In the
Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, PETITIONER,
v.

CYRUS R. VANCE, JR., in his official capacity as DISTRICT ATTORNEY OF THE COUNTY OF NEW YORK, RESPONDENT

BRIEF FOR PETITIONER

QUESTION PRESENTED

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

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

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved in this case are: U.S. Const. art. I, §3, cl. 7; U.S. Const. art. II, §1, cl. 1, §2, §3, §4; U.S. Const. art. VI, cl. 2.

STATEMENT OF THE CASE

A. Background

For years, the President's political opponents have not hidden their desire to investigate and expose his personal finances. His finances in general, and tax returns in particular, were a prominent issue in the 2016 presidential campaign. They became a priority of the Democratic Party both before and after the 2018 elections. Congress convened, the President's personal finances were the subjects of several hearings in the House of Representatives.

Shortly after those hearings, in April 2019, the House Oversight Committee issued a subpoena to the President's accounting firm, Mazars USA, LLP. Mazars is responsible for, among other things, preparing financial statements for the President and his businesses, as well his personal tax returns. In a letter released by its Chairman, the Committee claimed to be investigating a number of issues relating to "the President's representations of his financial affairs." In a memorandum, the Chairman added that the Committee wanted the records to examine, among other things, whether the President was violating the Emoluments Clauses of the U.S. Constitution and federal financial disclosure laws. The legality of the subpoena was quickly challenged, and it has repeatedly been stayed as part of that litigation-most recently by this Court.

That same month, two other House committees served subpoenas on Deutsche Bank AG, one of the President's lenders. The subpoenas, among other things, sought the President's tax returns. The committees claimed that they needed those returns as part of an investigation into money laundering and foreign influence in the bank and real estate sectors. Again, the legality of those subpoenas was challenged in court. They also have repeatedly been stayed as part of that litigation, including most recently by this Court. Deutsche Bank revealed to the Second Circuit that it does not have any of the President's returns.

At roughly the same time, the House Ways and Means Committee subpoenaed the President's federal tax returns from the Treasury Department. But the Treasury Department declined to disclose the returns because the Committee lacked a legitimate legislative purpose. The committee's purpose for demanding the President's returns was transparently political. For example, then-Minority Leader Nancy Pelosi in 2017 called for the Committee "to demand Trump's tax returns from the Secretary of the Treasury" and to "hold a committee vote to make those tax returns public." The current committee chairman, Congressman Richard Neal, similarly explained that it "is not about the law, this is about custom and practice. It's a settled tradition that candidates reach the level of expectation that they're supposed to release their tax forms." To date, the Committee has been unable to secure these tax documents.

The New York Legislature has also joined in the effort to obtain and publicize the President's tax records. Just before the President's inauguration, Senator Brad Hoylman (D-Manhattan) introduced Senate Bill S8217. It would have required candidates for President to publicly disclose their federal income tax returns from the last five years, or else their names would not appear on the New York

ballot and they could not receive New York's electoral votes. Lest anyone be confused about the target of S8217, Senator Hoylman named it the Tax Returns Uniformly Made Public Act, or TRUMP Act.

When the TRUMP Act failed to pass, Senator Hoylman quickly devised another plan to expose the President's finances. Working with Assembly Member Buchwald (D-Westchester), he introduced Assembly Bill A7426 and Senate Bill S5572-the Tax Returns Uphold Transparency and Honesty Act, or TRUTH Act. The bill would have required the Commissioner to publish the President's state income tax returns from the last five years. Although it covered other statewide candidates, the President was the target of the TRUTH Act; after introducing the legislation, the proponents held a press conference in front of a large banner that said ''#ReleaseTheReturns."

When the TRUTH Act failed to pass, Senator Hoylman and Assembly Member Buchwald devised a third way to target the President. By this time, the House Ways and Means Committee and the Treasury Department were disputing whether the President's federal returns should be disclosed to Congress. So Senator Hoylman and Assembly Member Buchwald devised legislation that would use the Committee's request for the President's federal returns as grounds for New York to disclose his state returns to Congress. They named the legislation the Tax Returns Released Under Specific Terms Act, or TRUST Act. It passed on party lines. The Committee has been enjoined from invoking this provision without notifying the President.

