No. 19-635

IN THE

Supreme Court of the United States

DONALD J. TRUMP,

Petitioner,

v.

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

Respondents.

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

BRIEF OF RESPONDENT

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QUESTION PRESENTED

Whether a state grand jury subpoena directing a third party to produce material that pertains only to unofficial and non-privileged conduct by a President and various private parties must be quashed under Article II or the Supremacy Clause of the Constitution.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

Constitutional Provisions

Statutes and Other Authorities

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

INTRODUCTION

This case involves a novel claim of presidential immunity from a state grand jury investigation that implicates no official presidential conduct or communications. Petitioner contends that Article II and the Supremacy Clause make him absolutely immune from providing evidence of private, potentially criminal acts that largely predate his presidency—even if the investigation is necessary to preserve evidence of purely private wrongdoing by petitioner and others—so long as he occupies office. That immunity exists, he says, even though he offers no case-specific showing of prosecutorial abuse or cognizable burden on his official functions.

Petitioner's sweeping and unprecedented contention is unfounded, and the reasoning underlying it is flawed. Relying on a Department of Justice (DOJ) opinion finding that a President has constitutional immunity from *indictment and prosecution* during his term of office, petitioner reasons that he necessarily has parallel immunity from *investigation* by state authorities. Yet prosecution and investigation implicate significantly different concerns, and the reasons offered by DOJ to support immunity from prosecution provide no support for petitioner's claim of *per se* immunity from investigation. To the contrary, immunity from investigation for private conduct runs counter to precedent, the structure and operation of the Constitution, and the bedrock principle that no person is above the law.

A President may of course invoke applicable evidentiary privileges when asked to disclose privileged official communications. A President may also seek

to make a case-specific showing that a state grand jury subpoena impermissibly interferes with the ability to perform Article II functions or was issued in bad faith. But petitioner has made no such showing here, nor could he. The grand jury is conducting an investigation into potential criminal conduct by multiple individuals and corporate entities, and its gathering of information does not intrude on petitioner's ability to perform his official duties. If the novel constitutional immunity proposed by petitioner were accepted, it not only could defeat the ordinary processes of the criminal law as to him but also could unjustifiably insulate private parties who have no immunity to assert. No principle of constitutional law justifies that outcome.

STATEMENT OF THE CASE

A. Factual Background

This case arises from an investigation commenced in summer of 2018 by the New York County District Attorney's Office (Office) into business transactions involving multiple individuals whose conduct may have violated state law. It is based on information derived from public sources, judicial admissions, confidential informants, and the grand jury process.[1]

1. In recent years, multiple public reports have appeared of possible criminal misconduct in activities connected to the Trump Organization. BIO 2-3. The reports described transactions and tax strategies—

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

spanning more than a decade—involving individual and corporate actors based in New York County, and raised the prospect that criminal activity might have occurred in the Office's jurisdiction within applicable statutes of limitations, particularly if (as the reports suggested) the transactions involved a continuing pattern of conduct over many years.

One of the issues raised related to "hush money" payments made on behalf of petitioner to two women with whom petitioner allegedly had extra-marital affairs. In August 2018, Michael Cohen, petitioner's counselor, pleaded guilty to campaign finance violations arising from payments to one of those women. *United States v. Cohen*, 366 F. Supp. 3d 612, 618 (S.D.N.Y. 2019). Cohen admitted that he violated campaign finance laws in coordination with, and at the direction of, an individual later identified as petitioner. Tr. of Plea Hr'g 23, *United States v. Cohen*, No. 18-cr-602 (S.D.N.Y. Aug. 21, 2018), ECF No. 7; Gov't Sentencing Submission 11, *United States v. Cohen*, No. 18-cr-602 (S.D.N.Y. Dec. 7, 2018), ECF No. 27; *Hearing with Michael Cohen, Former Attorney to President Donald Trump: Hearing Before the H. Comm. on Oversight and Reform*, 116th Cong. 1, 11 (Feb. 27, 2019).

Around the time Cohen entered his guilty plea, at the request of federal prosecutors and to avoid potential disruption of the ongoing federal investigation, the Office agreed to defer its own investigation pending resolution of the federal matter. In July 2019, the Office learned that the federal investigation had concluded without any further charges. *See United States v. Cohen*, 2019 WL 3226988, at *2 (S.D.N.Y.

July 17, 2019). The Office resumed its investigation shortly thereafter.[2]

2. The Office then issued grand jury subpoenas *duces tecum* for records including financial statements and tax returns, as well as the working papers necessary to prepare and test those records.

On August 1, 2019, the Office served the Trump Organization with a grand jury subpoena seeking records and communications concerning specific financial transactions, their treatment in the Trump Organization's books and records, and the personnel involved in determining that treatment. Soon after, the Office informed the Trump Organization's counsel that the subpoena required production of certain tax returns. From August 2019 through December 2019, the Trump Organization produced certain responsive documents—but not tax returns.

On August 29, 2019, the Office served petitioner's accounting firm, Mazars USA LLP (Mazars), with a grand jury subpoena (Mazars Subpoena or Subpoena) seeking financial and tax records—including for petitioner and entities he owned before he became President—from January 1, 2011 to the date of the Subpoena. The Office largely patterned the Mazars Subpoena on a subpoena for some of the same materials issued by the Committee on Oversight and Reform of the U.S. House of Representatives, with the aim of minimizing the burden on Mazars and facilitating expeditious production of responsive documents. The

[2] Contrary to petitioner's suggestion (Petr. Br. 6), the Office's investigation did not *begin* in summer 2019 but *resumed* then.

Mazars Subpoena does not seek any official communications, involve any official presidential conduct, or require *petitioner* to produce anything.

B. The Current Controversy

1. After the Mazars Subpoena was served, counsel for the Trump Organization informed the Office that they believed the request for production of tax records implicated constitutional considerations, and the Office agreed to temporarily suspend the tax portion of the Mazars Subpoena to allow petitioner to challenge it.

Petitioner then filed a complaint against Mazars and respondent in federal court and sought emergency injunctive relief, claiming that the Constitution provides a sitting President absolute immunity from any form of "criminal process" or "investigation," including a subpoena to a third party for records unrelated to petitioner's official conduct. D. Ct. Dkt. 1, at 1-2.

Respondent moved to dismiss, arguing that the court should abstain under *Younger v. Harris*, 401 U.S. 37 (1971); that petitioner's sweeping claim of immunity is contrary to settled precedent; and that petitioner had failed to establish irreparable harm. D. Ct. Dkt. 16.[3] Briefing and argument were highly expedited, and the Office agreed to temporarily forbear

[3] Mazars has taken no position on the legal issues presented in this case, viewing the dispute as solely between petitioner and respondent.

enforcement of the Mazars Subpoena. D. Ct. Dkt. 28.[4] DOJ filed a Statement of Interest asserting that abstention was inappropriate but taking no position on the merits. D. Ct. Dkt. 32.

2. The district court abstained and ruled in the alternative that petitioner was not entitled to injunctive relief. Pet. App. 36a-37a.

The court not only found that the balance of factors favored abstention but also rejected petitioner's contention that *Younger*'s bad-faith exception applied. Pet. App. 58a. The court observed that petitioner "fail[ed] to show that [respondent] could not reasonably expect to obtain a favorable outcome in [the] criminal investigation" furthered by the Mazars Subpoena, and after considering an *in camera* submission, found no basis to "impute bad faith to [respondent] in relation to these proceedings." *Id.*

On the merits, the district court rejected petitioner's "extraordinary claim" that "the person who serves as President, while in office, enjoys absolute immunity from criminal process of any kind." Pet. App. 31a. That position, the court explained, "finds no support in the Constitution's text or history" or in

[4] Respondent did not "express[] concern" at any point "that he would run out of time to bring 'charges' against 'the president himself' before he 'is out of office.'" Petr. Br. 9 (quoting D. Ct. Dkt. 38, at 40). Respondent merely requested the district court resolve this matter expeditiously to prevent a procedural delay of the Office's investigation until after statutes of limitations expire, at which point the Office would "have no charges available" against *any* potential defendant. D. Ct. Dkt. 38, at 40.

this Court's precedent. *Id.* at 34a. While "some aspects of criminal proceedings could impermissibly interfere with … the President's ability to discharge constitutional functions," "that consequence would not necessarily follow every stage of every criminal proceeding." *Id.* at 33a. And it "would not apply to the specific set of facts presented here," *id.*—*i.e.*, a state grand jury subpoena calling for a third party to produce petitioner's "personal and business records," *id.* at 62a.

