No. 19-635

IN THE

Supreme Court of the United States

DONALD J. TRUMP

Petitioner,

v.

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

Respondents.

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

BRIEF OF *AMICI CURIAE* FORMER REPUBLICAN MEMBERS OF CONGRESS, FORMER MEMBERS OF THE EXECUTIVE BRANCH UNDER REPUBLICAN ADMINISTRATIONS, AND LEGAL EXPERTS IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amici are former Republican members of Congress, former members of the executive branch under Republican administrations, and legal experts who have been deeply involved in, or close observers of, the relationship between the branches of government in recent decades.[2] They agree with President Ronald Reagan that the "genius of our constitutional system is its recognition that no one branch of government alone could be relied on to preserve our freedoms," and that "the great safeguard of our liberty is the totality of the constitutional system" that ensures that no branch of government gets "the upper hand."[3] They are concerned that President Trump's assertions of absolute immunity from process while in office—and more generally, his arguments against accountability in any forum—could impose lasting damage on our constitutional system of checks and balances as well as on the rule of law.

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[1] The parties have consented to the filing of *amicus* briefs in this case. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No such monetary contributions were made by anyone other than *amici* and their counsel.

[2] A complete list of *amici curiae* is appended to this brief.

[3] Ronald Reagan, *Remarks at the 'We the People' Bicentennial Celebration in Philadelphia, Pennsylvania* (Sept. 17, 1987), *available at* https://www.reaganlibrary.gov/research/speeches/091787a.

SUMMARY OF ARGUMENT

Since the Founding, it has been a bedrock principle in this country that nobody is above the law, not even the president. The king against whom the Founders rebelled was immune from judicial process, which was considered "incompatible with his dignity." *United States v. Burr*, 25 F. Cas. 30, 34 (C.C.D. Va. 1807) (No. 14,692d). In creating the presidency, the Founders explicitly rejected this model of leadership. *See* Federalist No. 69 (Alexander Hamilton) ("And it appears yet more unequivocally, that there is no pretense for the parallel which has been attempted between him and the king of Great Britain."). Instead, they created a president who, like all Americans, is subject to the law.

Recognizing the Founders' intent, this Court has been mindful of the principle that no one is above the law when considering questions of presidential immunity from legal process. People of good faith may debate how to accommodate the legitimate needs of the executive branch, but all agree that it must be done in a way that ensures "a government of laws, and not of men." *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

Petitioner now asks this Court to depart radically from that principle by holding that criminal investigations may not touch the president's affairs in any way, even when those investigations require nothing at all from the president. This extraordinary assertion is not based on any specific claim of privilege, but rather on a sweeping claim of absolute immunity. There is no principled reason to depart from the Court's historical approach and create such

a far-reaching, per se rule shielding all of the president's unofficial affairs from criminal investigation. Such a categorical rule is certainly not required by Article II. While there may be reasonable arguments that certain criminal proceedings—such as the actual indictment or prosecution of the president—might so interfere with the president's duties under Article II that they should not be imposed on a sitting president, it does not follow that all criminal proceedings must always steer clear of a sitting president's affairs in every respect. In a case like the present one, which concerns only a subpoena to a third party, the criminal process need not interfere with the president's duties in any way, because it does not ask him to do anything at all. The burden on a president arising from a third-party subpoena is certainly less than the burden imposed by other types of legal process from which this Court has refused to immunize the president.

For similar reasons, the Supremacy Clause does not require absolute presidential immunity from state criminal processes. The Constitution is concerned with the supremacy of federal *law*, not the supremacy of federal *officials*. There may be circumstances where a state's attempt to regulate the conduct of a federal official interferes with the execution of federal law. But this case does not present such a circumstance. A subpoena for documents that concern the president's personal affairs—rather than his official conduct—cannot possibly implicate the Supremacy Clause, because it does not impede federal law or the operations of the federal government in any way. Nor is there any basis for this Court to speculate that refusing to provide the immunity that Petitioner seeks would

lead to a deluge of state criminal subpoenas directed at the president. The Court should not assume that local prosecutors will abuse their power. Instead, it should apply its usual presumption that government officials will act in good faith.

If, in the future, state prosecutors use their powers to harass presidents in unjustified ways, reasonable people may conclude, as a matter of policy, that presidents should have some immunity broader than the existing immunity against indictment, prosecution, and compulsory attendance. If future circumstances made a broader presidential immunity seem desirable, the decision to create such an immunity and decisions about its scope should be made in Congress. Congress is better positioned to legislate the contours of any new immunity policy, and Congress is accountable to those Americans who, like *amici*, are deeply concerned about the specter of an unaccountable president.

For these reasons, the Court should affirm the Second Circuit.

