No. 26-142

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

E. JEAN CARROLL, ET AL.

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

REPLY BRIEF FOR THE PETITIONER

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This unprecedented case centers on whether the sitting President of the United States should incur personal liability of nearly a hundred million dollars for conduct that the United States certifies was within the scope of his office. Under the Westfall Act, the answer is no. The Act empowers the United States to substitute itself as the defendant in tort suits arising from actions performed in the course of an employee's duties; and once a case is pending in federal court, the Act imposes no time limit on when the United States may do so. The Second Circuit erred in holding otherwise, conjuring a pretrial time limit on substitution, which cannot be reconciled with the Westfall Act's text, structure, and context. That evident error, coupled with the serious practical consequences it entails, manifestly warrants this Court's intervention.

In opposing review, respondent reiterates the same flawed reading of the Westfall Act adopted below. Respondent insists (Br. in Opp. 31-33) that the Act implicitly contains a "before trial" requirement for substitution under 28 U.S.C. 2679(d)(2). But Section 2679(d)(2) contains an *express* "before trial" requirement for removal, while containing no such language for substitution. Worse, respondent all but concedes (Br. in Opp. 32) that, for cases commenced in *federal* court, the United States may substitute itself at any time, including posttrial. Yet respondent does not even attempt to explain why a rational Congress would treat cases *removed* to federal court differently, once there, from cases *commenced* in federal court.

That statutory error is dispositive. Although respondent claims (Br. in Opp. 30, 33-36) that the Second Circuit offered two "independent" bases for its decision, each instead rests on its misreading of the Act. While courts typically have broad authority to manage their dockets and to apply forfeiture rules, that authority cannot override a litigant's statutory right to raise a defense at a later time. Thus, if Section 2679(d)(2) gives the United States the right to substitute itself as the defendant posttrial, as it does, that compels reversal here.

Respondent fares no better in arguing that this case does not warrant this Court's attention. For starters, imposing liability against a sitting President for his official acts, in an amount that would bankrupt any other occupant of the office, is alone cert-worthy. Further, respondent does not meaningfully refute that the Westfall Act offers a statutory path to resolve this case, without engaging the presidential-immunity issue raised in the parallel petition. Nor does the ability of an employee to move for certification himself via 28 U.S.C.

2679(d)(3) take away from the importance of the question presented. There is no justification for forcing an employee to seek certification himself when Congress clearly allows the Attorney General to do so instead. Furthermore, the United States has a distinct interest in intervening in, and conducting, this sort of litigation in order to protect the presidency and other federal officers and employees, regardless of what the officer or employee chooses.

A. The Decision Below Is Wrong

1. Like the Second Circuit, respondent principally and mistakenly argues (Br. in Opp. 31-33) that Section 2679(d)(2) bars the Attorney General from certifying (or recertifying) posttrial that an employee was acting within the scope of office. Respondent fails to meaningfully refute the fatal textual and structural problems with that view.

a. Respondent argues that Section 2679(d)(2) "contemplates that certification, removal, and substitution occur in tandem," Br. in Opp. 31, such that the same timing requirement that applies to removal must also apply to substitution. That unsupported assertion contradicts both statutory text and this Court's precedents. It runs afoul of Section 2679(d)(2), which says that a claim "shall be removed * * * before trial," but provides no such timing limit on substitution. 28 U.S.C. 2679(d)(2). And it is at odds with *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417 (1995), which treated certification and substitution as discrete events, specifically confirming that different legal rules apply to certification depending on whether it is "for purposes of removal" or "for purposes of substitution." *Id.* at 434.

Respondent tries to rejoin that *Gutierrez de Martinez* "recognized that Congress contemplated only a

single certification that would trigger both removal and substitution," Br. in Opp. 31-32, because it described the statute as providing that, "[u]pon certification, the employee is dismissed from the action and the United States is substituted as defendant," 515 U.S. at 420. But the statute's contemplation of only a single certification further supports our view. Section 2679(d)(2) says that, "[u]pon certification," the proceeding "*shall* be removed" to federal court, and "the United States *shall* be substituted as the party defendant," 28 U.S.C. 2679(d)(2) (emphases added). At that point, the United States "must remain the federal defendant in the action unless and until the District Court determines that the employee[] *in fact*" was acting "beyond the scope of his employment." *Osborn* v. *Haley*, 549 U.S. 225, 231 (2007). The Act thus does not permit the Attorney General to unilaterally decide whether the United States remains the defendant post-certification. Pet. 17-18.

