No. 23-615
No. 23-616

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ALVIN L. BRAGG, JR., *in his official capacity as District Attorney for New York County*,
Plaintiff-Appellant,

v.

MARK F. POMERANTZ,
Defendant-Appellant,

v.

JIM JORDAN, *in his official capacity as Chairman of the Committee on the Judiciary*,
Defendant-Appellee,

THE COMMITTEE ON THE JUDICIARY OF THE UNITED STATES HOUSE OF REPRESENTATIVES,
Defendant-Appellee.

On emergency motion seeking an interim administrative stay and a stay pending appeal
from the United States District Court for the Southern District of New York

***AMICUS CURIAE* BRIEF OF THE AMERICAN CENTER FOR LAW & JUSTICE IN SUPPORT OF DEFENDANTS-APPELLEES JIM JORDAN AND THE COMMITTEE ON THE JUDICIARY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, AND AFFIRMANCE**

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Dated: April 21, 2023

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CORPORATE DISCLOSURE STATEMENT

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INTEREST OF *AMICUS*[1]

The American Center for Law & Justice ("ACLJ") is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have argued before the Supreme Court of the United States in numerous cases involving the freedoms of speech and religion. The ACLJ actively litigates cases and files *amicus* briefs in courts across the nation in defense of constitutional limitations on government and government accountability. Undersigned counsel, Jay Sekulow, appeared as counsel before the United States Supreme Court in *Trump, et al., v. Mazars USA, LLP, and Committee on Oversight and Reform of the U.S. House of Representatives*, 140 S. Ct. 2019 (2020), which was addressed extensively by the District Court and the parties in this case and which bears upon the issues at hand, as well as its companion case, *Trump v. Vance*, 140 S. Ct. 2412 (2020).

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[1] Counsel for Appellant Bragg and Appellee Jordan and the Committee consented to the filing of this *amicus* brief. Counsel for Appellant Pomerantz stated he took no position in response to our request for consent. No party's counsel in this case authored this brief in whole or in part. No party or party's counsel contributed any money intended to fund preparing or submitting this brief. No person, other than amicus, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

Amicus respectfully submits this brief to make two points. First, while a congressional subpoena cannot be based on exposing for exposing's sake, *Watkins v. United States*, 354 U.S. 178, 187 (1957), a *valid* congressional subpoena that will shed more light on or expose additional revealing facts about a state official's actions impacting federal interests is not a threat to federalism. Second, this congressional subpoena is valid. There are no grounds for judicial quashing of this congressional subpoena, as it serves a valid legislative purpose, relating to and furthering a legitimate task of Congress. Given the undisputed facts and the admissions on the record and the straightforward and limited scope of the Court's role, the Court's inquiry must end. *See Comm. on Ways & Means, U.S. House of Representatives v. U.S. Dep't of the Treasury*, 575 F. Supp. 3d 53, 69 (D.D.C. 2021), *aff'd sub nom.*, 45 F.4th 324 (D.C. Cir. 2022) ("It is not a court's 'function' to invalidate a congressional investigation that serves a legislative purpose." (quoting *Watkins*, 354 U.S. at 200)); *Barenblatt v. United States*, 360 U.S. 109, 132 (1959) ("So long as Congress acts in pursuance of its constitutional power, the Judiciary *lacks authority to intervene on the basis of the motives which spurred the exercise of that power*." (emphasis added)).

INTRODUCTION

Before the Court is "merely a motion to quash a subpoena dressed up as a lawsuit." District Court Opinion, at 5. Significant to its resolution is the undisputable

reality that the Committee on the Judiciary of the United States House of Representatives (the "Committee") explained that the subpoena at issue is based on two facts: (1) "[Mark F.] Pomerantz has 'already discussed many of the topics relevant to the Committee's oversight in a book that Pomerantz wrote and published in February 2023, as well as in several public interviews to promote his book'"; and (2) The District Attorney of New York ("DANY") has "'acknowledged that it used federal forfeiture funds in its investigations of President Trump,' and that the Committee was considering 'potential legislative reforms,' such as 'broadening the existing statutory right of removal of certain criminal cases from state court to federal court.'" Op. at 2 (quoting Ex. 1 at 2) (brackets removed). As the District Court observed, "the book recounts Pomerantz's *insider* insights, mental impressions, and his front row seat to the investigation and deliberative process leading up to the DANY case against former President and current presidential candidate Donald Trump." Op. at 2 (citing M. Pomerantz, *People vs. Donald Trump: An Inside Account* (2023) ("*Inside Account*")).

