Nos. 26-141, 26-142

IN THE

Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES,

Petitioner,

v.

E. JEAN CARROLL,

Respondent.

UNITED STATES OF AMERICA,

Petitioner,

v.

E. JEAN CARROLL, ET AL.,

Respondents.

On Petitions for Writs of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF IN OPPOSITION

Roberta A. Kaplan
Counsel of Record to
Respondent E. Jean Carroll
D. Brandon Trice
Maximilian T. Crema
KAPLAN MARTIN LLP
1133 Avenue of the Americas
Suite 1500
New York, NY 10036
(212) 316-9500
rkaplan@kaplanmartin.com

QUESTIONS PRESENTED

1. Whether the Second Circuit correctly held that petitioner waived his claim of absolute presidential immunity after he both disavowed that defense at the outset of litigation—telling the trial court that Ms. Carroll was "free to pursue this action when the President is no longer in office" and insisting that he was not "seeking to 'escape accountability'"—and then actively litigated this case for three years without raising the defense.

2. Whether petitioner's defamatory statements about a woman he sexually assaulted when he was a private citizen are protected by presidential immunity.

3. Whether the Second Circuit correctly held that neither petitioner nor the Government could raise a motion for substitution under the Westfall Act after trial and final judgment.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
TABLE OF AUTHORITIES iv
INTRODUCTION 1
STATEMENT OF THE CASE 3
A. Factual background 3
B. The trials 5
C. Procedural background for questions presented 7
i. Presidential immunity 7
ii. Westfall Act 10
iii. Subsequent proceedings 15
I. This Court should deny certiorari as to petitioner's first question presented. 15
II. This Court should deny certiorari as to petitioner's second question presented. 24
III. This Court should deny certiorari on the Westfall Act questions raised by petitioner and the Government. 26
A. This Court should deny certiorari on the question whether petitioner can seek posttrial substitution. 26
B. This Court should deny certiorari on the question whether the Government can seek posttrial substitution. 27
CONCLUSION 38

APPENDIX

Appendix A, Certification of the Director of the Torts Branch Civil Division, United States Department of Justice, attached as "Exhibit B" to defendant's Notice of Motion to Substitute the United States as Defendant, filed in the U.S. District Court for the Southern District of New York, September 8, 2020..... 1a

Appendix B, Letter of the U.S. Department of Justice to the parties, conveying DOJ's determination not to certify under the Westfall Act, filed in the U.S. District Court for the Southern District of New York, July 11, 2023..... 3a

Appendix C, Certification of the Director of the Torts Branch Civil Division, United States Department of Justice, attached as "Exhibit A" to the Joint Motion of Substitution of United States for Defendant-Appellant Pursuant to the Westfall Act, filed in the U.S. Court of Appeals for the Second Circuit, April 11, 2025..... 15a

TABLE OF AUTHORITIES

Cases **Page(s)**

Arthur v. U.S. ex rel. Veterans Admin.,
45 F.3d 292 (9th Cir. 1995) 29

Associated Bldrs & Contractors, Inc. v. Herman,
166 F.3d 1248 (D.C. Cir. 1999)..... 35

Boyd v. Carroll,
624 F.2d 730 (5th Cir. 1980) 22

Boykin v. Alabama,
395 U.S. 238 (1969) 23

Carroll v. Trump,
66 F.4th 91 (2d. Cir. 2023) 13

Carroll v. Trump,
49 F.4th 759 (2d. Cir. 2022) 12, 30

Clinton v. Jones,
520 U.S. 681 (1997) 19, 24

Cozzo v. Tangipahoa Par. Council—President Gov't, 279 F.3d 273 (5th Cir. 2002)..... 22

Cutter v. Wilkinson,
544 U.S. 709 (2005) 24

Dietz v. Bouldin,
579 U.S. 40 (2016) 33

Exxon Shipping Co. v. Baker,
554 U.S. 471 (2008) 33

Flohr v. Mackovjak,
84 F.3d 386 (11th Cir. 1996) 28

Gutierrez de Martinez v. Lamagno,
515 U.S. 417 (1995) 10, 12, 31

Humphrey v. United States,
787 F.3d 824 (7th Cir. 2015) 35

Jamison v. Wiley,
14 F.3d 222 (4th Cir. 1994) 11, 32

Jones v. Clinton,
No. 4:94-CV-00290 (E.D. Ark. May 6, 1994)..... 21

Jordan v. Hudson,
879 F.2d 98 (4th Cir. 1989) 28

Link v. Wabash R. Co.,
370 U.S. 626 (1962) 33

Melo v. Hafer,
13 F.3d 736 (3d Cir. 1994)..... 28

Moreno v. Small Bus. Admin.,
877 F.2d 715 (8th Cir. 1989) 28

Morgan v. Sundance,
596 U.S. 411 (2022) 35

Mullaney v. Anderson,
342 U.S. 415 (1952) 36

Nevada v. Hicks,
533 U.S. 353 (2001) 16

Nixon v. Fitzgerald,
457 U.S. 731 (1982) 19, 21, 22, 25

Osborn v. Haley,
549 U.S. 225 (2007) 11, 12

Palin v. New York Times Co.,
113 F.4th 245 (2d Cir. 2024) 15

Salmon v. Schwarz,
948 F.2d 1131 (10th Cir. 1991) 28

Schneckloth v. Bustamonte,
412 U.S. 218 (1973) 23

Sowell v. Am. Cyanamid Co.,
888 F.2d 802 (11th Cir. 1989) 28

Sullivan v. United States,
21 F.3d 198 (7th Cir. 1994) 28

Swalwell v. Trump,
2021 WL 2152939, No. 21-cv-586 (D.D.C. May 24, 2021) 21

Trump v. Carroll,
146 S. Ct. 2789 (2026) 1, 6

Trump v. Carroll,
No. 25-573, 2026 WL 2374093 (Aug. 17, 2026)..... 6

Trump v. Carroll,
292 A.3d 220 (D.C. 2023)..... 13, 30

Trump v. United States,
603 U.S. 593 (2024) 10, 23, 24, 25

Trump v. Vance,
591 U.S. 786 (2020) 22

United States v. Helstoski,
442 U.S. 477 (1979)
..... 9, 15, 20, 22

Wasserman v. Rodacker,
557 F.3d 635 (D.C. Cir. 2009) 28

Wood v. Allen,
558 U.S. 290 (2010) 17

Constitutional Provisions

U.S. Const., art. I, sec. 6, cl. 1 (Speech or Debate Clause) 20

U.S. Const., amend. V 21

U.S. Const., amend. VII 10

Statutes

28 U.S.C. § 2402 ..... 10, 35

Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), 28 U.S.C. § 2679 *et seq*. 2, 3, 10, 11, 14, 26–29, 31, 32, 34, 35

28 U.S.C. § 2679(b)(1)..... 10

28 U.S.C. § 2679(d)(1)..... 11, 32

28 U.S.C. § 2679(d)(2)..... 11, 14, 31, 32, 34

28 U.S.C. § 2679(d)(3)..... 2, 3, 11, 14, 26-29

28 U.S.C. § 2680 35

28 U.S.C. § 2680(h)..... 10

Westfall Act, Pub. L. No. 100-694, § 8(b), 102 Stat. 4563..... 28

Rules and Regulations

Fed. R. Civ. P. 16(b)(3)(A) 33

Fed. R. Civ. P. 38(d)..... 23

28 C.F.R. § 15.4(c) (2024) 12, 13, 32

INTRODUCTION

As found by a unanimous jury, petitioner Donald J. Trump sexually assaulted respondent E. Jean Carroll in 1996. In 2019, when Ms. Carroll came forward about the assault, petitioner (who by then was the President) made a series of false statements about her that maligned her character and threatened her safety. Ms. Carroll filed two suits: one for the defamation that occurred in 2019 and a second for the assault itself as well as subsequent defamatory statements.[1]

This Court has already declined to review the jury's verdict in favor of Ms. Carroll in that second case. 146 S. Ct. 2789 (2026). It should do the same here.

This new petition first raises questions regarding presidential immunity. But petitioner chose to renounce that defense at the outset of this case: In a letter to the court, petitioner disclaimed absolute immunity, insisting that Ms. Carroll was "free to pursue this action when the President is no longer in office" and that he was not "seeking to 'escape accountability.'" Def. Letter to Court 3, NYSCEF No. 103 (N.Y. Sup. Ct. July 16, 2020). Over the ensuing years, petitioner repeatedly affirmed his waiver of immunity by actively litigating this case. Even when he eventually raised presidential

---

[1] All references to "petitioner" are to individual petitioner Donald J. Trump. Similarly, all references to "Pet." and "Pet. App." refer to the petition and appendix in *Trump v. Carroll*, No. 26-141. We refer to the United States petitioner as "the Government" and to the petition and appendix in *United States v. Carroll*, No. 26-142, as "U.S. Pet." and "U.S. Pet. App."

immunity—three years into this litigation—he did not raise the question the petition presents that there is some sort of heightened standard for waiving presidential immunity. Petr. Br. 11, No. 23-1045 (2d Cir. Oct. 2, 2023) (ECF No. 92). That argument didn't come until another two years later, at which point the Second Circuit held it was too late.

This Court should deny review. There is no good reason for this Court to overlook the many procedural obstacles presented by this case. The standard for waiving presidential immunity has never come up before, and there is no reason to believe it will ever come up again. For a half century at least, every President who has wanted to raise presidential immunity has done so at the outset of litigation. Indeed, *this* President has raised absolute immunity in the first pleading in other cases against him. So the question of exactly how explicit a President must be to waive immunity does not warrant certiorari.

It's much the same story when it comes to the Westfall Act question—whether either petitioner or the Government may move for substitution posttrial. Petitioner can't; the Westfall Act tells defendant-employees exactly how and when they must move to substitute—and it must be "before trial." 28 U.S.C. § 2679(d)(3). Petitioner completely ignores this statutory deadline for defendant-employees. As for the Government, it does not supply any basis for reversing even one of the "three independent reasons" the Second Circuit gave for denying its posttrial substitution motion, let alone all three. Pet. App. 147a.

