No. 20A63

IN THE SUPREME COURT OF THE UNITED STATES

DONALD J. TRUMP,

Applicant,

v.

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

Respondents.

On Emergency Application For A Stay Pending Disposition
Of A Petition For A Writ Of Certiorari

OPPOSITION TO EMERGENCY APPLICATION FOR STAY

Caitlin Halligan
Ryan W. Allison
David A. Coon
SELENDY & GAY PLLC
1290 Sixth Avenue
New York, New York 10104
(212) 390-9000

Walter E. Dellinger III
DUKE UNIVERSITY LAW SCHOOL
Science Drive & Towerview Road
Durham, North Carolina
(919) 613-8535

Michael R. Dreeben
GEORGETOWN UNIVERSITY LAW CENTER
600 New Jersey Avenue NW
Washington, D.C. 20001
(202) 661-6609

Carey R. Dunne
Counsel of Record
Christopher Conroy
Julieta V. Lozano
Solomon B. Shinerock
James H. Graham
Allen J. Vickey
Sarah A. Walsh
NEW YORK COUNTY DISTRICT ATTORNEY'S OFFICE
One Hogan Place
New York, New York 10013
(212) 335-9000
dunnec@dany.nyc.gov

Counsel for Respondent Cyrus R. Vance, Jr.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Constitutional Provisions

Rules

Other Authorities

Respondent Cyrus R. Vance, Jr., in his official capacity as District Attorney for the County of New York, respectfully files this memorandum in opposition to the emergency application for a stay of the district court's order and judgment pending the filing and disposition of a petition for a writ of certiorari. The application presents a fact-specific challenge to the dismissal of an amended complaint for failure to state a claim that a grand jury subpoena was overbroad or issued in bad faith. Both courts below meticulously reviewed the complaint's allegations under settled legal standards and found that it did not state a plausible claim for relief. The application presents no issue warranting this Court's review and provides no basis for further delay in the enforcement of the grand jury subpoena, issued more than one year ago. The application should be denied.

INTRODUCTION

This case arises from a grand jury subpoena *duces tecum* issued to the President's accounting firm, Mazars USA, LLP (the "Mazars Subpoena"), seeking certain financial records relating to his businesses. In *Trump v. Vance*, 140 S. Ct. 2412 (2020), this Court rejected the President's broad constitutional claims of immunity from that subpoena, holding "that [a] President is neither absolutely immune from state criminal subpoenas seeking his private papers nor entitled to a heightened standard of need." *Id.* at 2431. Instead, the Court explained, a President may assert the "same protections" against grand jury subpoenas as "every other citizen," as well as two types of subpoena-specific claims grounded in Article II. *Id.* at 2430.

On remand, Applicant raised two state law claims challenging the Mazars Subpoena; neither involves claims uniquely grounded in Article II. Appendix to Emergency Application for a Stay ("Appx.") 127-28. The first argues that the Mazars Subpoena is overbroad; the second argues that the New York County District Attorney's Office ("the Office") issued the subpoena in bad faith. In a lengthy decision, the district court granted the Office's motion to dismiss Applicant's claims. Appx. 1-103. After careful review, the Second Circuit unanimously affirmed.

Appx. 115-49. Applicant has therefore received the "meticulous" review that is required when a subpoena is directed to the records of a sitting President. *Vance*, 140 S. Ct. at 2430 (internal quotation marks omitted).

Applicant's request for relief satisfies none of the stay factors. This Court is not likely to grant certiorari to review his fact-specific claims. And it is not likely to reverse, because the Second Circuit's decision is correct. Applicant has failed to allege facts that state a claim for relief on either of his theories. His overbreadth claim does not plausibly allege that the Mazars Subpoena's requests are unrelated to the investigation's scope. And his bad-faith claim fails to plausibly allege that the Office had an illicit purpose when issuing the Mazars Subpoena.

Applicant also fails to show either a likelihood of irreparable harm or that the balance of equities weighs in his favor. His purported confidentiality interests—to the extent they exist—will be protected by grand-jury secrecy rules. And any such interests pale in comparison to the "public interest in … comprehensive access to evidence," *Vance*, 140 S. Ct. at 2430, which will be served through finally enforcing the Mazars Subpoena.

Against all this, Applicant seeks exclusively error correction, arguing that the Second Circuit misapplied settled standards governing Federal Rule of Civil Procedure 12(b)(6) motions. But this Court does not grant certiorari to review lower courts' application of pleading rules to specific complaints. And Applicant's status as President does not warrant a departure from this Court's normal criteria for review. Applicant is asserting only ordinary, state-law subpoena challenges, not constitutional claims tied to his office. In any event, the Second Circuit correctly applied this Court's Rule 12(b)(6) precedents by accepting all facts alleged as true, but then deeming certain inferences from those facts implausible in light of judicial experience, common sense, and obvious alternative explanations.

Applicant has had multiple opportunities for review of his constitutional and state law claims, and at this juncture he provides no grounds for further delay. His request for extraordinary relief should be denied, and the grand jury permitted to do its work.

STATEMENT

A. The Grand Jury's Investigation

This case stems from a grand jury investigation commenced in 2018. Appx. 152, ¶ 11. Although the materials and evidence the grand jury has received are protected by secrecy rules, the Office has confirmed that the investigation involves "business transactions involving multiple individuals whose conduct may have violated state law." Appx. 152, ¶ 11 (quoting *Vance*, 140 S. Ct. at 2420). On August 1, 2019, as part of that investigation, the Office served a grand jury subpoena *duces tecum* on the Trump Organization (the "Trump Organization Subpoena"). Appx. 152, ¶ 13. The Trump Organization Subpoena sought records and communications from 2015 through 2018 relating to: (i) the Trump Organization's employment of Michael Cohen, Applicant's former lawyer; and (ii) the "hush-money" payments Cohen made to two women claiming to have had extramarital affairs with Applicant. Appx. 152-53, ¶ 13. The Trump Organization produced certain documents in response to this subpoena. Appx. 153, ¶ 15. When the Office expressed its view that Applicant's tax returns should be produced to the extent they were responsive to the Trump Organization Subpoena, the Trump Organization disagreed. Appx. 153, ¶ 16.

On August 29, 2019, the Office served Mazars with the Mazars Subpoena, which seeks two primary categories of documents relating to Applicant, the Trump Organization, and related entities: (i) tax returns since 2011 and (ii) financial statements since 2011. Appx. 154, ¶¶ 17-18. It also seeks three categories of supporting documents necessary to understand the primary documents: (iii) engagement agreements defining the accountants' role with respect to the tax returns and financial statements; (iv) source documents providing the accountants with raw

financial data; and (v) records and communications showing how the raw data was analyzed. Appx. 154, ¶ 18.

B. The President's Constitutional Challenge To The Mazars Subpoena And Its Rejection By This Court

On September 19, 2019, Applicant sued the Office and Mazars in federal district court, seeking to enjoin enforcement of the Mazars Subpoena. ECF 1.[1] He argued that Article II and the Supremacy Clause provide a sitting President with absolute immunity from state criminal process. *Id.* ¶ 58. The district court rejected that argument, *Trump v. Vance*, 395 F. Supp. 3d 283 (S.D.N.Y. 2019), and the Second Circuit affirmed in relevant part, *Trump v. Vance*, 941 F.3d 631 (2d Cir. 2019).

On July 9, 2020, this Court likewise affirmed. *Vance*, 140 S. Ct. 2412. All nine Justices agreed that a sitting President is not absolutely immune from state criminal process. *Id.* at 2429; *id.* at 2431 (Kavanaugh, J., concurring in the judgment); *id.* at 2434-36 (Thomas, J., dissenting); *id.* at 2448 (Alito, J., dissenting). The Court also held that "a state grand jury subpoena seeking a President's private papers" does not have to "satisfy a heightened need standard." *Id.* at 2429 (majority opinion); *accord id.* at 2436, 2439 n.3 (Thomas, J., dissenting). In so holding, the Court "reaffirm[ed] th[e] principle" that "no citizen, not even the President, is categorically above the common duty to produce evidence when called upon in a criminal proceeding." *Id.* at 2431. And it stressed the grand jury's critical need "to acquire 'all information that might possibly bear on its investigation.'" *Id.* at 2430 (quoting *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 297 (1991)).

[1] "ECF" citations refer to the district court's docket in *Trump v. Vance*, No. 1:19-cv-08694 (S.D.N.Y. 2019).

