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.

On Appeal from the United States District Court for the Southern District of New York, No. 19-cv-8694 (Marrero, J.)

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

INTRODUCTION

Were there any doubt that the District Attorney is engaged in a fishing expedition designed to harass the President, his brief eliminates it. Faced with the unenviable task of defending the district court's dismissal of the President's overbreadth and bad-faith claims as implausible, the District Attorney resorts to speculation and innuendo in order to create a misimpression that his office has undertaken an investigation broad enough to somehow justify the abusive subpoena it issued to Mazars. But this is all misdirection. The District Attorney nowhere claims that his office is actually investigating any of the discredited, stale, and recycled allegations of wrongdoing that are recounted in the press reports he has compiled. Rather, he argues that his sweeping demand should be upheld as properly tailored and having a good-faith basis because the grand jury hypothetically *could be* investigating these topics.

Perhaps this is a useful public-relations tactic. But it's not a legitimate basis for affirming the judgment below. On a motion to dismiss, well-pleaded factual allegations must be accepted as true. Here, the President has plausibly alleged that the investigation is about the Cohen payments. The salient issue thus is whether, on that understanding, the subpoena is overbroad and issued in bad faith. Not only has the President plausibly alleged that it is, the District Attorney cannot bring himself to argue otherwise. Nor is the District Attorney willing to defend the district court's mischaracterization of the President's claims as a "back door" request for absolute immunity. For these reasons, the decision below cannot be affirmed.

In order to defend the judgment, the District Attorney is thus forced to argue that the Court should disregard the President's allegations and assume that the grand jury's investigation is as broad as he suggests it might be. But that would violate binding precedent. The Court may not credit competing allegations raised by a defendant, draw inferences against the plaintiff, accept one plausible explanation over another, or use extrinsic evidence to resolve factual disputes. Remarkably, the District Attorney asks this Court to violate every one of these rules in mounting a defense of the district court's holding that it would be implausible for the grand jury's investigation to be limited to the Cohen payments. But the allegation is anything but implausible. That matter was the impetus for this investigation, the only subject the District Attorney has publicly admitted is under review, and the only topic of the subpoena issued to the Trump Organization. The District Attorney may contest this well-pleaded factual allegation. But not at the pleadings stage.

Similarly, the District Attorney is entitled to invoke the presumption of validity afforded to grand-jury subpoenas. Just not yet. The presumption imposes an evidentiary burden on the plaintiff—not a pleading burden. Indeed, courts uniformly agree that the Federal Rules do not impose any heightened pleading standards—let alone on a §1983 plaintiff. To hold otherwise would transform the plausibility standard into a probability requirement. Rule 12(b)(6) does not require a claim to be "probable or even reasonably likely." *Elias v. Rolling Stone LLC*, 872 F.3d 97, 105 (2d Cir. 2017). There is no special exemption for challenges to grand-jury subpoenas.

Regardless, the subpoena is plausibly invalid even if the investigation is as broad as the District Attorney claims and the presumption of validity applies at this stage. Try as he might, the District Attorney cannot explain why it is implausible for the President to allege that it raises overbreadth and bad-faith issues sufficient to survive a motion to dismiss when a local prosecutor copies a broad congressional subpoena that purports to be focused on exclusively federal issues. That the subpoena was issued while tensions were running high between the Trump Organization and the District Attorney's Office, and efforts to obtain the President's tax returns had reached a fever pitch, only makes the plausibility of the President's allegations that much more obvious. Moreover, the subpoena's near limitless reach—in time, scope, and geography—has all the hallmarks of a fishing expedition.

Ultimately, this intensely factual dispute should be resolved through the kind of streamlined evidentiary process typically used when subpoenas are challenged. But the District Attorney wants to deny the President that fair chance. So he seeks a heightened pleading standard, urges the Court to disregard the President's allegations, advocates for the one-sided admission of extrinsic evidence, and asks the Court to adopt a factual premise drawn from his self-serving description of the investigation and his motives. Few (if any) plaintiffs could survive that gauntlet. The District Attorney is thus correct that, in this setting, there is no "absolute immunity from any legal process whatsoever." Brief for Appellee ("Vance Br.") at 1. He just overlooks which party is actually seeking immunity at this point.

ARGUMENT

The District Attorney won't defend the district court's decision to stack the deck against the President by conflating the previously-litigated categorical immunity claims with these overbreadth and bad-faith claims. He won't defend the subpoena as properly tailored to a good-faith investigation of the Cohen payments. And he won't dispute that dismissal would deny the President *any* chance to test the legality of the subpoena in an evidentiary proceeding. That string of concessions dooms his already daunting task of defending the judgment below.

