No. 19-635

IN THE

Supreme Court of the United States

DONALD J. TRUMP,

Petitioner,

v.

CYRUS R. VANCE, JR., IN HIS OFFICIAL CAPACITY AS DISTRICT ATTORNEY OF THE COUNTY OF NEW YORK, *et al.*,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether presidential immunity bars the enforcement of a state grand jury subpoena directing a third party to produce material which pertains to the President's unofficial and non-privileged conduct.

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INTRODUCTION

Petitioner's main argument for review is that when the President seeks a writ of certiorari asserting immunity, this Court should grant it. But the petition provides no compelling basis for this Court's intervention here.

Petitioner is correct that this Court has in the past granted review to decide important and unanswered questions of presidential immunity, including whether the President can be subject to a subpoena (yes), *United States v. Nixon*, 418 U.S. 683, 713 (1974), and whether the President can be sued while in office (yes), *Clinton v. Jones*, 520 U.S. 681, 684 (1997). But this case presents only a narrow question that is readily resolved by those very precedents: whether a state may issue a subpoena to a third party seeking financial records of the sitting President when those records are relevant to a secret grand jury investigation and have no relation to official actions taken by the President during his time in office. The court of appeals answered that question in the affirmative, and that answer is plainly correct under a straightforward application of this Court's precedent. The circumstances that counseled in favor of review in cases like *Nixon* and *Clinton*—the existence of a substantial open question regarding the contours of presidential immunity relevant to the public interest—simply do not exist here.

Indeed, there is no real *public* interest at stake here at all; this case instead involves Petitioner's *private* interest in seeking his own and others' immunity from an ordinary investigation of financial improprieties independent of official duties. That is

not the kind of interest that warrants this Court's intervention, particularly in the absence of any genuine controversy over the legal question presented.

The petition should be denied.

STATEMENT OF THE CASE

A. Factual Background

This case arises from an investigation commenced in 2018 by the New York County District Attorney's Office (the "Office"). The investigation concerns a variety of business transactions, and is based on information derived from public sources, confidential informants, and the grand jury process.[1] In connection with the investigation, the Office has issued subpoenas on behalf of a sitting grand jury for financial and other records of Petitioner, among many other individuals and entities.

The subpoenas seek records, dating from 2011 to the present, concerning transactions that are unrelated to any official acts of the President, and that occurred largely before Petitioner assumed office. The subpoenas do not identify Petitioner (or anyone else) as a "target" of the investigation, but were issued as a routine part of the grand jury's fact-gathering process. The grand jury has not indicted Petitioner, nor called for his detention, arrest, or prosecution.

1. During the course of the Office's investigation, there were multiple public reports of possible criminal

[1] A summary overview of the scope and foundation of the investigation is further detailed in the redacted portions of the Shinerock Declaration, filed under seal. C.A. Dkt. 101.

misconduct by employees of Petitioner's New York County-based Trump Organization. *See*, *e.g.*, David A. Fahrenthold & Jonathan O'Connell, *After Selling Off His Father's Properties, Trump Embraced Unorthodox Strategies To Expand His Empire*, WASH. POST, Oct. 8, 2018, https://wapo.st/35iWaId (reporting on possible financial misconduct at the Trump Organization dating back to at least 2005). The reports described transactions—spanning more than a decade—involving individual and corporate actors who were based in New York County, but whose conduct at times extended outside the County. The reports raised the prospect that criminal activity had occurred within the jurisdiction of the Office, and within the applicable statutes of limitations, particularly if the transactions involved a continuing pattern of conduct. One of the issues reported on related to "hush money" payments made on behalf of Petitioner to two women with whom Petitioner allegedly had extra-marital affairs.

In August 2018, Michael Cohen, Petitioner's longtime counselor, pleaded guilty in federal court to, among other things, federal campaign finance violations arising from the "hush money" payments to one of the women. *United States v. Cohen*, 366 F. Supp. 3d 612, 618 (S.D.N.Y. 2019). Mr. Cohen admitted that he violated campaign finance laws in coordination with, and at the direction of, an unindicted coconspirator he later identified as Petitioner. Tr. of Plea Hr'g at 23, *United States v. Cohen*, No. 18-cr-602 (S.D.N.Y. Aug. 21, 2018), ECF No. 7; *Hearing with Michael Cohen, Former Attorney to President Donald Trump: Hearing Before the H. Comm. on Oversight and Reform*, 116th Cong. 1, 11

(Feb. 27, 2019). Around that time, in response to a request from federal prosecutors, and in the interest of ensuring that the ongoing federal investigation was not unduly disrupted, the Office deferred its investigation pending the outcome of the federal matter.

Nearly a year later, on July 17, 2019, the Office learned for the first time that the federal investigation had concluded without any further federal charges. *See United States v. Cohen*, No. 18-cr-602, 2019 WL 3226988, at *2 (S.D.N.Y. July 17, 2019). Shortly thereafter, the Office resumed its investigation into potential violations of state law, including issues beyond those involved in the Cohen matter.

2. Once its investigation resumed, the Office, on behalf of the grand jury, began issuing subpoenas *duces tecum* for financial and other records, including financial statements and tax returns, and the working papers necessary to prepare—and test—those records.

On August 1, 2019, the Office served the Trump Organization with a subpoena (the "Trump Organization Subpoena"). That subpoena seeks records and communications relating to, among other transactions, the "hush money" payments made on behalf of Petitioner, 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. Shortly after service of the Trump Organization Subpoena, the Office conveyed to counsel for the Trump

Organization its belief that tax returns are responsive to the subpoena. The Trump Organization produced certain documents (not including tax returns) on August 15 and 29, September 13, October 4 and 31, and November 12 and 20.

