

No. 26-142

**In the Supreme Court
of the United States**

UNITED STATES,

PETITIONER

v.

E. JEAN CARROLL, ET AL.,

RESPONDENTS

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

**BRIEF OF *AMICUS CURIAE*
DAVID BOYLE IN SUPPORT OF
RESPONDENT E. JEAN CARROLL**

David Boyle
Counsel of Record
P.O. Box 15143
Long Beach, CA 90815
dbo@boyleslaw.org
(734) 904-6132

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iii
<i>AMICUS CURIAE</i> STATEMENT OF INTEREST...	1
SUMMARY OF ARGUMENT.....	2
ARGUMENT.....	4
I. THE QUESTION PRESENTED FAILS TO ASK IF SOURCES OUTSIDE THE WESTFALL ACT PRECLUDE IMMUNITY.....	4
II. THE ATTORNEY GENERAL RE- CERTIFIED TRUMP FOR SUBSTITUTION QUITE TARDILY; HENCE, TRUMP SHOULD NOT RECEIVE IMMUNITY.....	5
III. PETITIONER FAILED TO RECERTIFY TRUMP BEFORE TRIAL, THOUGH THE CASE COMMENCED IN STATE COURT AND MAY REQUIRE PRETRIAL CERTIFICATION.....	6
IV. THE STATEMENTS' MALICE AND LIES RENDER THEM NOT IMMUNE.....	14
V. PRESIDENTIAL IMMUNITY IS WAIVABLE, PER JFK, FDR, AND TRUMAN.....	19
VI. TRUMP MAY HAVE WAIVED	

PRESIDENTIAL IMMUNITY; AND <i>TRUMP</i> MENTIONS <i>HELSTOSKI</i> , BUT DOESN'T DEMAND EXPLICIT WAIVER OF IMMUNITY.....	20
VII. TRUMP/PETITIONER MAY HAVE FORFEITED IMMUNITY-BASED “QUESTIONS PRESENTED”, BY NOT RAISING THEM BEFORE THE 25-573 REHEARING PETITION.....	22
(ANTECONCLUSION).....	24
CONCLUSION.....	26

TABLE OF AUTHORITIES

CASES

<i>Brown v. Armstrong</i> , 949 F.2d 1007 (8th Cir. 1991).....	11, 12, 13
<i>CAIR v. Ballenger</i> , 444 F.3d 659 (D.C. Cir. 2006).....	14, 17
<i>Carroll v. Trump</i> , No. 20-3977 (2d Cir. 2023).....	15
<i>Carroll v. Trump</i> (“ <i>Carroll 6</i> ”), 151 F.4th 50 (2d Cir. 2025).....	22
<i>De Martinez v. Lamagno</i> , 515 U.S. 417 (1995).....	18
<i>Fajardo v. U.S. Dep’t of State</i> , No. 16-cv-2980-LAB (S.D. Cal. Jan. 23, 2018),.....	12, 13
<i>Harper v. U.S. Dep’t of the Interior</i> , No. 21-197CRK (D. Idaho Feb. 11, 2022).....	10, 12, 13
<i>Helstoski v. Meanor</i> , 442 U. S. 500 (1979).....	4, 21
<i>Johnson v. Weinberg</i> , 434 A.2d 404 (D.C. 1981).....	17
<i>Lyon v. Carey</i> , 533 F.2d 649 (D.C. Cir. 1976).....	17
<i>McLaurin v. United States</i> , 392 F.3d 774 (5th Cir. 2004).....	11, 13
<i>Melo v. Hafer</i> , 13 F.3d 736 (3d Cir. 1994).....	13

<i>Nixon v. Fitzgerald</i> , 457 U.S. 731 (1982).....	21
<i>Osborn v. Haley</i> , 549 U.S. 225 (2007).....	3, 5, 6, 13, 24
<i>Plaut v. Spendthrift Farm, Inc.</i> , 514 U.S. 211 (1995).....	19
<i>Trump v. Carroll</i> (“ <i>Carroll II</i> ”), 25-573, <i>cert. denied</i> June 29, 2026, <i>pet. for reh’g denied</i> August 17, 2026.....	1, 4, 16, 22, 23, 24
<i>Trump v. Carroll</i> (“ <i>Carroll I</i> ”), 26-141 (July 28, 2026).....	1, 23
<i>Trump v. United States</i> , 603 U.S. 593 (2024).....	1, 4, 20, 21, 22, 24, 25
<i>United States v. Helstoski</i> , 442 U.S. 477 (1979).....	1, 4, 20, 21, 22, 24
<i>Wasserman v. Rodacker</i> , 557 F.3d 635 (D.C. Cir. 2009).....	7, 8
<i>Wilson v. Libby</i> , 535 F.3d 697 (D.C. Cir. 2008).....	17

CONSTITUTION

U.S. Const. as a whole (1789).....	5
U.S. Const. amend. V.....	5

STATUTES

Fed. Emps. Liab. Reform and Tort Comp. Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563 ("Westfall Act"), 28 U.S.C. § 2679.....	1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 19
28 U.S.C. § 2679(b)(2)(B).....	5
28 U.S.C. § 2679(d)(1).....	7, 8, 10, 14
28 U.S.C. § 2679(d)(2).....	3, 6, 7, 8, 9, 10, 13, 14
28 U.S.C. § 2679(d)(3).....	14

RULES

Fed. R. of Civ. Pro. 3.....	7, 8
Fed. R. of Evid. 406.....	16
S. Ct. R. 37.....	1 n.1

OTHER AUTHORITIES

(The Internet link below was last visited September 21, 2026.)

