

No.

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*

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals misconstrued the Westfall Act, 28 U.S.C. 2679, in rejecting the Attorney General's certification that statements made by President Trump during his first term fell within the scope of his federal office for purposes of the Act.

PARTIES TO THE PROCEEDING

Petitioner (movant below) is the United States of America. Respondents are E. Jean Carroll (plaintiff-appellee below) and President Donald J. Trump (defendant-appellant below).

RELATED PROCEEDINGS

United States District Court (S.D.N.Y.):

Carroll v. Trump, No. 20-cv-7311 (Oct. 27, 2020)
(denying government's motion to substitute under Westfall Act)

Carroll v. Trump, No. 20-cv-7311 (June 13, 2023)
(granting government's motion to reconsider prior Westfall Act position)

District of Columbia Court of Appeals:

Trump v. Carroll, No. 22-SP-745 (Apr. 13, 2023) (answering certified question regarding D.C. *respondeat superior* case law)

United States Court of Appeals (2d Cir.):

Carroll v. Trump, No. 20-3977 (Sept. 27, 2022) (vacating district court's denial of motion to substitute under Westfall Act and certifying scope-of-employment question to D.C. Court of Appeals)

Carroll v. Trump, No. 20-3977 (Apr. 21, 2023) (remanding to district court to apply D.C. law to scope-of-employment question following D.C. Court of Appeals opinion on certified question)

Carroll v. Trump, No. 24-644 (June 18, 2025) (order denying motion to substitute under Westfall Act)

Carroll v. Trump, No. 24-644 (Aug. 8, 2025) (opinion explaining order denying motion to substitute)

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OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 2a-21a) is reported at 148 F.4th 110. The order of the district court (App., *infra*, 22a-23a) is unreported.

JURISDICTION

The order of the court of appeals (App., *infra*, 1a) was entered on June 18, 2025, and its opinion explaining that order was issued on August 8, 2025. Petitions for rehearing were timely filed on July 2, 2025, and August 22, 2025. The petitions were denied on April 29, 2026 (App., *infra*, 24a-116a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reprinted in the appendix to this petition. App., *infra*, 117a-120a.

INTRODUCTION

The Westfall Act shields federal employees from certain tort claims for conduct performed in the course of their duties, including defamation claims. See 28 U.S.C. 2679. If such claims are brought, the Act empowers the Attorney General, subject only to one express restriction (satisfied here), to certify that the employee's alleged behavior fell within the scope of his office or employment. At that point, the United States is substituted as the defendant, and the suit becomes one against the United States, unless the district court later determines that the certification was incorrect. See *Osborn v. Haley*, 549 U.S. 225, 229-230 (2007).

This case concerns the only employee in the federal government who embodies a branch of the government, and carries out singular duties, the President of the United States. In this case, one Attorney General certified a President's conduct before trial; a second Attorney General later purported to decertify that conduct, still before trial; and a third recertified that conduct after the President had appealed an adverse judgment. This petition presents the question whether the Westfall Act contains an implicit timing restriction barring the Attorney General's posttrial recertification. Such a restriction does not exist.

In 2019, President Trump denied "false accusations" that he assaulted E. Jean Carroll in the mid-1990s. C.A. J.A. A1887. The President made those statements, defending his character and fitness for office, first in an official press release issued by the White House Press Office; and again during a press gaggle on the White House lawn, during which the President also addressed vital issues such as national security, the economy, immigration, and other items of national importance. Car-

roll then sued the President in New York state court claiming defamation.

In September 2020, during pretrial proceedings in state court, Attorney General Barr certified that President Trump’s statements defending his character and fitness to serve fell within the scope of his office for purposes of the Westfall Act. Per the Act, that certification triggered removal and should have triggered substitution of the United States. In 2023, however, as pretrial proceedings continued in federal court, Attorney General Garland took the extremely rare step of withdrawing a Westfall Act certification. As a result, the lawsuit proceeded against President Trump directly, and the jury eventually found in Carroll’s favor.

While appeal was pending, the President was reelected. Soon after, in April 2025, Attorney General Bondi recertified the President’s conduct and moved to substitute the United States as the defendant.

The court of appeals denied the motion. It said that, while Attorney General Garland was free to decertify President Trump’s conduct *before trial*, Attorney General Bondi was somehow “statutorily barred” from trying to recertify that conduct *after trial*. App., *infra*, 4a.

That illogical holding is plainly wrong, as Judge Menashi explained below. The Second Circuit’s imagined statutory bar appears nowhere in the statute. Under the Westfall Act’s express text, the only time the Attorney General must certify “before trial” is when a case pending in state court needs to be removed. 28 U.S.C. 2679(d). Attorney General Barr satisfied that requirement when he issued his certification during pretrial proceedings in state court. Once this case was thus removed to federal court, the Act’s plain language

did not impose any time limit at all, much less a pretrial restriction, on when any recertification must occur.

Worse, inferring such a restriction renders the Act's structure incoherent. Courts agree that when a case is *filed* in federal court, the Attorney General may certify at any time, including after trial. So too when a case is removed on *non-Westfall* grounds (*e.g.*, diversity). There is no reason Congress would adopt an anytime rule for those cases, but a before-trial rule for cases timely removed under the Act. Rather, the Act has a cogent scheme: For cases pending in state court, certification for removal must come before trial (as it did here); but once pending in federal court, the Act allows the Attorney General to certify (or recertify) at any time.

The decision below warrants review. Absent this Court's intervention, the sitting President is facing nearly a hundred million dollars of personal liability for conduct that was well within the scope of his federal office. That alone deserves this Court's attention. "This Court has held, on more than one occasion, that the high respect that is owed to the office of the Chief Executive is a matter that should inform the conduct of the entire proceeding." *Cheney v. United States District Court*, 542 U.S. 367, 385 (2004) (brackets, ellipsis, and quotation marks omitted). Here, such respect means that this Court should determine that the last Administration's abandoned defense of a former President did not justify the Second Circuit's failure to allow this Administration's renewed defense of the current President. Such review will "protect not the President himself, but the institution of the Presidency." *Trump v. United States*, 603 U.S. 593, 632 (2024). After all, the specter of personal liability for official conduct, in an amount that would bankrupt virtually any other President, will chill

the exercise of executive power by future Presidents and other high-ranking officials, due to the risk of having Westfall Act certifications similarly withdrawn by their successors.

Constitutional-avoidance considerations confirm the need for review. Below, the President also argued that presidential immunity barred this suit. Yet the court of appeals held that this defense was waived, under a standard that improperly placed presidential immunity on the same footing as ordinary affirmative defenses. The Second Circuit’s erroneous resolution of the proper standard for assessing waiver of presidential immunity—if it is waivable at all—itself warrants this Court’s review. But that is a question of constitutional dimension, which this Court would not need to address if it reversed on Westfall Act grounds. As such, this petition provides the Court with a statutory option to dispose of the case, without having to decide the significant constitutional immunity issues.

STATEMENT

A. Legal Background

Congress passed, and President Reagan signed, the Federal Employees Liability Reform and Tort Compensation Act of 1988 “to protect Federal employees from personal liability for common law torts committed within the scope of their employment.” Pub. L. No. 100-694, § 2(b), 102 Stat. 4564. Typically referred to as the Westfall Act, the statute “accords federal employees absolute immunity from [certain] tort claims arising out of acts they undertake in the course of their official duties.” *Osborn*, 549 U.S. at 229; see 28 U.S.C. 2679(b)(1).

The Westfall Act empowers the Attorney General to effectuate that absolute immunity by issuing a “certification” that “the defendant employee was acting within

the scope of his office or employment at the time of the incident out of which the claim arose.” 28 U.S.C. 2679(d)(1) and (2). The Act spells out this certification process across two paragraphs, depending on whether the proceeding began in federal or state court:

Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

28 U.S.C. 2679(d)(1).

Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

28 U.S.C. 2679(d)(2).

As the above makes clear, the Westfall Act contains only one express timing restriction on the Attorney General's certification, and that restriction concerns only the timing of removal from state court.

In particular, if the "civil action or proceeding" was "commenced" in federal court, the Westfall Act imposes no express time limitation on certification. It simply provides that "[u]pon certification," without any further qualification, the "United States shall be substituted as the party defendant" and the suit "shall be deemed an action against the United States." 28 U.S.C. 2679(d)(1). Accordingly, courts of appeals have held that the Attorney General may certify, and thus substitute the United States as the party defendant, at any time in a civil proceeding commenced in federal court. This includes cases previously removed to federal court based on diversity or other statutes besides the Westfall Act, see *Wasserman v. Rodacker*, 557 F.3d 635, 637, 639 (D.C. Cir. 2009), and this is so even after trial while on appeal, see *Sowell v. American Cyanamid Co.*, 888 F.2d 802, 805 (11th Cir. 1989). See also App., *infra*, 38a-39a, 42a-43a & nn.12-13 (Menashi, J., dissenting from the denial of rehearing en banc) (collecting cases).

By contrast, if the "civil action or proceeding" was "commenced" in state court, the Westfall Act provides that, "[u]pon certification" by the Attorney General, the suit "shall be removed" to federal court "at any time before trial." 28 U.S.C. 2679(d)(2). The certification "shall conclusively establish scope of office or employment for purposes of removal." *Ibid.* And once removed, just as with proceedings initiated in federal court, the "United States shall be substituted as the party defendant" and the suit "shall be deemed * * * an action or proceeding * * * against the United States." *Ibid.*

After the “United States is substituted as defendant,” the “litigation is thereafter governed by the Federal Tort Claims Act” (FTCA). *Osborn*, 549 U.S. at 230; see 28 U.S.C. 2679(d)(4). Unlike for removal, however, for substitution, the Attorney General’s scope-of-employment certification is subject to judicial review. *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 420 (1995). But as this Court has explained, following certification, the United States “must remain the federal defendant in the action unless and until the District Court determines that the employee, *in fact*, and not simply as alleged by the plaintiff, engaged in conduct beyond the scope of his employment.” *Osborn*, 549 U.S. at 231. The courts of appeals are uniform that plaintiffs bear the burden of rebutting the certification. See, *e.g.*, *Council on American Islamic Relations v. Ballenger*, 444 F.3d 659, 662 (D.C. Cir. 2006) (*per curiam*).