3. The Second Circuit vacated the district court's determination that *Younger* abstention applied. Pet. App. 13a-14a. But the court of appeals affirmed on the immunity question, holding that "any presidential immunity from state criminal process does not extend to investigative steps like the grand jury subpoena at issue here." *Id.* at 2a.

The Second Circuit focused in particular on *United States v. Nixon*, 418 U.S. 683 (1974), which held that neither absolute presidential immunity nor executive privilege barred enforcement of a subpoena directing President Nixon to produce materials "relating to his conversations with aides and advisers for use in a criminal trial against high-level advisers to the President." Pet. App. 16a (internal quotation marks omitted). Given that "executive privilege did not preclude enforcement of the subpoena issued in *Nixon*," the court saw no reason why "the Mazars [S]ubpoena must be enjoined despite seeking no privileged information and bearing no relation to the President's performance of his official functions." *Id.* at 17a. Regardless of any constitutional issues that might arise if a court sought to compel a President to

appear at a particular time and place, the court explained, compliance with the Mazars Subpoena "does not require the President to do anything at all." *Id.* at 20a. Furthermore, that President Nixon was required to produce "documents for a trial proceeding on an indictment that named him as a conspirator strongly suggests that the mere specter of 'stigma' or 'opprobrium' … is not a sufficient reason to enjoin a subpoena—at least when, as here, no formal charges have been lodged." *Id.* at 22a.

The court of appeals also rejected DOJ's argument—made for the first time on appeal and not embraced at the time by petitioner—that "while the President may not be absolutely immune from a state grand jury's subpoena power, any prosecutor seeking to exercise that power must make a heightened showing of need for the documents sought." Pet. App. 27a. The cases cited by DOJ, the court observed, all address "documents protected by executive privilege" and thus have "little bearing on a subpoena that, as here, does not seek any information subject to executive privilege." *Id.* "Surely the exposure of potentially sensitive communications related to the functioning of the government is of greater constitutional concern than information relating solely to the President in his private capacity and disconnected from the discharge of his constitutional obligations," the court reasoned. *Id.* at 28a.

SUMMARY OF ARGUMENT

I. A President has no categorical immunity from a state grand jury subpoena for documents unrelated to official duties.

A. This Court's precedents make clear that a President's Article II immunity extends only to official acts. *See Clinton v. Jones*, 520 U.S. 681 (1997); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982). The same is true for qualified evidentiary privileges.

The Supremacy Clause likewise provides no immunity as to private conduct, instead precluding States from directly interfering with a President's *official* acts.

B. The mere risk of interference with official functions does not afford a President categorical immunity against subpoenas for documents concerning private conduct. Presidents throughout history have been subject to judicial process in appropriate circumstances. Recognizing as much, this Court in *Clinton* held that the possibility that private litigation would distract a President from official functions does not warrant categorical immunity. And *Clinton* built on precedent including *United States v. Nixon*, 418 U.S. 683 (1974), in which the Court required the President to disclose Oval Office conversations that implicated official conduct and executive privilege.

C. These principles preclude petitioner's assertion of absolute immunity, as the Mazars Subpoena implicates only private, unofficial documents. A President may of course challenge a *particular* subpoena based on a case-specific showing of impermissible Article II burden, but the mere *potential* for such interference does not justify categorical immunity.

II. That conclusion is not altered by any of petitioner's or the Solicitor General's arguments in favor

of a categorical, prophylactic rule of presidential immunity from investigation.

A. Even assuming a sitting President is immune from indictment, the considerations that might justify such a rule do not support immunity from investigation, as the Office of Legal Counsel (OLC) has recognized. Responding to a grand jury subpoena is far less burdensome than facing indictment or prosecution, and an investigation protected by grand jury secrecy does not impose any stigmatic harm comparable to that of an official, public accusation of wrongdoing. Indeed, this Court has upheld judicial process accompanied by much greater burdens and stigmatic harms, and its analysis in *Nixon* confirms that the indictment and subpoena immunity inquiries are distinct.

B. Petitioner's speculation that state prosecutors cannot be trusted to investigate responsibly provides no basis for an absolute immunity rule. This Court in *Clinton* rejected a claim of immunity from private suits based on similar speculation, and the imagined risks are even less probable here. The States are central to the Nation's criminal justice system, and state prosecutions are cloaked with a presumption of regularity that makes federal interference particularly inappropriate. Existing structural constraints—including jurisdictional limitations, ethical rules, and the prohibition on state investigation of *official* presidential conduct—further mitigate any risk of harassing or overly burdensome state investigations.

In the event that a President can make a credible showing that a *particular* subpoena is overly burdensome or harassing, state and federal courts are well-

equipped to address such claims. Such case-by-case checks are consistent with this Court's precedent; petitioner's proposed blanket immunity rule is not.

C. The Solicitor General does not expressly adopt petitioner's absolute immunity rule but contends that any state criminal subpoena must satisfy a heightened-need standard, under which a prosecutor would have to show that the subpoena seeks important evidence unavailable from any other source. Courts have applied that standard in the face of claims of executive privilege, but the requirement makes no sense where the subpoenaed materials are not privileged and do not otherwise implicate official conduct. Nor does the *risk* of overly burdensome or harassing subpoenas justify a heightened standard. Existing procedures afford a President fully adequate means for pressing case-specific claims of burden or harassment, to be reviewed with all of the sensitivity and respect due a Chief Executive.

D. The rules petitioner and the Solicitor General propose come with substantial harms that further counsel against them.

The costs of the absolute immunity advocated by petitioner are severe. Immunizing a President from criminal investigation while in office could effectively provide immunity from indictment and prosecution after a presidential term due to the loss of evidence. Absolute presidential immunity from investigation could also impede criminal investigation of other parties. Even if evidence could eventually be gathered after a President's term ends, the statutes of limitations as to third parties may well have expired, and

there is no plausible argument that a President's immunity from investigation would toll the limitations period for indicting others.

A heightened-need standard would likewise impose substantial costs. Not only would it unduly hamper the States' traditional authority to enforce criminal laws through the grand jury's investigatory process but, if applied in the manner the Solicitor General suggests, it would in practice amount to the absolute immunity petitioner seeks.

III. Although a President may show that a particular subpoena is overly burdensome or issued in bad faith, petitioner has made neither showing here. The Mazars Subpoena is substantially less burdensome than the judicial process ratified in *Clinton* and *Nixon*. And the district court already considered the evidence petitioner cites and rejected a claim of bad faith in the context of *Younger* abstention, foreclosing any case-specific showing of harassment here.

ARGUMENT

I. A PRESIDENT HAS NO CATEGORICAL IMMUNITY FROM A SUBPOENA FOR DOCUMENTS UNRELATED TO OFFICIAL DUTIES

A. Article II And The Supremacy Clause Provide Immunity Only From Subpoenas That Interfere With A President's Official Functions

Petitioner contends that, during his term of office, Article II and the Supremacy Clause provide complete and categorical immunity from any criminal

process that implicates his conduct. Petr. Br. 19-39. He is incorrect. Both provisions protect a President only against interference with *official* conduct. Neither provides broad immunity from scrutiny of private acts.

1. Article II vests in a President the federal government's executive power but does not immunize a President for acts taken as a citizen. This Court's precedents have thus consistently limited any Article II-based presidential immunities or privileges from judicial process to circumstances that directly implicate or otherwise substantially interfere with a President's official duties. The Court has "never suggested that the President ... has an immunity that extends beyond the scope of any action taken in an official capacity." *Clinton v. Jones*, 520 U.S. 681, 694 (1997).

Presidential immunity against civil suit reflects this dichotomy. In *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), this Court held that the President's "unique position in the constitutional scheme" requires "absolute immunity from damages liability predicated on … official acts." *Id.* at 749. But this absolute immunity extends only to "liability for acts within the 'outer perimeter' of [a President's] official responsibility." *Id.* at 756; *see also Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 501 (1867) (barring injunction of President's "performance of … official duties").

Private conduct is subject to a different rule. This Court has held that immunity for *official* conduct "provides no support for an immunity for *unofficial* conduct." *Clinton*, 520 U.S. at 694. The "character of the office that was created by Article II of the Constitution" does not alone justify immunity for private

conduct, *id.* at 697, because the "doctrine of separation of powers is concerned with the allocation of *official* power among the three coequal branches of our Government," *id.* at 699 (emphasis added).[5]

The same restriction applies to qualified evidentiary privileges. A President may assert privilege against disclosure of communications that reflect presidential deliberations and decision-making. *See, e.g.*, *United States v. Nixon*, 418 U.S. 683, 708-13 (1974). But that privilege encompasses only internal deliberations and decision-making about *public or official acts*. *See Nixon v. Admin. of Gen. Servs.*, 433 U.S. 425, 449 (1977) (presidential privilege "is limited to communications 'in performance of (a President's) responsibilities … of his office'" (quoting *Nixon*, 418 U.S. at 711, 713)); *In re Sealed Case*, 121 F.3d 729, 752 (D.C. Cir. 1997) (presidential privilege encompasses only communications specifically related to advice to a President on "official government matters"). It does not extend to a President's discussions with private citizens concerning private conduct.