ARGUMENT

I. Neither Article II nor the Supremacy Clause precludes subpoenaing the president for documents or testimony related to unofficial actions.

A. Article II does not grant the president absolute immunity from process.

Under the English Constitution, the king could "do no wrong" and "no blame [could] be imputed to him." *Burr*, 25 F. Cas. at 34. As a result, the king could neither be named in debate nor served with process. *See id.* When creating the presidency, our Founders rejected that view. They denounced the king's "repeated injuries and usurpations," Declaration of Independence pmbl. (U.S. 1776), and then set out to build "a government of laws, and not of men." *Marbury*, 5 U.S. at 163.

Despite that history, Petitioner contends that the Founders intended to place the president entirely out of the reach of federal and state criminal law. According to Petitioner, not only can the president not be indicted or prosecuted, he cannot be subject to criminal process in any way, including indirectly via a subpoena to a third party for documents related to the president's purely private affairs. The absolute investigative immunity that the president asserts is wholly at odds with this Court's functional approach to claims of presidential immunity. Recognizing such an immunity would abandon the principles underlying that functional approach: that occupying high office does not shield an individual from

ordinary legal obligations; and that no person, regardless of rank or station, can wholly exempt himself and his affairs from the legal process.

1. As courts have recognized since the Founding, the president—like every American—is subject to judicial process.

Article II does not alter the president's obligation—shared by every American—to provide relevant, non-privileged evidence in judicial proceedings. This Court has recognized "the fundamental and comprehensive need for every man's evidence in the criminal justice system . . . ." *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 384 (2004) (internal quotations omitted). Indeed, "[t]he best opinion at Anglo-American law has always been that no man except the King is wholly free from the testimonial duty to give evidence required in the administration of justice." Archibald Cox, *Executive Privilege*, 122 U. PA. L. REV. 1383, 1385 (1974). Jeremy Bentham employed a trenchant hypothetical to frame the issue: "Were the Prince of Wales, the Archbishop of Canterbury, and the Lord High Chancellor, to be passing by . . . while a chimney-sweeper and a barrow-woman were in dispute about a halfpennyworth of apples," could they later refuse to testify about what they had seen? "No, most certainly," Bentham answered.[4]

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[4] 4 THE WORKS OF JEREMY BENTHAM 321 (J. Bowring ed. 1843). *See also* 1 R. Rotunda & J. Nowak, TREATISE ON CONST. L. § 7.1(a) (2019) (The president's "temporary duties as an official cannot overcome his permanent and fundamental duty as a citizen and as a debtor to justice.").

Like the eminences in Bentham's hypothetical—and indeed "like every other [U.S.] citizen"—the president "is under a legal duty to produce relevant, non-privileged evidence when called upon to do so." *Nixon v. Sirica*, 487 F.2d 700, 713 (D.C. Cir. 1973). To be sure, the president should be allowed to comply with that duty in ways that accommodate his unique position. A court may not compel the president to personally attend trial or to give live testimony in open court. *See Clinton v. Jones*, 520 U.S. 681, 692 n.14 (1997). But this case involves no comparable imposition. Indeed, "[t]he subpoena at issue . . . does not require the President to do anything at all." App. 20a. And as Chief Justice Marshall explained in *United States v. Burr*, although the president is entitled to "as guarded a respect . . . as is compatible with [his] official duties," "go[ing] beyond" that would "exhibit a conduct which would deserve some other appellation than the term respect." 25 F. Cas. at 37.

Thus, dating back to the early days of the Republic, courts have balanced the legitimate need to avoid interfering unduly with the president's duties against the recognition that justice may require that the president be subject to some process. This functional approach to official immunity—repeatedly applied to sitting presidents—rests on the premise that ours is a government of laws, not of men, and that the mere holding of high office cannot excuse an individual from the testimonial duties common to all Americans. To the extent that the president bears unique burdens, faces unique constraints, or harbors unique concerns, courts have accommodated them as part of their normal oversight of litigation.

In 1807, Chief Justice Marshall issued subpoenas to President Jefferson for evidence sought by treason defendant Aaron Burr. Marshall reasoned that the president was not a "king" exempt from compulsory process; and he likewise discounted the argument that the president was too busy and important to be subject to process. *Burr*, 25 F. Cas. at 34. Jefferson complied with the subpoena largely without objection, "dr[awing] the line only at having to *personally* attend [Burr's] trial at Richmond."[5]

Burr's case served as precedent eleven years later, when President Monroe became the second president to be served with a subpoena while in office. The case involved the court martial of Dr. William C. Barton, a naval surgeon who had pressed Monroe for an appointment to the Philadelphia Naval Hospital.[6] Barton eventually received an appointment, replacing Dr. Thomas Harris.[7] Harris then brought charges of "intrigue and misconduct" against Barton, and the court martial subpoenaed Monroe to testify on the subject of his meetings with

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[5] Louis Fisher, *Jefferson and the Burr Conspiracy: Executive Power Against the Law*, 45 PRESIDENTIAL STUDIES Q. 157, 169 (2015) (emphasis added).

