20-2766-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DONALD J. TRUMP,

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

MEMORANDUM IN SUPPORT OF EMERGENCY MOTION FOR ADMINISTRATIVE STAY AND STAY PENDING APPEAL

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Appellant, President Donald J. Trump, respectfully asks this Court to enter, on an emergency basis, a stay pending appeal and an administrative stay of the district court's dismissal of his challenge to the Mazars subpoena. *See* Doc. 71, *Trump v. Vance*, No. 1:19-cv-08694-VM (S.D.N.Y. August 20, 2020) (Exhibit A). Because the District Attorney has agreed to stay enforcement only for "seven calendar days after the date of a decision" by the district court, Doc. 52, the President needs relief **before August 28, 2020** in order to preserve his opportunity for appellate review. The President thus respectfully requests that the Court issue a stay pending appeal and that the stay remain in effect until the President's appeal is resolved and for one week afterward. The President also asks the Court to issue, as it did the last time this case was on appeal, an **immediate administrative stay** to preserve its ability to decide the motion for a stay pending appeal.

INTRODUCTION

The Court should grant the President a stay pending appeal and, as needed, an administrative stay. Absent a stay, the subpoena will be enforced and this appeal will be mooted. That is quintessential irreparable harm. It should thus be unsurprising that this Court issued a lengthy administrative stay in the prior appeal, the Supreme Court stayed the mandate pending certiorari in the congressional subpoena cases, and the District Attorney relented and voluntarily stayed enforcement of the subpoena on the eve of argument before this Court and throughout the proceedings before the Supreme Court.

In short, the President should be afforded appellate review of the district court's 103-page opinion dismissing his complaint outright.

The President also is likely to prevail on the merits. The only issue at this stage is whether the Second Amended Complaint *plausibly alleges* that the Mazars subpoena is invalid. It does. The District Attorney's decision to photocopy a sweeping congressional subpoena and send it to the President's custodians as part of an investigation into payments made by Michael Cohen in 2016 plainly states a claim for overbreadth and bad faith. Instead of accepting those plausible allegations as true, the district court credited alternative explanations that it deemed more likely. That is a violation of settled Second Circuit law. The district court's characterization of these claims, which the Supreme Court held that the President could press on remand, as nothing more than a backdoor attempt to secure immunity is unfair. The district court may disagree with the Supreme Court's decision to remand this case for further proceedings. But that dissatisfaction shouldn't have been held against the President.

Alternatively, the Court should grant a stay because the President raises serious arguments and the balance of harms tips heavily in his favor. The idea that the District Attorney needs these records so badly that there's no time for appellate review—after he voluntarily stayed enforcement for nearly a year—is implausible. Regardless, any harm he might suffer pales in comparison to the case-mooting harm the President will suffer.

BACKGROUND

On September 19, 2019, the President filed suit challenging the subpoena that the District Attorney issued to Mazars. The President also sought a preliminary injunction. Shortly thereafter, the District Attorney sought dismissal on jurisdictional grounds and opposed the preliminary-injunction motion. The district court granted dismissal under *Younger v. Harris*, 401 U.S. 37 (1971), and, in the alternative, denied the preliminary-injunction motion. *Trump v. Vance*, 395 F. Supp. 3d 283 (S.D.N.Y. 2019). The President appealed.

On November 4, 2019, this Court reversed the district court's holding on *Younger* abstention, but agreed that the President wasn't entitled to a preliminary injunction. As a consequence, this Court vacated the judgment dismissing the lawsuit, affirmed the denial of the preliminary injunction, and remanded the case for further proceedings. *Trump v. Vance*, 941 F.3d 631 (2d Cir. 2019). The President filed a petition for writ of certiorari, and the District Attorney agreed to stay the subpoena's enforcement throughout Supreme Court review.

The Supreme Court granted review and, on July 9, 2020, affirmed this Court's judgment. *Trump v. Vance*, 140 S. Ct. 2412 (2020). The Supreme Court's decision was "limited to absolute immunity and heightened need." *Id.* at 2431. Therefore, the Court "directed that the case be returned to the District Court, where the President may raise further arguments as appropriate." *Id.*; *see id.* n.6. The Court was "unanimous[]" in reaching this result. *Id.* (Kavanaugh, J., concurring in the judgment). The arguments

for remand included, among others, "bad faith and … breadth." *Id.* at 2430 (majority op.).