2. The Supremacy Clause likewise does not immunize a President from the everyday obligations of citizenship. *See* U.S. CONST. art. VI, cl. 2. It precludes the States from directly interfering with a President's (and other federal officials') *official* acts. *See, e.g.*, *Tennessee v. Davis*, 100 U.S. 257, 263 (1879)

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[5] Petitioner's reference (Petr. Br. 22) to *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838), is inapt for the same reason. There, the Court suggested only that a President is "beyond the reach of any other department … *as far as his powers are derived from the constitution*." *Id.* at 610 (emphasis added).

(States cannot "affix penalties to acts done under the immediate direction of the national government" and "within the scope of [the officer's] authority"); *In re Tarble*, 80 U.S. (13 Wall.) 397, 409-10 (1871) (States cannot "interfere[] with" or "control[]" acts "under the authority … of the United States"); *McClung v. Silliman*, 19 U.S. (6 Wheat.) 598, 605 (1821) (state court cannot compel federal officer to take governmental action); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436 (1819) (States "have no power … to retard, impede, burden, or in any manner control, the operations of the" federal government); *see also* Petr. Br. 31-32 (citing additional cases). Absent such interference, the Supremacy Clause does not supplant the States' authority to regulate the conduct of a President (or any other federal official) as a private citizen. *See, e.g.*, *United States ex rel. Drury v. Lewis*, 200 U.S. 1, 8 (1906) (refusing to grant habeas corpus to federal official in advance of his state criminal trial where evidence raised a genuine issue about whether official federal conduct was involved).

It follows that someone's status as a federal officer does not by itself trigger Supremacy Clause immunity. *See In re McShane's Petition*, 235 F. Supp. 262, 273 (N.D. Miss. 1964) ("[I]t cannot be said that any federal official is absolutely immune merely because of his official standing and his official purpose."). Instead, such immunity turns on whether a State is attempting to dictate how a federal officer carries out an official function. As petitioner concedes, the doctrine immunizes federal officers from state regulation "only when they undertake *official*

acts." Petr. Br. 25 (emphasis added); *see, e.g.*, *Cunningham v. Neagle*, 135 U.S. 1, 75 (1890) (Supremacy Clause protects federal officer from state punishment only if federal law "authorized" officer to do the challenged act, "which it was his duty to do as [an officer] of the United States"). An officer is not entitled to Supremacy Clause immunity, by contrast, for acts "other … than official acts." *Maryland v. Soper*, 270 U.S. 9, 35 (1926).

This dichotomy reflects the structural purpose of the Supremacy Clause. The Clause establishes that "[w]henever, therefore, any *conflict* arises between [federal and state] enactments … , or in the enforcement of their asserted authorities," those of the federal government prevail. *In re Tarble*, 80 U.S. at 407. When a State attempts to regulate a federal official's exercise of federal powers, its actions necessarily conflict with supreme federal authority, and the Supremacy Clause resolves the conflict in favor of the federal government. But when a State regulates the private, unofficial conduct of individuals who are also federal officials, no such conflict arises, and the Supremacy Clause does not apply.[6]

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[6] In *Clinton*, the Court reserved the question whether the Supremacy Clause might apply if a state court exercised "direct control ... over the President" in a civil action, presumably in a way that interfered with the performance of official responsibilities. 520 U.S. at 691 n.13. Nothing in that reservation implied a wholesale exemption of a President from the ordinary responsibilities of a citizen with respect to a state grand jury subpoena for private records, absent any showing of interference with official duties, much less that such an exemption would apply where, as here, a subpoena was issued to a third party.

Petitioner contends that, although this is the general rule, under *Fitzgerald*, a President's Supremacy Clause protection is broader than that afforded other federal officials and must extend to unofficial conduct. Petr. Br. 25. That is incorrect. *Fitzgerald* was a federal case that had nothing to do with the Supremacy Clause. And if *Fitzgerald* has any relevance at all, it undercuts petitioner's argument. The cited passage explained that even though federal officials have only qualified immunity for official acts, the unique position of the presidency requires absolute immunity for action within the outer bounds of official presidential duties. *See* 457 U.S. at 750-51, 756. But the Court was careful to explain that, for any official, the immunity extends *only to official conduct*. *See supra* at 13-15. No case has ever held that the Supremacy Clause's scope extends to a President's conduct as a private citizen.

B. The Mere Risk That A Subpoena *Duces Tecum* May Interfere With Official Presidential Functions Does Not Afford A President Categorical Immunity

Historical practice and this Court's precedent establish that the mere *risk* that a documentary subpoena seeking evidence of private conduct *might* interfere with official presidential functions does not justify a rule of categorical presidential immunity. The possibility that a President may have to expend effort to comply with judicial process or may experience incidental burdens has never been enough to demand Article II immunity. *See* Randolph D. Moss, Asst. Atty. Gen., *A Sitting President's Amenability to Indictment and Criminal Prosecution*, 24 O.L.C. Op.

222, 254 (Oct. 16, 2000) (Moss Memo) (no general immunity from "subpoenas for documents or testimony" or civil suits despite risk of interference with a President's time and energy and mental burdens).

1. Petitioner and the Solicitor General cite various writings of the Framers, which they contend show that the Framers uniformly believed a sitting President could not be subject to any criminal process whatsoever. Petr. Br. 22-23; U.S. Br. 9. But this Court considered the same historical evidence in *Clinton* and, after surveying conflicting statements from other Framers, concluded that these historical sources do not provide a definitive answer, and in fact "largely cancel each other" out. 520 U.S. at 696-97. The Court accordingly has looked to longstanding practice from our Nation's earliest years, which confirms that nothing in the Constitution prohibits a President from being "subject to judicial process in appropriate circumstances." *Id.* at 703.

Throughout American history, many Presidents not only have voluntarily participated in but also have been involuntarily compelled to comply with various forms of judicial process, including subpoenas to testify and produce documents in both civil and criminal cases. The earliest example involved Aaron Burr's treason trial, in which Chief Justice Marshall ruled that President Jefferson could be required to respond to a subpoena *duces tecum*. *Clinton*, 520 U.S. at 703-04 (citing *United States v. Burr*, 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14,692D)). President Monroe later "responded to written interrogatories," *id.* at 704 (citing Ronald Rotunda, *Presidents and Ex-Presidents as Witnesses: A Brief Historical Footnote*, 1975 U. ILL.

L. FORUM 1, 5-6 (1975)), after soliciting an opinion from the Attorney General, who concluded, based on *Burr*, that a subpoena *ad testificandum* could be issued to a President, *see* Rotunda, 1975 U. ILL. L. FORUM at 5-6. President Ford "complied with an order to give a deposition in a criminal trial." *Clinton*, 520 U.S. at 705. President Clinton "twice g[ave] videotaped testimony in criminal proceedings." *Id.* And "President Nixon was obligated to comply with a subpoena commanding him to produce certain tape recordings of his conversations with his aides" for use in a criminal trial. *Id.* at 704 (citing *Nixon*, 418 U.S. at 706).

2. Based in part on this established historical practice, this Court has repeatedly held that a President is subject to ordinary judicial process, even where there is a substantial risk that complying will distract a President or otherwise indirectly burden the ability to perform official presidential functions, or when a particular subpoena directly implicates privileged communications.

Clinton, for example, rejected a claim of temporary presidential immunity from a private lawsuit for unofficial conduct even though the Court understood that such a lawsuit would impose burdens on a President, requiring him to produce documents and even provide sworn testimony. *Id.* at 691-92. The Court also specifically rejected President Clinton's contention that, if denied immunity, the President would be the target of politically motivated, harassing, and frivolous litigation. *Id.* at 708-10. And it rejected the suggestion that courts would be unable to weed out

such claims, noting that sanctions would be a "significant deterrent to litigation directed at the President in his unofficial capacity for purposes of political gain or harassment." *Id.* at 708-09. As the Court explained, the threat that such litigation would distract a President in the exercise of official Article II duties is simply not the type of interference that triggers constitutional immunity. *See id.*; *see also id.* at 705 n.40 (the distractions of pending litigation, however "vexing," "do not ordinarily implicate constitutional separation-of-powers concerns").