[6] Ronald D. Rotunda, *Presidents and Ex-Presidents as Witnesses: A Brief Historical Footnote*, 1975 U. OF ILL. LAW FORUM 1, 5–6 (1975). *See also* Frank Lester Pleadwell, *William Paul Crillon Barton (1786–1856), Surgeon, United States Navy—A Pioneer in American Naval Medicine*, in *The Military Surgeon*, 46 J. OF THE ASS'N OF MILITARY SURGEONS OF THE U.S. 241, 260–62 (James Robb Church ed., 1920).

[7] Rotunda, *supra* note 6, at 5–6. *See also* Pleadwell, *supra* note 6, at 260–62.

Barton.[8] Advising Monroe, Attorney General William Wirt cited Marshall's *Burr* analysis as authority that the president may be subpoenaed to testify.[9] Wirt believed that constitutional problems would arise only if Monroe were forced to leave the seat of government when presidential duties demanded his presence there.[10] Wirt therefore advised Monroe to pursue a compromise: the president would remain in Washington but respond via deposition.[11] Monroe followed Wirt's advice and submitted written answers to interrogatories in the case.[12]

Modern cases have reaffirmed that the president is not absolutely immune from legal process. In *United States v. Nixon*, this Court unanimously upheld an order denying President Nixon's motion to quash a district court subpoena, issued in the course of a criminal investigation, directing Nixon to produce tapes of his Oval Office

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[8] Rotunda, *supra* note 6, at 5–6. *See also* Pleadwell, *supra* note 6, at 260–62; *Nixon v. Sirica*, 487 F.2d 700, 710 n. 42 (D.C. Cir. 1973).

[9] *See* Select Comm. on Pres. Campaign Activities, App. to the Hearings of the Select Comm. on Pres. Campaign Activities of the U.S. Sen.: Documents Related to the Select Comm. Hearings, Pt. I, at 740 (1974) ("A subpoena ad testificandum may I think be properly awarded to the President of the U.S.").

[10] *Id*. at 742–43.

[11] *Id*.

[12] *See* Letter from President James Monroe to George M. Dallas (Feb. 14, 1818), Records of the Office of the Judge Advocate General (Navy), Record Group 125, (Records of General Courts Martial and Courts of Inquiry, Microcopy M-272, case 282), National Archives Building, *available at* https://www.familysearch.org/ark:/61903/3:1:3Q9M-CS1G-5QT8-6?i=831&cat=573135 (log-in required) (on file with counsel); Rotunda & Nowak, *supra* note 4, at § 7.1(c)(ii).

conversations. *See* 418 U.S. 683, 686–87, 714 (1974). The Court held that "neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified privilege of immunity from judicial process under all circumstances." *Id.* at 706.

Additional examples of presidential testimony abound. Indeed, "[s]itting Presidents have responded to court orders to provide testimony and other information with sufficient frequency that such interactions between the Judicial and Executive Branches can scarcely be thought a novelty." *Jones*, 520 U.S. at 704. In 1975, a district court ordered President Ford to sit for a videotaped deposition to provide percipient-witness evidence bearing on defenses raised by his would-be assassin. *United States v. Fromme*, 405 F. Supp. 578 (E.D. Cal. 1975).[13] President Carter gave videotaped testimony twice while in office. *Jones*, 520 U.S. at 704–05.[14] President Clinton testified under oath for several hours before an independent counsel on issues relating to the criminal investigation of the Whitewater real estate deal.[15] And after this Court held that Paula Jones's sexual harassment suit against President Clinton would not be delayed until after he left office, *Jones*, 520 U.S. at 705–08, the president sat for a deposition and later was

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[13] The district court properly accommodated President Ford by permitting him to choose the time and place of the deposition, not by exempting him from the obligation to give testimony. *United States v. Fromme*, 405 F. Supp. 583 (E.D. Cal. 1975).

[14] *See also* Rotunda & Nowak, *supra* note 4, at § 7.1(b)(vi).

[15] *Id.* § 7.1(b)(vii).

sanctioned for giving false evidence. *See Jones v. Clinton*, 36 F. Supp. 2d 1118, 1127–30, 1132 (E.D. Ark. 1999).

