No. _____

In the Supreme Court of the United States

DONALD J. TRUMP, President of the United States,

Applicant,

v.

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

Respondents.

On Application for Stay

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

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

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

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

Counsel for President Donald J. Trump

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 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. 20-2766 (2d Cir.) – Judgment entered October 7, 2020;

2. *Trump v. Vance*, No. 19-cv-8694 (S.D.N.Y.) – Judgment entered August 20, 2020.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

To the Honorable Stephen G. Breyer, Associate Justice of the Supreme Court of the United States and Acting Circuit Justice for the Second Circuit:

Pursuant to Supreme Court Rule 23, 28 U.S.C. §2101(f), and the All Writs Act, President Donald J. Trump respectfully applies for a stay pending the disposition of a petition for writ of certiorari. The Court unanimously remanded this case to the district court so "the President may raise further arguments as appropriate." *Trump v. Vance*, 140 S. Ct. 2412, 2431 (2020). Those arguments include the two the President raised in a second amended complaint: the Mazars subpoena is an overbroad "fishing expedition[]" and was issued "in bad faith" to harass him. *Id.* at 2428. The Court anticipated that these claims would get "particularly meticulous" review. *Id.* at 2430. That is partially because a subpoena "directed to a President," *id.*, implicates "Article II requirements, not just statutory or state-law requirements," *id.* at 2433 n.2 (Kavanaugh, J., concurring in the judgment). But it is also because there is concern that *this* subpoena, which makes sweeping demands and is copied from Congress, crosses the line—even were it aimed at "some other citizen" instead of the President. *Id.* at 2429 (majority op.); *see id.* at 2449 (Alito, J., dissenting).

The remand process, therefore, ought to have been relatively straightforward. The factual predicate for the President's claims is uncomplicated. He alleges that the grand jury's investigation is about certain payments made by Michael Cohen in 2016, and that the District Attorney copied a congressional subpoena for "efficiency"—not because the grand jury needed every category of records that Congress sought. On those facts, the President challenges the subpoena as overbroad and lacking a good-faith basis. These claims are, by nature, intensely factual.

Thus, to resolve them, the district court should have fashioned a summary-judgment process that would have largely mirrored a motion-to-quash proceeding. That would have afforded the President the opportunity to develop a limited record, would have allowed the district court to resolve any sensitive matters through in-camera review, and would have ensured that the first state subpoena for the records of a sitting President is "properly tailored," *Vance*, 140 S. Ct. at 2426, and was not issued "out of malice or an intent to harass," *id.* at 2428. That is not just an efficient way to adjudicate this dispute. It's the *only* lawful way to do so. *See id.* at 2433 (Kavanaugh, J., concurring in the judgment); *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 301 (1991).

None of that happened. One day after this Court issued its decision, and before the judgment had issued, the district court ordered the President to indicate "whether further proceedings will be necessary in light of the dispositions by the Courts above," even though it was clear the President would be pressing additional claims. *Vance*, 140 S. Ct. at 2431 n.6; *id.* at 2439 (Thomas, J., dissenting). Then, in rapid succession, the District Attorney sought dismissal for failure to state a claim, the district court granted the motion in a 103-page opinion, and a stay pending appeal was denied. From the district court's perspective, it shouldn't have had to "devote considerable judicial resources to consider again a fact pattern" that it "had substantially addressed" in the prior preliminary-injunction proceeding concerning the President's immunity defense. Appendix ("App.") 9. As the district court saw it, the President's new claims were seeking "absolute immunity through a back door," App. 12, "[j]ustice

requires an end to this controversy," App. 102, and there's "no sign that the Supreme Court contemplated any further appellate proceedings," App. 109.

The Second Circuit affirmed. In so doing, however, the court of appeals not only ignored how the district court stacked the deck against the President. But it also broke every rule and precedent applicable to the motion-to-dismiss stage. It had to. As the court recognized, if the facts alleged by the President are accepted as true—especially his allegations that the investigation is focused on the Cohen payments and that the subpoena was copied from Congress for reasons of efficiency—then he has stated claims of overbreadth and bad faith. A demand for virtually every financial record of a global corporation and its owner is of course *plausibly* overbroad if the grand jury is focused on certain payments made in 2016. Likewise, the subpoena was *plausibly* issued in bad faith if the District Attorney copied a congressional subpoena with no good-faith effort to properly tailor it to his investigative needs. But even if the President's allegations about the scope of the grand jury's investigation could be rejected at this stage, the President still plausibly alleges overbreadth and bad faith, given the subpoena's limitless reach and the District Attorney's shifting rationales for issuing it.

To hold otherwise, the Second Circuit drew inferences against the President, incorrectly subjected nonconclusory factual allegations to a plausibility inquiry that applies only to the legal claims themselves, relied on assertions made in the motion to dismiss to resolve factual disputes at the pleading stage, gave the District Attorney the benefit of the doubt at every turn, imposed a heightened pleading standard under the guise of a "presumption of validity," and made the President shoulder the heavy

burden of negating every speculative inference that might conceivably justify issuing a broad subpoena copied from Congress.

Accordingly, the Court is likely to grant review and reverse the decision below. The Court has summarily reversed lower-court decisions that so sharply depart from the federal pleading rules, and would be justified in taking that step here. The Second Circuit's ruling not only contradicts this Court's precedent. It conflicts with *every* lower-court decision interpreting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Allowing this deeply flawed ruling to stand, especially given the prominence of this case, will needlessly sow confusion where none presently exists. The decision is indisputably wrong.

Interim relief is also warranted given the irreparable harm the President will suffer without a stay. Even if the disclosure of his papers is limited to prosecutors and grand jurors, the status quo can never be restored once confidentiality is destroyed. *See Church of Scientology of Calif. v. United States*, 506 U.S. 9, 12 (1992). But the harm will be more than irreparable if the records are publicly disclosed. It will be case-mooting—the strongest possible basis for a stay. That doesn't mean there will be leaks from the grand jury. There are lawful ways the District Attorney can release the President's papers (including in response to a third-party subpoena) before the President has the chance to seek further review.

In sum, the Court doesn't "proceed against the president as against an ordinary individual" and extends him the "high degree of respect due the President of the United States." *United States v. Nixon*, 418 U.S. 683, 708, 715 (1974). The President should have a fair chance to develop his serious overbreadth and bad-faith claims

before his records are disclosed. The Court should preserve the status quo in order to afford the President that opportunity.

OPINIONS BELOW

The district court's opinion dismissing the suit is reported at *Trump v. Vance*, --- F. Supp. 3d ---, 2020 WL 4861980 (S.D.N.Y. August 20, 2020), and is reproduced at Appendix (App.) 1-103. The district court's order denying a motion for stay pending appeal is reported at *Trump v. Vance*, --- F. Supp. 3d ---, 2020 WL 4914390 (S.D.N.Y. August 21, 2020), and is reproduced at App. 104-112. The Second Circuit's order denying an administrative stay is available at *Trump v. Vance*, 2020 WL 4929377 (2d Cir. August 21, 2020), and is reproduced at App. 113. The Second Circuit's order granting a stay pending appeal is unreported and is reproduced at App. 114. The Second Circuit's opinion affirming the district court's judgment is reported at *Trump v. Vance*, --- F.3d ---, 2020 WL 5924199 (2d Cir. October 7, 2020), and is reproduced at App. 115-149.