On remand, the President filed a Second Amended Complaint (SAC) in which he argued that the subpoena is invalid for at least two reasons. Doc. 57. First, it is "overbroad, improperly tailored, and otherwise amounts to an arbitrary fishing expedition." SAC ¶56. Second, it "was issued in bad faith." SAC ¶62. A week later, the District Attorney moved to dismiss for failure to state a claim. Doc. 63.

Just yesterday, on August 20, 2020, the district court issued a 103-page decision granting the District Attorney's motion to dismiss. *See* Ex. A. In the district court's view, the SAC failed to plausibly allege that the Mazars subpoena either is overbroad or was issued in bad faith and thus failed to state a claim. *Id.* at 47-102. That same day, the President filed an emergency notice of appeal, Doc. 73, and sought a stay pending appeal from the district court, Doc. 74. One hour ago, the district court denied a stay. Doc. 75.

ARGUMENT

This Court has the power to issue stays and injunctions pending appeal. Fed. R. App. P. 8. Interim relief is warranted if there is "'(a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.'" *Citigroup Glob. Markets,*

Inc. v. VCG Special Opportunities Master Fund Ltd., 598 F.3d 30, 35 (2d Cir. 2010). The President is entitled to relief under either standard.

I. The President will suffer irreparable harm without a stay.

The Supreme Court remanded this case so that the President can make further arguments challenging the subpoena as overbroad and issued in bad faith. In so doing, the Court also contemplated "appellate review" and reiterated that it "should be particularly meticulous." *Vance*, 140 S. Ct. at 2430. Absent a stay pending appeal, however, the President will be deprived of *any* appellate review of his claims. "Courts routinely issue injunctions to stay the status quo when" events might "moot the losing party's right to appeal." *John Doe Co. v. CFPB*, 235 F. Supp. 3d 194, 206 (D.D.C. 2017); *Ctr. For Int'l Envtl. Law v. Office of U.S. Trade Rep.*, 240 F. Supp. 2d 21, 22-23 (D.D.C. 2003) (explaining that the movant makes "a strong showing of irreparable harm" where disclosure would moot any appeal); *John Doe Agency v. John Doe Corp.*, 488 U.S. 1306, 1309, (1989) (Marshall, J., in chambers) ("The fact that disclosure would moot that part of the Court of Appeals' decision requiring disclosure … create[s] an irreparable injury.").

This "irreparable" harm exists when a plaintiff challenges a subpoena to a third party. *U.S. Servicemen's Fund v. Eastland*, 488 F.2d 1252, 1256 (D.C. Cir. 1973), *aff'd in relevant part*, 421 U.S. 491, 501 n.14 (1975). As the Supreme Court put it, "compliance by the third person could frustrate any judicial inquiry" into the subpoena's legality. *Eastland*, 421 U.S. at 501 n.14; *Trump v. Mazars*, 140 S. Ct. 2019, 2035 (2020). Allowing

this to happen would wrongly deny the plaintiff's rights and "immunize [the] subpoena from challenge" based on "the fortuity that documents sought by [the] subpoena are not in the hands of a party claiming injury." *United States v. AT&T Co.*, 567 F.2d 121, 129 (D.C. Cir. 1977). In short, denying interim relief could "entirely destroy [plaintiffs'] rights to secure meaningful review." *Providence Journal Co. v. FBI*, 595 F.2d 889, 890 (1st Cir. 1979). That is classic irreparable harm.

This Court's decision to grant an administrative stay in the previous appellate round—which remained in place until the eve of argument when the parties reached an agreement to further stay enforcement—recognized the irreparable nature of this case-mooting harm. That stay, in turn, was validated when the Supreme Court granted the President a stay of the mandate pending certiorari in the congressional subpoena cases, which involve the very same threat of irreparable harm. *Trump v. Mazars USA, LLP*, 140 S. Ct. 581 (2019); *Trump v. Deutsche Bank AG*, 140 S. Ct. 660 (2019). The President's harm from having appellate review denied is no less irreparable now than it was then.