On August 29, 2019, the Office served Petitioner's accounting firm, Mazars USA LLP ("Mazars"), with a subpoena (the "Mazars Subpoena") that was likewise issued on behalf of the grand jury. The Mazars Subpoena seeks financial and tax records of several individuals and entities, including Petitioner and entities owned by Petitioner before he became President, from January 1, 2011 to the present. The records sought by the Mazars Subpoena are not related to any official act of Petitioner in his capacity as President of the United States, nor does the subpoena require Petitioner himself to produce any records.[2]

On September 17, 2019, counsel for the Trump Organization requested a suspension of compliance with the Mazars Subpoena pending further negotiations or litigation. Although the Office declined to suspend the Mazars Subpoena indefinitely, on September 18, 2019, the Office agreed to suspend the tax-related portion of that subpoena for five days to allow counsel to challenge it.

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[2] The Mazars Subpoena was patterned in part on a subpoena already issued for some of the same records by the Committee on Oversight and Reform of the United States House of Representatives. This practice minimizes the burden on third parties and enables expeditious production of responsive documents.

B. Procedural History

1. On September 19, 2019, Petitioner (represented by private counsel) filed a civil lawsuit against Mazars and Respondent Vance in federal district court and simultaneously moved for emergency injunctive relief, asserting that the Constitution wholly exempts the President from any form of "criminal process" or "investigation," including a subpoena for records held by a third party that are unrelated to the President's official conduct.

Respondent opposed Petitioner's motion for emergency relief and cross-moved to dismiss, arguing that the court should abstain under *Younger v. Harris*, 401 U.S. 37 (1971); that Petitioner's sweeping claim of immunity is contrary to settled precedent, including *Nixon*; and that Petitioner had failed to establish irreparable harm.[3] Briefing and argument was highly expedited pursuant to an agreement between the parties, and the Office agreed to temporarily forbear enforcement of the Mazars Subpoena.

2. On October 2, 2019, one week after oral argument before the court, the Department of Justice (the "DOJ") filed a Statement of Interest, asserting that abstention was inappropriate but taking no position on Petitioner's preliminary injunction motion. On October 7, 2019, the district court issued its decision abstaining under *Younger* and, in the alternative, rejecting Petitioner's request for injunctive relief based on his claim of absolute immunity. Pet. App. 30a-95a.

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[3] Mazars took no position on the motion.

3. Minutes later, Petitioner appealed to the Second Circuit and moved to prevent the Office from enforcing the Mazars Subpoena while the appeal was pending. Respondent cross-moved for expedited briefing and argument, and the Second Circuit set a highly expedited schedule. The briefing included a submission by the DOJ as *amicus curiae*, which did not endorse Petitioner's claim of "temporary absolute immunity," but instead asserted that, under *Nixon*, a President can indeed be compelled to respond to a subpoena in a criminal case, so long as the prosecutor makes a "heightened and particularized showing of need."[4] The Second Circuit heard argument on October 23, 2019.[5]

On November 4, 2019, a Second Circuit panel unanimously affirmed the district court's decision that Petitioner is not entitled to injunctive relief. The court held 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." Pet. App. 15a. Emphasizing the narrow question presented—

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[4] The DOJ stated that Petitioner brought this litigation in his "individual capacity," disagreeing with Petitioner's assertion that he had brought it both in his personal capacity and in his capacity as President.

[5] After the Second Circuit imposed a brief administrative stay, the Office informed Petitioner that it would voluntarily forbear enforcement of the Mazars Subpoena pending any final determination by this Court, in exchange for Petitioner's agreement to expeditiously brief his petition for a writ of certiorari and to ask this Court to hear and decide the case this Term, should certiorari be granted.

namely, "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," Pet. App. 2a—the court held that Petitioner's claim of "temporary absolute presidential immunity" lacks any basis in "historical and legal precedent," Pet. App. 15a.

The court recognized "the long-settled proposition that 'the President is subject to judicial process in appropriate circumstances,'" pursuant to which "presidents have been ordered to give deposition testimony or provide materials in response to subpoenas." Pet. App. 15a-16a (citing *Clinton*, 520 U.S. at 703-05). "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.'" Pet. App. 16a (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 754 (1982)).

Examining this Court's precedent, the Second Circuit held that Petitioner had failed to explain "persuasively ... why, if executive privilege did not preclude enforcement of the subpoena issued in *Nixon*, the Mazars [S]ubpoena must be enjoined despite seeking no privileged information and bearing no relation to the President's performance of his official functions." Pet. App. 17a. "[T]hat Nixon was ordered to comply with a subpoena seeking documents for a trial proceeding on an indictment that named him as a conspirator," the court observed, "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." Pet. App. 22a.

The court explained that it was "not faced ... 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." Pet. App. 20a. The Mazars Subpoena "is directed not to the President, but to his accountants," *id.*, and "seek[s] no privileged information and bear[s] no relation to the President's performance of his official functions," Pet. App. 17a. Especially given these circumstances, the court held, Petitioner failed to "explain 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." Pet. App. 21a (internal quotation marks and alterations omitted).

At the same time, it would "exact a heavy toll on our criminal justice system to prohibit a state from even *investigating* potential crimes committed by [a President] for potential later prosecution, or by other persons ... simply because the proof of those alleged crimes involves the President." Pet. App. 23a-24a. The "'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," the court explained. Pet. App. 24a.

The Second Circuit saw "no obvious reason why a state could not begin to investigate a President during his term and, with the information secured during its

search, ultimately decide to prosecute him after he leaves office." Pet. App. 24a. It noted that memoranda from the DOJ's Office of Legal Counsel (the "OLC") cited by Petitioner "are directed almost exclusively to the question of whether the President may be *indicted*," an issue "that is not presented by this appeal," and observed that, in any event, one of those memoranda "explicitly approves of a grand jury continuing to gather evidence throughout the period of" any presidential immunity from indictment. Pet. App. 25a (internal quotation marks and alterations omitted).