The quest to obtain the President's tax returns took root in California too. On July 30, 2019, Governor Gavin Newsom signed into law the Presidential Tax Transparency and Accountability Act, also known as SB27. That law required all candidates for President to disclose their previous five years of tax returns as a condition of appearing on a primary ballot. But it was preliminarily enjoined by a federal court, and the California Supreme Court later invalidated it.

Toward the end of the summer, Respondent District Attorney of New York County began pursuing yet another investigation into President Trump's business dealings. It appears that this investigation is focused on certain payments made in 2016.

The District Attorney opened his investigation at a time when the President's political opponents had grown increasingly frustrated with their inability "to get their hands on the long-sought after documents." There was renewed

optimism that a criminal investigation would not face the obstacles that had stymied earlier efforts to expose the President's financial records. There was hope that "it may be more difficult" for the President "to fend off a subpoena in a criminal investigation with a sitting grand jury."

The District Attorney served a grand jury subpoena on the Trump Organization that demanded numerous records concerning the President and his financial interests. The subpoena was entitled "Investigation into the Business and Affairs of John Doe." It sought, among other things, records concerning the President from a three-year period-most of which post-dated his election. It also sought records concerning certain payments (including form W2s and 1099s)-but not tax returns. In an effort to work cooperatively, the Trump Organization began complying with the subpoena and produced thousands of pages of responsive documents.

Shortly after receiving an initial production, however, the District Attorney complained that it did not include the President's tax returns. The Trump Organization responded by pointing out that the tax returns did not fall within the terms of the subpoena and were irrelevant to the investigation. Rather than negotiate over the subpoena's scope or justify the need for the returns, the District Attorney circumvented the President and his business by sending a subpoena to Mazars. This subpoena-which is likewise entitled "Investigation into the Business and Affairs of John Doe" -names the President personally and demands production of a broad swath of his personal records (including his tax returns) from a much longer period than the subpoena to the Trump Organization.

The Mazars subpoena is copied, virtually word-for-word, from the one that the Oversight Committee issued to Mazars. The only difference is that the Oversight Committee did not ask for the President's tax returns. That portion of the District Attorney's subpoena instead tracks the subpoena the House Ways and Means Committee sent to the Treasury Department. In other words, the District Attorney largely cut and pasted his demand from two congressional subpoenas. According to the District Attorney, he decided to copy the two congressional subpoenas because it was more "expeditious."

When the President's lawyers learned of this subpoena, they immediately raised objections to the District Attorney. They explained that the subpoena went far beyond the scope of an investigation about 2016 payments, was an inappropriate attempt to circumvent their objections, and raised constitutional

issues. In response, the District Attorney refused to withdraw the subpoena or negotiate to narrow it. He also refused to stay enforcement so the parties could negotiate further or litigate the dispute if they were truly at an impasse.

B.Proceedings Below

On September 19, 2019, the President filed this action challenging the Mazars subpoena as a violation of the temporary immunity that a sitting President enjoys under Article II and the Supremacy Clause of the Constitution. The President sought an emergency injunction to stay enforcement of the subpoena. The Department of Justice filed a statement of interest in support of the President. Mazars filed a letter with the district court stating that because "this action is between Plaintiff the President and ... Vance," it "takes no position on the legal issues raised by the President."

The parties ultimately agreed to a short stay of enforcement and proceeded to brief and argue the preliminary injunction under a "compressed briefing schedule." During briefing and argument in the district court, the District Attorney reiterated that his office is "seeking the books and records ... of the President" to investigate ''business transactions that ... include the President" and potential "crimes at the behest of the President." At argument, the District Attorney even expressed concern that he would run out of time to bring "charges" against "the president himself' before he "is out of office."

The morning that the stay of enforcement was set to expire, the district court issued a 75-page opinion denying the President's request for injunctive relief and dismissing his complaint. The court held that the President's immunity claim must be pursued in state court, and dismissed the complaint on that ground. In an "alternative" holding, the district court denied the President's immunity claim on "the merits."

According to the district court, the President's absolute immunity from criminal process-including indictment and imprisonment-while in office must be assessed on a case-by-case basis. As a result, although the President might be immune from "lengthy imprisonment" or "a charge of murder," he might not be immune from a shorter prison sentence or prosecution for lesser crimes such as "failing to pay state taxes, or of driving while intoxicated." The district court "rejected" the contrary views of the Justice Department even though those views "have assumed substantial legal force." Applying its balancing test, the district court held that the President is not immune from this subpoena while in office.