Like the waiver of presidential immunity question, the Westfall Act question will not recur either: The petitions do not cite a single case since the

passage of the Westfall Act where either the Government or any federal employee—let alone a President—has sought substitution after trial. And the Westfall Act already protects against any risk that politically disfavored former officials will have their certifications withdrawn by a successive administration, since any official can independently seek certification and substitution. *See* 28 U.S.C. § 2679(d)(3). All those officials need to do is to exercise that right, rather than choosing to litigate in their own name.

Thus, there is no need for the Court to take this case to protect "the institution of the Presidency" or "future Presidents and other high-ranking officials." *Contra* U.S. Pet. 4-5, 15. Nor should this Court grant certiorari to bail out *this* President from the consequences of his repeated litigation choices.

For seven years—through five appeals, eight stay motions, and six days of trial—Ms. Carroll has litigated this case in the face of petitioner's increasingly vicious accusations and thousands of threats of death and sexual violence from his followers. *See* Pet. App. 7a-15a, 49a. This Court should decline to drag this litigation out any further based on defenses that petitioner chose to relinquish years ago.

STATEMENT OF THE CASE

A. Factual background.

1. As this case comes to this Court, it must accept the following facts—found by a unanimous jury—as true. Pet. App. 22a-23a. In 1996, petitioner sexually assaulted Ms. Carroll at the Bergdorf Goodman department store in Manhattan. *Id.* 3a. On June 21,

2019, while petitioner was serving his first term as President, an excerpt of Ms. Carroll's forthcoming book was published in *New York* magazine. In the excerpt, she described how petitioner "forcibly insert[ed] his fingers into her vagina without her consent." *Id.* 3a-4a.

Petitioner responded by making a series of false, malicious, and defamatory public statements about Ms. Carroll.

Just hours after the excerpt was published, petitioner provided a statement to a reporter, who then posted it on Twitter. Pet. App. 4a. The statement accused Ms. Carroll of "mak[ing] up false stories of assault to try to get publicity for [herself], or sell a book, or carry out a political agenda." *Id.* It also threatened that she "should pay dearly for such false accusations." *Id.* 5a.

The next day, petitioner once again accused Ms. Carroll of inventing a story "for the sake of publicity" and claimed that she was "actually paid money to say bad things about [him]." Pet. App. 5a-6a. He insinuated that he "was one of the many men" that she had falsely accused. *Id.* 5a. And he reiterated his threat to "be careful" because she was "playing with very dangerous territory." *Id.*

2. Petitioner continued to demean and defame Ms. Carroll throughout the ensuing seven years, including well after he left office. In October 2022, he insisted on the Truth Social platform that "[t]his 'Ms. Bergdorf Goodman case' is a complete con job" and that Ms. Carroll was just trying to "promot[e] a really crummy book" with a "complete Scam." Pet. App. 11a.

In 2023, on the very same day a jury found him liable for sexually abusing Ms. Carroll, petitioner

described Ms. Carroll's testimony as a "totally fabricated accusation" that led to "the greatest witch hunt of all time." Pet. App. 13a-14a.

And in 2024, during the trial in this very case, petitioner wrote on social media claiming that Ms. Carroll's account was a "MADE UP & DISGUSTING HOAX." Pet. App. 14a. He "proclaimed that he would continue to defame Carroll 'a thousand times.'" *Id.* 52a.

3. Petitioner's defamatory statements "had a domino effect." Pet. App. 51a. Ms. Carroll was "instantly and continuously attacked on Twitter and Facebook and in emails." *Id.* 49a. She received "thousands of such attacks," including graphic threats of sexual violence, physical violence, and death. *Id.* Faced with this onslaught, Ms. Carroll "fear[ed] for her safety" but "could not afford stronger personal security measures," as petitioner's defamation also cost Ms. Carroll her "decades-long career" as a columnist. *Id.*

B. The trials.

1. Ms. Carroll filed two suits against petitioner. The first—*Carroll I* and the subject of the instant petition—was filed in November 2019 and raised claims of defamation as to petitioner's June 2019 statements. Pet. App. 7a. The second—*Carroll II*—was filed in November 2022 and raised claims of sexual assault for petitioner's 1996 attack and defamation as to petitioner's October 2022 statement. *Id.* 10a-11a.

2. *Carroll II* went to trial first. The jury found that petitioner had sexually abused Ms. Carroll and that his October 2022 statement was false, defamatory, and made with actual malice. *See* Pet. App. 11a-12a.

It awarded Ms. Carroll $5 million in compensatory and punitive damages. *Id.* 12a. The court of appeals affirmed. *Id.* This Court denied certiorari and then denied petitioner's request for rehearing. *Trump v. Carroll*, 146 S. Ct. 2789 (2026) (mem.) (denying certiorari); *Trump v. Carroll*, No. 25-573, 2026 WL 2374093 (U.S. Aug. 17, 2026) (mem.) (denying rehearing).

3. Meanwhile, this case, *Carroll I*, proceeded through five appeals, eight stay motions, and at least four sets of counsel for petitioner. Pet. App. 7a-15a, 49a. The district court described petitioner's litigation strategy as "slow-roll[ing] his defenses, asserting or inventing a new one each time his prior effort to delay the case fails." *Id.* 264a.

Based on the verdict in *Carroll II*, the district court granted partial summary judgment to Ms. Carroll on the questions whether petitioner had sexually abused her (he had) and whether his June 2019 statements were false and defamatory (they were). Pet. App. 212a-214a. Thus, the trial here was limited to the appropriate amount of compensatory and punitive damages.

4. This case went to trial in January 2024. Pet. App. 12a. The jury ultimately returned a verdict of $83.3 million in compensatory and punitive damages. *Id.* 15a.

In upholding the punitive damages award, the district court highlighted petitioner's repeated statements "castigating Ms. Carroll as a politically and financially motivated liar, insinuating that she was too unattractive for him to have sexually assaulted, and threatening that she would 'pay dearly' for speaking out"—statements that only increased in

frequency after petitioner left office and all the way through trial. Pet. App. 206a. The district court also highlighted petitioner's conduct "*in the courtroom itself*." *Id.* 207a (emphasis in original). In front of the jury, petitioner "could be heard making audible comments" about a "'witch hunt' and a 'con job,'" and he "conspicuously stood and walked out of the courtroom" during closing statements by Ms. Carroll's lawyers. *Id.* 207a-208a. The district court concluded that petitioner "would not stop attacking Ms. Carroll unless faced with a significant deterrent, a critical function of substantial punitive damages awards." *Id.* 206a-207a.

C. Procedural background for questions presented.

The petition does not challenge the jury's findings or the compensatory and punitive damages awards. This Section recounts the procedural history of the only two defenses still at issue.

i. Presidential immunity.

a. In January 2020, petitioner filed an answer to Ms. Carroll's complaint in New York state court. Def. Answer, NYSCEF No. 68 (N.Y. Sup. Ct. Feb. 28, 2020).[2] He asserted that he was temporarily immune from being sued in state court while serving as President. *Id.* 11. He did not, however, raise any defense of absolute presidential immunity (that is, he did not argue that he could never be held liable). *Id.*

---

[2] For reasons described below, *see infra*, at 11-12, the case was removed to federal court and subsequently litigated there.

Petitioner then moved for a stay of proceedings until he was out of office, again asserting only a temporary immunity from suit in state court under the Supremacy Clause. Def. Mem. Mot. to Stay, NYSCEF No. 49 (N.Y. Sup. Ct. Feb. 4, 2020). Petitioner wrote to the state court that Ms. Carroll would be "free to pursue this action when the President is no longer in office." Def. Letter to Court 3, NYSCEF No. 103 (N.Y. Sup. Ct. July 16, 2020). He disclaimed presidential immunity, insisting that he was not "seeking to 'escape accountability.'" *Id.*

Over the next three years, petitioner followed through on that choice to litigate. He attempted to amend his answer to raise a counterclaim; he stipulated to discovery schedules and trial proceedings; he sat for a deposition and deposed Ms. Carroll twice; and he raised a variety of defenses—absolute presidential immunity was not among them. *See* ECF Nos. 47, 63, 75, 90, 92, 99, 101 (S.D.N.Y.).

b. In December 2022, after the close of discovery, petitioner for the first time attempted to claim absolute presidential immunity, asserting it in a motion for summary judgment. Def. Mem. Mot. for Summ. J. 3, ECF No. 109 (S.D.N.Y. Dec. 22, 2022). He did not dispute that he had waived the defense; rather, he argued only that "absolute immunity is a non-waivable question of subject matter jurisdiction." *See* Def. Letter to Court 2, ECF No. 160 (S.D.N.Y. May 26, 2023). He did not suggest that presidential immunity might be subject to a heightened standard of waiver. The district court and the Second Circuit on interlocutory review rejected the argument that absolute immunity was jurisdictional. Pet. App. 173a.

In the alternative, petitioner requested leave to amend his answer to raise the defense of absolute presidential immunity. Def. Answer to Pl.'s First Am. Compl. 20-21, ECF No. 171 (S.D.N.Y. June 27, 2023). Yet he gave "no explanation" for his "three-year delay in raising [the] presidential immunity defense." Pet. App. 263a. Accordingly, the district court denied that motion in light of petitioner's "undue delay" and the prejudice to Ms. Carroll. *Id.* The district court also granted Ms. Carroll's motion to strike petitioner's invocation of presidential immunity in his amended answer. *Id.* 10a. The Second Circuit affirmed both rulings. *Id.* 168a.