JURISDICTION

The Court has jurisdiction over this application under 28 U.S.C. §§1254(1), 1651(a), and 2101(f).

STATEMENT OF THE CASE

A. Factual Background

In the summer of 2018, the New York County District Attorney's Office began investigating certain payments made by Michael Cohen in 2016, for which he was reimbursed by the Trump Organization. App. 152. According to a press report, the focus of the District Attorney's investigation is whether the Trump Organization violated New York law by falsely recording those reimbursements as legal expenses.

App. 152. In August 2019, as part of that investigation, the District Attorney issued a grand-jury subpoena to the Trump Organization. App. 152. That subpoena only sought records about the Cohen payments. App. 152-53. In response, the Trump Organization opened a dialogue with the District Attorney and produced hundreds of responsive documents. App. 153.

That amicable process broke down when the District Attorney, relying on an implausibly broad reading of the subpoena, demanded the President's tax returns. App. 153-54. But instead of issuing a new subpoena for the returns to the Trump Organization (or the President), the District Attorney immediately obtained a new grand-jury subpoena directed to the President's accountant, Mazars USA, LLP—a neutral third-party custodian who held the President's records but had no incentive to resist the District Attorney's demands. App. 154. The Mazars subpoena issued on August 29, 2018. App. 154.

It is no secret that gaining access to the President's financial records—and his tax returns specifically—has long been a subject of intense political interest. App. 157. After the Democratic Party gained control of the U.S. House of Representatives, the House Ways and Means Committee issued a subpoena for the President's tax returns. App. 155. And the House Oversight Committee issued a sweeping subpoena to Mazars for other financial records of the President. App. 155. According to the Oversight Committee, it subpoenaed these records in aid of federal legislation about, *inter alia*, international relations, possible influences on the Executive Branch, reform of federal ethics laws, and federal-lease management. App. 159-61.

The District Attorney's subpoena to Mazars copies the Oversight Committee's virtually word for word, the only material difference being that the District Attorney supplemented his subpoena with a demand for tax returns (mirroring the Ways and Means Committee's subpoena). App. 155-56. But the District Attorney has no jurisdiction over the federal topics that the Oversight Committee purports to be investigating. App. 159-61. Indeed, he has denied that his investigation has the same scope as that Committee's. App. 157. Instead, the District Attorney has stated that he copied the congressional subpoena because it would be more efficient for Mazars to produce the same documents for both requests. App. 156. The result is a sweeping subpoena to Mazars for all financial papers "related to every facet of the business and financial affairs of the President and numerous associated entities" reaching back nearly a decade. App. 158.

B. Procedural History

On September 19, 2019, the President filed this suit challenging the Mazars subpoena and sought a preliminary injunction. App. 162. After extensive litigation, this Court held that the President was not categorically immune from state grand-jury subpoenas or entitled to a heightened showing of need. *See Vance*, 140 S. Ct. at 2425-31. At the same time, the Court unanimously agreed that the case should "be returned to the District Court, where the President may raise further arguments as appropriate." *Id.* at 2431; *see also id.* at 2431 (Kavanaugh, J., concurring in the judgment). The arguments available to the President on remand included, among others, that the subpoena is an "arbitrary fishing expedition[]" and that it had been issued in "bad faith." *Id.* at 2428 (majority op.) (cleaned up).

On July 10, 2020—they day after this Court issued its decision—the Second Circuit took the unusual step of immediately remanding the case to the district court without waiting for this Court to issue judgment. *See* D.Ct. Doc. 46. On that very same day, the district court ordered the parties to jointly inform it "whether further proceedings will be necessary in light of the dispositions by the Courts above" and to "outline potential areas for further argument." D.Ct. Doc. 47 at 1. Those actions raised concerns about the jurisdiction of both the Second Circuit and the district court. *See Hermann v. Brownell*, 274 F.2d 842, 843 (9th Cir. 1960). Consistent with his willingness to proceed on a highly expedited schedule at every step of this case, and to resolve this jurisdictional problem, the President did not object to the District Attorney's motion to expedite this Court's judgment. The Court granted that motion "in light of" the President's "consent." *Vance v. Trump*, No. 19-635, 2020 WL 4033094, at *1 (U.S. July 17, 2020).

On remand, the parties agreed that "the President should have an opportunity to advance additional 'appropriate' claims … consistent with the Supreme Court's opinion." D.Ct. Doc. 52 at 6. The proper way to do that, the District Attorney urged, was for the President to "file an amended pleading that can survive a motion to dismiss." *Id.* at 8. The President agreed to this process, and the District Attorney agreed to "forbear on enforcing the Mazars subpoena through and including seven calendar days after the date of a decision by [the district court] on the earliest motion filed by any party under Rule 12 or Rule 56 of the Federal Rules of Civil Procedure." *Id.* at 10.

The President filed his Second Amended Complaint (SAC), the now-operative pleading, and alleged that the subpoena is overbroad and was issued in bad faith. App. 164. The District Attorney moved to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). On August 20, 2020, the district court issued a 103-page decision granting the District Attorney's motion.

The district court started with an "Introduction," expressing its view that the claims raised in the SAC were just repackaged versions of the immunity argument that this Court had already rejected. App. 2-13. As to the claims themselves, the district court refused to credit the President's allegations that the grand jury's investigation was about the 2016 Cohen payments. "[M]indful of" and "refer[ing] to" documents outside the SAC, App. 72, the district court hypothesized the "possibility that this grand jury investigation could be … ranging and exploratory" instead, App. 70. The district court then dissected the President's allegations of overbreadth and bad faith one by one, explaining why it found each allegation implausible, especially in light of the presumption of validity that attaches to grand-jury subpoenas. App. 48-89.

After the district court's dismissal, the President filed an emergency appeal and—to preserve the status quo—asked the district court for a stay pending appeal. The district court denied a stay. App. 104-12. Even though this Court had remanded the case for the President to raise new subpoena-specific arguments, the district court found "no sign that the Supreme Court contemplated any further appellate proceedings." App. 109.

In all, the district court was dissatisfied with having to "devote considerable judicial resources to consider again a fact pattern it believe[d] the parties had thoroughly argued and [it] had substantially addressed." App. 9. It also denounced other recent cases in which the executive branch had made arguments "to justify … withholding information demanded by Congress, the courts, [and] the public." App. 13 n.9. In the district court's view, all of this litigation has "yielded disquieting constitutional effects eroding the rule of law and the doctrines of separation and balance of powers." *Id*.

The President next sought a stay pending appeal and an emergency administrative stay from the Second Circuit. His motion explained that interim relief was needed before August 28—seven days after the district court's judgment, when the subpoena would become enforceable. *See* CA2 Doc. 16-1 at 1; CA2 Doc. 16-2 at 1. Yet Judge Chin not only denied an administrative stay but also, inexplicably, scheduled the stay motion for argument on September 1—three days after the subpoena would have become enforceable. App. 113. That evening, the President's counsel contacted the District Attorney's office and sought agreement to stay enforcement until the panel could decide the motion. The next day, the District Attorney agreed to delay enforcement "until 5:00 pm on the second calendar day after the Second Circuit issues a decision on [the] application for a stay pending appeal." CA2 Doc. 61 at 2. On September 1, the Second Circuit granted a stay pending appeal. App. 114.

