitution and the historical record, the Court concludes that neither the Constitution nor the history surrounding the founding support as broad an interpretation of presidential immunity as the one now espoused by the President. As the Supreme Court did in *Clinton*, this Court notes that the historical record does not conclusively answer the question presented to the Court:

> Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and

> scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side .... They largely cancel each other.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634-35, 72 S. Ct. 863, 96 L. Ed. 1153, 62 Ohio Law Abs. 417 (1952).

c. Supreme Court Guidance

Turning to the opinions issued by the Supreme Court, the Court finds that they support this Court's conclusions in this action. The Supreme Court has twice recognized that "[i]t is settled law that the separation-of-powers doctrine does not bar every exercise of jurisdiction over the President of the United States." *Clinton*, 520 U.S. at 705 (quoting *Fitzgerald*, 457 U.S. at 753-54). "[I]t is also settled that the President is subject to judicial process in appropriate circumstances." *Id.* at 703.

The narrower part of the judicial process that is at issue in this action -- i.e., responding to a subpoena -- has similarly been addressed by the Supreme Court. That Court squarely upheld the view first espoused by Chief Justice Marshall, who presided over the trial for treason of Vice President Aaron Burr while in office, that "a subpoena duces tecum could be directed to the President." *Id.* at 703-04; *accord Nixon*, 418 U.S. at 706 ("[N]either the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential

privilege of immunity from judicial process under all circumstances."); *see also Nixon v. Sirica*, 487 F.2d 700, 709-10, 159 U.S. App. D.C. 58 (D.C. Cir. 1973) ("The clear implication is that the President's special interests may warrant a careful judicial screening of subpoenas after the President interposes an objection, but that some subpoenas will nevertheless be properly sustained by judicial orders of compliance.") (en banc) (per curiam).

And at least one President (Richard M. Nixon) has himself conceded that he, as President, was required to produce documents in response to a judicial subpoena: "He concedes that he, like every other citizen, is under a legal duty to produce relevant, non-privileged evidence when called upon to do so." *Sirica*, 487 F.2d at 713. If a subpoena may be directed to the President, it follows that a subpoena potentially implicating private conduct, records, or transactions of third persons and the President may lawfully be directed to a third-party.

The Court cannot square a vision of presidential immunity that would place the President above the law with the text of the Constitution, the historical record, the relevant case law, or even the DOJ Memos on which the President relies most heavily for support. The Court thus finds that the President has not demonstrated a likelihood of success on the merits and is accordingly not entitled to injunctive relief in this action. Contrary to the President's claims, the Court's conclusion today does not "upend our constitutional design." (Pl's Reply at 4.) Rather, the Court's decision upholds it.

d. Alternatives

The questions and concerns the DOJ Memos present, and that the President here embraces, need not inexorably lead to only one course, that of prescribing an absolute immunity rule. In fact, the Supreme Court has provided guidance to govern invocations of absolute immunity. In *Clinton* it declared that such claims should be resolved by a "functional" approach. Specifically, the Court counseled that "an official's absolute immunity should extend only to acts in performance of particular functions of his office." *Clinton*, 520 U.S. at 694. The court further explained that "immunities are grounded in 'the nature of the function to be performed, not the identity of the actor who performed it.'" *Id.* at 695 (quoting *Forrester v. White*, 484 U.S. 219, 229-30, 108 S. Ct. 538, 98 L. Ed. 2d 555 (1988)). Underscoring this point, the Court concluded that "we have never suggested that the President, or any other official, has an immunity that extends beyond the scope of any action taken in an official capacity." *Clinton*, 520 U.S. at 694.

The DOJ Memos, while espousing a categorical presidential immunity rule, and perhaps seeming inconsistent on this point as well,[17] also recognize the

17. The Dixon Memo, for example, though remarking that an alternative of permitting an indictment of a President and deferring trial until he is out of office is a course worthy of consideration, rejects the option in favor of a categorical rule. The Dixon Memo also admits to "certain drawbacks" of an absolute immunity doctrine. Similarly, the memo acknowledges the difficulties that a categorical rule presents because of issues such

applicability of such a method. The Dixon Memo, for instance, concludes that

> under our constitutional plan it cannot be said either that the courts have the same jurisdiction over the President as if he were an ordinary citizen or that the President is absolutely immune from the jurisdiction of the courts in regard to any kind of claim. The proper approach is to find the proper balance between the normal functions of the courts and the special responsibilities and function of the Presidency.