<i>9 to 5</i> (IPC Films 1980).....	4, 24-25
-------------------------------------	----------

Access Hollywood (NBC Studios/NBCUniversal
Syndication Studios 1996-present), Trump

Videotape (Sept. 2005).....	16
Br. of <i>Amicus Curiae</i> David Boyle in Supp. of Resp't in 25-573 (2026).....	1
Br. of <i>Amicus Curiae</i> David Boyle in Supp. of Resp't in 26-141 (2026).....	1
<i>Daniel</i> (“Susanna and the Elders”) (New Catholic Bible).....	1-2, 4, 10-11, 24
Dkt. 132 in <i>Carroll v. Trump</i> , No. 20-3977 (2d Cir. Apr. 13, 2023).....	15, 16
H.R. Rep. No. 700, 100th Cong., 2d Sess. (1988).....	12
Ann E. Marimow, <i>Supreme Court Again Rejects Trump’s Appeal of \$5 Million E. Jean Carroll Payment</i> , N.Y. Times, Aug. 17, 2026, https://tinyurl.com/yc7dzb3y	1
Pet. for Reh’g in 25-573, Donald J. Trump, Pet’r v. E. Jean Carroll (2026).....	22, 23
Pet. for Writ of Cert. in 25-573, Donald J. Trump, Pet’r v. E. Jean Carroll (2025).....	2, 3, 5, 6, 7, 8, 9
Pet. for a Writ of Cert. in 26-141, Donald J. Trump, Pet’r v. E. Jean Carroll (2026).....	2, 15, 16, 17, 18, 19, 21, 22, 24
Justin D. Smith, Letter in 25-573, June 2, 2026.....	23

AMICUS CURIAE STATEMENT OF INTEREST

The present *amicus curiae*, David Boyle (hereinafter, “Amicus”),¹ following up on his briefs in 25-573, *Trump v. Carroll* (“*Carroll II*”), and 26-141, *Trump v. Carroll* (“*Carroll I*”), respectfully supports Respondent, Elizabeth Jean (“E. Jean”) Carroll, yet again (though no amici support Trump here), as her victimhood continues:

“The American people stand with President Trump as they demand an immediate end to all of the witch hunts, including the Democrat-funded travesty of the Carroll hoaxes. President Trump will keep winning against liberal lawfare[.]” Ann E. Marimow, *Supreme Court Again Rejects Trump’s Appeal of \$5 Million E. Jean Carroll Payment*, N.Y. Times, Aug. 17, 2026, <https://tinyurl.com/yc7dzb3y> (Trump legal-team statement). The statement may pose this Court as a dupe/tool of “liberal lawfare”, *id.*, for denying rehearing of 25-573—from which, Trump is losing, not “winning”.

The instant case concerns the Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563 (“Westfall Act”), 28 U.S.C. § 2679, but the petition for certiorari (“cert”) mentions *Trump v. United States*, 603 U.S. 593 (2024) (“*Trump*”) and *United States v. Helstoski*, 442 U.S. 477 (1979) (“*Helstoski*”), so Amicus will also discuss *Trump/Helstoski* issues (or other immunity issues), and biblical ones:

Susanna entered the garden[; t]he

¹ No party or its counsel wrote or helped write this brief or gave money for its writing or submission, *see* S. Ct. R. 37.

maids ... closed the doors and left[,] unaware of the ... elders who remained in hiding. [T]he two elders sprang up and ran over to Susanna. “Look,” they pleaded with her, “[w]e are burning with desire for you; consent and give yourself to us. Should you refuse, we shall swear under oath that you were here with a young man in the garden[.]”

Daniel 13:15, 13:18-21 (“Susanna and the Elders”) (New Catholic Bible). This sordid scenario, *see id.*, resembles “elder” (wealthy businessman, later President) Trump’s raping Carroll behind closed doors (“digital rape” being rape by common-sense terms) and then lying, intentionally or recklessly (“actual malice”) about it.

Sadly, misuse of immunity law *hypothetically* could let Trump “skate”, shield him from liability for his libelous June 2019 presidential statements (“Statements”), 26-141 Appendix (“26-141App.”) at 4a-6a. But Amicus will show Trump is not immune, so that he can suffer his just punishment, just as the wicked Hebrew elders, Susanna’s abusers/defamers, *see Daniel* Excerpt, *supra*, suffered theirs.

SUMMARY OF ARGUMENT

Petitioner’s Question Presented, *see id.*, and supporting language ask if the Westfall Act time-limits the U.S.’s recertifying Trump, but don’t ask if powers outside the Act, e.g., court decisions or due process, may limit that timing.

The Attorney General recertified Trump very late, in April 2025, not January 2025. This violates

Osborn v. Haley, 549 U.S. 225, 253 (2007) (demanding immediate resolution of immunity issues), and contrasts with Attorney General Barr’s rapidly certifying Trump the very day of removal to district court.

Petitioner failed to re-certify Trump until post-trial, running afoul of 28 U.S.C. § 2679(d)(2) (“(d)(2)” (claim started in State court must be removed pre-trial, implying pre-trial certification also). Other interpretations of (d)(2) are strained, as would be claims of circuit-split; Petitioner even offers, in support, falsified versions of cases. Federalism may justify (d)(2)’s offering advantage to litigants who, like Carroll, filed in State court.

Petitioner claims Trump’s Statements are immune, being “official acts”. However, given their malice/falsehood, they go beyond not only decency, but also beyond presidential powers/responsibilities, and are thus not immune. D.C. Circuit guidance shows that any mere scintilla of “public purpose” in the Statements is insufficient, and that the context of Trump’s shameful abuse of women is relevant. In the alternative, the district court should be allowed to decide on scope-of-employment issues.

Presidential immunity is waivable, as shown by a previous Trump admission, separation-of-powers precedent, and by President Kennedy’s, and possibly other Presidents’, declining immunity when sued.

