No. 26-141

In the Supreme Court of the United States

PRESIDENT DONALD J. TRUMP,
PETITIONER,

v.

E. JEAN CARROLL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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This Court has never denied review when the "President, represented by private counsel," and the "Solicitor General, representing the United States," both assert that the decision below "create[s] serious risks for the institution of the Presidency." *Clinton* v. *Jones*, 520 U.S. 681, 689 (1997); *see* Pet. 5 (collecting cases). Respondent never disputes that fact. The Court should continue its longstanding practice, and grant review of the important questions of Presidential immunity and Westfall Act immunity raised here by the President and the United States.

This is the first time in our Nation's history that any court has ever imposed damages liability on a

President for his conduct in office. That alone warrants this Court's review. There is much more: the exorbitant $83.3 million award includes $65 million in punitive damages *specifically intended to punish* the President for the way that he "used the office of the presidency." Pet. App. 206a. If allowed to stand, that unprecedented judgment will dangerously render all future Presidents "[c]ognizan[t] of [their] personal vulnerability" to crippling personal liability, and damage the Presidency itself. *Nixon* v. *Fitzgerald*, 457 U.S. 731, 753 (1982).

Remarkably, respondent barely even attempts to defend the judgment on its merits. The Second Circuit's decision rests solely on its flawed holding that a President forfeits Presidential immunity by failing to expressly raise it with sufficient clarity in his first responsive filing. Yet, the opposition spends only 1.5 pages trying to defend that untenable rule. As Judges Menashi, Park, and Livingston explained below, it cannot be the case that the President—the only person who embodies a branch of government—enjoys a weaker immunity than the one that protects 535 Members of Congress, or protects individual States. *See* Pet. App. 82a (Menashi, J., dissenting from denial of rehearing *en banc*). Presidential immunity is not a run-of-the-mill defense that "may be waived unintentionally through inadvertence." *Ibid.* It is essential to the proper functioning of our government.

Rather than argue otherwise, respondent spends virtually all of her opposition insisting that this Court should let stand the Second Circuit's erroneous ruling because of supposed "vehicle" problems. Br. in Opp. 15-21, 24-25. But none of those purported problems is

real. As detailed *infra*, respondent distorts the record, misrepresents what happened below, and disregards this Court's established certiorari practices. There is no legal or prudential obstacle to this Court's consideration of the questions presented. It should grant review.

I. THE COURT SHOULD REVIEW THE SECOND CIRCUIT'S STRICT FORFEITURE RULE FOR PRESIDENTIAL IMMUNITY.

A. Respondent's Vehicle Arguments Are Baseless.

For almost all of her opposition, respondent tries to gin up "procedural defects" in the petition. Br. in Opp. 21. Her objections all lack merit.

1. *President Trump properly challenges the Second Circuit's initial forfeiture ruling.*

Start with a key point that respondent tries to obscure: President Trump is challenging the Second Circuit's *first* interlocutory decision denying Presidential immunity, not that court's second decision applying law of the case to "adher[e] to our prior" opinion. Pet. App. 20a. In its first decision, the Second Circuit summarized its erroneous holding as follows: "(1) Presidential immunity is a waivable defense. (2) Defendant waived the defense of presidential immunity by failing to raise it as an affirmative defense in his answer." Pet. App. 190a-191a. President Trump seeks review of those incorrect legal rulings. *See* Pet. I, 17. When the proceedings below have involved multiple rounds of appeals, "it is settled that [this Court] may consider questions raised on the first appeal, as well as those that were

before the court of appeals upon the second appeal." *Mercer* v. *Theriot*, 377 U.S. 152, 153 (1964).

2. *President Trump may rely on* Helstoski.

Respondent wrongly claims (at 15-17) that President Trump cannot rely on *Helstoski*'s express-waiver rule because he failed to cite that case during the first interlocutory appeal below. As this Court has repeatedly held, "parties are not limited to the precise arguments they made below"—let alone to the precise cited authorities. *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). Instead, "a party can make any argument" or cite any case "in support of" "what has been [a] consistent claim." *Ibid.*

Throughout the proceedings below, President Trump's position was consistent: he did not "waive[] his entitlement to absolute immunity by neglecting to raise it in his [initial] Answer." Mem. at 1, *Carroll* v. *Trump*, No. 20-cv-7311 (S.D.N.Y. Jan. 19, 2023), Dkt. 122. Accordingly, President Trump "can make any argument in support of that claim" in this Court. *Yee* v. *Escondido,* 503 U.S. 519, 534 (1992). He has two: (i) Presidential immunity is strictly jurisdictional, and thus cannot be waived or forfeited; and (ii) waiver requires at least an express and unequivocal statement under *Helstoski*. That President Trump initially focused on the first argument in the Second Circuit does not preclude him from also advancing a "different but closely related theory." *Lebron*, 513 U.S. at 380.