Dixon Memo at 24.

In the few instances in which the Supreme Court has addressed questions concerning the scope of the President's assertion of executive privilege and immunity from judicial process, albeit in varying contexts, several general principles and a functional framework emerge from the Court's pronouncements that should inform and guide adjudications of such claims. A synthesis of *Burr*, *Nixon*, *Fitzgerald*, and *Clinton* suggests that the Supreme Court would reject an interpretation and application of presidential powers and functions that would "sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances." *Nixon*, 418

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as the running of the statute of limitations and the involvement of co-conspirators, but again discounts those concerns to support a categorical rule. *See* Dixon Memo at 17, 32.

U.S. at 706. Rather than enunciating such a categorical rule, the Supreme Court's guidance suggests that courts take account of various circumstances that may bear upon a court's ultimate determination concerning the appropriateness of a claim of presidential immunity from judicial process relating to a criminal proceeding.

Among the relevant considerations are: whether the events at issue involve conduct taken by the President in an a private or official capacity; whether the conduct at issue involved acts of the President, or of third parties, or both; whether the conduct of the President occurred while the President was in office, or before his tenure; whether the acts in dispute related to functions of the President's office; whether a subpoena for production of records was issued against the President directly or to a third person; whether the judicial process at issue involves federal or state judicial process; whether the proceedings pertain to a civil or criminal offense; whether the enforcement of the particular criminal process concerned would impose burdens and interferences on the President's ability to execute his constitutional duties and assigned functions; and whether the effect of the President's asserting immunity under the circumstances would be to place the President, or other persons, above the law.

The analytic framework the Supreme Court counsels courts to employ requires a balancing of interests. The assessment would consider the interest of the President in protecting his office from undue burdens and interferences that could impair his ability to perform his official duties, and the interests of law enforcement officers and the

judiciary in protecting and promoting the fair, full, and effective administration of justice.

The relevance of these multiple considerations in a determination of the appropriateness of presidential immunity from criminal process under such varying circumstances underscores the incompatibility of an unqualified, absolute doctrine, and, rather than a blanket application; points to a case-by-case approach in which a demonstration of sufficiently compelling conditions to justify presidential exemption is made by the courts.[18]

Here, the Court's weighing of the competing interests persuades it to reject the President's request for injunctive relief. The interest the President asserts in maintaining the confidentiality of certain personal financial and tax records that largely relate to a time before he assumed office, and that may involve unlawful conduct by third persons and possibly the President, is far outweighed by the interests of state law enforcement officers and the federal courts in ensuring the full, fair, and effective administration of justice.

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18. The Moss Memo mentions such a course in passing, reiterating its support for a categorical rule "rather than a doctrinal test that would require the court to assess whether a particular criminal proceeding is likely to impose serious burdens upon the President.") Moss Memo at 254. This point ignores that it was precisely this kind of assessment that the Supreme Court conducted in *Nixon* and *Clinton*, and that more generally courts routinely make in the course of performing their constitutional duties.

The Court is not persuaded that the burdens and interferences the President describes in this case would substantially impair the President's ability to perform his constitutional duties. *See Clinton*, 520 U.S. at 705 ("The burden on the President's time and energy that is a mere byproduct of [judicial] review surely cannot be considered as onerous as the direct burden imposed by judicial review and the occasional invalidation of his official actions."). In the Court's view, frustration of the state criminal investigation under the facts presented here presents much greater concerns that overcome the President's grounds for not complying with the grand jury subpoena.

iii. The Public Interest

Given that the Court finds that the President would not suffer irreparable harm or succeed on the merits, it is unnecessary to consider whether the public interest would favor a preliminary injunction. Nevertheless, the Court notes that the public interest does not favor granting a preliminary injunction. As discussed above, grand juries are an essential component of our legal system and the public has an interest in their unimpeded operation. *Manypenny*, 451 U.S. at 243; *see also United States v. Dionisio*, 410 U.S. 1, 17, 93 S. Ct. 764, 35 L. Ed. 2d 67 (1973) (referring to "the public's interest in the fair and expeditious administration of the criminal laws"); *Branzburg v. Hayes*, 408 U.S. 665, 688-90, 92 S. Ct. 2646, 33 L. Ed. 2d 626 (1972) (in a First Amendment case, referring to "the public interest in law enforcement and in ensuring effective grand jury proceedings" and noting that the principle that the public is entitled to every

person's evidence "is particularly applicable to grand jury proceedings"); *In re Sealed Case*, 794 F.2d 749, 751 n.3, 254 U.S. App. D.C. 40 (D.C. Cir. 1986) (per curiam) (referring to "the weighty public interest in the orderly functioning of grand juries and the judicial process").