On October 7, 2020, the Second Circuit affirmed the district court's dismissal for failure to state a claim. App. 115-49. The court did not dispute that the President

has stated overbreadth and bad-faith claims if, as the SAC alleges, the grand jury's investigation is about the Cohen payments. App. 129-30, 134, 142. For two reasons, however, the Second Circuit rejected that assertion. First, the court did not read the SAC to clearly allege that "the Michael Cohen payments are the sole object of the investigation." App. 130. Second, it rejected that factual assertion as implausible, finding it "far from reasonable to infer that" the Cohen payments "would define the entire scope of a grand jury's investigation, particularly in complex financial investigations." App. 132.

The Second Circuit thus evaluated the subpoena on the assumption that the grand jury's investigation is as sweeping as the District Attorney asserted in his motion to dismiss. The court of appeals also believed it needed to take into account "the presumption of validity of grand jury subpoenas in assessing whether [the President] has pleaded sufficient facts in his complaint." App. 126. On this view, "a complaint seeking to quash a grand jury subpoena on the grounds of overbreadth or bad faith must include well-pled facts that, if accepted as true, *would* be sufficient to rebut the presumption of validity." App. 127.

The Second Circuit held that the President failed to plead facts to support plausible claims of overbreadth and bad faith. The subpoena is not plausibly overbroad, according to the court, since there is nothing "unusual []or unlawful" about a demand this sweeping "in the context of a financial investigation." App. 136-37. "Even if the subpoena is broad," the court thus held, "the SAC does not plausibly allege that the subpoena is *over*broad." App. 134.

The subpoena was not plausibly issued in bad faith, the Second Circuit held, because there are "obvious alternative explanation[s]" other than retaliation for refusing to produce tax returns in response to the Trump Organization subpoena. App. 143. Third-party subpoenas "are routine," the Court noted, and issuing this one to Mazars "relieves the President of the burden of supervising and being responsible for compliance." App. 145. The court also held that the SAC failed to plausibly allege that political considerations were a motive for issuing the subpoena. App. 144.

Last, the Second Circuit found it immaterial to either claim that the subpoena was "copied from, and is substantially identical to" a congressional subpoena. App. 139. "The same set of documents could be useful for multiple purposes," according to the court, so "it is unreasonable to automatically assume that state law enforcement interests and federal legislative interests do not overlap." App. 140. That "it is highly unlikely that *all* of the documents relevant to a federal legislative inquiry would also be relevant to a New York criminal investigation" was "not enough" to make the President's claims of overbreadth or bad faith plausible. App. 140-41. Nor could the court "see how the District Attorney's statement that he copied the Congressional subpoena for 'efficiency,'" or that he "recently abandoned his 'efficiency' explanation" altogether, would allow it "to infer bad faith." App. 147.

The Second Circuit issued an interim stay that will remain in place until this Court adjudicates the President's application for a stay pending certiorari. App. 148.

REASONS FOR GRANTING THE STAY

This Court grants a stay pending certiorari when there is: "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant

certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay. In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). The President meets this test.

I. There is a reasonable probability that the Court will grant certiorari.

This Court rarely denies review when a President seeks certiorari. And it has never denied review when a President claims, as here, that he is being subjected to unlawful legal process. The Court's solicitude is attributable to the fact that the President—both as a litigant and as a constitutional officer—is not an "'ordinary individual.'" *United States v. Nixon*, 418 U.S. 683, 708 (1974) (quoting *United States v. Burr*, 25 F. Cas. 187, 192 (C.C.D. Va. 1807) (Marshall, C.J.)). The Court's approach, in short, isn't driven by concern for any "particular President," but for "the Presidency itself." *Trump v. Hawaii*, 138 S. Ct. 2392, 2418 (2018).

This Court should be concerned that the President has not been shown that respect on remand. The Court's earlier ruling was "limited to absolute immunity and heightened need," and the case was unanimously "returned to the District Court, where the President may raise further arguments as appropriate." *Vance*, 140 S. Ct. at 2431. That's what the President did in raising subpoena-specific arguments on remand.

But the district court was unwilling to accept that the President was entitled to pursue these claims on remand. In its view, "the tenor and practical effect" of the President's overbreadth and bad-faith claims would "engender a form of presidential

immunity by default." App. 8. The court described the President's subpoena-specific challenges as "absolute immunity through a back door," called them a "roundabout route" to immunity, and asserted that "granting the relief the President requests would effectively constitute an undue expansion of presidential immunity doctrine." App. 12-13. While the court recognized that categorical immunity was not "directly before [it] at this stage," it was unwilling to abandon the notion that such immunity was "still implicated." App. 13 n.9.

For similar reasons, the court announced its belief that "[j]ustice requires an end to this controversy." App. 102. It expressed displeasure with having to "devote considerable judicial resources to consider again a fact pattern it believe[d] the parties had thoroughly argued and [it] had substantially addressed" in the prior preliminary-injunction proceedings. App. 9. And it denounced other cases where the executive branch had made arguments "to justify … withholding information demanded by Congress, the courts, or the public." App 13 n.9. In the court's view, all of this litigation had "yielded disquieting constitutional effects eroding the rule of law and the doctrines of separation and balance of powers." *Id.*[1]

In sum, the district court believed that this case should long have been over, that it doesn't deserve to be in court, and that its resolution of the motion to dismiss was preordained by its earlier rejection of the President's categorical immunity claim.

[1] While the district court is entitled to its view, it's worth noting that this President succeeded in two of the cases the district court was implicitly referencing. It was Congress and the lower courts—not the President—who "fail[ed] to take adequate account of the significant separation of powers issues raised by congressional subpoenas for the President's information." *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2033 (2020).

In the district court's own words, "the SAC in substantial part *merely reiterates* factual allegations made in the President's prior complaint. The revised pleadings thus prompted a motion to dismiss the action, hence calling upon the Court … to consider *again* a fact pattern it believe[d] … [it] had substantially addressed." App. 9 (emphases added).

The district court's antipathy for the President's subpoena-specific claims was improper. The President isn't seeking immunity. He's challenging this subpoena on distinct grounds that are cognizable under governing law, and raising claims that this Court identified as appropriate avenues for relief on remand in this very case. The district court may disagree with the decision to remand this case for further proceedings, but its task was to implement this Court's mandate—not question it. *See In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895).

Oddly, the Second Circuit failed to even address the President's argument that the district court erred by treating his subpoena-specific claims as an attempt to relitigate immunity. But ignoring the district court doesn't remedy the problem. The district court's misguided approach infected the entire remand proceeding. The need to ensure the President is afforded a fair chance to challenge this specific subpoena as overbroad and issued in bad faith is reason enough to grant review.

The dismissal of the President's claims at the pleading stage only intensifies concerns that he was treated unfairly. Overbreadth and bad-faith claims "ordinarily" would be resolved through a "motion to quash" proceeding. App. 125. That process, in turn, requires a factual record since the challenger "bears the burden to come forward with '*concrete evidence*' sufficient to rebut 'the presumption of validity accorded to

Grand Jury subpoenas.'" App. 125 (emphasis added). As this Court has explained, "[i]t seems unlikely … that a challenging party who does not know the general subject matter of the grand jury's investigation, no matter how valid that party's claim, will be able to make the necessary showing that compliance would be unreasonable. After all, a subpoena recipient 'cannot put his whole life before the court in order to show that there is no crime to be investigated.'" *R. Enterprises*, 498 U.S. at 301. Thus, "a court may be justified in a case where unreasonableness is alleged in requiring the Government to reveal the general subject of the grand jury's investigation before requiring the challenging party to carry its burden of persuasion." *Id*. at 302.