The Court then set forth the limited grounds that a sitting President has to challenge a grand jury subpoena. The Court explained that "a President may avail himself of the same protections available to every other citizen," including "the right to challenge the subpoena on any grounds permitted by state law, which usually include bad faith and undue burden or breadth." *Id.* at 2430. In addition, the Court continued, a President may assert certain protections that are available to him because of his office: a President "can challenge [a] subpoena as an attempt to influence the performance of his official duties," or "argue that compliance with a particular subpoena would impede his constitutional duties." *Id.* The Court remanded the case to the district court to allow Applicant to raise subpoena-specific arguments "as appropriate." *Id.* at 2431.

C. The President's Second Amended Complaint On Remand

1. On July 27, 2020, Applicant filed the Second Amended Complaint ("SAC"), which "in substantial part merely reiterates factual allegations made in the President's prior complaint." Appx. 9. The SAC asserts subpoena defenses that are "available to every other citizen"—(i) "undue … breadth" and (ii) "bad faith." *Vance*, 140 S. Ct. at 2430; *accord* Appx. 128 ("the President has raised only the ordinary challenges applicable to any grand jury subpoena"). It makes neither of the Article II specific claims that this Court had identified. *See Vance*, 140 S. Ct. at 2430.

First, the SAC asserts that the Mazars Subpoena is overbroad because it "seeks voluminous documents" that purportedly "have no relation to the grand jury's investigation." Appx. 164, ¶ 54. The SAC bases that claim on an assertion that the "the focus of the District Attorney's investigation" is the 2016 Cohen hush-money payments. Appx. 152, ¶ 12. The SAC further alleges that the Mazars Subpoena "exceed[s] the District Attorney's jurisdiction under New York law" and "covers a timeframe far exceeding that of the grand jury's investigation." Appx. 164, ¶¶ 54-55.

Second, the SAC asserts that the Office issued the Mazars Subpoena in bad faith "[i]n response to a dispute over whether the President's tax returns were encompassed by" the Trump Organization Subpoena. Appx. 164, ¶ 59. That alleged "dispute" supposedly prompted the Office to "photocop[y] a congressional subpoena for political reasons, for efficiency reasons, or for both." Appx. 164, ¶ 61.

2. On August 20, 2020, the district court granted the Office's motion to dismiss the SAC under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. The court explained its reasoning in an extensive and detailed analysis of the SAC's allegations.

As to overbreadth, the court held that even "accep[ting] that the grand jury is investigating the 2016 Michael Cohen Payments," the "SAC does not support a reasonable inference that the grand jury's investigation is *limited* to those payments." Appx. 66. The court also declined to infer that the Mazars Subpoena is unduly broad because it in part adopts language from a House Committee subpoena. Appx. 61-65. And the court concluded that the Mazars Subpoena requested relevant categories of documents from within a reasonable time frame and geographic scope. Appx. 74-83.

As to bad faith, the court found it implausible that the Office issued the Mazars Subpoena "as retaliation for the President's refusal to produce tax returns under the Trump Organization Subpoena." Appx. 50. The court also found it implausible that unaffiliated Democratic politicians' alleged desire to view the President's tax returns prompted the Office to issue the Mazars Subpoena. Appx. 56. Finally, the court rejected the inference that the Office's decision to base the Mazars Subpoena on a congressional subpoena evinced bad faith. Appx. 60.

D. The Court Of Appeals' Affirmance Of The Dismissal Of The Second Amended Complaint

On October 7, 2020, the Second Circuit, applying de novo review, Appx. 123, affirmed the district court's dismissal of the SAC in a unanimous per curiam opinion. The Second Circuit recognized that "although the President has raised only the ordinary challenges applicable to any grand jury subpoena," the "high respect that is owed to the office of the Chief Executive should inform the conduct of [this] entire proceeding." Appx. 128 (quoting *Vance*, 140 S. Ct. at 2430).

The Second Circuit applied the traditional standards that govern a motion to dismiss a civil complaint. Appx. 126-27. The complaint, the court explained, must allege sufficient facts to make its claim for relief "plausible." Appx. 126 (quoting *Ashcroft v. Iqbal*, 556 U.S. 622, 678 (2009)). Claims will fail, the court added, unless "suggestive of" liability for overbreadth and bad faith, not merely "consistent with" it. Appx. 126. (quoting circuit precedent quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). "[A]n obvious alternative explanation," the court stated, renders "[a] bare allegation of improper motive" insufficient. Appx. 126. (internal quotation marks omitted).

In conducting that analysis, the court made clear that the adequacy of the allegations must be measured in light of the established principle that "a grand jury subpoena 'enjoys a presumption of validity'" against "defenses to enforcement." Appx. 124 (quoting *Virag v. Hynes*, 54 N.Y.2d 437, 444 (1981)). That "presumption … stems from the grand jury's unique and long-standing role in evaluating the sufficiency of a prosecutor's evidence against the accused and from the strong public interest in the just enforcement of the criminal laws." Appx. 124. Relying on the presumption of validity in testing the allegations of the complaint, the court explained, does not "impos[e] a heightened pleading standard," but rather is part of "the particular cause[s] of action [asserted] and [their] elements." Appx. 126-27 (internal quotation marks omitted).

The court then turned to Applicant's two specific objections, which involve "legal doctrines that are anything but novel." Appx. 125.

Overbreadth. The court first held that Applicant has not stated a claim that the Mazars Subpoena is overbroad either in its "individual aspects" or "as a whole." Appx. 141. The court accepted as true the SAC's allegation that "the focus of the District Attorney's investigation is payments made by Michael Cohen in 2016 to certain individuals." Appx. 129 (quoting SAC ¶ 12). But the court noted that "the SAC never actually alleges that the Michael Cohen payments are the sole object of the investigation." Appx. 130. Nor could that fact be reasonably "infer[red]," the court explained, given "the extremely broad nature of grand jury investigations." Appx. 130-31. "In addition," the court added, "[i]t is far from reasonable to infer that [the Trump Organization Subpoena] would define the entire scope of [the] grand jury's investigation" because "the scope of a grand jury investigation … may easily expand over time." Appx. 131-32. And a *New York Times* article noting that the Office was "exploring" the Cohen payments did not support Applicant's desired inference either, the court reasoned, because that "article does not state that the grand jury investigation is limited to the Cohen payments" and in fact suggests otherwise. Appx. 133.

The court also found implausible Applicant's claim that the Mazars Subpoena "cannot be reasonably tailored to *any* particular investigation, and is instead just a fishing expedition for the President's records." Appx. 134-35 (internal quotation marks omitted). "The mere fact that the subpoena seeks information from a variety of related entities" did not suggest a valid claim of overbreadth, the court explained, because "it is neither unusual nor unlawful for grand juries to 'paint[] with a broad brush." Appx. 136 (quoting *R. Enterprises*, 498 U.S. at 297). There is "nothing suspect," the court continued, "about a grand jury demanding records relating to entities

beyond the grand jury's territorial jurisdiction, especially in the context of a financial investigation." Appx. 137. The records requested, the court added, are "run-of-the mill documents typically relevant to a grand jury investigation into possible financial or corporate misconduct." Appx. 138. And "the timeframe of the subpoena," the court concluded, cannot plausibly be deemed to "ha[ve] no relation to the subject matter of the investigation." Appx. 138-39.

The court additionally found implausible Applicant's claim that the Mazars Subpoena is overbroad because it is "substantially identical to[] an earlier subpoena from the House Oversight Committee to Mazars." Appx. 139. Because "state law enforcement interests and federal legislative interests" may "overlap," the court held, the alleged similarity between the two subpoenas did not plausibly suggest overbreadth. Appx. 140.

Bad faith. The court next held that Applicant has not stated a bad-faith claim, "[e]ven accounting for the public status and visibility of the President" and "the political interest in his tax returns." Appx. 143. Applicant has not plausibly alleged that the Office retaliated against him for "refus[ing] to produce his tax returns in response to the Trump Organization subpoena," the court reasoned, because an "obvious alternative explanation" exists: "if the original subpoena did not clearly call for the documents needed …, a new subpoena was issued that clearly called for them." Appx. 143-44. The court similarly found that "the President's reference to the ambient political motivations of third parties" did not support a plausible bad-faith claim, because "the SAC nowhere alleges that the District Attorney was himself motivated by partisan considerations." Appx. 144. And the court stressed that "the fact that the Mazars subpoena was issued to a third-party custodian adds nothing to the President's bad faith claim," since "[s]uch subpoenas are routine" and "signif[y] a legitimate investigation." Appx. 144-45.

Finally, just as the court found that the Mazars Subpoena's adoption of language from a House Committee subpoena did not plausibly suggest overbreadth, the court found that the use of the same language did not plausibly suggest bad faith. Appx. 145-47. "Notwithstanding the political interest in the President's tax returns," the court explained, it did "not see how the District Attorney's statement that he copied the Congressional subpoena for 'efficiency' allows [it] to infer bad faith." Appx. 147. Nor could that "efficiency explanation" be plausibly deemed inconsistent with the District Attorney's confirmation that "the Mazars and Congressional subpoenas are identical because they both relate to public reports about the same potentially improper conduct." Appx. 147. "Even construing these statements in the way most favorable to the President's claim," the court held "that they do not permit [it] to infer more than the mere possibility of bad faith." Appx. 147-48 (internal quotation marks omitted).