Having waived presidential immunity, petitioner stood trial in January 2024. The jury returned a verdict in Ms. Carroll's favor. Pet. App. 15a.

c. Petitioner then filed another appeal to the Second Circuit. Pet. App. 15a. Here, he argued for the first time that he had not waived presidential immunity because such a waiver would require an "explicit and unequivocal renunciation." *Id.* 16a (emphasis omitted). Only at this point in the litigation did he cite this Court's decision in *United States v. Helstoski*, 442 U.S. 477 (1979). *Id.*

The Second Circuit refused to consider the argument that presidential immunity is subject to a heightened standard of waiver, holding that petitioner "had the opportunity and incentive to raise this challenge in his initial [interlocutory] appeal and failed to do so; hence, he may not do so now." Pet. App. 20a. The Second Circuit also explained that "[e]ven assuming a waiver of presidential immunity must be 'explicit and unequivocal,'" petitioner's conduct "meets this standard." *Id.* n.12.

Petitioner also argued that this Court's opinion in *Trump v. United States*, 603 U.S. 593 (2024), had somehow changed the standard for waiver. Pet. App. 17a. The Second Circuit rejected that argument, holding that *Trump*—a case in which petitioner himself had asserted presidential immunity expressly and repeatedly—said nothing about the standard for waiving presidential immunity. *Id.* 17a-18a.

ii. Westfall Act.

a. The Westfall Act grew out of legislation regarding federal employees who got into car accidents while on the job. *See Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 425-26 (1995). The Act protects federal employees against personal liability for state-law torts committed within the scope of their employment, by allowing for the substitution of the United States as the defendant. 28 U.S.C. § 2679(b)(1), (d).

Once the United States becomes the defendant, the Federal Tort Claims Act governs any further litigation. As a result, some claims must be dismissed, including, as relevant here, any defamation claim. *See* 28 U.S.C. § 2680(h). Moreover, the procedures for trial are different once the United States is the defendant. Among other things, whereas a plaintiff seeking damages against an individual defendant has a Seventh Amendment right to a jury trial, Congress has generally barred jury trials where the United States is the defendant. *See* 28 U.S.C. § 2402.

In order to substitute the United States as a defendant, the defendant-employee must obtain a certification that he was acting within the scope of his

employment. The Westfall Act provides three routes to accomplish certification and substitution:

- Subsection (d)(1) addresses actions "commenced" in federal district court and provides for substitution upon the Attorney General's certification that the employee acted within the scope of employment. 28 U.S.C. § 2679(d)(1). That provision is not at issue in this case.

- Subsection (d)(2) addresses actions "commenced" in state court, as this case was. The Attorney General may certify "that the defendant employee was acting within the scope of his office or employment." Upon certification, the action "shall be removed . . . at any time before trial" to federal district court, and "[s]uch action or proceeding shall be deemed to be an action or proceeding brought against the United States," which is substituted as defendant. 28 U.S.C. § 2679(d)(2). The certification is conclusive as to removal. *Osborn v. Haley*, 549 U.S. 225, 231 (2007).

- If the Attorney General refuses to issue a certification or withdraws certification, subsection (d)(3) permits the employee to "at any time before trial petition the court to find and certify" that the challenged conduct fell within the scope of employment. 28 U.S.C. § 2679(d)(3); *Jamison v. Wiley*, 14 F.3d 222, 235-36 (4th Cir. 1994) (discussing withdrawal of a certification). That procedure applies whether the action was commenced in state or federal court.

Regardless of which path is taken, the district court must decide whether the employee was acting within the scope of his employment before substitution occurs

if either party challenges the certification. *Gutierrez de Martinez*, 515 U.S. at 432-34. A denial of substitution is reviewable on an interlocutory appeal. *Osborn*, 549 U.S. at 238-39. In addition, Department of Justice regulations provide that an Attorney General certification "may be withdrawn if a further evaluation of the relevant facts or the consideration of new or additional evidence calls for such action." 28 C.F.R. § 15.4(c) (2024).

b. In September 2020, the Attorney General issued a certification, removed this case from state to federal court, and moved to substitute. BIO App. 2a; Mot. to Substitute, ECF No. 3 (S.D.N.Y. Sept. 8, 2020).[3] After briefing and argument, the district court denied the motion to substitute because petitioner was not an "employee" within the meaning of the Westfall Act and because, under either New York or D.C. law, petitioner was not acting within the scope of his employment when he made the defamatory statements. Order Denying Substitution, ECF No. 32 (S.D.N.Y. Oct. 27, 2020).

On appeal, the Second Circuit held that petitioner was an "employee" within the meaning of the Westfall Act. *Carroll v. Trump*, 49 F.4th 759, 761 (2d Cir. 2022). It also held that D.C. law, not New York law, governed the scope of employment question and, accordingly, certified the question to the D.C. Court of Appeals. *Id.* One judge dissented from the decision to certify and would have found that petitioner was not an "employee" and that petitioner's statements were not

[3] The appendix to this brief in opposition collects the certification and decertification documents at issue in this case.

made within the scope of his employment. *Id.* at 783 (Chin, J., dissenting).

The D.C. Court of Appeals accepted the certified question. It clarified that its scope-of-employment test involves some half-dozen factors and focuses on the employee's "subjective state of mind." *Trump v. Carroll*, 292 A.3d 220, 228-234 (D.C. 2023). It also rejected a "categorical" rule that "the conduct of elected officials speaking to the press is always within the scope of that official's employment." *Id.* at 239. But it declined to decide whether petitioner acted within the scope of his employment under its test, explaining that "this fact-intensive question cannot be resolved as a matter of law in either party's favor on the record before us." *Id.* at 240.

c. The Second Circuit remanded this case to the district court to apply the D.C. Court of Appeals' clarified test. *Carroll v. Trump*, 66 F.4th 91, 94 (2d Cir. 2023) (per curiam). The district court set a deadline for additional briefing on the Westfall Act question, ordering that "any further submission" by either petitioner or the United States "with respect to substitution of the United States for the defendant shall be served and filed no later than July 13, 2023." Order, ECF No. 169 (S.D.N.Y. June 13, 2023).

Before that deadline, pursuant to 28 C.F.R. § 15.4(c), the Government withdrew its certification based on the D.C. Court of Appeals' clarification of the scope-of-employment test, new facts that had come to light at the *Carroll II* trial, and the jury's verdict in *Carroll II*. BIO App. 4a-14a. A jury had now found that Mr. Trump sexually abused Ms. Carroll "long before he became President." *Id.* 12a. This established that his false and defamatory statements about the woman

he had attacked were motivated by a "personal grievance." *Id*. Moreover, petitioner continued to make "very similar statements" long after he left office, at which point he could not have been acting within the scope of his employment. *Id.* 11a. Taken together, the evidence made clear that petitioner "could not have been motivated by any interest in serving the United States Government," as D.C.'s test for scope of employment required. *Id.*

Petitioner, by contrast, chose to do nothing. He did not file anything regarding substitution under Section 2679(d)(3) before the district court's deadline or before trial.

d. The Westfall Act issue did not reappear until more than a year after the trial concluded (by which point the appeal from the jury verdict was also fully briefed). In April 2025, petitioner and the United States jointly filed a request in the Second Circuit to substitute the United States as defendant. Pet. App. 8a.

The Second Circuit denied that motion for "three independent reasons":

First, the court held that the motion was "statutorily barred by the text of the Westfall Act." Pet. App. 147a. Section 2679(d)(3) required petitioner to request substitution "before trial," and Section 2679(d)(2) required the Government to issue a certification "before trial" in cases that originated in state court. Neither petitioner nor the Government had met that requirement. *Id.* 147a, 154a-155a.

Second, the court emphasized that neither petitioner nor the Government had moved for substitution by the district court's July 13, 2023, deadline. Pet. App. 160a-162a. Indeed, before the

deadline, the Government had affirmatively disclaimed seeking substitution because it concluded that petitioner was *not* acting within the scope of his employment. BIO App. 4a.

Third, the court held that no extraordinary equitable considerations counseled in favor of departing from the default rule that all motions governing how a trial will proceed must be made before trial. Pet. App. 163a-164a.

iii. Subsequent proceedings.

Both petitioner and the United States filed petitions for rehearing en banc. The court denied those petitions, with Judge Menashi, joined by two other judges, dissenting. Pet. App. 57a-58a.

Petitioner and the United States have now filed separate petitions for certiorari with this Court.

I. This Court should deny certiorari as to petitioner's first question presented.

1. The centerpiece of petitioner's brief to this Court is the claim that presidential immunity is lost only through "explicit and unequivocal renunciation." *See, e.g.*, Pet. I, 2, 17-24 (citing *United States v. Helstoski*, 442 U.S. 477 (1979)). But the Second Circuit squarely held that petitioner had forfeited that argument: It was "foreclosed because it was ripe for review at the time of [petitioner's] initial appeal but . . . nonetheless foregone." Pet. App. 18a-20a (quoting *Palin v. New York Times Co.*, 113 F.4th 245, 262 (2d Cir. 2024)). Petitioner's question presented does not challenge the holding that, separate and apart from waiving presidential immunity, petitioner forfeited any argument that presidential immunity is

subject to the "explicit and unequivocal renunciation" standard. *See* Pet. I. That is reason enough to deny certiorari.

Petitioner finally acknowledges this glaring vehicle defect more than halfway through his petition and urges that the Second Circuit was wrong to hold that he had forfeited his *Helstoski* argument. *See* Pet. 24. The Second Circuit reached that holding because petitioner previously "'argued only that presidential immunity could *never* be waived at all,' regardless of how clearly such intent is expressed." *Id.* (quoting Pet. App. 19a). Petitioner disputes that characterization, but even a glance at the record confirms the Second Circuit was correct. Petitioner's summary judgment briefing characterized presidential immunity as a "non-waivable question of subject matter jurisdiction." Pet. App. 247a (quoting Def. Reply Mem. Supp. Mot. for Summ. J. 5, ECF No. 122 (S.D.N.Y. Jan. 19, 2023)). And his counsel stressed in a letter to the district court that his motion "unequivocally stated that absolute immunity is a non-waivable question of subject matter jurisdiction." *Id.* 246a n.18 (quoting Def. Letter to Court 2, ECF No. 160 (S.D.N.Y. May 26, 2023)).[4]

---

[4] Petitioner no longer meaningfully defends that subject-matter jurisdiction argument, and for good reason: "There is no authority whatever for the proposition that absolute- and qualified-immunity defenses pertain to the court's jurisdiction." *Nevada v. Hicks*, 533 U.S. 353, 373 (2001). If presidential immunity were a question of subject-matter jurisdiction, a President could not choose to litigate a case to verdict in order to clear his name. There is no indication in this Court's precedents "that absolute presidential immunity ever was meant to be so patronizing." Pet. App. 256a.