Finally, the court rejected the DOJ's argument as *amicus curiae* that a heightened showing of need is required to subpoena documents relating to a President, determining that cases cited by DOJ in support of that argument address whether "a subpoena can demand the production of documents protected by executive privilege," which "has little bearing on a subpoena that, as here, does not seek any information subject to executive privilege." Pet. App. 27a. Accordingly, the court held, "any presidential immunity from state criminal process does not bar the enforcement" of a subpoena "demand[ing] 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." Pet. App. 28a.[6] The court,

[6] The court reversed the district court's *Younger* abstention ruling, reasoning that because a sitting President had invoked federal jurisdiction to press federal interests arising out of Article II and the Supremacy Clause, Petitioner's claims "are

construing the district court's decision as a denial of Petitioner's motion for a preliminary injunction, therefore affirmed that denial on the ground that Petitioner's immunity claim fails on the merits.[7] Pet. App. 2a.

REASONS FOR DENYING THE WRIT

Petitioner contends that certiorari is warranted because this case presents an important and unsettled question that the Second Circuit answered incorrectly. Petitioner is wrong on both points: resolution of this case follows directly from this Court's established precedent, and the Second Circuit correctly applied that precedent in rejecting Petitioner's sweeping theory of absolute presidential immunity. Whatever interests might counsel in favor of review where there are substantial, open questions regarding presidential immunity, they are not present here.

A. This Court's Intervention Is Unwarranted Because The Decision Below Correctly Resolved A Narrow Question Controlled By This Court's Precedents

The only question here is whether a third-party custodian of the President's financial records may be subpoenaed for those records when they are relevant to a secret grand jury investigation and completely

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more appropriately adjudicated in federal court." Pet. App. 13a. Respondent does not seek this Court's review of that ruling.

[7] Should this Court deny the petition, or affirm the decision of the Second Circuit, no further proceedings will be necessary beyond the district court's entry of final judgment for Respondent on the ground identified by the Second Circuit.

unrelated to any official action (and in fact were largely created before the President took office). The court of appeals answered that question in the affirmative by applying this Court's longstanding precedent, which makes clear that the President may be subject to a subpoena in a criminal proceeding under circumstances that implicate substantially greater interference with official functions than is true in the circumstances here.

Petitioner's response is an exercise in misdirection. He contends that a sitting President cannot be subject to criminal process of any kind because he cannot be indicted—a non sequitur that this Court rejected in *Nixon*. He argues that a President's records cannot be subpoenaed if the President is a subject of the investigation—another argument foreclosed by *Nixon*. He says that such a subpoena is particularly inappropriate when issued by a state or local prosecutor, rather than the federal government—a proposition that flips ordinary principles of federalism on their head. And he argues for a "heightened need" standard that applies only to claims of official privilege conspicuously absent from this case.

The court of appeals, in short, correctly resolved the narrow question presented here, and there is no basis for this Court's review.

1. *This Court's Precedents Establish That A President's Records May Be Subpoenaed In The Circumstances Here*

a. Under this Court's precedent, it is "settled that the President is subject to judicial process in

appropriate circumstances." *Clinton*, 520 U.S. at 703. More specifically, and of central importance here, this Court has long recognized that a sitting President may be subject to a subpoena in a criminal proceeding.

Chief Justice Marshall first considered the issue more than 200 years ago, while overseeing the trial of Aaron Burr. Faced with the question whether a subpoena *duces tecum* could be directed to President Jefferson, Chief Justice Marshall held, over objection: "That the president of the United States may be subpoenaed ... and required to produce any paper in his possession is not controverted." *United States v. Burr*, 25 F. Cas. 187, 191 (C.C. Va. 1807).

This Court in *Nixon* "unequivocally and emphatically endorsed Marshall's position." *Clinton*, 520 U.S. at 704 (citing *Nixon*, 418 U.S. 683). The Court held that the President was obligated to comply with a subpoena directing him to produce "tape recordings and documents relating to his conversations with aides and advisers"—*i.e.*, tapes created while he was in office, of conversations between himself and White House aides—for use in a criminal trial against several individuals who had "occupied either a position of responsibility on the White House staff or the Committee for the Re-election of the President." *Nixon*, 418 U.S. at 686, 687 n.3.

Nixon moved to quash the subpoena, asserting a "claim of absolute privilege." *Id.* at 705. In support of that assertion, Nixon cited the "need for protection of communications between high Government officials and those who advise and assist them in the

performance of their manifold duties," *id.*, and argued that separation-of-powers principles "insulate[] a President from a judicial subpoena in an ongoing criminal prosecution," *id.* at 706. This Court disagreed, holding 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.*[8]

In reaching that conclusion, the Court acknowledged the "need for confidentiality in the communications of [the President's] office" and "the public interest in candid, objective, and even blunt or harsh opinions in Presidential decision making." *Id.* at 712-13. But the President's need for confidentiality in his communications, the Court reasoned, was not the only important public interest at stake, and it must be evaluated "in light of our historic commitment to the rule of law" and "the twofold aim (of criminal justice) ... that guilt shall not escape or innocence suffer." *Id.* at 708-09 (internal quotation omitted). "The need to develop all relevant facts in

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[8] Petitioner strangely contends that *Nixon* "neither considered nor decided a claim of presidential immunity." Pet. 29. Yet that is exactly what this Court considered and rejected: an "unqualified Presidential privilege of immunity from judicial process." *Nixon*, 418 U.S. at 706; *cf. Nixon v. Sirica*, 487 F.2d 700, 708 (D.C. Cir. 1973) ("Counsel for the President contend on two grounds that Judge Sirica lacked jurisdiction to order submission of the tapes for inspection. *Counsel argue, first, that, so long as he remains in office, the President is absolutely immune from the compulsory process of a court*…." (emphasis added)).