Trump may have waived immunity, whether by his State-court admission that he can be sued post-presidency, or various late/defective attempts at claiming immunity.

If *Trump*, *supra* at 1, wanted to use *Helstoski*, *supra* at 1, to establish that Presidents must explicitly waive immunity, *Trump* would've *explicitly* said so, as it mentions a related *Helstoski* case, but never mentions waiver.

By not litigating immunity issues early in 25-573, especially considering Trump's claiming the Statements were immune and shouldn't have been evidence there, Trump, and Petitioner, who could have joined 25-573, have arguably waived those issues, which should prevent certiorari here—especially since Trump had previously failed to litigate immunity issues timely.

Finally, authority from “Susanna and the Elders” to Dolly Parton reminds us that rape matters, and rapists/liars should be punished; fortunately, immunity law can be upheld/respected, while still allowing no immunity for Trump's evil here.

ARGUMENT

I. THE QUESTION PRESENTED FAILS TO ASK IF SOURCES OUTSIDE THE WESTFALL ACT PRECLUDE IMMUNITY

The Question Presented here asks, “Whether the court of appeals misconstrued the Westfall Act ... in rejecting the Attorney General's certification that statements made by President Trump during his first term fell within the scope of his federal office[.]” *Id.* at (I). The petition then clarifies: “[T]he question [is] whether the Westfall Act contains an implicit timing restriction barring ... posttrial recertification. Such a restriction does not exist.” *Id.* at 2.

However, that formulation, *see id.*, is a red herring; it doesn't mean that *external* forces, outside of the Act, cannot prevent immunity. *See, e.g.*, “Immunity-related issues’ under the [Westfall] Act ‘should be decided at the earliest opportunity.’ *Osborn*, 549 U.S. 253”, 26-142 Appendix (“App.”) at 100a (some brackets removed). Thus, the Court, in *Osborn*, *supra* at 3, demands, *see id.* at 253, that the Act be employed with great dispatch, not tardily.

Too, prudential or constitutional considerations, *e.g.*, due process, *see* U.S. Const. amend. V, may demand that those wielding the Act avoid tardiness, gamesmanship, unfair surprise, hypocrisy, and other questionable behavior. *Cf.* the Act itself, 28 U.S.C. § 2679(b)(2)(B), saying that complaints against federal employees for violating the Constitution may not allow substituting the U.S. for defendants, thus emphasizing that the Constitution is above the Act.

II. THE ATTORNEY GENERAL RE-CERTIFIED TRUMP FOR SUBSTITUTION QUITE TARDILY; HENCE, TRUMP SHOULD NOT RECEIVE IMMUNITY

Speaking of *Osborn* and tardiness: in 2025, the Attorney General failed to substitute timely the U.S. for Trump as defendant. But A.G. William Barr certified Trump *on the same day*, September 8, 2020, that the case was removed to federal court, *see* App.5a (citations omitted).

By contrast, in Trump's second term, the A.G.'s office acted much more slowly. Re-certifying Trump for substitution waited for months, as the Second Circuit notes, until “April 11, 2025 – when Trump had been President for nearly three months

and this appeal had been fully briefed for nearly two months”, App.7a. Not in January, February, or March, but April. Thus, the Government could’ve acted before the “appeal had been fully briefed”, *id.*, with all the reliance incurred and time spent/wasted by full briefing; but it didn’t. They failed to do so “at the earliest opportunity”, *Osborn*, 549 U.S. at 253.

Having disobeyed the Court’s command, *see id.*, to resolve Westfall Act issues immediately, and having wasted Carroll’s time in briefing the appeal, the A.G. shouldn’t be allowed to re-certify Trump, lest *Osborn* be mocked as a dead letter. After all, given Barr’s quick action to certify Trump, *supra*, his successors had no excuse in delaying.

III. PETITIONER FAILED TO RECERTIFY TRUMP BEFORE TRIAL, THOUGH THE CASE COMMENCED IN STATE COURT AND MAY REQUIRE PRETRIAL CERTIFICATION

If Petitioner’s untimeliness *supra* somehow doesn’t prevent certification, other untimeliness may. For example, since Carroll started the action in New York State court, Trump was arguably required to be certified before trial, not after, so that his recertification, being post-trial, was invalid. “[A]ny civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court[.]” 28 U.S.C. § 2679(d)(2). While removal isn’t substitution: still, if certification accompanies removal, certification, like removal, *see id.*, would be pre-trial (thus, Trump was untimely certified; even re-certification is a form of certification).

That is the most natural reading of the Act, since it requires no extra work (*see* further details *infra*): and especially relevant here since Carroll, by any definition of “commenced”, did commence in State court. However, some would substitute a more strained interpretation.

For example, since § 2679(d)(1) says, “any civil action[/]proceeding commenced upon such claim in a United States district court”, *id.*, and *Wasserman v. Rodacker*, 557 F.3d 635, 639 (D.C. Cir. 2009) says, “Federal civil actions are typically commenced when the plaintiff files ... in a district court. *See* Fed.R.Civ.P. 3 (‘A civil action is commenced by filing a complaint with the court.’) *Wasserman* did not re-file his complaint with the district court after removal”, App.42a-43a, some might claim a State case is commenced, or re-commenced, upon removal to federal court, obviating any duty to certify before trial, since (d)(1), *see id.*, unlike (d)(2), doesn’t openly mention a time limit.

But such an interpretation takes work, as the *Wasserman*-based version *supra* had to do with its explanations, *id.* at 639. And “commence” in the Act doesn’t *ipso facto* mean what it does in FRCP 3, *supra*; rather, it may have the more common-sense meaning of “initially started”, favoring Carroll.