Stay. After rejecting all of Applicant's claims, the court ordered "[a]n interim stay of enforcement of the subpoena" pending Applicant's request for relief from this Court. Appx. 148. This order was consistent with the parties' agreement that the Office would forbear from enforcing the subpoena in exchange for Applicant's filing of an expedited request for relief here.

ARGUMENT

Applicant seeks a further stay of enforcement of the Mazars Subpoena pending the filing and disposition of a forthcoming petition for certiorari seeking review of the Second Circuit's decision. That relief should be denied. The relief Applicant seeks goes beyond a stay of proceedings below and is properly characterized as an injunction against the Office's conduct in state grand jury proceedings. A state grand jury subpoena is a presumptively valid and enforceable order. A stay of the Second Circuit's judgment affirming the dismissal of Applicant's complaint would not prevent the enforcement of the state subpoena; that relief requires an injunction and

demands a higher showing than required for a stay. But regardless of how the application is characterized, Applicant cannot meet the applicable standards for relief.

"An injunction and a stay … serve different purposes." *Nken v. Holder*, 556 U.S. 418, 428 (2009). "'[T]he extraordinary remedy of injunction' … directs the conduct of a party, and does so with the backing of [the Court's] full coercive powers." *Id.* (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)). A stay, by contrast, "operates upon the judicial proceeding itself" by "either … halting or postponing some portion of the proceeding, or by temporarily divesting an order of enforceability." *Id.*

Applicant seeks not to halt any lower-court proceedings or to divest any remedy of enforceability, but to enjoin the Office's enforcement of the Mazars Subpoena in the first instance. "[A] significantly higher justification" is required for an injunction than for a stay. *Respect Maine PAC v. McKee*, 562 U.S. 996, 996 (2010) (quoting *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers)). To obtain an injunction, an applicant must demonstrate that the legal rights at issue are "indisputably clear." *Hobby Lobby Stores, Inc. v. Sebelius*, 568 U.S. 1401, 1403 (2012) (Sotomayor, J., in chambers) (quoting *Wis. Right to Life, Inc. v. FEC*, 542 U.S. 1305, 1306 (2004) (Rehnquist, C.J., in chambers)). Applicant cannot plausibly claim that he meets that "demanding standard," *id.*, in challenging the concurrent conclusion of both courts below that the SAC is speculative, conclusory, and implausible.

The same result follows under the standards governing applications for a stay. "To obtain a stay," an "applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). These three conditions "are

necessary for issuance of a stay" but "are not necessarily *sufficient*." *Barnes v. E-Systems, Inc. Grp. Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1304 (1991) (Scalia, J., in chambers). When the "balance [of] equities" do not support a stay, "sound equitable discretion will deny [it]." *Id.* at 1304-05 (internal quotation marks omitted).

Whether characterized as an application for a stay or an injunction, Applicant has not carried his burden to justify the extraordinary relief he seeks: he presents no broad or enduring question of law meriting a grant of certiorari; has no arguments that the Court would likely reverse; and has no viable claim of irreparable harm.

A. There Is No Reasonable Probability That The Court Will Grant Review And Reverse

At issue is whether the SAC states a claim for relief under two garden-variety challenges to a subpoena—claims that are available to any citizen and routinely judged under settled standards. Two courts below have considered the SAC's allegations in meticulous detail and have found them deficient. Those holdings are correct; no further review is warranted.[2]

In *Vance*, this Court resolved the important constitutional questions initially raised by this case. 140 S. Ct. at 2424-31. Neither those questions, nor any of the other potential constitutional issues the Court identified, remain. Appx. 127-28. And while Applicant is still the sitting

[2] Applicant quotes isolated statements from the district court's "Introduction," apparently to suggest that "the district court stacked the deck against the President," Application ("Appl.") 2-3 (citing Appx. 9; Appx. 12), refused to show the President "respect on remand," Appl. 13-14 (citing Appx. 8; Appx. 12-13), and arrived at a "preordained" result, Appl. 14. Those suggestions are unfounded. The district court repeatedly recognized the "[h]igh respect for the President's office," which requires that judicial review "be particularly meticulous," Appx. 41-45, and its comprehensive opinion afforded such review. In any event, the Second Circuit reviewed the SAC de novo, and it is the appellate court's decision, not the district court's, that would be under review if this Court were to grant a petition.

President, this Court has previously denied certiorari in cases directly involving the President.[3] *Contra* Appl. 13 ("This Court rarely denies review when a President seeks certiorari."). Indeed, the Court has done so even when the case implicated privileges specifically designed to protect the President. *See supra* note 3. Denial is particularly appropriate here, given that the President raises only "the same protections available to every other citizen" who is faced with a subpoena, *Vance*, 140 S. Ct. at 2430—namely, "state-law challenges of overbreadth and bad faith," Appx. 127.

In reviewing those ordinary challenges, the courts below applied ordinary standards governing Rule 12(b)(6) motions. *See Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.* (quoting *Twombly*, 550 U.S. at 557). A complaint falls short, for instance, when there are "more likely," *id.* at 681, or "obvious alternative" explanations for the defendant's conduct, *id.* at 682 (quoting *Twombly*, 550 U.S. at 567). "Determining whether

[3] *See, e.g., Office of the President v. Office of the Indep. Counsel*, 525 U.S. 996 (1998) (case addressing extent to which communications of White House Counsel are privileged against disclosure to a federal grand jury); *Rubin v. United States*, 525 U.S. 990 (1998) (case addressing whether federal law recognizes a privilege that would permit a Secret Service agent protecting the President to refuse to testify unless he saw or heard conduct or statements that were clearly criminal); *Office of President v. Office of Indep. Counsel*, 521 U.S. 1105 (1997) (case addressing grand jury subpoena of allegedly privileged documents created in meetings between White House Counsel and First Lady).

a complaint states a plausible claim for relief" is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679. While surviving a Rule 12(b)(6) motion "is not a heavy burden for a plaintiff to shoulder," Appl. 18, it is a burden nonetheless: "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Iqbal*, 556 U.S. at 679 (quoting Fed. R. Civ. P. 8(a)(2)).[4]

Applying these standards, the Second Circuit assumed the truth of Applicant's allegations, and held that those allegations fail to state a plausible claim for relief. That holding was correct: the SAC does not plausibly suggest overbreadth or bad faith, especially given the longstanding presumption supporting a grand jury subpoena's validity. No legal or factual issue exists that would warrant this Court's intervention. In fact, by primarily seeking "summary reversal," Appl. 17, Applicant implicitly recognizes that no important or controversial legal principles are at stake that might merit plenary consideration.

Applicant devotes multiple pages (Appl. 15-17) to a complaint about the adjudication of his "claims at the pleading stage," as opposed to in a "motion to quash proceeding," Appl. 15, where courts "may require that the Government reveal the subject of the investigation to the trial court *in camera*," *R. Enterprises*, 498 U.S. at 302. In Applicant's view, "*some* evidentiary process is needed," and the Rule 12(b)(6) dismissal deprived him of that process. Appl. 16. But this Court rejected Applicant's view in *Vance*, holding that a prosecutor need *not* make a "threshold showing

[4] Applicant relies heavily on two per curiam summary reversals, Appl. 18-19, but neither of those decisions applied a different standard than *Iqbal* and *Twombly*—they simply found that the particular complaints in those cases satisfied the standard. *Johnson v. City of Shelby*, 574 U.S. 10, 12 (2014) (per curiam) (recognizing that *Iqbal* and *Twombly* instruct that a plaintiff "must plead facts sufficient to show that her claim has substantive plausibility"); *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (per curiam) (citing *Twombly*'s standard).

that the evidence sought is critical for specific charging decisions." 140 S. Ct. at 2429 (internal quotation marks omitted); *see id.* at 2431 ("the President is … no[t] entitled to a heightened need standard").[5]

Equally important, the limited procedural mechanisms available to Applicant stem entirely from *Applicant's* own choices. On remand, rather than moving to quash the Mazars Subpoena, Applicant challenged it in a collateral civil § 1983 complaint. In so doing, Applicant eschewed the flexible motion-to-quash procedure that would have allowed the court to, in its discretion, require the prosecutor to provide general information about the subject of the grand jury's investigation under appropriately protective procedures. *See R. Enterprises*, 498 U.S. at 302. Instead, he proceeded by way of a civil complaint that is subject to Rule 12(b)(6)'s pleading requirements. Under those requirements, Applicant must state a plausible claim for relief *before* he may obtain discovery into the subject of the investigation. *See Twombly*, 550 U.S. at 556; *16630 Southfield Ltd. P'Ship v. Flagstar Bank*, 727 F.3d 502, 504 (6th Cir. 2013) (Sutton, J.) ("Rule 8(a)(2) [requiring a complaint to contain 'a short and plain statement of the claim showing that the pleader is entitled to relief'] serves a vital practical function: It prevents plaintiffs from launching a case into discovery," which "imposes costs" on "courts and society."). And because Applicant cannot do so, no discovery is warranted, and dismissal is required.

