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 OF RESPONDENT

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.

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. In recent years, multiple public reports have appeared of possible criminal misconduct in activities connected to the Trump Organization. The reports described transactions and tax strategies 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. Cohen admitted that he violated campaign finance laws in coordination with, and at the direction of, an individual later identified as petitioner.

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. The Office resumed its investigation shortly thereafter.

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 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 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.

Respondent moved to dismiss; that petitioner's sweeping claim of immunity is

contrary to settled precedent; and that petitioner had failed to establish irreparable harm. Briefing and argument were highly expedited, and the Office agreed to temporarily forbear enforcement of the Mazars Subpoena. DOJ filed a Statement of Interest asserting that abstention was inappropriate but taking no position on the merits.

2. The district court abstained and ruled in the alternative that petitioner was not entitled to injunctive relief.

The court not only found that the balance of factors favored abstention but also rejected petitioner's contention that a bad-faith exception applied. The court observed that petitioner "failed 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."

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." That position, the court explained, "finds no support in the Constitution's text or history" or in this Court's precedent. 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." And it "would not apply to the specific set of facts presented here," *i.e.,* a state grand jury subpoena calling for a third party to produce petitioner's "personal and business records."

3. The Second Circuit vacated the district court's determination that *abstention* applied. 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."

The Second Circuit focused in particular on *United States v. Nixon,* 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." Given that "executive privilege did not preclude enforcement of the subpoena issued in *Nixon,"* the court saw no reason why "the Mazars Subpoena must be enjoined despite seeking no privileged information and bearing no relation to the President's performance of his official functions." 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." 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."

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." 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." 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.

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. 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,* 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.

CONCLUSION

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