2. Article II does not require a different approach in the criminal context.

Although "it is . . . settled that the President is subject to judicial process in appropriate circumstances," *Jones*, 520 U.S. at 703, Petitioner's arguments suggest that the president must be absolutely immune from any process that is labeled "criminal." But Petitioner provides no explanation for why the functional approach adopted in other contexts cannot adequately protect the president's prerogatives in the criminal context. Petitioner's argument boils down to a concern that subjecting the president to criminal process will impede his ability to carry out his duties. This same concern was soundly rejected in *Clinton v. Jones*. *See* 520 U.S. at 705–06. However compelling the argument that a sitting president should not be subject to indictment or prosecution, nothing in Article II demands that the president be immunized from all criminal processes, no matter how minimal the burden or how removed from his official duties.[16]

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[16] In an attempt to argue that the Constitution directs a per se distinction between the burdens of criminal and non-criminal processes, Petitioner cites the language of Article I, Section 3, which specifies that "indictment, trial, judgment, and punishment" are available after a federal officer subject to impeachment, including the president, is impeached and removed. Pet'r's Br. 21–22. According to Petitioner, that language shows that criminal processes touching the president cannot begin until the president leaves office. *Id*. This

The preceding examples demonstrate that courts have required sitting presidents to comply with legal process far more burdensome than the process contemplated here. In the present case, the subpoena was not even issued to the president, and it requires him to do literally nothing. Moreover, the subpoena seeks documents unrelated to and remote from the president's official duties. Nothing in Article II bars a state from seeking such documents in the course of a legitimate criminal investigation, from a party who is not even the president.

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argument fails on two grounds. First, it is clear that a federal officer subject to impeachment can be indicted, tried, and punished while in office. *See, e.g.*, *Nixon v. United States*, 506 U.S. 224 (1993) (federal judge prosecuted and convicted and only subsequently impeached). Second, even if the clause could be read as Petitioner contends, it would draw the line in a place that would leave Respondent Vance free to serve and enforce the subpoena at issue in this case. After all, the clause speaks not of *all* aspects of the criminal process but only of indictment and the phases that follow. The clause does not encompass earlier phases of the process, like investigation.

B. The Supremacy Clause does not grant the president—let alone a non-governmental party—immunity from all process related to the president's unofficial affairs.

Pointing to the Supremacy Clause and this Court's decisions, Petitioner argues that federal supremacy bars a state from conducting a criminal investigation touching the president's affairs, even if that investigation does not concern the president's official conduct. Pet'r's Br. 23–25. This argument misconceives federal supremacy. The Constitution establishes the supremacy of federal law, not the supremacy of the persons who hold federal office. *See* U.S. Const. art. VI, cl. 2 ("This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land[.]"). By claiming otherwise, Petitioner gives the Supremacy Clause a meaning that its text does not support—and in a way that transgresses the principle that ours is a government of laws and not of men.

The cases that Petitioner cites to support his supremacy argument all concern state attempts to impede federal government operations authorized by federal law. Those cases have no bearing on the exercise of state power against people who happen to be federal officials when federal government operations are not at issue. Petitioner obscures this distinction by quoting cases misleadingly. For example, Petitioner presents *McCulloch v. Maryland* as if it said that states may not "'retard, impede, burden, or in any manner control' the President, Congress, or the Judicial Branch." Pet'r's Br. 24 (quoting *McCulloch*, 17 U.S. 316, 436 (1819)). But

McCulloch actually says that the states may not "retard, impede, burden, or in any manner control, *the operations of the constitutional laws enacted by congress*[.]" *McCulloch*, 17 U.S. at 436 (emphasis added). By substituting "the President" for "the operations of the constitutional laws enacted by congress," Petitioner seeks to give an officeholder—a person—a status that rightly belongs only to the law of the land.

Petitioner's other Supreme Court cases, *see* Pet'r's Br. 24–25, are all, like *McCulloch*, cases about state attempts to control or impede the operations of the federal government. *In re Tarble* and *McClung v. Silliman* hold that a state may not order a federal officer to take an official action. *See Tarble*, 80 U.S. 397, 411–12 (1871); *McClung*, 19 U.S. 598, 604–05 (1821). *Tennessee v. Davis*, *Ohio v. Thomas*, and *Johnson v. Maryland* hold that a state may not prosecute a federal officer for performing his federal duties. *See Davis*, 100 U.S. 257, 263 (1879); *Thomas*, 173 U.S. 276, 285 (1899); *Johnson*, 254 U.S. 51, 57 (1920).[17] But no case decided by this Court suggests that federal officials are immune from generally

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[17] The Court's discussion of federal supremacy in footnote 13 of *Clinton v. Jones* is to the same effect. 520 U.S. at 691 n. 13. All of the authorities cited in that footnote stand for the proposition that states may not control or prevent the federal government's operations, *not* the proposition that states may not enforce their laws against federal officials. *See Hancock v. Train*, 426 U.S. 167, 178–82 (1976) (state may not use its control of a permit system to prohibit the federal government from operating a federal facility); *Mayo v. United States*, 319 U.S. 441, 443–45 (1943) (state may not order cessation of a federal program); Laurence Tribe, AMERICAN CONSTITUTIONAL LAW 513 (2d ed. 1988) (states may not "command federal officials . . . to take action in derogation of their . . . federal responsibilities").

applicable state law when no official federal action is concerned. And for good reason. Federal officials must pay state sales taxes and obey local anti-shoplifting laws, just like everybody else. Like everybody else, federal officials are subject to criminal sanction if they break those laws. A supremacy problem arises only when a state purports to act on a federal officer in a way that impedes or controls *official federal action*—the execution of federal law or the carrying out of federal government operations.