Respondent mischaracterizes (Br. in Opp. 32) our petition as taking the position that the Attorney General "cannot withdraw a certification once issued." Our actual argument is that, while the Attorney General may withdraw a certification, see 28 C.F.R. 15.4(c), that does not obviate the district court's obligation under 28 U.S.C. 2679(d)(2) to make its own determination in light of the initial certification, and thus decide for itself whether the United States should "remain" the party defendant. *Osborn*, 549 U.S. at 231. At minimum, if the Act is read to give the Attorney General an implicit unilateral decertification power that atextually obviates the district court's duty to make its own determination, there is no basis for further creating a *bar* on the Attorney General's power to *recertify*—or for imposing a particular time limit on his decision to do so. Pet. 17-18.

Respondent wrongly asserts (Br. in Opp. 32) that the government forfeited this argument below. But once "a federal claim is properly presented," a party "can make any argument in support of that claim," and is "not limited to the precise arguments [it] made below." *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). The government argued below that, once substitution occurs, "the United States is the party defendant unless and until a court rules to the contrary." C.A. Doc. 107-1, at 3 (Apr. 11, 2025) (citing *Osborn*, 549 U.S. at 231). That the Attorney General cannot negate the district court's duty to do so is merely a "new argument to support [that] consistent claim." *Lebron*, 513 U.S. at 379; see *Kamen* v. *Kemper Financial Services, Inc.*, 500 U.S. 90, 99 (1991) ("When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law").

b. Respondent also fails to provide any coherent theory of how its reading of Section 2679(d)(2) harmonizes with the rest of the Westfall Act. As explained (Pet. 19-23), the statute is best read as establishing a cogent scheme: For cases pending in state court, certification for removal must come before trial (as occurred here); but once a case is pending in federal court, the Act allows the Attorney General to certify (or recertify) at any time. See 28 U.S.C. 2679(d)(1) and (2).

Vitally, respondent does not dispute that certification can occur at any time for cases *commenced* in federal court. Br. in Opp. 32. Nor does respondent dispute that the same goes for cases *removed* to federal court on some basis other than Section 2679(d)(2). Respondent just wrongly asserts (*ibid.*) that "whatever the tim-

ing rule might be" for such cases, Section 2679(d)(2) "is clear" that certification must come pretrial. But as discussed, Section 2679(d)(2) does *not* say that—just the opposite. More fundamentally, statutory construction "must, to the extent possible, ensure that the statutory scheme is coherent and consistent." *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 222 (2008). That respondent's position offers no rationale for its "highly counterintuitive result" is further reason to reject it. *Yellen* v. *Confederated Tribes of the Chehalis Reservation*, 594 U.S. 338, 360 (2021).

Nor does respondent provide any meaningful response to the government's explanation of the statutory scheme. Respondent says that the government "does not dispute that Congress had good reason for insisting removal * * * happen before trial." Br. in Opp. 32. Quite right, but the reason that Congress had for requiring that *removal* happen before trial (to ensure the trial itself takes place in federal court) has no application to *substitution* (which is otherwise allowed at any stage once the case is in federal court). See Pet. App. 40a (Menashi, J., dissenting from the denial of rehearing en banc) (noting that the "logic" of requiring removal "to occur before trial in a state court" "does not apply to substitution"). And respondent's claim (Br. in Opp. 32) that, "in the mine run of cases, the certification that triggers removal also triggers substitution" proves nothing additional. Under any theory, that is how the Act works in most cases. The question is whether, in the rare instance that the Attorney General withdraws a certification once a case is in federal court, there is any reason to read the Act as implicitly barring posttrial recertification and substitution. The answer is no.