III. ORDER

For the reasons described above, it is hereby

ORDERED that the amended complaint of plaintiff Donald J. Trump (Dkt. No. 27) is **DISMISSED** pursuant to the decision of the United States Supreme Court in *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971).

SO ORDERED.

Dated: New York, New York
7 October 2019

/s/ Victor Marrero
Victor Marrero
U.S.D.J.

APPENDIX C — EMERGENCY NOTICE OF APPEAL TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, DATED OCTOBER 7, 2019

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Case No. 1:19-cv-08694-VM

DONALD J. TRUMP,

- against -

Plaintiff,

CYRUS R. VANCE, JR., IN HIS OFFICIAL CAPACITY AS DISTRICT ATTORNEY OF THE COUNTY OF NEW YORK; SOLOMON SHINEROCK, IN HIS OFFICIAL CAPACITY AS ASSISTANT DISTRICT ATTORNEY FOR THE COUNTY OF NEW YORK;

and

MAZARS USA, LLP,

Defendants.

EMERGENCY NOTICE OF APPEAL

Plaintiff Donald J. Trump hereby appeals to the U.S. Court of Appeals for the Second Circuit, on an emergency basis, this Court's decision from October 7, 2019, denying

Appendix C

Plaintiff's emergency motion for a temporary restraining order and a preliminary injunction, denying Plaintiff a stay pending appeal, and dismissing the case.

Dated: October 7, 2019

Respectfully Submitted,

/s/ William S. Consovoy
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APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED OCTOBER 7, 2019

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 19-3204

DONALD J. TRUMP,

Plaintiff-Appellant,

v.

CYRUS R. VANCE, JR., IN HIS OFFICIAL CAPACITY AS DISTRICT ATTORNEY OF THE COUNTRY OF NEW YORK, MAZARS USA, LLP,

Defendants-Appellees.

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 7th day of October, two thousand nineteen.

Before: Raymond J. Lohier, Jr., *Circuit Judge*.

ORDER

Appellant has filed a motion seeking an order temporarily staying enforcement of a subpoena to his

accountant. Because of the unique issues raised by this appeal,

IT IS HEREBY ORDERED that a temporary administrative stay is granted pending expedited review by a panel of the Court. A scheduling order will issue in the ordinary course.

For the Court:

Catherine O'Hagan Wolfe,
Clerk of Court

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED OCTOBER 7, 2019

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 19-3204

DONALD J. TRUMP,

Plaintiff-Appellant,

UNITED STATES DEPARTMENT OF JUSTICE,
AMICUS CURIAE,

v.

CYRUS R. VANCE, JR., IN HIS OFFICIAL CAPACITY AS DISTRICT ATTORNEY OF THE COUNTRY OF NEW YORK, MAZARS USA, LLP,

Defendants-Appellees.

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 7th day of October, two thousand and nineteen.

Before: Raymond J. Lohier, Jr., *Circuit Judge.*

Appendix E

ORDER

A temporary administrative stay pending expedited review by a panel of the Court issued earlier today. The order further provided that a scheduling order would issue in the ordinary course.

Appellee Cyrus R. Vance moves for expedited consideration of both the motion for a stay pending appeal as well as the merits of the appeal and proposes a briefing schedule with argument to be held on October 11, 2019. Appellee Vance also requests that if the appeal is not submitted to a merits panel on October 11, 2019, the Court hold argument on the motion for a stay pending appeal on that date. Appellant proposes a briefing schedule that contemplates consolidated argument of the stay motion and merits of the appeal after October 18, 2019. The United States Department of Justice, as amicus in support of Appellant, proposes that its brief be due on or before October 11, 2019.

IT IS HEREBY ORDERED that expedited consideration of both the request for a stay pending appeal and the merits of the appeal is granted. Under the circumstances, the motion for a stay pending appeal is too closely linked to the underlying merits to be argued separately. Appellant's brief is due Friday, October 11, 2019 at 5:00 pm. The United States Department of Justice's amicus brief in support of Appellant is due at the same time. Appellees' briefs are due Tuesday, October 15, 2019 at 5:00 pm. Appellant's reply brief is due Thursday, October 17, 2019 at 5:00 pm. Argument will be scheduled

as early as the week of October 21, 2019. The temporary administrative stay remains in effect until argument is completed.