the adversary system," the Court emphasized, "is both fundamental and comprehensive." *Id.* at 709. Barring enforcement of the subpoena would therefore "cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts." *Id.* at 712. Such an impediment to the fair administration of criminal justice could not be justified, the Court concluded, solely by "the generalized interest in confidentiality" of a President's communications. *Id.* at 713.

b. Denial of the petition here follows *a fortiori* from *Nixon*. As in *Nixon*, the Mazars Subpoena calls for production of documents for use in a criminal proceeding, and therefore implicates the "powerful interest," *Clinton*, 520 U.S. at 704 n.39, in the "full disclosure of all the facts," *Nixon*, 418 U.S. at 709. And the countervailing interests identified in *Nixon* that were insufficient to overcome this fundamental criminal-justice interest are even less weighty here, for at least three reasons.

First, unlike in *Nixon*, none of the materials sought by the Mazars Subpoena "implicate, in any way, the performance of [the President's] official duties." Pet. App. 18a. Rather, "[t]he 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." Pet. App. 17a-18a.

This Court's precedent draws a distinction between a President's official acts and acts as a private citizen in assessing matters of privilege and immunity. In *Nixon v. Fitzgerald*, the Court held that a former President "is entitled to absolute immunity from damages liability *predicated on his official acts*."

457 U.S. at 749 (emphasis added). But as this Court made clear in *Clinton*, the reasoning underlying that rule "provides no support for an immunity for *unofficial* conduct." 520 U.S. at 694. And even though the President's official acts carry substantially more weight than private ones, the Court in *Nixon*—which also recognized that a subpoena seeking recordings of conversations between the President and his aides directly implicates the sanctity of presidential communications—nevertheless held that the interest in fair and just criminal process outweighs this presidential interest. *Nixon*, 418 U.S. at 713.

It necessarily follows that a criminal subpoena that does *not* involve the President's official duties is likewise enforceable. After all, requiring production of documents relating entirely to the President's activities as a private citizen and having no relationship to his official duties poses no risk of tempering his official communications, nor does it threaten to render him unduly cautious in discharging his official duties. If the subpoena in *Nixon* was enforceable, the Mazars Subpoena must be as well.

Petitioner contends that the fact that the Mazars Subpoena "has no 'relation to the President's performance of his official functions' ... cannot be a relevant consideration," because if it was, it would mean that "a sitting President could be indicted, prosecuted, and imprisoned" for unofficial conduct. Pet. 30-31. Not so. For the reasons explained below, the questions whether a sitting President can be indicted, prosecuted, or imprisoned are wholly

distinct from whether the President can be the subject of an investigatory subpoena. *See infra* at 20-24. Petitioner's argument, moreover, is entirely non-responsive to *Nixon*: if the President can be subpoenaed even for communications related to official acts, then he can certainly also be subpoenaed for records unrelated to official conduct.

Second, the *Nixon* subpoena directed the President to produce documents that would be used in a criminal *trial*, which would be open to the public. *See* U.S. Const. amend. VI. Public disclosure of official communications clearly would have had a substantial impact on the President's interest in confidentiality. Here, not only are the records sought by the Mazars Subpoena unrelated to any official acts, but they will be directed to a state grand jury proceeding, the secrecy of which is mandated by New York state law. *See* N.Y. Crim. Proc. Law § 190.25(4)(a). Only if a prosecution is instituted and the records constitute evidence of the crimes charged would those records be offered in a public trial, and even then confidentiality concerns could be addressed through appropriate and routine court orders, for example to redact sensitive identifying information. *Cf. Nixon*, 418 U.S. at 714-16.

Petitioner asserts that the fact that this case involves a grand jury investigation, rather than a criminal trial, cuts *against* enforcement of the Mazars Subpoena, because "a trial triggers additional (and competing) constitutional rights held by the criminal defendant." Pet. 29. But Petitioner offers no plausible argument for why that matters. The truth-finding interests that compelled enforcement of the

subpoena in *Nixon* are just as weighty in a grand jury as they are in a trial. The whole purpose "of the grand jury is to inquire into all information that might possibly bear on its investigation." *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 297 (1991); *see Branzburg v. Hayes*, 408 U.S. 665, 688 (1972) ("[T]he longstanding principle that 'the public ... has a right to every man's evidence,' ... is particularly applicable to grand jury proceedings."). The fact that a criminal defendant (who is in immediate danger of being deprived of liberty) has more constitutional protections than the subject of a grand jury investigation (because he is in no such danger) does not somehow make a subpoena issued during a grand jury investigation more burdensome than one issued during trial. Disclosure of the Nixon tapes for introduction as evidence during a public trial obviously interfered far more with that presidency than disclosure to a secret grand jury would have.

Third, unlike the *Nixon* subpoena, which required the President himself to produce documents and recordings, the Mazars Subpoena "is directed not to the President, but to his accountants," and "compliance does not require the President to do anything at all." Pet. App. 20a. Therefore, whatever interest the President may have in avoiding the hassle of responding to criminal process—which, again, did not suffice to quash the subpoena in *Nixon*—is not implicated here.

Petitioner contends that enforcing the Mazars Subpoena will nonetheless "create a 'burden or distraction' that 'would rise to the level of interfering with'" the President's ability to fulfill his Article II

duties. Pet. 33 (quoting Pet. App. 21a). But simply asserting that judicial process will interfere with the President cannot be enough, since this Court has rejected the contention that subjecting a sitting President to judicial process necessarily "impose[s] an unacceptable burden on the President's time and energy, and thereby impair[s] the effective performance of his office." *Clinton*, 520 U.S. at 702. And whatever the theoretical burden on the President's Article II functions that the Mazars Subpoena might impose, that subpoena is substantially less burdensome than the *Nixon* subpoena for many of the reasons already discussed: the *Nixon* subpoena was directed at the President himself rather than a third party, and it involved recordings of communications with White House aides rather than financial records unrelated to any official duties. *See Nixon*, 418 U.S. at 712. There is no logic in enforcing the *Nixon* subpoena but quashing this one.