It is especially notable that respondent never tries to dispute that the Attorney General may make posttrial certifications under Section 2679(d)(1), given that the provision omits the "before trial" requirement included in Section 2679(d)(2) for removal and in Section 2679(d)(3) for employee-certification requests. At most, respondent observes that we cited only one case that involved posttrial certification, Br. in Opp. 28 & n.8 (citing *Sowell* v. *American Cyanimid Co.*, 888 F.2d 802 (11th Cir. 1989)), which respondent tries to somehow distinguish because it was on appeal when the Westfall Act was enacted. That passing response fails twice over.

First, it ignores that the government cited additional cases expressly stating that "Section 2679(d)(1) * * * places no limitation on the point at which the Attorney General must certify." *Sullivan* v. *United States*, 21 F.3d 198, 205 (7th Cir.), cert. denied, 513 U.S. 1060 (1994); see *Melo* v. *Hafer*, 13 F.3d 736, 747 (3d Cir. 1994) (similar). Second, it overlooks that, for federal cases, the Westfall Act's effective-date provision stated only that it would "apply," without modification, to all "pending" proceedings. Pub. L. No. 100-694, § 8(b), 102 Stat. 4565-4566. If the Act contained a posttrial limit, then "apply[ing]" it to the pending posttrial federal case in *Sowell* would have meant that the United States could not have been substituted as defendant. See *ibid.* That *Sowell* went the other way necessarily rested on reading Section 2679(d)(1) to permit posttrial certification.

Indeed, respondent nowhere addresses the implications of the Act's effective-date provision. In contrast to its treatment of proceedings pending in *federal* court, the provision *did* modify its default rules for "proceeding[s] pending in a State court," by authorizing a 60-day grace period for the Attorney General to seek removal

via certification if "the period for removal [under Section 2679(d)(2)] ha[d] expired." Pub. L. No. 100-694, § 8(c), 102 Stat. 4566. Congress thus clearly wanted to ensure that federal employees in pending *state* posttrial cases could obtain certification. The only sensible explanation for why Congress did not provide a similar grace period for federal employees in pending *federal* posttrial cases is that none was necessary in the first place, because posttrial certification and substitution was already available in federal court under the Act. Respondent ignores this point entirely.

2. Respondent also repeatedly and incorrectly asserts (Br. in Opp. 28, 30-31, 33-34) that the decision below rested on two other "independent" rationales—namely, that the district court was permitted to impose a pretrial deadline for certification under its inherent authority to "manage [its] own affairs" and under the "default rule" for issue preservation in civil litigation. While branding those grounds "independent," respondent fails to refute our showing that they actually depend entirely on the Second Circuit's misreading of the Westfall Act.

Respondent does not deny that, if Section 2679(d)(2) *expressly* authorized the Attorney General to recertify "at any time," a district court would lack the power to abridge that statutory right. And that is the "fair implication" of Section 2679(d)(2)'s "express[]" text, *Mims* v. *Arrow Financial Servs., LLC*, 565 U.S. 368, 379 (2012), which "omits" the before-trial limitation for substitution that the Act "includes" for removal and for employee-certification requests, *Russello* v. *United States*, 464 U.S. 16, 23 (1983). So the district court was powerless to invoke judge-made rules to nullify the Attorney General's statutory right to posttrial recertification.

B. The Decision Below Warrants Review

As a result of the Second Circuit's misreading of the Act, the sitting President of the United States is facing exorbitant liability for acts taken while in office. That alone warrants certiorari. Respondent's principal response (Br. in Opp. 27-29, 36-37) is that this case does not warrant review because an employee could always request certification under Section 2679(d)(3) if an Attorney General withdraws a prior certification before trial. For three independent reasons, that argument against review is unpersuasive.