For the Court:

Catherine O'Hagan Wolfe,
Clerk of Court

APPENDIX F — MEMORANDUM IN SUPPORT OF EMERGENCY MOTION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED OCTOBER 18, 2019

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

19-3204-cv

DONALD J. TRUMP,

Plaintiff-Appellant,

v.

CYRUS R. VANCE, JR., IN HIS OFFICIAL CAPACITY AS DISTRICT ATTORNEY OF THE COUNTY OF NEW YORK; MAZARS USA, LLP,

Defendants-Appellees.

MEMORANDUM IN SUPPORT OF EMERGENCY MOTION FOR A STAY PENDING APPEAL

Movant, President Donald J. Trump, respectfully asks this Court to stay the District Attorney's subpoena to Mazars during the pendency of this appeal—*i.e.*, until this Court issues the mandate. *See* Fed. R. App. P. 8; 28 U.S.C. §1651. The President's right to that relief is set out in his opening brief (CA2 Doc. 80 at 48-59) and reply (CA2 Doc. 121 at 27-32). This Court has administratively stayed the subpoena "until [oral] argument is completed" on October 23 (CA2 Docs. 10; 38), and Mazars will divulge

the President's confidential records shortly after the stay expires—causing him irreparable harm. The President thus needs a ruling on this motion for a stay pending appeal **before the end of oral argument on Wednesday, October 23, 2019**.

If the Court has not granted a stay pending appeal **before 9 a.m. on Tuesday, October 22, 2019**, the President will file a protective motion for a stay pending appeal with the U.S. Supreme Court. The President greatly appreciates the Court's prompt attention to this matter.

Dated: October 18, 2019

Respectfully submitted,

s/ William S. Consovoy

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Mukasey Frenchman & Sklaroff LLP
Two Grand Central Tower
140 East 45th Street, 17th Floor
New York, New York 10177
(212) 466-6400
marc.mukasey@mukaseylaw.com

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Appendix F

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Patrick Strawbridge
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Ten Post Office Square
8th Floor South PMB #706
Boston, MA 02109
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Counsel for President Donald J. Trump

APPENDIX G — AGREEMENT TO RESOLVE MOTION FOR STAY, DATED OCTOBER 21, 2019

DISTRICT ATTORNEY
COUNTY OF NEW YORK
ONE HOGAN PLACE
New York, N.Y. 10013
(212) 335-9000

Catherine O'Hagan Wolfe
Clerk of Court
U.S. Court of Appeals, Second Circuit
Thurgood Marshall United States Courthouse
40 Foley Square
New York, New York 10007

October 21, 2019

Re: Donald J. Trump v. Cyrus R. Vance, Jr., et al.
Case No. 19-3204 cv

Dear Ms. O'Hagan Wolfe:

We represent the office of Cyrus R. Vance, Jr., District Attorney of New York County, an Appellee in this matter.

We write to inform the Court that the parties have reached an arrangement to resolve Appellant's emergency motion for a stay pending appeal (Dkt. No. 128) filed on Friday, October 18, 2019.

Appendix G

Appellee Vance agrees to forbear enforcement of the Mazars Subpoena between the date of oral argument in this matter (October 23, 2019) and ten calendar days after this Court issues its panel opinion (the "Forbearance Period"), on the following conditions:

1. Any petition for *certiorari* in this matter will be filed in the Supreme Court within the Forbearance Period; any opposition will be filed within seven calendar days from the petition; and any reply will be filed within three calendar days from any opposition. Should any filing date specified above fall on a weekend or holiday, the terms of Federal Rule of Appellate Procedure 26 shall control.

2. Should Appellant petition for *certiorari,* Appellant will request in his petition that the Supreme Court hear the case in the current term, and Appellee Vance will further forbear enforcement of the Mazars Subpoena until the Supreme Court either denies *certiorari* or issues an opinion, whichever is sooner.

3. Appellant will immediately withdraw all pending motions for a stay in this Court.

We are available at the Court's convenience should any questions arise concerning this undertaking.

