20-2766-cv

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

MEMORANDUM IN OPPOSITION TO PLAINTIFF'S EMERGENCY MOTION FOR A STAY PENDING APPEAL

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Defendant-Appellee Cyrus R. Vance, Jr., in his official capacity as District Attorney for the County of New York (the "District Attorney"), respectfully submits this memorandum of law in opposition to the emergency motion filed by Plaintiff-Appellant Donald J. Trump ("Appellant") for "a stay pending appeal." Dkt. 16-2, at 1.[1] Appellant's motion should be denied, as his latest complaint fails to state a claim and he will not suffer irreparable harm in the absence of relief.

BACKGROUND

This matter arises from Appellant's nearly year-long effort to frustrate compliance with a lawful subpoena *duces tecum* issued by a New York County Grand Jury to Mazars USA, LLP ("Mazars") seeking evidence of potential financial improprieties and violations of state law (the "Mazars Subpoena").

When Appellant first brought this case, he advanced the expansive claim that the Mazars Subpoena must be quashed because, as President, he is absolutely immune from any state criminal process. That claim was thoroughly reviewed and rejected at every level of the federal courts. *Trump v. Vance*, 140 S. Ct. 2412 (2020); *Trump v. Vance*, 941 F.3d 631 (2d Cir. 2019); *Trump v. Vance*, 395 F. Supp. 3d 283 (S.D.N.Y. 2019). The Supreme Court rejected both Appellant's immunity claim and the Solicitor General's

[1] "Dkt." refers to documents filed on this Court's docket under case number 20-2766. "2019 Dkt." refers to documents filed on this Court's docket under case number 19-3204. "Dist. Ct. Dkt." refers to documents filed on the district court's docket under case number 19-cv-8694.

alternative theory that a state prosecutor must make a heightened showing of need to issue a subpoena *duces tecum* to a sitting President. 140 S. Ct. at 2431. The Court held that a President sits "in nearly the same situation with any other individual" when served with a criminal subpoena for unofficial documents, *id.* at 2429 (quoting *United States v. Burr*, 25 F. Cas. 187, 191 (No. 14,694) (C.C. Va. 1807) (Marshall, C.J.)), although a state prosecutor, of course, may not use criminal process to "attempt to 'influence'" a President's official duties, *id.* at 2428 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819)), or require compliance in a manner that "would impede [a President's] constitutional duties," *id.* at 2430.

After repudiating Appellant's claim of absolute immunity, the Supreme Court remanded this matter to the district court for Appellant to "raise further arguments as appropriate." *Id.* at 2431. The parties then agreed that, if Appellant believed he had further appropriate arguments and included "any and all" such claims in an amended complaint filed by July 27, 2020, the New York County District Attorney's Office (the "Office") would forbear on enforcing the Mazars Subpoena through and including seven days after the district court resolved the earliest dispositive motion. Dist. Ct. Dkt. 52, at 10.

On July 27, 2020, Appellant filed the Second Amended Complaint (the "SAC"), which largely regurgitates arguments that were previously rejected by every reviewing court. Dist. Ct. Dkt. 57. In the SAC, Appellant elected to assert "only … challenges available to private citizens," *Vance*, 140 S. Ct. at 2430—that the Mazars Subpoena is

overbroad or was issued in bad faith—and not to assert that the Mazars Subpoena is an unconstitutional attempt to manipulate the Executive Branch of the Federal Government, *see id.* at 2428, or that compliance with the Mazars Subpoena "would impede [Appellant's] constitutional duties," *see id.* at 2430.

On August 3, 2020, the Office made a motion to dismiss the SAC for failure to state a claim, which Appellant opposed. Dist. Ct. Dkts. 62-63, 66-69. On August 20, 2020, the district court issued a 103-page opinion thoroughly analyzing the claims in the SAC and dismissing this case with prejudice and without leave to further amend. *Trump v. Vance*, -- F. Supp. 3d --, 2020 WL 4861980 (S.D.N.Y. Aug. 20, 2020) (Dist. Ct. Dkt. 71).

