19-3204-cv

United States Court of Appeals
For the Second Circuit

DONALD J. TRUMP,

Plaintiff-Appellant,

UNITED STATES DEPARTMENT OF JUSTICE,

Amicus Curiae,

- v. -

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

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York

BRIEF OF DEFENDANT-APPELLEE DISTRICT ATTORNEY CYRUS R. VANCE, JR.

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PRELIMINARY STATEMENT

Appellee Cyrus R. Vance, Jr., in his official capacity as District Attorney of New York County, submits this brief in opposition to the brief of Plaintiff-Appellant Donald J. Trump, President of the United States ("Appellant"), and respectfully requests that this Court affirm the October 7, 2019 decision by the district court (Marrero, J.). Appellant has established neither a likelihood of success on the merits of his constitutional claim to immunity, nor that he would suffer irreparable harm should the Court allow production under the grand jury subpoena to proceed in the ordinary course. By contrast, continued delay poses serious concerns for the Office of the District Attorney for New York County and the People of the State of New York: It risks the expiration of statutes of limitation that apply to some of the transactions being investigated by the grand jury, and would immediately infringe rights and obligations of the District Attorney, as the duly elected executive representative of an independent sovereign, to investigate and enforce New York State criminal laws free from interference by the federal government, as mandated by the Constitution and longstanding principles of federalism.

This matter arises out of a state criminal investigation in which the New York County District Attorney's Office (the "Office"), on behalf of a sitting grand jury, is investigating a series of business transactions by individuals and entities centered in New York County. In New York, as elsewhere, the grand jury is a cornerstone of the criminal justice system, *see* N.Y. Crim. Proc. Law § 190.55; N.Y. Const. art. I § 6, and

functions as a constitutional fixture, "[r]ooted in long centuries of Anglo-American history." *In re Grand Jury Subpoena dated Aug. 9, 2000*, 218 F. Supp. 2d 544, 550 (S.D.N.Y. 2002) (citing *United States v. Williams*, 504 U.S. 36, 47 [1992]). Grand juries in New York function as an "arm of the court," presided over by a grand jury judge and advised by the district attorney. *Spector v. Allen*, 281 N.Y. 251, 260 (1939); *see* N.Y. Crim. Proc. Law § 190.25(6).

The criminal investigation is proceeding based upon information derived from public sources, confidential informants, and the grand jury process. The scope and foundation of the investigation is described, in part, in the redacted portions of the Shinerock Declaration, filed under seal. *See* Joint Appendix ("JA") 45-52. As part of the investigation, the Office, on behalf of a sitting grand jury, served a subpoena on Mazars USA LLP ("Mazars") on August 29, 2019 (the "Mazars Subpoena"). The Mazars Subpoena calls for financial and tax records of entities and individuals, including Appellant, who, during relevant periods, engaged in business transactions and other conduct within the jurisdiction of New York County. The records relate to business and financial matters unrelated to any official acts of the President of the United States, and are primarily from the time-period before Appellant assumed that office.[1]

[1] To the extent that the Mazar's Subpoena calls for any records created after the Appellant became a federal employee, those records, too, concern only private business and financial matters. These records do not relate to any official duties of Appellant.

A criminal subpoena seeking records of a sitting president is not unprecedented, *see United States v. Nixon*, 418 U.S. 683, 716 (1974); but this President's claim of immunity from such a subpoena is as novel as it is contrary to the law. His entire lawsuit relies on the remarkable proposition not only that a sitting president enjoys blanket immunity from criminal prosecution, but (1) that this blanket immunity also protects a president from having to respond to any grand jury request for information about his conduct or that of his businesses or employees before he took office; (2) that persons or entities employed by, or associated with, the president whose conduct also fall within the scope of the grand jury investigation benefit equally from this blanket immunity; and (3) that this blanket immunity also prevents any third-party from providing information to the grand jury about such prior conduct or transactions involving the president, his companies, or former associates and employees.

This extravagant claim is unsupported by constitutional text, statute, or caselaw, and is equally absent from the historical texts and government memoranda on which Appellant relies most heavily. Notably, the U.S. Department of Justice ("DOJ"), on whom Appellant relies to "tell this Court its current view of the law," Appellant Brief p. 23, stops far short of endorsing this view in its *amicus* brief. *See* DOJ Brief p. 5-7. Rather, it reaffirms what we know from Supreme Court decisions on the subject: The president is absolutely immune from civil damages liability for his official actions, *Nixon v. Fitzerald*, 457 U.S. 731, 756 (1982); is entitled to limited solicitude in discovery, but is not immune from civil suits solely related to private conduct, *Clinton v. Jones*, 520 U.S.

681, 707 (1997); and (though the DOJ omits the citation) the president must produce records in response to a subpoena *duces tecum*, even where those records implicate the president's own official conduct. *Nixon*, 418 U.S. at 716. Given the DOJ's own recent investigations, prosecutions, and convictions involving Appellant and his affiliates, including the prosecution of Michael Cohen, in which Appellant was referenced as an unindicted co-conspirator, the DOJ cannot (and does not) join in Appellant's claim to an absolute immunity. Appellant's aggressive immunity claim here is particularly hollow in view of his failure to raise it in these recent investigations and prosecutions.

The grand jury has not indicted Appellant, nor called for his arrest, prosecution, or imprisonment, and any claim to immunity from such proceedings is unripe. The Mazars Subpoena in no way "interferes with" or "burdens" Appellant's discharge of his duties, despite Appellant's repeated refrain. Directed to a third party, the Mazars Subpoena neither calls upon Appellant's time, nor threatens him with coercive process, as any motion to compel compliance would be directed at Mazars, not Appellant. Appellant cannot demonstrate that the production to a grand jury of non-privileged financial records and tax records—records which presidents are required to disclose to the relevant authorities and which past presidents have disclosed voluntarily and publicly—in any way prevents him from fulfilling his constitutional obligations. *See Trump v. Mazars USA LLP*, No. 19-5142, Slip Op. at 16, 42-43 (D.C. Cir. Oct. 11, 2019) (noting that Presidents Carter, Reagan, H.W. Bush, Clinton, W. Bush, and Obama all released personal tax returns to the public, indicating strongly that disclosure neither

prevents nor disrupts the presidential efforts to "take Care that the Laws be faithfully executed" [quoting U.S. Const. art. II, § 3]).[2]

Lacking any cognizable legal basis to challenge the Mazars Subpoena, Appellant and the DOJ resort to specious assertions that a parade of horribles will follow from enforcement. Appellant warns that "stacks" of the Appellant's so-called "confidential" records will be exposed to the public, Appellant Brief p. 44-45, and, joined by the DOJ, suggests that "thousands of state and local prosecutors" across the country could embroil the president in criminal proceedings for no reason other than political motivations. Appellant Brief p. 8; *see* DOJ Brief p. 2, 9, 14. These arguments rely upon two assumptions that are wholly speculative: That the Office will publicize materials obtained pursuant to the grand jury's powers, and that state prosecutors will investigate individuals whether or not they have a basis to suspect those individuals were involved in criminal activity within their jurisdiction.

The record belies these assertions. Appellant simultaneously argues that the Office can have no reason to investigate so-called "hush money" payments other than political motivation, while conceding, as he must, that these same matters have also been subject to the scrutiny of Congress and the U.S. Attorney's Office for the Southern

[2] For the same reasons, the Supremacy Clause does not require any different outcome here. *See Trump v. Mazars USA LLP*, No. 19-5142, Slip Op. at 39-40 (D.C. Cir. Oct. 11, 2019) ("in determining whether a statute disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions").

District of New York. The only state investigations initiated to date are in New York, where Appellant lived and based his business operations during the relevant time periods. Moreover, existing laws mandating grand jury secrecy and protecting against improper prosecutions are enforceable both by independent state courts, and by federal courts, including through the bad faith and harassment exceptions to *Younger* abstention. Rejecting Appellant's appeal will not undermine those important protections.

Appellant and the DOJ thus are forced to rely on the argument that the Mazars Subpoena, as part of a grand jury proceeding, is relegated to second-class status next to the "impeachment process," DOJ Brief p. 16; *see* Appellant Brief p. 25-26, or federal prosecution, where "structural features" mitigate the risk that providing the Appellant's business records will impair the functioning of his Office. DOJ Brief p. 21. This distinction has no basis in law, and Appellant's assertion that his objection is limited to being investigated by "local" authorities is cynical. The reality is that Appellant has refused to participate in the very impeachment process that he presents here as the bulwark against placing a president above the law. *See* Appellant Brief p. 31; Letter from Pat A. Cipollone, Counsel to the President, to Members of Congress (Oct. 8, 2019). He has similarly refused to comply with legislative Congressional subpoenas. *See*, *e.g.*, *Trump*, No. 19-5142, Slip Op. at 42-43. His core position on every one of these matters is that the United States Presidency places him beyond the reach of the law.