After enforcing its clear notice rules and denying district attorney Alvan L. Bragg's attempt to secure an *ex parte* temporary restraining order (TRO) without notice to or even service of the complaint on Rep. Jordan and the Committee, the District Court ordered briefing and held a hearing on Bragg's TRO motion. The

Court's ruling centered on two valid legislative purposes advanced by Rep. Jim Jordan and the Committee:

> [T]he Committee is considering the viability of legislation to protect former Presidents and presidential candidates from politically motivated prosecutions by local district attorneys, such as by permitting those cases to be removed to federal court, out of a concern that such prosecutions "could have a profound impact on how Presidents choose to exercise their powers while in office." Def. Mem. 3. Second, Defendants argue that the Committee is permissibly investigating DANY's use of federal forfeiture funds in the investigation of President Trump, which could potentially influence the outcome of the 2024 presidential election. Def. Mem. 8–9.

Op. at 6. As addressed further herein, these congressional purposes – and a congressional subpoena based upon these purposes, like the one before this Court – are valid.

ARGUMENT

I. *Valid* Congressional Subpoenas Exposing State Officials' Misuse of Federal Funds or the Politicization of the Prosecution of Candidates for Federal Office Threaten Neither State Sovereignty Nor Federalism.

The District Court correctly noted New York's sovereignty as a state and its unquestioned authority to enforce its criminal code. But, that sovereignty notwithstanding, the court held that "[t]he subpoena of Pomerantz, who was a private citizen and public commentator at the time Bragg indicted Trump, will not prevent or impede the criminal prosecution that is proceeding in New York state court." Op. at 8. In other words, a congressional subpoena based upon a state district attorney's use of federal funding and assessment of legislation concerning removal of cases

involving current or former United States presidents to federal court, directed to a private citizen who authored a book detailing inside accounts of that district attorney's actions, simply does not threaten the legitimate sovereignty interests of a state or its district attorney. While a congressional subpoena cannot be based on exposing for exposing's sake, *Watkins*, 354 U.S. at 187, a *valid* congressional subpoena that will shed more light on or expose additional revealing facts about a state official's actions is not a threat to federalism.

The Court is required to presume that a congressional committee's stated legislative object is "the real object." *McGrain v. Daugherty*, 273 U.S. 135, 178 (1927) (When it appears that Congress is investigating on a subject matter in aid of legislating, "the presumption should be indulged that this was the real object."). "It is not a court's 'function' to invalidate a congressional investigation that serves a legislative purpose." *Comm. on Ways & Means*, 575 F. Supp. 3d at 69 (quoting *Watkins*, 354 U.S. at 200). Indeed, the Supreme Court has instructed that "[s]o long as Congress acts in pursuance of its constitutional power, the Judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of that power." *Barenblatt*, 360 U.S. at 132 (emphasis added). Whatever motives may underlie the Committee's subpoena, its "inquiry may fairly be deemed within its province." *Tenney v. Brandhove*, 341 U.S. 367, 378 (1951). That is sufficient to resolve this inquiry.

II. The Court's Inquiry is Limited and this Congressional Subpoena is Valid.

Clearly, "[c]ongressional committees have constitutional authority to conduct investigations and issue subpoenas because 'each House has power to secure needed information in order to legislate." Op. at 10 (quoting *Mazars*, 140 S. Ct. at 2031). To be sure, "this power is not limitless." *Id.* at 11. As the District Court correctly observed, "The subpoena must serve a 'valid legislative purpose," Op. at 11 (quoting *Quinn v. United States*, 349 U.S. 155, 161 (1955)), and "'concern[] a subject on which 'legislation could be had,'" *id.* (quoting *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 506 (quoting *McGrain*, 273 U.S. at 177)). "Importantly, a congressional subpoena is valid only if it is 'related to, and in furtherance of, a legitimate task of the Congress.'" Op. at 12 (quoting *Watkins*, 354 U.S. at 187).