Hours after the district court issued its order dismissing the SAC with prejudice, Appellant filed a notice of appeal and applied to the district court for an emergency "stay."[2] Dist. Ct. Dkt. 74. In his application to the district court, Appellant raised irreparable harm arguments substantially similar to those raised in his present motion in this Court, but he did not bother to argue that his appeal was likely to succeed on the merits. *Id.* On August 21, 2020, the district court issued a nine-page opinion denying Appellant's motion for an emergency "stay," *Trump v. Vance*, 2020 WL 4914390 (S.D.N.Y. Aug. 21, 2020) (Dist. Ct. Dkt. 75), which prompted Appellant to file the

[2] Appellant indicated that he was also seeking a stay from this Court and the U.S. Supreme Court. *See* Dist. Ct. Dkt. 74 at 1 n.*.

instant motion in this Court for "a stay pending appeal and an administrative stay," Dkt. 16-2, at 1.

Later on August 21, 2020, Judge Denny Chin issued an Order denying Appellant's application for an administrative stay and scheduling the motion for a stay pending appeal for September 1, 2020. Dkt. 35. Appellant then contacted the Office to request further forbearance on enforcement of the Mazars Subpoena. *See* Dkt. 61. The Office maintained that the Second Circuit properly held that no administrative stay of the Mazars Subpoena is warranted because Appellant's claims are meritless and he will not suffer irreparable harm absent relief. But to ensure this Court has ample opportunity to consider thoroughly the issues raised in Appellant's appeal, and to avoid further undue delay, the Office agreed to forbear enforcement of the Mazars Subpoena until 5:00 p.m. on the second calendar day after this Court issues a decision on Appellant's application for a stay pending appeal. *Id.*[3]

In short, although Appellant's claim of "temporary absolute immunity" has been rejected at every level of the federal courts, by continuing to litigate this action he has effectively obtained temporary absolute immunity by delaying the grand jury's receipt of the evidence it seeks. As the district court observed, "[j]ustice requires an end to this controversy." *Vance*, 2020 WL 4861980, at *33.

[3] The Office respectfully submits that the present briefing and argument on September 1, 2020 will enable the Court to conduct a full review of, and issue a reasoned decision resolving, Appellant's motion for a stay pending appeal.

ARGUMENT

Although Appellant claims to be seeking a stay, the only relief even theoretically available to him would be a preliminary injunction pending appeal that enjoins the Office from enforcing a presumptively valid state grand jury subpoena *already upheld at every level of the federal courts*. Appellant attempts to justify this extraordinary request by recycling arguments he raised previously in support of his absolute immunity claim, repackaging them now as claims that the Mazars Subpoena is overbroad and was issued in bad faith. As discussed below, Appellant cannot show any likelihood of success on the merits because the SAC fails to meet the basic pleading requirements of Federal Rule of Civil Procedure 12(b)(6). Appellant also fails to demonstrate any irreparable harm if the Mazars Subpoena remains enforceable. Finally, the public interest weighs strongly against Appellant's application to interrupt presumptively valid state criminal process. *See Vance*, 140 S. Ct. at 2430.

I. Appellant continues to rely on improper legal standards.

First, Appellant continues to suggest (incorrectly) that the Supreme Court's opinion in this case somehow modified the legal standards applicable to efforts to quash a subpoena as overbroad or issued in bad faith. Dkt. 16-2 at 7 (citing *Vance*, 140 S. Ct. at 2432 (Kavanaugh, J., concurring in the judgment)). Protections against abusive process apply with special force to a sitting President—to prevent a state from hindering the Executive Branch's official functions—but a majority of the Supreme Court was unequivocal that the substantive standards governing those protections are

otherwise the same as those that apply to any other recipient of a grand jury subpoena. *Id.* at 2429, 2431.

Second, although Appellant describes the relief he seeks as a "stay pending appeal," Dkt. 16-2, at 1, the substance of his request seeks the injunction of a presumptively legitimate subpoena issued by a New York County grand jury.

"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)) (internal quotation marks omitted). 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.* In other words, "[a] stay 'simply suspend[s] judicial alteration of the status quo,' while injunctive relief 'grants judicial intervention that has been withheld by lower courts.'" *Id.* at 429 (quoting *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers)) (second alteration in original); *see also Brown v. Gilmore*, 533 U.S. 1301, 1303 (2001) (Rehnquist, C.J., in chambers) ("[A]pplicants are seeking not merely a stay of a lower court judgment, but an injunction against the enforcement of a presumptively valid state statute.").