Thus, whether a state legal process touching the president's affairs is consistent with federal supremacy depends on whether the burdens imposed directly impede, or do not impede, the operations of the federal government. Given the president's uniquely important role, there are obvious ways in which criminal proceedings against him could interfere with federal governance, even if the subject matter of the proceedings concerned the president's personal affairs rather than his official conduct. To exercise physical control over a president by arresting or jailing him, or even by compelling him to attend a trial at a certain time and place, could impede the government's operations. *See* A Sitting President's Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. 222, 229 (2000). But not every imposition of legal process on a president has that effect. And this Court has held that some impositions on a president, including some that could command nontrivial amounts of a president's attention, are consistent with the president's ability to do his job. *See Jones*, 520 U.S. at 703–08 (holding that the president is not immune from some civil suits and describing instances in which presidents

gave testimony in legal proceedings, both voluntarily and under court order, without compromising their constitutional function).

Petitioner contends, as a per se matter, that *any* criminal proceeding touching the president's affairs would impede the operations of the federal government. Pet'r's Br. 25, 29–30. That claim is too broad. Criminal justice encompasses a wide spectrum of proceedings, ranging from those that take over people's lives to those that are quickly completed and left behind. And many of its demands are considerably less burdensome than the burden of being subject to civil suit, which this Court deemed acceptable in *Jones*.

The present case is about a subpoena that touches the president's affairs but does not involve any official conduct and was issued to a private party. The subpoena does not direct the president to do anything, so compliance need not consume a minute of the president's time. Certainly this subpoena asks less of the president than has been required of other presidents who responded personally, in real time, to questions posed in depositions or other testimonial settings. There is simply no reason to think that any proceeding touching the president's affairs, no matter how little it demands of him, impedes federal governance simply because it is denominated "criminal."

To be sure, the prospect of an eventual criminal prosecution might distract any person, including a president. But so might a state official's public announcement of the intention to investigate and prosecute a president after he leaves office, or similar announcements from private parties campaigning for state office. Surely federal

supremacy cannot prohibit state officials or candidates for state office from articulating their intentions to the public, no matter how distracting a president would find it. Similarly, even though a subpoena served on a third party demands nothing from the president, he nevertheless might choose to involve himself personally and even to spend considerable time on the matter—as he might choose to spend his time on any of dozens of projects that interest him personally. One can easily imagine a president choosing to spend time defending himself in a civil suit, particularly if that suit featured explosive or embarrassing allegations, as in *Jones*. But the possibility that a president might choose to spend his time in a particular way is not a reason to think that the Constitution forbids a state from enforcing its laws—and certainly not when all the state has done is seek documents from a private party who is not the president.

Petitioner also argues that the scope of presidential immunity should reflect not the burden that *this* subpoena would impose but the cumulative burden that many similar proceedings might impose, if state prosecutors began to investigate the president en masse. Pet'r's Br. 36–37. But a similar concern could be raised about civil suits, too, including for civil suits that clearly would be permitted under *Jones*; and yet *Jones* held that the president is not immune. In any event, Petitioner's argument is both speculative and overly pessimistic. There is no way to know whether, and no basis for confidently predicting that, scores of prosecutors will use the criminal process to harass future presidents if the present subpoena is enforced. Unpopular

presidents are nothing new, but there has been no such epidemic in the past.

In *Jones*, the president's defenders warned that a denial of immunity would open the floodgates of civil litigation, harassing presidents in their personal capacities. But the Clinton administration was followed by four presidential terms in which no president had to spend significant time on civil suits brought against him in his personal capacity. Naïve though it might sound, perhaps presidents whose conduct is basically upstanding will usually not find themselves being sued or investigated. To presume otherwise—to say, without evidence, that this Court expects American prosecutors to systematically abuse their authority in order to harass presidents—is to deny a whole class of democratically elected officials the presumption of good faith that this Court usually and properly affords to local public officials.