Because Mazars was due to comply with the subpoena within hours of the district court's decision, the President immediately filed a notice of appeal and an emergency motion for stay with the Second Circuit. The Second Circuit granted the stay, issued an expedited briefing schedule, and then scheduled oral argument to be heard within sixteen days. The Justice Department filed an amicus brief supporting the President's position.

At oral argument before the Second Circuit, the District Attorney again made clear he is targeting the President in a criminal investigation for the purpose of possible indictment. Because, in his view, any potential immunity is not triggered until indictment, there is "no basis to object *at this point."* But even if the investigation reaches the point of indictment, the District Attorney would not recognize immunity for a sitting President:

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

On November 4-twelve days after argument the Second Circuit issued its opinion. It first disagreed with the district court's dismissal of the suit. As the Second Circuit explained, abstention is unjustified when the action is brought by "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." It did "not believe that the policy of comity can be vindicated where a county prosecutor, however competent, has opened a criminal investigation that involves the sitting President, and the President has invoked federal jurisdiction 'to vindicate the superior federal interests embodied in Article II and the Supremacy Clause."'

But the Second Circuit nevertheless affirmed the district court's denial of a preliminary injunction on the ground that "any presidential immunity from state criminal process does not extend to investigative steps like the grand jury subpoena at issue here." The President, the court held, is therefore unlikely to prevail on his claim that he is "absolutely immune from all stages of state criminal process while in office, including pre-indictment investigation, and that the Mazars subpoena cannot be enforced in furtherance of any investigation into his activities." In the Second Circuit's view, these are, broadly speaking,

"'appropriate circumstances"' to enforce a subpoena for the President's documents under the Constitution.

In reaching this conclusion, the Second Circuit praised the district court's "thorough and thoughtful decision" rejecting the President's immunity claim. "With the benefit of the district court's well articulated opinion," it held "that any presidential immunity from state criminal process does not bar the enforcement of this subpoena." According to the Second Circuit, it thus had "no occasion to decide ... the precise contours and limitations of presidential immunity from prosecution," and was "expressing no opinion on the applicability of any such immunity under circumstances not presented here." It limited the holding "only" to the determination "that presidential immunity does not bar the enforcement of a state grand jury subpoena directing a third party to produce non-privileged material, even when the subject matter under investigation pertains to the President."

The Second Circuit saw *United States v. Nixon,* as the "most relevant precedent for present purposes." Under *Nixon,* in the Second Circuit's view, "the President may not resist compliance with an otherwise valid subpoena for private and non-privileged materials simply because he is the President." The court rejected the argument that making the President a "'target' of the investigation" makes this case different from *Nixon.* "The President has not been charged with a crime. The grand jury investigation may not result in an indictment against any person, and even if it does, it is unclear whether the President will be indicted."

That this subpoena is from a state prosecutor unlike *"Nixon* and related cases"-also was not a basis for reaching a different result in the Second Circuit's view. Though conceding that "the Supreme Court has not had occasion to address" whether the President is immune from state criminal process, the court held that it need not pass on the issue. That was because, in the court's view, "this subpoena does not involve 'direct control by a state court over the President."' Since the subpoena targeted Mazars, "no court has ordered the President to do or produce anything." And since the District Attorney does not seek "the President's arrest or imprisonment" or "compel him to attend court at a particular time or place," the Second Circuit was unconvinced that enforcement of the subpoena would "interfere" with the President's execution of his official duties or otherwise "subordinate federal law in favor of a state process." The Second Circuit's ruling was driven, in large part, by its conclusion that the Mazars subpoena does not force "the President *himself* to do anything."

The Second Circuit also rejected the argument that, under *Nixon,* the District Attorney at least had to establish a heightened need for the documents the subpoena seeks. According to the court, that standard applies only when the President has invoked executive privilege. The Second Circuit thus upheld the entire subpoena based solely on the fact that "the Mazars subpoena seeks evidence in service of an investigation into potential criminal conduct within the District Attorney's jurisdiction." The court did not rely on the "portion" of the District Attorney's declaration that is "redacted from the public record."

The Second Circuit thus held that the President is "not entitled to preliminary injunctive relief." It affirmed the "district court's order denying the President's request for a preliminary injunction," it vacated the "judgment of the district court dismissing the complaint on the ground of *Younger* abstention," and it remanded "for further proceedings consistent with this opinion." This Court granted certiorari on December 13, 2019.