Appellant currently seeks from this Court the same relief prohibiting the Office from enforcing the Mazars Subpoena that the district court has now twice declined to enter, not an order halting or postponing any judicial proceedings below. The requested

relief is particularly extraordinary because Appellant is asking this Court to intervene in the operation of presumptively legitimate process issued by a grand jury that would otherwise be enforceable, as the district court correctly determined.

Appellant should not be allowed to recast his application as a request for a stay. Appellant has indicated that if this Court denies his current application, he intends to seek similar relief from the Supreme Court, Dist. Ct. Dkt. 74, at 1 n.*, where "a significantly higher justification" is required for an injunction pending appeal than for a stay pending appeal. *Respect Maine PAC v. McKee*, 562 U.S. 996, 996 (2010) (quoting *Ohio Citizens*, 479 U.S. at 1313). To obtain such 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) (quoting *Wis. Right to Life, Inc. v. FEC*, 542 U.S. 1305, 1306 (2004) (Rehnquist, C.J., in chambers)) (Sotomayor, J., in chambers); *accord Lux v. Rodrigues*, 561 U.S. 1306, 1307 (2010) (Roberts, C.J., in chambers). While Appellant cannot show grounds for relief from this Court under any standard, as detailed below, he should not be permitted to evade a demanding standard of review by mislabeling his request for injunctive relief as a request for a stay.

Finally, as the district court observed, Appellant's strategy of filing a civil lawsuit under 42 U.S.C. § 1983 is also procedurally misplaced. *Vance*, 2020 WL 4861980, at *11. Appellant should have filed a motion to quash, which would have required him to show that "there is no reasonable possibility that the category of materials the [g]overnment seeks will produce information relevant to the general subject of the

grand jury's investigation." *In re Grand Jury Proceeding*, -- F.3d --, 2020 WL 4744687, at *8 (2d Cir. Aug. 14, 2020) (quoting *United States v. R. Enters., Inc.*, 498 U.S. 292, 301 (1991)) (alteration in original).

This attempted end-run around long-settled procedure is yet another example of Appellant's efforts to invoke a heightened standard of protection unavailable to other litigants, again contrary to the Supreme Court's decision in this case. Nevertheless, as the district court concluded, Appellant's misplaced invocations do not affect the outcome here. Appellant loses under any of the standards invoked, and dismissal of the SAC was appropriate under the most basic standards of Rule 12(b)(6). *See Vance*, 2020 WL 4861980, at *31-32.

II. Appellant is not entitled to relief pending appeal.

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). "[A] party seeking a preliminary injunction" from a court of appeals must "show (a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." *Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 (2d Cir. 2010) (internal quotation marks omitted). "[T]he effect on each party of the granting or withholding of the requested relief," *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531,

542 (1987), and "the public consequences in employing the extraordinary remedy of injunction," *Romero-Barcelo*, 456 U.S. at 312, are also relevant considerations.

A. The SAC is deficient on its face, and Appellant's appeal stands no chance of success.

Appellant has made clear that his entire case depends on the implausible premise that, at the time the Mazars Subpoena issued, the grand jury's investigation was limited to payments Michael Cohen made in 2016. *See, e.g.*, Dkt. 16-2, at 9, 11. But Appellant's conclusory assertion that the investigation was so limited is insufficient to state a claim, particularly when set against the presumptive validity of grand jury process. As the district court held, Appellant cannot survive Rule 12(b)(6) review simply by stating that he believes the proper scope of the grand jury's investigation is limited to the Cohen payments. *See Vance*, 2020 WL 4861980, at *21-24. The SAC must contain more than such speculative conclusions to raise a right to relief. *See id.* at *9.

1. The Mazars Subpoena is entitled to a presumption of validity.

As the district court explained, any analysis of Appellant's present claims must start from the premise that the Mazars Subpoena is entitled to a presumption of validity that requires "more than mere 'speculat[ion]' and 'bare assertions' of impropriety" to be displaced. *Vance*, 2020 WL 4861980, at *12 (alteration in original) (quoting *Virag v. Hynes*, 54 N.Y.2d 437, 444-45 (1981)); *see id.* at *11-12 (explaining the presumption of validity). Appellant fails to demonstrate any likelihood of overcoming this presumption on appeal.