Unsurprisingly, then, the District Attorney's position reduces to two arguments designed to override the legal standards that make a Rule 12(b)(6) dismissal improper. First, he argues that the President's factual allegations concerning the scope of the grand jury's investigation should be rejected. And, second, he argues that the presumption of validity requires the President to make a heightened showing at the pleadings stage. But the President's well-pleaded allegations cannot be disregarded because the District Attorney disputes them or believes extrinsic evidence supports his version of events. Similarly, the presumption of validity isn't a license to transform a pleadings standard into an evidentiary burden the President must meet before a record has been developed. The President was required to plausibly allege overbreadth and bad-faith—that's it. The District Attorney cannot muster any persuasive argument as to why the President has failed to do so.

I. The district court's dismissal of the President's claims as implausible is untenable under controlling precedent.

The District Attorney does not respond to—let alone rebut—the key elements of the President's challenge to the district court's ruling. Indeed, he effectively concedes that reversal is warranted if the President's factual allegations as to the scope of the investigation are accepted as true. Hence, the District Attorney (as he must in mounting a defense of the decision below) asks this Court to simply ignore the facts as pleaded in the Second Amended Complaint (SAC). As previously explained, however, doing so would flout controlling precedent. The District Attorney cannot identify any case that would alter that conclusion.

A. The District Attorney does not defend the district court's decision to stack the deck against the President.

The district court wrongly stacked the deck against the President by accusing him of seeking a form of immunity by arguing on remand that the subpoena is overbroad and issued in bad faith. *See* Opening Brief ("Br.") 12-17. The District Attorney offers no defense of the district court on this score. To the contrary, he acknowledges that these are not the "legal theories" litigated in the prior appeal in this case, Vance Br. 12, and the President was entitled on remand to bring these "overbreadth and bad faith" claims "in a federal forum," *id.* at 27. In other words, prevailing on these subpoena-specific claims would not, contra the district court, "'engender a form of presidential immunity by default.'" Br. 14 (quoting JA37). The President's claims on remand should not have been treated as if they would.

The District Attorney's implicit concession is wise. But it is not costless. "Failure to respond to an argument ... results in waiver." *Bonte v. U.S. Bank, N.A.*, 624 F.3d 461, 466 (7th Cir. 2010); *see Procter & Gamble Co. v. Amway Corp.*, 376 F.3d 496, 499 n.1 (5th Cir. 2004) ("Failure adequately to brief an issue on appeal constitutes waiver of that argument."). This settled rule applies to appellants and appellees alike. *See, e.g.*, *Morel v. Am. Bldg. Maint. Co.*, 124 F. App'x 671, 672 (2d Cir. 2005); *Reaves v. Sec'y, Fla. Dep't of Corr.*, 872 F.3d 1137, 1149 n.4 (11th Cir. 2017). "Even appellees," in short, "waive arguments by failing to brief them." *United States v. Ford*, 184 F.3d 566, 578 n.3 (6th Cir. 1999) (citing *Thaddeus–X v. Blatter*, 175 F.3d 378, 403 at n.18 (6th Cir. 1999) (en banc)). That's what happened here.

The judgment should be vacated for this reason alone. The district court's (now conceded) legal error infected its entire approach to resolution of the District Attorney's motion. *See* Br. 16-17. To the district court, after all, dismissal was preordained since the President's overbreadth and bad-faith claims were really just a "roundabout route" to immunity that had already been rejected, JA41, and, as a consequence, there shouldn't even be "any further appellate proceedings," D.Ct. Doc. 75 at 6. Remand to the district court for adjudication of the District Attorney's motion to dismiss under the correct legal standard thus would be appropriate. *See, e.g.*, *Alabama Legis. Black Caucus v. Alabama*, 575 U.S. 254, 258 (2015); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993); *D.D. ex rel. V.D. v. N.Y. City Bd. of Educ.*, 465 F.3d 503, 515 (2d Cir. 2006).

B. The District Attorney acknowledges that dismissal is inappropriate if the President's allegations are accepted as true.