The President's "unique position in the constitutional scheme," *Fitzgerald*, 457 U.S. at 749, does not shield Appellant and his businesses and business associates from providing records in a criminal investigation into non-official conduct. Accordingly, this Court should affirm the decision below and deny Appellant's effort to thwart compliance with the duly issued Mazars Subpoena, the fruits of which will be protected by the cloak of grand jury secrecy.

STATEMENT OF THE ISSUES

1. Did the district court abuse its discretion when it concluded that (i) Appellant is unlikely to succeed on the merits of his claim that, as President, he is immune from all criminal process, including a grand jury subpoena issued to a third party for records of non-official business of the president and others that largely pre-date his time in office, (ii) compliance by the third party with the subpoena will not irreparably harm Appellant, and (iii) on balance, ensuring that the grand jury pursues this criminal investigation without interference outweighs the concerns that Appellant puts forth as grounds for not complying with the grand jury subpoena?

2. Does *Younger* abstention require federal courts to refrain from enjoining the execution of a duly issued subpoena in an ongoing state grand jury investigation?

3. Should the Court, in the event it affirms the decision below, grant a stay pending appeal, where Appellant has failed to show either a likelihood of success on the merits or irreparable harm, and where a stay, if imposed, risks allowing criminal actors to escape accountability, and would immediately infringe the Appellee's

constitutional rights and obligations, as a duly elected executive representative of an independent sovereign?

STATEMENT OF THE CASE

The subpoenas issued to the Trump Organization and Mazars

On August 1, 2019, the Trump Organization, was served with a Grand Jury subpoena (the "Trump Organization Subpoena") calling for a range of records and communications from multiple individuals and entities relating to, among a variety of other transactions, the so-called "hush money" payments to Stephanie Clifford and Karen McDougal, how those payments were reflected in the Trump Organization's books and records, and who was involved in determining how those payments would be reflected in the Trump Organization's books and records.[3] On August 7, 2019, this Office spoke with counsel for the Trump Organization, and conveyed that the Office believes the Trump Organization Subpoena calls for tax records for 2017. The Trump Organization produced records on August 15 and 29, September 13, and—after commencement of the present matter—October 4 and 13, 2019. To date, the Trump Organization has produced over 3,000 pages (approximately two-thirds of which are non-substantive Google alerts), but no tax records.

On August 29, 2019, Mazars was served with the Mazars Subpoena, prior to the Trump Organization's objections to producing tax returns in response to the Trump

[3] Contrary to Appellant's characterizations, the Office's investigation goes beyond the scope of the Trump Organization Subpoena. *See* JA45-52.

Organization Subpoena. The Mazars Subpoena seeks the same financial records that Mazars had already been called on to produce in response to requests from the federal government, and in addition calls for tax records for the years 2011 through the present. The Office spoke with counsel for Mazars in a series of phone calls to establish an agreed-upon production schedule beginning on, and extending past, the original September 19, 2019 return date for the Mazars Subpoena. Mazars did not and has not raised any of its own objections to the subpoena.

Although between August 7 and August 21, 2019, the Office made at least four follow-up requests to Trump Organization counsel for tax returns in response to the Trump Organization Subpoena, counsel did not raise any specific objections to producing tax returns until September 4, 2019. On that day, the Trump Organization's counsel claimed, for the first time, that production of those tax records implicated constitutional issues. In a follow-up email of September 9, 2019, counsel contended further that tax records were not responsive to the Trump Organization Subpoena.

Prior and continuing investigations related to Appellant

Public reporting has covered several prior and continuing investigations and prosecutions involving Appellant, his associates, and related entities, including those conducted by Congress and federal and state authorities. Appellant has not claimed that these matters invaded the constitutional prerogatives he seeks to vindicate here. This is so despite that, as reported, these investigations and prosecutions were marked

by the robust exercise of grand jury and other investigative powers, and involved investigation of grave conduct:

a. Special Counsel Robert Mueller oversaw an approximately two-year criminal investigation addressing (1) whether Appellant, his presidential campaign, or his associates were involved in unlawful efforts by Russia to interfere with the 2016 presidential election, and (2) whether Appellant, while president, was implicated in obstructing justice. According to public reporting, the Special Counsel's investigation involved, among other things, over 2,800 subpoenas, nearly 500 search warrants, and approximately 500 witnesses. It resulted in the indictment of thirty-four individuals, including individuals associated with Appellant and Appellant's presidential campaign.

b. Federal prosecutors in multiple districts have investigated the origins of financing for Appellant's inauguration committee, how the money was spent, and whether any donations to the committee resulted in favors or special access.

c. The New York Department of Financial Services has issued at least one subpoena seeking records and communications related to a non-criminal investigation into allegations that the Trump Organization and its officers engaged in insurance fraud.

d. The New York Attorney General's Office has issued at least one subpoena seeking records and communications related to a currently non-criminal

investigation into allegations that the Trump Organization and its officers engaged in bank fraud.

e. On August 21, 2018, federal prosecutors obtained the guilty plea of Michael Cohen on charges of tax fraud, false statements, and campaign finance violations, committed when Cohen was legal counsel to Appellant. In sentencing filings, federal prosecutors referred to Cohen as having acted in coordination with and at the direction of an unindicted co-conspirator referred to as "Individual-1." In testimony before Congress on February 27, 2019, Cohen testified under oath that "For the record: Individual #1 is President Donald J. Trump."

f. On September 20, 2018, federal prosecutors reached a non-prosecution agreement with a media company related to a criminal investigation into the lawfulness of "hush money" payments, which the media company admitted were made to prevent allegations that Appellant had an extra-marital affair from airing in the run-up to the 2016 election.

g. On October 10, 2019, a federal court unsealed an indictment charging two associates of Appellant's attorney, Rudolph Giuliani, with campaign finance violations involving, among other things, straw donors used to mask excessive donations and the unlawful facilitation of political donations by foreign nationals designed to advance foreign political interests.

h. The well-publicized list of Appellant's associates involved in criminal matters includes George Papadopoulos, a former campaign advisor, who pleaded guilty to lying to the FBI; Alex van der Zwaan, a lawyer who worked with former Trump campaign officials, who pleaded guilty to lying to investigators; Paul Manafort, the former Chairman of Appellant's presidential campaign, who pleaded guilty to, among other crimes, conspiracy to obstruct justice related to witness tampering; Rick Gates, a former Trump campaign advisor, who pleaded guilty to financial fraud and lying to the FBI; and Michael Flynn, a former national security advisor, who pleaded guilty to lying to the FBI about conversations with the Russian ambassador.

The point is that none of these many criminal investigations or prosecutions has led to the type of irreparable harm to his presidency that Appellant now claims or predicts will arise as a result of our Office's single Mazars Subpoena. This new claim is frivolous, and—again—seems to have been triggered by the simple fact that the subpoena called for tax returns.

Appellant's objection and subsequent litigation

As of September 13, 2019, the Office had not been made aware of any intent to intervene and quash the Mazars Subpoena, and sent separate emails to counsel for the Trump Organization and for Mazars stating that the Office deemed the Mazars Subpoena valid and returnable on September 19, 2019, absent a specific agreement or contrary court order.

On September 17, 2019, counsel for the Trump Organization met with the Office and asked for a suspension of compliance with the Mazars Subpoena pending further negotiation or litigation. Counsel made clear, however, that even if the Office negotiated a limited production, its client would never agree to the production of tax records. The Office declined.

On September 18, 2019, the Trump Organization again met with the Office and requested a suspension of the tax-related portion of the Mazars Subpoena for several days to allow counsel time to prepare briefs to challenge the subpoena. In response, the Office agreed to delay enforcement of the Mazars Subpoena until September 23, 2019 as it pertained to tax records.

On September 19, 2019, counsel for the Trump Organization sent the Office copies of Appellant's complaint and motion for emergency relief in the district court.

In response, the Office agreed to suspend enforcement of the subpoena temporarily through the end of a highly expedited briefing schedule that set the matter for oral argument six days later, on September 25, 2019. On September 23, 2019, the Office submitted papers in opposition to Appellant's request for emergency relief, and in support of a motion to dismiss the suit. The next day, on September 24, 2019, Appellant submitted a reply brief, along with an amended complaint asserting, for the first time, jurisdiction under 42 U.S.C § 1983. That same day the DOJ entered an appearance, seeking a three-week briefing schedule to submit a statement in support of Appellant.