Clinton was itself based in large part on this Court's longstanding view that a sitting President may be subject to a subpoena in a criminal proceeding without impermissibly intruding on a President's official functions. As noted, Chief Justice Marshall first considered the issue more than 200 years ago while overseeing the trial of Aaron Burr. President Jefferson contended that the Constitution immunized him from having to comply with a subpoena *duces tecum* in a criminal proceeding. But Chief Justice Marshall rejected that contention, holding that the fact that "the president of the United States may be subpoenaed … and required to produce any paper in his possession, is not controverted." *United States v. Burr*, 25 F. Cas. 187, 191 (C.C.D. Va. 1807) (No. 14,694).

The full Court in *Nixon* later unanimously, "unequivocally[,] and emphatically endorsed Marshall's position." *Clinton*, 520 U.S. at 704 (citing *Nixon*, 418 U.S. at 706). *Nixon* obligated the President to comply with a subpoena directing him to produce "tape recordings and documents relating to his conversations with aides and advisers"—*i.e.*, tapes created while he

was in office, of conversations between himself and White House aides in the Oval Office, that by nature implicated official conduct and privileged communications. *Nixon*, 418 U.S. at 686, 687 n.3.

President Nixon moved to quash the subpoena, asserting a "claim of absolute privilege." *Id.* at 705. The President cited the "need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties," *id.*, arguing that separation-of-powers principles "insulate[] a President from a judicial subpoena in an ongoing criminal prosecution," *id.* at 706. This Court rejected that contention, holding that "neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances." *Id.*[7]

In reaching that conclusion, the Court acknowledged the "need for confidentiality in the communications of [a President's] office" and "the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking." *Nixon*, 418 U.S. at 708, 712-13. But that interest was not the only im-

[7] Petitioner contends that *Nixon* "did not consider (let alone deny) a claim of presidential immunity." Petr. Br. 43. But that is exactly what this Court considered and rejected: an "unqualified Presidential privilege of immunity from judicial process." *Nixon*, 418 U.S. at 706; *cf. Nixon v. Sirica*, 487 F.2d 700, 708 (D.C. Cir. 1973) ("Counsel argue … that, so long as he remains in office, the President is absolutely immune from the compulsory process of a court").

portant public interest at stake and had to be evaluated "in light of our historic commitment to the rule of law" and "the twofold aim (of criminal justice) … that guilt shall not escape or innocence suffer." *Id.* at 708-09. "The need to develop all relevant facts in the adversary system," the Court emphasized, "is both fundamental and comprehensive." *Id.* at 709. Barring enforcement of the subpoena would therefore "cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts." *Id.* at 712. Such an impediment to the fair administration of criminal justice could not be justified, the Court concluded, solely by "the generalized interest in confidentiality" of presidential communications. *Id.* at 713.

C. A Subpoena Seeking Non-Privileged Evidence About A President's Private, Unofficial Conduct May Be Challenged As Applied If The President Shows An Impermissible Burden On Article II Functions

These principles preclude petitioner's assertion of categorical immunity, as it is undisputed that the grand jury investigation at issue here concerns only unofficial, private conduct, and none of the materials sought reflects confidential communications subject to a claim of executive privilege. *See* Pet. App. 17a-18a; Petr. Br. 15, 19, 32-33, 47, 48 (subpoena seeks only "personal" information); Cert. Reply 3, 8 (subpoena involves merely "unofficial" action); U.S. Br. 1, 6-7, 15-16, 23, 26, 28 (similar).

That does not mean, of course, that a President would have no remedy against a subpoena or other form of judicial process upon showing that it *in fact*

materially interferes with the ability to perform official presidential functions. While "potential burdens" on a President do not provide immunity, "those burdens are appropriate matters for [a court] to evaluate in its management of the case." *Clinton*, 520 U.S. at 707. And the "high respect that is owed to the office of the Chief Executive, though not justifying a rule of categorical immunity, is a matter that should inform the conduct of the entire proceeding, including the timing and scope of discovery." *Id.*

Thus, if a court is faced with a factually supported claim of *actual* interference with Article II functions—for example, unreasonably burdensome process that unduly distracts a President—it should ameliorate such problems on a case-by-case basis. As explained in Part III, petitioner has made no showing of case-specific burdens here. But categorical immunity based only on *potential* interference with the ability to perform official presidential functions has no basis in constitutional text, practice, or precedent, and should be rejected by this Court.

II. THE PROPHYLACTIC IMMUNITY RULES PROPOSED BY PETITIONER AND THE SOLICITOR GENERAL ARE UNSOUND

Both petitioner and the Solicitor General resist the lesson from history, precedent, and logic that a subpoena for documents in a criminal investigation involving a President's private, non-privileged conduct raises no constitutional issue, unless the President makes a case-specific showing that the process will interfere with Article II functions. They instead contend that considerations that might favor presi-

dential immunity from indictment, as well as the potential for politically motivated or harassing subpoenas, justify prophylactic, across-the-board rules that impose absolute or highly restrictive barriers to criminal investigations of unofficial conduct while a President occupies office. Nothing in the Constitution justifies such barriers, which would for the first time immunize a President from the ordinary responsibilities of citizenship in the context of private, unofficial conduct and impede the investigation of criminal conduct under state law.

A. The Considerations Asserted To Justify Presidential Immunity From Prosecution Do Not Justify Immunity From Investigation For Unofficial Conduct

Petitioner's principal argument is that he must be absolutely immune from criminal investigation into unofficial conduct because such an investigation raises the same concerns that OLC has identified as precluding indictment and prosecution of a sitting President. *See* Moss Memo 246-54. Reasoning from the premise that a sitting President is immune from indictment and prosecution because of the burden, distraction, and stigma from facing potential loss of liberty after a criminal trial, petitioner asserts that he must necessarily be immune from criminal investigation. Petr. Br. 29.

For the purpose of this case, the Court may assume the validity of OLC's position that a sitting

President is not amenable to criminal prosecution.[8] Certainly, a criminal trial and incarceration would infringe Article II. But the concerns that drove OLC's finding of an implied constitutional immunity from formal accusation do not extend to the *investigation* of unofficial, potentially criminal conduct during a President's term. Thus, even while finding an immunity from indictment and prosecution, OLC also concluded that "[a] grand jury could continue to gather evidence throughout the period of immunity [for a sitting President], even passing this task down to subsequently empaneled grand juries if necessary." Moss Memo 257 n.36.

Gathering evidence is all the grand jury seeks to do here. And that task is vital to ensure that a President may be held accountable for criminal violations upon leaving office—which all agree is basic to our constitutional scheme. Indeed, any constitutional rule of temporary immunity from prosecution during a President's term should not be transformed into a rule of permanent immunity simply because investigatory leads have grown stale or because the statute

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[8] This case does not involve the question whether a sitting President may be indicted by a state or local grand jury for unofficial conduct, and accordingly, it presents no opportunity for resolving that issue. The Court may proceed on the assumption that such immunity exists, however, coupled with the knowledge that respondent—who has made no determination on the ultimate merits—would be obligated under state law in this case to provide notice and, by extension, an opportunity to seek judicial review before any grand jury vote on an indictment. *See* N.Y. CRIM. PROC. LAW § 190.50(5)(a)-(b); *cf. Holder v. Humanitarian Law Project*, 561 U.S. 1, 16 (2010).

of limitations has run.[9] To guarantee that a President, along with individuals and entities connected to him, are not permanently above the law, the grand jury must be permitted to collect evidence and follow leads when memories are fresh and relevant evidence is available. Nothing in the Constitution requires otherwise.

Moreover, the concerns asserted to justify temporary presidential immunity from prosecution do not apply to grand jury investigations into unofficial conduct.

1. As an initial matter, petitioner incorrectly asserts that the text of the Impeachment Judgment Clause, U.S. CONST. art. I, § 3, cl. 7, establishes that a President may be criminally indicted "only *after* he is 'convicted' by the Senate." Petr. Br. 21. As the Moss Memo explains, that is not so; the Clause does not differentiate among federal officers who may be impeached, and history and the original understanding settle that prosecution may precede removal. *See* Moss Memo 223-25. But even if that were not so for the President, the Clause says nothing to preclude investigation.

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[9] For this reason, unless state law provides for tolling, or a federal immunity rule had the constitutional corollary of tolling the statute of limitations during a President's term of office, *see* Moss Memo 256 & n.33; Petr. Br. 33; U.S. Br. 32, the filing of a sealed indictment, with a stay of proceedings, might be a necessary and appropriate procedure. It is unnecessary to confront those difficult issues here, however, because—regardless of the breadth of any immunity from *prosecution*—the rationale for such a rule does not extend to *investigation*.