First, an employee's ability to independently seek certification under Section 2679(d)(3) does not fully account for all of the interests at stake. Foremost, the United States has an independent interest in being able to intervene in, and conduct, litigation against employees for actions done within the scope of their duties. That interest exists regardless of whether an employee wants the United States to substitute itself—which is why defendant employees cannot unilaterally reject the government's decision to certify and substitute. Moreover, the Act seeks to "immunize covered federal employees not simply from liability, but from suit." *Osborn*, 549 U.S. at 238. Making Section 2679(d)(3) a use-it-or-U.S.-loses-it provision undermines that purpose in cases where an employee does not invoke Section 2679(d)(3), and the United States later wishes to intervene. In such situations, later is far better than never; and it makes no sense to read the Act as barring the United States from relieving an employee of the litigation burden that Congress has determined he should not bear.

Second, those considerations are all the more compelling in this case, given the special solicitude owed to

the President of the United States under this Court's precedent. See, *e.g.*, *Cheney* v. *United States District Court*, 542 U.S. 367, 385 (2004) (noting that the "high respect" owed to the Presidency "should inform the conduct of the entire proceeding"). Once more, because of the Second Circuit's misconstruction of the Westfall Act, the sitting President of the United States stands personally liable to the tune of nearly a hundred million dollars for statements made while he was in office.

That result is especially egregious here because the statements were plainly within the scope of the President's unique position in our government. See Pet. 27-28. Respondent's cursory argument to the contrary (Br. in Opp. 30) fixates on the President's purportedly "personal" motive. But this Court has already explained that, when it comes to the Presidency—the only branch composed by a single person—"personal and official affairs" necessarily overlap. *Trump* v. *Mazars USA, LLP*, 591 U.S. 848, 868 (2020). Moreover, D.C. law is abundantly clear that an employee acts within the scope of his employment so long as he is "actuated, at least in part, by a purpose to serve the master." *Trump* v. *Carroll*, 292 A.3d 220, 233 (D.C. 2023); see, *e.g.*, *Lyon* v. *Carey*, 533 F.2d 649, 652 (D.C. Cir. 1976) (upholding a finding that a mattress deliveryman acted within the scope of his employment when he assaulted a customer following a delivery-related dispute). Here, the President's statements—delivered through the White House Press Office and from the White House lawn, *Carroll* v. *Trump*, 49 F.4th 759, 762-763 (2d Cir. 2022)—were clearly motivated, at least in part, to defend his fitness for office, which readily suffices under D.C. law, see, *e.g.*, C.A. App. A2109.

Third, reversing the Second Circuit's erroneous decision on the Westfall Act would allow this Court to avoid reaching the constitutional question of the proper standard for assessing waiver of presidential immunity. Thus, under constitutional-avoidance principles, if this Court grants certiorari in *Trump* v. *Carroll*, petition for cert. pending, No. 26-141 (filed July 28, 2026), it should also grant certiorari here. See Pet. 29.

At minimum, the Court should grant this petition, vacate the judgment below (which is the same judgment for both petitions), and remand for further proceedings in light of *Trump* v. *United States*, 603 U.S. 593 (2024), as the President has alternatively requested. Pet. at 26, *Carroll*, *supra* (No. 26-141). As Judge Menashi (joined by then-Chief Judge Livingston and Judge Park) explained, the intervening *Trump* decision "authorized a broader defense of presidential immunity than was previously available" by clarifying that it "prevents * * * the use of evidence of official acts" even when evaluating charges based on unofficial conduct. Pet. App. 54a-55a. That necessarily undermines the Second Circuit's waiver holding, because "the President cannot be said to have waived that defense by failing to raise it before *Trump v. United States* was decided." *Id.* at 55a.

All the same, the Second Circuit can avoid revisiting its holdings on presidential immunity if it upholds the Attorney General's authority under the Westfall Act to recertify the President. Accordingly, should this Court GVR in *Trump* v. *Carroll*, it should dispose of this petition the same way. The Second Circuit has the same duty to "avoid reaching constitutional questions in advance of the necessity of deciding them." *Camreta* v. *Greene*, 563 U.S. 692, 705 (2011).

* * * * *

The petition for a writ of certiorari should be granted, and the case should either be set for plenary review or vacated and remanded for further consideration in light of *Trump* v. *United States*, *supra*.

Respectfully submitted.

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NOVEMBER 2026

* The Solicitor General is recused in this case.