Moreover, *Wasserman* might not say what Petitioner wants:

[T]he D.C. Circuit clearly was not holding that every state court case removed pursuant to (d)(2) then, upon removal, becomes a new federal case governed by (d)(1)—an interpretation that would render (d)(2) entirely

superfluous. That is an implausible reading, not least because removal in *Wasserman* was effected by 28 U.S.C. § 1441 and § 1442, not the Westfall Act.

App.99a (2d Cir.). Too, “Notably, removal and substitution both occurred before trial.” *Id.*98a.

Even if the criticized “interpretation” didn’t “render (d)(2) entirely superfluous”, *id.*99a—after all, the Act had to say somewhere, that removal from State court must occur before trial—: still, the “interpretation” points up that the Act may be clumsily written. Congress should’ve made it clearer, e.g., stating that cases removed to federal court under (d)(2) definitely may be certified post-trial (Petitioner’s version, *see* Pet.2), or definitely cannot be certified post-trial (the Second Circuit’s version, *see* App.96a).

Again, though, the latter version takes less justification, since there’s no need to analyze “commenced” in (d)(2), the way that *Wasserman* had to analyze “commenced” in (d)(1), resorting to FRCP 3 and various explanations, *see Wasserman* at 639.

Additionally, Petitioner makes a “policy argument” against (d)(2)’s requiring certification pre-trial: “It would make no sense for the Westfall Act to treat suits that originate in federal court differently from suits ... timely removed ... under Section 2679(d)(2). And it would make even less sense to treat suits removed on non-Westfall-Act grounds differently[.]” Pet.22.

However, one reason for limiting substitution “before trial” to State court, that may pass rational-basis review, is to respect federalism and place

limits on the Attorney General's power. It may be better for plaintiffs to file in State court, because the A.G. will have to show them more consideration, e.g., be diligent not only to remove the case, but also substitute it, pre-trial. This offers plaintiffs a better option, and respects State courts as being not mere echoes of federal courts for Westfall Act purposes.

Judge Menashi's dissent says, "It would *undermine* the congressional purpose [of Westfall] if the plaintiff's mere election to file a complaint in state ... court would restrict the ability of the United States to provide a defense." App.42a. But part of the "congressional purpose", *id.*, of the Act, openly made it more difficult for the U.S. to "provide a defense", since the U.S. might want to remove the case to federal court, but can't post-trial, (d)(2). And this may apply to substitution, too, per the Second Circuit, *see* App.97a-99a.

As for "non-Westfall-Act grounds", Pet.22, such as diversity: while it may seem "asymmetrical" to treat such cases differently from (d)(2) cases re substitution, since (d)(2) cases make substitution harder, not every statute is well-written, and not everything is symmetrical. But even if (d)(2) is somehow seen as "unfair/asymmetrical", that doesn't entitle anyone to ignore the statute's commands—and again, Amicus provides a rational basis, *supra* at 8-9 (other rational bases might be imaginable, too), to have (d)(2) restrict substitution/certification, for cases started in State courts, to "before trial", *id.*

Petitioner also claims, re the Westfall Act inaugural-era "special rule [] for 'pending state proceedings.' [which] gave the Attorney General an additional 60-day window 'to seek removal' through

certification under Section 2679(d)(2) if the ‘period for removal * * * ha[d] expired’ [(case no longer before trial.)]”, Pet.22-23 (citation omitted), that if Westfall “imposed a ‘before trial’ period for certification[/]substitution in cases already pending in federal court, then Congress would have enacted a parallel 60-day window in such interim cases too. The fact that Congress did[n]t[,] shows that there was no pretrial period that needed to be extended”, Pet.23.

This logic, *supra*, while not wholly probative (e.g., legislation isn’t always optimally-drafted), may somewhat support (d)(1)’s not time-limiting substitution. (*But see* the *Harper* case, *infra*) However, it may not disprove that (d)(2) mandates that all cases *started in State court* be certified pre-trial, especially since, before the Act, (d)(2) couldn’t have been used to remove cases to federal court, since (d)(2) hadn’t existed yet.

Additionally, Petitioner claims the Attorney General has no power to revoke substitutions, *see* Pet.17-18. But is such revocation openly forbidden? What if, say, an A.G. substitutes the U.S. for a defendant, then, the next day, finds the defendant had lied to her and now actually appears to have acted beyond scope-of-employment? Does it make sense that the A.G. should be impotent to revoke the substitution? That sounds strange.

As well, Petitioner makes multiple false citations to support its claims. *Cf.* “The two elders [falsely] testified, ‘[A] young man ... went over to her [Susanna], and they lay together[;] we observed the crime taking place[.]’ Since they were elders and

judges[,] those who were assembled there accepted their testimony and condemned her to death.” *Daniel* 13:34, 13:36-38, 13:41 (NCB).

For example, Petitioner claims of “*McLaurin v. United States*, 392 F.3d 774, 779 (5th Cir. 2004) [that] Congress placed ‘no other time limitation’ on the Attorney General besides removal ‘before trial’[.]” Pet.19. (citation partly-omitted) But the real quote, plus explanatory language, is, “Section 2679(d)(2) requires only that the government remove ‘before trial’ a suit [regarding] a federal employee. Congress has placed no other time limitation or requirement on removal in a suit under Section 2679.” *McLaurin*, *supra*, at 779.

