20-2766-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DONALD J. TRUMP,
Plaintiff-Appellant,

v.

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

On Appeal from the United States District Court for the Southern District of New York, No. 19-cv-8694 (Marrero, J.)

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes & Rules

JURISDICTION

The district court had jurisdiction because the President alleged violations of federal law, 28 U.S.C. §1331, and sued to vindicate "any right, privilege or immunity secured by the Constitution," §1343; 42 U.S.C. §1983; *see also* JA16 ¶9. This Court has jurisdiction because the President appealed from a final judgment that dismissed his complaint. 28 U.S.C. §1291. The district court entered that judgment on August 20, 2020, and the President filed an emergency notice of appeal the same day. JA134.

STATEMENT OF THE ISSUES

After rejecting the President's argument that he is categorically immune from state criminal subpoenas, the Supreme Court remanded this case so that the President could raise specific challenges to the subpoena at issue here. *Trump v. Vance*, 140 S. Ct. 2412, 2431 & n.6 (2020). The President did so, challenging the subpoena as overbroad and issued in bad faith. Instead of requiring an answer, limited discovery, and expedited summary-judgment proceedings, however, the district court dismissed the President's complaint under Rule 12(b)(6). After prejudging his new claims as veiled attempts to reargue immunity, the district court deemed the President's claims *implausible*—even though the subpoena was issued to investigate 2016 payments in New York yet photocopies a legislative subpoena issued by a different body for different stated purposes, makes dragnet requests for reams of the President's papers, requests documents as far back as 2011, and seeks records from entities all over the world. Did the President, contrary to the district court's decision, plausibly allege overbreadth or bad faith?

STATEMENT OF THE CASE

I. Factual Allegations

The following facts are taken from President Trump's second amended complaint ("SAC"), which this Court "must accept as true." *Starr v. Sony BMG Music Entm't*, 592 F.3d 314, 317 (2d Cir. 2010). In the summer of 2018, the New York County District Attorney's Office opened an investigation into certain payments that Michael Cohen made in 2016. JA14, 16 ¶¶1, 12. Cohen made the payments to Karen McDougal and Stephanie Clifford, and Cohen was reimbursed by The Trump Organization. JA16-17 ¶¶12-13. According to a press report, the District Attorney is investigating whether The Trump Organization violated New York law by falsely recording the reimbursements as a legal expense. JA16 ¶12.

As part of that investigation, the District Attorney issued a grand-jury subpoena in August 2019 to The Trump Organization. Confirming the scope of the investigation, the subpoena sought documents and communications concerning Cohen and payments to Clifford or McDougal. JA16-17 ¶13. The Trump Organization quickly opened a dialogue with the District Attorney's office and produced hundreds of responsive documents. JA17 ¶15.

But the cooperative process broke down when the District Attorney demanded the President's tax returns. JA17-18 ¶16. When asked how the subpoena plausibly covered tax returns, the District Attorney refused to defend his interpretation. JA17-18 ¶16. He instead decided to retaliate and circumvent the President by issuing a new subpoena to the President's accountant, Mazars USA, LLP—a neutral third-party

custodian who possessed the President's financial information but who had no incentive to resist the District Attorney's demands. JA18 ¶16. He issued the grand-jury subpoena to Mazars on August 29. JA18 ¶17.

It is no secret that the President's finances generally—and his tax returns specifically—have been the subject of intense political interest. *See* JA21 ¶24. After the Democratic Party gained majority control of the U.S. House of Representatives, the House Ways and Means Committee issued a subpoena for the President's tax returns. JA19 ¶19. And the House Oversight Committee issued a sweeping subpoena to Mazars for other financial documents belonging to the President. JA19 ¶19. According to the Oversight Committee, it subpoenaed these documents from Mazars to investigate federal legislation concerning, among other things, international relations, potential improper influences of the Executive Branch, the need for reform to federal laws involving the President, the proper authority given to the Office of Government Ethics, and federal-lease management, among other things. JA23-25 ¶¶36-43.

The District Attorney's subpoena to Mazars copies, virtually word for word, the Oversight Committee's subpoena to Mazars—the only difference is that, following the lead of the Ways and Means Committee, the District Attorney added a request for tax returns. JA19-20 ¶¶19-20. But the District Attorney has no jurisdiction over the topics that the Oversight Committee purports to be investigating. JA21-25 ¶¶27-32, 35-44. The District Attorney has publicly denied the (inherently farfetched) suggestion that his investigation has the same scope as the Oversight Committee's. JA21 ¶26. In fact, the

District Attorney stated that he copied the congressional subpoena because it would be more efficient for Mazars, since Mazars had to gather the same documents for the Oversight Committee anyway. JA20 ¶22. That explanation concedes that the District Attorney made no attempt to tailor the Mazars subpoena to *his* investigation, or to minimize its burdens or breadth as applied to *the President*. JA20-21 ¶¶22-23, 36; *see* JA19-20 ¶¶19-20.

The result of all this is a sweeping subpoena to Mazars for the President's papers. JA18 ¶18; *see* JA20-26 ¶¶22-45. The subpoena demands reams of documents "related to every facet of the business and financial affairs of the President and numerous associated entities"—many of which operate wholly outside of New York County. JA22 ¶¶31-32. Indeed, the subpoena demands nearly a decade's worth of reports and detailed accounting and analysis on every single asset and liability belonging to entities all over the United States (California, Florida, Hawaii, Illinois, New Jersey, North Carolina, Pennsylvania, Virginia, and D.C.) and all over the world (Canada, the Dominican Republic, Dubai, India, Indonesia, Ireland, the Philippines, Scotland, and Turkey). JA22-23 ¶¶32-33. That is "hundreds—if not thousands—of comprehensive reports, each one containing a trove of information about the health, trajectory, and operations of the business." JA23 ¶33. And that's not all. The subpoena demands engagement agreements and contracts related to any of the aforementioned documents, as well as all workpapers, communications, memoranda, and notes. JA23 ¶34. Finally, it asks for

any communications (without regard to subject matter) between a Mazars partner and any employee or representative of any listed entity. JA23 ¶34.

II. Procedural History

The President filed a federal lawsuit to enjoin the Mazars subpoena one year ago, arguing that sitting Presidents are categorically immune from state criminal subpoenas. JA1 (D.Ct. Doc. 1). The President also sought a preliminary injunction. JA5 (D.Ct. Doc. 5). The District Attorney moved to dismiss on procedural grounds and opposed the preliminary-injunction motion. JA6 (D.Ct. Doc. 16). The district court granted dismissal under the doctrine of *Younger* abstention and, in the alternative, denied the preliminary-injunction motion on the merits. *Trump v. Vance*, 395 F. Supp. 3d 283 (S.D.N.Y. 2019).

On appeal, this Court reversed the district court's holding on *Younger* abstention, explaining that "allowing federal actors to access federal courts is 'preferable in the context of healthy federal-state relations'"—"strikingly so when the federal actor is the President of the United States, who under Article II of the Constitution serves as the nation's chief executive, the head of a branch of the federal government." *Trump v. Vance*, 941 F.3d 631, 637-38 (2d Cir. 2019). But this Court agreed that the President was not immune from the subpoena and, thus, not entitled to a preliminary injunction. *Id.* at 634-35. The President successfully petitioned for certiorari, and the District Attorney agreed to stay the subpoena's enforcement throughout Supreme Court review.

The Supreme Court affirmed. Because its ruling was "limited to absolute immunity and heightened need," the Court "directed that the case be returned to the

District Court, where the President may raise further arguments as appropriate." *Vance*, 140 S. Ct. at 2431. In fact, the Court "unanimously agree[d]" that the President could raise subpoena-specific objections in the district court on remand. *Id.* at 2431 (Kavanaugh, J., concurring in judgment). Those appropriate objections included claims that the subpoena is an "arbitrary fishing expedition" or was issued "in bad faith." *Id.* at 2428 (majority op.).