That record also makes it puzzling for petitioner to fault the Second Circuit for "positing that Presidential immunity must be either a 'defense[] based on subject-matter jurisdiction,' or else an 'ordinar[y]' defense that is lost unless 'raise[d] at the outset of the litigation.'" Pet. 23 (quoting Pet. App. 165a). That's the way *petitioner* originally briefed this case, all the way through his first round of appeals on the presidential immunity question. Pet. App. 246a n.18; *id.* 20a n.12. Aside from his subject-matter jurisdiction argument, petitioner simply never raised any argument that presidential immunity was something other than "an 'ordinar[y]' defense that is lost unless 'raise[d] at the outset of the litigation.'" Even now, he points this Court to nowhere in his briefing or argument where he might have done so (until, of course, his belated invocation of *Helstoski*). As the district court explained, it was "clear that Mr. Trump does not dispute that if absolute presidential immunity can be waived, he in fact waived it in this case." *Id.* 246a n.18; *see also id.* 19a-20a & n.12 (petitioner conceded that "if presidential immunity were waivable, he waived it").

The Second Circuit's holding that petitioner forfeited his "explicit and unequivocal renunciation" argument is thus correct. And in any event, petitioner's question presented does not challenge that holding. *See Wood v. Allen*, 558 U.S. 290, 304 (2010) (explaining that "under this Court's Rule 14.1(a)," discussing an issue only in the text of a petition "does not bring it before [the Court]"). Because the Second Circuit's forfeiture holding independently supports the judgment below, certiorari should be denied.

2. There is yet a second procedural defect that makes this case an inappropriate vehicle for considering petitioner's arguments about the proper waiver standard: Petitioner would lose under any of the rules gestured at in his petition.

a. Start with petitioner's question presented, which asks this Court to hold only that a President cannot waive presidential immunity "*solely* because his first responsive pleading did not invoke Presidential immunity by name." Pet. I (emphasis added). Yet again, the record works against petitioner: He would lose even if this Court held that presidential immunity need not be raised in the first responsive pleading. In this case, petitioner's failure to raise presidential immunity in his state-court answer was just the beginning of his waiver of presidential immunity, not the "sole[]" example.[5] Instead, petitioner *told* the courts he wouldn't be invoking absolute presidential immunity, and then backed up that representation with his conduct for the first three years of litigation.

At the very outset of this case, petitioner disavowed the defense of absolute presidential immunity, telling the state court that Ms. Carroll was "free to pursue this action when the President is no longer in office" and insisting that he was not "seeking to 'escape accountability.'" Def. Letter to Court 2-3,

---

[5] Petitioner now halfheartedly argues that his third affirmative defense in the answer—which referenced "one or more immunities . . . under the Constitution"—claimed presidential immunity. *See* Pet. 9. But at oral argument before the Second Circuit, petitioner conceded that presidential immunity "was not raised in the answer." Oral Arg. Audio Recording at 12:13-12:17, No. 23-1045 (2d Cir. Oct. 23, 2023).

NYSCEF No. 103 (N.Y. Sup. Ct. July 16, 2020). He cited canonical presidential immunity cases like *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), and *Clinton v. Jones*, 520 U.S. 681 (1997), in support of a "temporary" stay. *Id.* at 1-3. He declined to cite them in support of absolute presidential immunity. *Id.*

What's more, petitioner backed up that "explicit and unequivocal renunciation" by following through on his choice to litigate rather than invoking presidential immunity:

- In December 2020, petitioner moved to stay proceedings. He did not mention presidential immunity. Def. Letter Mot. to Stay, ECF No. 47 (S.D.N.Y. Dec. 10, 2020).
- In December 2021, petitioner moved to amend his answer. He did not ask to amend it to include presidential immunity. Instead, he attempted to amend his answer to include a counterclaim, affirmatively invoking the jurisdiction of the court. Def. Mot. to Amend Answer, ECF No. 59-1 (S.D.N.Y. Dec. 1, 2021).
- In May 2022, petitioner stipulated to a discovery schedule. He did not suggest that presidential immunity protected him against discovery. Joint Letter to the Court with Proposed Sched. Order, ECF No. 75 (S.D.N.Y. May 5, 2022). Petitioner ultimately agreed to sit for six hours of deposition testimony. Excerpts of 10/19/22 Deposition of Donald J. Trump, ECF No. 135-03 (S.D.N.Y. Feb. 16, 2023).
- In September 2022, petitioner again moved to stay proceedings. He did not rely on presidential immunity to argue for the stay. Def. Letter re: Stay

of Proceedings, ECF No. 92 (S.D.N.Y. Sept. 28, 2022).

- In November 2022, petitioner wrote to the court about scheduling trial proceedings. He never argued that presidential immunity barred such proceedings. Def. Letter re: Status Conference, ECF No. 99 (S.D.N.Y. Nov. 21, 2022); Def. Letter re: Modified Schedule, ECF No. 101 (S.D.N.Y. Nov. 29, 2022).

Not until December 2022, after nearly three years of discovery and motions practice, did petitioner first raise the defense of presidential immunity. Def. Mem. Mot. for Summ. J. 3, ECF No. 109 (S.D.N.Y. Dec. 22, 2022).

b. Petitioner's other proposed rule, derived from *United States v. Helstoski*, 442 U.S. 477 (1979), is that a waiver of presidential immunity must be "explicit and unequivocal." Pet. 18-19. But the Second Circuit concluded that petitioner had waived presidential immunity "[*e*]*ven assuming* a waiver of presidential immunity must be 'explicit and unequivocal.'" Pet. App. 20a n.12 (emphasis added). This case would thus be an inappropriate vehicle to consider whether *Helstoski* provides the right standard for waiving presidential immunity.

The Second Circuit was correct. Compare the facts of this case with the facts *Helstoski* found insufficient to establish an "explicit and unequivocal waiver." *See* 442 U.S. at 492. In *Helstoski*, a congressman indicated during grand jury proceedings that he would not request immunity but later invoked the Speech or Debate Clause when he was criminally charged. *See id.* at 481-84. This Court concluded that the congressman did not have his Speech or Debate Clause

immunity "clearly in mind" when he made the representation and was instead thinking only of Fifth Amendment immunity. *See id.* at 483 n.3, 492.

In this case, by contrast, petitioner certainly had presidential immunity "clearly in mind" when he submitted a letter to the court promising to litigate the case—the letter itself was peppered with citations to the foundational presidential immunity cases like *Nixon* and *Clinton*, but it conspicuously declined to claim absolute presidential immunity. *See* Def. Letter to Court, NYSCEF No. 103 (N.Y. Sup. Ct. July 16, 2020).

3. Even if this Court *could* somehow circumvent those procedural defects, it should not choose to do so here. There is no need for this Court to clarify exactly how explicit a waiver of presidential immunity must be. Any President who has wanted to avoid litigation has been able to do so, even without the benefit of any sort of heightened waiver standard.

Since *Nixon*, Presidents who wished to raise presidential immunity have consistently done so at the outset of a case. For example, in a case much like this one—where a plaintiff sued for defamation following a sexual assault—President Clinton argued in his motion to dismiss that the President is "absolutely immune from the allegation of defamation." Def. Mem. Mot. to Dismiss 20 n.7, *Jones v. Clinton*, No. 4:94-CV-00290 (E.D. Ark. Aug. 10, 1994), ECF No. 18. Indeed, a year before he finally decided to claim absolute immunity in this case, petitioner *himself* raised the defense at the outset of another case against him. *See, e.g.*, Def. Mem. Mot. to Dismiss 8-11, *Swalwell v. Trump*, No. 21-cv-586 (D.D.C. May 24, 2021), ECF No. 14-1.

4. In any event, petitioner is simply wrong to suggest that *Helstoski*'s heightened standard for waiver applies to this case.

Helstoski governs only legislative immunity, not the immunity of other government officials. For other government officials, including judges and prosecutors, there is no heightened standard for waiving immunity. On the contrary: The lower-court consensus is that these immunities are waived if they are not affirmatively pleaded.[6] There's no reason to think the waiver standard for presidential immunity is more akin to the waiver standard applicable to legislative immunity than to the waiver standard applicable to judicial and prosecutorial immunity—especially given that this Court has drawn "a careful analogy" between presidential immunity and "the common law immunity of judges and prosecutors." *Trump v. Vance*, 591 U.S. 786, 801 (2020); *see also Nixon v. Fitzgerald*, 457 U.S. 731, 746-47, 751-52 (1982).

Moreover, *Helstoski* involved criminal, not civil, proceedings, and this Court has never held that its heightened waiver standard applies to civil proceedings. *Helstoski* was concerned about the executive's intrusion on a co-equal branch of government. 442 U.S. at 491-92. No similar concerns attend a civil action brought by a private party.

---

[6] *See, e.g.*, *Boyd v. Carroll*, 624 F.2d 730, 732-33 (5th Cir. 1980) ("The failure to plead judicial immunity waived the affirmative defense."); *Cozzo v. Tangipahoa Par. Council—President Gov't*, 279 F.3d 273, 283 (5th Cir. 2002) ("Absolute immunity is an affirmative defense that is waived if it is not pleaded.").