Petitioner's argument that denying immunity in this case would permit states to control federal government operations is weak. Perhaps for that reason, Petitioner also makes an argument of a very different kind: he argues that criminal proceedings of *any* sort must be off the table because of the stigma they carry. Pet'r's Br. 17, 29–30, 32. This is a deeply troubling argument, and one that again reflects Petitioner's understanding of the presidency as a sort of royal office. The idea that the president has a distinctive claim to be protected against stigma, over and above the legitimate practical demands of his office, is more suited to the principles of an aristocracy than those of a republic. A king, perhaps, is entitled to be shielded from stigma: the person of the king is sacred in a monarchical system, and the law can be subordinated to protect his honor. But the

Constitution knows no principle of *lèse-majesté*. To argue that the Constitution shields the president from even the *suggestion* of involvement in criminal wrongdoing because that suggestion might call him into disrepute is to afford him an aristocratic privilege to which no American is entitled.[18]

To be sure, the Constitution protects Americans against being unjustifiably stigmatized by criminal accusations. We have probable cause requirements and grand juries and libel laws, for example. The president is as entitled to those protections as anyone else. But under a government of laws and not of men, the fact that a man is the president does not immunize him from the opinions that other citizens may form upon learning that a legitimate investigation is proceeding against him. The fact that citizens may come to think poorly of a president if the law takes its course cannot be a reason to prevent the law from operating. In essence, this Court has already so held: being sued for sexual harassment can be at least as stigmatizing as being investigated for financial improprieties, yet this Court has deemed sexual harassment suits permissible against sitting presidents. *See Jones*.

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[18] *See* Resp't Br. 34 (noting that "decades of this Court's precedents flatly reject the assumption . . . that state prosecutors are likely to exercise their investigatory powers irresponsibly").

II. Any grant of presidential immunity should come from Congress, not from this Court.

Petitioner raises the prospect of presidents harassed by local prosecutors seeking to score political points. This concern is overstated. But even if the concern were reasonable, the solution would not be a judicially crafted grant of immunity. It would be legislation from Congress, for two reasons.

First, the judgment that such an immunity was needed would be based on a prediction about the future, not the application of a principle required by the Constitution. Indeed, the necessary prediction would require this Court to abandon its normal presumption that local officials act in good faith.

Second, it would not be possible to establish the scope of such an immunity without making policy and political decisions that courts are unsuited to make.

A. This Court should not rule on the basis of a questionable prediction about the future.

Petitioner warns that denying immunity in this case would bring on an epidemic of ginned-up criminal investigations designed to harass presidents. Pet'r's Br. 25–28. But perhaps the sky is not falling. Twenty years ago, a different president's defenders warned that permitting a civil suit against a sitting president would open the floodgates to a similar kind of harassing litigation. But the Court decided *Jones* as it did, and the flood of harassing litigation did not come. The next four presidential

terms featured zero occasions on which presidents were forced to spend significant time dealing with civil lawsuits filed against them in their personal capacities.[19]

It is not clear, therefore, why anyone should confidently predict that denying immunity in this case would bring on a flood of pretextual criminal proceedings. Petitioner says that local politicians whose constituents dislike any given president will have incentives to engage in symbolic politics by investigating those presidents. Pet'r's Br. 26. That may be. But local politicians have had those incentives since the beginning of the Republic; yet, as Petitioner acknowledges, the present case appears to be the first of its kind. Pet'r's Br. 28.[20] Even in the

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[19] It is true that in the fifth presidential term after *Jones*—this one—the sitting president has been sued several times. But that is no evidence that the *Jones* warnings were right. This president was the subject of many lawsuits even before becoming president. That he continues to be sued while president thus does not reflect anything about a general tendency of presidents to face harassing litigation; it merely means that whatever characteristics the current president possesses that cause him to be sued frequently did not disappear upon his assuming office. The counterexamples of other administrations from 2001 to 2017 suggest that presidents who are not regularly sued before becoming president are also not regularly sued after becoming president, even after *Jones*.

[20] Citing cases in which this Court suggested that the *federal* government's declining to exercise a power over time raises doubts about that power's existence, Petitioner argues that the fact that *states* have not previously subjected the president to criminal process indicates that they lack the power to do so. Pet'r's Br. 28 (citing, *e.g.*, *Printz v. United States*, 521 U.S. 898, 905–08 (1997) (holding that Congress's history of not commandeering state officials suggests the absence of a power to commandeer)). But those cases are inapposite, because

divisive climate of 2020, the number of local prosecutors commencing investigations of an unusually unpopular president is vanishingly small.[21] Thus, despite the obvious opportunity to score political points, American prosecutors have not attempted to do so by launching flimsy investigations of locally unpopular presidents. To credit Petitioner's prediction that the future will be much worse, this Court would need to believe that large numbers of local prosecutors will begin to abuse their offices in a new way. That speculation would contradict the Court's normal and appropriate presumption that local elected officials act in good faith.[22] This Court should not abandon that stance to the denigration of local officials as a class, especially when there is no evidence of the relevant misbehavior.