One day after the Supreme Court's decision, this Court remanded the case to the district court. JA9 (D.Ct. Doc. 46). That same day, the district court ordered the parties to file a joint submission outlining next steps. JA9-10 (D.Ct. Doc. 47). In their joint submission, the President asserted that he intended to raise claims that the Supreme Court identified, including overbreadth and bad faith. D.Ct. Doc. 52 at 2-3. For his part, the District Attorney "d[id] not contest that the President should have an opportunity to advance additional 'appropriate' claims supported by factual allegations, consistent with the Supreme Court's opinion." D.Ct. Doc. 52 at 6. The proper way to do that, the District Attorney explained, was for the President to "file an amended pleading that can survive a motion to dismiss." D.Ct. Doc. 52 at 7-8; *see also* O.A. Recording at 31:20-33:02, *Trump v. Vance*, No. 20-2766 (2d Cir. Sept. 1, 2020) (answering, in response to a question about whether his "office has accepted this posture of a motion to dismiss rather than a motion to quash," that "you're correct that we are not seeking to have this Court convert it [the complaint] to a motion to quash or otherwise impose a higher standard that would be associated with a motion to quash").

The President did just that. He filed the SAC on July 27, raising claims that the subpoena is overbroad and was issued in bad faith. JA14-29. A week later, the District Attorney moved to dismiss for failure to state a claim. JA11 (D.Ct. Docs. 62, 63).

On August 20, the district court issued a 103-page decision dismissing the case "with prejudice" under Rule 12(b)(6). JA30-132. In the district court's view, the SAC failed to plausibly allege overbreadth or bad faith. The court started with an "Introduction," expressing its view that the claims raised in the SAC were simply repackaged versions of the immunity argument it had already addressed and decided last time. JA31-42. Turning to the allegations themselves, the court rejected the President's allegations that the scope of the grand jury's investigation was limited to the 2016 Cohen payments. JA94-103. "[M]indful of" and "refer[ing] to" documents outside the complaint, JA102, the court hypothesized the "possibility that this grand jury investigation could be ... ranging and exploratory" instead. JA99. The court then took the President's allegations of overbreadth and bad faith one at a time, explaining why it found each allegation unpersuasive, particularly in light of the presumption of validity that attaches to grand-jury subpoenas. JA76-94; JA103-18.

Shortly after the district court issued its opinion, the President filed an emergency notice of appeal and an emergency motion for a stay pending appeal. JA12 (D.Ct. Docs. 73, 74). The district court denied a stay, expressing its view that "[t]here is no sign that the Supreme Court contemplated any further appellate proceedings" in this case. D.Ct. Doc. 75 at 6.

One hour later, the President sought an emergency stay from this Court. CA2 Doc. 16. This Court denied an administrative stay and scheduled the stay pending appeal to be heard on September 1—five days after the subpoena would become enforceable. CA2 Doc. 35; *see* D.Ct. Doc. 52 at 10. The parties agreed, however, to stay enforcement of the subpoena until two days after this Court's decision. CA2 Doc. 61. On September 1, after hearing oral argument, this Court granted the stay pending appeal. CA2 Doc. 82.

SUMMARY OF ARGUMENT

A unanimous Supreme Court, this Court, and now even the District Attorney agree that the President of the United States can challenge this first-of-its-kind subpoena for his personal papers in federal court. And the Supreme Court held, in this very case, that the President could raise claims of overbreadth and bad faith on remand. "These protections, as the district attorney himself puts it, 'apply with special force to a President, in light of the office's unique position as the head of the Executive Branch.'" *Vance*, 140 S. Ct. at 2428 (quoting Br. for Resp't Vance 43).

The President outlined those claims in the SAC with far more detail and support than was required under the federal notice-pleading regime—relying on, among other things, press reports, the course of negotiations over a related subpoena, public statements by the District Attorney in this litigation, line-by-line explanations of the subpoena's breadth, and the fact that the District Attorney copied a congressional subpoena. That last fact, according to a Justice of the Supreme Court, raises "obvious

concerns" about "the scope of the subpoena." *Id.* at 2449 (Alito, J., dissenting). Tellingly, the district court needed *103 pages* to explain why the President's allegations do not rise to the level of plausible.

This is not how Rule 12(b)(6) works—for any plaintiff, let alone the President of the United States whose office is owed "'high respect.'" *Id.* at 2430 (majority op.). The district court's errors began with its introductory remarks, when it stacked the deck against the President by incorrectly characterizing his claims as a "back door" attempt to reargue presidential immunity. Unsurprisingly then, when analyzing the President's claims, the district court refused to credit his well-pleaded allegations about the scope of the investigation, drew inferences against him, faulted him for not disproving conceivable alternatives (occasionally peeking at extrinsic materials from the prior litigation), and sliced and diced each allegation of bad faith and overbreadth until the cumulative picture was lost.

Not only was this improper; it was wholly unnecessary. Based on the President's clearly plausible allegations, the District Attorney should have simply answered the complaint, participated in limited discovery, and filed a motion for summary judgment. That is how federal courts resolve highly fact-intensive disputes. *See id.* at 2433 (Kavanaugh, J., concurring in judgment) ("[C]ourts 'should be particularly meticulous' in assessing a subpoena for a President's personal records" and "will almost invariably have to begin by delving into" the facts (quoting the majority opinion)). The President proposed that process. The President was willing to work with the District Attorney to

streamline and expedite that process. And that process might be finished already if the District Attorney had pursued it, instead of convincing the district court to apply a heightened version of the pleading standard that is foreign to federal litigation and that denied the President a chance to litigate his serious claims. This Court should reverse.

ARGUMENT

This Court reviews a 12(b)(6) dismissal de novo, "'construe[ing] the complaint liberally, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor.'" *Palin v. N.Y. Times Co.*, 940 F.3d 804, 809 (2d Cir. 2019). A complaint need only allege "'enough facts to state a claim to relief that is plausible on its face'"; so long as the "'[f]actual allegations'" in the complaint "'raise a right to relief above the speculative level,'" the court cannot dismiss for failure to state a claim. *Rich v. Fox News Network, LLC*, 939 F.3d 112, 121 (2d Cir. 2019). This "plausibility threshold is exceedingly low." *Elias v. Rolling Stone LLC*, 872 F.3d 97, 111 (2d Cir. 2017) (Lohier, J., concurring in part and dissenting in part). "To keep [it] in perspective," this Court has stressed that "just two weeks after deciding *Twombly*, the Supreme Court" summarily reversed a 12(b)(6) dismissal because "'[s]pecific facts are not necessary'" and "'the [complaint] need only give the defendant fair notice to what the claim is and the grounds upon which it rests.'" *Adia v. Grandeur Mgmt., Inc.*, 933 F.3d 89, 92 (2d Cir. 2019) (quoting *Erickson v. Pardus*, 551 U.S. 89, 93 (2007)).

A right to relief can be "plausible" even if it's "not probable or even reasonably likely." *Elias*, 872 F.3d at 105 (majority op.). The complaint can proceed "'even if it

strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely.'" *Starr*, 592 F.3d at 322 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). "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, LLC v. Am. Media, Inc.*, 680 F.3d 162, 184 (2d Cir. 2012). Thus, "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).