What's more, the standards for waiver of procedural rights are traditionally higher in criminal prosecutions than in civil proceedings. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 235 (1973). That means that not only is *Helstoski* inapposite, but petitioner's reliance on the heightened standards for waiving counsel or a jury trial right in a criminal proceeding is equally inapposite. *Compare, e.g.*, *Boykin v. Alabama*, 395 U.S. 238, 243 & n.5 (1969) (standard for waiving jury trial in criminal case), *with* Fed. R. Civ. P. 38(d) (standard for waiving jury trial in civil case).

5. As a final Hail Mary, petitioner requests a GVR in light of *Trump v. United States*, 603 U.S. 593 (2024). It's not clear whether petitioner thinks *Trump* excuses his failure to claim presidential immunity earlier, to mention his proposed heightened waiver standard earlier, or both. Either way, he's wrong.

As to the former: Petitioner claimed presidential immunity in this case in December 2022. Def. Mem. Mot. for Summ. J. 3, ECF No. 109 (S.D.N.Y. Dec. 22, 2022). That was a year and a half before this Court's decision in *Trump*. So there can be no argument that the defense was unavailable prior to that decision.

As to the latter: Petitioner cannot rely on *Trump* to forgive his failure to timely argue that waiver of presidential immunity must be "explicit and unequivocal." *Trump* nowhere discusses the standard for waiving presidential immunity, as there was no argument in that case that immunity had been waived. To the contrary, petitioner claimed presidential immunity at the outset of that case. *Trump*, 603 U.S. at 603. As such, the word "waiver" appears nowhere in that opinion.

II. This Court should deny certiorari as to petitioner's second question presented.

1. Not content to ask the Court in his first question presented to consider an argument the court of appeals correctly held he forfeited, petitioner next asks this Court to ignore its time-honored certiorari practice to resolve a question that the court below had no reason to address: whether he is entitled to presidential immunity for his knowingly false and defamatory statements after Ms. Carroll went public about his sexual assault. This Court should decline review of that question as well. After all, this is "a court of review, not of first view." *See Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

This Court has applied its "review, not first view" rule specifically to deny requests to address in the first instance whether a particular communication made by a President to the public is entitled to immunity. It should follow that practice here. In *Trump v. United States*, this Court explained that parsing such a communication is a "necessarily factbound analysis [that] is best performed initially by the District Court" and accordingly declined to do so itself. 603 U.S. at 630. Similarly, in *Clinton v. Jones*, this Court declined to consider whether allegedly defamatory statements made by the President to the press were entitled to absolute presidential immunity. 520 U.S. 681, 686 n.3 (1997).

Petitioner argues this Court has enough facts about "the content, context, form, [and] circumstances" of the statements at issue in this case to resolve the question presented. *See* Pet. 32. But this Court knew as much about the Tweets and public speech at issue in *Trump v. United States* as it knows

about the statements at issue in this case, yet it still declined to conduct the analysis there, instead concluding a trial court was better situated. *See* 603 U.S. at 630. It should follow its usual course here.

2. Contra petitioner, the statements at issue in this case are not "'readily categorized' as official in nature." Pet. 31-32. Whether petitioner's statements were "official" turns on their "context" and "content," *see Trump*, 603 U.S. at 629—and both establish that these statements were not official acts.

As this case comes to this Court, it must accept as true that petitioner sexually assaulted Ms. Carroll. Pet. App. 23a. And it must accept that his statements—while in office, after leaving office, and all the way through trial—were false and defamatory. *Id.* 27a.

In light of that context, consider the contents of petitioner's statements. While in office, petitioner accused Ms. Carroll of lying to sell her book, promised she would "pay dearly" for her accusations, and warned her to "be careful" because she was "playing with very dangerous territory." Pet. App. 4a-5a. He insinuated that Ms. Carroll made other false accusations, stating that he was just "one of the many men that she wrote about." *Id.* 5a. As a result, Ms. Carroll received thousands of messages—many mirroring petitioner's rhetoric—replete with graphic images or imagery and threatening sexual violence or death. *Id.* 12a-13a, 49a. Wherever the "outer perimeter" of a President's responsibilities lies, *see Nixon*, 457 U.S. at 756, surely what petitioner inflicted on Ms. Carroll is beyond it.

III. This Court should deny certiorari on the Westfall Act questions raised by petitioner and the Government.

Petitioner and the Government urge that this Court should grant certiorari to determine whether either party can move for posttrial substitution under the Westfall Act. This Court should decline both requests.

A. This Court should deny certiorari on the question whether petitioner can seek posttrial substitution.

Recall that the Westfall Act specifies the proper recourse for a person in petitioner's position who seeks substitution but is denied a certification by the Attorney General: Under 28 U.S.C. § 2679(d)(3), a defendant-employee may "*before trial* petition the court to find and certify that the employee was acting within the scope of his office or employment" (emphasis added). But petitioner did not ask for substitution before trial. Instead, petitioner sought substitution only after the trial was over—indeed, only after judgment was entered, the case was appealed, and the appellate briefing was complete. Pet. App. 153a, 160a-161a.

The district court expressly invited motions regarding substitution under the Westfall Act. Order Granting Mot. to Amend 1-2, ECF No. 169 (S.D.N.Y. June 13, 2023). Petitioner declined to file anything—presumably because he wanted to litigate this case in his personal capacity. Consistent with that strategy, while the Westfall Act question was on appeal in 2023, petitioner joined a motion to try *Carroll I* (the instant case) jointly with *Carroll II* (which concerned only

conduct when petitioner was not in office and in which the United States could not possibly be a defendant). Joint Letter Mot. to Consolidate, ECF No. 147 (S.D.N.Y. Mar. 17, 2023). And even while the district court's invitation was pending, petitioner brought a counterclaim against Ms. Carroll for defamation—a claim only he, and not the United States as a substituted defendant, could have raised. Def. Answer to Pl.'s First Am. Compl. 23-27, ECF No. 171 (S.D.N.Y. June 27, 2023).

Petitioner nowhere defends his failure to comply with the "before trial" deadline in Section 2679(d)(3). What's worse, his petition fails to even mention Section 2679(d)(3). It is clear that petitioner cannot move for substitution after trial.[7]

B. This Court should deny certiorari on the question whether the Government can seek posttrial substitution.

That leaves the question whether the Government can move for substitution after trial. This Court should not grant certiorari as to that question, either. To start, the legal issue of whether the United States can substitute itself after trial has never come up before and will not come up again. Moreover, resolving the question presented will not, contrary to the

---

[7] Below, the dissent raised the possibility that petitioner's mention of the Westfall Act as the nineteenth affirmative defense in his answer to the amended complaint sought relief under Section 2679(d)(3). Pet. App. 68a-69a. Not even petitioner makes that argument, and understandably so. Section 2679(d)(3) requires a defendant to "petition the court to find and certify" that substitution is proper. 28 U.S.C. § 2679(d)(3). Petitioner's passing reference to the Westfall Act did no such thing.

Government's suggestion, "dispose of the case"; it will merely drag out this litigation further. *Contra* U.S. Pet. 29. And in any event, the Government has not shown that the Second Circuit erred, let alone that it erred on each of the "three independent reasons" for denying the Government's posttrial motion for substitution. Pet. App. 147a.

1. Neither the petitions nor the dissent below identifies a single case commenced after the Westfall Act was passed in which the United States moved to substitute itself after trial.[8] Not only is there no circuit split on the question presented, then, but the issue has *never* arisen in the nearly 40 years since the Act's passage.

Nor is there any reason to think it will come up in the future. Section 2679(d)(3) ensures that the issue of substitution will get resolved before trial. When a certification is not issued or is revoked, a defendant-employee who thinks the United States should be

---

[8] Most of the cited cases did not involve posttrial substitution at all. *See Wasserman v. Rodacker*, 557 F.3d 635, 637, 639 (D.C. Cir. 2009); *Flohr v. Mackovjak*, 84 F.3d 386, 388-89 (11th Cir. 1996); *Melo v. Hafer*, 13 F.3d 736, 747-48 (3d Cir. 1994); *Sullivan v. United States*, 21 F.3d 198, 205-06 (7th Cir. 1994); *Jordan v. Hudson*, 879 F.2d 98, 98-99 (4th Cir. 1989); *Moreno v. Small Bus. Admin.*, 877 F.2d 715, 716-17 (8th Cir. 1989); *Salmon v. Schwarz*, 948 F.2d 1131, 1133, 1141-42 (10th Cir. 1991).

The lone exception, *Sowell v. Am. Cyanamid Co.*, 888 F.2d 802, 805 (11th Cir. 1989), was already on appeal when the Westfall Act was enacted and thus subject to a provision that made the new statute applicable to then-pending proceedings. *See* Westfall Act, Pub. L. No. 100-694, § 8(b), 102 Stat. 4563, 4565-66.

substituted will invoke Section 2679(d)(3) to seek substitution. At that point, the district court will have to address the question. Either it will hold that the defendant was acting within the scope of his employment, in which case the United States will immediately be substituted. Or it will hold that the defendant was not acting within the scope of his employment, in which case the United States cannot be substituted (unless that holding is reversed on interlocutory appeal). Either way, there will be no need for any posttrial request for substitution. And with or without an Attorney General certification, the district court and court of appeals will review the scope-of-employment determination de novo. *See, e.g.*, *Arthur v. U.S. ex rel. Veterans Admin.*, 45 F.3d 292, 295 (9th Cir. 1995).

That's also why the United States's claim that this Court must grant certiorari so "future Presidents" don't face "the risk of having Westfall Act certifications similarly withdrawn by their successors," U.S. Pet. 4-5, is unfounded. Should a future administration do so, the future President need only invoke Section 2679(d)(3), as petitioner could have done here.