The district court's holding that the President's overbreadth and bad-faith claims are implausible should be reversed. *See* Br. 17-37. The District Attorney (like the district court) will not take the position that the subpoena is properly tailored if the scope of the investigation is limited to the Cohen payments. And for good reason. *See id.* at 18-27. As for bad faith, the District Attorney only says that there is no overlap between overbreadth and whether a subpoena has a good-faith basis. *See* Vance Br. 41-42. But that is incorrect. *See* Br. 30-31 (collecting cases).[1] The notion that the District Attorney could engage in a "fishing expedition[]" of the President's personal records this abusive without crossing the line into "bad faith" is untenable. *Trump v. Vance*, 140 S. Ct. 2412, 2428 (2020) (citations and quotations omitted).

To avoid reversal on this basis, then, the District Attorney is forced to argue that this Court must disregard as implausible the SAC's allegations as to the scope of the investigation. *See* Vance Br. 30-32. As explained, however, the President's allegations are well-pleaded. The Cohen payments were the impetus for the investigation, they were the exclusive focus of the Trump Organization subpoena, and the Mazars subpoena

[1] The District Attorney's attempt to distinguish *Burns v. Martuscello*, 890 F.3d 77 (2d Cir. 2018), is misplaced. *See* Vance Br. 42 n.14. He is correct that this wasn't a subpoena case and that the Court was analogizing to the "the longstanding rule that 'the public has a right to every man's evidence.'" *Burns*, 890 F.3d at 92 (quoting *United States v. Nixon*, 418 U.S. 683, 709 (1974)). But what matters is that, in drawing that analogy, the Court agreed with the President that a subpoena can be so "overbroad" as to be "abusive of an individual's rights and privileges." *Id.*

was issued only after the District Attorney's demand for the tax returns was rebuffed. *See* Br. 21-22. "Shortly after service of the Trump Organization Subpoena," as the District Attorney now acknowledges, "the Office conveyed to counsel for the Trump Organization its belief that tax returns could be responsive to the Trump Organization Subpoena *to the extent that they related to the Cohen payments*" and subpoenaed Mazars for those and other records only after the Trump Organization declined to produce them. Vance Br. 7 (emphasis added). These allegations, collectively, make it plausible that the grand jury's investigation is about the Cohen payments.

The District Attorney barely argues otherwise—devoting less than two pages to this important issue. He begins by challenging the "theory that the Trump Organization Subpoena alone defines the scope of the grand jury's investigation." *Id.* at 30. But that isn't the President's theory. The SAC alleges that the nature and focus of the Trump Organization subpoena, and the issuance of the Mazars subpoena on the heels of the dispute over it, is factual support for the allegation that the investigation is about the Cohen payments. There is nothing "illogical" about alleging this relationship between the two subpoenas. Vance Br. 30.

It is true, as the District Attorney argues, that grand jury investigations sometimes broaden. *See id.* But that does not make implausible the President's allegation that this particular grand jury investigation did *not* broaden. Whether the investigation broadened is a classic fact dispute—not a pleadings issue. To hold otherwise would replace the plausibility standard with a probability requirement and would require this Court to

draw factual inferences against the President. That would contradict binding precedent. *See* Br. 24-27. When this case proceeds beyond the pleadings stage, the District Attorney may argue that the subpoena isn't overbroad because the "grand jury's investigation" was always broader than the President alleges or is no longer as "limited" as it was "when the Mazars Subpoena was issued in August 2019." Vance Br. 30-31 n.9. Until then, the SAC's well-pleaded allegations concerning the scope of the investigation must be accepted as true.

The District Attorney also criticizes the SAC's depiction of one press report as indicating that "the grand jury's investigation is as limited as Appellant claims." *Id.* at 32. In his view, the allegation should be disregarded because the SAC doesn't include a citation to the media report referenced in the complaint and because other portions of that article contradict this characterization of it. *See id.* at 31-32. The Court should reject these arguments.

The District Attorney incorrectly contends (at 33 n.10) that the portions of the article omitted from the SAC can be incorporated by reference or otherwise introduced at the pleadings stage. *See* Br. 10-11. He does not (and could not) develop any argument as to why this material is "'integral' to the complaint." *Goel v. Bunge, Ltd.*, 820 F.3d 554, 559 (2d Cir. 2016). The allegation as to the scope of the investigation doesn't hinge on press reports. Even ignoring ¶12 of the SAC, the allegation easily satisfies the plausibility requirement for the reasons set forth above. The District Attorney's reliance on this extrinsic evidence thus is improper. *See infra* 10-13.