SUMMARY OF ARGUMENT

This case marks the first time in our country's history that a local prosecutor has sought to subject the sitting President of the United States to criminal process. The District Attorney seeks to compel the production of an enormous swath of the President's personal financial information as part of an ongoing grand jury investigation into the President's conduct. Throughout these proceedings, the District Attorney has pointedly refused to eliminate the President as a target for indictment. Indeed, he has not ruled out indicting-or even trying-the President during his term in office.

There is a reason why this is unprecedented. The Constitution vests in the President-and in him alone-the Executive Power of the United States. It grants him unparalleled responsibilities to defend the nation, manage foreign and domestic affairs, and execute federal law. The President cannot effectively discharge those duties if any and every prosecutor in this country may target him with criminal process. The Constitution gives to Congress, through its power of impeachment, the sole right to prosecute the sitting President for wrongdoing. Once he leaves office, the President may be subjected to criminal process-but not before then. Text, structure, and history all lead inexorably to this understanding. That is why this has been the consistent position of the Justice Department for nearly 50 years.

The need for temporary presidential immunity is particularly acute when it

comes to state and local prosecutors. The Supremacy Clause prohibits state and local officials from using their powers to "defeat the legitimate operations" of the national government. Local officials thus cannot exercise their power to hinder the Chief Executive in the performance of the duties that he owes to the undivided nation. The risk that politics will lead state and local prosecutors to relentlessly harass the President is simply too great to tolerate. The President must be allowed to execute his official functions without fear that a State or locality will use criminal process to register their dissatisfaction with his performance.

A prosecutor crosses a constitutional line when, as here, he initiates compulsory criminal process upon the President as part of a grand jury proceeding that targets him. Like indictment itself, criminal process of this kind will inevitably distract the President from his unique responsibilities and burden his ability to act confidently and decisively while in office. It also stigmatizes the President in ways that will frustrate his ability to effectively represent the United States in both domestic and foreign affairs.

This grand-jury subpoena for the President's tax returns and other financial records includes both offending features. First, there is no dispute that the subpoena itself targets the President-it names him personally and seeks his private records. The District Attorney has also repeatedly confirmed the grand jury is investigating the President's conduct and may well charge him while he is in office. The Second Circuit's emphasis on the fact that the subpoena was sent to Mazars, not the President, was misplaced. This Court has long recognized that, under these circumstances, the target of the subpoena has standing to challenge its legality even when he or she is not the subpoena's recipient. The subpoena must be treated as though it was sent directly to the President.

The Second Circuit's focus on who might bear the *physical* burden of compliance for *this* subpoena was also mistaken. The burdens justifying immunity go far beyond the President's personal involvement in compiling and transmitting responsive materials. Nor does immunity turn on the individual burden imposed by any particular subpoena. For immunity purposes, what matters is the cumulative effect of permitting *every* state and local prosecutor to take the same steps the District Attorney did. That is an easy assessment here: a President besieged with criminal process from hostile local jurisdictions cannot effectively serve the national interest.

The Court's precedent bolsters this conclusion.

In *Nixon v. Fitzgerald,* (1982), this Court determined that the burdens of civil damages suits against former Presidents for official acts were so great that permanent immunity was needed. The toll that criminal process-for official and unofficial acts alike-exacts from the President is even heavier and thus compels temporary immunity. The Second Circuit concluded that *Clinton* and *Nixon* required a different result. But those cases arose from federal proceedings-a point that was emphasized in both decisions. Indeed, *Clinton* expressly reserved whether the President should be immune from state process while in office given the many concerns that it raises. Further, *Clinton* involved civil litigation for unofficial acts and *Nixon* involved a third-party trial subpoena. The case for immunity from state criminal process is far stronger than in those circumstances.

In fact, *Nixon* provides an independent basis for invalidating the District Attorney's subpoena. In that decision, and in those applying it, the courts have held that there must be a "demonstrated, specific need" for the material sought in a subpoena directed at the President. The threat to the Presidency posed by this compulsory criminal process requires a standard of review at least as rigorous, and the District Attorney cannot remotely make that showing. His subpoena was copied almost word-for-word from subpoenas issued by Congress for unrelated reasons. The District Attorney seeks, in other words, a trove of the President's personal financial records for reasons unconnected to his investigation-or even to the State of New York. This Court should not validate such an inappropriate demand.

CONCLUSION

The Court should vacate the judgment below with instructions to enter injunctive relief in favor of the President.