2. Even if this Court were to hold that posttrial certification is a possibility in some future case, answering that question would not affect the outcome of this litigation. Even apart from the belated certification, substitution is unjustified here because Ms. Carroll maintains that petitioner's defamation of

the woman he sexually assaulted was not within the scope of his employment.[9]

As the Second Circuit stressed, deciding this question would require further factual development. Pet. App. 162a n.6. But even the limited record at present indicates that petitioner's defamation was outside the scope of his employment as a matter of D.C. law, as two Article III judges have already found (albeit prior to the D.C. Court of Appeals's clarification of D.C. law). Order Denying Substitution 45-46, ECF No. 32 (S.D.N.Y. Oct. 27, 2020); Opinion 18-20, No. 20-03977 (2d Cir. Sept. 27, 2022) (Chin, J., dissenting) (ECF No. 127). And the Government's reasons for withdrawing its certification in 2023—that petitioner sexually assaulted Ms. Carroll long before becoming President and continued to defame her long after, suggesting he was motivated by a "personal grievance," BIO App. 11a-12a—only became stronger after the jury in this case found that petitioner had acted "with a deliberate intent to injure or out of hatred, ill will, or spite," Pet. App. 39a; *see Trump v. Carroll*, 292 A.3d 220, 234 (D.C. 2023) (holding that the defendant-employee's "subjective state of mind" is a factor in determining whether he acted within the scope of his employment).

3. In any case, the Second Circuit was correct to reject the Government's attempt to recertify after trial. The Second Circuit's decision rested on "three independent reasons." Pet. App. 147a. The

---

[9] Ms. Carroll also maintains that petitioner is not an "employee" within the meaning of the Westfall Act. Although the Second Circuit rejected that argument, *Carroll v. Trump*, 49 F.4th 759, 761 (2d Cir. 2022), Ms. Carroll would renew the argument before this Court if necessary.

Government has no compelling response to even one, let alone all three.

a. To start, the plain text of the Westfall Act requires certification "before trial" in a case like this one. Section 2679(d)(2)—the provision about cases that originate in state court, which the Government agrees controls here, U.S. Pet. 16—contemplates that certification, removal, and substitution occur in tandem. First, the Attorney General issues a certification "that the defendant employee was acting within the scope of his office or employment." 28 U.S.C. § 2679(d)(2). "Upon certification," the action or proceeding commenced in state court "shall be removed . . . at any time *before trial*." *Id.* (emphasis added). "Such action or proceeding shall be deemed to be an action or proceeding brought against the United States . . . and the United States shall be substituted as the party defendant." *Id.* Under this provision, it is indisputable that removal must come "before trial," which necessarily means that the antecedent step of certification must come "before trial."

To evade this timing restriction and justify its posttrial recertification, the Government attempts to distinguish certification for removal, which it concedes must come before trial, from certification for substitution, which it argues can come whenever. *See* U.S. Pet. 16-17. But that distinction has no basis in the statutory text, which provides for a single certification that is the prerequisite for both removal and substitution.

In search of support, the Government cites this Court's decision finding that certification is conclusive as to removal and not as to substitution. *See Gutierrez de Martinez*, 515 U.S. at 432. Yet in that very case, this

Court recognized that Congress contemplated only a single certification that would trigger both removal and substitution, summarizing that "[u]pon certification, the employee is dismissed from the action *and* the United States is substituted as defendant." *Id*. at 420 (emphasis added).

The Government protests that "[i]t makes no sense that Congress would choose to subject cases removed to federal court" (that is, cases under Section 2679(d)(2)) to "differential treatment" from cases that originated in federal court (that is, cases under Section 2679(d)(1), where the statute does not specify substitution must happen "before trial"). U.S. Pet. 14 (emphasis omitted). But whatever the timing rule might be for cases that originate in federal court, section 2679(d)(2) is clear for cases originating in state court. *See* 28 U.S.C. § 2679(d)(2). Moreover, the Government does not dispute that Congress had good reason for insisting removal—and therefore certification—happen before trial: Claims against the United States must be tried in federal court. And Congress—correctly—contemplated that in the mine run of cases, the certification that triggers removal also triggers substitution.

The Government now (halfheartedly) suggests the original, pre-removal certification in this case is still effective because the Government cannot withdraw a certification once issued. U.S. Pet. 17-18. But it has forfeited any such argument by not raising it below. In any event, the Government's own regulations allow for withdrawing a certification, presumably because the Government needs the flexibility to change its determination as new facts come to light. 28 C.F.R. § 15.4(c) (2024); *see also, e.g.*, *Jamison*, 14 F.3d at 228-

35 (withdrawing certification where "independent review" revealed that defendant-employee had sexually assaulted coworker). That's exactly what happened here: As the Government explained in July 2023, it withdrew its certification after reviewing the evidence and jury verdict in the *Carroll II* trial as well as the D.C. Court of Appeals' clarification of applicable law. *See* BIO App. 4a-14a.

b. In the alternative, the Second Circuit held that even if there were no statutory deadline, the Government could no longer seek substitution once the district court's deadline for such motions had passed. Pet. App. 161a-162a.

Where there is no statute specifying otherwise, district courts are free to set appropriate deadlines to "manage their own affairs." *Dietz v. Bouldin*, 579 U.S. 40, 45 (2016) (quoting *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-31 (1962)). Indeed, the Federal Rules of Civil Procedure mandate that district courts "*must* limit the time" to "file motions." Fed. R. Civ. P. 16(b)(3)(A) (emphasis added). As this Court has explained, a district court's "sensible efforts to impose order upon the issues in play and the progress of the trial deserve our respect"—including by insisting upon "waiver and forfeiture rules" where a party foregoes a certain position by a district court's deadline. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 487 n.6 (2008).

The Government argues that the statute here *does* specify otherwise—that "the Westfall Act provides the Attorney General with clear authority to certify or recertify at any time while a case is pending within federal court." U.S. Pet. 24. But at no point does the Government explain where in the statute such "clear authority" appears. If the Government is referring to

the "any time before trial" language in Section 2679(d)(2), it cannot have its cake and eat it too. Either the "any time before trial" language covers certification for purposes of substitution, in which case the Second Circuit was correct to hold that the United States missed its statutory deadline. *See supra*, at 31-33. Or that language doesn't apply to certification for substitution, in which case the Second Circuit was correct that the district court was allowed to impose its own deadline.

Not only did the Government fail to request substitution by the district court's deadline, it affirmatively disclaimed its right to seek substitution by telling the district court that petitioner's conduct was outside the scope of his employment. When it later changed its mind, after trial, it pointed to no intervening development to justify the change, submitting just two sentences of boilerplate in support of its new position. *See* BIO App. 15a. By contrast, when the Government sought to withdraw its certification in July 2023, it submitted 2,500 words of analysis, recounting all the circumstances that led to its change in position. *Id.* 3a-14a.

c. As a third independent ground, the Second Circuit correctly held that it need not entertain a substitution motion made for the first time after trial absent any extraordinary reason to do so. Pet. App. 163a-164a.

The Government protests that the Second Circuit could not insist it move for substitution before trial unless the statute so specified. *See* U.S. Pet. 25. But that gets things backwards. The default rule in civil litigation is that a motion regarding how a case should proceed to trial should be made at the earliest

opportunity, and in all events before trial, absent some compelling equitable basis for excusing untimeliness. Indeed, many statutes and rules don't provide any sort of a deadline—think motions to arbitrate or intervene. *See* 9 U.S.C. § 4; Fed. R. Civ. P. 24. But no court has ever thought that those motions can be raised after trial just because there is no express deadline.[10] Our civil litigation system would cease to function if that were so.

The default rule that motions must be made before trial applies with special force to motions to substitute under the Westfall Act. If a posttrial motion to substitute were ever granted, it would likely require retrying the whole case. It would change the party held to trial (the United States instead of an individual). *See* 28 U.S.C. § 2679(d). It would change the procedure for trial (a jury trial is generally prohibited instead of being a constitutional entitlement). 28 U.S.C. § 2402. And it would change the defenses available (the Government can avail itself of various exceptions under 28 U.S.C. § 2680 that are unavailable to individuals but cannot avail itself of various individual defenses). 28 U.S.C. §§ 2674, 2680. Allowing such motions after trial whenever the

---

[10] *See Morgan v. Sundance*, 596 U.S. 411, 413 (2022) (finding waiver may arise even well before trial if a party "engage[s] in months, or even years, of litigation . . . before deciding they would fare better in arbitration"); *Associated Bldrs & Contractors, Inc. v. Herman*, 166 F.3d 1248, 1257 (D.C. Cir. 1999) ("A motion for 'intervention after judgment will usually be denied where a clear opportunity for pre-judgment intervention was not taken.'"); *Humphrey v. United States*, 787 F.3d 824, 825-26 (7th Cir. 2015) ("Would-be parties cannot watch the litigation proceed for years and then jump in after its end.").

Government changes its mind would wreak havoc on the orderly administration of justice.

To be sure, there may be circumstances where the equities mandate considering even a motion filed for the first time after final judgment (assuming the statute does not bar such consideration). *See Mullaney v. Anderson*, 342 U.S. 415, 416-17 (1952). The Second Circuit correctly held, though, this was not such a case. Here, "[t]he practical impact of permitting the Movants' untimely motion to substitute would be to unwind" years of litigation and a "duly-rendered jury verdict." Pet. App. 163a. The Government derides what it calls "the Second Circuit's resort to its sense of 'fairness,'" but it does not dispute that only the strongest equitable considerations can justify entertaining a motion filed after a jury verdict. U.S. Pet. 25.

In sum, to revive its motion to substitute, the Government must run the table, showing that (1) the plain text of the statute does not impose a trial deadline; (2) the district court does not have the authority to set deadlines; *and* (3) the default principle that motions governing a trial must be raised before trial somehow does not apply to the Westfall Act. Because the Second Circuit was right about each of its "three independent reasons," Pet. App. 147a—all of which would have to be reversed for the Government to prevail—this Court should deny certiorari.

* * *

Even the dissenters in the court of appeals agreed that "the same rules should apply equally to all defendants." Pet. App. 132a. But no ordinary defendant would be forgiven waiver after waiver—and then waiver of any argument about the standard for

waiver—over the course of years of litigation. And no ordinary defendant would be entitled to bring a motion for the first time *after* trial that would require voiding years of litigation, not to mention a trial and jury verdict.