The law "presumes, absent a strong showing to the contrary, that a grand jury acts within the legitimate scope of its authority," including in issuing subpoenas *duces tecum*. *R. Enters.*, 498 U.S. at 300; *accord Virag,* 54 N.Y.2d at 443.[4] To overcome that presumption, "the party challenging the subpoena" must "demonstrate, by concrete evidence, that the materials sought have no relation to the matter under investigation," have "no conceivable relevance to any legitimate object of investigation by the … grand jury," or "are so unrelated to the subject of inquiry as to make it obvious that their production would be futile as an aid to the Grand Jury's investigation." *Virag*, 54 N.Y.2d at 444 (ellipses in original; internal quotation marks omitted); *accord In re Grand Jury Proceeding*, 2020 WL 4744687, at *8. "Any circumstance permitting intelligent estimate of relevancy is sufficient to support a direction that the subpoena's mandate be obeyed." *Manning v. Valente*, 272 A.D. 358, 362 (1st Dep't 1947) (internal quotation marks omitted). As the district court held, Appellant has not come close to overcoming this presumption. *Vance*, 2020 WL 4861980, at *15-29.

2. The SAC neither presents plausible allegations nor supports reasonable inferences that the Mazars Subpoena is overbroad.

The SAC is rife with implausible, self-serving "descriptions" of the scope of the grand jury's investigation. The SAC asserts that "[i]n 2018, a New York County grand jury began investigating whether certain business transactions from 2016 violated New

[4] This Court need not resolve whether federal or state law governs this dispute because the relevant standards are materially identical.

York law," SAC ¶ 1, but it offers no plausible basis to infer that the investigation remained so limited when the Mazars Subpoena was issued in August 2019. Many investigations develop and expand over time. *See Vance*, 2020 WL 4861980, at *22-23. The SAC further asserts that "[a]ccording to published reports, the focus of the District Attorney's investigation is payments made by Michael Cohen in 2016 to certain individuals." SAC ¶ 12. But the sole report the SAC quotes from (without citing) actually states it was possible "that the [O]ffice had expanded its 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://nyti.ms/3aji2qQ. In any event, there are no facts in the SAC supporting any inference that the reports' authors had accurate information about the investigation.

Similarly, in the district court Appellant inaccurately asserted that the Office "has never publicly acknowledged that the grand jury investigation extends beyond the 2016 Michael Cohen payments." *Vance*, 2020 WL 4861980, at *23. But Appellant has been put on notice throughout this litigation that the grand jury's investigation was not limited to Cohen's 2016 payments. For example, the Office has stated that the grand jury is investigating "potential violations of state law, including issues beyond those involved in the Cohen matter." Br. in Opp. at 4, *Trump v. Vance*, 140 S. Ct. 2412 (2020) (No. 19-635), 2019 WL 6327270, at *4.[5]

[5] The district court observed that, although it need not rely on them here, public reports not taken for their truth may illustrate a pleading's deficiency by demonstrating notice

The SAC's only non-speculative allegation regarding the scope of the grand jury's investigation is the Office's own statement that it is investigating "business transactions involving multiple individuals whose conduct may have violated state law," SAC ¶ 11 (quoting *Vance*, 140 S. Ct. at 2420), which actually undermines Appellant's theory of a limited investigation.

In the district court, Appellant also pointed to a grand jury subpoena served on the Trump Organization (the "TO Subpoena") as the "best evidence" of the scope of the Office's investigation. Dist. Ct. Dkt. 66, at 5. *But see* Br. of Def.-Appellee at 8 n.3 *Trump v. Vance*, 941 F.3d 631 (2d Cir. 2019) (No. 19-3204), 2019 WL 5304305, at *8 n.3 (2019 Dkt. 99) ("[T]he Office's investigation goes beyond the scope of the [TO] Subpoena."). He then claimed that by pleading that the TO Subpoena relates to 2016 conduct, he had also plausibly pleaded that the entirety of the grand jury's investigation relates *only to* that 2016 conduct. *See* Dist. Ct. Dkt. 66 at 5. Singling out one subpoena and declaring that it defines the full scope of a grand jury's inquiry makes no sense at all, particularly in a months-long financial investigation. Grand juries routinely issue subpoenas in an iterative process, with later subpoenas building on new information