More importantly, these quotations from the article don't undermine the SAC's allegation as to scope—they support it. The article reports that the investigation is about "whether the reimbursements Cohen made violated any New York state laws" and that it is "unclear if the Office had expanded its investigation beyond actions taken during the 2016 campaign." Vance Br. 32 (cleaned up). The fact that it's "unclear" whether the grand jury's investigation has since expanded beyond the Cohen payments *confirms* the plausibility of the SAC's allegation that, in fact, the grand jury's investigation has not expanded.

The District Attorney's argument is so perfunctory because he understands that "every allegation" in the SAC must be taken "as true." *Id.* at 1. What he really wants this Court to do, but cannot bring himself to argue forthrightly, is deploy competing facts from outside the "four corners" of the SAC to override the President's allegations as to the scope of the investigation—and then shoehorn that enterprise into the plausibility inquiry. *Id.* That's why the District Attorney uses the factual background of his brief to introduce extrinsic evidence, *see* Vance Br. 3-5, and then, based on that evidence, asks this Court to simply accept *as a fact* that the investigation "concerns a variety of business transactions," *id.* at 3, and that this subpoena, specifically, seeks "information about the many public allegations to date about possible financial improprieties in New York County by the Trump Organization and its employees and affiliates," *id.* at 8-9. The District Attorney's argument, at bottom, is that the "'public reports'" to which he points

"provide a substantial factual basis to infer a much broader investigation" than the Cohen payments. *Id.* at 16. This is wholly improper.

First, there's no basis for introducing this extrinsic evidence at the pleading stage. *See* Br. 12, 25-26. Because the District Attorney relegates his response to a footnote, *see* Vance Br. 33 n.10, the argument is forfeited. *See City of N.Y. v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 137 (2d Cir. 2011). It is also meritless. The notion that the SAC's reference to "published reports"—one of which is expressly referenced in the complaint—allows the District Attorney to introduce any article in the world that references the President and alleged wrongdoing is self-refuting. Not one of these articles—none of which discuss this investigation—is "integral" to the SAC. *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 44 (2d Cir. 1991).

Nor would these reports be integral even if they were about this investigation. *See* Br. 11-12. "In most instances where this exception is recognized, the incorporated material is a contract or other legal document containing obligations upon which the plaintiff's complaint stands or falls, but which for some reason—usually because the document, read in its entirety, would undermine the legitimacy of the plaintiff's claim—was not attached to the complaint." *Goel*, 820 F.3d at 559 (citation and quotations omitted). "A complaint that alleges facts related to or gathered during a separate litigation," this Court noted, "does not open the door to consideration, on a motion to dismiss, of *any and all* documents filed in connection with that litigation." *Id.* at 560 (emphasis added). So too here. The SAC's discussion of one article doesn't open the

door to reliance on any and all reports about this investigation that the District Attorney would like to introduce.

The District Attorney is also wrong that these press reports are subject to judicial notice. *See* Vance Br. 33 n.10. Judicial notice may be permissible to show "that certain things were said in the press"—but those reports cannot be "offered for the truth of the matter asserted." *Staehr v. Harford Fin. Servs. Grp., Inc.*, 547 F.3d 406, 425 (2d Cir. 2008). "It must also be clear that there exist no material disputed issues of fact regarding the relevance of the document." *Faulkner v. Beer*, 463 F.3d 130, 134 (2d Cir. 2006). The District Attorney's reliance on these press reports violates both rules. There is a serious dispute as to their relevance. *See infra* at 13. And the District Attorney is clearly asking this Court to use this "external material ... to make a finding of fact that *controvert[s]* the plaintiff's own factual assertions set out in its complaint." *Glob. Network Commc'ns, Inc. v. City of N.Y.*, 458 F.3d 150, 156 (2d Cir. 2006); *e.g.*, *O'Keefe v. Ogilvy & Mather Worldwide, Inc.*, 2006 WL 3771013, at *2 (S.D.N.Y. 2006).

Second, the District Attorney is using the press reports to override the SAC's allegations and draw a factual inference *against* the President. It's not the existence of these press reports that renders the SAC's allegations as to the scope of the investigation implausible. Rather, according to the District Attorney, these articles prove why those allegations are incorrect. He is asking this Court to accept as a factual matter, in other words, that the investigation must be broader than the Cohen payments because he "would have been remiss not to follow up" on these press reports alleging wrongdoing.

Vance Br. 6 (citation and quotations omitted). But that's not how Rule 12(b)(6) works. *See* Br. 24-27.