So, *McLaurin* is speaking only of *removal*, not substitution, in the real quote, *id.*

Petitioner also says, “In *Brown v. Armstrong*, 949 F.2d 1007 (8th Cir. 1991), the court ... merely stated that *challenges* to ... pretrial certification should be resolved before trial[.] *Id.* at 1012”, Pet.21. No; rather, “[C]hallenges to the Attorney General’s certification must be resolved before trial, as soon after the motion for substitution as practicable, even if an evidentiary hearing is needed”, *Brown*, *supra*, at 1012: thus, substitution occurs “before trial”, *id.*

Moreover, *Brown* section “III. Substitution”, *id.* at 1010, includes “H.R. Rep. No. 100-700, 100th Cong., 2d Sess. ... [T]he U.S. Attorney made a timely, facially proper certification”, *id.* (some citation omitted) The word “timely”, in *Brown*’s section on “Substitution”, proves, *see id.*, there *is a time-limit* on substitution, rather than Petitioner’s wished-for “timeless” substitution at an A.G.’s whim. And mention of “H.R. Rep. No. 100-700”, *id.*, shows the

Brown court knew of that report, which Petitioner claims “describ[es] Section 2679(d) as requiring ... ‘substitut[ion]’ ... ‘whenever’ the Attorney General [wants]”, *see* Pet.24; but as noted *supra*, *Brown* indicates that the A.G. is time-limited.

Too, *pace* “As for ... two district-court cases, th[ey] simply affirmed that the Attorney General need not make a certification *earlier* than the very start of trial. *See Harper v. United States Department of the Interior*[:] *Fajardo v. United States Department of State*”, Pet.21 (some citation omitted): *Harper*, *supra*, actually says, “Defendants were permitted to file the Certifications at any time before trial[:] Plaintiff’s contention that the[y] should have filed ... earlier is without merit”, and, “Although ... 2679(d)(1) does not explicitly provide a time period to file a certification, the Court sees no reason to apply a different time constraint for subsection (d)(1) than ... under subsections (d)(2) and (d)(3), which permit certifications to be filed at any time before trial[.]” *Harper*, No. 21-197CRK, at 8 & n.5 (D. Idaho Feb. 11, 2022) (citations omitted).

This, *see id.*, contradicts what Petitioner said, and indeed, establishes that one court “constrain[s] subsection (d)(1)” to mandate that certification must be *pre-trial*, as in “subsections (d)(2) and (d)(3)”, *id.*

Likewise, *Fajardo*, No. 16-cv-2980-LAB (S.D. Cal. Jan. 23, 2018), says, re “the United States has not been substituted in as Defendant [per] 28 U.S.C. § 2679(d)(1) or (3)”, *id.* at 2, “The only time limit for this certification is that it must be made before trial[.] *See also Strei v. Blaine*[(D. Minn. Dec. 3, 2013) (holding that a motion to substitute under § 2679(d) may be brought at any time before trial.)]”

Id. at 2 n.1 (some supporting material and citation-portion omitted).

This, *see id.*, contradicts Petitioner, by saying that certification “must be made before trial”, *id.*

While Amicus may not have room here to refute Petitioner’s every case-citation: finding even four cases, *McLaurin*, *Brown*, *Harper*, and *Fajardo*, that say the opposite, as noted *supra*, of what Petitioner claims, does not a strong case make for Petitioner.

As for even a putatively more-favorable-to-Petitioner case, “*Melo v. Hafer*, 13 F.3d 736, 747 (3d Cir. 1994) (The ‘Attorney General may file a certification under § 2679(d)(1) whenever he or she concludes that an employee defendant was acting within the scope of his or her employment at the relevant time’)”, Pet.21, *Melo*, *supra*, is 32 years old, long antedating *Osborn* (2007), which demands immediate resolution of immunity, *see id.* at 253. (And *Melo* antedates *Harper* (certification must precede trial), *supra*, by 28 years.)

As well, *see Melo* at 748 n.8, “If the court[,] determining the substitution issue, necessarily finds [relevant] facts[,] the defendant may be estopped from disputing those facts at trial.” *Id.* (citation omitted) This, by mentioning “at trial”, implies, *see id.*, that “certification under § 2679(d)(1) whenever he or she concludes”, *id.* at 747, really means “whenever” *before trial*.

Finally, as for possible circuit splits, the Second Circuit disavowed one, *see App.127a-128a*: “To force a circuit split, the dissent would have us adopt an implausibly broad reading [every State-court case removed by (d)(2) becomes new federal case governed

by (d)(1)] of *Wasserman*'s first ground, and completely ignore the second [D.C. Superior Court is State court for (d)(2) purposes]."

But even if there were a circuit split, would it be worth granting certiorari for, given all the other problems with this case? (Indeed, this Section was written from abundance of caution; the ins-and-outs of (d)(1)-(3) may not even be important, given all the other reasons to deny immunity.) Problems like, e.g., the Statements' indefensibility as "official acts", now discussed.

IV. THE STATEMENTS' MALICE AND LIES RENDER THEM NOT IMMUNE

Petitioner claims Trump's Statements are immune, as official acts, *see* Pet.15, citing *CAIR v. Ballenger*, 444 F.3d 659 (D.C. Cir. 2006) (*per curiam*), in support, *see* Pet.8,14,27.

Congressman Cass Ballenger, during a press interview discussing his personal life, called the Council on American Islamic Relations ("CAIR") fundraisers for Hezbollah; CAIR sued for defamation, *see Ballenger, supra*, at 662. The D.C. Circuit held that in "context", *id.* at 666, Ballenger acted within scope-of-employment, since "[t]he appropriate question, then, is whether that telephone conversation[,] not the allegedly defamatory sentence[,] was the kind of conduct Ballenger was employed to perform", *id.* at 664, and "a congressman's 'remarks, made to the media to ensure his effectiveness as a legislator, can "fairly[/] reasonably be deemed to be an ordinary[/]natural incident[/]attribute of his job"', *id.* at 665 (citation omitted).