1. *The Mazars Subpoena Is Presumptively Valid*

a. The Second Circuit held that "a grand jury subpoena 'enjoys a presumption of validity' against … defenses to enforcement." Appx. 124 (quoting *Virag*, 54 N.Y.2d at 444). The

[5] To be sure, as Applicant emphasizes, Appl. 16, certain Justices expressed a preference for requiring prosecutors to make such a showing. *See Vance*, 140 S. Ct. at 2433 (Kavanaugh, J., concurring in the judgment). But "[t]he reasoning of th[e] Court" is "set forth in th[e] [majority] opinion and none other." *Gill v. Whitford*, 138 S. Ct. 1916, 1931 (2018).

presumption arises from "the grand jury's unique and long-standing role in evaluating the sufficiency of a prosecutor's evidence against the accused and from the strong public interest in the just enforcement of the criminal laws." Appx. 124. The Second Circuit's holding that this presumption defines a *substantive ingredient* of Applicant's cause of action accords with settled principles of state and federal law.

"Grand Juries exist by virtue of the New York State Constitution and the Superior Court that impanels them; they are not arms or instruments of the District Attorney." *United States v. Reed*, 756 F.3d 184, 188 (2d Cir. 2014); *see* N.Y. Const. art. I, § 6; N.Y. Crim. Proc. § 190.05. The grand jury's responsibility is to "determin[e] whether or not a crime has been committed." *R. Enterprises.*, 498 U.S. at 297. In carrying out that responsibility, "the grand jury 'can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.'" *Id.* (quoting *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950)). "A grand jury investigation 'is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed.'" *Id.* (quoting *Branzburg v. Hayes*, 408 U.S. 665, 701 (1972)). The grand jury therefore must gather material that bears not only on the actual commission of a crime, but also on "related aspects whose significance [the grand jury] is seeking to uncover." *Virag*, 54 N.Y.2d at 444 (citation omitted).

Given "the strong governmental interests in affording grand juries wide latitude, … the law presumes, absent a strong showing to the contrary, that a grand jury acts within the legitimate scope of its authority." *R. Enterprises*, 498 U.S. at 300. The "presumption of validity enjoyed by Grand Jury subpoenas" stems both from "the broader presumption of regularity applicable to all officials acts" and from "the nature of the Grand Jury" as "an investigatory body with broad exploratory powers." *Virag*, 54 N.Y.2d at 443. To overcome the presumption of validity, the

party challenging a subpoena must show "that the materials sought have no relation to the matter under investigation," or "any legitimate object of investigation." *Id.* at 444. "Bare assertions of the lack of relevancy will not suffice." *Id.* While "th[e] presumption of validity imposes a difficult burden" on a party challenging a subpoena, that burden is justified by the grand jury's critical "task [of] inquir[ing] into the possible existence of criminal conduct." *Id.* at 445.

b. In one brief paragraph, Applicant suggests that the presumption of validity should not apply here because it "sets the bar too high" at the pleading stage. Appl. 31. But the Rule 12(b)(6) inquiry always accounts for the legal "principles implicated by the complaint" and "the elements a plaintiff must plead to state a claim." *Iqbal*, 556 U.S. at 675. And overcoming the presumption of validity is an established element of overbreadth and bad-faith claims. *See Virag*, 54 N.Y.2d at 443-44. Accordingly, to survive a Rule 12(b)(6) motion, a complaint seeking to enjoin enforcement of a grand jury subpoena "must include well-pled facts that, if accepted as true, *would* be sufficient to rebut the presumption of validity." Appx. 127. That approach applies the standard established by *Iqbal* and *Twombly*; it does not require any "definitive proof of liability." Appl. 32.

Applicant then contends that the SAC "overcome[s] the presumption" even if it applies, basing that contention primarily on overbreadth and bad-faith arguments that will be addressed below. Appl. 32. Applicant also suggests, however, that because subpoenas to the President are "highly unusual," the presumption of validity is surmounted here. Appl. 32. But in *Vance*, this Court made clear that "as respects [his private] paper[s]," Applicant stands "in nearly the same situation with any other individual" when served with a grand jury subpoena. 140 S. Ct. at 2429 (quoting *United States v. Burr*, 25 F. Cas. 30, 191 (CC Va. 1807) (Marshall, C.J.)). "And it is only 'nearly'—and not 'entirely'—because the President retains the right to assert privilege over documents that, while ostensibly private, 'partake of the character of an official paper.'" *Id.*

(quoting *Burr*, 25 F. Cas. at 191-92). Applicant asserts no privilege here. He therefore stands "entirely" in the same position as any other person. Applicant's suggestion that he—and he alone—need not overcome the presumption of validity contradicts *Vance*'s core holding. For these reasons, the Second Circuit correctly applied a presumption of validity in this case. No further review of that holding is warranted.

2. *Applicant Has Not Plausibly Alleged That The Mazars Subpoena Is Overbroad*

A subpoena is overbroad only when the documents requested "have no conceivable relevance to any legitimate object of investigation by the grand jury," *Virag*, 54 N.Y.2d at 444 (internal quotation marks omitted), or when 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. Accepting the SAC's well-pleaded allegations as true, the Second Circuit held that Applicant has not satisfied that standard. First, the court declined to infer that the grand jury investigation is limited to the 2016 Michael Cohen payments; next, it found that the Mazars Subpoena's requests are not plausibly overbroad in scope; finally, it found unreasonable the inference that the Mazars Subpoena's similarity to a congressional subpoena evinces overbreadth. These conclusions are correct, and none meets the standards for further review here. *See* S. Ct. R. 10.

a. The crux of Applicant's overbreadth argument is that the grand jury investigation "is limited to the Cohen payments," and the Mazars Subpoena is overbroad because it requests documents unrelated to those payments. Appl. 21-23. That logic is misconceived.

To start, the Second Circuit properly recognized that "the SAC never actually alleges that the Michael Cohen payments are the sole object of the investigation." Appx. 130. Applicant cites nothing in the SAC stating that the grand jury's investigation is focused *exclusively* on the Cohen payments. That is why Applicant's brief uses phrases like "the investigation is about the Cohen

payments," Appl. 22, rather than stating that the investigation is *solely* about those payments. The SAC does allege that those payments are "the focus" of the investigation, Appx. 152, ¶ 12, but just because an investigation focuses on a particular event does not mean that event is the investigation's "*only* focus," Appx. 130. And elsewhere, the SAC notes that the investigation trains on *multiple* "business transactions," Appx. 152, ¶ 11, and cites a *New York Times* article suggesting that the investigation could well encompass more than the Cohen payments, Appx. 152, ¶ 12.[6]

Because the SAC's actual "word[s]" do not allege that the investigation focused only on the Cohen payments, Applicant argues that the Second Circuit should have drawn that "inference[]." Appl. 23. Of course, in evaluating a complaint, courts must draw "reasonable inference[s]" in the plaintiff's favor. *Iqbal*, 556 U.S. at 678. But courts uniformly recognize that they need not draw "*unreasonable* inferences" or "*unwarranted* deductions of fact." *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 971 (9th Cir. 2009) (emphases added) (citation omitted); *see Iqbal*, 556 U.S. at 678 (asking only whether the "factual content" alleged "allows the court to draw [a] *reasonable inference*" (emphasis added)).[7] Applicant appears to agree. *See* Appl. 18 (noting that allegations may be "augmented by all *reasonable* inferences" (emphasis added)). And here, the

[6] The article states that "[i]t was unclear if the broad scope of the subpoena indicated that the [District Attorney] had expanded [his] investigation beyond actions taken during the 2016 campaign." William K. Rashbaum & Ben Protess, *8 Years of Trump Tax Returns Are Subpoenaed by Manhattan D.A.*, N.Y. TIMES, Sept. 16, 2019, https://www.nytimes.com/2019/09/16/nyregion/trump-tax-returns-cy-vance.html.