Indeed, the claimed burden implicated here is dwarfed by other judicial intrusions into the presidency that this Court has ratified. There is, of course, the *Nixon* subpoena, which was directed squarely at the President's private communications with his aides. And there is *Clinton*, in which the Court held that a sitting President is required to defend against civil litigation, including by providing sworn testimony. 520 U.S. at 691-92. To be sure, the Court made clear that trial courts should make every effort to "accommodate his busy schedule." *Id.* But the time and effort involved in preparing and sitting for a sworn deposition dwarfs the effort involved in responding to a document request. And it obviously

dwarfs the effort Petitioner would need to expend to respond to the document request here, since the subpoena is not even directed to him.

Petitioner contends that the court of appeals below wrongly "focus[ed] on whether *this* subpoena interferes with the President's execution of his duties under Article II," because, he says, "this Court always takes a categorical approach to presidential immunity." Pet. 26. To the contrary, this Court's leading presidential immunity decisions were resolved on the specific facts that they presented. *See Clinton*, 520 U.S. at 701-02; *Nixon*, 418 U.S. at 710-13; *Fitzgerald*, 457 U.S. at 756. And to whatever extent the presidency is burdened by this "category" of subpoenas—that is, subpoenas demanding "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," Pet. App. 28a—the burden plainly does not exceed the burden imposed by (i) subpoenas directed to the President himself for production of private Oval Office communications, or (ii) lawsuits brought by private parties.

2. *Petitioner's Contrary Arguments Are Meritless*

Petitioner offers three basic arguments for why this Court's precedents do not squarely resolve the narrow question at issue here. Each is wrong.

a. The Question Whether A President May Be Indicted Or Detained Is Irrelevant To The Issue Here

Petitioner's front-line attack on the decision below principally rests not on this Court's precedent, but on

three DOJ memoranda focused on presidential immunity from indictment and prosecution. That question is not presented here.

As their titles indicate (and the court of appeals correctly recognized), two of the memoranda cited by Petitioner consider whether a sitting President is immune from indictment or criminal prosecution. *See A Sitting President's Amenability to Indictment and Criminal Prosecution*, 24 Op. O.L.C. 222 (2000) ("Moss Memo"); 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 third memorandum, filed by the Solicitor General in litigation concerning a grand jury investigation of Vice President Spiro Agnew, "brought up the President's immunity only for the sake of contrast" in arguing *against* the Vice President's immunity claim. Pet. App. 25a n.17; *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. 73-965 (D. Md.) ("Bork Memo"). And even then, the Bork Memo, in at least some instances, specifically referred to the President's immunity "from indictment and trial," aligning it with the DOJ memoranda. Bork Memo at 20.

Whatever the merits of the analysis in the DOJ memoranda, the question on which they focus—whether a sitting President is absolutely immune from indictment and trial—is irrelevant to the narrow question "whether a state may lawfully demand production by a third party of [a sitting] President's

personal financial records for use in a grand jury investigation." Pet. App. 28a. And neither the DOJ memoranda nor any judicial authority supports Petitioner's claim of absolute immunity from mere investigation.

Indeed, one of the memoranda on which Petitioner relies cuts directly against his position as to the question actually presented here. The Moss Memo specifically contemplates that "[a] grand jury could continue to gather evidence throughout" any period of Presidential immunity from indictment and prosecution, mitigating concerns about the potential loss of evidence. Moss Memo at 257 n.36. That conclusion makes perfect sense, as all agree that a President may be indicted and prosecuted *after* leaving office, and delaying investigation for a period of up to eight years would obviously frustrate prosecutors' ability to preserve evidence and build a case.

Petitioner nevertheless maintains not only that a sitting President is immune from prosecution and trial, but that this also means he is immune from grand jury investigation (or any other criminal process). Pet. 22.[9] But that proposition is facially

[9] Even the arguments on the broader question whether a sitting President is absolutely immune from criminal prosecution or indictment are not as straightforward as Petitioner suggests. According to Petitioner, the Constitution's Impeachment Judgment Clause, U.S. Const. art. I, § 3, cl. 7, makes clear that a President cannot be indicted or convicted before he is impeached. Pet. 20. But the very DOJ memoranda on which he relies considered that argument and concluded "that the plain terms of the Clause ... do not, by themselves, preclude the

irreconcilable with *Nixon*. *Nixon* held that the President could be required to produce confidential communications from his time in office. 418 U.S. at 703, 713. Yet at the same time, the Court expressly declined to address the question whether the grand jury acted within its authority in naming the President as an unindicted coconspirator, concluding that resolution of that issue was "unnecessary to resolution of the question whether the claim of privilege [in resisting the subpoena] is to prevail." *Id.* at 687 n.2. That necessarily means that the subpoena question is distinct from the indictment question—it did not matter to the *Nixon* Court whether the President could be named as an unindicted coconspirator, because he could be issued a subpoena either way.

Petitioner relies on a single judge's opinion in *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973), to argue that if a sitting President may not be indicted or tried, he must also be immune from grand jury subpoenas. Pet. 22 (citing *Sirica*, 487 F.2d at 757 (MacKinnon, J., concurring in part and dissenting in part)). But the *Sirica* majority forecloses Petitioner's

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criminal prosecution of a sitting President." Moss Memo at 223 (citing Dixon Memo at 7).