Finally, “[i]n the event that the Attorney General has refused” to issue a certification, the Westfall Act allows an employee, regardless of where the suit began, to “petition the [trial] court to find and certify that the employee was acting within the scope of his office or employment.” 28 U.S.C. 2679(d)(3). Any such petition, however, must be made “before trial.” *Ibid.* If the trial court grants that petition, then, as in cases where the Attorney General makes a proper certification, “the United States shall be substituted as the party defendant” and the suit “shall be deemed” an action against the United States. *Ibid.*

B. Factual and Procedural Background

1. In 2019, E. Jean Carroll claimed for the first time publicly that President Trump had assaulted her in a department store in midtown Manhattan “at some point in the mid-1990s.” 49 F.4th 759, 761. President Trump

immediately issued a statement via the White House Press Office, which categorically rejected the claim as “false,” adding that he had “never met” Carroll, she was trying to “sell a book,” and “[f]alse accusations diminish the severity of real assault.” *Id.* at 762. The next day, during a press gaggle on the White House lawn, the President reiterated this was, among other things, a “totally false accusation.” *Id.* at 762-763.

2. In November 2019, Carroll sued President Trump in New York state court, alleging his statements were defamatory. 49 F.4th at 763. In September 2020, during pretrial proceedings, the United States intervened, and Attorney General Barr’s designee certified under the Westfall Act that President Trump’s statements were made “within the scope of his office as President of the United States.” *Ibid.*; see 28 U.S.C. 510 (authorizing Attorney General to delegate authority to subordinates). The case was then removed to federal district court, where the government moved to substitute the United States as the defendant. 49 F.4th at 763.

The district court denied the motion on two grounds. First, the court held that the President of the United States is not an “employee of the Government” within the meaning of the Westfall Act; and second, the court held that, regardless, President Trump’s remarks were not within the scope of his employment. 498 F. Supp. 3d 422, 427-428.

In September 2022, the court of appeals reversed in part. The court held that the President—who is paid a salary to work on behalf of the Nation—is an “employee of the government” under the Westfall Act’s plain terms. 49 F.4th at 761, 770. But as for whether President Trump’s comments fell within the scope of his employment, the court concluded that the “*respondeat su-*

perior law” of the “District of Columbia”—which all agreed would apply—was at least “uncertain[]” as applied in this context. *Id.* at 772. Accordingly, the Second Circuit certified to the D.C. Court of Appeals the question whether President Trump’s remarks fell “within the scope of his employment as President of the United States.” *Id.* at 781.

3. In April 2023, the D.C. Court of Appeals accepted the certified question, while reframing it to “clarify its *respondeat superior* case precedents.” 292 A.3d 220, 225. The court reaffirmed that the District of Columbia “generally adheres to the Restatement (Second) of Agency’s statement of *respondeat superior* law as expressed in § 228.” *Ibid.* But the court explained that some of its “precedents construe more expansively some of the concepts set forth therein.” *Id.* at 240; see, e.g., *id.* at 230. Most relevant to this case, under D.C. law, an employee’s conduct need only have “some relationship or nexus” to the “employee’s responsibilities,” and be motivated “at least in part”—*i.e.*, with “more than an insignificant interest”—to “serve the employer.” *Id.* at 232-233, 235, 237.

As for how those concepts applied here, the court “decline[d]” to “define the scope of employment of the President of the United States,” reasoning that it was a “fact-intensive question for the factfinder and cannot be resolved as a matter of law in either party’s favor on the record before us.” 292 A.3d at 240.

4. After the D.C. Court of Appeals’ decision, the Second Circuit remanded the case to the district court for it to decide whether President Trump’s statements were made within the scope of his employment under D.C. law, as informed by “the detailed guidance provided by the D.C. Court of Appeals.” 66 F.4th 91, 94.

On remand in June 2023, however, the government filed a letter asserting that “the prior certification and motion to substitute have been overtaken by events,” and that Attorney General Garland should “be given the opportunity to decide anew whether to certify that Mr. Trump was acting within the scope of his office as President.” D. Ct. Doc. 166, at 1 (June 9, 2023). The district court agreed, setting a purported deadline for “any further submission[s]” regarding Westfall Act substitution to be “filed no later than July 13, 2023.” App., *infra*, 23a.

That month, Attorney General Garland’s designee informed the district court that the government was withdrawing its certification. D. Ct. Doc. 177, at 1 (July 11, 2023). The government conceded that the President’s comments went to “his fitness to hold the office of the Presidency”; and it acknowledged that under D.C. law, actions done “‘at least in part[] by a purpose to serve’ the employer” fall within the scope of one’s employment. D. Ct. Doc. 177-1, at 2-3 (quoting 292 A.3d at 233). But pointing to the President’s continued denial of Carroll’s claims after leaving office, the alleged “prior history” between the two, and the supposed tone of certain remarks, the government insisted that President Trump’s “*subjective* intent” was motivated by a personal rather than public purpose. *Id.* at 3-4; see *id.* at 3-6. The government’s letter did not cite any comparable instance of the United States withdrawing a Westfall Act certification for any government official, let alone a former President, and we are unaware of one.

Following the certification withdrawal, no further action was taken in the district court regarding the Westfall Act. See App., *infra*, 7a. The case proceeded to trial, and in February 2024, the jury rendered an

award of \$83.3 million in Carroll’s favor. See *ibid.*; 151 F.4th 50, 65.¹

5. President Trump timely appealed. As that appeal was pending, he was reelected to another term as President of the United States. In April 2025, Attorney General Bondi’s designee recertified under the Westfall Act that President Trump’s 2019 statements were within the scope of his office or employment, and the government moved to substitute the United States as the defendant. C.A. Doc. 107.2 (April 11, 2025).

The court of appeals issued an order denying the motion and a subsequent opinion explaining the denial. App., *infra*, 1a, 2a-21a. Because this case was “commenced” in state court, the court turned to Section 2679(d)(2). *Id.* at 9a-10a. As noted, the provision states that the Attorney General must certify “before trial” in order to remove the case to federal court. 28 U.S.C. 2679(d)(2). In the court’s view, this “timing requirement” was best read to also carry through into the subsequent proceedings in federal court after removal—including any recertification decision and accompanying substitution. App., *infra*, 12a, 19a. That reading, the court maintained, helped further the Act’s overall “purpose,” which purportedly included having immunity-related issues always be decided at the “earliest opportunity.” *Id.* at 13a-14a.

Accordingly, the Second Circuit held that, while Attorney General Garland was free to decertify the con-

¹ This jury trial concerned only damages, not liability, because the district court had granted partial summary judgment to Carroll on liability after a parallel jury verdict in her favor in a related lawsuit. 151 F.4th at 59. That suit is the subject of a separate petition for a writ of certiorari (*Trump v. Carroll*, No. 25-573), which was recently denied but is the subject of a pending rehearing petition.

duct at issue because he did so *before* trial, Attorney General Bondi was somehow “statutorily barred” from recertifying Attorney General Barr’s original pretrial decision, because that came *after* trial. App., *infra*, 4a.

The Second Circuit also offered an alternative basis for its holding. App., *infra*, 4a. It ruled that the government “waived” the ability to recertify because it withdrew the certification rather than recertifying by the purported deadline. *Id.* at 19a. It further emphasized that the “practical impact” of granting substitution would be the termination of this suit. *Id.* at 20a-21a. Because the FTCA does not waive federal sovereign immunity for the tort of defamation, 28 U.S.C. 2680(h), “substituting the United States in place of Trump means the failure of Carroll’s defamation lawsuit,” App., *infra*, 21a; see *United States v. Smith*, 499 U.S. 160, 162 (1991). Pointing to the years dedicated to this litigation, the court asserted that “[f]airness and equity dictate[d] that the motion to substitute be denied.” App., *infra*, 21a.

6. The Second Circuit denied petitions for panel rehearing and rehearing en banc. App., *infra*, 24a-116a. Judges Merriam and Kahn, two members of the panel, wrote jointly to defend the panel’s reasoning, joined by Judges Robinson and Pérez. *Id.* at 26a. Senior Judge Chin (the third panel member) wrote a statement to the same effect, expressing his support for denial of rehearing en banc. *Id.* at 84a-116a.

Judge Menashi dissented, joined in relevant part by then-Chief Judge Livingston and Judge Park. App., *infra*, 29a-48a. He explained that nothing in the Westfall Act prohibited Attorney General Bondi from recertifying President Trump’s conduct, as this case was already pending in federal court. *Id.* at 38a-39a. Section

2679(d)(2) has only one timing requirement, which is expressly limited to when certification for *removal* must occur. *Id.* at 40a-41a. That requirement was satisfied here when Attorney General Barr issued his certification in September 2020. *Id.* at 41a. Judge Menashi further objected that the panel’s decision created an “arbitrary” system that lacks any “basis in the statute.” *Id.* at 38a. “Everyone agrees” that when a proceeding is commenced in federal court—including after removal on non-Westfall grounds—Section 2679(d)(1) allows an Attorney General to certify and substitute at any time. *Id.* at 38a-39a, 42a-43a. It makes no sense that Congress would choose to subject cases *removed* to federal court *under* the Westfall Act to “differential treatment.” *Id.* at 38a.

Judge Menashi concluded that the panel’s “waiver holding made no sense” either. App., *infra*, 35a. Given that the Westfall Act empowers the Attorney General to issue a certification at any time in a case already pending in federal court, the district court lacked authority to craft new “procedural requirements” to constrain that power. *Ibid.*

As for the merits of Attorney General Bondi’s certification—which the panel had completely avoided—Judge Menashi explained that it was “not a difficult” call. App., *infra*, 45a. “When the President engages in ‘public communications,’ he is discharging ‘official responsibilities’ and acting within the scope of his office.” *Ibid.* (quoting *Trump*, 603 U.S. at 629). Indeed, as the D.C. Circuit has held in interpreting D.C. law, speaking to the press to defend one’s character and fitness to hold public office is a fundamental duty of the job. *Ibid.* (citing *Ballenger*, 444 F.3d at 664). And nothing about the D.C. Court of Appeals’ later clarification of D.C. law in

this case altered that commonsense conclusion. See *id.* at 34a.