However, Petitioner admits there isn't automatic immunity, noting the D.C. Circuit "rejected a categorical rule that every statement to the press is necessarily within the scope of a public official's employment", Pet.27 (citation omitted).

But Petitioner should have noted further, that that Circuit has "consistently entrusted ... the factfinder to decide whether, upon a showing that the employee acted with at least a partial purpose to serve their employer's interest, that purpose was not too little actuated", and "the factfinder must determine that an employee's partial purpose to serve their employer was *more than an insignificant interest.*" *Carroll v. Trump*, No. 20-3977 (2d Cir. Apr. 13, 2023), Dkt. 132 ("Dkt.") at 32-33 (emphasis added). Thus, a mere scintilla of employer-serving interest isn't enough, *see id.*

Too, "[For] this purpose inquiry, we consider direct and circumstantial evidence of the employee's state of mind", *id.* at 26 (footnote omitted); "[W]e have viewed it as relevant[,] whether there was a prior history between the tortfeasor and the victim. *Coron*, 515 A.2d 438 ('[The employee's] entire behavior during this incident reflected that of an individual bent on personal vengeance for a perceived personal affront.')" *id.* at 27 (footnote omitted).

That said, the Statements show "insignificant interest", Dkt., *supra*, at 33, in serving the People.

The June 21, 2019 Statement, 26-141App.4a-5a (citation omitted), doesn't even mention the American people, Trump's employers, but makes vicious, false accusations, *see id.*

While the Statement says, "False accusations

diminish the severity of real assault. All should condemn false accusations and any actual assault in the strongest possible terms”, *id.*, this is very brief, a drive-by scintilla (or false pretense) of concern about assault, a Trojan horse—especially because, since 25-573’s denial of certiorari, Trump’s own accusations against Carroll are confirmed false, and his sexual battery confirmed true, as civil liability.

Trump also spoke falsely because in his deposition, he admitted not having read or researched Carroll or her writings prior to the Statements, *see* App.68a (citation omitted). Lying does not serve the People.

The June 22, 2019 Statement, 26-141App.5a-6a (citation omitted), was similar, attacking Carroll rather than only defending Trump, and even claims/implies, evidence-free, and shamefully, that she was paid to fabricate her story, *see id.* And Trump now, *see id.*, doesn’t even condemn “actual assault”; so, was the first Statement’s mentioning it not even sincere? Too, once again, the Statement doesn’t mention the American people, just as Trump’s brief June 24, 2019 Statement didn’t, *see* 26-141App.6a (citation omitted).

And the Statements follow Trump’s pattern/habit, *cf.* Fed. R. of Evid. 406 (habit), of demeaning women, e.g., “[g]rab[bing] [women] by the pu[denda]” from the infamous 2005 *Access Hollywood* tape, *id.*; and he had previous history (including rape) with Carroll. This chimes with “employee’s state of mind”, “prior history”, and “personal vengeance”, D.C. Cir. Dkt. at 26-27, and proves Trump’s “insignificant interest”, Dkt. at 33, in serving America’s People.

(Menashi offers various “cases from hell”, *see, e.g.*, App.44a,n.14, 45a,n.15 (citations omitted), wherein people doing/saying terrible things received immunity. However, Amicus sees no case in Petition/Appendix which resembles Carroll’s case enough to give Trump immunity here; even *Ballenger*, *see id.* at 662, features a slander of CAIR on a politics-related topic, funding Hezbollah, while Carroll’s case revolves around unsubstantiated personal attacks on Carroll (“actual malice”), with vicious language (“common-law malice”), on a non-political topic, the rape, an event far before Trump’s presidency, and with Trump’s lifetime of misogynist abuse/habit as background context.)

By the way, even if Trump’s motives/purposes were somehow forbidden to analyze, there’s also *effect*, e.g., the Statements hurt Carroll, and attacked her instead of merely defending himself. This doesn’t serve a public/American interest.

However, Petitioner still claims the Statements were to defend Trump’s character/reputation: “[A]s his own later comments make clear: ‘I just wanted to defend myself, my family, and frankly, the presidency.’” Pet.28 (citation omitted). But Petitioner, amazingly, neglects to mention that the district court *excluded* this statement (besides the “No” preceding the other words): “Trump’s statement, ‘I just wanted [etc.]’ not only went beyond the scope of the agreed-upon ‘yes or no’ question but also implied that Carroll’s accusations were false and improper.” 26-141App.29,32.

And, as the district court notes, “For the sake of argument, the Court assumes ... the president’s speech on a matter of public concern comes within

the president’s official responsibilities. Th[is] point[], however, do[es] not lead to the conclusion that [Trump’s] statements ... came within the outer perimeter of his official duties”, 26-141App.259a; and, “Mr. Trump does not identify any connection between the allegedly defamatory content of his statements – that Ms. Carroll fabricated her sexual assault accusation and did so for financial and personal gain – to any official responsibility of the president. Nor can the Court think of any possible connection.” 26-141App.261a.

Finally, “Subjecting the president to damages liability for making a personal attack that is unrelated to the president’s official responsibilities would not threaten to distract the president from his or her official duties.” 26-141App.263a. Indeed, it’s “crying wolf” to think there’s a huge danger of Presidents’ being distracted: “In *Trump*, there was no dispute about whether Trump had waived his immunity because, unlike here, he asserted it at the very outset of the proceedings”, 26-141App.17a (citation omitted). I.e., it’s now obvious to all, that Presidents should immediately assert immunity. All said, Trump should not be held immune for his Statements.