To resolve a 12(b)(6) motion, moreover, a court may "not look beyond facts stated on the face of the complaint, documents appended to the complaint or incorporated in the complaint by reference, and matters of which judicial notice may be taken." *Goel v. Bunge, Ltd.*, 820 F.3d 554, 559 (2d Cir. 2016) (cleaned up). And "[t]he Court may take judicial notice of court filings 'not for the truth of the matters asserted … but rather to establish the fact of such litigation and related filings.'" *Wexler v. Allegion (UK) Ltd.*, 374 F. Supp. 3d 302, 306 n.1 (S.D.N.Y. 2019); *accord Staehr v. Harford Fin. Servs. Grp., Inc.*, 547 F.3d 406, 425 (2d Cir. 2008) ("[I]t is proper to take judicial notice of the *fact* that press coverage, prior lawsuits, or regulatory filings contained certain information, without regard to the truth of their contents"). While the court can also consider "a document not expressly referenced" that is "'integral' to the complaint," integral is a high bar. *Goel*, 820 F.3d at 559. A document is not integral unless the

complaint "'relies heavily upon its terms and effect'"; "mentioning a document" or "offering limited quotations" are "not enough." *Id.* (cleaned up).

Apart from these sources, all other extrinsic materials must be ignored. *See id.*; *McCray v. Lee*, 963 F.3d 110, 119 (2d Cir. 2020); *Faulkner v. Beer*, 463 F.3d 130, 134 n.1 (2d Cir. 2006); *Newman & Schwartz v. Asplundh Tree Expert Co., Inc.*, 102 F.3d 660, 662 (2d Cir. 1996). "A contrary rule would permit the improper transformation of the Rule 12(b)(6) inquiry into a summary-judgment proceeding—one featuring a bespoke factual record, tailor-made to suit the needs of defendants." *Goel*, 820 F.3d at 560. Faced with extrinsic materials, "a district court must either 'exclude the additional material and decide the motion on the complaint alone' or 'convert the motion to one for summary judgment … and afford all parties the opportunity to present supporting material.'" *Friedl v. City of N.Y.*, 210 F.3d 79, 83 (2d Cir. 2000).

In the SAC, the President plausibly alleged that the Mazars subpoena is overbroad and was issued in bad faith. The district court's decision to the contrary is flawed from start to finish. At the outset, the district court confused the President's prior claim of categorical immunity with his later claims of overbreadth and bad faith, incorrectly stacking the deck against him. Then, the district court violated basic principles of federal pleading by disputing the President's factual allegations, drawing inferences against him, and faulting him for not disproving conceivable alternatives. In the end, none of this was necessary: Instead of ratcheting up the pleading standard based on theoretical guesses about the District Attorney's investigation, the district

court should have required the District Attorney to answer the complaint, engage in limited discovery, and then litigate this dispute where many (if not most) fact-dependent disputes are resolved—summary judgment.

I. The district court incorrectly treated the President's overbreadth and bad-faith claims as a "back door" request for immunity.

When the Supreme Court issued its opinion in this case, it drew a clear line between claims of categorical presidential immunity and other "subpoena-specific" challenges that the President "may raise" on remand. *Vance*, 140 S. Ct. at 2430. The Court stressed that "[t]he arguments presented here and in the Court of Appeals were limited to absolute immunity and heightened need," and that this case will "be returned to the District Court, where the President may raise further arguments as appropriate." *Id.* at 2431. The Supreme Court then outlined what those subpoena-specific challenges could be, citing both overbreadth and bad faith as examples. *Id.* at 2428. According to the Court, subpoenas issued to the President that are "'arbitrary fishing expeditions'" or that are issued "'out of malice or an intent to harass'" are invalid. *Id.*; *see id.* at 2433 n.1 (Kavanaugh, J., concurring in judgment) (grounding these limits in Article II). The Court thus "unanimously agree[d]" that this case should be returned to the district court

where the President would have the opportunity to raise subpoena-specific claims. *Id.* at 2431 (Kavanaugh, J., concurring in judgment); *id.* at 2431 & n.6 (majority op.).[1]

But the district court apparently disagreed. It rejected both the Supreme Court's distinction between categorical immunity and subpoena-specific challenges, and the Supreme Court's unanimous judgment that the President had a right to litigate the latter on remand. Before addressing the only issue presented to it (whether the President plausibly alleged overbreadth and bad faith), the district court spent ten pages discussing why the President's theory of *immunity* was "extrem[e]," had "ominous implications," and threatened "adverse consequences for … justice." JA31-42.

By the court's own admission, its discussion of presidential immunity was not simply prologue or review. JA37. Rather, the court thought it was relevant because "the tenor and practical effect" of the SAC's claims would "engender a form of presidential immunity by default." JA37. The court described the President's subpoena-specific challenges as "absolute immunity through a back door," called the SAC a "roundabout route" to immunity, and asserted that "granting the relief the President requests would effectively constitute an undue expansion of presidential immunity doctrine." JA41-42.

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[1] The Supreme Court made its mandate even clearer in the decretal language at the end of its opinion. The Court not only "affirm[ed] the judgment of the Court of Appeals," but also "remand[ed] the case for further proceedings consistent with this opinion." *Vance*, 140 S. Ct. at 2431. That "remand" language is unusual. Normally, when the Supreme Court affirms a circuit court opinion, it simply "affirms" without ordering proceedings on remand. *E.g.*, *Barr v. Am. Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2356 (2020); *Hernandez v. Mesa*, 140 S. Ct. 735, 750 (2020). The Court typically doesn't order remand even in interlocutory cases, like this one, where it affirms denial of a preliminary injunction. *E.g.*, *Glossip v. Gross*, 576 U.S. 863, 893 (2015).

While the district court recognized that categorical immunity was not "directly before [it] at this stage," it was unwilling to let go of the notion that immunity is "still implicated." JA42 n.9.

For similar reasons, the district court announced its firm belief that "[j]ustice requires an end to this controversy." JA131. It expressed dissatisfaction with having to "devote considerable judicial resources" to "consider[ing] again a fact pattern it believes the parties had thoroughly argued and the Court had substantially addressed." JA38. It also denounced other cases where the executive branch made arguments "to justify … withholding information demanded by Congress, the courts, [and] the public." JA42 n.9. In the court's view, all this litigation has "yielded disquieting constitutional effects eroding the rule of law and the doctrines of separation and balance of powers." JA42 n.9.[2]

In short, the district court believed that this case should be over, that this case does not deserve to be in court, and that its resolution of the motion to dismiss was predetermined by its earlier rejection of the President's immunity claim. In its 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,

[2] While the district court is entitled to its view, it's worth noting that the President *succeeded* in the cases that the district court was implicitly referencing. According to a unanimous Supreme Court, 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, 2036 (2020).

hence calling upon the Court … to consider *again* a fact pattern it believes … the Court had substantially addressed." JA38 (emphases added).

The district court should not have approached remand this way. The President is not trying to resurrect a categorical-immunity claim. He is challenging this specific subpoena on distinct grounds that are recognized by the governing law, and that the Supreme Court identified as appropriate claims on remand *in this very case*. The court may disagree with the Supreme Court's ruling, but it was tasked with implementing that mandate—not questioning it. *See In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895); *Etuk v. Slattery*, 973 F.2d 60, 62 (2d Cir. 1992). Courts "err[]" when they depart from either "the express terms or the spirit" of a decision remanding the case. *Ginett v. Computer Task Grp., Inc.*, 11 F.3d 359, 361 (2d Cir. 1993).

Though the district court eventually made its way to the President's subpoena-specific claims, its introductory criticisms of the President's suit infected the rest of its analysis. The court's belief that it was "again" considering "a fact pattern" that it had previously "addressed," JA38, is troubling because, in the earlier litigation, the court was considering a *preliminary-injunction* motion. That motion did require the district court to consider extrinsic evidence and make preliminary findings of "fact." The President bore "a heavier burden" at the preliminary-injunction stage "than [he] bears in pleading the plausible claim necessary to avoid dismissal" under Rule 12(b)(6), where the only question is "the sufficiency of the pleadings" and where the court must "accept all [his] allegations as true" and "draw all reasonable inferences in [his] favor." *New Hope Family*

Servs., Inc. v. Poole, 966 F.3d 145, 165 (2d Cir. 2020). Though the district court agreed that it could not "rely on … the prior filings during the preliminary injunction phase" to resolve the motion to dismiss, it could not resist the temptation to "be mindful of" and "refer to" those exact materials. JA102. Its mindfulness, plus its belief that the President was surreptitiously trying to reargue immunity, likely explain why the rest of the court's opinion applies a withering form of scrutiny to the President's complaint—one that does not resemble the liberal pleading standards that govern "every other citizen." *Vance*, 140 S. Ct. at 2430.