7. In parallel to all this, the President argued that presidential immunity also barred the lawsuit. Across decisions in 2023, the district court held that the President had waived—more precisely, forfeited—this defense by failing to raise it in time, and that the defense was futile on the merits regardless. See, *e.g.*, 685 F. Supp. 3d 267, 279-280. In December 2023, before trial, the court of appeals affirmed as to waiver, holding that presidential immunity is not only waivable, but that it was in fact waived by purportedly “failing to raise it as an affirmative defense in [the President’s] answer.” 88 F.4th 418, 423. Following trial, and after this Court’s decision in *Trump*—which held that the Constitution provides the President with immunity for his official acts to protect the institution of the Presidency, see 603 U.S. at 631-632—the Second Circuit in September 2025 adhered to its prior holdings. See 151 F.4th at 65-68. The court then denied en banc review, App., *infra*, 24a-25a, over the dissent of Judge Menashi, joined by then-Chief Judge Livingston and Judge Park, *id.* at 48a-60a.

REASONS FOR GRANTING THE PETITION

The court of appeals incorrectly held that the Attorney General was statutorily barred under the Westfall Act from recertifying after trial that President Trump’s challenged conduct was performed within the scope of his office. That decision has no basis in the text, structure, context, or purpose of the Act. And as a result, the President of the United States is facing nearly a hundred million dollars of personal liability for defending his character and fitness for office in official statements from and at the White House—conduct that falls well within the President’s scope of office, as Attorney Gen-

eral Bondi concluded. This Court’s review is needed to remedy the Second Circuit’s misinterpretation of the Westfall Act and that error’s attendant consequences.

A. The Decision Below Is Wrong

1. Attorney General Bondi had the authority to recertify President Trump’s conduct under the Westfall Act at any time during the pendency of the case once it was removed to federal court pretrial, including after the federal trial. Because this suit was “commenced” in state court and removed pursuant to the Westfall Act, it is governed by Section 2679(d)(2). That provision contains one—and only one—timing requirement: While the case is pending in state court, certification for removal must come “before trial.” And that requirement was satisfied below, when Attorney General Barr issued his certification during pretrial proceedings in state court in September 2020, removing the case to federal court.

After the case was in federal court, Attorney General Garland withdrew the certification. But even if that action permitted the district court to disregard whether the United States should be substituted as the defendant—which is not the case, as discussed below—nothing in the Westfall Act constrains when an Attorney General may *recertify* the challenged conduct, since the case is already pending in federal court. To the contrary, “Congress spoke in discrete sentences in § 2679(d)(2)[;] first of removal, then of substitution.” *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 432 (1995). The Act’s “before trial” restriction is included only in the former, regarding removal. Once a suit is pending in federal court, the Attorney General’s certification authority has no temporal limit. The Act is most naturally read to simply provide that “[u]pon certification” at any

time, the “United States shall be substituted as the party defendant” and the suit “shall be deemed to be an action or proceeding brought against the United States.” 28 U.S.C. 2679(d)(2). As such, Attorney General Bondi had the authority to recertify President Trump’s conduct, and to move for substitution of the United States as the defendant, including after the federal trial had ended.

2. The court of appeals nevertheless held that Attorney General Bondi was “statutorily barred” from recertifying President Trump’s conduct. App., *infra*, 4a. That was error. The Second Circuit posited that, while Attorney General Garland was free to change the government’s position “before trial,” Section 2679(d)(2) prohibited Attorney General Bondi from reverting to the original position “after trial.” *Id.* at 10a-11a. That contrived timing requirement is wrong, as it has no basis in the text, structure, context, or purpose of the Westfall Act.

a. At the threshold, the Westfall Act does not even provide for an Attorney General to withdraw a certification—as Attorney General Garland purported to do below. Rather, the Act treats substitution as automatic: “Upon certification * * * the United States shall be substituted as the party defendant.” 28 U.S.C. 2679(d)(2); see 28 U.S.C. 2679(d)(1). Drawing on that self-executing language, this Court has stressed that, upon certification and substitution, the United States “must remain the federal defendant in the action *unless and until* the District Court determines that the employee, *in fact*, * * * engaged in conduct beyond the scope of his employment.” *Osborn v. Haley*, 549 U.S. 225, 231 (2007) (first emphasis added). Under that text and precedent, Attorney General Garland’s withdrawal

of Attorney General Barr’s certification did not eliminate the automatic effect of that certification—namely, substitution was required absent a finding by the district court that President Trump’s challenged conduct in fact exceeded the scope of his office, which it did not.

The Second Circuit nonetheless read into the Westfall Act an implicit exception to automatic substitution, holding that Attorney General Garland should be given the opportunity to restart the certification and substitution process “anew” following the D.C. Court of Appeals’ decision. 148 F.4th 110, 113-114. But the notion that an Attorney General can eliminate the statutory consequences of a prior certification based on a “new legal and factual record,” *id.* at 120, is wholly atextual. At minimum, if the Act is read to give the Attorney General such an implicit decertification power, it cannot be read to impose a time limit on the resulting power to recertify. If the government is free to change its mind once, it is free to do so again. Vitally, the Act provides no “principled justification” for mandating that recertification must occur pretrial. App., *infra*, 36a (Menashi, J., dissenting from the denial of rehearing en banc).

b. The Second Circuit held otherwise, wrongly concluding that any recertification decision in a Section 2679(d)(2) case must be made “before trial,” despite the case already having been removed to federal court. App., *infra*, 4a. Rather, under the Westfall Act, if the case is pending in state court, certification and substitution must come before trial; but if the case is pending in federal court, the Attorney General may certify and substitute the United States at any time.

i. The Second Circuit’s “before trial” requirement for recertification in federal court has no basis in the text. Again, Section 2679(d)(2) is express that certifica-

tion must occur “before trial” to *remove* a case to federal court under that provision. It says nothing about when recertification must occur to *substitute* the United States as the defendant after a case has already been timely certified and removed to federal court but then decertified.

The court of appeals asserted that because “*removal* must be accomplished before trial,” “*certification* must be made before trial, too.” App., *infra*, 11a-12a. That is true for the Attorney General’s initial certification, which is a prerequisite to removal under Section 2679(d)(2). But there is no textual basis to extend that “before trial” requirement into the federal proceedings, once the case has already been removed. In fact, contrary to the Second Circuit’s assumption that what holds for removal necessarily holds for substitution, Section 2679(d)(2) explicitly differentiates between the two. Treating removal and substitution “in discrete sentences,” it provides that certification is “conclusive[]” only “for purposes of removal,” which was a key factor supporting this Court’s holding that judicial review of the certification is available for purposes of substitution. *Lamagno*, 515 U.S. at 432 (emphasis omitted).

Thus, while Section 2679(d)(2) imposes an express “before trial” requirement regarding removal, it does not do the same regarding substitution. See *McLaurin v. United States*, 392 F.3d 774, 779 (5th Cir. 2004) (Congress placed “no other time limitation” on the Attorney General besides removal “before trial”), cert. denied, 545 U.S. 1104 (2005). Likewise, Section 2679(d)(3) contains another express “before trial” requirement—namely, absent a certification by the Attorney General, any petition by an employee for a court “to find and certify that the employee was acting within the scope of his of-

fice or employment” must be made “before trial.” This Court typically gives meaning to such decisions by Congress to include language in some places in a statute while omitting it elsewhere. *Russello v. United States*, 464 U.S. 16, 23 (1983).

That interpretive principle has particular force here, because there is every indication the difference was deliberate. After a state-court trial has occurred, removal to federal “district court” would be unusual since the trial is already over, 28 U.S.C. 2679(d)(2), and substitution of the United States in state appellate court would be impossible since the FTCA waives sovereign immunity only in federal courts, 28 U.S.C. 1346(b)(1). It thus makes sense for Congress to ensure that certification and removal occur “before trial” in any state court—and hence, why that language appears in Section 2679(d)(2) as to removal of cases commenced in state court, as well as in Section 2679(d)(3), which applies to all cases, including those commenced in state court. By contrast, this rationale is inapposite for proceedings already pending in federal court. And accordingly, the text of Section 2679(d)(1) includes no timing requirement.

ii. Indeed, Section 2679(d)(1) and the Act’s overall structure counsel strongly against the decision below. Because that provision does not include an express timing requirement, courts have long held that the Attorney General is free to issue a certification—thus substituting the United States as the defendant—at any time, be it before, during, or after trial. App., *infra*, 38a-39a & n.12 (Menashi, J., dissenting) (collecting cases).

The court of appeals briefly raised the unsupported notion that some courts have held that Section 2679(d)(1) certifications must be made before trial. App., *infra*, 16a-17a. That is wrong, as each of the cases

cited by the Second Circuit makes clear. In *Brown v. Armstrong*, 949 F.2d 1007 (8th Cir. 1991), the court held that the Attorney General’s scope-of-employment determination is reviewable (as affirmed in *Lamagno*), and merely stated that *challenges* to an Attorney General’s pretrial certification should be resolved before trial (and not by a jury). *Id.* at 1012. As for the two district-court cases, those decisions simply affirmed that the Attorney General need not make a certification *earlier* than the very start of trial. See *Harper v. United States Department of the Interior*, No. 21-197-CRK, 2022 WL 425058, at *4 & n.5 (D. Idaho Feb. 11, 2022); *Fajardo v. United States Department of State*, No. 16-cv-2980-LAB, 2018 WL 539084, at *1 n.1 (S.D. Cal. Jan. 23, 2018).

Instead, as Judge Menashi’s dissent showed, there is broad agreement that “the Attorney General may make a certification pursuant to § 2679(d)(1)” at any time. App., *infra*, 38a-39a; see *Sowell v. American Cyanamid Co.*, 888 F.2d 802, 805 (11th Cir. 1989) (on appeal after trial); *Jordan v. Hudson*, 879 F.2d 98, 99-100 (4th Cir. 1989) (on appeal after grant of summary judgment); *Moreno v. Small Business Administration*, 877 F.2d 715, 716-717 (8th Cir. 1989) (on appeal after denial of summary judgment); *Salmon v. Schwarz*, 948 F.2d 1131, 1135, 1143-1144 (10th Cir. 1991) (same); see also *Melo v. Hafer*, 13 F.3d 736, 747 (3d Cir. 1994) (The “Attorney General may file a certification under § 2679(d)(1) whenever he or she concludes that an employee defendant was acting within the scope of his or her employment at the relevant time”); *Sullivan v. United States*, 21 F.3d 198, 205 (7th Cir.) (Section 2679(d)(1) “places no limitation on the point at which the Attorney General must certify”), cert. denied, 513 U.S. 1060 (1994).