On September 25, 2019, the district court heard oral argument and ordered the DOJ to file any statement no later than October 2, 2019. During oral argument, the district court declined to rule on the merits of any pending motion, stayed enforcement of the Mazars Subpoena for one day, and directed the parties to confer in an attempt to agree on a way to proceed pending the Court's decision.

On September 26, 2019, the parties agreed that the Office would temporarily forbear enforcement of the Mazars Subpoena.

On October 2, 2019, the DOJ submitted a brief in support of Appellant.

The decision below

On October 7, 2019, the district court issued a 75-page decision dismissing Appellant's amended complaint and, in the alternative, denying Appellant's motion for injunctive relief and a stay. The district court concluded that it "cannot square a vision of presidential immunity that would place the President above the law with the text of the Constitution, the historical record, the relevant case law, or even the DOJ Memos on which the President relies most heavily for support." JA136.

The court also concluded that "enforcement of and compliance with the Mazars Subpoena would not cause irreparable harm to the President." JA108. It noted that, on balance, "[t]he interest the President asserts in maintaining the confidentiality of certain personal financial and tax records that largely relate to a time before he assumed office, and that may involve unlawful conduct by third persons and possibly the President, is far outweighed by the interests of state law enforcement officers, and the

federal courts in ensuring the full, fair, and effective administration of justice." JA140. Notwithstanding the "burdens and interferences" asserted by Appellant, the district court concluded that "frustration of the state criminal investigation under the facts presented here presents much greater concerns that overcome the President's grounds for not complying with the grand jury subpoena." JA140-41. The district court found that the position taken by Appellant was "repugnant to the nation's governmental structure and constitutional values." JA76.

SUMMARY OF THE ARGUMENT

This Court should affirm the district court's decision that Appellant failed to show that he would suffer irreparable harm if records were produced pursuant to the Mazars Subpoena, and failed to show that he is likely to succeed on the merits of his claim to absolute immunity including from a grand jury subpoena to a third party relating to non-official conduct of Appellant and others. Should subpoena compliance commence, rules governing grand jury secrecy protect against any harm that could conceivably flow from the production of business and tax records of the type routinely disclosed by presidents and other officials. If a court ultimately endorses Appellant's challenge to the Mazars Subpoena, records produced in response to it could be returned, restoring Appellant to his pre-compliance status. Controlling precedent requires a president to answer a subpoena to produce records, even where those records implicate his own conduct. Neither constitutional text, history, nor commentators support Appellant's contrary view. Whatever the contours may be of presidential

immunity, this Court need not define them to reject Appellant's overly expansive formulation.

Appellant's failure to identify irreparable harm means that he cannot argue that "extraordinary circumstances" preclude an affirmance of the district court's decision to abstain under the *Younger* doctrine. His argument that a grand jury proceeding does not constitute a "state criminal proceeding" for *Younger* purposes is defeated by New York's grand jury rules and the weight of authority on the subject in the U.S. Court of Appeals and the district courts of this Circuit. He fails to show that he would not be afforded an adequate opportunity for judicial review in state court, and indeed the case law and the circumstances here indicate that he would have the opportunity to present his constitutional claims and obtain review. Appellant's assertions of bad faith and harassment rely on speculation and a failure to acknowledge the record of convictions involving some of the same actors and transactions at issue in the grand jury investigation here.

Finally, the failure to show irreparable harm and likelihood of success on the merits is fatal to Appellant's request that this Court enter a stay in the event that it affirms the decision below. The Office will suffer serious adverse consequences should Appellant's lawsuit continue to delay enforcement of the Mazars Subpoena.

ARGUMENT

APPELLANT HAS FAILED TO SATISFY HIS BURDEN OF SHOWING IRREPARABLE HARM AND A LIKELIHOOD OF SUCCESS ON THE MERITS OF HIS CLAIM TO ABSOLUTE IMMUNITY FOR HIMSELF AND HIS FORMER BUSINESSES AND BUSINESS ASSOCIATES, AND HAS NO COGNIZABLE CLAIM THAT A FEDERAL COURT MAY HEAR

I. Standards of review

The district court's denial of a preliminary injunction is reviewed for abuse of discretion. *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 278 (2d Cir. 2012). The district court's factual findings should be reviewed for clear error, its legal findings may be reviewed *de novo*, and its ultimate decision should not be disturbed absent an abuse of discretion. *See Twenty-First Sec. Corp. v. Crawford*, 502 F. App'x 64, 65-66 (2d Cir. 2012).

The district court's conclusion that *Younger* abstention applies must be reviewed *de novo*. *Diamond "D" Const. Corp. v. McGowan,* 282 F.3d 191, 197 (2d Cir. 2002). The district court's findings of fact should be reviewed only for clear error, and whether those facts come within the ambit of either the "bad faith" or "extraordinary circumstances" exceptions to the *Younger* abstention doctrine is a mixed question of law and fact that is reviewed *de novo*. *Id.* at 198.

II. The district court correctly concluded Appellant is not entitled to injunctive relief based on his sweeping and unsupported claim of a presidential immunity for all conduct extending to associates and entities

The district court rejected Appellant's demand for injunctive relief, which was based primarily on an unprecedented claim of presidential absolute immunity. The district court found that Appellant demonstrated neither irreparable harm nor a likelihood of success on the merits, given that such success rested on a "virtually limitless" view of immunity unsupported by "the Constitution, the historical record, and the relevant case law." JA70, JA111. The district court's holding was plainly not an abuse of discretion.

A preliminary injunction should only be granted if the moving party has established: (1) a likelihood of success on the merits; (2) that he is likely to suffer irreparable harm without the relief requested; (3) that the balance of equities tips in his favor; and (4) that an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).[4] Granting a preliminary injunction is "an extraordinary and drastic remedy" and "one that should not be granted unless the movant, *by a clear showing*,

[4] The district court correctly noted that this Court's "serious questions" standard is not applicable where, as here, the moving party's request for injunctive relief is an attempt to "stay government action taken in the public interest pursuant to a statutory . . . scheme." JA105 (quoting *Able v. United States*, 44 F.3d 128, 131 [2d Cir. 1995]). The district court also did not abuse its discretion in finding that Appellant "would not prevail even under the different but no less stringent 'sufficiently serious questions' analysis." JA105.

carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam) (internal quotations and citations omitted) (emphasis in original).

Indeed, this Court holds a movant to a heightened standard when an injunction "will provide the movant with substantially all the relief sought and that relief cannot be undone even if the defendant prevails at a trial on the merits." *Tom Doherty Assocs., Inc. v. Saban Entm't, Inc.*, 60 F.3d 27, 33-34 (2d Cir. 1995). In such situations, the heightened standard requires the movant "show a 'clear' or 'substantial' likelihood of success on the merits, *Beal v. Stern*, 184 F.3d 117, 123 (2d Cir. 1999), and make a 'strong showing' of irreparable harm, *Doe v. N.Y. Univ.*, 666 F.2d 761, 773 (2d Cir. 1981), in addition to showing that the preliminary injunction is in the public interest." *New York ex rel. Schneiderman v. Actavis PLC*, 787 F.3d 638, 650 (2d Cir. 2015). Where, as here, statutes of limitation may run if Appellant is granted injunctive relief, this Court's more stringent standard for granting the already extraordinary remedy of injunctive relief should apply.

A. No irreparable harm would flow from compliance with the Mazars Subpoena

Showing irreparable harm is "[p]erhaps the single most important prerequisite for the issuance of a preliminary injunction. . . ." *Bell & Howell: Mamiya Co. v. Masel Supply Co. Corp.*, 719 F.2d 42, 45 (2d Cir. 1983) (citing 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2948, at 431 [1973]). To make the demonstration, a movant must show "an injury that is neither remote nor speculative, but actual and imminent."

Shapiro v. Cadman Towers, Inc., 51 F.3d 328, 332 (2d Cir. 1995); *see Winter*, 555 U.S. at 22 ("Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy. . . ."). In other words, a movant must demonstrate that, "but for the grant of equitable relief, there is a substantial chance that upon final resolution of the action the parties cannot be returned to the positions they previously occupied." *Brenntag Int'l Chem., Inc. v. Bank of India*, 175 F.3d 245, 249 (2d Cir. 1999).

The district court correctly found that, "because a grand jury is under a legal obligation to keep the confidentiality of its records, . . . no irreparable harm will ensue from disclosure to it of the President's records sought here." JA110.