Petitioner also cites various writings of the Framers, which he contends show that the Framers uniformly believed that a sitting President could not be subject to criminal indictment or prosecution. Pet. 21-22. Yet this Court considered the same historical evidence in *Clinton* and, after surveying conflicting statements from other Framers, concluded that the historical sources do not provide a definitive answer, and in fact "largely cancel each other" out. 520 U.S. at 696-97 (internal quotation and citation omitted).

theory. The majority concluded that a subpoena directed at President Nixon as part of a criminal proceeding was enforceable. And in reaching that conclusion, the majority saw "no need to explore" the question whether "impeachability precludes criminal prosecution of an incumbent" because the subpoena there—like the Mazars Subpoena—did not "compete with the impeachment device by working a constructive removal of the President from office." *Sirica*, 487 F.2d at 711.

Every relevant precedent, in other words, makes clear that the President can be the subject of a subpoena *regardless* of whether he can be indicted or tried. The Court may one day be forced to confront the question of presidential immunity from indictment and prosecution, but the answer to that question has no bearing on the resolution of Petitioner's claim in this case.[10]

b. That The President May Be Among Several Potential Subjects Of The Grand Jury's Investigation Does Not Distinguish *Nixon*

Petitioner's effort to distinguish *Nixon* relies heavily on the assertion that "the President was not himself a target" in that case. Pet. 28. That contention understates the extent to which the

[10] It bears noting that, as a practical matter under New York law, an individual who becomes aware of a grand jury proceeding involving himself or herself—as here—upon notice to the prosecutor, has a right to testify before prosecutors ask the grand jurors to weigh any criminal charges. N.Y. Crim. Proc. Law § 190.50(5)(a). Here, this right has the practical effect of ensuring that Petitioner could interpose any objections to, or assert any rights against, a potential indictment.

President was personally implicated in *Nixon* and overstates the extent to which the President himself is the central focus of the grand jury investigation here.

As an initial matter, it is simply not true that the President was not a subject of the grand jury investigation in *Nixon*. There is no question that the grand jury had named Nixon "as an unindicted coconspirator" in the proceeding for which his records were sought. *Nixon*, 418 U.S. at 687; *see also* Reply Brief for the United States at 4, 7, *Nixon*, 418 U.S. 683 ("During the course of [the *Nixon* grand jury's] investigation, it received a considerable amount of information concerning the President's role in the alleged conspiracy," and so decided to "record[] ... its determination of the identity of each of the known co-conspirators, including 'Richard M. Nixon.'"). And the subpoenaed tapes recorded potentially unlawful conversations the individuals targeted for criminal prosecution had *with the President*. *Nixon*, 418 U.S. at 686. Nixon's conduct, then, was plainly within the scope of the grand jury's investigation, and it defies credulity to suggest that those proceedings did not expose the President to the "serious stigma" associated with a "public ... allegation of wrongdoing." Pet. 28. Yet the Court nonetheless held that the subpoena was enforceable.

Petitioner's assertion that the Mazars Subpoena imposes some kind of "stigma" on the President is in any event overblown. As the Second Circuit observed, "[t]he President has not been charged with a crime," and "[t]he 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." Pet. App. 22a. (Again, Petitioner has not been named as a target.) Certainly, a grand jury investigation does not impose a "stigma" greater than that imposed by (i) a trial subpoena for potentially criminal communications between the President and his associates regarding official functions, or (ii) civil lawsuits directly alleging that the President has engaged in wrongdoing.

Finally, it warrants mention that the Office's investigation extends beyond Petitioner. Thus, Petitioner's position would preclude subpoenas for documents relevant to investigations of parties *other than* the President just because the President could, in theory, also be implicated in wrongdoing. This Court rejected exactly that perverse result in *Nixon*, and there is no reason to revisit that decision here.

c. That The Subpoena Was Issued By A State Rather Than Federal Grand Jury Only Confirms Its Propriety

Petitioner also attempts to distinguish *Nixon* and *Clinton* on the ground that those cases concerned *federal* judicial process against the President, whereas this case involves a state's judicial process. But that distinction does not materially alter the immunity analysis here. If anything, ordinary principles of federalism make this an easier case.

According to Petitioner, subjecting the President to state judicial process runs afoul of the Supremacy Clause. Pet. 23. In Petitioner's view, when a state issues a subpoena for the President's documents, it exercises control over the President—the individual

responsible for faithfully executing federal law—and thus it effectively subordinates federal law to state law, in violation of the Supremacy Clause's pronouncement that federal law is "the supreme Law of the Land." U.S. Const. Art. VI, cl. 2. That argument makes no sense—requesting documents from the President that have no bearing on his official acts does not in any respect subordinate federal *law* to state law. Whatever concerns might exist if a state sought to subpoena the President for documents related to the exercise of his public duties are not implicated here, as the Mazars Subpoena does nothing of the sort.[11]

In any event, Petitioner's argument rests on a false premise, because the Mazars Subpoena does not attempt to exercise any control over the President at all—it has not "ordered the President to do or produce anything." Pet. App. 21a. The subpoena is directed

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[11] That distinguishes this case from *United States v. McLeod*, 385 F.2d 734 (5th Cir. 1967), on which Petitioner heavily relies. Pet. 23-24, 27. *McLeod*, unlike this case, involved state investigations into the official operations of a federal government agency. 385 F.2d at 751 (state grand jury investigating DOJ funding of Dr. Martin Luther King Jr.'s transportation).