Instead, both petitions ask for special solicitude because, they say, this case implicates the institution of the presidency. Not so. There will not be another President who disavows both presidential immunity and substitution under the Westfall Act time and again, then much later changes his mind. If someday a President again chooses to litigate a case rather than claim presidential immunity or move to substitute the United States, that choice should be respected. But if things don't go his way, he should also be held to his choice.

There is thus no reason for this Court to grant certiorari. While this President may want this Court's help, the Presidency does not need it.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted,

Roberta A. Kaplan
Counsel of Record to Respondent E. Jean Carroll
D. Brandon Trice
Maximilian T. Crema
KAPLAN MARTIN LLP
1133 Avenue of the Americas, Suite 1500
New York, NY 10036
(212) 316-9500
rkaplan@kaplanmartin.com

October 30, 2026

APPENDIX

TABLE OF CONTENTS

Appendix A, Certification of the Director of the Torts Branch Civil Division, United States Department of Justice, attached as "Exhibit B" to defendant's Notice of Motion to Substitute the United States as Defendant, filed in the U.S. District Court for the Southern District of New York, September 8, 2020 ..... 1a

Appendix B, Letter of the U.S. Department of Justice to the parties, conveying DOJ's determination not to certify under the Westfall Act, filed in the U.S. District Court for the Southern District of New York, July 11, 2023 ..... 3a

Appendix C, Certification of the Director of the Torts Branch Civil Division, United States Department of Justice, attached as "Exhibit A" to the Joint Motion of Substitution of United States for Defendant-Appellant Pursuant to the Westfall Act, filed in the U.S. Court of Appeals for the Second Circuit, April 11, 2025 ..... 15a

APPENDIX A

* * *

[EXHIBIT B]

JEFFREY BOSSERT CLARK
Acting Assistant Attorney General
Civil Division

JAMES G. TOUHEY, JR.
Director
STEPHEN R. TERRELL (CA Bar No. 210004)
Attorney
Torts Branch, Civil Division
United States Department of Justice
P.O. Box 888
Washington, DC 20044
Telephone: (202) 353-1651
Facsimile: (202) 616-5200
Email: stephen.terrell2@usdoj.gov

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

E. JEAN CARROLL,

Plaintiff,

v.

DONALD J. TRUMP, in his personal capacity,

Defendant.

ECF Case

No. _____

CERTIFICATION OF THE DIRECTOR OF THE TORTS BRANCH CIVIL DIVISION, UNITED STATES DEPARTMENT OF JUSTICE

I, James G. Touhey, Jr., am the Director of the he Torts Branch, Civil Division, United States Department of Justice, responsible for most civil litigation under the Federal Tort Claims Act. I have read the complaint dated November 4, 2019, in the above-captioned case. Pursuant to 28 U.S.C. § 2679, and by virtue of the authority vested in me pursuant to 28 C.F.R. § 15.4, I hereby certify, on the basis of the information now available with respect to the incidents alleged in the complaint, that Defendant Donald J. Trump was acting within the scope of his office as the President of the United States at the time of the alleged conduct.

Dated this 8th day of September, 2020.

James Touhey, Jr.
JAMES G. TOUHEY, JR.
Director, Torts Branch
Civil Division,
United States Department of Justice

* * *

APPENDIX B

U.S. Department of Justice

Civil Division

Torts Branch, Federal Tort Claims Office
P.O. Box 888
Washington, DC 20044
JGT:JGTouhey/DJ# 157-51-6306

Telephone (202) 616-4400
Facsimile (202) 616-5200

July 11, 2023

BY ECF

Hon. Lewis A. Kaplan
United States District Court
Southern District of New York
500 Pearl Street
New York, NY 10007

RE: *Carroll v. Trump*, No. 1:20-cv-7311-LAK

Dear Judge Kaplan:

Attached please find a letter to the parties conveying the Department of Justice's determination not to certify under the Westfall Act.

Sincerely,

BRIAN M. BOYNTON
Principal Deputy
Assistant Attorney General

BY: JAMES TOUHEY [Digitally signed by James Touhey
Date: 2023.07.11]

JAMES G. TOUHEY, JR.
Director, Torts Branch

U.S. Department of Justice

Civil Division

Torts Branch, Federal Tort Claims Office
P.O. Box 888
Washington, DC 20044
JGT:JGTouhey/DJ# 157-51-6306

Telephone (202) 616-4400
Facsimile (202) 616-5200

July 11, 2023

Alina Habba, Esq.
Michael T. Madaio, Esq.
Habba Madaio & Associates LLP
LLP 1430 US Highway 206, Suite 240
Bedminster, NJ 07921
ahabba@habbalaw.com
mmadaio@habbalaw.com

Roberta Kaplan, Esq.
Kaplan Hecker & Fink LLP
350 Fifth Avenue, 63rd Floor
New York, NY 10118
rkaplan@kaplanhecker.com

Re: *Carroll v. Trump*, No. 20-cv-07311 (S.D.N.Y.)

Dear Counsel:

I write to inform you that, in light of the D.C. Court of Appeals' clarification of the standard for *respondeat superior* liability under D.C. law, *see Trump v. Carroll*, 292 A.3d 220 (D.C. 2023), as well as new factual developments, the Department of Justice is declining to certify under the Westfall Act, 28 U.S.C. § 2679(d), that defendant Donald J. Trump was acting within the scope of his office and employment as President of the United States when he made the statements that form the basis of the

defamation claims in plaintiff's Amended Complaint in this action.

The D.C. Court of Appeals Decision

Under the Westfall Act, federal employees are entitled to absolute immunity from personal tort liability for conduct occurring within the scope of their employment. *See* 28 U.S.C. § 2679. State tort law governs the scope-of-employment inquiry under the Act. Here, the parties agree that D.C. *respondeat superior* law governs. *Carroll v. Trump*, 49 F.4th 759, 766 & n.6 (2d Cir. 2022). The District of Columbia "generally adheres" to the Restatement (Second) of Agency's formulation of the *respondeat superior* standard, as set forth in § 228. *See Carroll*, 292 A.3d at 225; *Moseley v. Second New St. Paul Baptist Church*, 534 A.2d 346, 348 n.4 (D.C. 1987).

The D.C. Court of Appeals clarified the meaning of this standard in response to the Second Circuit's certification in this case. The Court explained that the question under § 228(1)(c)—whether the conduct "is actuated, at least in part, by a purpose to serve" the employer—contains distinct components, two of which are relevant here: the "purpose" element and the "quantum" element. *Carroll*, 292 A.3d at 233-34.

The purpose element "is an inquiry into the employee's state of mind to determine whether the employee was, in fact, motivated by a purpose to serve their employer." *Id.* at 234. This element focusses on the *subjective* state of mind of the employee, notwithstanding prior D.C. Court of Appeals decisions suggesting that the inquiry was an objective one. *E.g.*, *Weinberg v. Johnson*, 518 A.2d 985, 991 (D.C. 1986). The Court explained that any

history between the employee and the victim may also be relevant to this determination of subjective intent: "Inquiries into whether there was a prior employee-victim relationship allow the factfinder to make inferences about whether the tortfeasor-employee, for example, used their employment as a mere opportunity to act on a personal grievance." *Carroll*, 292 A.3d at 235.

The quantum element requires that the employee be motivated "at least in part" by a purpose to serve the employer. The requirement "does not foreclose that an employee could be concurrently motivated by a personal purpose," nor that such personal purpose could be the employee's predominant motivation. *Id.* at 235-36. But "if the employee's conduct is 'too little actuated' by [a public] purpose, then the employee's conduct would be outside the scope of employment." *Id.* at 236. The Court declined to "parse out an exact threshold" at which an employee is "actuated at least in part" by a purpose to serve their employer but "too little actuated" by that purpose for their conduct to fall within the scope of employment, instead "entrust[ing] this question to the factfinder." *Id.* at 237. The Court explained: "In other words, the factfinder must determine that an employee's partial purpose to serve their employer was more than an insignificant interest. It is a balancing and weighing of the evidence, both direct and circumstantial, to determine whether the quantum of purpose is more than insignificant." *Id.*

Finally, with respect to the D.C. Circuit's decision in *Council on American-Islamic Relations v. Ballenger*, 444 F.3d 659 (D.C. Cir. 2006), the Court of Appeals made two observations: First, it noted that

Ballenger did not adopt a categorical rule holding that "the conduct of elected officials speaking to the press is always within the scope of that official's employment," and the Court declined to itself adopt such a categorical rule. *Carroll*, 292 A.3d at 239-240 ("We have never adopted a rule that has determined that a certain type of conduct is per se within (or outside of) the scope of employment, and we decline to do so now."). Second, it noted that the *Ballenger* court's holding "rested on undisputed, affirmative evidence in the record that [Ballenger's] purpose behind making the allegedly defamatory statements was to serve his constituents and otherwise carry out his legislative responsibilities," *id.* at 239, and suggested that in this respect, the record before the *Ballenger* court was distinct from the record in this case, "which is disputed by the parties." *Id.* at 239 n.23.

Analysis

Applying the clarified D.C. *respondeat superior* standard, the Department has determined that it lacks adequate evidence to conclude that the former President was sufficiently actuated by a purpose to serve the United States Government to support a determination that he was acting within the scope of his employment when he denied sexually assaulting Ms. Carroll and made the other statements regarding Ms. Carroll that she has challenged in this action.[1] The evidence of Mr. Trump's state of mind, some of which has come to light only after the Department last made a certification decision, does not establish

[1] In her Amended Complaint, Ms. Carroll no longer challenges Mr. Trump's denial of having raped her.

that he made the statements at issue with a "more than insignificant" purpose to serve the United States Government. *Id.* at 237.