2. As a functional matter, responding to a grand jury subpoena does not impose the kinds of burdens on a President's time and effort associated with criminal indictment or prosecution. A grand jury subpoena does not "make it physically impossible for the President to carry out" official duties by restraining a President's liberty as a sentence of incarceration would. *Id.* at 246. Nor does responding to a grand jury subpoena for documents require a President to choose between exercising constitutional rights—to attend trial, to confront witnesses, to have a public and speedy trial—and fulfilling Article II functions. *See id.* at 251-54. A grand jury subpoena is not an accusation that demands a defense; it is an investigative step that generally unfolds behind closed doors.

Presidents have routinely responded to much more burdensome requests for evidence than that at issue here without any disruption of their Article II functions. *See supra* at 18-19. And responding to a grand jury subpoena *duces tecum* for documents related to unofficial conduct would not even impose the kinds of burdens that this Court has found *acceptable* in prior cases, including requiring a President to testify under oath and disclose tape recordings of privileged Oval Office communications with close advisors. *See supra* at 19-22 (discussing *Clinton* and *Nixon*). Responding to such a subpoena is an incident of citizenship that does not, absent some special case-specific showing, impose burdens cognizable under Article II.

3. Unlike a criminal indictment or prosecution, a grand jury subpoena does not impose any cognizable

stigmatic burdens on a President either. An "indictment and criminal prosecution," the Moss Memo reasoned, creates a "distinctive and serious stigma" that would "threaten the President's ability to act as the Nation's leader in both the domestic and foreign spheres." Moss Memo 249. A grand jury subpoena does not implicate any remotely similar stigmatic harm, for at least three reasons.

First, a criminal indictment and subsequent prosecution is uniquely stigmatizing because it is a "public … allegation of wrongdoing," *id.* at 250—an "official pronouncement that there is probable cause to believe [the defendant] committed a criminal act," *id.* at 254. A grand jury subpoena, in contrast, is not an "official pronouncement" of wrongdoing; it signals only that an investigation is underway. Grand jury investigations are "necessarily broad," *United States v. Dionisio*, 410 U.S. 1, 13 (1973), and while they seek to discover possible criminal conduct, they also serve the "invaluable function in our society of standing between the accuser and the accused" and protecting "the innocent against hasty, malicious, and oppressive prosecution," *Wood v. Georgia*, 370 U.S. 375, 390 (1962). Thus, it is "clearly recognized" that giving evidence as part of a grand jury investigation is a "public dut[y] which every person within the jurisdiction of the government is bound to perform upon being properly summoned." *Blair v. United States*, 250 U.S. 273, 281 (1919). And that notion—that it is every person's civic obligation to participate fully in a grand jury investigation—"in itself removes any stigma" from the participation. *In re Grand Jury Proceedings Harrisburg Grand Jury 79-1*, 658 F.2d 211, 214 (3d Cir. 1981); *see*

also United States v. Doe, 457 F.2d 895, 898 (2d Cir. 1972) ("A [grand jury] subpoena is served in the same manner as other legal process; it involves no stigma whatever … and it remains at all times under the control and supervision of a court."), *cert. denied*, 410 U.S. 941 (1973).

Second, unlike criminal indictments and prosecutions, a core feature of grand jury investigations is secrecy: "Since the 17th Century, grand jury proceedings have been closed to the public, and records of such proceedings have been kept from the public eye." *Douglas Oil Co. v. Petrol Stops Nw.*, 441 U.S. 211, 218 n.9 (1979); *see also United States v. Proctor & Gamble*, 356 U.S. 677, 681-82 (1958). Today, federal and state rules guarantee secrecy in grand jury proceedings. *See, e.g.*, FED. R. CRIM. P. 6(e)(2); N.Y. CRIM. PROC. LAW § 190.25(4)(a).

Petitioner contends that he is nonetheless subject to stigma because he is not merely a witness but the "target" of the grand jury's criminal investigation. That is not so. The only person who has ever described petitioner as a "target" of the grand jury investigation at issue is petitioner himself.[10] But even if petitioner were a "target," grand jury secrecy prevents any stigma by ensuring "that persons who are accused but exonerated by the grand jury will not be held up to public ridicule." *Douglas Oil Co.*, 441 U.S. at 219.

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[10] The Mazars Subpoena does not identify petitioner (or anyone else) as a "target" of the investigation but was issued as a part of the grand jury's fact-gathering process into conduct that involves petitioner and multiple other persons and entities.

Third, to the extent that a grand jury subpoena for a President's records of unofficial conduct raises any stigmatic concerns, the Court has already rejected far more serious stigmatic harms as a basis to avoid judicial process. *Nixon* required the production—and, depending on relevance, public disclosure—of the President's privileged, sensitive Oval Office conversations that would implicate him in a criminal conspiracy. *Clinton* envisioned civil proceedings that could result in a jury verdict determining that the President had acted improperly or unlawfully in his private conduct. An investigatory subpoena for documents in the sanctity of the grand jury threatens no remotely comparable stigma.

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

Petitioner overlooks this aspect of *Nixon* and instead relies on *Fitzgerald*, which he contends held

that a President is immune from civil suits stemming from official conduct because "personal vulnerability" to such suits would "distract [the President] from … public duties." Petr. Br. 30 (quoting *Fitzgerald*, 457 U.S. at 753). If a *civil* suit is too distracting, petitioner reasons, a *criminal* investigation must also be. *Id.* But the Court's immunity holding in *Fitzgerald* was not based on distraction caused by the litigation itself. If it were, then *Clinton* would have come out the other way. Rather, *Fitzgerald* recognized that liability for official conduct would "render [a President] unduly cautious in the discharge of his official duties." 457 U.S. at 752 n.32; *see Clinton*, 520 U.S. at 694 n.19. And, as explained, this Court has recognized that the Constitution does not immunize a President from the general burden of responding to legal process involving private conduct. *Clinton*, 520 U.S. at 694, 701-706.

Criminal investigation of a President's private conduct, in short, does not come with such inherent, serious burdens as to justify a categorical rule of absolute immunity.

B. Absolute Immunity From State Criminal Investigation Would Strike Deeply Into Principles Of Accountability And Federalism

Beyond his arguments for immunity from any and all criminal process (including investigation), petitioner asserts that such immunity is especially important where *state or local* grand jury investigations are concerned. *See* Petr. Br. 16, 23. If state prosecutors are permitted to ask grand juries to investigate a

President, he argues, thousands of vexatious and harassing investigations will "embroil the sitting President in criminal proceedings," making it impossible to fulfill Article II functions. *Id.* at 26. Those speculative concerns cannot justify an unprecedented new rule of immunity that would flip constitutional notions of federalism and accountability on their head.

1. It is a fundamental tenet of our system of federalism that "both the Federal government and the States wield sovereign powers." *Gamble v. United States*, 139 S. Ct. 1960, 1968 (2019). The federal government's powers are limited and expressly delineated, while the Constitution reserves any remaining powers for the States and the people. *See* U.S. CONST. amend. X. In particular, our system "reserv[es] a generalized police power to the States," in recognition of the States' unique interest in investigating and prosecuting crimes within their borders. *United States v. Morrison*, 529 U.S. 598, 618 n.8 (2000).

Despite the centrality of the States to the Nation's criminal justice system, petitioner contends that the presidency requires a blanket immunity from state investigations because state prosecutors cannot be trusted to exercise their investigatory power responsibly when it comes to a President. Yet petitioner cannot identify a single instance of state prosecutors abusing that power.[11] He insists that a lack of abusive investigations or prosecutions is evidence that

[11] The Solicitor General's catalogue of examples of purportedly harassing behavior by state officials, *see* U.S. Br. 18-21, demonstrates the opposite of what he suggests. Only one of these examples involved a state or local prosecutor. In the lone

state prosecutors did not previously understand themselves to have such power, and that once they do, "the floodgates will open." Petr. Br. 28. That is a remarkably thin reed on which to rest a claim of prophylactic constitutional immunity, which is why this Court rejected a virtually identical argument in *Clinton*. There, the President argued that a decision denying immunity would "engulf the Presidency" in a "deluge" of private litigation. *Clinton*, 520 U.S. at 702. But that prediction did not convince the Court to recognize an immunity from civil suits for private conduct, and moreover, the prediction turned out to be wrong: In the two decades since *Clinton* was decided, only a handful of private suits have been filed against Presidents, many of which have been quickly dismissed by courts, minimizing any potential interference with the presidency. *See, e.g.*, *Johnson v. Trump for Pres., Inc.*, 2019 WL 2492122 (M.D. Fla. June 14, 2019); *Sibley v. Obama*, 866 F. Supp. 2d 17 (D.D.C. 2012).