Similarly, courts have held that when a case is removed to federal court on grounds other than the Westfall Act—such as diversity or federal-officer removal—then the resulting proceeding commenced in federal court is governed by Section 2679(d)(1) rather than Section 2679(d)(2). App., *infra*, 42a-43a & n.13 (Menashi, J., dissenting); see, e.g., *Wasserman v. Rodacker*, 557 F.3d 635, 637, 639 (D.C. Cir. 2009). As a result, for that class of removed cases too, the Attorney General is free to recertify at any point, including after the federal trial, just as in cases initially filed in federal court.

It would make no sense for the Westfall Act to treat suits that originate in federal court differently from suits that are timely removed to federal court under Section 2679(d)(2). And it would make even less sense to treat suits removed on non-Westfall-Act grounds differently, allowing certification and recertification at any time, from those removed under the Westfall Act.

Instead, the Act is best read as drawing a different, sensible line. If the case is pending in state court, certification and removal must occur before trial. But once a case is pending in federal court (whether filed or removed there), the Attorney General has discretion to certify and, if needed, recertify at any time.

iii. The Westfall Act’s effective-date provisions confirm that design. The Act took effect on the date of enactment and applied to all proceedings pending on or after that date. Pub. L. No. 100-694, § 8(a) and (b), 102 Stat. 4565-4566. But it then created a special rule for “pending state proceedings.” *Id.* § 8(c), 102 Stat. 4566 (capitalization omitted). It gave the Attorney General an additional 60-day window “to seek removal” through certification under Section 2679(d)(2) if the “period for removal * * * ha[d] expired” —*i.e.*, if the case was no

longer before trial. *Ibid.* In other words, Congress wanted to ensure that federal employees in pending *state* posttrial cases could get the benefit of the newly passed Act, and it recognized an interim modification was necessary due to Section 2679(d)(2)'s "before trial" requirement for removal through certification.

Of course, Congress presumably wanted to make sure that federal employees in pending *federal* posttrial cases could also get the benefit of the newly passed Act. So if the Act imposed a "before trial" period for certification and substitution in cases already pending in federal court, then Congress would have enacted a parallel 60-day window in such interim cases too. The fact that Congress did not include such a provision shows that there was no pretrial period that needed to be extended in such cases. Rather, for all cases pending in federal court, the Act already allowed the Attorney General to certify at any point, including posttrial, as here.

iv. The Second Circuit's mistaken conclusion to the contrary relied heavily on the Westfall Act's "purpose." App., *infra*, 13a-14a. As the court of appeals recognized, the Act's purpose was not only to shield employees from liability, but also to protect them from the burdens of litigation. *Ibid.* And certification thus should ordinarily be resolved at the "earliest opportunity." *Id.* at 14a. But from those settled premises, the court then leaped to the novel conclusion that "substitution motions" *must always* be made "before trial." *Id.* at 13a-14a.

That rationale makes no sense. While it may be ideal for a certification to come as early as possible, an employee would surely prefer a delayed certification to no certification, and thus no protection, at all. The Westfall Act's purpose of immunizing federal employees is thus furthered by maximizing the ability of the United

States to certify and substitute itself as the defendant, not minimizing it as the Second Circuit wrongly did. See H.R. Rep. No. 700, 100th Cong., 2d Sess. 9 (1988) (describing Section 2679(d) as requiring the United States to be “substituted” as the defendant “whenever” the Attorney General “determines” the relevant conduct was within scope of office). Plus, if Congress wanted all certification-related decisions to be concluded before trial, it would have placed a timing restriction within Section 2679(d)(1) too. It did not do so. All of this underscores the Second Circuit’s failure to grasp that the Westfall Act does not pursue only one purpose “at all costs” and that the statute’s textual limitations are just “as much a part of [its] purpose[s].” *Encino Motorcars, LLC v. Navarro*, 584 U.S. 79, 89 (2018). The Second Circuit’s gross mischaracterization of the Westfall Act’s purposes was egregious error.

3. The Second Circuit’s misinterpretation of the Westfall Act also forecloses its alternative holding (App., *infra*, 19a) that the government “waived” its right to recertify. While federal district courts have inherent power to “manage their own affairs,” the exercise of that power “cannot be contrary to” applicable rules or statutes. *Dietz v. Bouldin*, 579 U.S. 40, 45 (2016). Because 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, the district court lacked the power to require the Attorney General to recertify by the pretrial date of the court’s own choosing. See *Sullivan v. United States*, 21 F.3d 198, 205-206 (7th Cir.), cert. denied, 513 U.S. 1060 (1994). By analogy, if a court purported to require that the Attorney General’s initial certification under Section 2679(d)(2) must occur before the filing of summary-

judgment motions, even though the text says “at any time before trial,” no rational actor would claim that was permissible. So too here: Because Section 2679(d)(2)’s substitution provision deliberately omits the “before trial” limitation included elsewhere in the Act, it was impermissible for the district court to impose such a limitation through a scheduling order. And the same flaw taints the Second Circuit’s reliance on its “law of waiver” for the proposition that a party cannot “withdraw an objection” in the district court, only to “reassert” it later on appeal: if a party has the statutory right to reassert an objection at any time during proceedings, he has not waived anything. App., *infra*, 19a.

Finally, the Second Circuit’s resort to its sense of “fairness” is also indefensible. App., *infra*, 20a. A court may not invoke its own sense of equity to abridge a substantive statutory right—especially where that right implicates a federal employee’s statutory immunity from suit. Cf. *United States v. Craig*, 694 F.3d 509, 512 (3d Cir. 2012), cert. denied, 571 U.S. 816 (2013). The court of appeals objected to the “practical impact” of granting Attorney General Bondi’s motion, recognizing that if the United States is substituted as the defendant, Carroll’s suit will necessarily “fail[,]” as the FTCA does not waive federal sovereign immunity for defamation suits. App., *infra*, 20a-21a. But the same result—the defamation suit failing—would occur even on the Second Circuit’s incorrect view, so long as certification had occurred before trial. And the court had no business trying to thwart that result. Congress decided—and this Court affirmed, see *United States v. Smith*, 499 U.S. 160, 162, 165-166 (1991)—that not only should the United States be able to stand in the shoes of a federal employee, but that certain actions against the sovereign

should not be allowed to continue thereafter. If fairness “dictate[s]” anything, App., *infra*, 21a, it is that the Act should apply as written for President Trump just as for any other federal employee.

B. The Decision Below Warrants Review

1. As a result of the decision below, the President of the United States is under threat of owing nearly a hundred million dollars (after interest) for statements defending his character and fitness for office that fell well within the scope of his federal job. That alone warrants this Court’s attention. This Court has repeatedly emphasized that the “high respect that is owed to the office of the Chief Executive is a matter that should inform the conduct of the entire proceeding.” *Cheney v. United States District Court*, 542 U.S. 367, 385 (2004) (ellipsis omitted). That respect supports Supreme Court review where a sitting President is being sued for his conduct in office and is being denied a claimed immunity from suit. See *Clinton v. Jones*, 520 U.S. 681, 689-690 (1997).

Indeed, the need to ensure the proper functioning of the Westfall Act—including the ability of the Attorney General to substitute the United States as the defendant in a suit against one of its employees—is at its apex when the employee is the President. The President’s duties are of “unrivaled gravity and breadth” and of the “utmost discretion and sensitivity.” *Trump v. United States*, 603 U.S. 593, 607, 610-611 (2024). Protections like those in the Westfall Act are critical for the presidency, because they afford the President the breathing room within which to act. *Nixon v. Fitzgerald*, 457 U.S. 731, 749, 753 (1982). But below, the Second Circuit relied on a flawed reading of that Act to improperly deprive the President of its immunity without even considering the merits of Attorney General Bondi’s certifi-

cation. That error threatens all Presidents and the Presidency, and warrants review.

2. The error is especially egregious because, on the merits, President Trump’s conduct was plainly within the scope of his office. App., *infra*, 45a-48a (Menashi, J., dissenting). When the President engages in “public communications,” he is typically discharging the “official responsibilities” of his position. *Trump*, 603 U.S. at 629. And that is certainly true when those communications defend his character and fitness to hold that office. *Ibid.*; see *Barr v. Matteo*, 360 U.S. 564, 574-575 (1959) (plurality opinion). Indeed, as mentioned, the D.C. Circuit has correctly interpreted D.C. local law to hold that a federal official defending his reputation to the press (there, a congressman) was acting within the scope of his employment. See *Council on American Islamic Relations v. Ballenger*, 444 F.3d 659, 664-666 (D.C. Cir. 2006) (per curiam). And while the D.C. Court of Appeals has since rejected a categorical rule that *every* statement to the press is necessarily within the scope of a public official’s employment, 292 A.3d 220, 239-240, that general perspective does not alter the reality that the particular facts of this case—where the President’s official communications from the White House were defending his character and fitness to hold office—fall within the heartland of his vital job, as in *Ballenger*, see App., *infra*, 45a-48a (Menashi, J., dissenting).

That conclusion is underscored by the weakness of Attorney General Garland’s reasons for withdrawing Attorney General Barr’s certification. Pointing to President Trump’s continued denial of Carroll’s claims after leaving office (which he has consistently done since the allegations were first made), their alleged “prior history,” and the supposed tone of certain remarks, Attor-

ney General Garland claimed that the President’s statements were “insufficiently actuated by a public purpose,” and instead were the product of a “personal motivation.” D. Ct. Doc. 177-1, at 4; see *id.* at 3-5. But that claim was error, and Attorney General Bondi correctly rejected it. The wrongful claim mischaracterized the facts because the purported evidence clearly showed an official motive. Even if there were personal motive present, the President can have both official and personal interests in his reputation. Cf. *Trump v. Mazars USA, LLP*, 591 U.S. 848, 868 (2020) (explaining the President’s “personal and official affairs” overlap). And so long as an employee is “actuated, at least in part, by a purpose to serve the master,” that is sufficient under D.C. law. 292 A.3d at 233. That is the case here. When the President made his official statements from and at the White House, he was obviously seeking to defend his character and fitness for office, in addition to his personal reputation. In fact, as his own later comments make clear: “I just wanted to defend myself, my family, and frankly, the presidency.” C.A. J.A. A2109.