M'Clung v. Silliman, 19 U.S. 598 (1821), and *North Dakota v. United States*, 495 U.S. 423 (1986), are even further afield. *See* Pet. 24. *M'Clung*, like *McLeod*, dealt with official conduct: specifically, whether a state court could compel a federal government officer to discharge his official duties in a particular way. 19 U.S. at 604-05. And in *North Dakota*, this Court considered the validity not of a state investigation, but of a state regulation. 495 U.S. at 435.

at a third party whose compliance will in no way implicate the balance of federal and state power. Therefore, even if a subpoena for private documents could count as "direct control by a state court over the President" that may potentially "implicate concerns" under the Supremacy Clause, *Clinton*, 520 U.S. at 691 n.13, no such concerns are raised here. And if the concern is that courts should be especially wary of allowing state courts to burden the federal executive, that concern is simply not implicated in this case.[12]

Petitioner also warns of "the practical threat" that enforcement of the Mazars Subpoena would pose, asserting that "[s]tate 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." Pet. 25. But that is exactly the same argument President Clinton made: if denied immunity, he contended, the President would be the target of politically motivated, harassing, and frivolous litigation. *Clinton*, 520 U.S. at 708. Yet this Court declined to simply accept that assertion, instead considering whether history demonstrates that there is a serious risk of such vexatious litigation and concluding that it did not. *Id.*

Here, as in *Clinton*, history affords no support for Petitioner's speculative predictions. Indeed, history suggests that the risk of vexatious litigation here is substantially lower than in *Clinton*, because

[12] Notably, the records sought by the Mazars Subpoena have already been provided to state and federal agencies with their own confidentiality obligations, and there has been no claimed harm to the presidency as a result.

government officials—and not private citizens—are charged with enforcing criminal law. *See Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 386 (2004) ("The decision to prosecute a criminal case," in contrast to a civil case, "is made by a publicly accountable prosecutor subject to budgetary considerations and under an ethical obligation, not only to win and zealously to advocate for his client but also to serve the cause of justice."). And as government officials, local prosecutors are entitled to a "presumption of regularity," meaning that "in the absence of clear evidence to the contrary, courts presume that [prosecutors] have properly discharged their official duties." *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (internal citation and quotation omitted); *see also Cheney*, 542 U.S. at 386 ("The rigors of the penal system are also mitigated by the responsible exercise of prosecutorial discretion.").

Moreover, as this Court noted in *Clinton*, even if vexatious litigation does occur, our constitutional system is equipped to stop it. State courts, like federal courts, have tools to protect the President from being harassed by unnecessary subpoenas. *United States v. Burr*, 25 F. Cas. 30, 34 (C.C. Va. 1807) ("The guard, furnished to this high officer, 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."); *cf. Clinton*, 520 U.S. at 708-09 (noting that courts, through sanctions and scheduling, can "accommodate the President's needs" and give "the utmost deference to Presidential responsibilities" (internal citations omitted)). Indeed, the Constitution originally deemed state courts the appropriate fora to

adjudicate federal constitutional claims, with this Court as a backstop to review and reverse any abuses of federal rights. *See Lockerty v. Phillips*, 319 U.S. 182, 187 (1943). So state courts are fully capable of enforcing principles of presidential immunity, and any harassing subpoena that nonetheless somehow passes muster in state courts would ultimately be subject to review by this Court.[13] And in the end, "if Congress deems it appropriate to afford the President stronger protection, it may respond with appropriate legislation." *Clinton*, 520 U.S. at 709.

Indeed, if anything, the federalism concerns implicated by this case counsel in favor of—not against—enforcing the Mazars Subpoena. As this Court has recently reiterated, our constitutional system is one of "dual sovereignty" in which "both the Federal government and the States wield sovereign powers." *Gamble v. United States*, 139 S. Ct. 1960, 1968 (2019) (internal quotation omitted). The federal government's sovereign powers are limited and expressly delineated in the Constitution, while the remaining powers are reserved to the states or the people. *See* U.S. Const. amend. X. Most relevant here, the system "reserve[es] a generalized police power to the States," in recognition of the states' unique interest in prosecuting crimes within their borders. *United States v. Morrison*, 529 U.S. 598, 618

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[13] Even if state courts could not adequately enforce these principles, the Second Circuit's ruling on *Younger*, which the Office has not asked this Court to review, allows for federal court supervision of any such litigation and thus installs additional safeguards against any threat of vexatious or harassing local prosecutors.

n.8 (2000). Proper respect for this deliberate reservation of power means that the states' strong interests in operating a fair and just criminal judicial process should be respected no less than the federal government's parallel interests recognized in *Nixon*.

d. There Is No Basis For Applying A Heightened Need Standard In The Circumstances Here

Next, and for the first time, Petitioner adopts the DOJ's position as *amicus curiae* below that, if absolute immunity does not apply, a grand jury subpoena for non-official records of the President is subject to a "heightened need" standard derived from *Nixon* and later applied in *In re Sealed Case*, 121 F.3d 729, 756 (D.C. Cir. 1997). Petitioner argues that under those cases, the "evidence sought must be directly relevant to the issues that are expected to be central" and "not available with due diligence elsewhere." Pet. 34.

The heightened standard Petitioner invokes, however, applies only in response to an assertion of executive privilege over materials that "reflect presidential decisionmaking and deliberations." *In re Sealed Case*, 121 F.3d at 744; *cf. R. Enterprises*, 498 U.S. at 299 (noting that "application of the *Nixon* test in [the grand jury] context ignores that grand jury proceedings are subject to strict secrecy requirements" (internal citation omitted)).[14] Here, it

[14] The heightened standard is at most a particular application of the standards applicable to *all* federal subpoenas issued under Federal Rule of Criminal Procedure 17(c). *Sealed Case*, 121 F.3d at 754; *see* Pet. App. 27a (noting that this Court has held that *Nixon* applied "the same 'exacting standards'

is undisputed that the records sought are neither presidential communications nor in any way related to the President's official conduct. *See R. Enterprises*, 498 U.S. at 299 ("Requiring the Government to explain in too much detail the particular reasons underlying a subpoena threatens to compromise the indispensable secrecy of grand jury proceedings."). It follows that there is no presumptive privilege over the records, and therefore neither *Sealed Case* nor this Court's precedent provide a basis to require a heightened showing of need for the records.[15]

In short, the Second Circuit applied the correct standard, and reached the correct result under this Court's precedent. There is no basis for this Court's review of that decision.