Enforcement of the subpoena will also destroy confidentiality. That harm is "[c]learly … irreparable in nature." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bishop*, 839 F. Supp. 68, 72 (D. Me. 1993). "Once the documents are surrendered," in other words, "confidentiality will be lost for all time. The status quo could never be restored." *Providence Journal*, 595 F.2d at 890. That is why the "disclosure of private, confidential information," even to the government, "'is the quintessential type of irreparable harm

that cannot be compensated or undone by money damages.'" *Airbnb, Inc. v. N.Y.C.*, 373 F. Supp. 3d 467, 499 (S.D.N.Y. 2019).

In short, the question at this stage is straightforward: whether the President will be allowed *any* appeal of his claims, or whether he'll be deprived of that chance because the District Attorney issued the subpoena to a third-party custodian with no incentive to test its validity. The choice should be easy. Courts do not "proceed against a President as [they] would against an ordinary litigant." *Vance*, 140 S. Ct. at 2432 (Kavanaugh, J., concurring in the judgment) (citing *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 381-82 (2004)). Rather, "protections" against abusive process "'apply with special force to a President, in light of the office's unique position as the head of the Executive Branch.'" *Id.* at 2428 (majority op.) (quoting Brief for Respondent Vance 43). That understanding "should inform the conduct of the entire proceeding, including the timing and scope of discovery." *Clinton v. Jones*, 520 U.S. 681, 707 (1997). Whatever else this special solicitude provides, it at least affords the President the opportunity to appeal. Concern for "the Presidency itself" should require that much. *Trump v. Hawaii*, 138 S. Ct. 2392, 2418 (2018).

II. The President is likely to succeed in reversing the decision below.

This Court reviews "de novo a district court's grant of a motion to dismiss, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor." *Shomo v. City of New York*, 579 F.3d 176, 183 (2d Cir. 2009). "Factual allegations" thus need only "be enough to raise a right to relief above

the speculative level." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555 (2007). The SAC shouldn't have been dismissed under this standard. The President plausibly alleged that the Mazars subpoena is overbroad and was issued in bad faith.

A. The President plausibly alleged that the subpoena is overbroad.

To be valid, the subpoena must be "properly tailored." *Vance*, 140 S. Ct. at 2426. As the Supreme Court has explained, "grand juries are prohibited from engaging in 'arbitrary fishing expeditions.'" *Id.* at 2428; *id.* at 2430 (explaining that the subpoena's "breadth" can be challenged). While the grand jury's subpoena power is broad, it is "not unlimited." *United States v. R. Enterprises, Inc.,* 498 U.S. 292, 299 (1991); *In re Eight Grand Jury Subpoena Duces Tecum*, 701 F. Supp. 53, 55 (S.D.N.Y. 1988). The subpoena cannot be "out of proportion to the end sought." *See McMann v. SEC*, 87 F.2d 377, 379 (2d Cir. 1937) (L. Hand).

Whether the subpoena is overbroad is measured against "the general subject of the grand jury's investigation." *R. Enterprises, Inc.,* 498 U.S. at 301; *Virag v. Hynes*, 54 N.Y.2d 437, 444 (1981) (grand jury subpoena must be assessed in "relation to the matter under investigation"); *In re Certain Chinese Family Benevolent & Dist. Ass'ns,* 19 F.D.R. 97, 99 (N.D. Cal. 1956) ("The real question here is not the power of the Grand Jury to investigate, but rather the alleged excessive use of that power in this case."). Put simply, the subpoena is overbroad if there is "no reasonable possibility" that a "category of materials" requested will yield "information relevant to the general subject of the grand jury's investigation." *R. Enterprises,* 498 U.S. at 301.