3. Constitutional-avoidance principles further favor review. The President argued below that this suit was independently barred by presidential immunity. The court of appeals rejected that argument, reasoning that presidential immunity is waivable and that the President in fact “waived” it here, by merely failing to raise the defense in a timely manner, akin to forfeiture. See 151 F.4th 50, 65-68; 88 F.4th 418, 422 n.1, 430-435. The President is filing a separate petition for a writ of certiorari seeking review of that ruling—a petition that, in the view of the United States, this Court should grant.

The decision below regarding presidential immunity is wrong. Contrary to the Second Circuit’s holding,

even assuming presidential immunity is waivable, it cannot be forfeited through inadvertence. Whatever the standard, it cannot be weaker than the one for legislative immunity—which demands an “explicit and unequivocal renunciation.” *United States v. Helstoski*, 442 U.S. 477, 490-491 (1979); see *Trump*, 603 U.S. at 631-632 (“[T]he interests that underlie Presidential immunity seek to protect not the President himself, but the institution of the Presidency.”). And there is no colorable argument that the President explicitly and unequivocally renounced presidential immunity below. App., *infra*, 49a-53a (Menashi, J., dissenting). Also, as with the Westfall Act question, the Second Circuit’s failure to reach the merits is made worse by the fact that presidential immunity clearly applies here—under federal law for much the same reasons that the President’s conduct is immunized by the Westfall Act under D.C. law. See *id.* at 58a-60a (Menashi, J., dissenting).

That said, the question of the proper standard to assess waiver of presidential immunity—if it is waivable at all—is one of constitutional dimension. Cf. *Helstoski*, 442 U.S. at 490-491. So too, of course, the question whether presidential immunity shields the conduct at issue. See *Nixon*, 457 U.S. at 747-748 & n.27. While those questions are no doubt important, there is no need to reach them in this case. As the court of appeals itself recognized, allowing Westfall Act certification here would dispose of the entire suit. See App., *infra*, 21a. And under the Act, rightly interpreted, that is precisely what should happen. Accordingly, in granting this petition, this Court would gain a statutory route to dispose of the case without having to answer the significant constitutional questions that would otherwise merit this Court’s resolution.

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

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Acting Solicitor General *
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JULY 2026

* The Solicitor General is recused in this case.

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 24-644

E. JEAN CARROLL,
PLAINTIFF-CTR-DEFENDANT-APPELLEE

v.

DONALD TRUMP, IN HIS PERSONAL CAPACITY,
DEFENDANT-CTR-CLAIMANT-APPELLANT

Filed: June 18, 2025

ORDER

Before: DENNY CHIN, SARAH A. L. MERRIAM, MARIA
ARAÚJO KAHN, *Circuit Judges*.

Oral argument in this matter is scheduled for June 24, 2025. Appellant has moved to substitute the United States as a party pursuant to the Westfall Act, 28 U.S.C. § 2679(d).

IT IS HEREBY ORDERED that the motion is DENIED. The Court will issue an opinion detailing its reasoning in due course.

For The Court:

/s/ CATHERINE O'HAGAN WOLFE
CATHERINE O'HAGAN WOLFE,
Clerk of Court

(1a)

2a

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 24-644

August Term 2024

E. JEAN CARROLL, PLAINTIFF-APPELLEE

v.

DONALD J. TRUMP, IN HIS PERSONAL CAPACITY,
DEFENDANT-APPELLANT

UNITED STATES OF AMERICA, MOVANT^{*}

Argued: June 24, 2025

Decided: Aug. 8, 2025

Appeal from the United States District Court
for the Southern District of New York
No. 1:20CV07311, Lewis A. Kaplan, *Judge*

ORDER

Before: CHIN, MERRIAM, and KAHN, *Circuit Judges*.

On April 11, 2025, after this appeal was fully briefed, defendant-appellant President Donald J. Trump and the government jointly moved to substitute the United

^{*} The Clerk's Office is respectfully directed to amend the caption as reflected above.

States as a party to this appeal pursuant to the Westfall Act, 28 U.S.C. § 2679(d). Attached to the motion was an April 11, 2025, certification by a delegate of the Attorney General that Trump was acting in the scope of his office or employment at the time the statements underlying this defamation action were made.

Plaintiff-appellee E. Jean Carroll opposed the motion, contending that substitution under the Westfall Act on appeal is barred by the statute's text and that Trump waived any right to seek substitution by failing to petition the District Court before trial.

On June 18, 2025, this Court issued an order denying the motion. We write now to articulate our reasoning for that denial. Specifically, we conclude that the motion is statutorily barred by the text of the Westfall Act, that both Trump and the government waived any right to now move for substitution by failing to timely petition the District Court, and that, in any event, principles of equity warrant denying the belated motion.

Michael E. Talent, James Otis Law Group, LLC,
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Plaintiff-Appellee*.

Jonathan D. Guynn, Deputy Assistant Attorney
General, U.S. Department of Justice, *for Yaakov
Roth, Acting Assistant Attorney General, Civil
Division, Washington, D.C., for Movant*.

PER CURIAM:

On April 11, 2025, after this appeal was fully briefed, defendant-appellant President Donald J. Trump and the government (“the Movants”) jointly moved to substitute the United States as a party to this appeal pursuant to the Westfall Act, 28 U.S.C. § 2679(d). Attached to the motion was an April 11, 2025, certification by a delegate of the Attorney General that Trump was acting in the scope of his office or employment at the time he made the statements underlying this defamation action.

Plaintiff-appellee E. Jean Carroll opposed the motion, contending that substitution under the Westfall Act on appeal is barred by the statute’s text and that Trump waived any right to seek substitution by failing to petition the District Court before trial.

On June 18, 2025, this Court denied the motion. We write now to articulate our reasoning for that denial. Specifically, we denied the motion for three independent reasons. First, the motion is statutorily barred by the text of the Westfall Act. Second, even assuming it was not statutorily barred, both Trump and the government waived any right to now move for substitution by failing to request substitution after the case returned to the District Court following earlier appellate proceedings. Finally, and in any event, principles of equity counsel in favor of denying the belated motion.

I. BACKGROUND

On November 4, 2019, Carroll filed this action in New York state court, asserting a single count of defamation *per se* against Trump in his individual capacity, based on statements he made in June 2019 during his first term as President of the United States. The litigation pro-

ceeded in state court until September 2020 when then-Attorney General William Barr, through his delegate, certified that Trump had been acting within the scope of his employment when he made the statements, removed the case to the United States District Court, and filed a motion pursuant to the Westfall Act, 28 U.S.C. § 2679(d)(2), seeking to substitute the United States as the defendant. *See Carroll v. Trump*, 1:20CV07311(LAK) (S.D.N.Y. Sept. 8, 2020), ECF Nos. 1, 3. Certification is conclusive for purposes of the removal to federal court, but the question of substitution is subject to judicial review. *See De Martinez v. Lamagno*, 515 U.S. 417, 433-34 (1995). Upon such review, the District Court denied the motion to substitute. *See Carroll v. Trump*, 498 F. Supp. 3d 422, 430 (S.D.N.Y. 2020).

Trump filed an interlocutory appeal from that ruling, and on September 27, 2022, a divided panel of this Court reversed in part, vacated in part, and certified a question to the D.C. Court of Appeals. *See Carroll v. Trump*, 49 F.4th 759 (2d Cir. 2022). Specifically, this Court (1) reversed the District Court’s finding that Trump was not an “employee of the Government” under the Westfall Act; (2) vacated the District Court’s determination that Trump was not acting within the scope of his employment when he made the statements at issue; and (3) certified the scope-of-employment question to the D.C. Court of Appeals. *See id.* at 761, 770, 781.¹

On April 13, 2023, the D.C. Court of Appeals clarified the scope of the doctrine of *respondeat superior* under

¹ The day after this Court’s decision, Trump moved the District Court to stay the proceedings and substitute the United States as defendant pending decision by the D.C. Court of Appeals. The District Court declined to do so.

District of Columbia law but declined to resolve the ultimate question of whether Trump was acting within the scope of his employment when he made the statements underlying Carroll’s defamation claim. *See Trump v. Carroll*, 292 A.3d 220, 240 (D.C. 2023). We then remanded this matter to the District Court with instructions for it to apply the clarified D.C. law to the facts of this case. *See Carroll v. Trump*, 66 F.4th 91, 94 (2d Cir. 2023) (per curiam).

On remand, the government filed a letter contending: “[T]he prior certification and motion to substitute have been overtaken by events. The Attorney General should therefore be given the opportunity to decide anew whether to certify that Mr. Trump was acting within the scope of his office as President at the time of the incidents out of which the plaintiff’s claim arose, and to do so with respect to the allegations that are set forth in the operative complaint.” *Carroll v. Trump*, 1:20CV07311(LAK) (S.D.N.Y. June 9, 2023), ECF No. 166 at 1. On June 13, 2023, the District Court granted this request:

In all the circumstances, any further submission by the United States (including any new or amended certification and/or motion to substitute) and/or the defendant with respect to substitution of the United States for the defendant shall be served and filed no later than July 13, 2023.

Carroll v. Trump, 1:20CV07311(LAK) (S.D.N.Y. June 13, 2023), ECF No. 169 at 1-2.

In response, on July 11, 2023, the government notified the District Court:

[I]n light of the D.C. Court of Appeals’ clarification of the standard for respondeat superior liability un-

der 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.

Carroll v. Trump, 1:20CV07311(LAK) (S.D.N.Y. July 11, 2023), ECF No. 177-1 at 1. No further action was taken in the District Court by Trump or the government regarding Westfall Act substitution. The case proceeded to trial, and in January 2024, the jury rendered a verdict in Carroll’s favor.