In the alternative, though: if the Court somehow doesn’t rule for Carroll—and it should surely deny certiorari—, it should still let the district court decide whether the U.S. was properly substituted for Trump, since “the scope-of-employment certification is reviewable in court”, *De Martinez v. Lamagno*, 515 U.S. 417, 420 (1995). And if so, the Court should order that that decision be maximally expedited, at all levels. Carroll is 82 and could die soon, after

decades of suffering, so it'd be best not to delay—and there're so many barriers to Trump's immunity, that sending scope-of-employment review to district court isn't needed.

We now explore non-Westfall immunity issues:

V. PRESIDENTIAL IMMUNITY IS WAIVABLE, PER JFK, FDR, AND TRUMAN

First: is presidential immunity waivable? Trump may have admitted waivability; the district court noted, “Trump agreed with the plaintiff [in a 2018 case] that absolute presidential immunity was not a ‘threshold issue[] that must be decided before reaching the merits’”, and that Trump, so having conceded, may be estopped from asserting otherwise now, i.e., from claiming immunity is unwaivable, *see* 26-141App.255a&n.43 (citation omitted).

As well, President Kennedy settled two civil suits against him instead of claiming immunity, *see id.*177a&n.41, 255a&n.42; and Presidents Franklin Roosevelt and Harry Truman may have done similarly, *see id.*177a&n.41. After all, per the Second Circuit, “[S]eparation-of-powers considerations militate in favor of, not against, recognizing presidential immunity as waivable. A President’s autonomy should be protected; thus, a President *should* be able to litigate if he chooses to do so.” *Id.*177a.

Finally, “[T]he proposition that legal defenses based upon doctrines central to the courts’ structural independence can never be waived simply does not accord with our cases.” *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 231 (1995).

Thus, even if Trump wants to operate with less

dignity/autonomy than JFK, FDR, and Harry S[.] Truman, this may not be possible.

**VI. TRUMP MAY HAVE WAIVED
PRESIDENTIAL IMMUNITY; AND *TRUMP*
MENTIONS *HELSTOSKI*, BUT DOESN'T
DEMAND EXPLICIT WAIVER OF IMMUNITY**

Immunity being waivable, Trump may not've said, "I explicitly waive immunity", but the Second Circuit "held that Trump waived his immunity defense here by, among other things, failing to assert it in his answer to Carroll's complaint in state court and conceding to it at oral argument." App.104a (citation omitted); *but see, e.g.*, App.52a (per Menashi, oral-argument concession was *vis-à-vis* treating waiver-of-immunity as ordinary waiver, and even then, amended complaint preserves immunity).

Indeed, in his answering, Trump said, "The alleged defamatory statements are privileged or protected by one or more immunities[,] under the Constitution of the United States." App.50a,n.18. This, *see id.*, is remarkably vague: bad lawyering. (If it isn't, then why not let people just say, "My actions are privileged by any immunities under any law"? 10 words, short and simple!)

Too, "this Court affirmed the district court's ruling that Trump waived ... immunity ... by failing to invoke it in his first state court answer—a decision that Trump *did not even challenge* in that appeal." App.108a (citation omitted) (emphasis added).

And, from the State-court period of the case, Trump "expressly noted, however, that he was only seeking 'temporary' immunity from suit. ... ('[N]o

one is seeking to “escape accountability” here[; Carroll] is free to pursue this action when the President is no longer in office.’.” 26-141App.7a (citation omitted). That, *see id.*, seems quite explicit in renouncing immunity, except “temporar[ily]”, *id.* Waiver is waiver.

As for *Trump/Helstoski*: *Trump* involves “immunity from *criminal prosecution*”, *id.* at 602 (Roberts, C.J.) (emphasis added), not *civil* immunity. And while *Trump* says “most of a President’s public communications are likely to fall comfortably within the outer perimeter of his official responsibilities”, *id.* at 629, this doesn’t change things from *Nixon v. Fitzgerald*, 457 U.S. 731, 756 (1982), recognizing “absolute Presidential immunity ... for acts within the ‘outer perimeter’ of his official responsibility”, since *Fitzgerald*, *see id.*, didn’t exempt public communications from official responsibilities.

Petitioner, *see* Pet.29, cites *Trump* to support the need for explicit waiver, *à la Helstoski*. However, one huge problem: *Trump* doesn’t say that, *id.* (Amicus couldn’t find the words “waive”/“waiver” in *Trump*, *id.*)

Trump does cite “*Helstoski v. Meanor*, 442 U. S. 500 [] (1979)”, *id.* at 654-55 (re interlocutory appeal of refusal to dismiss indictment on Speech/Debate Clause grounds) (Barrett, J. concurring in part), and “See *Helstoski*, 442 U. S., at 507–508”, *id.* at 655 (also about interlocutory review), but no other *Helstoski*-s; and the *Helstoski* it mentions was heard, *see id.* at 500 n.1, with *Helstoski*, *supra* at 1.

So, if the *Trump* Court knew of the latter *Helstoski*, as they reasonably must, but didn’t cite it, especially not to support explicit waiver, then there’s

no reason to think they wanted explicit waiver *à la Helstoski*. It's rather "putting the mountain in the mousehole", to claim they did.

And, the Second Circuit observed that Trump didn't bring up *Helstoski* to support explicit waiver, until "*Carroll 6*", see App.106a-107a; and, "Trump's second argument[,] that a waiver ... requires an 'explicit and unequivocal renunciation,' *Helstoski*[,] is also foreclosed because it was 'ripe for review at the time of [Trump's] initial appeal but[,] nonetheless foregone'", 26-141App.18a (citations omitted) (some brackets in original).

(Even if some day, explicit waiver of presidential immunity "should ideally" become the law, that doesn't mean Trump himself should presently receive such a ruling, since he failed, *see id.*, timely to evoke *Helstoski*.)