Third, and last, the argument fails on its own terms. At most, these articles show what the scope of the investigation could be. But this is not an appeal about theoretical possibilities; the investigation's actual scope is what matters. The District Attorney thus would have this Court hold that *this* grand jury is not only investigating the Cohen payments—*i.e.*, the reason why it was convened—but also every reported allegation about the President and his businesses ever published, no matter how baseless, how old, or how far beyond the District Attorney's compass. The idea that it is "so obvious" that the investigation expanded this dramatically based on irrelevant press reports that it renders all other possibilities implausible, *L–7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419, 430 (2d Cir. 2011), should be troubling not just to the President but to "every other citizen" of New York as well, *Vance*, 140 S. Ct. at 2430.

Of course, the inference the District Attorney wants drawn is not so obvious that it defeats the SAC's well-pleaded allegations. Indeed, his argument faulters even if the District Attorney has the better view. "Ferreting out the most likely reason for the defendants' actions is not appropriate at the pleadings stage." *Watson Carpet & Floor Covering, Inc. v. Mohawk Indus., Inc.*, 648 F.3d 452, 458 (6th Cir. 2011). The allegation as to the scope of this investigation easily clears the low bar of plausibility. *See, e.g.*, *Cohen v. S.A.C. Trading Corp.*, 711 F.3d 353, 360 (2d Cir. 2013).

II. The presumption of validity is not a legitimate basis for dismissal of the President's claims at the pleadings stage.

The District Attorney relies heavily on the presumption of validity afforded to grand jury subpoenas to defend the district court's decision. *See* Vance Br. 19-25. But the presumption is an *evidentiary* burden that does not alter Rule 8 pleading standards. Br. 37-39. That is necessarily true because courts have categorically rejected attempts to impose heightened pleading standards for *any* reason unless mandated by statute. *See id.* at 37 (citing *Randall v. Scott*, 610 F.3d 701, 710 (11th Cir. 2010)); *see also Educadores Puertorriquenos en Accion v. Hernandez*, 367 F.3d 61, 66-67 (1st Cir. 2004) ("We join several of our sister circuits in holding that there are no heightened pleading standards for civil rights cases…. Let us be perfectly clear. The rule that we announce today is not contingent on the type of civil rights case, the capacity in which a particular defendant is sued, the availability vel non of a qualified immunity defense, or the need (or lack of need) for proof of illegal motive. All civil rights actions are subject to Rule 8(a)'s notice pleading regime."); *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 119-20 (2d Cir. 2010) (similarly rejecting heightened pleading standards).

Requiring plaintiffs to *overcome* presumptions or defenses in their complaints would have the effect of imposing a heightened pleading standard, and it is therefore prohibited. *See, e.g.*, *Chamberlain v. City of White Plains*, 960 F.3d 100, 111 & n.18 (2d Cir. 2020). After all, a plaintiff is "not required to 'demonstrate' or 'establish'" anything at the pleading stage; "he [is] required only to *plead* a claim upon which relief could be

granted." *Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 84 & n.8 (2d Cir. 2015). Pleadings require claims to be plausible and nothing more. Br. 10-11, 39.

Furthermore, numerous courts have explicitly and specifically applied this rule when prosecutorial presumptions are invoked in civil proceedings. *See* Br. 38-39 (citing *Galbraith v. Cnty of Santa Clara*, 307 F.3d 1119, 1126 (9th Cir. 2002) and *Evans v. Chalmers*, 703 F.3d 636, 657 & n.16 (4th Cir. 2012)); *see also Cooley v. City of Walnut Creek*, 2018 WL 6330020, *6 & n.11 (N.D. Cal. Dec. 4, 2018) (explaining that *Galbraith*'s statement that the presumption "is to be applied at the summary judgment stage, and not the pleading stage" is consistent with the most current decisions from the Supreme Court); *Milton v. Bruno*, 2016 WL 7177603, *3 (D.N.J. Dec. 9, 2016) (because a court "cannot reasonably" expect a plaintiff to bring forth the evidence required to overcome a presumption of probable cause "[a]t the pleadings stage," the "absence of specific factual allegations concerning exactly how the indictment was allegedly 'procured by fraud, perjury and/or other corrupt means' is not fatal at [the pleading] stage of [the plaintiff's] case"); *Davis-Guider v. City of Troy*, 2019 WL 1101278, at *3-4 (N.D.N.Y. Mar. 8, 2019) (citing *Galbraith* as "an analogous case" and denying 12(b)(6) motion based on grand jury presumption).