In any event, this Court is not the right institution for making predictions about how the future will be different from the past; nor is it the

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questions of state and federal power are fundamentally dissimilar. The federal government always has the burden to demonstrate affirmatively the existence of some power that it claims; state governments are presumed to possess the power to act and are denied such power only when some affirmative prohibition applies. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 848 (1995) (Thomas, J., dissenting).

[21] The current president has an extensive business empire, giving prosecutors in many different jurisdictions the opportunity to gin up harassing investigations if they were bent on doing so. They have not. Whether the lack of other investigations is due to the president's having done nothing to warrant investigation in those jurisdictions or to any other cause, the important fact for present purposes is that prosecutors are not engaged in widespread investigations for the purpose of scoring political points with their constituents.

[22] *See* Resp't Br. 35 (citing *Mesa v. California*, 489 U.S. 121, 138 (1989)).

right institution to design a legal regime aimed at addressing a hypothetical problem. Within our system, the institution for those projects is the legislature. If Congress legislates based on its expectations of the future and those expectations turn out to be wrong, Congress can amend its legislation. If Congress legislatively confers a broad immunity from all criminal processes, and then two or three consecutive presidents turn out to be crooks whose immunity helped them get away with serious wrongdoing, a reformist Congress can reduce or eliminate the immunity for later presidents. But a constitutional holding from this Court cannot be corrected as easily.

In any event, a legislative scheme—wisely crafted or not—is the choice of the people's democratically elected representatives. Congress is entitled to make law based on its guesses, right or wrong. This Court does not sit to predict changes in American behavior and craft future-oriented solutions.

B. This Court is ill-suited to make the policy choices necessary to determine the scope of a presidential immunity from investigation.

The Constitution requires only that the president be immune from state legal processes that would control or frustrate the operations of the federal government. *Supra* § I.[23] But suppose that lawmakers believed that a broader immunity would be better. How far should that immunity extend?

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[23] *See also Jones*, 520 U.S. at 691 n. 13.

Petitioner argues that states must not be able to "distract, burden, and stigmatize the President." Pet'r's Br. 29. What measures would have those effects? The question is not easy. Criminal justice features a broad array of practices, formal and otherwise. "Investigation" is not just one thing: local law enforcement authorities gather information, interview witnesses, consult experts, make plans, and communicate with the public, formally and informally, with and without coercive legal measures. Perhaps any of those measures could distract or stigmatize a president, and perhaps only under certain circumstances would that distraction or stigma be worth worrying about. There is no way to draw the necessary lines without making many contestable policy choices. Legislatures resolve such questions routinely, and properly so. But these questions do not lend themselves to principled judicial resolution as a matter of constitutional law.

Suppose that a given criminal investigation might distract or stigmatize a president, even if no further action were taken while the president remained in office. If so, a prosecutor's announcement that a criminal investigation would commence one day after the president left office might be just as distracting or stigmatizing. Should a local prosecutor be prohibited from announcing that a criminal investigation would commence one day after the president left office? From announcing that he has enough information to justify opening an investigation? From conducting those portions of an investigation that can be conducted without formally coercive measures like subpoenas? So long as a president will not actually be prosecuted until he leaves office, the prospect of trial and possible

conviction is equally far in the future in all of these scenarios—and all of them carry the potential for distraction or stigma. How far, if at all, to grant the president immunity so that he can focus his attention on other matters is not a question that admits of a principled answer on the basis of the Constitution's text, history, or structure—unless that answer is "only far enough to prevent state authorities from controlling or impeding the operations of the federal government."

The project of crafting a broader immunity would also have to consider not only the potential for presidential distraction but also the potential costs to legitimate state law enforcement needs. Those costs are hard to estimate. If current circumstances are any guide, some number of future presidents are likely to be people with extensive business holdings, located in many jurisdictions. If so, the policy impact of a blanket immunity against all criminal investigations (whatever that might mean) could be quite large. Suppose that a business in which a president had a substantial interest were suspected of being one of many businesses in an industry engaging cooperatively in a course of illegal conduct. A rational investigation of the scheme might involve an investigation of the president's business. Would the whole group of businesses be shielded from investigation because any investigation would distract and stigmatize the president? These questions raise complex matters of policy and politics better suited for legislative than judicial resolution, both because they involve guesses about costs and benefits and because it is wise to make any solutions revisable in light of experience.