This step is doubly important when a subpoena seeks the President's records. "The high respect that is owed to the office of the Chief Executive should inform the conduct of the entire proceeding." *Vance*, 140 S. Ct. at 2430 (cleaned up). In cases like this one, then, judicial resolution "will almost invariably have to begin by delving into why the State wants the information; why and how much the State needs the information, including whether the State could obtain the information elsewhere; and whether compliance with the subpoena would unduly burden or interfere with a President's official duties." *Id.* at 2433 (Kavanaugh, J., concurring in the judgment). In all events, *some* evidentiary process is needed. *See In re Grand Jury Proceedings*, 486 F.2d 85, 93 (3d Cir. 1973).

There was no such process on remand. After demanding that the President file a second amended complaint, the District Attorney successfully sought dismissal of the President's intensely factual claims as a matter of law. That dismissal was erroneous. *See infra* II. But short-circuiting this case raises deeper concerns. At the

pleading stage, the President didn't even have notice of the investigation's general subject. He wasn't allowed to review evidence previously submitted to the district court. Nor was he permitted to develop a record of his own. App. 148-49 n.13. Based on the public record and his communications with the District Attorney, the President was able to glean—and plead—facts creating plausible inferences of overbreadth and bad faith. But the lower courts refused to credit those facts and then dismissed his case because he couldn't set forth "a plausible allegation about the nature of the ongoing investigation." App. 138. "The President," the Second Circuit remarked, "has a 'difficult' burden and an 'unenviable' task." App. 142 (quoting *R. Enterprises*, 498 U.S. at 300). As decisions like *R. Enterprises* explain, however, it shouldn't be an insurmountable burden or an impossible task either.

***

"The procedural posture of this case" is, no doubt, "unusual." App. 125. But that did not license the district court to stack the deck against the President. Nor did it authorize the lower courts to transform the Rule 12(b)(6) inquiry into lopsided summary-judgment proceeding—one where the President was given no opportunity to make his case and had inferences drawn against his allegations. *See Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 512-13 (2002). This is "the first *state* criminal subpoena directed to a President," *Vance*, 140 S. Ct. at 2420, and "appellate review should be particularly meticulous," *id.* at 2430 (cleaned up). The rush to judgment on remand warrants this Court's review.

II. There is a fair prospect that the judgment below will be reversed.

Dismissal of the President's overbreadth and bad-faith claims as implausible is unsustainable. Indeed, it is so contrary to settled law that summary reversal is

justified. The lower courts disregarded the President's pleaded facts, repeatedly drew inferences against him, penalized him for not disproving hypothetical alternatives, and misused a "presumption of validity" to give the District Attorney the benefit of the doubt. Even setting these many errors aside, dismissal at the pleading stage was still patently erroneous.

A. The President's overbreadth and bad-faith claims are plausible on their face.

A complaint need only contain "a short and plain statement of the claim." Fed. R. Civ. P. 8(a)(2). That means allegations that—when presumed true and augmented by all reasonable inferences—indicate "more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678. The Court has emphasized that this "plausibility standard is not akin to a 'probability requirement.'" *Id.* (quoting *Twombly*, 550 U.S. at 556). To the contrary, "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of [the pleaded] facts is improbable, and 'that a recovery is very remote and unlikely.'" *Twombly*, 550 U.S. at 556 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)). "Factual allegations," in sum, "must be enough to raise a right to relief above the speculative level." *Id.*

This is not a heavy burden for a plaintiff to shoulder. A mere two weeks after issuing its decision in *Twombly*, this Court summarily reversed a Tenth Circuit decision that dismissed a complaint for making factual "allegations" deemed to be "'conclusory.'" *Erickson v. Pardus*, 551 U.S. 89, 90 (2007) (per curiam). "Specific facts," this Court explained, "are not necessary; the statement need only give the defendant fair notice of what the claim is and the grounds upon which it rests." *Id.* at 93 (cleaned

up). And courts "must accept as true *all* of the factual allegations contained in the complaint." *Id*. at 94 (emphasis added).

Illustrating the liberal federal pleading standard, the *Erickson* plaintiff alleged that prison officials were "endangering his life" by not providing the medication he needed, and the Court held that "[t]his alone was enough to satisfy Rule 8(a)(2)." *Id.* (cleaned up). The Court more recently emphasized this crucial point in summarily reversing the Fifth Circuit. *See Johnson v. City of Shelby*, 574 U.S. 10 (2014) (per curiam). "A plaintiff," the Court reiterated, need only "plead facts sufficient to show that her claim has substantive plausibility." *Id.* at 12. The plaintiffs did so there by pleading "simply, concisely, and directly events that, they alleged, entitled them to damages from the city. Having informed the city of the factual basis for their complaint, they were required to do no more to stave off threshold dismissal for want of an adequate statement of their claim." *Id*.

It follows that the President's overbreadth and bad-faith claims shouldn't have been dismissed. A grand jury's power is broad, but "not unlimited." *R. Enterprises,* 498 U.S. at 299. Grand jury subpoenas, like all "forced production of documents by subpoena," must be reasonable, not oppressive, and not "'out of proportion to the end sought.'" *Application of Harry Alexander, Inc.*, 8 F.R.D. 559, 560 (S.D.N.Y. 1949) (quoting *McMann v. SEC*, 87 F.2d 377, 379 (2d Cir. 1937) (L. Hand)). A subpoena that is "too sweeping" in scope cannot "be regarded as reasonable." *Hale v. Henkel*, 201 U.S. 43, 76 (1906). A subpoena is overbroad if there is "no reasonable possibility" that a "category of materials" requested will yield "information relevant to the general subject of the grand jury's investigation." *R. Enterprises*, 498 U.S. at 301. At bottom,

grand jury subpoenas must be "properly tailored," *Vance* 140 S. Ct. at 2426, and may not be "'arbitrary fishing expeditions,'" *id*. at 2428 (quoting *R. Enterprises*, 498 U.S. at 299).

Separately, a subpoena is invalid if it "is motivated by a desire to harass" or is issued "in bad faith." *Id*. (*quoting Huffman v. Pursue, Ltd.*, 420 U.S. 592, 611 (1975)). Naturally, issuing a subpoena to engage in "harassment or other prosecutorial abuse" is "improper." *In re Grand Jury Proceedings*, 33 F.3d 1060, 1063 (9th Cir. 1994). A subpoena is also "abusive" if it's limitless in scope, *Burns v. Martuscello*, 890 F.3d 77, 92 (2d Cir. 2018), or if the prosecutor fails to make "a reasonable effort to request only those documents that are relevant and non-privileged, consistent with the extent of its knowledge about the matter under investigation," *In re Grand Jury Subpoena, JK-15-029*, 828 F.3d 1083, 1089 (9th Cir. 2016). No "law"—federal or state—allows the District Attorney to subject the President to such "abuse." *Vance*, 140 S. Ct. at 2428; *accord id*. at 2433 & n.1 (Kavanaugh, J., concurring in the judgment).