Critically, in reviewing a subpoena challenge, the court's inquiry is limited in scope: "The role of a court in evaluating a congressional subpoena is strictly limited to determining only whether the subpoena is 'plainly incompetent or irrelevant to any lawful purpose . . . in the discharge of [the Committee's] duties.'" Op. at 11 (quoting *McPhaul v. United States*, 364 U.S. 372, 381 (1960) (emphasis added); *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509 (1943)).

To this end, "Congress may conduct inquiries 'into the administration of existing laws, studies of proposed laws, and [particularly relevant here,] 'surveys

of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them.'" Op. at 12 (quoting *Mazars*, 140 S. Ct. at 2031; *Watkins*, 354 U.S. at 187). Further, "There can be no doubt that Congress may permissibly investigate the use of federal funds, particularly where the result of the investigation might prompt Congress to pass legislation changing how such funds are appropriated or may be spent." Op. at 12 (*Sabri v. United States*, 541 U.S. 600, 608 (2004) ("The power to keep a watchful eye on expenditures and on the reliability of those who use public money is bound up with congressional authority to spend in the first place."); U.S. Const. art. I, § 8, cl. 1)).

The inquiry is straightforward and boils down to a simple "if-then" equation. *If* the congressional subpoena is not plainly incompetent or irrelevant to any lawful purpose of Congress, *then* the court cannot intervene. Put differently, *if* the congressional subpoena is issued based on any valid legislative purpose, *then* the court will not quash it. If such a purpose is advanced, then a movant for either temporary restraining order or preliminary injunction – which are subject to the same legal standard in this Circuit, *see 3M Co. v. Performance Supply, LLC*, 458 F.Supp. 3d 181, 191 (S.D.N.Y. 2020) – is unlikely to succeed on the merits and the motion is therefore properly denied. There is no need to advance to the remaining preliminary injunction/temporary restraining order factors. *See Oneida Nation of New York v. Cuomo*, 645 F.3d 154, 164 (2d Cir. 2011). Applying this simple

equation to the facts, it becomes abundantly clear that the District Court's ruling was correct.

To illustrate, the District Court noted that "DANY has conceded that it used federal forfeiture funds in its investigation of President Trump." Op. at 12 (citing Ex. 19; Compl. ¶¶ 78, 81). Next, "Defendants represent that the Committee is considering legislation to prohibit the use of federal forfeiture funds to investigate a current or former President." *Id.* (citing Def. Mem. at 8; Ex. V). For the "then" component of the equation, dispositively, "*On the record at the hearing on the motion for emergency relief, Bragg's counsel conceded that the investigation of DANY's use of federal funds is a valid legislative purpose*." *Id.* (emphasis added). Given Bragg's fatal concession, the District Court was spot-on in its conclusion that, "[t]his purpose, standing alone, is clearly sufficient to justify the subpoena and thereby to end this Court's inquiry." *Id.* There are no grounds for this Court to intervene and quash the congressional subpoena here, as it serves a valid legislative purpose, relating to and furthering a legitimate task of Congress. The Court's inquiry in the question before it must end. *See Comm. on Ways & Means*, 575 F. Supp. 3d at 69 ("It is not a court's 'function' to invalidate a congressional investigation that serves a legislative purpose." (quoting *Watkins*, 354 U.S. at 200)); *Barenblatt*, 360 U.S. at 132 ("So long as Congress acts in pursuance of its constitutional power, the

Judiciary *lacks authority to intervene on the basis of the motives which spurred the exercise of that power*." (emphasis added)).