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to a party. *Vance*, 2020 WL 4861980, at *23. The public record here underscores the deficiency of Appellant's claims that the investigation was limited to the 2016 Cohen payments. *Id.* at *23-24; Dist. Ct. Dkt. 63, at 17 & n.7 (citing press coverage); *see also Staehr v. Hartford Fin. Servs. Grp., Inc.*, 547 F.3d 406, 425 (2d Cir. 2008) (a court may take "judicial notice of the fact that press coverage … contained certain information, without regard to the truth of their contents" (emphasis omitted)). And although the Court need not rely on it, the unredacted Shinerock Declaration (Dist. Ct. Dkt. 29) further supports the scope of the Mazars Subpoena.

and leads generated from returns on earlier subpoenas. Grand juries have a duty to follow "every available clue" wherever it may lead, *Untied States v. Stone*, 429 F.2d 138, 140 (2d Cir. 1970), which may in some cases cause "the scope of an investigation [to] broaden," *Vance*, 2020 WL 4861980, at *22 (citing *Full Gospel Tabernacle, Inc. v. Attorney-General*, 142 A.D.2d 489 (3d Dep't 1988)).

Appellant also retreads old ground, arguing that the Mazars Subpoena is overbroad because it is similar to another subpoena issued by the House of Representatives to Mazars. Dkt. 16-2, at 11-12. He alleges that "[i]t is 'inconceivable,'" SAC ¶ 45, that the Office might seek the same documents as Congress, and that the similarity between the subpoenas therefore demonstrates that the Mazars Subpoena is overbroad. But the SAC provides no basis to infer impropriety from the fact that Congress sought the production of certain documents from Mazars for legitimate, legislative purposes, and the grand jury simultaneously sought the same documents for its own legitimate, law enforcement purposes. *See Vance*, 2020 WL 4861980, at *18-21.

Appellant also contends that the Mazars Subpoena is overbroad because it "asks for every document and communication related to the President and his businesses, from any part of the world, over roughly the last decade" and thus "is not properly tailored to the District Attorney's investigation." Dkt. 16-2, at 9 (quoting SAC ¶ 12) (internal quotation marks omitted). That argument fails as a matter of law to establish overbreadth. *See In re Aug., 1993 Regular Grand Jury (Med. Corp. Subpoena II)*, 854 F. Supp. 1392, 1401-02 (S.D. Ind. 1993) (challenging party who offers nothing to substantiate an

assertion of overbreadth "except a statement complaining that the subpoena requires virtually every record of the Corporation" fails "to overcome the strong presumption of validity which surrounds grand jury subpoenas"). It also relies on an inaccurate description of the Mazars Subpoena, which specifies five categories of documents it seeks—tax returns; financial statements; engagement letters; underlying support for financial statements; and working papers. SAC ¶ 18. That specificity is more than sufficient to preserve the presumption of validity. *See* Dist. Ct. Dkt. 63, at 15-16 (collecting cases); *see also* Br. for *Amici Curiae* Washington State Tax Practitioners ("Tax Practitioners Br.") at 7, *Trump v. Vance*, 140 S. Ct. 2412 (2020) (No. 19-635), 2020 WL 1433479, at *7 ("In Practitioners' experience, the scope of [the Mazars Subpoena] is not surprising.").[6]

In sum, nothing in the SAC supports Appellant's conclusory assertion that the grand jury's investigation is limited to Cohen's 2016 payments. Rather, Appellant "merely speculate[s] as to what, in [his] view, was the Grand Jury's purpose in seeking the business records," which is "insufficient to overcome the presumption that the materials sought were relevant to the Grand Jury's investigation." *Virag*, 54 N.Y.2d at

[6] Appellant also notes that the Mazars Subpoena seeks documents going back more than five years and relates in part to entities and transactions outside New York. *See* Dkt. 16-2, at 9-10. There is nothing improper about the temporal or geographic scope of the Mazars Subpoena, as New York criminal law applies to acts that took place in part more than five years ago and to acts that occurred in part outside of Manhattan. *See People v. McLaughlin*, 80 N.Y.2d 466, 471 (1992); *People v. E. Ambulance Serv., Inc.*, 106 A.D.2d 867, 868 (4th Dep't 1984); *see also Vance*, 2020 WL 4861980, at *24-25.