The SAC plausibly states overbreadth and bad-faith claims. The subpoena is "essentially copied" from a legislative subpoena issued by a congressional committee. *Id. at* 2420 n.2; *see* App. 155-56. Of course a subpoena issued by Congress supposedly in aid of federal legislation is *plausibly* overbroad when issued by a county prosecutor as part of an investigation into local crimes. And of course copying a congressional subpoena and issuing it to a custodian was *plausibly* done in bad faith. Indeed, "it would be quite a coincidence if the records relevant to an investigation of possible violations of New York criminal law just so happened to be almost identical to the

records thought by congressional Committees to be useful in considering federal legislation." *Vance*, 140 S. Ct. at 2449 (Alito, J., dissenting).

But the plausibility of the President's claims does not turn on these high-level observations alone. Overbreadth is measured against "the nature, purposes and scope" of the grand jury's investigation. *Okla. Press Publ'g Co. v. Walling*, 327 U.S. 186, 209 (1946); *see Virag v. Hynes*, 54 N.Y.2d 437, 444 (1981) (grand-jury subpoena assessed in "relation to the matter under investigation"). The SAC alleges that, even though the investigation is about the Cohen payments, the District Attorney issued a broad subpoena seeking all financial records, documents, and communications from every business associated with the Trump Organization over the course of nearly a decade. App. 158-59. In fact, the subpoena reaches entire categories of records that have nothing to do with those 2016 payments—for example, an accounting of the assets held in 2011 by entities in California, Illinois, or Dubai, and documents related to a lease between the federal government and a D.C. hotel. App. 158-59. Accepting these factual allegations as true, the subpoena is plausibly overbroad. *See, e.g.*, *In re Horowitz*, 482 F.2d 72, 79-80 (2d Cir. 1973).

As for bad faith, the SAC alleges that the subpoena was issued on the heels of a dispute over the Trump Organization's refusal to produce tax returns in response to a demand that didn't seek them, and at a time when there was intense political interest in these records. App. 153-54, 157. The SAC also alleges, as noted, that the subpoena was copied from a House Committee subpoena that purports to be in aid of federal legislation. App. 155-56, 159-61. Worse still, the SAC alleges that it was copied for reasons of efficiency; by his own admission, the District Attorney copied

the congressional subpoena even though his investigation has a different scope, subject matter, and timeframe. App. 156-57. Because an overbroad subpoena is inherently "abusive," *Burns*, 890 F.3d at 92, the District Attorney's disregard for the tailoring requirement is powerful evidence of bad faith. These allegations more than suffice to plausibly allege bad faith.

B. The Second Circuit misapplied the federal pleading rules in rejecting the President's factual allegation concerning the scope of the investigation.

Neither lower court—nor the District Attorney—contests that the subpoena is plausibly overbroad and plausibly issued in bad faith if the investigation is about the Cohen payments. The Second Circuit affirmed the district court's dismissal because, in its view, the SAC didn't clearly allege that the investigation is limited to the Cohen payments and, even if it did, that allegation should be disregarded as implausible. App. 130-34. The Second Circuit badly misapplied the Federal Rules.

First, the President has alleged that the investigation is about the Cohen payments. "In 2018," according to the SAC, "a New York County grand jury began investigating whether certain business transactions from 2016 violated New York law." App. 152. The SAC then specifically alleges that those business transactions are "payments made by Michael Cohen in 2016 to certain individuals" and that "Mr. Vance's office is exploring whether the reimbursements violated any New York state laws." App. 152. The SAC further alleges that the Mazars subpoena is related to a grand-jury subpoena that the District Attorney issued to the Trump Organization only a few weeks earlier. App. 152-54. That subpoena was exclusively focused on the Cohen payments. App. 152-53.

The Second Circuit's conclusion that "the SAC never actually alleges that the Michael Cohen payments are the sole object of the investigation" is thus untenable. App. 130. That conclusion rests entirely on mischaracterizing what the SAC actually says and refusing to draw inferences it obviously suggests. For example, in the Second Circuit's view, that "the Cohen payments were *a* focus of the investigation" doesn't necessarily mean they were "the *only* focus." App. 130. But the SAC doesn't say that the payments were "*a* focus" of the investigation; it alleges that the payments were "*the* focus" of the investigation. App. 152 (emphasis added). Similarly, the Second Circuit accepted that the SAC alleges that these reimbursements were the predicate for opening the investigation, App. 132, but it ignored that nothing in the SAC pleads (or even suggests) that the investigation expanded beyond its original scope, App. 132-34.

More importantly, the Second Circuit's "hypertechnical" fixation on word choice misses the forest for the trees. *Iqbal*, 556 U.S. at 678. Under the liberal pleading standard of Rule 8, the plaintiff receives "the benefit of the doubt." *Michigan v. U.S. Army Corps of Engineers*, 758 F.3d 892, 895 (7th Cir. 2014). The Second Circuit was thus required to construe the facts "in the light most favorable to [the President]." *Papasan v. Allain*, 478 U.S. 265, 283 (1986). Yet the Second Circuit drew inferences *against* the President. The SAC reasonably can be—and therefore should have been—construed as alleging that the investigation is about the Cohen payments. This is a well-pleaded fact that must be accepted as true.

Second, the Second Circuit committed a category error by subjecting a pleaded fact to plausibility analysis. It's the legal *claim*—not the pleaded *facts*—that must be

plausible. The "judge must accept as true *all* of the factual allegations contained in the complaint." *Erickson*, 551 U.S. at 94 (emphasis added); *see Iqbal*, 556 U.S. at 678 (same). Otherwise, the plaintiff would need to include evidence in the complaint to substantiate pleaded facts. "But no part of the *Twombly-Iqbal* pleading standard requires a plaintiff to provide evidence for the factual allegations in a complaint before they are 'entitled to the assumption of truth' at the motion-to-dismiss stage." *Hi-Tech Pharm., Inc. v. HBS Int'l Corp.,* 910 F.3d 1186, 1197 (11th Cir. 2018) (quoting *Iqbal*, 556 U.S. at 679). In other words, "factual allegations [needn't] themselves be plausible" given that "they are assumed to be true." *Bryson v. Gonzales,* 534 F.3d 1282, 1286 (10th Cir. 2008); *accord Ocasio-Hernández v. Fortuño-Burset,* 640 F.3d 1, 12 (1st Cir. 2011) ("Non-conclusory factual allegations in the complaint must then be treated as true, even if seemingly incredible.").[2]

The Second Circuit's contrary approach reflects profound confusion. If this were litigation over a car accident, the court could not second-guess as implausible the pleaded fact that the defendant ran a red light. The issue at the motion-to-dismiss stage would be whether that and all other pleaded facts—accepting them all as true—"plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679. Here, then, the Second Circuit needed to accept as true that the investigation is about the Cohen payments and then determine, on that factual basis, whether the subpoena is

[2] The only exception to the rule that all pleaded facts must be accepted as true is, as noted, that "recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. But the Second Circuit didn't find the allegation to be conclusory. Nor could it have. *See supra* 22-23. The factual allegation that the grand jury investigation is about the Cohen payments "is a specific assertion … that is either true or false, no matter what legal conclusions it may or may not support." *Hi-Tech Pharm.*, 910 F.3d at 1197.

plausibly overbroad or plausibly issued in bad faith. *See id*. at 680. Its failure to do so was indisputable error.