Sometimes "a tangent makes a point." JA32 n.1. But sometimes that point is an erroneous conviction that distorts the court's view of the case and prevents it from reaching the correct result. That is what happened here. For this reason alone, the Court should vacate the district court's opinion and require it to reexamine the President's claims—this time, without inappropriately prejudging them as back-door attempts to reargue presidential immunity.

II. The district court misapplied the federal pleading rules.

This important case and the President's serious claims on remand, quite plainly, should not be resolved at *the pleading stage*. To paraphrase a unanimous Supreme Court decision summarily reversing another misapplication of the pleading standard, the President "stated simply, concisely, and directly events that, [he] alleged," made the subpoena overbroad and issued in bad faith; "[h]aving informed the [District Attorney] of the factual basis for [his] complaint, [he] w[as] required to do no more to stave off

threshold dismissal for want of an adequate statement of [his] claim[s]." *Johnson v. City of Shelby*, 574 U.S. 10, 12 (2014) (citing Fed. R. Civ. P. 8(a)(2)-(3), (d)(1), (e)). This Court's inquiry can begin and end there.

That the SAC cleared the plausibility threshold should not be surprising. "This case involves … the first *state* criminal subpoena directed to a President," and the District Attorney who issued that subpoena "essentially copied" a *legislative* subpoena issued by a committee of the U.S. House of Representatives. *Vance*, 140 S. Ct. at 2420 & n.2; *see* JA19-20 ¶¶19-20. Of course a subpoena issued by Congress to supposedly help it pass federal legislation is *plausibly* overbroad when issued by a county prosecutor to help him investigate local crimes. And of course the decision to photocopy a congressional subpoena was *plausibly* 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 President didn't rest on high-level observations alone. He thoroughly stated detailed claims for overbreadth and bad faith. Because the SAC easily satisfies the generous federal pleading standard, this Court should reverse.

A. The President plausibly alleged that the Mazars subpoena is overbroad.

While a grand jury's subpoena power is broad, it is "not unlimited." *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 299 (1991); *see In re Eight Grand Jury Subpoenae Duces*

Tecum, 701 F. Supp. 53, 55 (S.D.N.Y. 1988) ("broad but circumscribed" and "subject to some limitations"); *Stern v. Morgenthau*, 62 N.Y.2d 331, 336-37 (1984) ("extensive" but "not unlimited"). 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.'" *In re 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)).

In the context of a grand-jury subpoena, "reasonableness" generally has three components:

1. The subpoena "may command only the production of things relevant to the investigation being pursued."
2. The subpoena "must specify the things to be produced with reasonable particularity."
3. And the subpoena "may order the production of records covering only a reasonable period of time."

In re Grand Jury Subpoena Duces Tecum Addressed to Provision Salesmen and Distributors Union, Local 627, AFL-CIO, 203 F. Supp. 575, 578 (S.D.N.Y. 1961); *see Stern*, 62 N.Y.2d at 336-37. Under the first and third elements, there must be a "logical connection between" the subpoenaed documents and both the subject matter and the time period of the investigation. *In re Aug. 1993 Regular Grand Jury (Med. Corp. Subpoena II)*, 854 F. Supp. 1392, 1400 (S.D. Ind. 1993); *In re Rabbinical Seminary Netzach Israel Ramailis*, 450 F. Supp. 1078, 1084-85 (E.D.N.Y. 1978); *see also Virag v. Hynes*, 54 N.Y.2d 437, 444 (1981) (requiring "relation to the matter under investigation"). A subpoena "too sweeping in

its terms" on either front cannot "be regarded as reasonable." *Hale v. Henkel*, 201 U.S. 43, 76 (1906).

Despite a presumption of regularity, 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; *see In re Horowitz*, 482 F.2d 72, 79-80 (2d Cir. 1973); *Virag*, 54 N.Y.2d at 444 (relevance must be "conceivable"); *Manning v. Valente*, 272 A.D. 358, 362 (N.Y. App. Div. 1947) (requiring an "'intelligent estimate' of relevancy"). While subpoenas needn't be perfectly drawn and legitimate requests can sweep in some irrelevant documents, a subpoena is "unreasonably broad" if is likely that certain "types of documents" contain no relevant information for the grand jury's investigation. *In re Grand Jury Subpoena Duces Tecum Dated Nov. 15, 1993*, 846 F. Supp. 11, 12-14 (S.D.N.Y. 1994); *accord R. Enterprises, Inc.*, 498 U.S. at 301.

Importantly, though, a prosecutor cannot insulate a subpoena from overbreadth challenges by drafting categories of requests so broadly that they will surely produce "some relevant information." *Subpoena Dated Nov. 15*, 846 F. Supp. at 12; *see In re Grand Jury Subpoena, JK-15-029*, 828 F.3d 1083, 1089 (9th Cir. 2016) (explaining that the government cannot "insulate[] its subpoena from review" "by self-defining the 'category of materials' sought as broadly as possible"). Subpoenas that are too broad on their face—like subpoenas requesting "all of one's books and papers en masse" over "an extensive period"—are presumptively unreasonable. *Schwimmer v. United States*, 232

F.2d 855, 861-62 (8th Cir. 1956); *accord In re Grand Jury Investigation*, 174 F. Supp. 393, 395 (S.D.N.Y. 1959).

As the Supreme Court summarized these principles, the District Attorney's subpoena must be "properly tailored." *Vance*, 140 S. Ct. at 2426. This rule guards against "'arbitrary fishing expeditions'" and applies with "'special force'" to the President. *Id.* at 2428. Courts must be "particularly meticulous" when assessing a subpoena, like this one, that seeks the President's personal papers. *Id.* at 2430 (quoting *United States v. Nixon*, 418 U.S. 683, 702 (1974)); *accord id.* at 2433 (Kavanaugh, J., concurring in judgment). "'The high respect that is owed to the office of the Chief Executive'" requires as much. *Id.* at 2430 (majority op.).

Here, the President plausibly alleged that the subpoena is not properly tailored. 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); and, here, the President alleged that the investigation was about Cohen's 2016 payments to certain individuals. JA14 ¶1; JA15 ¶4; JA16 ¶12; JA23 ¶35. The press reported that the investigation was about Cohen's payments and how The Trump Organization recorded them. JA16 ¶12. The District Attorney issued a subpoena to The Trump Organization that asked about *only* those precise topics. JA16-17 ¶13. And it's reasonable to infer that the Mazars subpoena is part of that same investigation, as the District Attorney issued it shortly after the subpoena to The Trump Organization, issued it only after those negotiations broke down, framed it to get around the exact reasons why the negotiations

broke down (by sending it to a neutral third party and explicitly requesting tax returns), and copied an existing congressional subpoena for "efficiency" (not because the scope of the investigation had broadened). JA17-20 ¶¶15-22. These well-pleaded allegations about the scope of the investigation must be accepted as true. *Starr*, 592 F.3d at 317.