The President plausibly alleged that the subpoena is not properly tailored to "the District Attorney's investigation [into] payments made by Michael Cohen in 2016 to certain individuals." SAC ¶12. It asks for every document and communication related to the President and his businesses, from any part of the world, over roughly the last decade. SAC ¶18, 31-35. This is precisely the type of "en masse" demand of "such a varied accumulation" "over such an extensive period" that is strongly suggestive of a "fishing expedition." *Schwimmer v. United States*, 232 F.2d 855, 861-62 (8th Cir. 1956); *In re Grand Jury Investigation*, 174 F. Supp. 393, 395 (S.D.N.Y. 1959). Indeed, the subpoena is designed to include everything "in the imaginative concept of every shred of paper" in Mazars' possession related to the President and the Trump Organization. *In re Harry Alexander, Inc.*, 8 F.R.D. 559, 560 (S.D.N.Y. 1949). On its face, then, the subpoena's unlimited breadth means that it cannot possibly be reasonably tailored to any particular investigation.

It is certainly not tailored to this particular grand jury investigation into business records and bookkeeping related to 2016 payments by Michael Cohen. The subpoena demands all financial records, documents, and communications (not just those related to business transactions or New York reporting) from all entities associated with the Trump Organization across the nation and world (not just those with a connection to Michael Cohen or influence over New York reporting), over nearly a decade (including five years before the conduct forming the basis for the investigation). SAC ¶¶18, 31-35. By its terms, the subpoena reaches entire categories of documents that have nothing to

do with the payments under investigation. For example, an accounting of the assets held in 2011 by entities in California, or Illinois, or Dubai, or anywhere else, bears no conceivable relationship to an investigation about particular 2016 transactions in New York. SAC ¶¶22-45. Likewise, investigations into a contractual relationship between the federal government and a Trump entity in Washington D.C has absolutely nothing to do with these allegations. SAC ¶43. In short, the Mazars subpoena has all the hallmarks of an overbroad demand. *E.g. In re Horowitz*, 482 F.2d 72, 79-80 (2d Cir. 1973); *Manning v. Valente*, 272 A.D. 358, 362 (N.Y. App. Div. 1947).

That the subpoena reaches far beyond the subject of the investigation is not a surprise. It was drafted by the House Oversight Committee to investigate a range of national and international issues. SAC ¶¶20, 22-27, 36-45. The Committee claims to be investigating international relations, potential improper influences over the Executive Branch, reforms to federal laws involving the President, the proper authority given to the Office of Government Ethics, and federal-lease management, among other things. SAC ¶¶37-43. And the Committee tied the time period (dating back to 2011) to the initiation of a contractual relationship between the federal government and a Trump entity in Washington D.C. SAC ¶43. These purposes are issues "of national importance" and claim to be grounded in constitutional and federal law. SAC ¶¶ 36-45. None involve state criminal law, and none fall within the jurisdiction of the County of New York, making it plausible—to say the least—that much of the information the subpoena requests does not relate to the grand jury's investigation. *Vance*, 140 S. Ct. at

2449 (Alito, J., dissenting) ("[I]t would be quite a coincidence if the records relevant to an investigation of possible violations of New York criminal law just so happened to be almost identical to the records thought by congressional Committees to be useful in considering federal legislation.").

The district court's reasons for concluding otherwise are misplaced. Importantly, it did *not* hold that the subpoena is properly tailored accepting the President's allegation that the investigation is about the 2016 payments made by Michael Cohen. As evidenced by the District Attorney's failure to offer any defense of the subpoena on these terms, that conclusion would be untenable. The district court, moreover, accepted "that the grand jury is investigating the 2016 Michael Cohen Payments." Ex. A. at 66. It held, however, that "the SAC does not support a reasonable inference that the grand jury's investigation is *limited* to those payments." *Id.* In its view, the inference "is speculative in light of the obvious alternative explanation that the grand jury's broader requests might simply indicate a broader investigation." *Id.* at 67-68.

The court misunderstood its limited role at the pleadings stage. To be certain, there can be "'alternative explanations *so obvious* that they render plaintiff's inferences unreasonable.'" *Id.* at 27 (quoting *L–7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419, 430 (2d Cir. 2011) (emphasis added)). But that doesn't give a court license to disregard factual allegations because it finds them less likely than alternative scenarios. "As Rule 8 implies, a claim should only be dismissed at the pleading stage where the allegations are so general, and the alternative explanations so compelling, that the claim no longer

appears plausible." *Arar v. Ashcroft*, 585 F.3d 559, 617 (2d Cir. 2009) (en banc). Thus, "on a Rule 12(b)(6) motion it is not the province of the court to dismiss the complaint on the basis of the court's choice among plausible alternatives." *Anderson News, LLC v. Am. Media, Inc.*, 680 F.3d 162, 190 (2d Cir. 2012).