Third, even if a pleaded fact about the scope of the investigation were subject to independent plausibility analysis, the Second Circuit made a textbook error that reflects a "stark" departure from the Federal Rules. *Erickson*, 551 U.S. at 90. Until now, all lower courts (including the Second Circuit) understood that "a claim should only be dismissed at the pleading stage where the allegations are so general, and the alternative explanations so compelling, that the claim no longer appears plausible." *Arar v. Ashcroft*, 585 F.3d 559, 617 (2d Cir. 2009) (en banc).[3] That is because it is "not the province of the court to dismiss the complaint on the basis of the court's choice among plausible alternatives." *Anderson News, LLC v. Am. Media, Inc.*, 680 F.3d 162, 190 (2d Cir. 2012). After all, there often is "more than one plausible interpretation of a defendant's words, gestures, or conduct." *Id*. at 189-90. So the "question at the pleading stage is not whether there is a plausible alternative to the plaintiff's theory; the question is whether there are sufficient factual allegations to make the complaint's claim plausible." *Id*. at 189.

[3] *See In re U.S. Office of Pers. Mgmt. Data Sec. Breach Litig.*, 928 F.3d 42, 57 (D.C. Cir. 2019); *McDonough v. Anoka County*, 799 F.3d 931, 946 (8th Cir. 2015); *Hassan v. City of New York*, 804 F.3d 277, 297 (3d Cir. 2015); *Houck v. Substitute Tr. Servs., Inc.*, 791 F.3d 473, 484 (4th Cir. 2015); *Evergreen Partnering Grp., Inc. v. Pactiv Corp.*, 720 F.3d 32, 45-46 (1st Cir. 2013); *In re Bill of Lading Transmission & Processing Sys. Patent Litig.*, 681 F.3d 1323, 1340 (Fed. Cir. 2012); *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011); *Watson Carpet & Floor Covering Inc. v. Mohawk Indus., Inc.*, 648 F.3d 452, 458 (6th Cir. 2011); *Speaker v. U.S. Dep't of Health & Human Servs. Ctrs. for Disease Control & Prevention*, 623 F.3d 1371, 1386 (11th Cir. 2010); *Swanson v. Citibank, N.A.*, 614 F.3d 400, 404 (7th Cir. 2010); *Lormand v. US Unwired, Inc.*, 565 F.3d 228, 267 (5th Cir. 2009); *Dias v. City & County of Denver*, 567 F.3d 1169, 1184 (10th Cir. 2009).

Any other approach would negate the rule, reiterated in *Twombly* and *Iqbal*, that a claim can be "plausible" even if it's "not probable or even reasonably likely." *Elias v. Rolling Stone LLC*, 872 F.3d 97, 105 (2d Cir. 2017). "Because plausibility is a standard lower than probability, a given set of actions may well be subject to diverging interpretations, each of which is plausible." *Anderson News*, 680 F.3d at 184. Accordingly, "the existence of other, competing inferences does not prevent the plaintiff's desired inference from qualifying as reasonable unless at least one of those competing inferences rises to the level of an 'obvious alternative explanation.'" *N.J. Carpenters Health Fund v. Royal Bank of Scotland Grp., PLC*, 709 F.3d 109, 121 (2d Cir. 2013). It is not the court's "task at the motion-to-dismiss stage to determine whether a lawful alternative explanation appears more likely from the facts of the complaint." *SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412, 425 (4th Cir. 2015) (cleaned up).

Contrary to these settled principles, the Second Circuit credited alternative explanations at every turn. It dismissed the pleaded fact that "the scope of the investigation remained limited to the Michael Cohen payments" as "speculation." App. 132. It "rejected" any inference that the Trump Organization subpoena issued weeks earlier might be a clue to "the scope of the investigation." App. 132. And it read a news report that "it was unclear if the broad scope of the [Mazars] subpoena indicated that the District Attorney had expanded his investigation beyond actions taken during the 2016 campaign" as "significantly undermin[ing] the plausibility of the President's assertion that the scope of the investigation is limited to the Michael Cohen payments." App. 133 (cleaned up).

None of this makes the SAC's allegation implausible. That the investigation *conceivably* expanded does not make a contrary allegation *obviously* implausible. And the common understanding that a grand-jury investigation "may easily expand over time" is not a basis for finding—at the pleading stage—that *this* investigation in fact did. App. 131. It is irrelevant whether the Second Circuit believed that a "lawful alternative explanation appeared more likely." *Houck*, 791 F.3d at 484. The court wasn't supposed to "decide whose version to believe, or which version is more likely than not." *Swanson*, 614 F.3d at 404. But that is what the Second Circuit did. Like the district court, it faulted the President for failing to negate "the readily apparent *possibility* that this grand jury investigation *could* be as ranging and exploratory as" others have been "in the past." App. 70. (emphases added). But it's *that* reasoning—not the factual allegations concerning the scope of the investigation—that amounts to impermissible speculation.

In this motion-to-dismiss posture, the lower courts should have asked "*could* these things have happened, not *did* they happen." *Swanson*, 614 F.3d at 404. The investigation plainly *could be* confined to the Cohen payments. That the Second Circuit itself considered it "unclear" if the investigation has since expanded confirms the plausibility of an allegation that it has not. Whether that's "what 'really' went on in this plaintiff's case" is for the trier of fact to decide—after the evidence is in. *Id*. at 405. The lower courts erred by preempting that judgment at the pleading stage after "weighing the competing inferences that can be drawn from the complaint." *SD3*, 801 F.3d at 425.

C. The President's claims are plausible even under the mistaken approach taken by the Second Circuit.

The Second Circuit embraced a standard for plausibility under which *no* subpoena challenge can survive a motion to dismiss. Even though overbreadth and bad faith must be measured against the scope of the grand jury's investigation, the Second Circuit never actually described what it thought the scope of the investigation might be. Instead, the court of appeals merely speculated in broad terms about a "complex financial investigation," and then found that the President's claims are implausible because there is nothing inherently "unusual []or unlawful" about a subpoena seeking every financial record of a global corporation as part of this kind of investigation. App. 136. The Second Circuit thus echoed the circular reasoning of the district court: if the subpoena is broad, then the grand jury's investigation must be equally broad, and hence it is implausible to allege that the subpoena "is *over*broad." App. 135; *compare* App. 67-68.

That can't be right. The end result would be to insulate every subpoena from any overbreadth challenge. For example, the Second Circuit found "nothing suspect about a grand jury demanding records relating to entities beyond the grand jury's territorial jurisdiction." App. 137. But while investigating beyond jurisdictional borders may not alone raise an inference that the subpoena is overbroad, a blanket request spanning the globe does make it *plausibly* overbroad. Not even a complex financial investigation gives the District Attorney jurisdiction and limitless subpoena power over anything the Trump Organization does in any part of the world without any threshold level of suspicion. *See In re Grand Jury Subpoena Duces Tecum Dated Nov. 15, 1993*, 846 F. Supp. 11, 12-14 (S.D.N.Y. 1994); *L&S Hosp. & Institutional*

Supplies Co. v. Hynes, 375 N.Y.S.2d 934, 941 (Sup. Ct. 1975). Surely a broad demand by a local prosecutor, in 2019, for documents encompassing the contract between a Washington D.C. hotel and the federal government in 2011, value of the equipment held by an entity in India in 2012, and a transaction by an entity in Ireland in 2013 is *plausibly* overbroad. App. 158, 161-62.