[7] *Accord Guilfoile v. Shields*, 913 F.3d 178, 186 (1st Cir. 2019) ("we do not draw unreasonable inferences" at the pleading stage (internal quotation marks omitted)); *Martin v. Duffy*, 858 F.3d 239, 248 (4th Cir. 2017) ("[w]e are not required … 'to accept as true … unreasonable inferences'" (citation omitted)); *Handy-Clay v. City of Memphis*, 695 F.3d 531, 539 (6th Cir. 2012) ("[w]e need not accept as true … an unwarranted factual inference" (internal quotation marks omitted)); *Brown v. Medtronic, Inc.*, 628 F.3d 451, 461 (8th Cir. 2010) ("we are not required, even at this preliminary stage, to draw unreasonable inferences").

inference that an investigation into potentially unlawful "business transactions involving multiple individuals," Appx. 152, ¶ 11 (internal quotation marks omitted), would focus on *only* the Cohen payments is unreasonable, in light of "the extremely broad nature of grand jury investigations," Appx. 131. As the Second Circuit noted, Appx. 131, grand jury investigations "paint[] with a broad brush," *R. Enterprises*, 498 U.S. at 297, and are "ranging" and "exploratory," *Virag*, 54 N.Y.2d at 444. "[S]ingle subpoena[s]," like the Trump Organization Subpoena here, do not normally "define the entire scope of a grand jury's investigation." Appx. 132; *see Full Gospel Tabernacle, Inc. v. Att'y-Gen. of N.Y.*, 142 A.D.2d 489, 497 (3d Dep't 1988) (rejecting overbreadth challenge where "the focus of the investigation shifted" from one matter to another). Recognizing this reality does not require "dr[a]w[ing] inferences against the President." Appl. 23 (emphasis omitted). It simply requires application of "judicial experience and common sense." *Iqbal*, 556 U.S. at 679. After all, "you can't assess the plausibility of an inference in a vacuum." *16630 Southfield*, 727 F.3d at 505.

Nor is the Second Circuit's analysis tantamount to "subjecting a pleaded fact to plausibility analysis." Appl. 23. Applicant's cited cases (Appl. 24) hold only that a court errs by deeming a complaint's *factual allegations* implausible.[8] That is not what the Second Circuit did. Rather, the Second Circuit accepted the SAC's factual allegations as true but deemed certain *inferences* from

[8] *See Johnson*, 574 U.S. at 12 (reversing where plaintiffs had pled "facts sufficient to show that [their] claim has substantive plausibility"); *Erickson*, 551 U.S. at 93-94 ("[i]t was error for the Court of Appeals to conclude that the allegations in question … were too conclusory" because "a judge must accept as true all of the factual allegations contained in the complaint"); *Hi-Tech Pharms., Inc. v. HBS Int'l Corp.*, 910 F.3d 1186, 1197 (11th Cir. 2018) (pleading standard does not "require[] a plaintiff to provide *evidence* for the factual allegations in a complaint before they are entitled to the assumption of truth" (internal quotation marks omitted)); *Ocasio-Hernandez v. Fortuno-Burset*, 640 F.3d 1, 12 (1st Cir. 2011) ("[n]on-conclusory factual allegations in the complaint must … be treated as true"); *Bryson v. Gonzales*, 534 F.3d 1282, 1286 (10th Cir. 2008) ("factual allegations" need not "themselves be plausible" because "they are assumed to be true").

those facts unreasonable, as courts routinely do. *See supra* at 8; Appx. 130 ("[w]e decline to take [the] leap" of "infer[ring] that" the Cohen payments "must have been the *only* focus").

Finally, Applicant is incorrect that the Second Circuit improperly "credited alternative explanations" when evaluating his overbreadth claim. Appl. 26. This Court has held that "more likely explanations" or "obvious alternative explanation[s]" for a defendant's conduct render a plaintiff's claim implausible. *Iqbal*, 556 U.S. at 681-82 (internal quotation marks omitted); *see Twombly*, 550 U.S. at 567 (rejecting claim as implausible due to "an obvious alternative explanation"). Here, the obvious explanation for the subpoena's breadth—especially in light of "the presumptive validity of grand jury subpoenas and the extremely broad nature of grand jury investigations"—is that the investigation had extended beyond the Cohen payments. Appx. 131 ("[j]udicial experience and common sense tell us that the scope of a grand jury investigation … may easily expand over time"); Appx. 132 ("in complex financial investigations" a "single subpoena" does not "define the entire scope of [the] investigation").

This basic analysis is not a "stark departure from the Federal Rules." Appl. 25 (internal quotation marks omitted). Every circuit recognizes that obvious alternative explanations for a defendant's conduct will doom a plaintiff's claim.[9] That is unsurprising, since *Iqbal* and *Twombly* compel that rule. Even Applicants themselves acknowledge the rule, Appl. 26, as does nearly

[9] *In re Ariad Pharms., Inc. Sec. Litig.*, 842 F.3d 744, 756 (1st Cir. 2016); *Hayden v. Paterson*, 594 F.3d 150, 167 (2d Cir. 2010); *George v. Rehiel*, 738 F.3d 562, 586 (3d Cir. 2013); *McCleary-Evans v. Md. Dep't of Transp., State Highway Admin.*, 780 F.3d 582, 588 (4th Cir. 2015); *Gulf Coast Hotel-Motel Ass'n v. Miss. Gulf Coast Golf Course Ass'n*, 658 F.3d 500, 506 (5th Cir. 2011); *16630 Southfield*, 727 F.3d at 505; *McCauley v. City of Chicago*, 671 F.3d 611, 616 (7th Cir. 2011); *Ellis v. City of Minneapolis*, 860 F.3d 1106, 1112 (8th Cir. 2017); *In re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104, 1108 (9th Cir. 2013); *Llacua v. W. Range Ass'n*, 930 F.3d 1161, 1179-80 (10th Cir. 2019); *Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1295 (11th Cir. 2010); *In re U.S. Office of Pers. Mgmt. Data Sec. Breach Litig.*, 928 F.3d 42, 57 (D.C. Cir. 2019).

every decision they cite, even if those decisions ultimately find the rule inapplicable on the particular allegations in those cases.[10] In this case, by contrast, the alternative explanation for the subpoena's breadth is obvious, as the Second Circuit recognized. But even if this were a close question (it is not), fact-bound "[]application[s] of a properly stated rule of law" do not merit this Court's review. S. Ct. R. 10.

b. The SAC also asserts that the Mazars Subpoena is overbroad on its face and cannot be tailored to any grand jury investigation. Appx. 159, ¶ 35. But while grand juries may not engage in "fishing expeditions," *Vance*, 140 S. Ct. at 2428, "an objection on that ground is a very long shot under New York law," *id.* at 2450 (Alito, J., dissenting). The Second Circuit correctly rejected that improbable objection.

The Mazars Subpoena requests five specific categories of documents: tax returns; financial statements; engagement letters; underlying support for financial statements; and working papers. Appx. 154, ¶ 18. And the Mazars Subpoena seeks those documents for various entities owned by the President over an approximately nine-year time period, beginning in 2011. *Id.* No feature of this request is plausibly overbroad.

[10] *Data Sec. Breach Litig.*, 928 F.3d at 57 (dismissal appropriate where "obvious alternative explanations" are "incompatible with the plaintiffs' versions of events"); *Hassan v. City of N.Y.*, 804 F.3d 277, 297 (3d Cir. 2015) (dismissal appropriate where "convincing" "alternative explanation" renders "the plaintiff's explanation *im*plausible" (internal quotation marks omitted)); *McDonough v. Anoka Cty.*, 799 F.3d 931, 946 (8th Cir. 2015) (dismissal appropriate where "there are lawful, obvious alternative explanations for the alleged conduct" (internal quotation marks omitted)); *N.J. Carpenters Health Fund v. Royal Bank of Scot. Grp., PLC*, 709 F.3d 109, 121 (2d Cir. 2013) (dismissal appropriate where "one of th[e] competing inferences rises to the level of an 'obvious alternative explanation'"); *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011) (dismissal appropriate where "defendant's plausible alternative explanation is so convincing that plaintiff's explanation is *im*plausible").

The number and geographic reach of the entities provides no basis for finding overbreadth. "[I]n a complex financial investigation" like this one, "[t]he mere fact that the subpoena seeks information from a variety of related entities—all owned by the same individual—[cannot] overcome the presumption of validity." Appx. 136. Complex financial investigations commonly involve numerous interrelated corporate entities that commingle assets, liabilities, and tax-reporting obligations in a complicated and dynamic web.[11] And it is neither "unusual nor unlawful" for the Mazars Subpoena to request documents associated with businesses that operate outside of New York County. Appx. 136. New York criminal law extends both to acts that occurred within the County and to out-of-County acts that have in-County consequences. *See People v. McLaughlin*, 80 N.Y.2d 466, 471 (1992); *see* N.Y. Crim. Proc. Law §§ 20.20, 20.40. And grand juries "have authority and jurisdiction to investigate the facts in order to determine … whether the facts show a case within their jurisdiction." *Blair v. United States*, 250 U.S. 273, 282-83 (1919). These legal "principles," combined with "judicial experience and common sense," compel the conclusion that the subpoena's geographic reach is not plausibly overbroad. *Iqbal*, 556 U.S. at 679. *Contra* Appl. 28.