Notably, in denying a 12(b)(6) motion to dismiss, the court in *Milton v. Bruno*, went on to note that the question whether a plaintiff can overcome a presumption (there, of probable cause, though the statement applies equally to a subpoena's validity) is "generally" a "factual issue," and therefore often difficult to resolve even at summary judgment. 2016 WL 7177603, *4 & n.6. "It follows that if caution is called for at the

summary judgment stage in determining such issues, an even greater quantum of caution is appropriate under [Rule] 12(b)(6)." *Id.* Such caution is especially warranted before dismissing the President's case. *See Vance*, 140 S. Ct. at 2428; *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 381-82 (2004); Br. 37-38.

None of the cases that the District Attorney cites (at 20-25) are to the contrary. Indeed, he spends two pages (at 20-21) discussing *Melville v. Morgenthau*, 307 F. Supp. 738, 739-41 (S.D.N.Y. 1969), a case that is inapposite on this point, given that it was addressing a motion for preliminary injunction—*not* the sufficiency of a complaint. *See New Hope Family Servs., Inc. v. Poole*, 966 F.3d 145, 165 (2d Cir. 2020) (explaining that having to "demonstrate a reasonable likelihood of success" on the merits is "a heavier burden than [a party] bears in pleading the plausible claim necessary to avoid dismissal"). Thus, the District Attorney is correct that the district court's approach here was "just like" the approach taken in *Melville*. Vance Br. at 22. That's why the district court committed reversible error. The district court was not called on to decide a preliminary-injunction motion (that is, to determine whether the President is likely to succeed); it was asked to rule on the sufficiency of the complaint (whether the President could plausibly succeed). *See* Br. 16-18.

Similarly, cases that note the existence of the presumption yet ground their holdings in the lack of *any* plausible factual allegations to support a claim (or necessary element of a claim) fail to undermine the consensus that evidentiary presumptions don't apply at the pleading stage. Yet those are the only kinds of cases the District Attorney

relies on. *See, e.g.*, *D'Alessandro v. City of N.Y.*, 713 F. App'x 1, 7 (2d Cir. 2017); *Ostrer v. Aronwald*, 567 F.2d 51, 553 (2d Cir. 1977); *see* Vance Br. 24-25 (collecting cases). They stand only for the proposition that a plaintiff must allege facts sufficient to support a plausible inference as to each element of his claim. Br. 39. In short, no case upon which the District Attorney relies actually applied a prosecutorial presumption to require a heightened showing at the pleadings stage, and no case held that a court would be justified in doing so.

This Court has declined to accept similar references to background principles and recitations of the prohibition against conclusory allegations as somehow altering the pleading standard required to survive a motion to dismiss. *See, e.g.*, *Phelps v. Kapnolas*, 308 F.3d 180, 186-87 & n.6 (2d Cir. 2002). In reversing the dismissal of a complaint alleging an Eighth Amendment violation, for example, this Court explained that a district court "may not go beyond [Rule] 8(a)(2) to require the plaintiff to supplement his pleadings …. Whether the plaintiff can produce evidence to create a genuine issue with regard to his allegations *is to be resolved through a motion for summary judgment*." *Id.* at 186-87 (emphasis added). The Court was not persuaded by cases that the defendants claimed to have "created just this sort of heightened pleading standard." *Id.* at 186-87 n.6. The Court found that all of the cited cases were consistent with normal rules against "conclusory" allegations or had been "overruled." *Id.* So too here.

III. The President's claims are plausible under any applicable standard.

The District Attorney badly wants the Court to accept his version of the facts and to apply an evidentiary standard at the pleading stage—an effort that is as misguided as it is telling. In the end, however, the effort is also futile. Even if this Court were to accept that the grand jury were investigating the kind of amorphous, "broad[]" and "complex" investigation to which the District Attorney alludes (at 16, 36), and even if this Court imposed a presumption of validity, the SAC still states plausible claims of overbreadth and bad faith. The President has made detailed factual allegations that create a plausible inference that he will be able to rebut any presumption that the Mazars subpoena was properly tailored or issued in good faith if the case proceeds beyond the pleadings stage.[2]

With respect to overbreadth, the subpoena *itself* is evidence that it is not properly tailored. The subpoena is topically unlimited, geographically sprawling, and temporally expansive—all characteristics that raise suspicions of an unlawful "fishing expedition" without regard to the subject of the investigation. Br. 27. While raising such issues in the SAC, as the President did, JA22-23 ¶¶31-35, would have been sufficient to support a plausible claim of overbreadth, the President offered several additional—specific and undisputed—allegations to support his claim.

[2] The District Attorney continues to argue that the President's overbreadth and bad-faith claims sound exclusively in state law. *See* Vance Br. 12. That is incorrect. *See* Br. 13-14.