It is irrelevant that the Second Circuit declined to address President Trump's *Helstoski* argument by relying on "law of the case," Pet. App. 12a. The "court of appeals' adherence to the law of the case cannot

insulate an issue from this Court's review" and "cannot bind this Court." *Christianson* v. *Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988).

Moreover, respondent is wrong in claiming (at 16 n.4) that President Trump has somehow abandoned his argument that Presidential immunity is jurisdictional. President Trump has consistently maintained that position, and it is correct. The comparison to Speech or Debate immunity is instructive: in "case after case," the D.C. Circuit has considered that immunity a "jurisdictional" "limit[] . . . on federal courts' power." *Meadows* v. *Pelosi*, 639 F. Supp. 3d 62, 69 (D.D.C. 2022) (collecting cases). Presidential immunity operates the same way, as the petition explained (at 18-22). The petition included, but did not lead with, that strict jurisdictional theory, because this Court need not reach it. Instead, as in *Helstoski*, the Court can "assum[e], *arguendo*" that the immunity is non-jurisdictional, while holding that waiver requires at least an "explicit and unequivocal expression." *United States* v. *Helstoski*, 442 U.S. 477, 493 (1979).

3. *President Trump never expressly relinquished his immunity.*

Respondent next claims that the question here is academic because President Trump "*told* the courts he wouldn't be invoking absolute presidential immunity." Br. in Opp. 18. That is absurd. Respondent stretches to rely (at i, 18-19) on a snippet of a July 2020 letter that President Trump filed with the state trial court that initially oversaw this case. President Trump was then seeking a temporary stay. Respondent had accused the President of trying to use the stay "to escape

accountability." Pl. Letter, NYSCEF No. 101 (N.Y. Sup. Ct. July 15, 2020). In response, President Trump quoted respondent's own words and explained that

> no one is seeking to "escape accountability" here (PL at 2). Plaintiff is free to pursue this action when the President is no longer in office. Plaintiff's repetition of the assertion that a postponement of proceedings would place the President "above the law" (*id.* at 1) does not make it so.

Def. Letter at 3, NYSCEF No. 103 (N.Y. Sup. Ct. July 16, 2020).

Thus, in context, President Trump was merely observing that respondent's own hyperbolic language about "escaping accountability" did not fairly describe his request for a temporary stay. He did not come close to *unequivocally* relinquishing Presidential immunity—especially considering his earlier pleading, in his answer, that the "alleged defamatory statements" here "are privileged or protected by one or more immunities . . . under the Constitution." Pet. 9.

Respondent is also wrong in suggesting (at 20-21) that the waiver question turns on whether President Trump had absolute immunity "'clearly in mind' when he submitted" the July 2020 letter. In *Helstoski*, the defendant "was aware of the Speech or Debate Clause at the time he made his first grand jury appearance," and had even "recently" "relied upon" that immunity in a different litigation. 442 U.S. at 483 n.4. Such awareness did not convert Helstoski's failure to invoke

immunity into an "explicit and unequivocal waiver." *Id.* at 492. The same is true here.

Respondent also incorrectly states (at 19-20) that President Trump clearly waived absolute Presidential immunity by litigating and engaging in "discovery and motions practice." That cannot be a clear "expression of waiver." *Helstoski*, 442 U.S. at 492. Merely litigating a case is not an express waiver; that would eliminate the whole point of the heightened waiver standard. For example, this Court has routinely permitted States to assert immunity "for the first time on appeal." *Patsy* v. *Board of Regents of Fla.*, 457 U.S. 496, 515 n.19 (1982).

4. *The Second Circuit did not hold that President Trump expressly relinquished his immunity.*

Finally, respondent suggests (at i, 9, 20-21) that the Second Circuit agreed with her reading of the July 2020 letter, and relied on it to find a waiver. That is false; the Second Circuit did not rely on the letter in either of its two opinions.