The types of materials sought are also characteristic of a financial investigation. As noted above, the subpoena seeks five categories of financial and accounting records. Nothing in the SAC "suggest[s] that these are anything but run-of-the-mill documents typically relevant to a grand jury investigation into possible financial or corporate misconduct." Appx. 138. In similar corporate

[11] *See, e.g.*, *People v. Olivet Univ.* (N.Y. Co. 2020), https://bit.ly/3crV1Dj ($35 million financing fraud and money laundering scheme involving financial statements prepared by out-of-state accounting firm for a New York university and numerous related businesses claiming assets and income throughout the world); *see also United States v. ConocoPhillips Co.*, 744 F.3d 1199, 1208 (10th Cir. 2014) ("members of an affiliated group [may] report their tax liability as a single consolidated group on a single consolidated tax return during a consolidated return year"); *accord* N.Y. Tax Law § 210-C ("Combined Reports").

investigations, New York courts have upheld subpoenas seeking "virtually every corporate document of [certain] entities." *United States v. Vilar*, 2007 WL 1075041, at *46 (S.D.N.Y. Apr. 4, 2007); *Jordache Enters., Inc. v. United States*, 1987 WL 9705, at *4 n.3 (S.D.N.Y. Apr. 14, 1987) (in tax-related investigation, denying motion to quash subpoena for "certified or qualified financial statements, accountant's workpapers, accountant reports, and all records pertaining to the preparation and/or filing of corporate tax returns").

Nor does the time period covered by the subpoena, *viz.*, documents from January 1, 2011 to August 29, 2019, plausibly suggest facial overbreadth. "No magic figure limits the vintage of documents subject to a grand jury subpoena." Appx. 138 (citation omitted). So long as the time period "bear[s] some relation to the subject matter of the investigation," it is not overbroad. *Id.* Here, it is implausible to infer that the grand jury's "investigation would have no use for documents from prior years." Appx. 139. After all, in "run[ing] down" "every available clue," *R. Enterprises*, 498 U.S. at 297, a grand jury may find leads outside the statute-of-limitations period that shed light on criminal activity within that period, Appx. 139.

According to Applicant, the Second Circuit needed to "describe[] what it thought the scope of the investigation might be" before it could conclude that the subpoena was not overbroad. Appl. 28. But it was Applicant who argued that the subpoena was overbroad on its face and could not be "reasonably tailored to *any* particular investigation." Appx. 134-35 (quoting Appellant's Br. 27). So the Second Circuit understandably addressed *that* argument—by explaining why the number and geographic reach of the entities implicated, types of materials sought, and time period covered by the Mazars Subpoena are not unusual or unreasonable in a complex financial investigation like this one.

Applicant also insists that the Second Circuit's reasoning would "insulate every subpoena from any overbreadth challenge." Appl. 28. But as an initial matter, the Second Circuit's analysis was tied to "complex financial investigation[s]," so it does not suggest that a broad subpoena would necessarily be permissible if the investigation were narrower. Appx. 132, 136. And in any event, overbreadth challenges are unlikely to succeed by design: the "presumption of validity imposes a difficult burden … on one seeking to" challenge a subpoena "on relevancy grounds" because the grand jury "should not be hindered in its quest by [objectors] who continually litigate the threshold validity of its subpoenas." *Virag*, 54 N.Y.2d at 445.

c. Applicant further maintains that the Mazars Subpoena's similarity to a House Oversight Committee subpoena makes it plausibly overbroad. Appl. 20. That claim fails too.

As earlier explained, the test for overbreadth is whether "there is no reasonable possibility that the category of materials" sought by the Mazars Subpoena "will produce information relevant to the general subject of the grand jury's investigation." *R. Enterprises*, 498 U.S. at 301. It is implausible to find "no reasonable possibility" that a legislative subpoena would produce no "relevant" documents for a grand jury investigation, where, as here, the investigations cover similar—even if not "coextensive," Appl. 29—subjects. *See* Appx. 140 ("The same set of documents could be useful for multiple purposes, and it is unreasonable to automatically assume that state law enforcement interests and federal legislative interests do not overlap."); *Hutcheson v. United States*, 369 U.S. 599, 613 (1962) (opinion of Harlan, J.) ("the authority of [Congress], directly or through its committees, to require pertinent disclosures in aid of its own constitutional power is not abridged because the information sought to be elicited may also be of use in" state criminal proceedings).

Applicant flips the test on its head in insisting that the congressional subpoena will seek some "documents *irrelevant* to this local investigation." Appl. 29 (emphasis added). Because a grand jury "has no catalog of what books and papers exist and are involved in a situation with which it is attempting to deal," *Virag*, 54 N.Y.2d at 444 (citation omitted), it is permitted to "paint[] with a broad brush," *R. Enterprises*, 498 U.S. at 297. If a grand jury had to demonstrate relevance in advance of production, it could not carry out its mission to determine whether crimes have occurred. *Id.* That is why the test focuses on whether "there is *no reasonable possibility*" that the requested materials will be relevant, *id.* at 301 (emphasis added)—not on whether there is any possibility that some materials will be *irrelevant*, as Applicant suggests, Appl. 29. *But see* Appl. at 19 (elsewhere recognizing the "no reasonable possibility" standard). Applicant's proposed framework entirely ignores the "elements a plaintiff must plead to state a claim of" overbreadth. *Iqbal*, 556 U.S. at 675.

3. *Applicant Has Not Plausibly Alleged That The Office Issued The Mazars Subpoena In Bad Faith*

Bad-faith "objections are almost universally overruled." *Vance*, 140 S. Ct. at 2451 (Alito, J., dissenting) (quoting S. Beale et al., Grand Jury Law and Practice § 6:23. p. 6-243 (2014)). To state a claim, Applicant must plausibly allege "an affirmative act of impropriety or bad faith." *In re Grand Jury Subpoenas*, 72 N.Y.2d 307, 316-17 (1988). "[S]peculations about possible irregularities in the grand jury investigation [are] insufficient…." *United States v. Leung*, 40 F.3d 577, 582 (2d Cir. 1994).

After fully "accounting for the public status and visibility of the President" and "the political interest in his tax returns," the Second Circuit applied these standards in holding that Applicant had not "raise[d] a plausible inference that the [Mazars Subpoena] was issued 'out of

malice or an intent to harass.'" Appx. 142-43 (quoting *Vance*, 140 S. Ct. at 2428). Nothing in that fact-specific holding warrants further review.

a. The SAC first alleges that the Mazars Subpoena "was issued in bad faith" "in response to a dispute over whether the President's tax returns were encompassed" by the prior Trump Organization Subpoena. Appx. 164, ¶¶ 59, 62; *see* Appl. 21. "When the President's attorneys pointed out that the subpoena could not plausibly be read to demand returns," the SAC alleges, "the District Attorney declined to defend his implausible reading" and "instead retaliated by issuing a new subpoena to Mazars." Appx. 153-54, ¶ 16.

The SAC contains no "factual content" that would "allow[] the [C]ourt to draw [a] reasonable inference" that the Office issued the Mazars Subpoena to retaliate against Applicant for refusing to produce his tax returns in response to the Trump Organization Subpoena. *Iqbal*, 556 U.S. at 678. For starters, the SAC's allegation that the subpoena "was issued in bad faith," Appx. 164, ¶ 62, is a "mere conclusory statement[]" in support of a "[t]hreadbare recital[] of the elements of a cause of action" that this Court need not accept as true, *Iqbal*, 556 U.S. at 678.

Beyond that, the only relevant factual allegation is that the Office issued the Mazars Subpoena about a month after the Trump Organization Subpoena, which Applicant believes suggests "retaliation over the refusal to turn over the President's tax returns." Appl. 30. But as the Second Circuit recognized, Appx. 143-44, an "obvious alternative explanation" exists. *Twombly*, 550 U.S. at 567. Namely, the Office concluded that "if the [Trump Organization Subpoena] did not clearly call for the documents needed for the grand jury investigation," it should issue "a new subpoena … that clearly called for them." Appx. 144. This obvious alternative explanation precludes Applicant's effort to impute an improper motive to the Office. *See Iqbal*, 556 U.S. at 682 (declining to infer illegal discrimination because there was an "obvious alternative

explanation for the [relevant] arrests" (internal quotation marks omitted)); *Twombly*, 550 U.S. at 554 (declining to infer anticompetitive agreement based on conduct that was "consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy"). Applicant responds that this alternative "isn't so obvious," Appl. 30—but again, even if the question were close (again, it is not), Applicant seeks only fact-intensive error correction.