Given this alleged scope, the Mazars subpoena is plainly overbroad. The subpoena demands *all* financial records, documents, and communications (not just those related to business transactions or New York reports) from *all* entities associated with The Trump Organization (not just those connected to Michael Cohen or with responsibility for New York reports), over the course of nearly a decade (including five years before the Cohen payments). JA18 ¶18; JA22-23 ¶¶31-35. The subpoena reaches entire categories of documents that have nothing to do with the 2016 payments—for example, an accounting of the assets held in 2011 by entities in California, or Illinois, or Dubai, JA22-23 ¶¶32-33, and documents related to a lease between the federal government and a D.C. hotel, JA25 ¶43. These are the hallmarks of an overbroad demand. *See Horowitz*, 482 F.2d at 79-80 (finding it "difficult to see what relevance there could be in papers so long antedating the inception of the [investigated] project"); *Schwimmer*, 232 F.2d at 861-62 (demanding papers "en masse" over "an extensive period" raises suspicions of irrelevance and overbreadth).

In fact, the District Attorney admits that he did not even *try* to tailor the Mazars subpoena to his investigation. The subpoena was drafted by the House Oversight Committee for the stated purpose of considering federal legislation. JA23-26 ¶¶36-45;

see JA19-20 ¶¶19-20. That legislation, in turn, purportedly involves the Constitution's Foreign Emoluments Clause, federal conflict-of-interest laws, federal disclosure laws, reforms to the Office of Government Ethics, and a lease operated by the General Services Administration—explaining the subpoena's international reach and the volume of financial information requested. JA24-25 ¶¶37-43. The subpoena's time period (dating back to 2011) is purportedly tied to the Committee's purposes, as that is when The Trump Organization pursued a contract with the federal government to operate a hotel in D.C. JA25 ¶43. The scope, timeframe, subject matter, and purpose of the subpoena, according to the Oversight Committee, are not tied to a local investigation of New York crimes. JA24-25 ¶¶37-43. And its purported legislative purposes are all outside the District Attorney's jurisdiction. JA21-22 ¶¶27-30; JA24-25 ¶¶37-44. When he copied the subpoena, the District Attorney denied that his investigation was coextensive with the Oversight Committee's. JA21 ¶¶25-26. Instead, he said he copied the subpoena because it made compliance easier for Mazars—a damning confession that the subpoena was never tailored to the scope of his actual investigation. JA20 ¶22.

The district court did not dispute that if, as the President alleged, the District Attorney's investigation is focused on Cohen's payments, then the Mazars subpoena is overbroad. In fact, the district court accepted "that the grand jury *is* investigating the 2016 Michael Cohen Payments." JA95 (emphasis added). The district court instead declined to accept the President's allegations about the scope of the investigation. "[T]hat the grand jury's investigation is *limited* to those payments," the court reasoned,

"is speculative in light of the obvious alternative explanation that the grand jury's broader requests might simply indicate a broader investigation." JA95-97.

This reasoning is a "stark" departure "from the pleading standard mandated by the Federal Rules of Civil Procedure." *Erickson*, 551 U.S. at 90. As explained, the President's allegations about the scope of the District Attorney's investigation are well-pleaded and must be accepted as true. All reasonable inferences about the investigation's scope must be drawn in the President's favor. And even the existence of a readily available alternative scope does not give the district court license to disregard the President's allegations.

"As Rule 8 implies, 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). 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*, 680 F.3d at 190. "The question at the pleading stage," in other words, "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. After all, "there may ... be more than one plausible interpretation of a defendant's words, gestures, or conduct," and so "although an innocuous interpretation of the defendants' conduct may be plausible, that does not mean that the plaintiff's allegation that that conduct was culpable is not also plausible." *Id.* at 189-90. "[T]he choice between or among plausible

interpretations of the evidence will be a task for the factfinder." *Id.* at 190; *accord 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).

The district court would have erred if it had concluded that the District Attorney's investigation *probably* extends beyond the Cohen payments. "When a court confuses probability and plausibility, it inevitably begins weighing the competing inferences that can be drawn from the complaint. But it is not [the court's] task at the motion-to-dismiss stage to determine 'whether a lawful alternative explanation appear[s] more likely' from the facts of the complaint." *SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412, 425 (4th Cir. 2015); *accord Wilson v. Ark. Dep't of Human Servs.*, 850 F.3d 368, 374 (8th Cir. 2017).

But the district court's errors were worse than that. It dismissed the President's overbreadth claim because it found his allegations merely "consistent with" its alternative hypothesis. JA97. Worse, it referred to extrinsic evidence for "illustrative examples" of what the grand jury *could be* investing and then faulted the President for not overcoming those theoretical possibilities. JA97, 102. In the court's view, because the grand-jury investigation "need not" be limited to the Cohen payments, and because "the scope of an investigation *may* broaden in short order," it was implausible to conclude otherwise. JA97-98 (emphasis added). In short, the President was faulted for failing to negate "the readily apparent *possibility* that this grand jury investigation could

be as ranging and exploratory as the many grand jury investigations that courts have approved in the past." JA99 (emphasis added).

The district court also explicitly drew inferences *against* the President. At one point, the court wholly discounted the President's allegations because they did not address "competing inferences" drawn from external evidence that may "not, in fact," be true. JA102.[3] The court also read parts of the complaint that were consistent with the President's theory as if they were contradictory. *See, e.g.*, JA97 (construing the President's allegation that the investigation concerned "business transactions involving multiple individuals" as referring to something other than the 2016 payments, the reimbursements, and the various individuals and entities involved with those payments). At another point, the court cited the *breadth of the subpoena* as evidence that the District Attorney's investigation is broader than the Cohen payments. JA97. This reasoning is plainly circular. It's hard to imagine it being employed to dismiss any other complaint—for example, a court would not use the fact that an employee was fired to argue that he

[3] The District Attorney went further and actually asked the court to consider these extrinsic materials (the Shinerock declaration and various news articles) for their truth. *See* D.Ct. Doc. 63 at 11, 22-23, 23 n.7, 24 n.9, 26 n.11. The district court correctly concluded that it could not do so. JA102. The District Attorney is no longer pressing this argument on appeal. *See* O.A. Recording 23:10-23:30 (stating he would "not … suggest looking at [the Shinerock declaration] for purposes of our 12(b)(6) motion"). Even if he were, these documents would not negate the complaint's reasonable inferences about the investigation's scope. The articles do not mention the District Attorney or state anything about what he's investigating. D.Ct. Doc. 63 at 23 & n.7. And the unredacted portions of the Shinerock declaration do not identify any allegations that the District Attorney is investigating other than the 2016 payments. JA160-67.

must have been a bad employee, rather than the victim of racial discrimination. That's not how plausibility works.

But even assuming the District Attorney's investigation is not limited to the Cohen payments, the Mazars subpoena is still overbroad. *See* JA23 ¶35. On its face, the subpoena asks for every document and communication related to the President and his businesses for nearly a decade. JA18 ¶18; JA22-23 ¶¶31-35. This is precisely the type of "en masse" demand of "such a varied accumulation" "over such an extensive period" that is strongly suggestive of a "fishing expedition." *Schwimmer*, 232 F.2d at 861-62; *see also Grand Jury Investigation*, 174 F. Supp. at 395 (holding that a "subpoena which requires production of practically every paper outside of routine correspondence relating to every phase of the corporation's affairs" constituted "an unlimited exploratory investigation" and was thus "unreasonable"). The subpoena is designed to include everything "in the imaginative concept of every shred of paper" in Mazars' possession related to the President and The Trump Organization. *Harry Alexander*, 8 F.R.D. at 560.

The subpoena's unlimited breadth means it cannot possibly be reasonably tailored to *any* particular investigation. Not even "a complex financial investigation," *see* D.Ct. Doc. 63 at 19-24, 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, e.g.*, *Subpoena Dated Nov. 15*, 846 F. Supp. at 12-14; *In Re Grand Jury Subpoena Duces Tecum Served Upon Local 456, Intern. Broth. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 1980 WL 2157, *1-2 (S.D.N.Y. Mar. 25,

1980); *In re Grand Jury Proceedings Witness Bardier*, 486 F. Supp. 1203, 1214 (D. Nev. 1980); *L&S Hospital & Institutional Supplies Co. v. Hynes*, 375 N.Y.S.2d 934, 941 (1975).