"The question at the pleading stage," in other words, "is not whether there is a plausible alternative to the plaintiff's theory; the question is whether there are sufficient factual allegations to make the complaint's claim plausible." *Id.* at 189. After all, "there may ... be more than one plausible interpretation of a defendant's words, gestures, or conduct. Consequently, although an innocuous interpretation of the defendants' conduct may be plausible, that does not mean that the plaintiff's allegation that that conduct was culpable is not also plausible." *Id.* at 189-90. "[T]he choice between or among plausible interpretations of the evidence will be a task for the factfinder." *Id.* at 190; *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011); *Watson Carpet & Floor Covering, Inc. v. Mohawk Indus., Inc.*, 648 F.3d 452, 458 (6th Cir. 2011).

Yet the district court dismissed the overbreadth claim because it found the SAC's inference "consistent with" its alternative hypothesis. Ex. A. at 68. It found that the SAC failed to plead that the investigation "could *not* include transactions and record filings beyond those related to the 2016 Michael Cohen Payments." *Id.* The grand-jury investigation, in the district court's view, "need not be so limited." *Id.* And the court speculated that "the scope of an investigation may broaden in short order." *Id.* at 69. Put simply, the President was faulted for failing to negate "the readily apparent *possibility*

that this grand jury investigation could be as ranging and exploratory as the many grand jury investigations that courts have approved in the past." *Id.* at 70 (emphasis added).

This error alone makes dismissal of the overbreadth claim unsustainable. "When a court confuses probability and plausibility, it inevitably begins weighing the competing inferences that can be drawn from the complaint. But it is not [the court's] task at the motion-to-dismiss stage to determine 'whether a lawful alternative explanation appear[s] more likely' from the facts of the complaint." *SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412, 425 (4th Cir. 2015). That is what happened here. *E.g.*, *Wilson v. Ark. Dep't of Human Servs.*, 850 F.3d 368, 374 (8th Cir. 2017).

B. The President plausibly alleged the subpoena was issued in bad faith.

As this Court has explained, evidence of "improper purpose [can] overcome the presumption of propriety of the grand jury subpoena." *In re Grand Jury Proceeding*, 961 F.3d 138, 152 (2d Cir. 2020); *Virag*, 54 N.Y.2d at 442-43. Naturally, issuing a grand jury subpoena to engage in "harassment or other prosecutorial abuse" is an improper purpose. *In re Grand Jury Proceedings*, 33 F.3d 1060, 1063 (9th Cir. 1994). But a subpoena also can be deemed "abusive" if it is limitless in scope. *Burns v. Martuscello*, 890 F.3d 77, 92 (2d Cir. 2018). No "law" permits the District Attorney to subject the President to such "abuse." *Vance*, 140 S. Ct. at 2428; *id.* at 2433 & n.1 (Kavanaugh, J., concurring in the judgment).

Here, the District Attorney has admitted to copying the Mazars subpoena from a subpoena drafted by the House Oversight Committee rather than drafting a subpoena

tailored to his own investigation. SAC ¶22. This complete disregard for the tailoring requirement alone states a claim of bad faith. *Burns*, 890 F.3d at 92. Worse, the District Attorney issued the subpoena in response to—and in retaliation for—a dispute over the scope of an earlier subpoena to the Trump Organization. SAC ¶16. When the District Attorney realized he would not be getting the President's tax returns via a subpoena to the Trump Organization itself, he immediately sought them from Mazars and then abusively copied an unrelated subpoena issued by the House Oversight Committee. SAC ¶¶17-20. Retaliation is an improper and harassing purpose, and the subpoena can't be enforced for this reason. *In re Grand Jury Proceeding*, 961 F.3d at 152; *In re Grand Jury Proceedings*, 33 F.3d at 1063.

In any event, the District Attorney's shifting defenses for the copycat subpoena only serves to confirm the absence of a legitimate basis. In the first round of litigation, the District Attorney's story was that "the decision to mirror the earlier subpoena was about efficiency, 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"—that is, he was trying to facilitate "expeditious production of responsive documents." SAC ¶22. But the ban on abusive subpoenas cannot be overcome based on what is easiest for the custodian or most convenient for the prosecutors.