Appendix G

Respectfully submitted,

/s/_____
Carey R. Dunne, *General Counsel*
Christopher Conroy (*pro hac vice*)
Solomon B. Shinerock
James H. Graham
Sarah Walsh (*pro hac vice*)
Allen J. Vickey
Assistant District Attorneys
New York County District Attorney's Office

APPENDIX H — LETTER WITHDRAWING MOTION FOR STAY, DATED OCTOBER 21, 2019

October 21, 2019

Catherine O'Hagan Wolfe
Clerk of Court
U.S. Court of Appeals for the Second Circuit
Thurgood Marshall United States Courthouse
40 Foley Square
New York, NY 10007

Re: *Donald J. Trump v. Cyrus R. Vance, Jr., et al.*, No. 19-3204 (withdrawal of stay motions)

Per the parties' agreement (CA2 Doc. 136), the President withdraws all pending motions for a stay.

Respectfully submitted,

/s/ William S. Consovoy
1600 Wilson Boulevard, Suite 700
Arlington, VA 22209
703.243.9423
will@consovoymccarthy.com

Counsel for President Donald J. Trump

APPENDIX I — SUBPOENA TO THE TRUMP ORGANIZATION, DATED AUGUST 1, 2019

SUBPOENA

(Duces Tecum)

FOR A WITNESS TO ATTEND THE

GRAND JURY

In the Name of the People of the State of New York

To: Custodian of Records
The Trump Organization

YOU ARE COMMANDED to appear before the **GRAND JURY** of the County of New York, at the Grand Jury Room 907, of the Criminal Courts Building at One Hogan Place, between Centre and Baxter streets, in the Borough of Manhattan of the City, County and State of New York, on **August 15, 2019** at **2:00 p.m.** of the same day, **as a witness in a criminal proceeding**:

Investigation into the Business and Affairs of John Doe (2018-00403803),

AND, YOU ARE DIRECTED TO BRING WITH YOU AND PRODUCE AT THE TIME AND PLACE AFORESAID, THE FOLLOWING ITEMS IN YOUR CUSTODY:

SEE EXHIBIT A - ATTACHED

Appendix I

IF YOU FAIL TO ATTEND AND PRODUCE SAID ITEMS, you may be adjudged guilty of a Criminal Contempt of Court, and liable to a fine of one thousand dollars and imprisonment for one year.

Dated in the County of New York,
August 1, 2019

CYRUS R. VANCE, JR.
District Attorney, New York County

By: /s/_____
Solomon Shinerock
Assistant District Attorney
(212) 335-9567

Note: In lieu of appearing personally with the requested documents, you may email electronic copies to paralegal Daniel Kenny (kennyd@dany.nyc.gov) or deliver CDs, DVDs, or USB 2.0 external hard drives to the New York County District Attorney's Office, 80 Centre Street, Major Economic Crimes Bureau, New York, NY 10013, for the attention of Assistant District Attorney Solomon Shinerock, c/o Daniel Kenny.

Inv. Number: 2018-00403803

Appendix I

EXHIBIT A TO SUBPOENA TO THE TRUMP ORGANIZATION DATED AUGUST 1, 2019

ITEMS TO BE PRODUCED are those in the actual and constructive possession of the Trump Organization, its entities, agents, officers, employees and officials over which it has control, including without limitation its subsidiaries:

1. For the period of June 1, 2015, through September 20, 2018, any and all documents and communications that relate to, reference, concern, or reflect:

    a. payments made for the benefit of or agreements concerning Karen McDougal,

    b. payments made for the benefit of or agreements concerning Stephanie Clifford aka Stormy Daniels aka Peggy Peterson,

    c. payments made to or agreements with Michael Cohen or American Media, Inc. that concern Karen McDougal or Stephanie Clifford aka Stormy Daniels aka Peggy Peterson,

    including but not limited to documents and communications involving:

    • Resolution Consultants LLC

    • Essential Consultants LLC aka EC LLC

Appendix I

- Entities owned or controlled by Michael Cohen
- Michael Cohen
- David Dennison
- Keith Davidson
- Keith M. Davidson & Associates
- American Media, Inc.
- National Enquirer
- David Pecker
- Dylan Howard
- Hope Hicks
- Jill Martin
- Jeffrey McConney
- Deborah Tarasoff
- Donald Trump, Jr.
- Allen Weisselberg.