The subpoena reaches so far beyond New York County's borders and so comprehensively beyond any conceivable conduct related to New York County that it plausibly sweeps in categories of irrelevant information. The District Attorney has generically noted that The Trump Organization is headquartered in his county, and that that New York City is a "financial nerve center." D.Ct. Doc. 63 at 19-20, 23. But the President has plausibly alleged facts sufficient to support the inference that any such actors would not alone or together have a relevant relationship to *all* of the entities covered by the subpoena for the *entire* time period. JA20-26 ¶¶22-45. It strains credulity to think, for example, that the contractual agreement between a Washington D.C. hotel and the federal government in 2011, *and* the value of the equipment held by an entity in India in 2012, *and* a transaction by an entity in Ireland in 2013 (let alone every transaction) has a material connection to a hypothetical investigation under the criminal jurisdiction of New York, or that any New York actor has a meaningful connection to all three.

Again, the subpoena is obviously overbroad because it was not even *drafted* with a New York criminal investigation in mind. The District Attorney photocopied a legislative subpoena justified on entirely different grounds, while denying that his investigation overlaps with the Oversight Committee's and confessing that he copied the subpoena solely to make things easier for Mazars.

Conflating plausibility with probability, the district court stated that copying a subpoena drafted for another purpose doesn't *necessarily* mean that the second subpoena includes irrelevant categories of documents. JA87. But it is certainly *plausible*. The case that the district court cited for that proposition involved copying a subpoena from a search warrant pursuing the same investigative ends, which is, of course, not the situation here. *See* JA87 (citing *United States v. Vilar*, 2007 WL 1075041, at *45-46 (S.D.N.Y. Apr. 4, 2007)).

In the same vein, the district court noted that Congress and the States *sometimes* have overlapping jurisdiction and that "a particular document may be desirable for multiple purposes." JA62-65. That's true as far as it goes; it just doesn't go very far. This isn't about *a* particular document—it's about thousands of them. This isn't about the potential overlap of a congressional and state investigation—it's about the idea that several congressional purposes (at least seven alleged in the SAC, *see* JA24-25 ¶¶37-43) *all* overlap with the grand jury's investigation. And this isn't about what the District Attorney *could* be investigating—it is about what he *is* investigating. It is plausible to conclude that not all of the categories of the information covered by such a sweeping subpoena are simultaneously tailored to the purposes of different bodies with different interests and different powers. And it is plausible to conclude that a sweeping subpoena drafted by one of those bodies to pursue several goals and functions unique to it is not properly tailored to any purpose of the other.

Relatedly, while it is *possible* for the District Attorney to both act within his jurisdiction and "prosecute foreign entities and crimes with an international dimension," JA110, that's not the point. The District Attorney hasn't just subpoenaed some documents from entities in a foreign country or even a foreign region—he has issued blanket demands for all documents related to entities in every corner of the world, from Canada to the Philippines and from the Dominican Republic to Turkey. *See* JA22-23 ¶¶31-35. Although the subpoena is broken down into categories, it remains a demand for *every* document Mazars has that is in any way related to the President or his businesses in any part of the world. It is an "en masse" demand strongly suggestive of a "fishing expedition." *Schwimmer*, 232 F.2d at 861-62; *Grand Jury Investigation*, 174 F. Supp. at 395. Especially at this stage, it makes no difference that a given document "may" in theory "assist the grand jury." JA116-17.

Contrary to the district court's conclusion, it is at least plausible that some of the reams of documents the District Attorney requested "'are so unrelated'" to the subject of the grand jury's inquiry that their production is "'futile.'" JA112 (quoting *Virag*, 54 N.Y.2d at 444). The President made detailed allegations in that regard. The Federal Rules require no more at this stage.

B. The President plausibly alleged that the Mazars subpoena was issued in bad faith.

The President's bad-faith claim is likewise well pleaded. As the Supreme Court held, a subpoena is invalid if it "is motivated by a desire to harass" or has been issued "in bad faith." *Vance*, 140 S. Ct. at 2428. Indeed, evidence of "improper purpose [can]

overcome the presumption of propriety of the grand jury subpoena." *In re Grand Jury Proceeding*, 961 F.3d 138, 152 (2d Cir. 2020); *accord Virag*, 54 N.Y.2d at 442-43. Naturally, issuing a grand jury subpoena to engage in "harassment or other prosecutorial abuse" is an improper purpose. *In re Grand Jury Proceedings*, 33 F.3d 1060, 1063 (9th Cir. 1994). But 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," *JK-15-029*, 828 F.3d at 1088; *see also In re Stolar*, 397 F. Supp. 520, 522 (S.D.N.Y. 1975) ("[E]ven when the grand jury is generally acting within its normal limits care must be taken to ensure that its historic functions are not subverted nor its powers abused."). No "law" permits the District Attorney to subject the President of the United States to such "abuse." *Vance*, 140 S. Ct. at 2428; *see id.* at 2433 & n.1 (Kavanaugh, J., concurring in judgment).

Here, the District Attorney has admitted to copying the Mazars subpoena from the House Oversight Committee, rather than drafting a subpoena tailored to his own investigation. JA20 ¶22. He justified copying the subpoena as a means of "facilitat[ing] 'expeditious production of responsive documents.'" *Id.* As a consequence, the subpoena asks for a litany of documents that go far beyond the grand jury's investigation into Cohen's 2016 payments. JA21-26 ¶¶27-45. The relevant point here, though, is not the overbreadth itself, but the District Attorney's complete disregard for the tailoring requirement—which, alone, states a claim of bad faith. *Burns*, 890 F.3d at

92; *see JK-15-029*, 828 F.3d at 1089 ("[A] subpoena may be quashed when no effort is made to tailor the request to the investigation, even if some fraction of the material the subpoena seeks is relevant.").

Further, the District Attorney issued the subpoena in response to—and in retaliation for—a dispute over the scope of an earlier subpoena to the Trump Organization. JA17-18 ¶16. When the District Attorney realized he would not be getting the President's tax returns via a subpoena to The Trump Organization, he quickly sought them from Mazars by taking advantage of an existing congressional subpoena. JA18-20 ¶¶17-20. Both the tax returns and the other financial information in the Mazars subpoena were, not coincidentally, the subject of intense public interest and an ongoing dispute between the President and Congress. *See* JA21 ¶24 (noting that the subpoena was issued during a time when "Democrats had become increasingly dismayed over their ongoing failure 'to get their hands on the long-sought after documents'"). Retaliation is an improper and harassing purpose. *Grand Jury Proceeding*, 961 F.3d at 152; *Grand Jury Proceedings*, 33 F.3d at 1063.

On remand, the District Attorney has tried to abandon his "efficiency" rationale for copying the congressional subpoena. In the district court, he argued that "it makes perfect sense that the subpoenas seek the same information [as the congressional subpoena], as they both relate to public reports about the same potentially improper conduct." D.Ct. Doc. 63 at 9; *see also* D.Ct. Doc. 63 at 19 (suggesting that his "Office

might want the same documents as Congress"). But this argument misses the mark for two main reasons.

First, what matters at this stage is that the President has plausibly alleged that the subpoena was issued for "efficiency" reasons, not whether the District Attorney believes he can ultimately rebut this allegation as a factual matter. The President's allegations—which rely on the District Attorney's own statements, JA20-26 ¶¶22, 25-26—must be accepted as true. The President has further alleged—again supported by the District Attorney's own statements—that the grand jury's investigation does *not* have the same scope, subject matter, or timeframe as the congressional investigation. *See* JA21-25 ¶¶26-44. In fact, it would be farfetched to conclude otherwise. JA26 ¶45; *see* JA23-25 ¶¶36-44; *Vance*, 140 S. Ct. at 2449 (Alito, J., dissenting) ("[I]t would be quite a coincidence.").