445-46. Accordingly, the SAC states no claim for relief on a theory that the Mazars Subpoena is overbroad. *See Vance*, 2020 WL 4861980, at *10-11.

3. Appellant's assertion of bad faith retaliation is baseless speculation.

In support of his claim that the Office acted in bad faith, Appellant asserts that the Office issued the Mazars Subpoena in retaliation against Appellant. To overcome the presumption of validity on a theory of bad faith, a party challenging a grand jury subpoena must put forward more than "bare assertion[s]," *Congregation B'Nai Jonah v. Kuriansky*, 172 A.D.2d 35, 38 (3d Dep't 1991), "hearsay, irrelevancies," and "conclusory" statements regarding the usefulness or propriety of a grand jury subpoena, *In re Kronberg*, 95 A.D.2d 714, 716 (1st Dep't 1983). Only "credible, particularized allegations" of bad faith displace the presumption of validity. *Id.*; *accord In re Grand Jury Proceeding*, 2020 WL 4744687, at *8. Here, Appellant has failed to put forth any "factual content that allows the court to draw the reasonable inference" that the Office acted in bad faith. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Appellant's theory appears to be based on nothing more than the fact that the Mazars Subpoena was issued after the TO Subpoena and after the parties had a "dispute" over whether the TO Subpoena called for tax returns. *See* Dkt. 16-2, at 14. But the SAC states merely that the Office issued the TO Subpoena on August 1, 2019, SAC ¶ 13, and later that month "[w]hen the President's attorneys pointed out that the subpoena could not plausibly be read to demand [tax] returns, the District Attorney

declined to defend his implausible reading. He instead retaliated by issuing a new subpoena to Mazars, a neutral third-party custodian, in an effort to circumvent the President," SAC ¶ 16. That conclusory statement is the full extent of the SAC's "factual" support for its claim of retaliation.

Appellant cannot salvage his conclusory retaliation claim through unreasonable inferences. First, the claim of retaliation presupposes that there could be no valid reason for the grand jury to issue a subpoena to Mazars. Not only is that unsupported by anything in the SAC, it is undermined by the SAC's admissions that Mazars "is a New York accounting firm," SAC ¶ 8, and that the investigation includes "business transactions involving multiple individuals whose conduct may have violated state law," SAC ¶ 11 (quoting *Vance*, 140 S. Ct. at 2420). To credit the inference that no valid purpose supported the Mazars Subpoena would turn the presumption of regularity afforded the grand jury process on its head. *See Vance*, 2020 WL 4861980, at *19.

Second, a claim of retaliation implies that the Office felt wronged by certain conduct and sought to inflict harm on the perceived wrongdoer. But the SAC is devoid of any facts indicating that was the case. Indeed, the SAC does not even assert that there was a "dispute"; it simply points out that the President's lawyers represented that no tax records were responsive to the TO Subpoena, and then inexplicably concludes that the Office "retaliated by issuing a new subpoena to Mazars." SAC ¶ 16. That is

not a well pleaded fact, and it cannot sustain Appellant's assertion of bad faith.[7] *See Vance*, 2020 WL 4861980, at *18.

The SAC therefore fails to state a plausible claim for relief, and Appellant's application for an injunction pending appeal should be denied.[8]

B. Appellant has failed to show irreparable harm.

Appellant has also failed to show that he will suffer irreparable harm if this Court preserves the Mazars Subpoena in its current posture. He argues that if the Subpoena is left undisturbed, Mazars will comply with it, thereby "destroy[ing]" the confidentiality of his private records and denying him "particularly meticulous" appellate review. Dkt. 16-2, at 5-6. These arguments fail.