In claiming otherwise, respondent miscites a one-sentence footnote from the Second Circuit's law-of-the-case ruling. *See* Pet. App. 20a n.12. There, in unexplained dicta, the court suggested that an oral-argument "concession" by President Trump's counsel might satisfy *Helstoski*'s express-waiver standard. *Ibid.* But as Judges Menashi, Park, and Livingston explained, this supposed "concession" was simply an answer to a hypothetical oral-argument question, in which President Trump's counsel had been asked to assume that "presidential immunity is subject to ordinary waiver

rules." Pet. App. 82a-83a. Notably, the original Second Circuit panel that heard counsel's answer did not treat it as an express waiver; the court made clear that it "express[ed] no view on whether Defendant intended to relinquish his presidential immunity defense." Pet. App. 166a n.1. Again, it is that initial forfeiture decision by the original panel that President Trump challenges here—and that the Court can, and should, overturn.

B. The Rules Governing Waiver Or Forfeiture Of Presidential Immunity Are Vitally Important And Require Clarification.

In respondent's telling (at 21), there is no need for this Court's review because a President can always be sure to avoid forfeiture or waiver by invoking immunity in his first responsive filing. The opposition itself shows why that supposed certainty is a mirage. As explained, respondent's lead argument is that President Trump waived immunity in a letter he filed six months *after* his answer. That demonstrates the uncertainty created by the Second Circuit's decision: even if a President does expressly assert immunity right away, plaintiffs can continue to scour his subsequent filings or statements for language, no matter how broad or obscure, that they can try to paint as a waiver. That vitiates one of the purposes of immunity: to free the President from the "burdens of litigation." *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985). It is therefore critical for this Court to provide guidance on "exactly how explicit a President must be to waive immunity," Br. in Opp. 2—or confirm that waiver is impossible for this jurisdictional protection.

Respondent baselessly claims (at 2) that the "standard for waiving presidential immunity" will not "ever come up again." There is no way for respondent to know that. The question came up in this case. It came up for legislative immunity in *Helstoski*, and has come up regularly since, *see Meadows*, 639 F. Supp. 3d at 69. And it has come up for judges in the lower-court cases that respondent herself cites (at 22 n.6).

It is hardly unheard of for counsel to do or say something that gives rise to a potential waiver or forfeiture argument. Such inadvertent actions may fairly result in the loss of defenses that are solely "for the personal or private benefit" of individuals. *Eastland* v. *U.S. Servicemen's Fund*, 421 U.S. 491, 502 (1975). But they cannot cause a President to lose an immunity that protects the constitutional structure.

C. Respondent's Few Merits Arguments Are Unpersuasive.

Tellingly, respondent barely attempts to argue that the Second Circuit's strict forfeiture rule for Presidential immunity is correct. No surprise: that rule cannot be squared with *Helstoski* or this Court's Presidential immunity precedents. Pet. 17-24.

Respondent first urges (at 22) that *Helstoski*'s waiver standard should be limited to "criminal, not civil, proceedings." But as this Court has recognized, "just as a criminal prosecution infringes upon [legislative] independence," "a private civil action . . . creates a distraction and forces Members to divert their time, energy, and attention from their legislative tasks." *Eastland*, 421 U.S. at 503. The same exact concerns arise in criminal prosecutions and damages actions

against a President based on his official acts. Pet. 20-21.

Respondent also wrongly insists (at 22) that there is "no reason to think the waiver standard for presidential immunity" should match the standard "applicable to legislative immunity." But as the petition explained (at 19-22), both immunities are designed to protect their respective institutions and the separation of powers, rather than individual officeholders. Further, compared to legislators, the "sheer prominence of the President's office," and "the effect of his actions on countless people" make him an exceedingly attractive target. *Fitzgerald*, 457 U.S. at 752-753. That confirms why a robust litigation protection is critical for Presidents. Respondent offers no counterargument.

* * *

The Court should grant review to clarify the rules that govern the waiver or forfeiture of Presidential immunity. At a minimum, it should grant, vacate, and remand for further consideration in light of *Trump* v. *United States*, 603 U.S. 593 (2024), which made clear that Presidential immunity is rooted in the Constitution, and thus not subject to the prosaic waiver rules governing ordinary litigation arguments.

II. THE COURT SHOULD DECIDE WHETHER PRESIDENTIAL IMMUNITY PROTECTS THE OFFICIAL STATEMENTS ON WHICH THE UNPRECEDENTED JUDGMENT BELOW RESTS.