Trump appealed. On January 20, 2025, Trump was sworn into office for his second term as President. On April 11, 2025—when Trump had been President for nearly three months and this appeal had been fully briefed for nearly two months—Trump and the government jointly moved in this Court to substitute the United States as a party under the Westfall Act. We issued an order on June 18, 2025, in advance of oral argument, denying the motion. We write to explain the bases for that decision.²

² It is “common practice” for this Court to resolve a pending motion and later issue an opinion expounding on its reasoning. *Hasoun v. Searls*, 976 F.3d 121, 129 & n.4 (2d Cir. 2020) (collecting cases).

II. DISCUSSION

A. The motion to substitute is untimely under the Westfall Act.

Carroll argues that the Westfall Act does not “envision certification on appeal after trial.” Opp’n at 4. We agree, in the circumstances presented here.

The Westfall Act, 28 U.S.C. § 2679,³ permits the United States, in certain circumstances, to be substituted as a party in a lawsuit against a federal employee alleging that the employee committed tortious conduct in the course of his employment. *See Carroll*, 49 F.4th at 765. “[S]ubstituting the defendant with the United States . . . mak[es] the action against the United States under the FTCA the exclusive means of recovery for the injured individual in tort.” *Id.*

The statute provides three avenues for substitution. For actions initiated in federal court, § 2679(d)(1) provides:

³ The Federal Tort Claims Act (“FTCA”) was amended, by way of the Federal Employees Liability Reform and Tort Compensation Act of 1988, to include the statute we refer to as the Westfall Act. The Westfall Act was enacted in direct response to the Supreme Court’s decision in *Westfall v. Erwin*, 484 U.S. 292 (1988), in which the Court held that “to gain immunity from suit for a common-law tort, a federal employee would have to show (1) that he was acting within the scope of his employment, and (2) that he was performing a discretionary function.” *De Martinez*, 515 U.S. at 425-26. Congress responded through the Westfall Act, and “delete[d] the ‘discretionary function’ requirement, finding it an unwarranted judicial imposition.” *Id.* at 426. The purpose of the Westfall Act was to “return Federal employees to the status they held prior to the *Westfall* decision.” *Id.* (quoting H.R. Rep. No. 100-700, p.4 (1988)).

Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

For actions like this one that are initiated in state court, § 2679(d)(2) provides for removal of the action to federal court, and then for a substantially similar method for substitution:

Upon certification by the Attorney General . . . , any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

28 U.S.C. § 2679(d)(2); *see also Osborn v. Haley*, 549 U.S. 225, 240-41 (2007) (discussing the application of § 2679(d)(1) to suits filed in federal court and § 2679(d)(2) to suits filed in state court).

Under the plain language of the statute, substitution under either § 2679(d)(1) or § 2679(d)(2) is contingent

upon certification by the Attorney General. Section § 2679(d)(3), on the other hand, provides an opportunity for substitution where the employee does *not* have a certification from the Attorney General:

In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

28 U.S.C. § 2679(d)(3). Certification under either § 2679(d)(1) or (d)(2) “does not conclusively establish as correct the substitution of the United States as defendant in place of the employee.” *De Martinez*, 515 U.S. at 434; accord *Carroll*, 49 F.4th at 765-66; *Bowles v. United States*, 685 F. App’x 21, 23 (2d Cir. 2017) (summary order). Rather, it remains for the court to consider any objections, and to determine whether “the Attorney General’s scope-of-employment certification” is correct. *De Martinez*, 515 U.S. at 437.

The motion for substitution before us is properly analyzed under § 2679(d)(2) because Carroll’s suit was “commenced . . . in a State court,” and the motion attaches a certification by the Attorney General’s delegate. Section 2679(d)(2) contains a timing restriction: “Upon certification by the Attorney General . . . , any civil action or proceeding commenced . . . in a State court shall be removed . . . at any time *before trial* by

the Attorney General.” *Id.* § 2679(d)(2) (emphasis added). This motion was filed after trial, and before this Court, during the pendency of Trump’s appeal; Carroll argues that the motion is therefore untimely under the statute. *See* Opp’n at 4-5.

The Movants disagree, asserting that § 2679(d)(2)’s “before trial” limitation applies only to the initial act of removal and that the statute contains no express prohibition on a later post-removal *recertification* by the Attorney General. The Movants further argue that because § 2679(d)(1), which governs substitution in actions commenced in federal court, contains no express timing restriction, imposing an “any time before trial” limitation on motions filed pursuant to § 2679(d)(2) would unreasonably treat substitution motions differently depending on the forum in which the suit was originally filed. *See* Reply at 3-5. We are not persuaded for a number of reasons.

1. Plain language of the statute

The “before trial” language in § 2679(d)(2) places a timing restriction on both the certification by the Attorney General *and* the removal of the suit from state court to federal court. That is because, by operation of statute, the impetus for the removal—which must be accomplished before trial—is the certification. In other words, it is the certification itself that prompts the removal in the first instance. Without certification, there is no removal. *See* § 2679(d)(2) (“Upon certification . . . any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial.”); *see also De Martinez*, 515 U.S. at 431-32 (“If the case was initiated by the tort plaintiff in state court, the Attorney General is to remove it to the federal

court.”). It is undisputed and indisputable that *removal* must be accomplished before trial; as such, the *certification* must be made before trial, too.

Even if § 2679(d)(2) did not apply to the instant motion, the Attorney General’s 2023 rescission of his certification, at the very least, placed this case within the ambit of § 2679(d)(3)’s requirements. Under that provision, too, the motion is untimely. The plain language of § 2679(d)(3), which governs cases in which the Attorney General has not certified that an employee was acting within the scope of his employment, also requires any substitution motion to be made before trial: “[T]he employee may at any time *before trial* petition the court to find and certify that the employee was acting within the scope of his office or employment.” § 2679(d)(3) (emphasis added). Section 2679(d)(3) does not distinguish between suits based on whether they were filed originally in state or federal court. Thus, regardless of whether an employee is sued in federal or state court and petitions for substitution pursuant to § 2679(d)(3), he must do so before trial.

Adopting the Movants’ position—that certification and substitution pursuant to § 2679(d)(2) and (d)(3) may occur at any time, even after trial—would require us to ignore the clear timing requirement contained in both of these provisions. The Movants’ interpretation that the time limitation does not apply would read the words “at any time before trial” out of the statute, running afoul of the well-settled rule that “[i]t is our duty ‘to give effect, if possible, to every clause and word of a statute.’” *United States v. Menasche*, 348 U.S. 528, 538-539 (1955) (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)).

2. Statutory purpose of the Westfall Act

The broader role and purpose of the Westfall Act also compellingly support our conclusion that substitution motions pursuant to § 2679(d)(2) and (d)(3) must be made before trial. Invocation of the Westfall Act, and substitution of the United States, “supplant[s] the jury in covered cases” because FTCA cases are subject to bench trials. *Osborn*, 549 U.S. at 252. Logically, the substitution under either subsection must occur prior to trial. Supplanting the jury as factfinder has little utility in a case, like this one, that has already been tried to a jury. Moreover, the Supreme Court has explained that “[t]he Westfall Act’s core purpose also bears on the appropriate trier of any facts essential to certification. That purpose is to relieve covered employees from the cost and effort of defending the lawsuit, and to place those burdens on the Government’s shoulders.” *Id.*; see also H.R. Rep. No. 700, at 3 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5945, 5946-47 (statement of Deputy Assistant Attorney General Robert L. Wilmore) (“The prospect of routinely compelling Federal employees to subject their personal resources to the lottery of a jury trial will leave them uncertain and intimidated in the performance of any official duties that might expose them to potentially ruinous personal liability.”). In other words, Westfall Act substitution is in the nature of an immunity from suit, and “[i]mmunity-related issues, the Court has several times instructed, should be decided at the earliest opportunity.” *Id.* at 253 (citing *Hunter v. Bryant*, 502 U.S. 224, 228 (1991) (per curiam) (“Immunity ordinarily should be decided by the court long before trial.”), and *Anderson v. Creighton*, 483 U.S. 635, 646, n.6 (1987) (“[I]mmunity questions should be resolved at the earli-

est possible stage of litigation.”)). We are many years removed from “the earliest opportunity.”⁴

3. Second Circuit precedent interpreting similar language

Our conclusion is also supported by this Court’s prior case law analyzing a related statutory provision with substantially similar language, 42 U.S.C. § 233(c). *See Celestine v. Mount Vernon Neighborhood Health Ctr.*, 403 F.3d 76 (2d Cir. 2005). In *Celestine*, the plaintiff sued Mount Vernon Neighborhood Health Center (“Mount Vernon”) in state court, alleging that Mount Vernon was negligent and committed malpractice. *See id.* at 78. When Mount Vernon failed to respond or otherwise appear, Celestine moved for a default judgment. *See id.* Approximately one month later, the Attorney General certified pursuant to 28 U.S.C. § 2679 that “Mount Vernon was acting within the scope of its defined employment as an employee of the United States at the time of the alleged malpractice and that, pursuant to 42

⁴ Indeed, the Movants’ attempt to certify Trump at this late stage of the litigation would have been foreclosed under the Federal Drivers Act, the predecessor to the Westfall Act. *See* 75 Stat. 539 (previously codified at 28 U.S.C. § 2679(d) (1982 ed.)). That is because, under the Federal Drivers Act, federal courts were required to remand removed cases to state court upon a determination that the federal employee was not acting within the scope of his employment. *See id.* We do not think that Congress omitted this provision from the Westfall Act to permit the Attorney General to do what it is trying to do here—recertify at any time in a removed case “whenever her view of the law or facts has changed.” Reply at 4. Rather, as the Supreme Court observed in *De Martinez*, “Congress likely omitted this provision . . . because it had decided to foreclose needless shuttling of a case from one court to another.” 515 U.S. at 434 n.10.

U.S.C. § 233(g), any claims against” it must be brought under the FTCA. *Id.*

After removal, Celestine argued that the certification was untimely under § 233(l), which provides a 15-day window for the Attorney General to advise a state court whether the defendant was an employee of a public health service. *See id.* at 79. The government countered that removal was timely under the broader language of § 233(c), which provides:

Upon a certification by the Attorney General that the defendant was acting in the scope of his employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond *at any time before trial* by the Attorney General to the district court of the United States of the district and division embracing the place wherein it is pending and the proceeding deemed a tort action brought against the United States under the provisions of Title 28 and all references thereto.