Thus, upon reflection (inspired by the need to coherently defend his choice on remand), the District Attorney decided to abandon rather than defend his efficiency

rationale. In his most recent briefing to the district court, the District Attorney argued that "it makes perfect sense that the subpoenas seek the same information [as the congressional subpoena], as they both relate to public reports about the same potentially improper conduct." Doc. 63 at 3. His shifting justification is, alone, troubling and evidence of pretext. *Carlton v. Mystic Transp., Inc.*, 202 F.3d 129, 137 (2d Cir. 2000); *Weinstock v. Columbia University*, 224 F.3d 33, 58 (2d Cir. 2000). Even worse for the District Attorney, however, his newly minted justification is utterly implausible. In fact, he previously (and wisely) acknowledged that the grand jury's criminal investigation is not 'coextensive with the investigation of the House Committee' and that 'the Mazars Subpoena does not define the scope of the grand jury investigation.'" SAC ¶26. There is no good faith basis for suggesting at the eleventh hour that the information covered by a sweeping federal subpoena is simultaneously tailored to the purposes of different bodies with different interests and different powers.

Here, too, the district court credited alternative explanations over the President's plausible allegations of bad faith. The timing of the subpoena didn't create an inference of bad faith, according to the district court, because "this sequence of events could obviously be explained in ways that do not impugn the presumptive validity of the Mazars Subpoena." Ex. A. at 50. The decision to seek the tax returns from Mazars instead of from the Trump Organization "need not reflect bad faith" either, the district court reasoned. *Id.* at 50-51. In all, the district court admitted that its preferred explanations "might not in fact be the case," but it dismissed the President's complaint

because they might well be. *Id.* at 51. This is a textbook case of a court overriding well-pled allegations because it has decided that alternative explanations make more sense. But the court's ability "to conjure up some non-discriminatory motive to explain the [the District Attorney's] alleged conduct is not a valid basis for dismissal. It is only when a defendant's plausible alternative explanation is so convincing to render the plaintiff's explanation implausible that a court may dismiss a complaint." *Hassan v. N.Y.C.*, 804 F.3d 277, 297 (3d Cir. 2016) (cleaned up).

The court's herculean effort to explain away the District Attorney's decision to copy a congressional subpoena proves the point. The court recognized that it was copied for "efficiency," Ex. A at 60, and the "specific legislative purposes" for which that congressional subpoena was issued "are not within the jurisdiction of a New York grand jury," *id.* at 61. Even still, the court held that it wasn't even *plausibly* in bad faith because copying a subpoena isn't *per se* illegal, *id.* at 58, the District Attorney might have had an unknown basis for copying it, *id.* at 62, and it's possible that the investigations overlap since sometimes federal and state investigations overlap, *id.* at 62-63. This attempt to "impose the sort of 'probability requirement' at the pleading stage which *Iqbal* and *Twombly* explicitly reject" is likely to be reversed. *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 597 (8th Cir. 2009).

III. Alternatively, the President has raised serious questions and the balance of hardships tips decidedly in his favor.

At the very least, the President's claim raises "'sufficiently serious questions going to the merits to make them a fair ground for litigation'" and the "balance of hardships

tip[s] decidedly toward … preliminary relief.'" *Citigroup*, 598 F.3d at 35. *Eastland* is analogous. There, a congressional committee subpoenaed the plaintiff's bank for "records pertaining to or involving the [plaintiff's] account or accounts." 488 F.2d at 1254. The plaintiff sued the bank and several congressional defendants for a declaration that the subpoena was unenforceable and for an injunction prohibiting the defendants from enforcing or complying with it. *Id.* at 1254-56. When the district court denied a TRO, the D.C. Circuit reversed and stayed enforcement. *Id.* at 1256. The "decisive element" favoring a stay, the D.C. Circuit explained, was that "unless a stay is granted this case will be mooted, and there is likelihood, that irreparable harm will be suffered by [plaintiff when the subpoena's due date arrives]." *Id.*

The D.C. Circuit added that the stay was warranted because the dispute raised "serious constitutional questions" that "require more time" and raised issues "of such significance that they require" further "consideration and deliberation." *Id.* When the district court then denied a preliminary injunction on remand, the D.C. Circuit reversed again and entered another stay to preserve the status quo. *Id.* at 1257. The D.C. Circuit reiterated that plaintiff's claims should be considered on final judgment to "ensure" that the case "is determined with the best available perspective, both as to the underlying evidence and the appraisal thereof by the District Judge." *Id.* at 1257.