No direct evidence of the former President's state of mind in making these statements is available. As the D.C. Court of Appeals noted, this case stands in contrast to *Ballenger*, in which the Congressman offered "undisputed, affirmative evidence," *id.* at 239, by way of his affidavit, on which the district court relied in finding that he was acting, at least in part, "for the purpose of preserving his effectiveness as a congressman." *Ballenger*, 444 F.3d at 663 (quotation marks and citation omitted).

Moreover, the circumstantial evidence of Mr. Trump's *subjective* intent in making the allegedly defamatory statements does not support a determination in this case that he was sufficiently motivated by a desire to serve the United States Government. There is some evidence that could, in some circumstances, support a certification. The former President was responding to allegations that could have called into question his fitness to hold the office of the Presidency. In addition, the statements at issue were drafted or made at the White House, in response to inquiries made to or at the White House, through official channels that Presidents often use to communicate with the media: a statement issued by the press office to a daily press pool, a press "gaggle" on the White House lawn, and an interview in the Oval Office. *See, e.g.*, *Does 1-10 v. Haaland*, 973 F.3d 591, 602 (6th Cir. 2020) ("Congressmembers routinely broadcast their views on pending legislation and related current events through press releases,

televised speeches, interviews, and, as in the present case, through social media postings.").

The D.C. Court of Appeals, however, has now made clear that D.C. law does not hold that *any* statement, whatever its actual purpose, is by definition made for official purposes simply because it is made using official channels of communication. *See Carroll*, 292 A.3d at 232 ("The employment must have created more than the mere opportunity to commit the tort; there must still be some relationship or nexus between the tortious conduct and the employee's responsibilities for it to be an outgrowth of a job-related controversy."). Additionally, the Court of Appeals' clarification that *Ballenger* did not establish a "categorical" rule "that would hold that the conduct of elected officials speaking to the press is always within the scope of that official's employment," *id.* at 239, confirms that the context in which the former President made these statements does not end our inquiry even if it would, on its own, give rise to an inference that he was acting for an official purpose.

Instead, the Department must also consider whether the allegedly tortious action arose out of a work-related incident. *See id.* at 232 (explaining that "the District of Columbia case precedents have focused on whether the conduct was an 'outgrowth of a job-related controversy,'" which has been "framed as an inquiry into whether the conduct was the 'outgrowth of the employees' instructions or job assignments'" (citation omitted)).[2] The D.C. Court of

---

[2] Although this language comes from the Court of Appeals' discussion of the first prong of its *respondeat superior* test—

Appeals explained that this inquiry may be informed by whether the alleged tortfeasor and the victim had a prior history that would suggest that the alleged tortfeasor was personally motivated. *See id.* at 234 ("Likewise, we have viewed it as relevant, at least in part, whether there was a prior history between the tortfeasor and the victim."). Here, although the statements themselves were made in a work context, the allegations that prompted the statements related to a purely personal incident: an alleged sexual assault that occurred decades prior to Mr. Trump's Presidency. That sexual assault was obviously not job-related. As a general matter, an elected official's ability to retain the trust of his constituents—including by addressing their concerns and informing them of his views on issues that they care about, or by discussing personal matters that may pertain to the public's confidence in him—is an important part of his ability to effectively perform his job. But that background principle cannot overcome countervailing evidence that an official who made defamatory statements was insufficiently actuated by a public purpose, to justify a finding that he was acting within the scope of his employment. *See, e.g.*, *Lyons v. Brown*, 158 F.3d 605, 610 (1st Cir. 1998) (noting that "whatever justification [the defendant] might have

---

whether the allegedly tortious conduct was "of the kind" the person is employed to perform, *see Carroll*, 292 A.3d at 232—the Court also considered it relevant for purposes of determining the defendant's subjective state of mind under the third prong. *See id.* at 235 ("[I]nquiries into whether the tort was the outgrowth of a job-related controversy allow the factfinder to make inferences about whether the employee was in fact responding to an employment-related circumstance, despite the tortious conduct appearing as if it were personally motivated.").

for his actions could be overcome if his actual purpose was to retaliate"). The evidence of personal motivation that has been developed in this case outweighs any public purpose inference one might draw in other circumstances.

First, Mr. Trump's statements regarding Ms. Carroll continued after the former President left office, as indicated by new allegations in the Amended Complaint. *See Carroll v. Trump*, No. 20-cv-07311, Dkt. No. 157, Ex. A (Amended Complaint), ¶ 152 (October 12, 2022 Truth Social post that the *Carroll II* jury found defamatory); ¶ 165 ("Mere minutes after the verdict [in *Carroll II*] became public, Trump repeated the defamatory lie that he had no idea who Carroll was" on his Truth Social account); *id.* ¶¶ 166-67 (two additional Truth Social posts the night after the jury verdict, calling Ms. Carroll's allegations a "Hoax" and suggesting that the accusations and subsequent trial were part of a political conspiracy); *id.* ¶ 168 (stating, during a CNN town hall on May 10, 2023, "I never saw this woman"; labelling Ms. Carroll's accusations a "fake story"; and calling her "a whack job"). The later statements are substantially similar to the three June 2019 statements at issue in this action, and because he was no longer the President when he made the later statements, Mr. Trump could not have been motivated by any interest in serving the United States Government. These post-Presidency statements, which were not before the Department during the original scope certification in this case, tend to undermine the claim that the former President made very similar statements at issue in *Carroll I* out of a desire to serve the Government.

Second, the prior history between Ms. Carroll and Mr. Trump supports a determination that the former President's statements were not sufficiently motivated by a purpose to serve the Government. As noted above, the D.C. Court of Appeals "ha[s] viewed it as relevant, at least in part, whether there was a prior history between the tortfeasor and the victim." *Carroll*, 292 A.3d at 234; *id.* at 235 ("Inquiries into whether there was a prior employee-victim relationship allow the factfinder to make inferences about whether the tortfeasor-employee, for example, used their employment as a mere opportunity to act on a personal grievance."). And a jury has now found that Mr. Trump sexually assaulted Ms. Carroll long before he became President. That history supports an inference that Mr. Trump was motivated by a "personal grievance" stemming from events that occurred many years prior to Mr. Trump's presidency. *Id.* at 235.[3]

Third, certain aspects of the content of the statements at issue and subsequent statements by Mr. Trump go far beyond merely denying Ms. Carroll's accusation. *See, e.g.*, Amended Compl. ¶ 83 ("Shame on those who make up false stories of assault to try to get publicity for themselves or sell a

[3] The Westfall Act affords the Attorney General or his designee broad latitude to make factual determinations relevant to applying the scope-of-employment standard. *See Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 429 (1995); *cf. Osborn v. Haley*, 549 U.S. 225, 247 (2007). For this reason, the Department is not bound by the jury's findings. At the same time, in this case, there does not appear to be a basis to disregard the jury's conclusions, which were made after weighing the relevant evidence presented by both parties in that case.

book or carry out a political agenda."); *id.* ("It is a disgrace, and people should pay dearly for such false accusations."); *id.* ¶ 92 ("This is a woman who has also accused other men of things . . . she's made this charge against others. . . I was one of the many men that she wrote about."); *id.* ("I have no idea who she is, none whatsoever."); *id.* ("[T]here were numerous cases where women were paid money to say bad things about me . . . those women did wrong things . . . here's a case, it's an absolute disgrace that she's allowed to do that."); *id.* ¶ 98 & n.10; Jordan Fabian & Saagar Enjeti, *Trump Vehemently Denies E. Jean Carroll Allegation, Says "She's Not My Type,"* The Hill (June 24, 2019), at 11 ("[S]he made this charge up. And by the way, she's made it up about, or she's said it about other people too."); *id.* ("I'll say it with great respect, number one, she's not my type."). In his deposition, Mr. Trump indicated that he "wanted people to know" that "she's . . . a very deranged, sick person[.]" Deposition of Donald J. Trump, *Carroll v. Trump*, No. 20-cv-07311 (S.D.N.Y. Oct. 19, 2022), at 216:3-8. The "tone of [the relevant statements] strongly suggests that [defendant's] motivation . . . did not spring from a desire to serve . . . the United States." *Armstrong v. Thompson*, 759 F. Supp. 2d 89, 95 (D.D.C. 2011).

* * *

The Department must "take a holistic approach to discerning an employee's purpose in engaging in the tortious conduct, considering any inferences from the circumstances of the relationship between the parties and the conduct," as is "appropriate under the facts presented," *Carroll*, 292 A.3d at 235. After "balancing and weighing [] the evidence," *id.* at 237,

from Mr. Trump's deposition, the jury verdict in *Carroll II*, and the new allegations in the Amended Complaint, the Department has determined that there is no longer a sufficient basis to conclude that the former President was motivated by "more than an insignificant" desire to serve the United States Government, *id*. Accordingly, the Department hereby declines to issue a new Westfall Act certification.

Sincerely,

BRIAN BOYNTON [Digitally signed by BRIAN BOYNTON Date: 2023.07.11]

Brian M. Boynton
Principal Deputy
Assistant Attorney General

APPENDIX C

* * *

[EXHIBIT A]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

E. JEAN CARROLL,

Plaintiff-Counter Defendant-Appellee,

v.

DONALD TRUMP, in his personal capacity,

Defendant-Counter Claimant-Appellant.

No. 24-644

CERTIFICATION

I, Kirsten L. Wilkerson, Director, Torts Branch, Civil Division, United States Department of Justice, acting pursuant to the provisions of 28 U.S.C. § 2679(d), and by virtue of the authority vested in me by 28 C.F.R. § 15.4, hereby certify that I have read the First Amended Complaint in this action. On the basis of the information now available with respect to the claims asserted therein, I find that Donald J. Trump was acting within the scope of his office or employment at the time of the incidents out of which the plaintiff' s claims arose.

Dated: April 11, 2025

KIRSTEN WILKERSON

Digitally signed by KIRSTEN WILKERSON
Date: 2025.04.11 10:56:53

KIRSTEN L. WILKERSON
Director, Torts Branch
Civil Division, United States Department of Justice

* * *