Second, even if the District Attorney's extrinsic statements could be credited at this stage, he certainly *did* justify the Mazars subpoena on efficiency grounds before, and the fact that his explanation is now shifting is itself evidence of bad faith. *Carlton v. Mystic Transp., Inc.*, 202 F.3d 129, 137 (2d Cir. 2000); *Weinstock v. Columbia Univ.*, 224 F.3d 33, 58 (2d Cir. 2000); *see Digilov v. JPMorgan Chase Bank, N.A.*, 2015 WL 685178, at *15 (S.D.N.Y. 2015) ("Defendant's inconsistent justifications for his denial of promotion are sufficient to permit a jury to find that Defendant's shifting explanations are pretexts designed to conceal an illicit motive."). The District Attorney's evolving explanations are troubling, not comforting. He should not have told the Supreme Court

that the subpoena was copied to "minimize[] the burden on third parties and enable[] expeditious production of responsive documents" if that wasn't accurate or the full picture. Br. in Opp. at 5 n.2, *Trump v. Vance*, 2019 WL 6327270 (U.S. Nov. 21, 2019).

In all events, a legal fight over "motive" is a classic "factual dispute inappropriate for resolution on a Rule 12(b)(6) motion." *Lawton v. Success Academy Charter Schs., Inc.*, 323 F. Supp. 3d 353, 365 (E.D.N.Y. 2018). A defendant's "argument that plaintiff's 'bad faith' claim fails because [defendant] acted reasonably is without merit. In essence, defendant challenges the truth of plaintiff's allegations and the substantive merits of plaintiff's second cause of action, which is inappropriate at this stage of the litigation .... The ultimate question of whether defendant did not actually act in bad faith is not yet relevant." *Douglas E. Barnhart, Inc. v. Zurich American Insurance Company*, 2007 WL 9777932, at *4 (S.D. Cal. 2007) (cleaned up). So too here.

In concluding otherwise, the district court again credited conceivable alternatives over the President's plausible allegations. The timing of the subpoena didn't create an inference of bad faith, according to the district court, because "this sequence of events could obviously be explained in ways that do not impugn the presumptive validity of the Mazars Subpoena." JA79. The decision to seek the tax returns from Mazars instead of The Trump Organization "need not reflect bad faith" either, the district court reasoned. JA79-80. And, according to the district court, there is "nothing inherently inconsistent" with the District Attorney's shifting explanations for his actions. JA89-90 n.22. In all, the district court admitted that its preferred explanations "might not in fact

be the case"—that is, the subpoena may have been issued in bad faith—but it dismissed the President's complaint anyway. JA80. This is a textbook case of overriding well-pleaded allegations because the district court has decided that alternative explanations make more sense. The district court's ability "to conjure up some non-discriminatory motive to explain [the District Attorney's] alleged conduct is not a valid basis for dismissal." *Hassan*, 804 F.3d at 297 (cleaned up).

Take, for example, the district court's justifications for the District Attorney's decision to copy a congressional subpoena. The court recognized that the congressional subpoena was copied for "efficiency," JA89, and the "specific legislative purposes" for which that congressional subpoena was issued "are not within the jurisdiction of a New York grand jury," JA90. Even still, the court held that it wasn't even plausible to infer bad faith because copying a subpoena isn't *per se* illegal, JA87, because the District Attorney might have an unknown basis for copying it, JA91, and because it's possible that the investigations actually overlap to some degree, JA91-93. This attempt to "impose the sort of 'probability requirement' at the pleading stage which *Iqbal* and *Twombly* explicitly reject" should be reversed. *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 597 (8th Cir. 2009).

Moreover, the overall structure of the district court's opinion—taking the President's allegations one by one—elevates the pleading standard in another impermissible way. Slicing and dicing each individual allegation in the SAC, the district court determined that the close proximity of the Mazars subpoena and The Trump

Organization subpoena does not reasonably suggest bad faith. JA79-81. Then the District Attorney's use of a neutral third party to obtain the President's personal papers. JA81-83. Then the political climate surrounding the President's tax returns. JA83-85. Then the District Attorney's efficiency rationale. JA89-90. And so on. Despite occasional, conclusory assurances that it also considered the President's allegations collectively, the district court nowhere considered the totality of the President's complaint. It never considered the full picture of a dragnet, copycat subpoena (originally drafted without any thought to the grand jury's investigation), issued on the heels of a dispute over another subpoena, using a third party to circumvent the President, during a time when Democrats were restless to obtain the President's tax returns.

The district court erred. "[F]or the purposes of 12(b)(6) analysis, [courts] may not consider a particular allegation in isolation; instead, [they] must consider whether the 'factual content' in a complaint 'allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Franchino v. Terence Cardinal Cook Health Care Ctr., Inc.*, 692 F. App'x 39, 43 (2d Cir. 2017) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). The district court reasoned "that there is an 'obvious alternative explanation' for the [District Attorney's] allegedly malicious acts. Maybe so if each act were viewed in isolation." *Evans v. Chalmers*, 703 F.3d 636, 657 n.16 (4th Cir. 2012). But the Federal Rules ask "whether plaintiffs' well-pleaded, non-conclusory allegations *collectively* nudge the issue of malice 'across the line from conceivable to plausible.'" *Id.* The district court's analysis was not faithful to that approach.

In the end, the district court was simply "not persuaded" that the District Attorney issued the subpoena in bad faith. *See* JA83; JA88; JA89 n.22; JA103; JA107; JA119. But its decision violates the principles governing 12(b)(6) motions—from imposing a probability standard, to drawing inferences against the President, to disposing of factual allegations one-by-one. The Court should reverse on this claim as well.

C. There is no basis for ratcheting up the federal pleading standard for the President's claims.

Like the vast majority of complaints filed by "other citizen[s]," *Vance*, 140 S. Ct. at 2430, the President's claims get the benefit of Rule 8. His complaint need only provide "a short and plain statement of the claim showing that [he] is entitled to relief"; his allegations need only be "simple, concise, and direct"; and his pleadings "must be construed so as to do justice." Fed. R. Civ. P. 8(a)(2), (d)(1), (e). There are no heightened pleading requirements for cases involving grand-jury subpoenas. *See Randall v. Scott*, 610 F.3d 701, 710 (11th Cir. 2010) ("After *Iqbal* it is clear that there is no 'heightened pleading standard' as it relates to cases governed by Rule 8(a)(2), including civil rights complaints.").

If anything, the safeguards built into the liberal federal pleading standard should "'apply with special force to a President, in light of the office's unique position as the head of the Executive Branch.'" *Vance*, 140 S. Ct. at 2428. When the Supreme Court emphasized that "in no case would a court be required to proceed against the president as against an ordinary individual," it didn't mean that the President should get *less*

protection. *Cheney v. United States Dist. Court for D.C.*, 542 U.S. 367, 381-82 (2004) (cleaned up). It meant that "the high respect that is owed to the office of the Chief Executive should inform the conduct of the entire proceeding, including" the application of procedural rules governing "the timing and scope of discovery." *Vance*, 140 S. Ct. at 2428 (cleaned up).

The district court attempted to justify the withering version of 12(b)(6) that it applied to the President's claims by referencing the "presumption of validity" afforded to grand-jury subpoenas. JA56-57; JA62-66. In its view, the presumption of validity was so strong that it allowed the court to *weigh* the President's factual allegations at the pleading stage. *See, e.g.*, JA77; JA79; JA99; JA83; JA107. But the presumption does not justify that kind of analysis.