First, he included specific allegations comparing the geographic reach of the subpoena to the limited reach of the District Attorney's criminal jurisdiction. JA21-23 ¶¶27-32. While simply investigating beyond his jurisdictional borders may not raise an inference that the subpoena is overbroad, a blanket request covering the entire globe does. *See* Br. 27-28, 30. Contrary to the District Attorney's assertion (at 36-38), that is true even for complex financial investigations, Br. 27-28 (collecting cases), and even if a particular business is incorporated in the state, *see Myerson v. Lentini Bros. Moving and Storage Co.*, 33 N.Y.2d 250, 260 (N.Y. 1973) (mere incorporation in New York does not authorize subpoenas of the "broadest possible dimensions").[3]

Second, the President raised the fact that the District Attorney copied another subpoena related to a different investigation without any material alterations. Br. 28-29. Neither the District Attorney nor the district court can point to any case in which a subpoena is copied directly from a subpoena related to an investigation with a different purpose. This unprecedented departure from usual process tends to show that the Mazars subpoena is not properly tailored to the grand jury's investigation.

[3] The District Attorney claims (at 34) that the Mazars subpoena is "principally" limited to "tax returns and financial statements, as well as the underlying preparatory records necessary to understand those primary documents." That sounds benign except that description omits what that alone entails and that the subpoena is not so limited. *See* Br. 4-5, 27, 30. Indeed, while the District Attorney asserts (at 35) that the Mazars subpoena "plainly does not … ask for every [document] Mazars has that is in any way related to the President or his businesses in any part of the world," there is not a single substantive document that escapes the "imaginative concept" of the demand for a period covering nearly a decade. *See In re Harry Alexander, Inc.*, 8 F.R.D. 559, 560 (S.D.N.Y. 1949).

Third, and relatedly, that conclusion is bolstered by the additional fact that the original drafter of the subpoena—the Oversight Committee—has completely different powers than the District Attorney and has offered at least seven reasons (related to, *inter alia*, the Emoluments Clauses, federal legislation, federal government contracting, and international relations) for issuing the subpoena, none of which the District Attorney has the authority to pursue. Br. 3, 22-23. For that reason alone, it is plausible on its face to conclude that the subpoena reaches categories of documents beyond the scope of the District Attorney's concededly different investigation. This isn't to say that Congress and the District Attorney might possibly be interested in some overlapping documents or topics—but *all* of the exact same *thousands* of documents touching all parts of the world? The President need not show that the District Attorney's proffered inference (at 31) is implausible to survive a motion to dismiss, *see, e.g.*, *N.J. Carpenters Health Fund v. Royal Bank of Scotland Grp., PLC*, 709 F.3d 109, 121 (2d Cir. 2013), but in this instance, the inference happens to be. Br. 29.

All of these allegations, collectively, *see Evans*, 703 F.3d at 657 n.16, support a plausible inference that the President could successfully overcome a presumption that the subpoena is properly tailored.

The same holds true for the President's bad-faith claim. The District Attorney incorrectly argues that a claim of bad faith "presupposes that there could be no valid reason" for a prosecutor's conduct. Vance Br. at 40. Again, even assuming that a presumption of validity applies at the pleading stage, the allegations in a complaint still

only need to be sufficient to support a plausible inference that the plaintiff could rebut a presumption of good faith. The allegations in the SAC do just that.

A good faith subpoena is, among other things, issued without a retaliatory motive, *Vance*, 140 S. Ct. 2428, after "*a reasonable effort* to request only those documents that are relevant and non-privileged, consistent with the extent of its knowledge about the matter under investigation," *In re Grand Jury Subpoena, JK-15-029*, 828 F.3d 1083, 1088 (9th Cir. 2016) (emphasis added). The District Attorney (at 41-42) is thus wrong to argue that failing to make a reasonable effort to tailor a subpoena to an investigation "goes to overbreadth, not bad faith." Certainly, a prosecutor's failure to tailor a subpoena could (and here, does) support an overbreadth claim. But the tailoring inquiry focuses on a subpoena's substantive demands. A lack of "reasonable *effort*," on the other hand, provides the underlying *reason* for the massive overbreadth. There isn't a good-faith justification for the District Attorney's failure to make a reasonable effort to comply with his prosecutorial obligations.