If an additional basis for the subpoena were necessary, one is patently obvious from the record. As the District Court observed, Rep. Jordan and the Committee have gone on the record stating their plans to pursue "legislative reforms to insulate current and former presidents from state prosecutions, such as by removing criminal actions filed against them from state to federal court." Op. at 12. This particular concern resonates with the undersigned counsel for *amicus* as this encompasses his contention to the Supreme Court in oral argument in *Trump v. Vance*, 19-635, one of the companion cases heard in conjunction with *Trump v. Mazars*.[2] Rep. Jordan and the Committee recognize the threat and are exploring a legislative response. As the District Court emphasized, "Congress also has authority to investigate legislative

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[2] In *Vance*, counsel warned that this Court's decision in that case

> weaponizes 2300 local DAs. An overwhelming number of them are elected to office and are thereby accountable to their local constituencies. The decision would allow any DA to harass, distract, and interfere with the sitting President. It subjects the President to local prejudice that can influence prosecutorial decisions and to state grand juries, who can then be utilized to issue compulsory criminal process in the form of subpoenas targeting the President. This is not mere speculation. It is precisely what has taken place in this case and with the subpoena we challenge.

Transcript, *Trump v. Vance*, 19-635 (U.S. Sup. Ct.), at 4-5 (available at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/19-635_g3bh.pdf).

reforms to prevent local prosecutions that could potentially interfere with federal elections." Op. at 12-13 (citing *Mazars*, 140 S. Ct. at 2031 (It is legitimate for Congress to conduct "inquiries into the administration of existing laws" and "proposed laws" that seek to address problems "in our social, economic or political system.")).

Article 1 of the United States Constitution plainly grants to Congress the power "[t]o make all laws which shall be necessary and proper for carrying into execution the foregoing powers." U.S. Const. art. I, § 8, cl. 18. "The [investigative] power of the Congress . . . encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes." *Watkins*, 354 U.S. at 187 (emphasis added). Congress possesses authority to consider, and to investigate, this potential legislative reform. This congressional subpoena is based on that purpose, among other valid purposes, and is therefore lawful.

While this judicial inquiry should stop there, *see Comm. on Ways & Means*, 575 F. Supp. 3d at 69; *Watkins*, 354 U.S. at 200; *Barenblatt*, 360 U.S. at 132, further inquiry reveals additional reasons supporting the subpoena's validity: The subpoenaed deponent, which no longer works for Bragg or the DANY, literally wrote the book, *Inside Account*, illustrating from an insider's viewpoint *how* the district attorney's indictment and prosecution of a now former United States president is driven by political motivation and a, frankly, unflattering series of

actions and statements. *See* Op. at 2-4 (listing certain relevant pieces of information from Pomerantz's book).

Pomerantz's book is decisive evidence of Rep. Jordan and the Committee's assertion that the congressional subpoena to Pomerantz is based upon seeking a legislative response to curb local prosecutions that could potentially interfere with federal elections, as the subject of Bragg's "zombie," *see* Op. at 2, indictment is a current candidate for president. Indeed, Bragg did not indict former President Trump until *after* he had announced his candidacy.

The House Judiciary Committee's consideration of a legislative response to a real, demonstrable problem, and its congressional subpoena to a key local actor (no longer even employed by the office) in a real-life example of that *precise* problem, playing out in real time, is entirely valid. The District Court got it right. If Bragg or Pomerantz believe they have a concrete objection, based on privilege or otherwise, to a specific question asked in Pomerantz's deposition, there is a well-known procedure for making such an objection and obtaining court supervision.

CONCLUSION

As the Supreme Court put it in *Mazars*, "Legislative inquiries might involve the President in appropriate cases; as noted, Congress's responsibilities extend to every affair of government." *Mazars*, 140 S. Ct. 2019, 2033 (2020). Here, the legislative inquiry involves somebody much less weighty: a former pro bono

employee of a state district attorney's office who has commercialized exposing just how politically motivated, and botched, an indictment of a former president and current candidate for president really is.

Amicus respectfully request this Court to affirm the District Court's decision.

Respectfully submitted,

Dated: April 21, 2023

By: /s/*Jay Alan Sekulow*
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Counsel for Amicus Curiae,
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[redacted]

CERTIFICATE OF COMPLIANCE

This brief complies with type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Local Rules 32.1(a)(4)(A) and 29.1(c) because this brief contains 3,214 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word processing software in 14-pt Times New Roman font.

Dated: April 21, 2023

/s/ *Jay Alan Sekulow*
Jay Alan Sekulow
Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on April 21, 2023, I electronically filed a copy of the foregoing *Amicus Curiae* Brief using the ECF System which will send notification of that filing to all counsel of record in this litigation. I also certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: April 21, 2023

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