Applicant questions why the Office issued a subpoena "call[ing] for thousands of additional records" if it "merely wanted the tax returns." Appl. 30. But the SAC does not allege that the Office "wanted the tax returns" alone. And "judicial experience and common sense" teach that subpoenas for tax returns frequently also seek underlying documents necessary to understand those returns. *Iqbal*, 556 U.S. at 679; *see Jordache Enters.*, 1987 WL 9705, at *4 n.3 (in tax-related investigation, denying motion to quash subpoena for "certified or qualified financial statements, accountant's workpapers, accountant reports, and all records pertaining to the preparation and/or filing of corporate tax returns"). At a minimum, Applicant's speculative suggestions about "harassment" (Appl. 30) cannot plausibly overcome the presumption of validity.

b. The SAC further alleges that the Mazars Subpoena is an "effort to circumvent the President" by seeking documents from "a neutral third-party custodian." Appx. 153-54, ¶ 16; *see* Appl. 20 (faulting the Office from issuing the subpoena "to a custodian"). That allegation, too, fails to support an inference that the Subpoena was issued in bad faith. Subpoenas to third-party custodians "are routine." Appx. 144; *see, e.g.*, *Hirschfeld v. City of N.Y.*, 253 A.D.2d 53, 55 (1st Dep't 1999) (upholding issuance of "four Grand Jury subpoenas *duces tecum* to Citibank, N.A. … directing it to produce records pertaining to certain financial transactions of plaintiff"). If anything, seeking documents from Mazars evinces only respect for Applicant's official duties, as "it relieves [him] of the burden of supervising and being responsible for compliance." Appx. 145. At the

same time, that third-party request "does not prevent the President from objecting to the subpoena," as this case shows. *Id.*

c. The SAC also alleges that the Office "photocopied a congressional subpoena for political reasons, for efficiency reasons, or for both." Appx. 164, ¶ 61. That "photocopy[ing]" allegedly occurred "at a time when … Democrats had become increasingly dismayed over their ongoing failure to get their hands on" the President's "tax returns." Appx. 157, ¶ 24 (internal quotation marks omitted).

The SAC's reference to "ambient political motivations" of "unspecified 'Democrats'" suggests nothing about the Office's purpose in issuing the Mazars Subpoena. Appx. 144. "[T]he SAC nowhere alleges that the District Attorney was himself motivated by partisan considerations." *Id.* And it would be unreasonable to infer that the Office issued the subpoena to further the goals of unaffiliated Democrats, because grand-jury secrecy laws would prevent any politicians or their constituents from viewing the subpoenaed documents. *See* N.Y. Crim. Proc. Law § 190.25(4); N.Y. Penal Law § 215.70. "[T]hose who make unauthorized disclosures regarding a grand jury subpoena do so at their peril." *Vance*, 140 S. Ct. at 2427.

Nor does the Office's choice to base the Mazars Subpoena on a congressional subpoena plausibly suggest bad faith. Again, "obvious alternative explanation[s]" exist for doing so. *Twombly*, 550 U.S. at 567. The Office modeled the Mazars Subpoena on a congressional subpoena because it sought generally the same documents that the Office needed, and had already been issued to Mazars, meaning that compliance would be "less onerous" for the accounting firm. *Hirschfeld*, 253 A.D.2d at 58. The Second Circuit correctly saw no way in which "cop[ying] the Congressional subpoena for 'efficiency' allow[ed] [it] to infer bad faith." Appx. 147. As is evident from that reasoning, the Second Circuit did not "disregard" the SAC's allusion to this "efficiency"

rationale, Appl. 30-31; it simply found that the alleged "efficiency" rationale, "accepted as true," Appl. 30, did not plausibly suggest bad faith.[12]

According to Applicant, the Office's effort to promote efficiency suggests a "disregard for the tailoring requirement," which "alone states a bad-faith claim." Appl. 31. But Applicant's only authority for that assertion, *In re Grand Jury Subpoena, J-K-15-029*, 828 F.3d 1083 (9th Cir. 2016), quashed a subpoena because it was "unreasonably overbroad," *id.* at 1088—not because it was issued in bad faith. And even if improper tailoring could ever alone suggest bad faith, "the alleged facts here are not so suggestive." Appx. 146. Unlike the subpoena in *J-K-15-029*, the subpoena here does not seek "emails on … personal accounts" that one would "reasonably expect[] to remain private." 828 F.3d at 1087; *see id.* at 1089-90 (noting that requested communications involved "particularly private matters," including "children or medical care"). Rather, it seeks non-personal "financial and business documents" and "thus do[es] not give rise to an inference of improper motive." Appx. 146.[13]

[12] The application—though not the SAC—accuses the District Attorney of "shifting" his explanation for the similarity between the Mazars and congressional subpoena to the "'overlap' between the two investigations." Appl. 30. But there has been no shift. *See, e.g.*, Transcript of Sept. 25, 2019 Hr'g, *Trump v. Vance*, No. 19-cv-8694 (S.D.N.Y. Oct. 7, 2019), ECF No. 38 at 30:15-25 (explaining that the congressional subpoena mirrored the scope of what the Office needed from Mazars, and would have already prompted Mazars to begin the process of identifying and gathering responsive records). And even if there had been, "the District Attorney's two alleged statements are not inconsistent," and thus not suggestive of bad faith. Appx. 147-48.

[13] Applicant also cites *Burns v. Martuscello*, 890 F.3d 77 (2d Cir. 2018), Appl. 20, 22, to suggest that "an overbroad subpoena is inherently abusive," *id.* at 22 (internal quotation marks omitted). But *Burns* is a First Amendment case that does not even involve the issuance of a subpoena. In passing, the court simply notes that "[a] subpoena can be contested, and a court may quash or limit the scope of the subpoena if it is overbroad, or otherwise abusive of an individual's rights and privileges." 890 F.3d at 92.

B. Applicant Will Suffer No Irreparable Harm, And The Balance Of Equities Disfavors Relief

Applicant has also failed to establish either that he is likely to suffer irreparable harm or that the balance of equities favors extraordinary relief.

1. A stay must be denied if the applicant cannot "show … a likelihood that irreparable harm will result from the denial of" relief. *Hollingsworth*, 558 U.S. at 190. Applicant advances three arguments for why he would suffer irreparable harm absent relief, but each argument lacks merit.

First, Applicant contends that he will be irreparably harmed even if the relevant documents are disclosed only to the "grand jury and prosecutors." Appl. 33. But the primary authority Applicant cites for that proposition, *Church of Scientology of Cal. v. United States*, 506 U.S. 9 (1992), suggests the opposite. There, the Court held that a party's appeal of an order requiring it to produce records to the government does *not* become moot even after the party has produced those records. *Id.* at 12-13. In such a case, the Court reasoned, "a court can fashion some form of meaningful relief," such as "ordering the Government to destroy or return any and all copies [of records] it may have in its possession." *Id.* (emphasis omitted). Following this logic, several courts of appeals have held that "court[s] can fashion a meaningful remedy for [an] allegedly unlawful subpoena by ordering a return of [the relevant documents]." *In re Grand Jury Investigation*, 445 F.3d 266, 270 (3d Cir. 2006).[14] As these authorities show, Applicant could still be awarded "meaningful relief" absent a stay. *Church of Scientology*, 506 U.S. at 12-13. If he

[14] *See also In re Sec. Life Ins. Co. of Am.*, 228 F.3d 865, 870 (8th Cir. 2000); *In re Grand Jury Subpoenas*, 40 F.3d 1096, 1100 (10th Cir. 1994); *United States v. Florida Azalea Specialists*, 19 F.3d 620, 622 (11th Cir. 1994); *cf. United States v. Under Seal*, 853 F.3d 706, 724 (4th Cir. 2017) ("multi-page records of confidential statements [which] can be ordered destroyed or returned").

were to ultimately prevail in this Court, the subpoenaed documents could be removed from the grand jury's possession and returned to Mazars, and any testimony related to those documents could be stricken from the grand jury's records.[15]

It is true that these remedies may not return Applicant to the precise "*status quo ante*." Appl. 33 (quoting *Church of Scientology*, 506 U.S. at 12). But the availability of "meaningful relief," *Church of Scientology*, 506 U.S. at 12, shows that Applicant's harm is not *irreparable*. Irreparable harm occurs when an effective remedy "will be impossible," *Conkright v. Frommert*, 556 U.S. 1401, 1403 (2009) (Ginsburg, J., in chambers), which is not the case here. *See Sampson v. Murray*, 415 U.S. 61, 90 (1974) ("The possibility that adequate … corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.").