The Court's refusal to credit speculative claims of harassing civil litigation in *Clinton* applies *a fortiori* to state criminal investigations. If anything, such investigations by officials who take an oath to support the Constitution give rise to substantially less cause for concern. U.S. CONST. art. VI, cl. 3 (requiring state

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exception, an outgoing district attorney indicted Vice President Cheney and other federal officials, not President Bush, and a state court promptly dismissed the indictment, demonstrating that courts are fully capable of checking any prosecutorial misconduct. *See* Debra Cassens Weiss, *Judge Tosses Indictments of Vice President Cheney, Ex-AG Gonzales*, A.B.A. J. DAILY NEWS, Dec. 2, 2008, http://bit.ly/2SSNVPW.

officers to "be bound by Oath or Affirmation, to support this Constitution"). A state prosecutor, unlike a private plaintiff, is "under an ethical obligation, not only to win and zealously to advocate for his client but also to serve the cause of justice." *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 386 (2004). Thus, the "responsible exercise of prosecutorial discretion" serves as a check on potentially vexatious or harassing criminal litigation that has no counterpart in the civil system. *Id.* This Court has repeatedly explained that the lack of "the check imposed by prosecutorial discretion" is a reason to reject or narrow the scope of private actions. *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2106 (2016) (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004)). The presence of that same check provides ample reason here to refrain from immunizing a President against criminal investigation of private conduct.

Indeed, decades of this Court's precedents flatly reject the assumption implied in petitioner's prophylactic rule—*viz.*, that state prosecutors are likely to exercise their investigatory powers irresponsibly. As "representative[s] not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all," prosecutors' "interest … in a criminal prosecution is not that [they] shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). Accordingly, state prosecutors, like their federal counterparts, are cloaked in a presumption of regularity: "It is generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this

Court." *Dombrowski v. Pfister*, 380 U.S. 479, 484 (1965). Thus, this Court has recognized that "federal interference with a State's good-faith administration of its criminal laws is peculiarly inconsistent with our federal framework," *id.*, and cautioned against "denigrat[ing] the independent judgment of state prosecutors to execute the laws of those sovereigns," *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 580 (2010).

This Court, in sum, has been "unwilling to credit … ominous intimations of hostile state prosecutors and collaborationist state courts interfering with federal officers." *Mesa v. California*, 489 U.S. 121, 138 (1989). Yet that is exactly what petitioner asks this Court to do, based on unwarranted generalizations and rampant speculation without even a hint of evidence in history or actual practice. No constitutional principle authorizes a rule of prophylactic immunity from the ordinary incidents of citizenship premised on such unfounded fears.

2. Petitioner's argument for a special rule of immunity from state investigation also ignores the substantial structural and practical limitations on state prosecutors. State prosecutors generally may only bring prosecutions within their jurisdictions and so are inherently limited in the investigations they can launch. Every state jurisdiction also has adopted a rule requiring prosecutors to refrain from prosecuting baseless charges unsupported by probable cause,[12]

[12] Forty-nine States and the District of Columbia have adopted the American Bar Association's Model Rule of Professional Conduct 3.8(a), which provides that prosecutors "shall refrain from prosecuting a charge that the prosecutor knows is not

and a prosecutor who violates that rule can be subject to professional discipline. *Connick v. Thompson*, 563 U.S. 51, 66 (2011). The "development and enforcement of [these] professional standards for prosecutors … lessen the danger … [of] prosecutorial misconduct." *Malley v. Briggs*, 475 U.S. 335, 343 n.5 (1986). And if these professional disciplinary mechanisms were not enough, prosecutors can be punished criminally under 18 U.S.C. § 242 for "willfully depriv[ing] [a] citizen of … constitutional rights." *O'Shea v. Littleton*, 414 U.S. 488, 503 (1974).

As petitioner himself points out and the cases he cites show, moreover, state grand juries are already precluded from targeting federal officials for *official acts*. Petr. Br. 30-31 (citing *United States v. McLeod*, 385 F.2d 734, 750-52 (5th Cir. 1967) (state grand jury precluded from investigating DOJ activities); *United States v. Owlett*, 15 F. Supp. 736, 741 (M.D. Pa. 1936) (state legislative committee barred from investigating operations of Federal Works Progress Administration)). That result follows from the protections for the exercise of official duties granted by the Supremacy Clause. *See supra* at 13-15. This prohibition against state prosecutors' investigating a President's official conduct minimizes any risk of prosecutorial interference with Article II duties. No basis exists to extend such an immunity to cover purely private acts.

3. Finally, petitioner fails to explain why existing judicial checks on harassing or overly burdensome subpoenas do not suffice to ameliorate any harm that

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supported by probable cause." California has an analogous rule. *See* CAL. RULES OF PROF'L CONDUCT r. 3.8(a).

might occur in a particular case. State courts, like federal courts, have tools to protect the presidency from grand jury abuse and harassment. *See, e.g.*, *Virag v. Hynes*, 54 N.Y.2d 437, 443-44 (1981) (explaining grounds to quash grand jury subpoena *duces tecum*); *infra* at 42-43. And a President can seek to make a credible factual showing in federal court that a subpoena seeking evidence of unofficial, unprivileged conduct is issued in bad faith or actually threatens Article II interests. *Cf. Huffman v. Pursue, Ltd.*, 420 U.S. 592, 611 (1975) (federal intervention in a state proceeding may be appropriate if "the state proceeding is motivated by a desire to harass or is conducted in bad faith"); *Younger v. Harris*, 401 U.S. 37, 45 (1971) ("[W]hen absolutely necessary for protection of constitutional rights, courts of the United States have power to enjoin state officers from instituting criminal actions.").[13] Federal and state courts are required to approach any case-specific allegation of harassment or burden on a President's Article II functions with the "high respect that is owed to the office of the Chief Executive." *Clinton*, 520 U.S. at 707. Petitioner provides no reason to believe that, in the unlikely event that a state prosecutorial office abuses its authority, both state and federal courts will fail to protect the presidency from a well-founded showing of harassment or burden.

Such case-by-case checks are consistent with this Court's prior treatment of judicial process against a

[13] Respondent did not challenge in this Court the Second Circuit's holding that *Younger* abstention does not preclude such federal court review.

President, especially when it comes to unofficial conduct. *See supra* at 19-22. In contrast, a prophylactic immunity protecting a President from the ordinary duties of citizenship with respect to purely private conduct would be unprecedented. Congress could, of course, enact such a prophylactic immunity if it believed it necessary to provide a President more protection than the Constitution requires. *See Clinton*, 520 U.S. at 709. But no constitutional provision or principle authorizes this Court to adopt such a novel rule.

C. The Solicitor General's Heightened-Need Standard Applies Only To Privileged Materials

The Solicitor General stops short of supporting petitioner's claim of absolute, unqualified immunity. But the Solicitor General puts forth his own categorical, prophylactic rule, arguing that a state prosecutor must in every case "satisfy a heightened standard of need." U.S. Br. 26. Nothing justifies applying such a rule to state grand jury subpoenas across the board.

The heightened-need standard derives principally from *Nixon*, where the Court held that when a subpoena seeks material over which a President makes an "assertion of privilege," the government must show a "demonstrated, specific need" for the evidence to overcome that claim. 418 U.S. at 713. *Nixon* involved a trial subpoena, but the D.C. Circuit later applied this standard in the grand jury context, concluding that "to overcome [a] presidential privilege it is necessary to demonstrate with specificity why it is likely that the subpoenaed materials contain important evidence and why this evidence, or equivalent

evidence, is not practically available from another source." *In re Sealed Case*, 121 F.3d at 756.

The Solicitor General contends that respondent "has not satisfied" that standard here. U.S. Br. 26. But respondent never attempted to satisfy any heightened-need standard in the district court because petitioner argued only for categorical immunity—not a heightened standard—until his petition for certiorari in this Court.[14] In any event, nothing justifies applying such a heightened threshold standard when the materials sought are not privileged or confidential official documents but rather purely private ones pertaining only to acts taken by a President as an ordinary citizen.

1. The Solicitor General acknowledges that, in every case applying the heightened-need standard, the subpoena at issue involved "the President's [confidential] communications with his advisors." U.S. Br. 28. There has never been any real dispute on this point, *see, e.g.*, *In re Sealed Case*, 121 F.3d at 753 (heightened-need standard concerns the "type of showing of need the [prosecutor] must make in defense of the grand jury subpoena in order to overcome the privilege"), but petitioner—who advances a heightened-need standard as a fallback—disputes it anyway, arguing that *Nixon*'s heightened-need holding was independent of President Nixon's claim of privilege, Petr. Br. 46.

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[14] DOJ raised its proposed heightened-need standard for the first time on appeal in the Second Circuit—also after respondent would have had any opportunity to demonstrate that he can satisfy it.