42 U.S.C. § 233(c) (emphasis added); *see Celestine*, 403 F.3d at 80-81. We agreed with the government that § 233(c) applied, holding that “if the Attorney General does not act [under § 233(l)] within fifteen days after receiving notice, § 233(c) remains a viable avenue for certification and removal by the Attorney General, even after those fifteen days—provided that the Attorney General acts *before the beginning of the state court trial*.” *Id.* at 81 (emphasis added). We later reiterated that certification must occur before trial: “The Government can, therefore, choose to remove a case from state court by proceeding pursuant to § 233(c). (If so, the Attorney General, or his designee, must, at *any time before the*

state trial begins, formally certify the status of the named defendant as a federal employee.).” *Id.* at 82 (emphasis added).

The text of § 233(c), which applies to federally funded public health centers, is substantively identical to § 2679(d)(2). Both statutes provide that upon the Attorney General’s certification, a suit in state court “shall be removed without bond at any time *before trial* by the Attorney General.” *Compare* § 233(c), *with* § 2679(d)(2) (emphasis added). We held in *Celestine* that the plain text of § 233(c) requires pre-trial certification. There is no principled reason to read the identical language in § 2679(d)(2) any differently. *See Northcross v. Bd. of Ed. Of Memphis City Sch.*, 412 U.S. 427, 428 (1973) (the “similarity of language in” two related statutes “is . . . a strong indication that the two statutes should be interpreted” in the same way).

4. Weight of authority in other federal courts

The weight of authority in other courts, though not binding on us, likewise supports our conclusion. Federal courts have consistently interpreted the subsections of § 2679(d) as requiring certification before trial. *See, e.g., Brown v. Armstrong*, 949 F.2d 1007, 1012 (8th Cir. 1991) (“[C]hallenges to the Attorney General’s certification must be resolved before trial, as soon after the motion for substitution as practicable, even if an evidentiary hearing is needed to resolve relevant fact disputes.”); *Harper v. United States Dep’t of the Interior*, No. 1:21CV00197(CRK), 2022 WL 425058, at *4 n.5 (D. Idaho Feb. 11, 2022) (“Although 28 U.S.C. § 2679(d)(1) does not explicitly provide a time period to file a certification, the Court sees no reason to apply a different time constraint for subsection (d)(1) than the statute provides under

subsections (d)(2) and (d)(3), which permit certifications to be filed at any time before trial.”); *Fajardo v. United States Dep’t of State*, No. 3:16CV02980(LAB)(MDD), 2018 WL 539084, at *1 n.1 (S.D. Cal. Jan. 23, 2018) (“The only time limit for this certification [under subsection (d)(1) or (d)(3)] is that it must be made before trial.”).

* * *

In sum, the statute’s plain text, context, and purpose; our own precedent analyzing similar statutory language; and the weight of authority in other federal courts all support one conclusion. A motion for substitution pursuant to § 2679(d)(2) or (d)(3) must be made *before trial*. The motion to substitute here, filed after entry of a verdict at trial and during the pendency of the appeal, is therefore statutorily barred.

B. The Movants waived their rights to move for substitution.

Carroll next contends that “Trump waived any right to seek substitution when he failed to timely petition the district court pursuant to subsection (d)(3) for certification in 2023.” Opp’n at 5. Again, we agree. Even if the motion were not statutorily barred, Trump and the government have both waived their rights to move for substitution.

We begin with Trump’s waiver. “Waiver” occurs when a litigant “intentional[ly] relinquish[es] . . . a known right.” *Kaplan v. Bank Saderat PLC*, 77 F.4th 110, 117 n.10 (2d Cir. 2023); *see also United States v. Spruill*, 808 F.3d 585, 597 (2d Cir. 2015) (True waiver results “only from a defendant’s intentional decision not to assert a right.”). Trump could have sought substitution after the government declined to issue a pre-trial

certification in July 2023 by petitioning the District Court under § 2679(d)(3). That provision provides that if “the Attorney General has refused to certify scope of office or employment under this section, the *employee* may at any time *before trial* petition the court to find and certify that the employee was acting within the scope of his office or employment.” 28 U.S.C. § 2679(d)(3) (emphases added).

But Trump—the “employee” under this language—waived his right to petition for certification under that subsection. As set forth in detail above, after the D.C. Court of Appeals clarified the standard for *respondeat superior* liability, we remanded for the District Court to apply D.C. law to this case. *See Carroll*, 66 F.4th at 94. The District Court then provided both Trump and the government an opportunity to make further submissions on the issue of Westfall Act substitution—including “any new or amended certification and/or motion to substitute” by July 13, 2023. *Carroll v. Trump*, 1:20CV07311(LAK) (S.D.N.Y. June 13, 2023), ECF No. 169 at 1-2. On July 11, 2023, the Attorney General declined to certify that Trump was acting within the scope of his employment at the time the statements were made. *See Opp’n*, Ex. A. Trump could have moved, at that time, under § 2679(d)(3). He declined to do so. Indeed, at no time after the remand did Trump file anything regarding substitution in the District Court. By declining to seek such relief, Trump waived his right to now bring this motion.⁵

⁵ Trump argues that the District Court’s July 13, 2023, deadline “did not curtail the Attorney General’s statutory authority to issue a Westfall Act certification.” Reply at 7. But the Attorney General *exercised* that authority by declining to issue a certification on July 11, 2023—within the District Court’s deadline. In any event,

The government likewise waived its right to bring this motion and its belated *recertification*. The government followed the statutory procedure set forth in § 2679(d)(2) in 2020 when it certified that Trump was acting within the scope of his federal employment and removed the suit from state to federal court. But in 2023, when the question arose again, on a new legal and factual record, the government determined that certification was *not* appropriate. The Movants contend that “in the unusual circumstances where an Attorney General withdrew certification, nothing in Section 2679(d)(2) prevents that Attorney General—or a subsequent one—from later recertifying because her view of the law or facts has changed.” Reply at 4. But our law of waiver does not permit a party to withdraw an objection in the district court and then attempt to reassert that objection on appeal, with the benefit of hindsight. *See Spruill*, 808 F.3d at 597 (“We have identified waiver where a party asserts, but subsequently withdraws, an objection in the district court.”). The government determined that certification was not appropriate under the *respondeat superior* standard as clarified by the D.C. Court of Appeals and explicitly so advised the District Court. It cannot now change course on appeal. The government has waived its right to bring this belated motion.⁶

whether or not the District Court’s July 13, 2023, deadline was binding, Trump did not move for substitution under the *statutory* “before trial” deadline, which certainly is binding.

⁶ We have exercised our discretion to reach waived issues only “to avoid manifest injustice or if the argument presents a question of law and there is no need for additional fact-finding.” *Commack Self-Serv. Kosher Meats, Inc. v. Hooker*, 680 F.3d 194, 208 n.11 (2d Cir. 2012). Neither exception applies here.

C. As a matter of fairness, the motion must be denied as untimely.

The parties have litigated this case extensively for more than five years, through multiple courts. Liability was determined at the summary judgment stage; the matter then proceeded to a jury trial on the issue of damages, and the jury returned a verdict of \$83.3 million in favor of Carroll. After being sworn into office for a second term as President on January 20, 2025, and throughout the briefing in this appeal, neither Trump nor the government moved for substitution.

The practical impact of permitting the Movants' untimely motion to substitute would be to unwind those

Permitting the extremely belated motion to substitute would result in manifest injustice to Carroll, while finding it waived wreaks no such injustice on Trump. Trump has vigorously litigated this action without substitution through able counsel of his choosing. Requiring him to remain in the case at this late stage does no injustice.

And the issue of substitution does not present a pure issue of law; to the contrary, as the D.C. Court of Appeals recognized, the scope-of-employment inquiry is "fact-intensive." *Trump*, 292 A.3d at 230. Consideration of the merits of the substitution motion would require remand to the District Court to make findings of fact in the first instance. *See, e.g., Bowles*, 685 F. App'x at 24 ("We review the district court's legal conclusions regarding the denial of immunity *de novo*, and its factual findings for clear error."); *Bello v. United States*, 93 F. App'x 288, 289 (2d Cir. 2004) (summary order) ("A district court will conduct *de novo* review of a § 2679(d) certification if plaintiffs allege with particularity facts relevant to the scope-of-employment issue." (citation and quotation marks omitted)); *accord Cholewa v. United States*, No. 23-1278, 2024 WL 869550, at *3 (6th Cir. Feb. 29, 2024) ("We cannot make the necessary findings in the first instance, so we must vacate the order and remand for findings of fact.").

five years of litigation and a duly-rendered jury verdict, and, potentially, to deprive Carroll of any opportunity to pursue her claims. As this Court observed in a prior opinion in this matter, a successful motion to substitute would result in this matter being governed by the FTCA. *See Carroll*, 49 F.4th at 765-66. Under the FTCA, the United States consents to suit and thereby waives its sovereign immunity in certain matters, but with important exceptions, including one that is squarely applicable here: “The FTCA, expressly, does *not* waive the sovereign immunity of the United States for the tort of defamation, *see* 28 U.S.C. § 2680(h). So substituting the United States in place of Trump means the failure of Carroll’s defamation lawsuit.” *Id.* at 766 (emphasis added). The Movants’ decision to forego certification until now prevented the District Court from considering this case-dispositive issue in the first instance—ahead of both the summary judgment ruling and jury trial. *See De Martinez*, 515 U.S. at 420.

After several years of litigation, at substantial cost to all parties, and a significant victory for Carroll, it is simply too late to bring this motion. Fairness and equity dictate that the motion to substitute be denied.

III. CONCLUSION

For the foregoing reasons, the motion to substitute the United States as a party pursuant to 28 U.S.C. § 2679(d) is **DENIED**.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

20-cv-7311 (LAK)

E. JEAN CARROLL, PLAINTIFF

v.

DONALD J. TRUMP, IN HIS PERSONAL CAPACITY,
DEFENDANT

Filed: June 13, 2025

ORDER

LEWIS A. KAPLAN, *District Judge*.

1. The plaintiffs motion for leave to amend [Dkt 155] is granted. A memorandum opinion may follow. The amended complaint is deemed served and filed today.