This Court should follow *Eastland*. Here, too, the President faces "irreparable harm" if he does not receive interim relief. *Id.* at 1256. And here, too, the President raises "serious constitutional questions" that should be resolved following full merits

briefing, oral argument, and this Court's "best available perspective" after thoughtful "consideration and deliberation." *Id.* at 1256-57. Hence, the fact that the President will suffer irreparable harm if the subpoena is not stayed and Mazars reveals his information should be "decisive." *Id.* at 1257.

Also like *Eastland*, the balance of harms in this case tips decidedly in favor of a preliminary injunction. A stay will cause only negligible harm to the District Attorney. A stay will not affect whether the grand jury gets the subpoenaed documents: If the District Attorney wins this case, he will get the documents; and if he loses, he was never entitled to the documents anyway. Accordingly, his only injury is the time delay between receiving the documents now versus receiving the documents later—a non-irreparable injury that is far outweighed by the harm that disclosure would cause the President. *Araneta v. United States*, 478 U.S. 1301, 1304-05 (1986) (Burger, C.J., in chambers) (granting a stay despite the public's "strong interest in moving forward expeditiously with a grand jury investigation" because "the risk of injury to the applicants could well be irreparable and the injury to the Government will likely be no more than the inconvenience of delay").

The District Attorney's "interest in receiving this information immediately" thus "poses no threat of irreparable harm" to him. *John Doe*, 488 U.S. at 1309 (Marshall, J., in chambers)); *EPIC v. DOJ*, 15 F. Supp. 3d 32, 47 (D.D.C. 2014) (explaining that "desire to have [the documents] in an expedited fashion without more is insufficient to constitute irreparable harm"); *Providence Journal*, 595 F.2d at 890; *Judicial Watch, Inc. v.*

U.S. Dep't of Homeland Sec., 514 F. Supp. 2d 7, 11 (D.D.C. 2007); *Fund For Animals v. Norton*, 281 F. Supp. 2d 209, 222 (D.D.C. 2003); *22nd Avenue Station, Inc. v. City of Minneapolis*, 429 F. Supp. 2d 1144, 1152 (D. Minn. 2006). Indeed, having voluntarily delayed enforcement for *nearly a year*, the District Attorney cannot complain about any additional delay from appellate review.

Last, the public interest weighs strongly in favor of preserving the status quo. The District Attorney simply "does not have an interest" in issuing an overbroad and bad-faith subpoena to the President, *Amarin Pharma, Inc. v. FDA*, 119 F. Supp. 3d 196, 237 (S.D.N.Y. 2015), and allowing the District Attorney to evade appellate review is not in the public interest. "Although … the public has an interest in ensuring that the [government] can exercise its authority," "Defendants offer no persuasive argument that there is an immediate public interest in enforcing … [now] rather than after a full hearing." *Cigar Ass'n of Am. v. FDA*, 317 F. Supp. 3d 555, 563 (D.D.C. 2018). In sum, all of the factors governing a plaintiff's entitlement to preliminary relief strongly favor the President. The President made these same points to the Supreme Court in the congressional subpoena cases, and the Supreme Court granted stays in both cases. *See Mazars*, 140 S. Ct. 581; *Deutsche Bank*, 140 S. Ct. 660.

CONCLUSION

For these reasons, the Court should grant the motion for a stay pending appeal. The President respectfully requests that the stay remain in effect until the President's

appeal is resolved, and for one week afterward. The Court should also grant an immediate administrative stay to preserve its ability to consider this motion.

Dated: August 21, 2020

Respectfully submitted,

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ATTACHMENTS

Exhibit	Document	D.Ct. Dkt.
A	District Court Opinion	71