Nonetheless, and though now framed as a basis for granting a stay rather than injunctive relief, Appellant claims he will suffer irreparable harm because his records will be disclosed to "the District Attorney and grand jury." Appellant Brief p. 44. But, as the district court noted, a "grand jury [is] bound by law and sworn official oath to keep such documents and records confidential." JA109. Indeed, grand juries routinely seek and obtain financial and tax records like those at issue, and such records are entitled to no special treatment under the law governing grand jury inquiries. Appellant's tax records have previously been produced to other, similarly situated governmental agencies with confidentiality obligations of their own—namely, the federal and state tax authorities. Appellant has not claimed that any harm ensued from these prior disclosures, and he cannot explain why any harm would thus ensue here.

Appellant cites a number of inapposite cases to support his claim of irreparable harm. These cases, like those distinguished by the district court, do not "relate to ongoing criminal investigations, let alone to the disclosure of documents and records to a grand jury bound by law and sworn official oath to keep such documents and records confidential." JA109. *Nat'l Treasury Employees Union v. United States Dept. of Treasury*, for example, was in the right to privacy context, and the district court found that, because the government failed to demonstrate a "compelling interest" in obtaining the information at issue, the applicants' right to privacy prevailed. 838 F. Supp. 631, 636-37 (D.D.C. 1993). Here, it is beyond dispute that the government has a compelling interest in enforcing its criminal laws. The other cases relied on by Appellant are similarly inapplicable. *See Airbnb, Inc. v. City of New York*, 373 F. Supp. 3d 467, 499 (S.D.N.Y. 2019) (disclosure of confidential information to New York City deemed irreparable harm because the ordinance in question "does not appear to place meaningful limits on the City's ability to disseminate the information it collects, either to other government offices or to the public at large"); *U.S. Servicemen's Fund v. Eastland*, 488 F.2d 1252 (D.C. Cir. 1973) (disclosure of names found to be irreparable harm based on a finding that the disclosure would curb free speech and free association under the First Amendment), *rev'd*, 421 U.S. 491 (1975).

The Supreme Court in *Nixon* noted that the interest in protecting the confidentiality of presidential communications is, by contrast, "significantly diminished" when the disclosed materials are provided to a judge, "with all the

protection that a district court will be obliged to provide." *Nixon*, 418 U.S. at 706. Likewise, a grand jury, with its laws surrounding secrecy, would be "obliged" to protect any documents turned over in response to the Mazars Subpoena. *See* N.Y. Crim. Proc. Law § 190.25(4)(a); *People v. DiNapoli*, 27 N.Y.2d 229, 235 (1970) (listing the policy reasons for grand jury secrecy, which includes "protection of an innocent accused from unfounded accusations if in fact no indictment is returned"); *In re Dist. Attorney of Suffolk Cty*, 58 N.Y.2d 436, 443 (1983) (the Court of Appeals unanimously rejected Suffolk County DA's request to share grand jury transcripts with the County in furtherance of a civil RICO suit based on the fact that "secrecy has been an integral feature of Grand Jury proceedings since well before the founding of our Nation"); *People v. Fetcho*, 91 N.Y.2d 765, 769 (1998) (noting that "a presumption of confidentiality attaches to the record of Grand Jury proceedings"); *Melendez v. City of New York*, 109 A.D.2d 13, 16 (1st Dept. 1985) (explaining that secrecy is a "necessary requisite to the proper functioning of the grand jury system" and that "[h]istorically, the overriding need for confidentiality had its roots prior to the founding of our Nation").

Whether framed as the "unscrambling of an egg" or the "unringing of the bell," Appellant can plainly be restored to his pre-compliance status if any court later agrees with his proposition that a President is immune from criminal investigation. The records can simply be returned to Mazars or destroyed. And assuming bad faith on the part of state prosecutors (alleging "massive incentives" to unethically target a president with investigations to "advance their careers"), Appellant Brief p. 28, is exactly

the type of "speculative" and "remote" harm that cannot sustain a showing of irreparable harm. *See Shapiro*, 51 F.3d at 332.

As the district court put it, having Appellant's accountants comply with a subpoena would not "create the catastrophic intrusions on the President's personal time and energy, or impair his ability to discharge official functions, or threaten the 'dramatic destabilization' of the nation's government." JA128. It was therefore not an abuse of discretion to find that Appellant failed to demonstrate irreparable harm, particularly given that the exceptions "to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." *Nixon*, 418 U.S. at 710.

B. There is no likelihood of success on the merits

The district court also correctly found that Appellant "failed to demonstrate a likelihood of success on the merits." This finding rested in large part on the district court's rejection of "the President's position that a third person or entity cannot be subpoenaed requesting documents related to an investigation concerning potentially unlawful transactions and conduct of third parties in which records possessed or controlled by the sitting President may be critical to establish the guilt or innocence of such third parties, or of the President." JA111. In arguing that his position is nonetheless supported by the DOJ and legal commentators, Appellant conflates his proposed "immunity from criminal process" with a possible presidential immunity from indictment and post-indictment prosecution. *See, e.g.*, Appellant Brief p. 30

(selectively quoting a DOJ memo and stating "[c]riminal process comes with a 'distinctive and serious stigma[,]'" when in fact the quoted passage addresses only "the distinctive and serious stigma of *indictment and criminal prosecution*." [*A Sitting President's Amenability to Indictment and Criminal Prosecution*, 24 O.L.C. Op. at 249 [Oct. 16, 2000] [emphasis added]]).[5]

A review of the sources upon which the district court rested its decision makes clear that the court's ruling regarding the likelihood of success should be affirmed.

1. Controlling precedent

Controlling precedent confirms that a sitting president must comply with this subpoena. While Appellant addressed precedent only in passing at the end of his discussion of presidential immunity, the relevant cases are the proper place to begin.[6]

Although no court has ruled on the precise issue presented here—whether a president and those around him are absolutely immune from responding to a grand jury subpoena relating to non-official conduct—the Supreme Court in *Nixon* decided a case

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[5] Appellant's use of the term "criminal process" is further suspect in light of his insistence, contrary to prevailing law, that a grand jury indictment is not part of a criminal proceeding in the *Younger* abstention context. *See* Appellant Brief p. 17.

[6] Appellant instead begins by doubling down on his claim, rejected below, that "[v]irtually all legal commentators agree" with his sweeping view of immunity. Appellant Brief p. 22. However, one of the principal commentators cited argues instead that Congress *should* enact a law to defer "criminal investigations and prosecutions of the President" until he has left office, and thus apparently believes that such investigations are *not* otherwise prohibited. *See* Brett M. Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 Minn. L. Rev. 1454, 1461 (2009).

that presented strikingly similar facts. And in that case, despite the fact that the subpoenaed material related to the president's communications with government advisors while in office, in carrying out official acts, the Court held that a president is not immune from responding to a subpoena *duces tecum* merely because of the office he occupies. *Nixon*, 418 U.S. at 713.

In considering President Nixon's claim of "an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances," *id.* at 706, the Supreme Court in *Nixon* acknowledged the "need for confidentiality in the communications of his office" and "the public interest in candid, objective, and even blunt or harsh opinions in Presidential decision making," *id.* at 708. The Court concluded, however, 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.* at 706.

The Court weighed the president's interests against "our historic commitment to the rule of law," which "is nowhere more profoundly manifest than in our view that 'the twofold aim (of criminal justice) is that guilty shall not escape or innocence suffer.'" *Id.* at 708-09 (quoting *Berger v. United States*, 295 U.S. 78, 88 [1935]). In explaining why even a president must in some cases comply with a subpoena in a criminal matter, the

Court stated:

> The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.

Id. at 709.

After weighing these competing interests, a unanimous Court held that the president's position was unsupported by the law, explaining that, "when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice." *Id.* at 713.

The relevant considerations in this case are far more straightforward because the concerns voiced by the Court in *Nixon*—concerns it overcame—are non-existent here. The documents sought relate entirely to non-official conduct,[7] and not even Appellant claims that complying with the subpoena will impinge on "[a] President's acknowledged need for confidentiality in the communications of his office." *Id.* at 712-13. Instead, the premise of Appellant's argument appears to be that his preference not to turn over his tax records outweighs our nation's "historic commitment to the rule of law" and

[7] The records that post-date Appellant's taking Office relate to business transactions that he continued to pursue while in Office, not acts taken in his official capacity.

"the fundamental demands of due process of law in the fair administration of criminal justice." *Id.* at 708, 713.