For one, the presumption does not alter the federal *pleading* standard; it is an *evidentiary* burden that a plaintiff bears in establishing "ultimate entitlement to relief." JA62. As the Ninth Circuit explained about the related "presumption of independent prosecutorial judgment," this kind of presumption "is an evidentiary presumption applicable at the summary judgment stage to direct the order of proof; it is not a pleading requirement to be applied to a motion to dismiss, before discovery has taken place." *Galbraith v. Cty. of Santa Clara*, 307 F.3d 1119, 1126 (9th Cir. 2002). That a plaintiff will "ultimately bear the burden of proving [his] allegations" is a separate question from whether he "present[ed] plausible claims" at the outset. *Evans*, 703 F.3d

at 657. Evidentiary presumptions cannot turn plausibility into probability or pleading into proof. *Galbraith*, 307 F.3d at 1126.

To be sure, whether a complaint states a claim "'necessarily depends on substantive law and the elements of the specific claim asserted.'" JA56. But that observation is simply another way of saying that the plaintiff must plead facts sufficient to support "all elements of the claim" (and to target affirmative defenses that appear on the face of the complaint). *Christine Asia Co. v. Ma*, 718 F. App'x. 20, 22 (2d Cir. 2017). In other words, because grand-jury subpoenas are presumptively valid, a plaintiff cannot survive a 12(b)(6) motion with mere legal conclusions couched as factual allegations. *See* JA27-28 (collecting cases). He must plausibly allege a claim that, under the governing law, would render the subpoena invalid.

The President did that. As explained, his complaint pleads plausible claims of overbreadth and bad faith—claims that all agree would invalidate a grand-jury subpoena. The presumption of validity does not somehow change the Federal Rules, or elevate the pleading standard to require more than a plausible claim for relief. Relying on the presumption would be especially inappropriate given that state law typically makes the scope of grand-jury investigations confidential. *See Bass v. Stryker Corp.*, 669 F.3d 501, 511 (5th Cir. 2012) (citing *Bausch v. Stryker Corp.*, 630 F.3d 546, 558 (7th Cir. 2010)).

Even if the presumption did meaningfully affect the pleading standard, it is hard to imagine a better example of a complaint that plausibly rebuts the presumption that

grand-jury subpoenas are valid. It is highly unusual—indeed, unprecedented—for a grand jury to subpoena a sitting President's records. It is highly unusual for a state grand jury to photocopy an unrelated congressional subpoena and issue it under its own name. And it is highly unusual for a plaintiff to have prior statements from the District Attorney confessing to copying a congressional subpoena and denying that his investigative goals are the same as Congress's. Yet the President alleged all of that—and much more.

For all these reasons, the district court was not "particularly meticulous" in ensuring that the President received all the procedural and substantive protections he is due. *Vance*, 140 S.Ct. at 2432-33 (Kavanaugh, J., concurring in judgment); *id.* at 2430 (majority op.). Quite the opposite: it violated basic principles of federal pleading law that would warrant reversal in a case involving an ordinary citizen. These errors are only more "striking[] when the federal [plaintiff] is the President of the United States, who under Article II of the Constitution serves as the nation's chief executive, the head of a branch of the federal government." *Vance*, 941 F.3d at 638.

III. The district court never gave the President a meaningful chance to litigate his claims.

To be sure, this case is not a typical challenge to a state grand-jury subpoena. Normally, the recipient of such a subpoena would challenge it by filing a motion to quash in state court. That motion, in turn, would be governed by the state-law procedures for those kinds of motions. And *Younger* abstention might bar the recipient from coming to federal court.

But to be equally sure, the Mazars subpoena is not a normal state grand-jury subpoena. It is "the first *state* criminal subpoena directed to a President." *Vance*, 140 S. Ct. at 2420. This Court immediately recognized that "the President of the United States," of all people, must be able "to access federal courts" to challenge such subpoenas. *Vance*, 941 F.3d at 637-39. And the Supreme Court unanimously agreed that the President could litigate his subpoena-specific challenges in federal court. *See Vance*, 140 S. Ct. at 2431 & n.6; *id.* at 2431 (Kavanaugh, J., concurring in judgment). The only way to raise a claim in federal court is to file a complaint—and that complaint, of course, is governed by the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 1, 2, 3. The District Attorney agrees. *See* D.Ct. Doc. 52 at 7-8; O.A. Recording at 31:20-33:02.

A legitimate dispute between a President and a state prosecutor over the validity of a grand-jury subpoena for the President's papers is unlikely to be resolved under Rule 12(b)(6). District courts "in cases of this sort involving a President 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." *Vance*, 140 S. Ct. at 2433 (Kavanaugh, J., concurring in judgment).

These are fact-intensive issues, and most plaintiffs and courts will be flying blind at the pleading stage. While the President has gleaned enough information about the District Attorney's investigation to plausibly allege its scope in the SAC, most plaintiffs

cannot do that given grand-jury secrecy rules. It is thus unreasonable to think 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" of overbreadth or bad faith. *R. Enterprises*, 498 U.S. at 301. Instead, the State should be required "to make some preliminary showing … that each item is at least relevant to an investigation being conducted by the grand jury and properly within its jurisdiction, and is not sought primarily for another purpose." *In re Grand Jury Proceedings*, 486 F.2d 85, 93 (3d Cir. 1973); *accord In re Seiffert*, 446 F. Supp. 1153, 1155 n.5 (N.D.N.Y. 1978) ("The fairest and least intrusive approach would seem to be to require that the Government, in any case wherein a grand jury subpoena is challenged by a party with proper standing, state on the record that there is an investigation being conducted by the grand jury, indicate in general terms the nature of the investigation, and demonstrate that the records sought bear some relation to that investigation.").

Fortunately, the Federal Rules are already well equipped to do this. Faced with a presidential challenge to a grand-jury subpoena, the prosecutor can answer the complaint, the parties can engage in discovery, and the parties can file cross-motions for summary judgment (where any applicable presumptions would apply with full force). Discovery would be quite limited—here, for example, the President asked only for targeted interrogatories and the redacted portions of the Shinerock declaration. *See* D.Ct. Doc. 67 at 3. The President believes those requests are appropriate in light of the needs of this case, are proportional to what would be available in a motion-to-quash

proceeding, and are consistent with "'[t]he high respect that is owed to the office of the Chief Executive.'" *Vance*, 140 S. Ct. at 2428; *see Grand Jury Proceedings*, 486 F.2d at 93 (holding that "unless extraordinary circumstances appear, the nature of which we cannot anticipate, the Government's supporting affidavit should be disclosed to the witness in the enforcement proceeding").

But however the district court ultimately resolved these questions, they might *already* be resolved if this litigation had proceeded on a normal track. Ironically, then, it is the District Attorney's misguided attempt to end this case at the pleading stage—rather than defend his investigation on the merits—that has delayed his investigation and brought this litigation to a halt. Perhaps the District Attorney knows that, once this case moves beyond the pleadings, he will be unable to prove that his photocopied subpoena for the President's global finances is "relevant to an investigation being conducted by the grand jury and properly within its jurisdiction, and is not sought primarily for another purpose." *Grand Jury Proceedings*, 486 F.2d at 93. But that is precisely what the Federal Rules are meant to facilitate, precisely why the President's allegations are plausible, and precisely why the district court's reasoning was misguided.

CONCLUSION

This Court should reverse the dismissal of the SAC and remand to the district court for further proceedings.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with Rule 32(a)(7)(B) because it contains 11,131 words, excluding the parts that can be excluded. This brief also complies with Rule 32(a)(5)-(6) because it is prepared in a proportionally spaced face using Microsoft Word 2016 in 14-point Garamond font.

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I filed a true and correct copy of this brief with the Court via CM/ECF, which will electronically notify all counsel requiring notice.

Dated: September 11, 2020

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