The Second Circuit also found "no logic to the proposition that the documents sought in the Mazars subpoena are irrelevant … because a Congressional committee considered the same documents relevant to its own investigative purposes." App. 140. But the District Attorney has acknowledged that his investigation "is not 'coextensive with the investigation of the House Committee' and that 'the Mazars Subpoena does not define the scope of the grand jury investigation.'" App. 157. To be sure, "[t]he same set of documents could be useful for multiple purposes." App. 140. But the SAC didn't "automatically assume that state law enforcement interests and federal legislative interests do not overlap." *Id*. It alleged that it is plausible to infer that a congressional subpoena purportedly issued in aid of legislation will seek categories of documents irrelevant to this local investigation.

The plausibility of that allegation is bolstered by the fact that the drafter of the subpoena—the Oversight Committee—has completely different powers than the District Attorney and has offered at least seven reasons for issuing the subpoena (*e.g.*, the Emoluments Clauses, federal legislation, federal government contracting, and international relations) that the District Attorney has no legal authority to pursue. App. 160-61. It is thus plausible to allege that the congressional subpoena reaches

categories of records outside the scope of the District Attorney's admittedly different investigation.

The Second Circuit's analysis of bad faith was erroneous for similar reasons. The court held that the subpoena wasn't even plausibly issued in retaliation over the refusal to turn over the President's tax returns since there is an "obvious alternative explanation": "if the original subpoena did not clearly call for the documents needed for the grand jury investigation, a new subpoena was issued that clearly called for them." App. 143-44. The Second Circuit missed the point. If the District Attorney merely wanted the tax returns, why did he issue a subpoena that called for thousands of additional records? For that matter, why didn't he just issue a new subpoena to the Trump Organization that "clearly called" for the tax returns? Perhaps the District Attorney has a good-faith explanation. But harassment is a plausible explanation too. The idea that the District Attorney went to Mazars to make the President's life easier, App. 145, isn't so obvious an alternative that it renders bad faith implausible. On the contrary, it's just another example of how the Second Circuit consistently gave *the defendant* the benefit of the doubt.

The Second Circuit also held that the District Attorney's "efficiency" rationale for copying the congressional subpoena did not tend to show bad faith. App. 147. The District Attorney now says that he copied the subpoena because of "overlap" between the two investigations and, according to the court, those shifting explanations can be reconciled. App. 147. But the SAC pleads that the congressional subpoena was copied strictly for efficiency, App. 156, and that allegation must be accepted as true. The

Second Circuit had no authority to disregard it in favor of a competing explanation offered in the motion to dismiss.

That the District Attorney has now abandoned the "efficiency" rationale only makes matters worse. Evolving motives is classic evidence of pretext. *See, e.g.*, *Foster v. Chatman*, 136 S. Ct. 1737, 1754 (2017); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000). But it's understandable why he did. The efficiency rationale represents a flagrant disregard for the tailoring requirement. That alone states a bad-faith claim. *See JK-15-029*, 828 F.3d at 1089. The ban on abusive subpoenas cannot be overcome based on what is easiest for the custodian or what is most convenient for prosecutors. It is self-evidently plausible that the District Attorney's decision to copy a congressional subpoena was not based on the good-faith needs of *this* investigation. *See Vance*, 140 S. Ct. at 2449 (Alito, J., dissenting). Indeed, the District Attorney hasn't identified another time where a local prosecutor copied a legislative subpoena word-for-word like he did here. This unprecedented departure from usual process tends to show that the Mazars subpoena is not properly tailored to the grand jury's investigation.

Finally, the presumption of validity given to grand-jury subpoenas does not defeat the President's claims at the pleading stage. As the Second Circuit recognized, it is an evidentiary burden the President must rebut at summary judgment or trial. App. 125. Yet the court held that the President must allege facts that, accepted as true, "*would* overcome the presumption of validity." App. 142 (emphasis added). But that still sets the bar too high. It uses different words to impose the same "probability requirement" this Court has rejected. *Iqbal*, 556 U.S. at 678. Pleading "more than the

mere possibility of misconduct" does not require the kind of definitive proof of liability that the Second Circuit is demanding. *Id.* at 679.

Regardless, the SAC alleges facts that would overcome the presumption. The subpoena is geographically sprawling, temporally expansive, and topically unlimited —all attributes that raise suspicions of an unlawful fishing expedition. App. 156-59. Furthermore, it is highly unusual—indeed, unprecedented—for a state grand jury to subpoena a sitting President's records. *See Vance*, 140 S. Ct. at 2420. It is still more unusual for a state grand jury to copy an unrelated congressional subpoena and issue it under its own name. And it is highly unusual for the District Attorney to publicly confess to copying a congressional subpoena while denying that his investigative goals are the same as Congress's. App. 157. Yet the President has alleged all of that—and more. His overbreadth and bad-faith claims are, consequently, plausible even under the "heightened pleading standards" that the Second Circuit incorrectly imposed. *Educadores Puertorriqueños en Acción v. Hernandez*, 367 F.3d 61, 66-67 (1st Cir. 2004).

III. The President will suffer irreparable harm absent a stay.

There is a clear "likelihood of irreparable harm if the judgment is not stayed." *Philip Morris USA Inc. v. Scott*, 561 U.S. 1301, 1302 (2010) (Scalia, J., in chambers). This Court remanded this case so that the President could make further arguments challenging the Mazars subpoena. The President should have the chance to seek certiorari on those serious claims as part of "'the normal course of appellate review.'" *Garrison v. Hudson*, 468 U.S. 1301, 1302 (1984) (Burger, C.J., in chambers). In this

very case, the Court has emphasized that "appellate review should be particularly meticulous." *Vance*, 140 S. Ct. at 2430 (cleaned up).

But the status quo will be irrevocably altered before the President has this opportunity without a stay. Even if disclosure is confined to the grand jury and prosecutors, no court can later "return the parties to the *status quo ante*—there is nothing a court can do to withdraw all knowledge or information" from the District Attorney or from the grand jury. *Church of Scientology*, 506 U.S. at 12. "Once the documents are surrendered," in other words, "confidentiality will be lost for all time. The status quo could never be restored." *Providence Journal Co. v. FBI*, 595 F.2d 889, 890 (1st Cir. 1979); *accord Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bishop*, 839 F. Supp. 68, 72 (D. Me. 1993); *Metro. Life Ins. Co. v. Usery*, 426 F. Supp. 150, 172 (D.D.C. 1976). "The disclosure of private, confidential information," even to the government, thus "'is the quintessential type of irreparable harm that cannot be compensated or undone.'" *Airbnb, Inc. v. City of New York*, 373 F. Supp. 3d 467, 499 (S.D.N.Y. 2019). The Court "cannot unring that bell." *United States v. Under Seal*, 853 F.3d 706, 724 (4th Cir. 2017).