The items sought by this demand include without limitation: emails, memoranda, and other

communications; invoices; agreements, including without limitation retainer agreements; accounting and other book entries or backup documents; general ledger records; wire transfer requests and related records, check images, bank statements, and any other evidence of payments or installments; and organizational documents and agreements, including without limitation articles of incorporations, limited liability agreements, and minutes of director or member meetings.

2. For the period of June 1, 2015, through September 20, 2018, any and all documents and communications that relate to, reference, concern, or reflect Michael Cohen's employment by or work on behalf of Donald Trump or the Trump Organization at any time, including without limitation: invoices, payment records, human resource records, W2s, 1099s, emails, memoranda, and other communications.

3. For any responsive documents or communications withheld under a claim of privilege, please provide a log setting forth, as to each such document or communication, the legal basis for the claim of privilege, the type of document or communication, its general subject matter, date, author, sender and recipient where applicable, and such other information as is sufficient to determine the claim of privilege.

Appendix I

DEFINITIONS AND INSTRUCTIONS

As used herein, unless otherwise indicated, the following terms shall have the meanings set forth below:

A. The terms "relate," "reference," "concern," "reflect," "include," and "including without limitation," in whatever tense used, shall be construed as is necessary in each case to make the request to produce inclusive rather than exclusive, and are intended to convey, as appropriate in context, the concepts of comprising, respecting, referring to, embodying, evidencing, connected with, commenting on, concerning, responding to, showing, refuting, describing, analyzing, reflecting, presenting, and consisting of, constituting, mentioning, defining, involving, explaining, or pertaining to in any way, expressly or impliedly, to the matter called for.

B. The words "and," "or," "any" and "all" shall be construed as is necessary in each case to make each request to produce inclusive rather than exclusive.

C. Terms in the plural include the singular and terms in the singular include the plural. Terms in the male include the female and terms in the female include the male. Neutral gender terms include all.

D. "Document" includes without limitation, any written, printed, typed, photocopied, photographic, recorded or otherwise created or reproduced communication or representation, whether comprised of letters,

words, numbers, pictures, sounds or symbols, or any combination thereof, in the form maintained, having access to, constructively possessed, physically possessed, and controlled. This definition includes copies or duplicates of documents contemporaneously or subsequently created that have any non-conforming notes or other markings, and drafts, preliminary versions, and revisions of such. It includes, without limitation, correspondence, memoranda, notes, records, letters, envelopes, telegrams, faxes, messages, emails, voice mails, instant messenger services, studies, analyses, contracts, agreements, working papers, summaries, work papers, calendars, diaries, reports. It includes, without limitation, internal and external communications of any type. It includes without limitation documents in physical, electronic, audio, digital, video existence, and all data compilations from which the data sought can be obtained, including electronic and computer as well as by means of other storage systems, in the form maintained and in usable form.

E. "Communication" includes every means of transmitting, receiving or recording transmission or receipt of facts, information, opinion, data, or thoughts by one person, and between one and more persons, entities, or things.

APPENDIX J — SUBPOENA TO MAZARS USA LLP, DATED AUGUST 29, 2019

SUBPOENA
(Duces Tecum)

FOR A WITNESS TO ATTEND THE

GRAND JURY

In the Name of the People
of the State of New York

To: Custodian of Records
Mazars USA LLP

YOU ARE COMMANDED to appear before the G**RAND JURY** of the County of New York, at the Grand Jury Room 907, of the Criminal Courts Building at One Hogan Place, between Centre and Baxter streets, in the Borough of Manhattan of the City, County and State of New York, on **September 19, 2019** at **2:00p.m.** of the same day, **as a witness in a criminal proceeding:**

Investigation into the Business and Affairs of John Doe (2018-00403803),

AND, YOU ARE DIRECTED TO BRING WITH YOU AND PRODUCE AT THE TIME AND PLACE AFORESAID, THE FOLLOWING ITEMS IN YOUR CUSTODY:

Appendix J

SEE EXHIBIT A - ATTACHED

IF YOU FAIL TO ATTEND AND PRODUCE SAID ITEMS, you may be adjudged guilty of a Criminal Contempt of Court, and liable to a fine of one thousand dollars and imprisonment for one year.