Finally, when Menashi says, "The *Carroll 3* opinion expressly stated that 'we express no view on whether Defendant intended to relinquish his presidential immunity defense'", App.52a (citation omitted), he omits, "which is a question of fact reserved for the district court", 26-141App.165a,n.1: a huge omission. And the district court said Trump waived immunity, *see id.*246a&n18, 247a&n.22.

All told, Trump seems to have waived immunity, *Trump/Helstoski* notwithstanding.

VII. TRUMP/PETITIONER MAY HAVE FORFEITED IMMUNITY-BASED "QUESTIONS PRESENTED", BY NOT RAISING THEM BEFORE THE 25-573 REHEARING PETITION

Last, but not least: Trump claimed in his 25-573 rehearing petition, *see id.* at 1, that the Statements’ alleged immunity mandated rehearing, as the Statements were exhibits in *Carroll II*.

But, then, why he didn’t offer Questions Presented about immunity during 25-573? He didn’t litigate immunity until the rehearing petition. (His June 2 letter didn’t mention immunity *per se*, *see id.*)

And Trump had even less excuse after April 29, 2026, the court-of-appeals denial of rehearing *en banc*, App.24a; Trump could’ve requested a time-extension to deal with immunity issues—in 25-573, not delaying them to 26-141/26-142.

Thus, there should be estoppel, or similar constraint, against granting cert to the Questions Presented, all immunity-based, in 26-141/26-142, since Trump should’ve brought them up in 25-573 well before the rehearing petition, even if he’d had to request time-extension and supplemental briefing. In fact, Petitioner, being aware of Trump’s immunity issues, should’ve, in 25-573, requested intervenor status, submitted an immunity-themed brief, or moved to substitute itself as defendant re the Statements. But it didn’t. Once again, “Immunity-related issues[,] should be decided at the earliest opportunity.’ *Osborn*”, App.100a.

And Trump *has done this before*, or close, per the Second Circuit: “Defendant unduly delayed in raising presidential immunity as a defense. Three years passed between Defendant’s answer and his request for leave to amend[,] Defendant’s excuse for not timely raising the defense—that the question of [the] Westfall Act[,] was pending[,] is unpersuasive”, and, “Defendant does not explain how the Westfall

Act dispute precluded him from raising ... presidential immunity. Indeed, Defendant first raised [it] during the pendency of the Westfall Act dispute.” 26-141App.182a-183a (footnotes omitted).

Thus, again, Trump shows a pattern of hypocrisy and titanic delay. —When one adds up the above (failure to litigate immunity promptly in 25-573), plus: Trump’s hyper-tardy April 2025 recertification, defying *Osborn*; his Statements’ going beyond his powers/duties; *Trump*’s not adopting a *Helstoski* “explicit waiver” standard; and other factors *supra*, this case is one of the worst vehicles imaginable for exploring presidential-immunity issues.

* * *

“Susanna cried out[,] ‘O eternal God, [y]ou know that these elders have perjured themselves[.]’ And the Lord heard her cry.” *Daniel* 13:42-44. Likewise, Trump has been outrageously evil: this Court, since June 29, has upheld his status as a sexual batterer and defamer. —Daniel interrogated the elders, revealing their lies, *see id.* at 13:52-59; and “the entire assembly ... rose up against the two elders whom Daniel had convicted [from] their own perjured testimony, [and i]n accordance with the law of Moses, they put them to death.” *Id.* at 13:60-62.

Thus, Trump may get off easy; he merely has to pay Carroll \$80-some millions out of his billions, instead of being killed. (And Trump actually raped Carroll, whereas the elders only attempted it.)

See also 9 to 5 (IPC Films 1980), where secretary Doralee Rhodes, played by Dolly Parton (RIP), tells her boss who tries to blackmail her into sex (as the elders tried with Susanna): “If you ... make another indecent proposal, I’m going to get that gun of mine

and ... change you from a rooster to a hen in one shot.” *Id.* By contrast, Carroll isn’t threatening castration-by-firearm, *see id.*, on Trump, but merely asks that he compensate her for the 2019 portion of his defamations.

Nor is Carroll trying to “castrate”, topple the pillars of, presidential immunity; she simply, and rightfully, notes that Trump shouldn’t be immune *here, vis-à-vis* his hate-filled, dishonest Statements. (Or: she isn’t trying to overturn *Trump* the case, but merely to receive damages from Trump the man.)

Indeed, what signal would it send, if not only can slanderers be undeterred by fines—Trump still defames Carroll—, but fines don’t even have to be paid, if you’re a government employee who brutally slanders, for years?

On that note, what if the elders had walked free, still slandering Susanna? Too shameful to contemplate. So, biblical wisdom plus common-sense, legally-valid understanding that the Statements are a fair exception to the rule of presidential immunity, show that Carroll should get her fair, non-violent “shot”, *9 to 5, supra*, at financial redress for the monstrous, endless lies of a rapist President, well outside his core powers, and defying his core responsibilities to *serve/protect* the American people—not *molest/threaten* them. “As a result of Trump’s statements, Carroll was harassed and humiliated, subjected to death threats, and feared for her physical safety for years.” App.110a (2d Cir.) (citation omitted).

Otherwise put: the recent September 11 anniversary teaches us eternal vigilance against *foreign* terrorism; but also, the *domestic* President

cannot be allowed to hijack government power and terrorize innocent people... especially his own Court-recognized victim, Carroll.

CONCLUSION

Amicus respectfully asks the Court to deny the petition for certiorari; and humbly thanks the Court for its time and consideration.

September 22, 2026

Respectfully submitted,

David Boyle

Counsel of Record

P.O. Box 15143

Long Beach, CA 90815

dbo@boyleslaw.org

(734) 904-6132