Presidential immunity requires reversal of the exorbitant $83.3 million judgment. *First*, the district court improperly held the President liable for

statements that were not manifestly or palpably beyond the outer perimeter of his "bully pulpit" power to speak to the public and, therefore, were official acts. Pet. 27-30. *Second*, the district court wrongly permitted the jury to award $65 million in punitive damages specifically to punish President Trump for his supposedly "reprehensib[le]" "use[] [of] the office of the presidency." Pet. 30-31.

In response, respondent focuses on the jury verdict in *Carroll II*. But that verdict is irrelevant here. It is black-letter law that absolute immunity, when it applies, overrides a contrary verdict. In *Barr* v. *Matteo*, this Court relied on official immunity (what it called an "absolute privilege") to reverse a jury verdict finding a federal agency head liable for defamation. 360 U.S. 564, 567 (1959). And in *Bogan* v. *Scott-Harris*, this Court relied on legislative immunity to reverse a jury's damages award. 523 U.S. 44, 47-48, 54-56 (1998). Moreover, the jury's verdict in *Carroll II* is unreliable, as the trial there was marred by numerous "striking departures" from basic evidentiary protections for defendants. *Carroll* v. *Trump*, 141 F.4th 366, 368 (2d Cir. 2025) (Menashi, J., dissenting from denial of rehearing *en banc*).

Respondent also suggests (at 25) that the specific "contents of [President Trump's] statements" here somehow crossed the official-acts line. They did not. When the President is accused of personal misconduct threatening his perceived integrity and fitness for office, the Constitution does not limit his response to graceful, antiseptic denials. As with all "matters of public concern," the President must be permitted to "speak[] forcefully or critically" to "persuade

Americans" to agree with his position, free of any concern that his statements may later be used to impose crippling liability. *Trump*, 603 U.S. at 629.

Consider a few examples of other Presidents defending their fitness for office. President Clinton accused Paula Jones of seeking "to derive economic benefit and simultaneously to harm the president politically." Peter Baker, *Clinton 'Adamantly' Denies Jones Allegations*, Wash. Post (July 3, 1997). President George H.W. Bush called allegations of an extramarital affair "a lie," and harshly criticized a CNN reporter for asking such "sleazy questions." George H.W. Bush, *The President's News Conference With Prime Minister Yitzhak Rabin of Israel in Kennebunkport*, 2 Pub. Papers 1331, 1336 (Aug. 11, 1992). President Theodore Roosevelt called for Joseph Pulitzer to be criminally "prosecuted for libel" after Pulitzer "wantonly and wickedly" accused Roosevelt's associates of corruption. Theodore Roosevelt, *Special Message of the President of the United States*, H.R. Doc. No. 60-1213, at 4-5 (1908).

This Court should decide this recurring Presidential immunity question now, rather than delay this litigation for several more years. Respondent incorrectly insists (at 24) that deciding the immunity question will require a "factbound analysis." But she identifies no relevant facts that are missing or disputed here—not one.

Respondent also wrongly urges (at 24) the Court to follow its typical "review, not first view" practice. But this is far from a typical case. Federal courts have "a duty to see that" official-immunity questions are "swiftly resolved," *Eastland*, 421 U.S. at 511 n.17, even

more so where the $83.3 million judgment is against the sitting President. Allowing this high-profile litigation to drag on will perpetuate the very "diversion of [Presidential] attention" that immunity is intended to prevent, as post-judgment interest rapidly accrues. *Clinton*, 520 U.S. at 694 n.19.

III. THE COURT SHOULD ALSO GRANT REVIEW OF THE WESTFALL ACT QUESTION.

Finally, the Court should also grant the third question presented, and grant the United States's petition in No. 26-142, regarding substitution under the Westfall Act. As the United States explains (U.S. Pet. 17-18), Attorney General Barr's initial, pre-trial certification was sufficient to trigger substitution under the Act. But at a minimum, the statute certainly did not prohibit Attorney General Bondi from later re-certifying. The Second Circuit was therefore required to decide whether the United States is the proper defendant here, which it is. *See* Pet. 32-35. In wrongly holding that Attorney General Bondi's post-trial re-certification was untimely, the decision below invites future certification gamesmanship, harming not only the affected federal officers, but the federal government itself.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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