Dated in the County of New York,
August 29, 2019

CYRUS R. VANCE, JR.
District Attorney, New York County

By: /s/_____
Solomon Shinerock
Assistant District Attorney
(212) 335-9567

Note: In lieu of appearing personally with the requested documents, you may email electronic copies to paralegal Daniel Kenny (kennyd@dany.nyc.gnv) or deliver CDs, DVDs, or USB 2.0 external hard drives to the New York County District Attorney's Office, 80 Centre Street, Major Economic Crimes Bureau, New York, NY 10013, for the attention of Assistant District Attorney Solomon Shinerock, c/o Daniel Kenny.

Inv. Number: 2018-00403803

Appendix J

EXHIBIT A TO SUBPOENA TO MAZARS USA LLP
DATED AUGUST 29, 2019

ITEMS TO BE PRODUCED are those in the actual and constructive possession of Mazars USA LLP, its related predecessors, entities, agents, officers, employees and officials over which it has control, including without limitation subsidiaries:

1. For the period of January 1, 2011 to the present, with respect to Donald J. Trump, the Donald J. Trump Revocable Trust, the Trump Organization Inc., the Trump Organization LLC, the Trump Corporation, DJT Holdings LLC, DJT Holdings Managing Member LLC, Trump Acquisition LLC, Trump Acquisition, Corp., the Trump Old Post Office LLC, the Trump Foundation, and any related parents, subsidiaries, affiliates, joint ventures, predecessors, or successors (collectively, the "Trump Entities"):

    a. Tax returns and related schedules, in draft, as-flied, and amended form;

    b. Any and all statements of financial condition, annual statements, periodic financial reports, and independent auditors' reports prepared, compiled, reviewed, or audited by Mazars USA LLP or its predecessor, WeiserMazars LLP;

    c. Regardless of time period, any and all engagement agreements or contracts related to the preparation, compilation, review, or auditing of the documents described in items (a) and (b);

d. All underlying, supporting, or source documents and records used in the preparation, compilation, review, or auditing of documents described in items (a) and (b), and any summaries of such documents and records; and

e. All work papers, memoranda, notes, and communications related to the preparation, compilation, review, or auditing of the documents described in items (a) and (b), including, but not limited to,

   i. All communications between Donald Bender and any employee or representative of the Trump Entities as defined above; and

   ii. All communications, whether internal or external, related to concerns about the completeness, accuracy, or authenticity of any records, documents, valuations, explanations, or other information provided by any employee or representative of the Trump Entities.

DEFINITIONS AND INSTRUCTIONS

As used herein, unless otherwise indicated, the following terms shall have the meanings set forth below:

A. The terms "relate," "reference," "concern," "reflect," "include," and "including without litnitation," in whatever tense used, shall be construed as is

necessary in each case to make the request to produce inclusive rather than exclusive, and are intended to convey, as appropriate in context, the concepts of comprising, respecting, referring to, embodying, evidencing, connected with, commenting on, concerning, responding to, showing, refuting, describing, analyzing, reflecting, presenting, and consisting of, constituting, mentioning, defining, involving, explaining, or pertaining to in any way, expressly or impliedly, to the matter called for.

B. The words "and," "or," "any" and "all" shall be construed as is necessary in each case to make each request to produce inclusive rather than exclusive.

C. Terms in the plural include the singular and terms in the singular include the plural. Terms in the male include the female and terms in the female include the male. Neutral gender terms include all.

D. "Document" includes without litnitation, any written, printed, typed, photocopied, photographic, recorded or otherwise created or reproduced communication or representation, whether comprised of letters, words, numbers, pictures, sounds or symbols, or any combination thereof, in the form maintained, having access to, constructively possessed, physically possessed, and controlled. This definition includes copies or duplicates of documents contemporaneously or subsequently created that have any non-conforming notes or other markings, and drafts, preliminary versions, and revisions of such. It includes, without

limitation, correspondence, memoranda, notes, records, letters, envelopes, telegrams, faxes, messages, emails, voice mails, instant messenger services, studies, analyses, contracts, agreements, working papers, summaries, work papers, calendars, diaries, reports. It includes, without limitation, internal and external communications of any type. It includes without limitation documents in physical, electronic, audio, digital, video existence, and all data compilations from which the data sought can be obtained, including electronic and computer as well as by means of other storage systems, in the form maintained and in usable form.

E. "Communication" includes every means of transmitting, receiving or recording transmission or receipt of facts, information, opinion, data, or thoughts by one person, and between one and more persons, entities, or things.

APPENDIX K — EXCERPTS OF COMPLAINT, FILED SEPTEMBER 24, 2019

***

49. The following table illustrates how each provision of the District Attorney's subpoena (other than paragraph 1.a) precisely tracks the House Oversight Committee's subpoena.