In attempting to answer questions like these, Congress could carve and limit the world of potential investigations in ways that a court could not. For example, Congress might grant immunity against investigations of the president personally but permit the investigation of corporate entities connected to the president. Congress might choose to shield conduct occurring after the president took office but not pre-presidential conduct. Congress could specify immunity from state investigation for conduct that was already the subject of investigation by Congress itself. And so on. Moreover, Congress's choice of tools for addressing this set of issues is not limited to grants of immunity. For example, much as Congress has made legal actions against members of the Armed Services removable to federal court, Congress could create substantive federal law requiring state prosecutors to show probable cause in federal court before proceeding past a specified point in criminal investigations touching the president's affairs. In all of these ways, Congress is better suited than this Court to protect presidents against unwarranted criminal investigations by state authorities—if any such protection were needed. And it is Congress that the Constitution charges in the first instance with structuring the offices of the federal government and deciding what each one needs to function. *See* U.S. Const. art. I, § 8, cl. 18. (vesting in Congress the power to make all laws necessary and proper for carrying into execution the powers vested "in any department or officer" of the United States).

CONCLUSION

The Framers designed a system in which no one is above the law, not even the president. Historically, this Court has adhered to that principle. It should do so again and affirm the decision of the Second Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX: LIST OF *AMICI*—FORMER REPUBLICAN MEMBERS OF CONGRESS, FORMER MEMBERS OF THE EXECUTIVE BRANCH UNDER REPUBLICAN ADMINISTRATIONS, AND LEGAL EXPERTS

Donald Ayer
Principal Deputy Solicitor General, 1986–1988
Deputy Attorney General, 1989–1990

Steve Bartlett
U.S. House of Representatives (R-Texas), 1983–1991

Jack Buechner
U.S. House of Representatives (R-Missouri), 1987–1991

Linda Chavez
White House Director of Public Liaison, 1985
Chairman, National Commission on Migrant Education, 1988–1992

Tom Coleman
U.S. House of Representatives (R-Missouri), 1976–1993

George T. Conway III

John Dean
White House Counsel, 1970–1973

David Durenberger
U.S. Senate (R-Minnesota), 1978–1995

Mickey Edwards
U.S. House of Representatives (R-Oklahoma), 1977–1993

David Emery
U.S. House of Representatives (R-Maine), 1975–1983
Deputy Director, U.S. Arms Control and Disarmament Agency, 1983–1988

Emil Frankel
Assistant Secretary for Transportation Policy, U.S. Department of Transportation, 2002–2005

Charles Fried
Solicitor General of the United States, 1985–1989

Stuart M. Gerson
Acting Attorney General of the United States, 1993
Assistant Attorney General, Civil Division, 1989–1993

Jimmy Gurulé
Assistant Attorney General, Department of Justice, 1990–1992
Assistant U.S. Attorney, 1985–1989
Under Secretary for Enforcement, Department of the Treasury, 2001–2003

David Iglesias
U.S. Attorney for the District of New Mexico, 2001–2007

Bob Inglis
U.S. House of Representatives (R-South Carolina), 1993–1999, 2005–2011

Leon Kellner
U.S. Attorney for the Southern District of Florida, 1985–1988

James Kolbe
U.S. House of Representatives (R-Arizona), 1985–2007

Steven T. Kuykendall
U.S. House of Representatives (R-California), 1999–2001

James Leach
U.S. House of Representatives (R-Iowa), 1977–2007

John LeBoutillier
U.S. House of Representatives (R-New York), 1981–1983

Paul N. (Pete) McCloskey, Jr.
U.S. House of Representatives (R-California), 1967–1983

John McKay
U.S. Attorney for the Western District of Washington, 2001–2007

Mike Parker
U.S. House of Representatives (R-Mississippi), 1989–1999

Thomas E. Petri
U.S. House of Representatives (R-Wisconsin), 1979–2015

Trevor Potter
Chair, Federal Election Commission, 1994
Commissioner, Federal Election Commission, 1991–1995

Reid J. Ribble
U.S. House of Representatives (R-Wisconsin), 2011–2017

Paul Rosenzweig
Deputy Assistant Secretary for Policy, Department of Homeland Security, 2005–2009

Claudine Schneider
U.S. House of Representatives (R-Rhode Island), 1981–1991

Christopher Shays
U.S. House of Representatives (R-Connecticut), 1987–2009

Peter Smith
U.S. House of Representatives (R-Vermont), 1989–1991

Alan Steelman
U.S. House of Representatives (R-Texas), 1973–1977

J.W. Verret
Associate Professor of Law, George Mason University Antonin Scalia Law School*

Kimberly L. Wehle
Assistant U.S. Attorney, Civil Division, 1997–1999
Associate Independent Counsel, Whitewater Investigation, 1996–1997

Christie Todd Whitman
Administrator, Environmental Protection Agency, 2001–2003

Lawrence Wilkerson
Chief of Staff to U.S. Secretary of State, 2002–2005

Dick Zimmer
U.S. House of Representatives (R-New Jersey), 1991–1997

**Institutional affiliation listed for identification purposes only.*