Second, Applicant claims irreparable harm from the possibility that his records may be "disclosed publicly" outside the grand jury. Appl. 33. But as noted, Applicant must show a "*likelihood*"—not a mere hypothetical possibility—"that irreparable harm will result from the denial of" relief. *Hollingsworth*, 558 U.S. at 190 (emphasis added). There is no likelihood that

[15] In discussing the risks of disclosure to the grand jury, Applicant cites *John Doe Agency v. John Doe Corp.*, 488 U.S. 1306 (1989), Appl. 34, but that case cuts against him. There, a lower court ordered disclosure of confidential grand jury materials to a corporation that was "the target[] of th[e] investigation"—which would have destroyed confidentiality—and the Supreme Court granted a stay to the government to avoid "jeopardizing an important ongoing grand jury investigation." *Id.* at 1308-09. Here, by contrast, the Second Circuit dismissed a complaint seeking to withhold materials from a grand jury—a body that is bound to protect confidentiality in order to assist an ongoing investigation. And none of Applicant's other cited cases even involve grand juries at all, so the likelihood that the information there, once released, would be disclosed to the public was significantly greater. *Providence Journal Co. v. Fed. Bureau of Investigation*, 595 F.2d 889 (1st Cir. 1979) (disclosure of FBI documents to a private party); *Airbnb, Inc. v. City of N.Y.*, 373 F. Supp. 3d 467 (S.D.N.Y. 2019) (disclosure of data regarding business customers to city agencies); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bishop*, 839 F. Supp. 68 (D. Me. 1993) (disclosure of business records to a competitor); *Metro. Life Ins. Co. v. Usery*, 426 F. Supp. 150 (D.D.C. 1976) (disclosure of insurance company forms to federal offices).

his records will become public, given the "presumption of confidentiality [that] attaches to the record of Grand Jury proceedings." *People v. Fetcho*, 91 N.Y.2d 765, 769 (1998). Anyone who breaks the "longstanding rules of grand jury secrecy" could face felony charges. *Vance*, 140 S. Ct. at 2427; *see* N.Y. Penal Law § 215.70. That promise of secrecy distinguishes this case from "the congressional-subpoena cases," Appl. 34, where the risk of public disclosure was substantially higher. *See Trump v. Mazars USA, LLP*, 140 S. Ct. 581 (2019); *Trump v. Deutsche Bank AG*, 140 S. Ct. 660 (2019). And Applicant does not explain how his concerns about a "public prosecutor" disclosing his records (Appl. 33) are *likely* to manifest here, where the District Attorney has protected the confidential details of this grand jury investigation from its outset.

Regardless, Applicant lacks substantial privacy interests in the subject records in the first place. "[T]here can be little expectation of privacy where records are handed to an accountant, knowing that mandatory disclosure of much of the information therein is required in an income tax return." *Couch v. United States*, 409 U.S. 322, 335 (1973). And since Applicant filed the SAC, the *New York Times* has obtained his tax-return data and described that data in depth in a series of articles.[16] With the details of his tax returns now public, Applicant's asserted confidentiality interests have become highly attenuated if they survive at all. And even assuming any remain, they cannot justify extraordinary relief from this Court that would deprive the grand jury alone of facts available to anyone who reads the press.

Finally, Applicant contends that the purported harm is "particularly pressing" because he "challenges a subpoena to a third party." Appl. 34. But the subpoena's issuance to a third party (Mazars) is immaterial because everyone agrees that it "is functionally a subpoena issued to the

[16] *See* Russ Buettner, Susanne Craig, & Mike McIntire, *Long-Concealed Records Show Trump's Chronic Losses and Years of Tax Avoidance*, N.Y. TIMES, Sept. 27, 2020, https://www.nytimes.com/interactive/2020/09/27/us/donald-trump-taxes.html.

President." *Vance,* 140 S. Ct. at 2425 n.5. That is why, throughout these proceedings, Mazars has taken "no position on the legal issues raised" and indicated that it would follow any court order. *Id.* at 2420. Here, then, Applicant has been fully able to "resist and thereby test the subpoena," and there is no risk that Mazars will suddenly turn over Applicant's documents and "frustrate any judicial inquiry." *Eastland v. U.S. Servicemen's Fund,* 421 U.S. 491, 504 n.14 (1975); *see United States v. AT&T Co.,* 567 F.2d 121, 129 (D.C. Cir. 1977) (noting the risk—not relevant here—that third party would disclose records and "immunize th[e] subpoena from challenge by" the "party claiming injury")

2. Because Applicant has not satisfied the three "*necessary*" conditions for a stay, the Court need not "balance the equities." *Barnes,* 501 U.S. at 1304-05. But to the extent it does so, that balance tilts decisively against a stay. Whereas Applicant would face only minimal harm if relief were denied, the Office—and the effectiveness of its grand jury investigation—would face significant harm if relief were granted.

In *Vance*, this Court stressed that "the public interest in fair and effective law enforcement cuts in favor of comprehensive access to evidence." 140 S. Ct. at 2430. And it recognized the need to avoid "hobbl[ing] the grand jury's ability to acquire 'all information that might possibly bear on its investigation.'" *Id.* (quoting *R. Enterprises,* 498 U.S. at 297). Despite these compelling law-enforcement interests, at earlier stages of this case, the Office deferred enforcement of the subpoena in the interest of resolving Applicant's constitutional claim of absolute immunity. Even in the proceedings below, the Office accommodated the President's interest in judicial review, at serious costs to the investigation's progress. But Applicant no longer raises a constitutional claim tied to his status as President. He simply raises ordinary state-law overbreadth and bad-faith

objections—objections that are "very long shot[s] under New York law," *id.* at 2450 (Alito, J., dissenting), and that have been meticulously reviewed and rejected by two courts below.[17]

Applicant deems the Office's interest a mere "time delay," stating that because the Office has deferred enforcement already, "additional incremental delay" is immaterial. Appl. 35-36. But that characterization gives short shrift to the law-enforcement interests discussed above. And it also ignores this Court's admonition that "grand jury proceedings should be free of … delays," in order to avoid "frustrat[ing] the public's interest in the fair and expeditious administration of the criminal laws." *R. Enterprises*, 498 U.S. at 298-99. After this Court's holding in *Vance*, Applicant's private interests can no longer be elevated above these public interests—especially since Applicant raises no claims based on his status as President.

Applicant's allegation that the delay here is "largely self-inflicted" is meritless. Appl. 36. As noted above, Applicant is the party that made the supposedly "[im]practical" decision (*id.*) to file a § 1983 complaint rather than a motion to quash, where discretionary in-camera review may have been available. *See supra* at 15. And by doing so, Applicant subjected himself to *Iqbal* and *Twombly*'s pleading standards—which he has failed to overcome. The Office successfully moved to dismiss Applicant's implausible claims on an expedited timeline, thereby protecting its interest in a timely resolution.

Now that the Office has prevailed, and Applicant has received the meaningful appellate review that is warranted, no further delay in enforcing the Mazars Subpoena can be justified. For over a year, this Office has entered forbearance agreements out of respect for the President's

[17] In *Araneta v. United States*, 478 U.S. 1301 (1986), *see* Appl. 35, by contrast, foreign-official applicants raised Fifth Amendment claims on which courts were divided and faced a choice of either foregoing their "privilege against self-incrimination" or facing immediate incarceration. *Id.* at 1302.

constitutional arguments and the judicial process. But forbearance and deprivation of the grand jury's access can no longer be supported by arguments for yet one more layer of discretionary review. This litigation has already substantially hampered the grand jury's investigation. No legal basis exists for the extraordinary relief that Applicant requests—or remotely justifies the further delay it entails.

CONCLUSION

The application should be denied.

Respectfully submitted,

/s/ Carey R. Dunne
Carey R. Dunne

Caitlin Halligan
Ryan W. Allison
David A. Coon
SELENDY & GAY PLLC
1290 Sixth Avenue
New York, New York 10104
(212) 390-9000

Walter E. Dellinger III
DUKE UNIVERSITY LAW SCHOOL
Science Drive & Towerview Road
Durham, North Carolina
(919) 613-8535

Michael R. Dreeben
GEORGETOWN UNIVERSITY LAW CENTER
600 New Jersey Avenue NW
Washington, D.C. 20001
(202) 661-6609

Carey R. Dunne
Counsel of Record
Christopher Conroy
Julieta V. Lozano
Solomon B. Shinerock
James H. Graham
Allen J. Vickey
Sarah A. Walsh
NEW YORK COUNTY DISTRICT ATTORNEY'S OFFICE
One Hogan Place
New York, New York 10013
(212) 335-9000
dunnec@dany.nyc.gov

Counsel for Respondent Cyrus R. Vance, Jr.