House Oversight Committee	District Attorney
Unless otherwise noted, the time period covered by this subpoena includes calendar years 2011 through 2018.	1. For the period of January 1, 2011 to the present,
With respect to Donald J. Trump, Donald J. Trump Revocable Trust, the Trump Organization Inc., the Trump Organization LLC, the Trump Corporation, DJT Holdings LLC, the Trump Old Post Office LLC, the Trump Foundation, and any parent, subsidiary, affiliate, joint venture, predecessor, or successor of the foregoing:	with respect to Donald J. Trump, the Donald J. Trump Revocable Trust, the Trump Organization Inc., the Trump Organization LLC, the Trump Corporation, DJT Holdings LLC, DJT Holdings Managing Member LLC, Trump Acquisition LLC, Trump Acquisition, Corp., the Trump Old Post Office LLC, the Trump Foundation, and any related parents, subsidiaries, affiliates, joint ventures, predecessors, or successors (collectively, the "Trump Entities"):

Appendix K

House Oversight Committee	**District Attorney**
Unless otherwise noted, the time period covered by this subpoena includes calendar years 2011 through 2018.	1. For the period of January 1, 2011 to the present,
With respect to Donald J. Trump, Donald J. Trump Revocable Trust, the Trump Organization Inc., the Trump Organization LLC, the Trump Corporation, DJT Holdings LLC, the Trump Old Post Office LLC, the Trump Foundation, and any parent, subsidiary, affiliate, joint venture, predecessor, or successor of the foregoing:	with respect to Donald J. Trump, the Donald J. Trump Revocable Trust, the Trump Organization Inc., the Trump Organization LLC, the Trump Corporation, DJT Holdings LLC, DJT Holdings Managing Member LLC, Trump Acquisition LLC, Trump Acquisition, Corp., the Trump Old Post Office LLC, the Trump Foundation, and any related parents, subsidiaries, affiliates, joint ventures, predecessors, or successors (collectively, the "Trump Entities"): ***a. Tax returns and related schedules, in draft, as-filed, and amended form;***

Appendix K

1. All statements of financial condition, annual statements, periodic financial reports, and independent auditors' reports prepared, compiled, reviewed, or audited by Mazars USA LLP or its predecessor, WeiserMazars LLP;	b. Any and all statements of financial condition, annual statements, periodic financial reports, and independent auditors' reports prepared, compiled, reviewed, or audited by Mazars USA LLP or its predecessor, WeiserMazars LLP;
2. Without regard to time, all engagement agreements or contracts related to the preparation, compilation, review, or auditing of the documents described in Item Number 1;	c. Regardless of time period, any and all engagement agreements or contracts related to the preparation, compilation, review, or auditing of the documents described in items (a) and (b);
3. All underlying, supporting, or source documents and records used in the preparation, compilation, review, or auditing of documents described in Item Number 1, or any summaries of such documents and records relied upon, or any requests for such documents and records; and	d. All underlying, supporting, or source documents and records used in the preparation, compilation, review, or auditing of documents described in items (a) and (b), and any summaries of such documents and records; and

Appendix K

4. All memoranda, notes, and communications related to the preparation, compilation, review, or auditing of the documents described in Item Number 1, including, but not limited to:	e. All work papers, memoranda, notes, and communications related to the preparation, compilation, review, or auditing of the documents described in items (a) and (b), including, but not limited to,
a. all communications between Donald Bender and Donald J. Trump or any employee or representative of the Trump Organization; and	i. All communications between Donald Bender and any employee or representative of the Trump Entities as defined above; and
b. all communications related to potential concerns that records, documents, explanations, or other information, including significant judgments, provided by Donald J. Trump or other individuals from the Trump Organization, were incomplete, inaccurate, or otherwise unsatisfactory.	ii. All communications, whether internal or external, related to concerns about the completeness, accuracy, or authenticity of any records, documents, valuations, explanations, or other information provided by any employee or representative of the Trump Entities.

****

APPENDIX L — CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. art. I, § 3, cl. 7

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

U.S. Const. art II, § 1, cl. 1

The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected as follows

U.S. Const. art. II, § 2

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

U.S. Const. art. II, § 3

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Appendix L

U.S. Const. art. II, § 4

The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

U.S. Const. art. VI, cl. 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.