B. There Are No Additional Considerations That Counsel In Favor Of This Court's Review

Petitioner suggests that the importance of the question presented warrants review independent of

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applicable to all criminal subpoenas" (quoting *Cheney*, 542 U.S. at 386)). By its own terms, *Sealed Case* only went beyond the requirements of Rule 17(c) with respect to information over which there was an assertion of presidential privilege. *Sealed Case*, 121 F.3d at 754.

[15] There is accordingly no need to grant Petitioner's request for further delay and remand on the question of "heightened need," Pet. 36 n.3, particularly because Petitioner has challenged neither the scope nor the substance of the subpoena and failed to raise the issue below. Once Petitioner's claim of absolute immunity is resolved, there is nothing more to review below.

the merits of the Second Circuit's decision. It does not.

This Court has granted certiorari in cases like *Nixon*, *Fitzgerald*, and *Clinton* to answer broad and important questions concerning presidential immunity. But the fact that the President has an interest in the validity of the Mazars Subpoena does not mean that this case presents a question of substantial importance to the presidency. After all, the grand jury here is performing a garden-variety investigation of purely private conduct. This case does not involve a state's investigation of the President's exercise of his Article II duties. It does not involve a subpoena for documents related to the President's (or anyone else's) official conduct. It does not involve a request for disclosure of privileged communications. And it does not even involve criminal process directed at the President himself. It would be one thing if the validity of a subpoena in these circumstances were an open question. But for the reasons explained in the previous Section, it is not.

Thus, the only real interest implicated here is Petitioner's private interest in avoiding a valid investigation into private conduct unconnected to the presidency. That is not the type of interest that warrants this Court's review, particularly when there is no real controversy over the answer to the legal question presented.[16]

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[16] Contrary to Petitioner's suggestion, this Court frequently denies certiorari in cases involving assertions of government

C. This Court Should Expeditiously Resolve The Petition For Certiorari And, If Necessary, The Merits Of This Dispute

Expeditious resolution of the petition for certiorari, and if necessary, the merits of this dispute, is essential to avoid further disruption of the grand jury's ongoing investigation.

The Mazars Subpoena was issued by a grand jury in an ongoing criminal investigation, and its enforcement is essential for the grand jury to complete its work. Given the dates of many of the transactions at issue in the investigation, applicable statutes of limitations could expire in a matter of months. Each day that compliance with the Mazars Subpoena is delayed increases the likelihood that—as a result of this lawsuit—criminal conduct may go unpunished, giving Petitioner a *de facto* victory on the merits of his sweeping immunity claim and giving other individuals under investigation similar immunity from prosecution. Delay may also cause physical evidence to be lost, memories to fade, or witnesses to disappear—an outcome that would not

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privilege that were designed to protect the President. *See, e.g.*, *Office of the President v. Office of the Indep. Counsel*, 525 U.S. 996 (1998) (case involving extent to which communications of White House Counsel are privileged against disclosure to a federal grand jury); *Office of President v. Office of Indep. Counsel*, 521 U.S. 1105 (1997) (case involving grand jury subpoena of allegedly privileged documents created in meetings between White House Counsel and First Lady); *Rubin v. United States*, 525 U.S. 990 (1998) (case addressing whether federal law recognizes a privilege that would permit a Secret Service agent protecting the President to refuse to testify unless he saw or heard conduct or statements that were clearly criminal).

only undermine the Office's duty to enforce New York's criminal laws, but could also work to the detriment of those who may be charged in any indictment returned by the grand jury and might wish to use this evidence in their defense. *See, e.g.*, *Toussie v. United States*, 397 U.S. 112, 114-15 (1970) (statutes of limitations are "designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time"); *see also Nixon*, 418 U.S. at 711 (rejecting claim of presidential privilege to vindicate criminal defendants' Sixth Amendment rights).

Although, as Petitioner notes, there are other cases currently pending in which Petitioner has sought to prevent the enforcement of subpoenas regarding his financial records (including tax returns), those cases should not delay resolution of this petition because they present different questions than that presented here. *Trump v. Mazars USA, LLP*, No. 19-5142 (D.C. Cir.), in which the D.C. Circuit recently denied a petition for rehearing *en banc*, raises three questions regarding the exercise of congressional authority and separation of powers, none of which is relevant to the Office's issuance of a subpoena to a third party regarding conduct unrelated to the President's official duties that indisputably lies within the Office's law enforcement jurisdiction. And in *Committee on Ways & Means v. U.S. Department of Treasury*, No. 19-cv-1974 (D.D.C. Sept. 6, 2019), Petitioner contends that the district court lacks jurisdiction to adjudicate a congressional committee's lawsuit to compel production of information from the executive branch and should

abstain from doing so. *See* No. 19-cv-1974 (D.D.C. Sept. 6, 2019) (Dkt. 44) (Defendants' and Defendant-Intervenors' Motion to Dismiss). Resolution of those questions will in no way impact the Court's consideration of the petition here, which raises an entirely distinct, narrow, and easily answered question. Whatever the Court thinks about the certworthiness of the questions raised in these other cases, this petition should be denied.

CONCLUSION

Petitioner's assertion of absolute presidential immunity is foreclosed by this Court's precedent, which conclusively establishes that "[n]o [person] in this country is so high that he is above the law." *United States v. Lee*, 106 U.S. 196, 220 (1882); *see also Nixon*, 418 U.S. at 715; *Clinton*, 520 U.S. at 697. The petition for a writ of certiorari should be denied.

Respectfully Submitted,

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