Appellant attempts to distinguish *Nixon* by stating that "the subpoena upheld in *Nixon* asked the President to provide evidence in *someone else's* criminal proceeding; the President was not himself a target." Appellant Brief p. 29. That description conveniently ignores that, at the time the subpoena issued, and as the Supreme Court noted, a grand jury had already named President Nixon "as an unindicted coconspirator" in the proceeding for which his records were sought. *Nixon*, 418 U.S. at 687. He was not merely a "witness." Appellant Brief p. 30. Instead, like the grand jury subpoena at issue here, the trial subpoena in *Nixon* sought documents relevant to an investigation that related to conduct of the president and his associates. Further underscoring the factual similarities of the two cases, like President Nixon, Appellant was (as noted above) referenced as a co-conspirator in a federal prosecution of his former lawyer, Michael Cohen, that relates to some of the same transactions that have been reported to be at issue here.

Appellant also claims *Nixon* is inapplicable because Appellant here is being treated as a "target," not a witness. Appellant Brief p. 30. But that argument is based on a false premise: As stated since Appellant initiated this action, the grand jury here is investigating and seeking documents related to a number of individuals and entities, including records of Appellant. Nowhere, other than in his own briefs, has Appellant been referred to as a "target."

Like *Nixon*, the other cases that have addressed the scope and contours of possible presidential immunity, in varying contexts, make clear that the absolute immunity claimed by Appellant simply does not exist. In *Nixon v. Sirica*, for example, the first question addressed by the D.C. Circuit was whether "so long as he remains in office, the President is absolutely immune from the compulsory process of a court." 487 F.2d 700, 708 (D.C. Cir. 1973). The court found that no such absolute immunity existed. *Id.* at 712. Indeed, the court in *Sirica* noted that President Nixon "concedes that he, like every other citizen, is under a legal duty to produce relevant, non-privileged evidence when called upon to do so." *Id.* at 712-13.

In arriving at its conclusion, the *Sirica* court relied in large part on *United States v. Burr*. There, Chief Justice Marshall, riding circuit, answered in the affirmative the question of "whether a subpoena *duces tecum* can be directed to the president of the United States." *United States v. Burr*, 25 F. Cas. 30, 34 (C.C. Va. 1807). The Supreme Court has since repeatedly confirmed Chief Justice Marshall's ultimate finding. *See Clinton*, 520 U.S. at 704 (explaining that in *Nixon* the Court "unequivocally and emphatically endorsed" Chief Justice Marshall's ruling in *Burr* "that a subpoena *duces tecum* could be directed to the President"); *see also Presidential Amenability to Judicial Subpoenas*, p. 5. Robert G. Dixon, Jr. (June 25, 1973) ("Modern legal discussion of the power of the courts to subpoena the President still adheres to Chief Justice Marshall's view that the President is not exempt from judicial process. . . .").

In *Clinton*, the Supreme Court found that a sitting president does not enjoy absolute immunity from civil suit for events that occurred before he took office. 520 U.S. at 710. In explaining its decision, the Court, citing *Nixon* and *Burr*, explained that it is "settled that the President is subject to judicial process in appropriate circumstances." *Id.* at 703. The Court added that it has "never suggested that the President, or any other official, has an immunity that extends beyond the scope of any action taken in an official capacity," *id.* at 694, and that constructing an immunity for unofficial acts "grounded purely in the identity of [the president]" would be "unsupported by precedent," *id.* at 695.

The Court in *Clinton* specifically accounted for whether defending against litigation would "impose an unacceptable burden on the President's time and energy, and thereby impair the effective performance of his office." *Id.* at 702. It nonetheless found that the president was not immune from civil litigation. Appellant makes similar arguments to petitioner's in *Clinton*, claiming that compliance with the Mazars Subpoena will "take the President's focus away from his or her responsibilities to the people." Appellant Brief p. 34 (quoting Kavanaugh, 93 Minn. L. Rev. at 1461). Yet Appellant ignores not only that the Supreme Court in *Clinton* ultimately rejected such arguments, but also that those arguments are not even applicable here. Allowing Mazars to comply with a subpoena for records that Appellant has previously turned over to other government agencies will in no way impose a "burden on the President's

time and energy." *Clinton*, 520 U.S. at 702. Indeed, Appellant will not have to do anything at all.

Though Appellant cites *Fitzgerald* as recognizing a "categorical absolute immunity for the President's official acts," in reality the holding was limited to a presidential immunity "from damages liability predicated on his official acts." 457 U.S. at 749. In so holding, the Court noted that "[i]t is settled law that the separation-of-powers doctrine does not bar every exercise of jurisdiction over the President of the United States." *Id.* at 753-54. And the Court went on to specify the circumstances here as one in which a President is *not* entitled to immunity: "When judicial action is needed to serve broad public interests—as when the Court acts, not in derogation of the separation of powers, but to maintain their proper balance, *cf. Youngstown Sheet & Tube Co. v. Sawyer*, [343 U.S. 579 (1952)], *or to vindicate the public interest in an ongoing criminal prosecution*, *see United States v. Nixon*, *supra* —the exercise of jurisdiction has been held warranted." *Id.* at 754 (emphasis added).

Almost the entirety of the section Appellant entitles "Precedent" is dedicated to distinguishing the instant case from *Nixon* and *Clinton*; the remainder points to the so-called DOJ Memos (discussed below), which needless to say do not belong under the heading "Precedent." *Nixon* and the other cases on presidential immunity directly undercut Appellant's claim of a sweeping and categorical immunity that would apply equally to him and his associates, including for conduct before Appellant ever took office. No such immunity exists.

2. The DOJ Memos

In claiming that the district court was wrong in finding no likelihood of success on the merits, Appellant misplaces his reliance on the district court's review of three documents drafted by DOJ lawyers: (1) *Amenability of the President, Vice President, and Other Civil Officers to Criminal Prosecution While in Office* (Sept. 24, 1973) (the "Dixon Memo"); (2) Memorandum for the U.S. Concerning the Vice President's Claim of Constitutional Immunity, *In re Proceedings of the Grand Jury Impaneled Dec. 5, 1972*, No. 73-cv-965 (D. Md.) (the "Bork Memo"); and (3) *A Sitting President's Amenability to Indictment and Criminal Prosecution*, 24 O.L.C. Op. (Oct. 16, 2000) (the "Moss Memo," and collectively, the "DOJ Memos" or "Memos").

Appellant's attacks on the decision below regarding the meaning and persuasive weight of the DOJ Memos fundamentally misconceive the weight given those Memos by the district court and the weight those Memos can bear. First, the district court based its holding, not on a rejection of the DOJ Memos, but on a "reject[ion of] the President's contention that the Constitution, the historical record, and the relevant case law support such a presidential claim." JA111. Second, the Memos are not binding precedent. The DOJ makes this clear in its brief, recognizing that the Memos merely merely the DOJ's "longstanding position," as applicable to federal prosecutors, on whether a president may be "arrested, indicted, prosecuted." DOJ Brief p. 18.

With respect to the substance of the DOJ Memos, the documents are "flawed by ambiguities (if not outright conflicts) on an essential point: the scope of presidential

immunity." JA117 (noting that the Dixon memo refers to immunity from "criminal proceedings," the Bork Memo discusses immunity from "criminal process," and the Moss Memo refers to the immunity as not subjecting a sitting president to "indictment and criminal prosecution"). As just one example, the Moss Memo affirmatively undercuts Appellant's position because it endorses the idea that a sitting President *may* be criminally investigated. *See* O.L.C. Memo at 257 n. 36 (during the period that a sitting President enjoys immunity from criminal prosecution, "[a] grand jury could continue to gather evidence").

Perhaps most importantly, this Court need not waste its time parsing the DOJ Memos in search of a singular conclusion. Rather, as Appellant rightfully points out, "[t]he Justice Department is participating in this case and can tell this Court its current view of the law [on presidential immunity]." Appellant Brief p. 23. And in its brief, filed *in support* of Appellant, the DOJ makes clear that its "current view" does not include that "[t]he President is constitutionally immune from criminal process while he is in office." Appellant Brief p. 22. To the contrary, in urging this Court to adopt a "particularized need" standard[8] for determining whether compliance with the subpoena is required, *see* DOJ Brief p. 5, the DOJ concedes that in some situations (when such a need has been shown), the president would have to comply with a state grand jury subpoena. In other words, Appellant's claim that "[t]he Justice Department agrees"

[8] As discussed in more detail below, this standard is contrary to the law and inapplicable to the facts of this matter.

with his view on presidential immunity, Appellant Brief p. 22, is belied by the DOJ's brief filed in this very case as *amicus* in support of Appellant. The DOJ's "current view" that a president can, in some circumstances, be subject to criminal process is reflected by the investigation recently undertaken by Special Counsel Robert Mueller and related investigations conducted by the U.S. Attorney's Office for the Southern District of New York.