Petitioner is wrong. *Nixon* announced the heightened-need standard in the section of the opinion labeled "The Claim of Privilege" and explained that the government must show a "demonstrated, specific need" for the evidence when there has been an "assertion of privilege" based on "confidentiality." 418 U.S. at 703, 713. The portion of *Nixon* on which petitioner relies that is *not* specifically addressed to a claim of privilege concerned Federal Rule of Criminal Procedure 17, *id.* at 702, and had nothing to do with the heightened-need standard.

Petitioner also seeks to expand heightened need beyond executive claims grounded in confidentiality interests, based on a distorted reading of *Cheney*. He cites that case for the proposition that "'[s]pecial considerations control' … whenever the 'autonomy' of the President's office is at stake—which is always the case 'in the conduct of litigation against' the Chief Executive." Petr. Br. 46 (quoting *Cheney*, 542 U.S. at 385). What this Court actually said was that "special considerations control when the Executive Branch's interests in maintaining the autonomy of its office *and safeguarding the confidentiality of its communications* are implicated." *Cheney*, 542 U.S. at 385 (emphasis added). The Vice President did not formally invoke executive privilege in *Cheney*, but this Court held that facially overbroad requests for information about a task force that advised the President could nonetheless be narrowed to avoid unnecessary interference with official Executive Branch functions. *Id.* at 387. Even interpreting *Cheney* to impose some type of heightened burden when a civil plaintiff seeks discovery of official materials, no case from this or any

other Court suggests that a heightened showing is required when the evidence sought is unofficial, purely private, and implicates no interest in government confidentiality or privilege.

2. Requiring a prosecutor to make a showing of special need for evidence makes sense in the context of privilege: Article II provides a qualified privilege to protect the confidentiality of official communications. *See supra* at 14, 38. But that privilege (like any qualified privilege) must be balanced against other important public interests, such as the public's interest in "the fair adjudication of a particular criminal case in the administration of justice." *Nixon*, 418 U.S. at 713. Otherwise said, because a President's confidential communications in furtherance of official presidential duties are presumptively protected, a prosecutor must make a special showing to overcome the presumption. No such across-the-board rule makes sense, however, when the materials in question are *not* confidential communications with Executive-Branch advisers but are instead a President's purely private records.

The Solicitor General nevertheless argues that a heightened-need standard is required to "mitigate the risk of harassment" of a President by prosecutors and "reduce the risk of subjecting the President to unwarranted burdens." U.S. Br. 28. But this argument fails for the same reason that petitioner's similar argument for absolute immunity fails: The Solicitor General offers no basis for an across-the-board rule based on a *risk* of such harms when courts can (and should) remedy those harms if and when they actually arise in a particular case. *Cf. Burr*, 25 F. Cas. at 34 ("The

guard, furnished to [a President], to protect him from being harassed by vexatious and unnecessary subpoenas, is to be looked for in the conduct of a court after those subpoenas have issued; not in any circumstance which is to precede their being issued.").

In fact, the ordinary procedures for challenging grand jury subpoenas already provide for quashing or modifying subpoenas on harassment and excessive-burden grounds. *See, e.g.*, FED. R. CRIM. P. 17(c)(2) ("[A] court may quash or modify [a] subpoena if compliance would be unreasonable or oppressive."); *United States v. R. Enters., Inc.*, 498 U.S. 292, 299 (1991) ("Grand juries are not licensed to engage in arbitrary fishing expeditions, nor may they select targets of investigation out of malice or an intent to harass."); *Virag*, 54 N.Y.2d at 443-44 (grand jury subpoena *duces tecum* may be quashed if the "materials sought have no relation to the matter under investigation" or upon showing of "bad faith").

Article II, moreover, requires courts to be especially sensitive to the unique position occupied by a sitting President, making clear that they are not "required to proceed against the president as against an ordinary individual." *Nixon*, 418 U.S. at 708 (quoting *Burr*, 25 F. Cas. at 192). Thus, if a President showed in a particular case that complying with a grand jury subpoena would unduly impede Article II functions, a court could narrow the subpoena, extend the time to comply, or, in extreme cases, quash it. As this Court explained in *Clinton*, "[i]f and when" a President shows that judicial process would interfere with official presidential functions, a court should respond "in such fashion … that interference with the President's

duties would not occur." 520 U.S. at 708. But in a case when "no such impingement upon the President's" official conduct is shown, *id.*, no basis exists for requiring a heightened showing.

The same is true for harassing subpoenas. Courts already must quash grand jury subpoenas issued "out of malice or an intent to harass," *R. Enters.*, 498 U.S. at 299; *see Virag*, 54 N.Y.2d at 443-44, and the same protections would apply with special force to a President, in light of the office's unique position as the head of the Executive Branch, *cf. Nixon*, 418 U.S. at 702 (appellate review of a subpoena to a President should be "particularly meticulous" (citing *Burr*, 25 F. Cas. at 34)). Beyond that review, a President could invoke constitutional principles grounded in Article II if the President could make a factual showing that an investigative demand for private documents was intended as retaliation for official policies. *Cf. United States v. Goodwin*, 457 U.S. 368, 380 n.12 (1982) (defendant may establish claim for vindictive prosecution by "prov[ing] through objective evidence an improper prosecutorial motive"); *Branzburg v. Hayes*, 408 U.S. 665, 707-08 (1972) (First and Fifth Amendments prohibit grand jury subpoenas that constitute "[o]fficial harassment"). But the Solicitor General has offered no ground for special scrutiny where, as here, the President has made no *prima facie* showing of malice, harassment, or politically motivated conduct.[15]

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[15] Because all subpoenas, state or federal, are ultimately constrained by constitutional principles, *see Branzburg*, 408 U.S.

The Solicitor General also errs in suggesting that a prophylactic, across-the-board rule is required to ensure federal-court review of allegedly overly burdensome or harassing subpoenas issued to a President. U.S. Br. 28-29. A President may address objections to grand jury subpoenas in state *or* federal court if a viable constitutional claim is put forward based on a case-specific showing. *See supra* at 36-37.

There is, in sum, no constitutional basis for requiring state prosecutors to satisfy a heightened-need standard in every case based on the *risk* of impermissibly burdensome or harassing subpoenas, when a President will have every opportunity to show that a particular subpoena in a particular case *in fact* interferes with the ability to carry out official presidential duties or was issued in bad faith or to harass. As explained in Part III, however, petitioner has made neither showing in this case, which requires affirming the decision below.

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at 707-08; *In re Grand Jury Subpoenas for Locals 17, 135, 257, & 608 of the United Bhd. of Carpenters & Joiners*, 72 N.Y.2d 307, 312-17 (1988), the fact that Rule 17(c) does not apply in state proceedings does not leave a President with inadequate protection, nor does it suggest that a heightened-need standard must be universally applied in Rule 17(c)'s place. *Contra* Petr. Br. 47.

D. The Prophylactic Rules Proposed By Petitioner And The Solicitor General Would Impose Severe And Unwarranted Negative Consequences On The Criminal Justice System

Apart from lacking any constitutional basis, the prophylactic, across-the-board rules pressed by petitioner and the Solicitor General will substantially harm the public's interest in the proper administration of criminal justice.

1. The costs of an absolute rule of presidential immunity during a President's term of office are obvious and severe.

To start, petitioner concedes that a President is amenable to criminal indictment and prosecution after leaving office. Petr. Br. 16. Yet immunizing a President from investigation during a presidential term risks effectively providing permanent immunity from indictment and prosecution, because delay "increase[s] the danger of prejudice [to the State] resulting from the loss of evidence." *Clinton*, 520 U.S. at 707-08. And "the constitutional need for production of relevant evidence in a criminal proceeding is specific and central to the fair adjudication of a particular criminal case in the administration of justice"—"[w]ithout access to specific facts a criminal prosecution may be totally frustrated." *Nixon*, 418 U.S. at 713. This is presumably why OLC has concluded that while a President is not amenable to indictment while in office, "[a] grand jury could continue to gather evidence throughout the period of immunity." Moss Memo 257 n.36.

The immunity petitioner seeks would also profoundly affect criminal investigations into conduct by other parties. Complex financial relationships, such as those being investigated here, often have multiple members, and a President's records may be (and are in this case) essential to evaluating the actions of other individuals and entities. Not only would petitioner's absolute immunity rule frustrate investigation of such third parties but it could well immunize them altogether. Absent the gathering of sufficient evidence, no indictment could be filed—and any rule that might toll a limitations period during the term of a *President's* immunity, *see supra* at 25-26 & n.9, would provide no basis for tolling the limitations period for third parties who are not legally immune from prosecution. A delay in the ability to investigate such third parties for the length of a presidential term may well result in the running of the relevant limitations period and thus de facto immunity.