[7] Appellant also pins his bad faith claim on what he calls the Office's "shifting" explanation for adopting congressional subpoena language for the Mazars Subpoena. Dkt. 16-2, at 14-15. But the SAC contains no facts supporting an inference of "shifting" explanations or any nefarious purpose on this subject. Both commonality of need for the records and efficiency support the choice to adopt language from Congress, and the Office has been transparent and consistent about that reasoning from the start. *See, e.g.*, Dist. Ct. Dkt. 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).

[8] Appellant argues alternatively that a stay should be granted because he "has raised serious questions and the balance of hardships tips decidedly in his favor," relying on *U.S. Servicemen's Fund v. Eastland*, 488 F.2d 1252 (D.C. Cir. 1973). Dkt. 16-2, at 16-29. But in *Eastland*, a stay was justified because the dispute raised "serious constitutional questions" that "require[d] more time … for proper consideration." 488 F.2d at 1256. Although it is arguable that Appellant's prior absolute immunity claim raised unique constitutional issues, he raises no such serious questions here.

Appellant's confidentiality argument ignores the bedrock legal principle that "a presumption of confidentiality attaches to the record of Grand Jury proceedings." *People v. Fetcho*, 91 N.Y.2d 765, 769 (1998). "[T]hose who make unauthorized disclosures regarding a grand jury subpoena do so at their peril," *Vance*, 140 S. Ct. at 2427, and could be subject to criminal penalties, N.Y. Crim. Proc. Law § 190.25(4)(a).

Even if the records were not protected by grand jury secrecy at this juncture—which they are—appellant also fails to explain why the information called for by the Mazars Subpoena should be treated as confidential. "[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); *see also* Tax Practitioners Br., 2020 WL 1433479, at *9 ("The tax returns and supporting documentation covered by the Mazars [S]ubpoena are … inherently imbued with a public character."). Many of the records covered by the Mazars Subpoena have already been produced to federal and state tax authorities. And "the past six presidents, dating back to President Carter, all voluntarily released their tax returns to the public." *Vance*, 941 F.3d at 641 n.12.

Appellant's claims would not be rendered moot, and this Court's ability to review the district court's decision would be preserved, even if the Court declines to intervene in the regular operation of the Mazars Subpoena. The Third Circuit has recognized that even where grand jury process is enforced pending appeal, resulting in the production of evidence to a grand jury, appellate review is not moot, because the

appellate court can "fashion a meaningful remedy for the allegedly unlawful subpoena." *In re Grand Jury Investigation*, 445 F.3d 266, 270 (3d Cir. 2006). If the Court were ultimately to rule in favor of Appellant on the merits of his appeal here, it could, for example, order the records produced to be returned to Mazars or destroyed; order any related testimony to be stricken from the grand jury's record; or order any individual's pre-compliance status to be restored.

C. Delay will substantially injure the grand jury's investigation and the public interest.

The Office previously agreed to forbear enforcement of the Mazars Subpoena to ensure courts had time to review the constitutional issues raised by Appellant's claim of absolute immunity. That forbearance imposed real costs on the Office—for nearly an entire year, the grand jury's investigation has been substantially hampered.

The SAC no longer contains difficult questions of constitutional law. Although filed by the President, the SAC is no more than a run-of-the-mill attack on a presumptively legitimate grand jury subpoena as overbroad or issued in bad faith. Continued delay of the grand jury's investigation is unwarranted, and it would significantly impair the Office's ability to discharge its constitutionally protected duty to investigate and, where appropriate, prosecute violations of New York law. Delay can lead to the loss of evidence, fading memories, and the running of statutes of limitation, which "could frustrate the identification, investigation, and indictment of third parties." *Vance*, 140 S. Ct. at 2430. "More troubling," continued delay "could

prejudice the innocent by depriving the grand jury of *exculpatory* evidence." *Id.* The SAC does not recite allegations that warrant such results. *See Vance*, 2020 WL 4861980, at *32.

CONCLUSION

Appellant's application for relief pending appeal should be denied.

Dated: New York, New York
August 27, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

It is hereby certified that the foregoing Memorandum in Opposition to Plaintiff's Emergency Motion for a Stay Pending Appeal is in compliance with Federal Rule of Appellate Procedures 27 and 32 and with the local rules of the Second Circuit. The foregoing was printed in 14-point proportional font and, including footnotes and headings, contains 5,181 words.

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August 27, 2020

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