3. History

Appellant spends a great deal of time cherry-picking quotes from the founders that he claims support his assertion of a categorical presidential immunity from investigation. But Justice Robert H. Jackson's oft-quoted words in *Youngstown Sheet & Tube Co. v. Sawyer* perfectly address this flawed approach:

> Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question.

343 U.S. at 634-35 (Jackson, J., concurring).

Indeed, the Supreme Court in *Clinton* was "unpersuaded by the evidence from the historical record" that President Clinton put forth to support his claim of presidential immunity—evidence that is identical to what Appellant puts forth here. *Compare Clinton*, 520 U.S. at 695 (specifically listing Ellsworth, Adams, and Jefferson as the evidence it found unpersuasive), *with* Appellant Brief at 27-28 (citing Ellsworth,

Adams, and Jefferson). In other words, nothing in the historical record supports Appellant so decisively that it can be concluded that the district court abused its discretion in denying injunctive relief.

4. The DOJ's proposed standard

As noted above, the DOJ claims that the district court erred by not partaking in a "heightened and particularized review" of the Office's request for Appellant's documents. DOJ Brief p. 24. This standard is contrary to the law. It is well settled that the burden rests on the party challenging a subpoena to show that quashing is appropriate under established standards. *See United States v. R. Enter., Inc.*, 498 U.S. 292, 301 (1991) (a grand jury subpoena "is presumed to be reasonable, and the burden of showing unreasonableness must be on the recipient who seeks to avoid compliance"). In New York, a grand jury subpoena "enjoys a presumption of validity that requires the party challenging the subpoena to demonstrate, by concrete evidence, that the materials sought have no relation to the matter under investigation." *Virag v. Hynes*, 54 N.Y.2d 437, 444 (1981). To require, in this context, a prosecutor to explain to a judge what lies behind the grand jury's thinking would hamstring the grand jury process and improperly insert a federal court into a state court's pre-charge supervision of the grand jury function.

Moreover, applying some form of heightened review of need may have made sense in the context of *Nixon* where the president asserted a presidential communications privilege over phone conversations and other materials from his time

in office. But there is no precedent for applying that standard for examining claims of executive immunity where no prerogative of the executive is at stake. As explained in *In re Sealed Case*, relied on by the DOJ, the communications privilege is implicated when a president is "asked to produce documents or other materials that reflect presidential decisionmaking and deliberations and that the President believes should remain confidential." 121 F.3d 729, 744 (D.C. Cir. 1997). The Mazars Subpoena does not touch on Appellant's communications or official actions as president. The materials sought will not include references to "political leaders within the country or foreign statesmen" and will not jeopardize the "public interest in candid, objective . . . Presidential decisionmaking," which were the "considerations justifying" the *Nixon* Court's approach. 418 U.S. at 715, 708.

For these reasons, the standard offered by the DOJ has no place here. *See R. Enter., Inc.*, 498 U.S. at 298. Indeed, it would be in direct conflict with the obligations on prosecutors under the rules of state grand jury secrecy. If a prosecutor were to have to explain and defend the substance of a subpoena upon any motion to quash, it would necessarily upend the confidentiality protections accorded the grand jury process: protections that are designed to benefit people—like Appellant—who are not, and may never be, subjected to an actual criminal charge.

Even if applied, the DOJ's proposed standard would not change the result because the facts supporting the Mazars Subpoena, as set forth in the sealed, unredacted portion of the Shinerock Declaration, more than meet that standard.

C. The district court correctly found that an injunction would be contrary to the public interest

The district court did not abuse its discretion in finding that "the public interest does not favor granting a preliminary injunction." JA141. With ample support in the record and in precedent, it explained that "[t]he interest the President asserts in maintaining the confidentiality of certain personal financial and tax records that largely relate to a time before he assumed office, and that may involve unlawful conduct by third persons and possibly the President, is far outweighed by the interests of state law enforcement officers, and the federal courts in ensuring the full, fair, and effective administration of justice." JA140.

The interests of the grand jury, and by extension the People of the State of New York, will be injured by suspension of the Mazars Subpoena, and the district court was correct in weighing this countervailing interest in its final analysis. Appellant has slowed the machinery of the grand jury process and made it abundantly clear that his tactic of delaying through litigation and appeals will continue indefinitely. *See* Appellant Brief p. 1 (a stay must be issued "so that the President's documents are not disclosed before his case is decided by this Court and, if necessary, the Supreme Court").

III. The district court's decision should be affirmed because Appellant has no cognizable right to challenge the Mazars Subpoena

In concluding that the "Act of Congress" exception applied to bar the applicability of the Anti-Injunction Act ("AIA"), the district court assumed, "without

deciding[,] that the [Appellant's] claim is properly brought under Section 1983." JA81 n. 4. However, since Appellant has (for all the reasons discussed above) failed to establish a legal basis for the absolute immunity he asserts, he cannot show the sort of "unambiguously conferred right" that is enforceable under 42 U.S.C. § 1983. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002). *See Davis v. Shah*, 821 F.3d 231, 244 (2d Cir. 2016). For this reason, this Court may also find that the Appellant's action should be dismissed for failure to state a claim.

The district court found Appellant's expansive vision of presidential immunity bereft of support in either the Constitution or interpretive caselaw, JA133-36, and noted that, as formulated, it is "limitless," JA72, "unqualified," JA75, and "all-encompassing," JA112. As the district court observed, under Appellant's formulation here:

> presidential immunity would stretch to cover every phase of criminal proceedings, including investigations, grand jury proceedings and subpoenas [and] would encompass any conduct, at any time, in any forum, whether federal or state, and whether the President acted alone or in concert with other individuals.

JA70. The district court declined to endorse "such a categorical and limitless assertion of presidential immunity." JA72. In other words, Appellant's claimed immunity is not "sufficiently specific and definite to be within 'the competence of the judiciary to enforce," *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 108 (1989) (internal citation omitted). As such, it cannot form the basis for a § 1983 action. This failure to state a § 1983 claim removes the bar to application of the AIA, and provides an

alternative basis for affirmance. *See Swatch Grp. Mgmt. Servs. v. Bloomberg*, 756 F.3d 73, 93 (2d Cir. 2014).

IV. The Court should abstain under *Younger* because there is an ongoing state criminal proceeding

A. Legal Standard

"Since the beginning of this country's history Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts." *Younger v. Harris*, 401 U.S. 37, 43 (1971). Recently, the Supreme Court explained that *Younger* abstention is "exceptional" but still firmly bars federal interference in "ongoing state criminal prosecutions." *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 72 (2013). Thus, the Court reaffirmed the long-standing principle that "*Younger* exemplifies one class of cases in which federal-court abstention is required: When there is a parallel, pending state criminal proceeding, federal courts must refrain from enjoining the state prosecution." *Id.* at 73.

The Court may consider the three additional, non-dispositive factors identified in *Middlesex Cnty. Ethics Committee v. Garden State Bar Assn.*, 457 U.S. 423, 432 (1982): "(1) there is a pending state proceeding, (2) that implicates an important state interest, and (3) the state proceeding affords the federal plaintiff an adequate opportunity for judicial review of his or her federal constitutional claims." *Falco v. Justices of the Matrimonial Parts of the Supreme Court of Suffolk Cty.*, 805 F.3d 425, 427 (2d Cir. 2015) (citation and internal

quotation marks omitted). Here, for the reasons that follow, all three questions are answered in the affirmative.

B. Application of *Younger* compels abstention

1. A state grand jury proceeding constitutes an "ongoing state criminal prosecution" and a "pending state proceeding" under *Younger*

With respect to the first *Middlesex* factor, the weight of authority holds that a state grand jury subpoena constitutes an ongoing state criminal proceeding under *Younger*. As the district court observed, JA84, under New York law, a "criminal proceeding" is defined to include "any proceeding which . . . involves a criminal investigation." N.Y. Crim. Proc. Law § 1.20(18). Thus, "when a grand jury has been impaneled and is sitting and investigating, there is a . . . criminal proceeding, and most significantly there is a State court responsible for and having jurisdiction of such grand jury from which relief from constitutional abuses may be obtained." *Notey v. Hynes*, 418 F. Supp. 1320, 1326 (S.D.N.Y. 1976).