Here, the President plausibly alleged that the District Attorney made no effort to tailor the subpoena to the grand jury's investigation because, rather than drafting a subpoena specific to his investigation, he copied directly a subpoena from the House Oversight Committee. Br. 31. Initially, the District Attorney claimed to have done this for efficiency reasons. *Id.* Now, the District Attorney rejects that characterization of his motive (notwithstanding the many times he offered this rationale) and instead professes that "the congressional subpoena mirrored the scope of what the Office needed from

Mazars" all along. Vance Br. 42. But at least one Justice rightly viewed that explanation with skepticism. *See Vance*, 140 S. Ct. at 2449 (Alito, J., dissenting). Whether the District Attorney's explanation has shifted, or has always been rooted in the contention that his investigation has the same scope of one being conducted by a congressional committee, this is more than enough to plausibly rebut a presumption that the subpoena was copied in good faith. *See* Br. 33-34.

Last, the President plausibly alleged that the District Attorney issued the Mazars subpoena in retaliation to a dispute over the scope of an earlier subpoena to the Trump Organization. Br. at 32. The District Attorney claims that the SAC lacks facts to support an inference that the District Attorney's Office "felt wronged." As an initial matter, the already forgiving plausibility standard is even more relaxed when it comes to questions of motive. *See LBBW Luxemburg S.A. v. Wells Fargo Secs. LLC*, 10 F. Supp. 3d 504, 517 (S.D.N.Y. 2014). Regardless, the circumstances surrounding issuance of the Mazars subpoena tend to support an inference of retaliation. There was a dispute over the scope of the Trump Organization subpoena; the District Attorney abruptly changed course and subpoenaed the disputed documents from a third party; but instead of confining the demand to those records, he copied a sweeping congressional subpoena. These facts support an inference of retaliation that plausibly rebuts the presumption that the Mazars subpoena was issued in good faith. *See* Br. 30-37.

IV. The President should not be denied the chance to test the legality of the subpoena in an evidentiary proceeding.

The Court should be as perplexed as the President is as to why time and resources are being wasted on this appeal. *See* Br. 40-43. On remand, the parties filed a joint status report charting a path forward that the district court endorsed. The District Attorney reserved the right to seek dismissal as a matter of law, but the parties also agreed on expedited merits resolution should an answer prove to be the more sensible response to the forthcoming amended complaint. *See* D.Ct. Doc. 52 at 9. Why he didn't answer and clear the way for timely resolution of this dispute is difficult to understand. Whether this subpoena is overbroad or issued in bad faith is intensely factual. It would have been far more practical for the parties to engage in limited discovery and then have the issue definitively resolved.

At this point what matters, however, are the ramifications of that choice for the President. The District Attorney is advocating for a heightened pleading standard under which the President must essentially prove his ultimate entitlement to relief without any notice as to "the general subject matter of the grand jury's investigation"—let alone having been afforded the chance to develop a record. *United States v. R. Enters., Inc.*, 498 U.S. 292, 301 (1991). To his credit, the District Attorney doesn't deny any of this. He advocates for the SAC to be dismissed *because* the President "cannot know" at this early juncture exactly "what predicate supports the grand jury's investigation." Vance Br. 32. It is thus the District Attorney who actually seeks "absolute immunity from any legal process whatsoever." *Id.* at 1.

The District Attorney's apparent trepidation at having to defend this subpoena on the merits is not a basis for denying the President a fair chance to test its legality. The Supreme Court remanded this case to the district court so the President could raise fact-specific challenges to the Mazars subpoena. But he wasn't given that opportunity. At the District Attorney's urging, the district court instead stacked the deck against the President, turned the plausibility standard into a probability requirement, drew factual inferences against the non-movant, and deemed the SAC's allegations implausible based on speculation and extrinsic evidence. The case should be remanded for resolution of the President's plausible claims through the kind evidentiary process the Federal Rules and governing precedent require.

CONCLUSION

This Court should reverse the dismissal of the SAC and remand to the district court for further proceedings.

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Respectfully submitted,

s/ William S. Consovoy

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CERTIFICATE OF COMPLIANCE

This brief complies with Rule 32(a)(7)(B) and Local Rule 32.1(a)(4) because it contains 6,454 words, excluding the parts that can be excluded. This brief also complies with Rule 32(a)(5)-(6) because it is prepared in a proportionally spaced face using Microsoft Word 2016 in 14-point Garamond font.

Dated: September 24, 2020

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CERTIFICATE OF SERVICE

I filed a true and correct copy of this brief with the Court via CM/ECF, which will electronically notify all counsel requiring notice.

Dated: September 24, 2020

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