This all assumes that the President's papers would be kept secret. However, there are several ways in which a "public prosecutor" may disclose such records "in the proper discharge of his official duties." N.Y. Penal Law §215.70. This includes disclosure as part of an indictment, as part of a grand-jury report, N.Y. Crim. Proc. Law §190.85, or to third parties who (like the District Attorney himself) would rather avoid subpoenaing the President directly. If the President's records are disclosed publicly (as thus could happen even without a grand-jury breach) then the

harm will not only be irreparable. It will be case-mooting. Disclosure by any means "would moot … the Court of Appeals' decision requiring disclosure" and thus "create an irreparable injury." *John Doe Agency v. John Doe Corp.*, 488 U.S. 1306, 1309 (1989) (Marshall, J., in chambers). Avoiding mootness is "'[p]erhaps the most compelling justification'" for a stay pending certiorari. *Id.*

The "irreparable harm" of enforcement is particularly pressing when a plaintiff challenges a subpoena to a third party. *U.S. Servicemen's Fund v. Eastland*, 488 F.2d 1252, 1256 (D.C. Cir. 1973), *aff'd in relevant part*, 421 U.S. 491, 501 n.14 (1975); *see also Mazars*, 140 S. Ct. at 2035. As this Court put it, "compliance by the third person could frustrate any judicial inquiry" into the subpoena's legality. *Eastland*, 421 U.S. at 501 n.14. Allowing this to happen would deny the plaintiff's rights and "immunize [the] subpoena from challenge" based on "the fortuity that documents sought by [the] subpoena are not in the hands of a party claiming injury from the subpoena." *United States v. AT&T Co.*, 567 F.2d 121, 129 (D.C. Cir. 1977). Denying interim relief, at bottom, could "entirely destroy [the President's] rights to secure meaningful review." *Providence Journal*, 595 F.2d at 890.

For all of these reasons, the Second Circuit *twice* granted stays in this case and the District Attorney voluntarily stayed compliance in the prior litigation. This Court likewise granted the President a stay of the mandate pending certiorari in the congressional-subpoena cases. *See Trump v. Mazars USA, LLP*, 140 S. Ct. 581 (2019); *Trump v. Deutsche Bank AG*, 140 S. Ct. 660 (2019). The same risks of irreparable harm that existed then exist now.

IV. The balance of equities and relative harms weigh strongly in favor of granting a stay.

That the President will suffer severe, potentially case-mooting harm without a stay should end the debate over whether relief is warranted. But even if this were a "close case," the "'balance [of] equities'" favors a stay. *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers).

A stay will cause only negligible harm to the District Attorney. A stay will not affect whether the grand jury gets the subpoenaed documents: If the District Attorney wins this case, he will get the documents; and if he loses, he was never entitled to the documents anyway. Accordingly, his only injury is the time delay between receiving the documents now versus receiving the documents later—a non-irreparable injury that is far outweighed by the harm that disclosure would cause the President. *See Araneta v. United States*, 478 U.S. 1301, 1305 (1986) (Burger, C.J., in chambers) (granting a stay despite the public's "strong interest in moving forward expeditiously with a grand jury investigation" because "the risk of injury to the applicants could well be irreparable and the injury to the Government will likely be no more than the inconvenience of delay").

The District Attorney's "interest in receiving this information immediately" thus "poses no threat of irreparable harm" to him. *John Doe Agency*, 488 U.S. at 1309; *see EPIC v. DOJ*, 15 F. Supp. 3d 32, 47 (D.D.C. 2014) (explaining that "desire to have [the documents] in an expedited fashion without more is insufficient to constitute … irreparable harm"); *accord Providence Journal*, 595 F.2d at 890; *Judicial Watch, Inc. v. U.S. Dep't of Homeland Sec.*, 514 F. Supp. 2d 7, 11 (D.D.C. 2007). Indeed, having voluntarily delayed enforcement for *over a year*—including during the district-court

proceedings on remand—the District Attorney should not be heard to complain about any additional incremental delay resulting from full review. His need to secure these records did not somehow become uniquely pressing in the last few weeks.

Moreover, any harm the District Attorney may suffer from incremental delay is largely self-inflicted. On remand, the parties filed a status report charting a path forward that the district court endorsed. The District Attorney reserved the right to seek dismissal as a matter of law, but the parties also agreed on expedited merits resolution should an answer be the more appropriate response to the forthcoming amended complaint. *See* D.Ct. Doc. 52 at 9. Why the District Attorney didn't answer and clear the way for timely resolution is perplexing. As explained, whether this subpoena is overbroad or issued in bad faith is intensely factual. It would have been far more practical to engage in limited discovery and/or in-camera review followed by definitive resolution on summary judgment.

That streamlined process might have been completed by now had the District Attorney taken a more sensible approach. Perhaps he's apprehensive about defending the subpoena in a motion-to-quash style process. But whatever the District Attorney's reasons for seeking dismissal on plausibility grounds, he must bear the costs of that short-sighted choice. The President certainly should not be penalized because the District Attorney sought a too-early dismissal of claims that are obviously plausible on their face.

Finally, the public interest weighs in favor of preserving the status quo. The District Attorney "does not have an interest" in issuing an overbroad and harassing subpoena. *Amarin Pharma, Inc. v. FDA*, 119 F. Supp. 3d 196, 237 (S.D.N.Y. 2015).

Nor is allowing him to evade this Court's review in the public interest. While "the public has an interest in ensuring that the [government] can exercise its authority," "Defendants offer no persuasive argument that there is an immediate public interest in enforcing … [now] rather than after a full hearing." *Cigar Ass'n of Am. v. FDA*, 317 F. Supp. 3d 555, 563 (D.D.C. 2018). Especially not when the party being deprived of appellate review is the President. *See Vance*, 140 S. Ct. at 2430.

V. The President meets the standard for an injunction pending appeal even though he is not required to do so.

The District Attorney argued below that the President needs an injunction—not a stay—to preserve the status quo. The Second Circuit disagreed and granted a stay. App. 114. It was right to do so. The District Attorney linked the enforceability of the subpoena to the lower courts' decisions. *See supra* 8. Hence, "temporarily divesting [those] order[s] of enforceability" renders the subpoena unenforceable. *Nken v. Holder*, 556 U.S. 418, 428 (2009). This is also what happened in the litigation over the congressional subpoenas. As here, the committees deferred enforcement pending judicial review, and they tied enforceability to issuance of a judicial judgment (there, the appellate court's mandate). *See* Emergency App. for Stay of Mandate at 1, *Mazars*, 140 S. Ct. 581 (No. 19A545) (filed Nov. 15, 2019). The appropriate relief thus was a stay of the mandate—not an injunction pending appeal—and that was the relief this Court granted. *See Mazars*, 140 S. Ct. 581.

But the injunction-versus-stay dispute is ultimately immaterial. Dismissal on remand contravened basic pleading rules and denied the President a meaningful opportunity to challenge the subpoena. Given that this Court has summarily reversed similar errors, the President satisfies the standard for an injunction pending appeal.

His right to relief is "indisputably clear," and an injunction would be "in aid of [this Court's] jurisdiction" given the serious concern that these claims could otherwise be mooted. *Hobby Lobby Stores, Inc. v. Sebelius*, 568 U.S. 1401, 1403 (2012) (Sotomayor, J., in chambers).

CONCLUSION

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

Dated: October 13, 2020

Respectfully submitted,

s/ William S. Consovoy

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

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

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

Counsel for President Donald J. Trump