The prevailing view among district courts in this Circuit is that a grand jury investigation constitutes a state criminal proceeding under *Younger*. *See*, *e.g.*, *Mir v. Shah*, 2012 WL 6097770, at *3 (S.D.N.Y. 2012), *aff'd*, 569 F. App'x 48, 50-51 (2d Cir. 2014); *Nick v. Abrams*, 717 F. Supp. 1053, 1056-57 (S.D.N.Y. 1989); *Mirka United, Inc. v. Cuomo*, 2007 WL 4225487, at *3 (S.D.N.Y. 2007) (Lynch, J.); *but see Brennick v. Hynes*, 471 F. Supp. 863, 867 (N.D.N.Y. 1979).

The majority of the U.S. Courts of Appeals that have addressed this issue agree. *See Tex. Ass'n of Bus. v. Earle*, 388 F.3d 515, 519-20 (5th Cir. 2004); *Craig v. Barney*, 678 F.2d 1200, 1201-02 (4th Cir. 1982); *Kaylor v. Fields*, 661 F.2d 1177, 1182 (8th Cir. 1981). Appellant, *see* Appellant Brief p. 17, makes much of *Monaghan v. Deakins*, 798 F.2d 632 (3d Cir. 1986), *aff'd in part, vacated in part*, 484 U.S. 193, 195 (1988), the sole case from a U.S. Court of Appeals purportedly to hold that *Younger* abstention does not apply to actions to enjoin grand jury subpoenas. But contrary to Appellant's contention, *Monaghan* does not actually create a circuit split because the relevant part of the decision was vacated as moot, *Deakins*, 484 U.S. at 195, and thus has no precedential effect. *See Brown v. Kelly*, 609 F.3d 467, 476-77 (2d Cir. 2010).

Although the Supreme Court has not directly ruled on this topic, it has issued a decision consistent with the conclusion that *Younger* applies to an action seeking to enjoin state grand jury subpoena. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 n.1 (1992) (noting that the *Younger* doctrine "imposes heightened requirements for an injunction to restrain . . . an about-to-be pending state criminal action."); *see Mirka*, 2007 WL 4225487, at *3 (citing *Trans World Airlines* for the proposition that the Supreme Court has rejected the categorical rule that *Younger* abstention does not operate pre-indictment).

The DOJ does not dispute that a grand jury investigation constitutes an ongoing state proceeding under *Younger*, instead opposing abstention considering the "exceptional context" of this case. DOJ Brief p. 15. Notably, even Appellant must

concede that a state grand jury subpoena involves a pending criminal proceeding, as he argues that "[t]he President is immune from criminal process while in office, and a grand-jury subpoena (a coercive order backed by the State's threat of contempt) is certainly a form of 'criminal process.'" Appellant Brief p. 22-23.

This Court should embrace the persuasive view of the majority of circuits to decide the issue and hold that a grand jury investigation constitutes a pending state criminal proceeding for *Younger* purposes.

2. New York State has an important state interest in the enforcement of grand jury subpoenas

Here, as the district court found below, JA88, New York's "important and necessary task of enforcing" its criminal laws clearly constitutes an important state interest, *Younger*, 401 U.S. at 51-52, satisfying the second *Middlesex* factor. *Falco*, 805 F.3d at 427.

3. Appellant, despite the opportunity to do so, failed to raise his constitutional claim in state court

The third and final *Middlesex* factor is satisfied here because the state court with jurisdiction over the grand jury proceeding "affords the federal plaintiff an adequate opportunity for judicial review of his or her federal constitutional claims." *Falco*, 805 F.3d at 427. "[I]n the ordinary course, 'a state proceeding provides an adequate forum for the vindication of federal constitutional rights.'" *Diamond*, 282 F.3d at 198 (citing *Kugler v. Helfant*, 421 U.S. 117, 124 [1975]). The burden rests with Appellant to show "that state procedural law barred presentation of [its] claims." *Pennzoil Co. v. Texaco,*

Inc., 481 U.S. 1, 14 (1987) (quoting *Moore v. Sims*, 442 U.S. 415, 432 [1979]). "Under *Younger*, . . . defendants need not establish that state law definitively permits the interposition of constitutional claims." *Spargo v. N.Y. State Comm'n on Judicial Conduct*, 351 F.3d 65, 78 (2d Cir. 2003). Instead, "[t]he relevant question under *Younger* is whether the state's procedural remedies *could* provide the relief sought [not] . . . whether the state *will* provide the constitutional ruling which the plaintiff seeks." *Id.* at 79 (brackets in original: internal quotation marks omitted).

Article VI of the U.S. Constitution declares that "Judges in every State shall be bound" by the Federal Constitution. *Pennzoil*, 481 US at 15. "Accordingly, when a litigant has not attempted to present his federal claims in related state-court proceedings, a federal court should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary." *Id.* Notably, a district court in this Circuit has already found that "there is a State court responsible for and having jurisdiction over such grand jury from which relief from constitutional abuses may be obtained." *Notey*, 418 F. Supp. at 1326. *See Law Firm of Daniel P. Foster, P.C. v. Dearie*, 613 F. Supp. 278, 281-82 (E.D.N.Y. 1985).

In the ordinary course, Appellant could—and should, before he invites a federal court to interfere with a state grand jury proceeding—move in New York County Criminal Court before the sitting grand jury judge to quash the subpoena. His claim for standing to quash a third-party subpoena would include the claim he makes here that, as president, he is entitled to a constitutional immunity that gives him the right to

object to the Mazars Subpoena. Thus, he would have the opportunity to present his constitutional arguments to the court. Should his position be rejected, he could appeal on an interlocutory basis, and the Appellate Division, First Department, which would have jurisdiction of that appeal, would consider the merits of his claim with due regard to his status as president. *See* Order, *Efrain Galicia v. Donald J. Trump, et al.*, Index No. 24973/2015 (1st Dept. Sept. 24, 2019) (Doc. 421) (staying video deposition of Appellant in view of special accommodations that may be necessary for his schedule and responsibilities).

Appellant, citing two New York lower-court decisions, argues that the target of a third-party subpoena cannot raise his claims in state court. Appellant Brief p. 18-19. These cases are distinguishable for the simple reason that they did not involve Appellant's claim of immunity based on the Constitution. Indeed, Appellant concedes that claim has never been raised in any state or federal court. *See* Appellant Brief p. 11.

Furthermore, Appellant has claimed the privilege of immunity and, as a holder of the privilege and to protect his own interests, he presumably has standing to object to the production of materials as to which he asserts immunity. *See Matter of Grand Jury Subpoena Served Upon Bekins Record Storage Co., Inc.*, 62 N.Y.2d 324 (1984) (granting in part and denying in part motion to quash grand jury subpoena to storage facility, where motion was brought by third-party client of law firm asserting, among other things, attorney-client privilege over the law firm's records sought from the facility); *see also* Sara Sun Beale, *Grand Jury Law and Practice* § 9:21 (2d ed. Dec. 2018) ("[a]s a general rule a

third party clearly has standing to challenge a subpoena if he is the holder of a privilege, a property right, or any constitutional, common law, or statutory right that may be invaded by the subpoena."). *Bekins Record Storage* presents an example of someone who successfully intervened as a third party petitioner with a motion to quash a subpoena to a business in possession of the petitioner's allegedly protected records. The court conducted a thorough review of the privilege claim, which was then appealed to New York's highest court, with no rejection on standing grounds. As the district court suggested, presumably Appellant in this case could do the same. *See* JA89-90 (noting that a third-party can challenge a subpoena upon a claim of privilege).

As the Supreme Court explained in *Pennzoil*, that a case presents an unusual fact pattern never addressed by the relevant state court does not mean that those state courts "would have been any less inclined than a federal court to address and decide the federal constitutional claims." 481 U.S. at 17. In other words, potential ambiguities do not mean that federal courts can "assume that state judges will interpret ambiguities in state procedural law to bar presentation of federal claims." *Spargo*, 351 F.3d at 78 (quoting *Pennzoil*, 481 U.S. at 15).

Here, since it is "abundantly clear that [Plaintiff] had an opportunity to present [his] federal claims in the state proceedings[,] . . . [n]o more is required to invoke *Younger* abstention." *Juidice v. Vail*, 430 U.S. 327, 337 (1977).