All of that assumes that the evidence in a President's possession would inculpate third parties. But such evidence could also *exonerate* them. Shielding exculpatory evidence during a President's term could lead to wrongful indictment or even conviction, eroding the grand jury's "invaluable function" in "standing between the accuser and the accused." *Wood*, 370 U.S. at 390.

2. The Solicitor General's alternative heightened-need rule would likewise impose serious costs on the administration of criminal justice. After all, the grand jury's "right to every man's evidence" yields only as to "those persons protected by a constitutional, common-law, or statutory privilege." *Branzburg*, 408

U.S. at 688; *see supra* at 14, 38. And as the Court explained in *Nixon*, such "exceptions … are not lightly created nor expansively construed, for they are in derogation of the search for truth." 418 U.S. at 710.

The impediment to criminal accountability for private conduct would be especially severe if the Court were to adopt the Solicitor General's expansive view of the heightened-need standard. According to the Solicitor General, respondent cannot satisfy the standard because respondent "in all events lacks the power to indict the President before the end of the President's term," and so "the immediate production of the President's records" is not "critical to the grand jury's investigation." U.S. Br. 32. On that view, there would be no difference between the heightened-need standard and the absolute immunity that petitioner seeks. The heightened-need standard would thereby implicate all the same severe harms to the criminal justice system as petitioner's absolute immunity rule. When a subpoena seeks confidential official records that implicate Article II concerns, a countervailing constitutional interest may justify limited costs to the administration of criminal justice. But there is no constitutional or other justification for imposing such costs on criminal justice when the subpoena concerns only a President's private, unofficial records.

III. PETITIONER HAS NOT SHOWN THAT THIS SUBPOENA IMPERMISSIBLY BURDENS HIS ABILITY TO PERFORM OFFICIAL FUNCTIONS OR WAS ISSUED IN BAD FAITH

Although petitioner is not entitled to any prophylactic immunity rule, a President could move to quash

or narrow a subpoena in a particular case upon a showing of either an *actual* (not theoretical) burden that interferes with the ability to perform official Article II duties, or *actual* bad faith or harassment. But petitioner has not demonstrated any cognizable burden here. And while he has suggested that the Mazars Subpoena was issued in bad faith, that contention lacks support, as the district court has already found.

A. Petitioner has not shown that responding to the Mazars Subpoena would unduly interfere with his ability to carry out his official duties. To the contrary, the potential burdens of the Subpoena are minimal, particularly when compared with the judicial processes this Court has ratified in prior cases.

First, the Mazars Subpoena seeks only petitioner's personal documents. It does not require him to appear at a hearing or testify under oath. Yet this Court in *Clinton* concluded that requiring a President to prepare for deposition and give sworn testimony did not warrant even a stay of that proceeding, let alone full immunity. *See* 520 U.S. at 704-06. Even setting aside that this subpoena is not directed at petitioner himself, *see infra* at 50, the burden imposed by the requirement to disclose readily available financial records is far less than the already-approved burden of preparing for and providing sworn testimony at a civil deposition.

Second, the *Nixon* subpoena required the production of documents that would be used in a criminal *trial*, which would be open to the public. 418 U.S. at 688, 711; *see* U.S. CONST. amend. VI. Public disclosure of a President's communications with top-level

advisers in the Oval Office clearly would have had a substantial impact on the President's interest in confidentiality and would have been a major distraction from official presidential functions. Here, in contrast, the records sought by the Mazars Subpoena will be directed to a state grand jury proceeding, the secrecy of which is mandated by New York law. *See* N.Y. CRIM. PROC. LAW § 190.25(4)(a). Only if a prosecution were instituted and the records constituted evidence of the crimes charged would they be offered in a public trial, and even then, confidentiality concerns could be addressed through routine court orders, for example to redact sensitive identifying information. *Cf. Nixon*, 418 U.S. at 714-16.[16]

Third, the information sought by the Mazars Subpoena is far less sensitive than the material subpoenaed in *Nixon*. The financial information, such as tax returns, sought by the Mazars Subpoena has nothing to do with presidential functions. In fact, tax returns are routinely submitted to federal and state agencies, presidential candidates and Presidents routinely release them publicly, and petitioner himself

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[16] Petitioner asserts that the fact that this case involves a grand jury investigation, rather than a criminal trial, cuts against enforcement of the Mazars Subpoena, because a "trial triggers additional and competing constitutional rights held by the criminal defendant." Petr. Br. 43 n.7. But petitioner offers no plausible argument for why that matters. The truth-finding interests that compelled enforcement of the trial subpoena in *Nixon* are just as weighty in the grand jury context. *See supra* at 22. That a criminal defendant has greater constitutional protections than the subject of a grand jury investigation does not somehow make a grand jury subpoena more burdensome or less necessary than a trial subpoena.

has asserted that he would do so if his returns were not under audit. There is no additional burden to providing those same documents to a secret grand jury by court order.

Fourth, unlike the *Nixon* subpoena, which required the President himself to produce documents and recordings, the Mazars Subpoena "is directed not to the President, but to his accountants," and "compliance does not require the President to do anything." Pet. App. 20a. Petitioner objects that, because the underlying documents are his, he has standing to challenge a subpoena seeking them. Petr. Br. 17, 35. But the question here is not standing. It is whether having to comply with the Mazars Subpoena will interfere with petitioner's ability to perform official functions because of distraction. And the fact that the Mazars Subpoena is not directed at petitioner, even if his lawyers consult with him before production, makes clear that the judicial process here will impose no direct, cognizable burden on petitioner.[17]

B. Petitioner has also failed to make a threshold showing that the Mazars Subpoena was issued in bad faith or with the intent to harass. Despite having had

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[17] Petitioner contends that it is not any direct burden but the indirect "distractions and mental burdens" associated with the Mazars Subpoena that "matter." Petr. Br. 38. But as explained above, if the mere fact that a President might be required to "consult with his attorneys, consider the need to assert available privileges, and otherwise participate in his defense," Petr. Br. 38 (footnote omitted), were a cognizable burden, *Clinton* would have been decided differently. *See supra* at 19-20, 48. And petitioner does not and cannot identify any more specific imposition that exists in this case.

the opportunity to adduce any relevant evidence before the district court, *see* D. Ct. Dkt. 38, petitioner continues to rely principally on two facts to show harassment—*viz.*, (i) that the Mazars Subpoena was largely patterned on congressional subpoenas, Petr. Br. 48; and (ii) that various officials in New York unaffiliated with respondent have made statements regarding efforts to investigate petitioner and his tax returns, *id.* at 26-27. Yet the district court rejected these very arguments when evaluating petitioner's contention that the bad-faith exception to *Younger* abstention applied and concluded that they did not suffice to demonstrate bad faith.

As the district court recognized, there is nothing suspect about the Office's decision to pattern the Mazars Subpoena on the congressional subpoenas, because those subpoenas "encompass documents relevant to the state's investigation," and mirroring the congressional subpoenas would "enable Mazars to produce those documents promptly." Pet. App. 56a. That respondent sought to facilitate the production of documents by streamlining the process is certainly not evidence of bad faith.

Meanwhile, the vast majority of the statements petitioner cites as supposed evidence of the motives behind this investigation were not made by respondent or anyone else associated with the Office or the investigation, and therefore (as the district court found) "do not reveal the 'subjective motive' of [respondent] in initiating these particular proceedings." Pet. App. 56a. The only statements petitioner cites that were actually made by the Office are badly mis-

characterized: Each was a direct response to or summary of petitioner's or DOJ's position, not a description of the true motivation for the investigation or the Mazars Subpoena. *See* C.A. Dkt. 99, at 4, 6 (summarizing petitioner's and DOJ's position that any state investigation of a President must come after impeachment); D. Ct. Dkt. 33, at 1-2 (responding to DOJ's position that compliance with the Subpoena would result in irreparable harm); D. Ct. Dkt. 38, at 43 (responding to argument that the grand jury might not preserve the secrecy of the subpoenaed documents).

Having considered these facts, the district court found no basis to "impute bad faith to [respondent]." Pet. App. 58a. Petitioner has offered this Court no basis to second-guess that conclusion, which is plainly correct. *See, e.g.*, *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 857 (1982) ("[a]n appellate court cannot substitute its interpretation of the evidence for that of the trial court simply because the reviewing court might give the facts another construction [or] resolve the ambiguities differently" (internal quotation marks omitted)).

Petitioner has failed, in short, to demonstrate that the Mazars Subpoena imposes a burden that would unduly interfere with his ability to perform his official duties or that it is a bad faith effort at presidential harassment.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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