4. There is no bad faith or exceptional circumstance

Appellant has failed to demonstrate that bad faith, harassment, or any other equitable consideration bars *Younger* abstention. *See generally Spargo*, 351 F.3d at 75 n.11. Although a federal court may not typically intervene in an ongoing state criminal proceeding, such intervention is warranted in "special circumstances suggesting bad faith, harassment or irreparable injury that is both serious and immediate." *Gibson v. Berryhill*, 411 U.S. 564, 573-74 (1973). In order to establish such irreparable harm, a challenged state proceeding must be "flagrantly and patently violative of express constitutional prohibitions." *Younger*, 401 U.S. at 53-54. "'[O]nly in cases of proven harassment or prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction and perhaps in other extraordinary circumstances where irreparable injury can be shown is federal injunctive relief against pending state prosecutions appropriate.'" *Kugler*, 421 U.S. at 124 (quoting *Perez v. Ledesma*, 401 U.S. 401 U.S. 82, 85 [1971]). "[S]uch circumstances must be 'extraordinary' in the sense of creating an extraordinarily pressing need for immediate federal equitable relief, not merely in the sense of presenting a highly unusual factual situation." *Kugler*, 421 U.S. at 125. And "a plaintiff who seeks to head off *Younger* abstention bears the burden of establishing that one of the exceptions applies." *Diamond*, 282 F.3d at 198.

Contrary to Appellant's apparent contention that the grand jury subpoena was part of some sort of collusive, partisan action between this Office, the House of Representatives, and the State of New York, *see* Appellant Brief p. 20-21, the grand jury

investigation is fully independent and focused exclusively on violations of New York's criminal laws. JA173. Appellant fails to meet his burden because he cannot show that any action has "been brought without a reasonable expectation of obtaining a valid conviction." *Kugler*, 421 U.S. at 126 n. 6 (citing *Ledesma*, 401 U.S. at 85); *see* JA51. Indeed, at this point, Appellant's claim of bad faith (which DOJ echoed in its brief), has been reduced to the much-repeated assertion that the Mazars Subpoena appeared to be a "photocopied" version of an earlier subpoena sent by the House of Representatives to Mazars. Putting aside that there were indeed differences between the requests, the simple explanation proffered by the Office at oral argument below was that far from signaling "collusion" by the Office (which has had no contact with the House of Representatives), the decision to mirror the earlier subpoena was about efficiency, JA173, meaning it was intended to facilitate the easy production by Mazars of a set of documents already collected, and to minimize any claim that the Office's request imposed new and different burdens. It is important to note that, contrary to Appellant's assertion, the Mazars Subpoena does not define the scope of the grand jury investigation.

As this Court has held, *Younger*'s "bad faith" exception may apply if, prior to the issuance of the third-party subpoena to Mazars, "the New York Court of Appeals or the United States Supreme Court had conclusively determined" the claim at issue. *Schlagler v. Phillips*, 166 F.3d 439, 443 (2d Cir. 1999). Of course, no court has held that the president has an absolute immunity from a state criminal grand jury investigation

while in Office. Not even Appellant makes this claim, instead citing the non-binding DOJ Memos in support of his contention. Rather, as discussed in Point II, *supra*, the clear precedent establishes the opposite—that the president enjoys no such absolute immunity.

The last exception to *Younger* abstention requires Appellant to demonstrate extraordinary circumstances. "[S]uch circumstances must be 'extraordinary' in the sense of creating an extraordinarily pressing need for immediate federal equitable relief, not merely in the sense of presenting a highly unusual factual situation." *Kugler*, 421 U.S. at 125. This exacting standard requires "(1) that there be no state remedy available to meaningfully, timely, and adequately remedy the alleged constitutional violation; *and* (2) that a finding be made that the litigant will suffer 'great and immediate' harm if the federal court does not intervene." *Diamond*, 282 F.3d at 201 (citation and internal quotation marks omitted). As discussed above, there is a state remedy available—bringing his constitutional claims in state court—to Appellant, and, for the reasons discussed in Point II. A, *supra*, he has failed to establish irreparable harm.

Lastly, Appellant contends that *Younger* abstention does not apply to his claim of official immunity from state process, Appellant Brief p. 11-15. As detailed above, no such immunity exists, and as Appellant concedes, "no court has considered how *Younger* applies in this context." Appellant Brief p. 11. With regard to Appellant's argument that his purported immunity is similar to double jeopardy, the case cited for that proposition, *Mannes v. Gillespie*, 967 F.2d 1310, 1312 (9th Cir. 1992), involved an

individual who already exhausted her state remedies on her double jeopardy claim, which allowed the federal court to avoid abstention under *Younger*.

Additionally, Appellant cites cases for his proposition that *Younger* is inapplicable where the federal government is asserting its rights against a state; but none was raised in the context of an ongoing state criminal proceeding. Appellant Brief p. 12-14. Of course, as the Supreme Court recently re-affirmed, *Younger* abstention is "required" in such a proceeding. *Sprint*, 571 U.S. at 72. Further, as the district court correctly noted below, "[e]ven if the law regarding suits brought by the federal government is ultimately unclear, the Court cannot disregard the principles under *Younger* on this basis alone." JA95. Here, again, none of the records sought relate to Appellant's official duties or the federal government, so the state-federal governmental conflict alleged by him is non-existent.

For these reasons, this court should affirm the district court's holding to abstain from exercising jurisdiction.

V. The Court should reject Appellant's request for a stay as unjustified, and affirm that a stay would substantially injure the sovereign interests of New York and the public interest in enforcing New York's criminal laws

A. Legal standard

The standard to which Appellant must be held in applying for a stay "overlap[s] substantially with the preliminary injunction standard." *Citigroup Glob. Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 37 (2d Cir. 2010). However, it

is not identical, and places a more exacting burden on the applicant. *See id.* at 38. In this case, it requires a specific consideration of the harm that such a stay will inflict on the grand jury investigation. *See Nken v. Holder*, 556 U.S. 418, 433-34 (2009) ("The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion."). Specifically, the Court must consider "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken*, 556 U.S. at 434. "A stay is an intrusion into the ordinary processes of administration and judicial review, and accordingly is not a matter of right, even if irreparable injury might otherwise result to the appellant." *Id.* at 427 (internal quotation marks and citations omitted).

As noted above, Appellant has failed to show that he is likely to succeed on the merits, and failed to show that he will be irreparably injured absent a stay.

B. Appellee Vance, an elected executive agent of an independent sovereign, is the only party who will suffer irreparable harm if a stay is imposed, and the public interest supports compliance

Here, since the grand jury proceeding constitutes a state criminal proceeding, the Office, as an executive agent of an independent sovereign, is entitled to pursue that proceeding free from federal interference. *See Ledesma*, 401 U.S. at 84 ("It is difficult to imagine a more disruptive interference with the operation of the state criminal process short of an injunction against all state proceedings."). Continued litigation in federal

court offends foundational principles of federalism and comity enshrined in the Constitution and hundreds of years of settled law. *See Younger*, 401 U.S. at 43-50 (reviewing the history of this longstanding public policy).

As the district court found, "frustration of the state criminal investigation under the facts presented here presents much greater concerns that overcome the President's grounds for not complying with the grand jury subpoena." JA141. Because Appellant will suffer no irreparable harm from the orderly production of records under the rules governing grand jury secrecy, Mazars should permitted to produce documents, and, if necessary, the parties can concurrently litigate their respective constitutional claims in an appropriate forum. As the executive agent of an independent sovereign, the Office must be permitted to enforce New York's criminal laws and pursue grand jury investigations, including the one at issue here, free from interference by the federal courts. Should Appellant ultimately prevail in his expansive claim to an absolute and categorical immunity for his former businesses and business associates, the Office will be able to restore, without harm, Appellant to his pre-compliance status by the return or destruction of the subpoenaed records.

It is the grand jury and the State of New York that will suffer irreparable harm from any decision that continues a suspension of the Mazars Subpoena. Appellant has made it abundantly clear that his litigation tactics will be to pursue indefinite delay in an effort to frustrate the grand jury. *See* Appellant Brief p. 39-40 (arguing that "[t]here is no good reason to force the President to rush to the Supreme Court immediately,"

rather, this Court "should stay the mandate and subpoena until the President files a petition for a writ of *certiorari*"). All the while, if Appellant has his way, the grand jury will be obstructed in its investigation. *See Nixon*, 418 U.S. at 713 ("Without access to specific facts a criminal prosecution may be totally frustrated."). Of course, in this situation, litigation delays—when accompanied by continued stays of subpoena compliance—mean that Appellant will prevail in his ultimate goal of preventing disclosure of the records at issue until after the statutes of limitation expire, even if he does not ultimately prevail on the merits of his extravagant legal claim.

CONCLUSION

For all of the above reasons, this Court should affirm.

Dated: New York, New York
October 15, 2019

Respectfully submitted,

s/Carey R. Dunne
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CERTIFICATE OF COMPLIANCE

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Dated: October 15, 2019

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