2. Defendant has requested that the Court, “[s]hould the Court . . . deny Plaintiff’s Motion to Amend” [Dkt 164, at 19], grant defendant permission to file a supplemental motion for summary judgment. As the Court has granted plaintiff’s motion, that request is moot.

3. The United States concedes that subsequent events have “overtaken” both (1) the government’s 2020 certification that the defendant acted within the scope of his employment in making his allegedly defamatory

statements, and (2) the government's 2020 motion to substitute the United States for the defendant in this case under the Westfall Act. It nevertheless has requested time following determination of the motion for leave to amend for the government to determine its present position on the scope of employment question. In all the circumstances, any further submission by the United States (including any new or amended certification and/or motion to substitute) and/or the defendant with respect to substitution of the United States for the defendant shall be served and filed no later than July 13, 2023. Any response by the plaintiff shall be served and filed no later than July 27, 2023. Any reply(ies) by the United States and/or the defendant shall be served and filed no later than August 3, 2023.

SO ORDERED.

Dated: June 13, 2023

/s/ LEWIS A. KAPLAN
LEWIS A. KAPLAN
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 24-644

E. JEAN CARROLL,
PLAINTIFF-COUNTER-DEFENDANT-APPELLEE

v.

DONALD TRUMP, IN HIS PERSONAL CAPACITY,
DEFENDANT-COUNTER-CLAIMANT-APPELLANT

Filed: June 18, 2025

ORDER

Present: DEBRA ANN LIVINGSTON, *Chief Judge*,
RAYMOND J. LOHIER, JR., RICHARD J. SULLIVAN, JO-
SEPH F. BIANCO, MICHAEL H. PARK, WILLIAM J. NAR-
DINI, STEVEN J. MENASHI, EUNICE C. LEE, BETH ROB-
INSON, MYRNA PÉREZ, SARAH A. L. MERRIAM, MARIA
ARAÚJO KAHN, *Circuit Judges*.

FOR PLAINTIFF-COUNTER-DEFENDANT-APPELLEE:

Roberta A. Kaplan (D. Brandon Trice, Maximilian T.
Crema, and Avita Anand, *on the brief*), Kaplan Mar-
tin, LLP, New York, NY.

FOR DEFENDANT-COUNTER-CLAIMANT-APPELLANT:

Justin D. Smith, James Otis Law Group, LLC, St.
Louis, MO.

Following disposition of this appeal on September 8, 2025, an active judge of the Court requested a poll on whether to rehear the case *en banc*. A poll having been conducted and there being no majority favoring *en banc* review, the petitions for rehearing *en banc* are hereby **DENIED**.

SARAH A. L. MERRIAM and MARIA ARAÚJO KAHN, *Circuit Judges*, joined by BETH ROBINSON and MYRNA PÉREZ, *Circuit Judges*, concur by opinion in the denial of rehearing *en banc*.

STEVEN J. MENASHI, *Circuit Judge*, joined by MICHAEL H. PARK, *Circuit Judge*, and joined by DEBRA ANN LIVINGSTON, *Chief Judge*, except as to Part II.E.1, dissents by opinion from the denial of rehearing *en banc*.

DENNY CHIN, *Circuit Judge*, filed a statement with respect to the denial of rehearing *en banc*.

ALISON J. NATHAN, *Circuit Judge*, took no part in the consideration or decision of the petitions.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

MERRIAM and KAHN, *Circuit Judges*, writing jointly, joined by ROBINSON and PÉREZ, *Circuit Judges*, concurring in the denial of rehearing *en banc*:

We concur in the decision of the majority of the active members of the Court declining to rehear these matters *en banc*. As our colleague Judge Chin has so clearly explained in his statement, the petitions for rehearing do not point to any conflict created by the panel's opinions with binding precedent of this Circuit, another Circuit, or the Supreme Court, nor do they persuasively argue that the decisions embodied in our opinions pose a question of exceptional importance sufficient to support *en banc* review. Likewise, the arguments raised in the opinion dissenting from the denial of *en banc* review do not support rehearing.

We fully adopt the statement of Judge Chin as our concurrence in this matter.

MENASHI, *Circuit Judge*, joined by PARK, *Circuit Judge*, and joined by LIVINGSTON, *Chief Judge*, except as to Part II.E.1, dissenting from the denial of rehearing *en banc*:

In this case, the panel issued two separate decisions that are each the subject of a petition for rehearing *en banc*. The first decision rejected the motion of the United States to substitute the United States as the defendant after the Attorney General certified that the President “was acting within the scope of his office or employment at the time of the incident out of which the claim arose.” 28 U.S.C. § 2679(d). The United States has petitioned for rehearing of that decision.¹ The second decision affirmed the judgment awarding \$83.3 million in compensatory and punitive damages and denying the President’s motion for a new trial or judgment as a matter of law. President Trump has petitioned for rehearing of that decision,² and the United States has filed a brief in support of that petition.³

I would grant both petitions because both decisions were erroneous. The panel opinion denying the motion for substitution made three primary errors. First, the panel erroneously determined that Attorney General Bondi had “waived” the right to make a Westfall Act certification because Attorney General Garland had previ-

¹ See Petition for Panel Rehearing and En Banc Determination of the United States and President Donald J. Trump, *Carroll v. Trump*, No. 24-644 (2d Cir. Aug. 22, 2025), ECF No. 132.1.

² See Petition for Rehearing En Banc of President Donald J. Trump, *Carroll v. Trump*, No. 24-644 (2d Cir. Sept. 23, 2025), ECF No. 138.1.

³ See Brief for the United States as Amicus Curiae, *Carroll v. Trump*, No. 24-644 (2d Cir. Sept. 29, 2025), ECF No. 139.1.

ously declined to certify—even though (1) Garland himself had reversed a prior certification by Attorney General Barr, (2) the Act contains no time limitation for making a certification, and (3) no Attorney General was ever a party to the case and subject to any waiver rules. Second, the panel misread the Westfall Act to prohibit substitution following trial when a case begins in state court even though everyone agrees that the Act allows substitution following trial when a case begins in federal court. There is no justification for the differential treatment. Third, the panel failed to correct the decision of the district court that the President does not act within the scope of his office when he makes public remarks to the press from the White House.

The panel opinion affirming the judgment then made three additional errors. First, the panel refused to address the effect of presidential immunity under *Trump v. United States*, 603 U.S. 593 (2024). It did so on the doubly erroneous premise that President Trump “waived” any immunity defense and that *Trump v. United States* “simply reaffirmed long-established principles,” so nothing prevented the President from raising the exact same arguments before *Trump v. United States* was even decided. *Carroll v. Trump*, 151 F.4th 50, 67 (2025). That holding is not credible. Whatever one thinks about the merits of *Trump v. United States*, everyone agrees that it represents a significant legal development.⁴ Second, the panel wrongly held that President Trump was properly denied a jury trial. The panel reasoned that his liability for defamation for statements

⁴ See, e.g., *Trump*, 603 U.S. at 685 (Sotomayor, J., dissenting) (“The relationship between the President and the people he serves has shifted irrevocably.”).

made in 2019 was predetermined by a trial about different statements made in 2022. But the jury verdict about a purported defamation in 2022 did not resolve the question of whether he was liable for different statements made under different circumstances in 2019. Third, the panel upheld a damages award that included unauthorized damages, duplicative compensatory damages, and a grossly excessive monetary figure for a defamation claim.

I would rehear the case *en banc* to bring our case law about the scope of presidential duties and immunity into conformity with decisions of the Supreme Court and to resolve these questions of exceptional importance in line with the constitutional separation of powers and normal judicial practice. *See* Fed. R. App. P. 40(b)(2)(B)-(D). “In my view, the same rules should apply equally to all defendants.” *Carroll v. Trump*, 141 F.4th 366, 368 (2d Cir. 2025) (Menashi, J., dissenting from the denial of rehearing *en banc*).

I

Congress enacted the Westfall Act “to protect Federal employees from personal liability for common law torts committed within the scope of their employment.” Federal Employees Liability Reform and Tort Compensation Act, Pub. L. No. 100-694, § 2(b), 102 Stat. 4563, 4564 (Nov. 18, 1988), *codified at* 28 U.S.C. § 2671 note. The Act authorizes the Attorney General to certify “that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose.” 28 U.S.C. § 2679(d)(1)-(2). Upon such certification, two things will happen. First, the action will be removed to federal court if it was commenced in state court and a trial has not yet occurred.

See id. § 2679(d)(2). Second, the action “shall be deemed an action against the United States” and “the United States shall be substituted as the party defendant.” *Id.* § 2679(d)(1); *id.* § 2679(d)(2) (similarly providing for substitution).

The paradigmatic cases of substitution under the Westfall Act are those in which a driver conducting government business allegedly injures someone in a car accident, *see, e.g., De Martinez v. Lamagno*, 515 U.S. 417, 420-21 (1995), or in which a doctor employed by the government injures a patient through alleged malpractice, *see, e.g., Sanchez v. United States*, 740 F.3d 47, 49-50 (1st Cir. 2014). The Attorney General will certify that the driver or the doctor was acting within the scope of his government employment when driving or when treating patients—not that the tortious conduct itself was an official act—and then the tort suit will proceed against the United States. “Ordinarily, scope-of-employment certifications occasion no contest.” *De Martinez*, 515 U.S. at 422.

It is a unique circumstance when this statutory framework applies to the President of the United States. The President may be an “employee of the government,” 28 U.S.C. § 2671, but he also “alone composes a branch of government,” *Trump v. Mazars USA, LLP*, 591 U.S. 848, 868 (2020). This circumstance should make it *easier* to determine that the President was acting within the scope of his office when the purportedly tortious conduct occurred: The President, compared to other government employees, has an especially broad scope of office. “[T]here is not always a clear line between his personal and official affairs,” *id.*, because “unlike anyone else, the President is a branch of government, and the Constitu-

tion vests in him sweeping powers and duties,” *Trump*, 603 U.S. at 639-40. In this case, the President made the allegedly defamatory statements when he issued a press release and responded to press inquiries from the White House. Making public statements to the press is part of the President’s job. When the President engages in “public communications,” he discharges “official responsibilities” and therefore acts within the scope of the office. *Id.* at 629.⁵ That principle is well-established with respect to other elected officials. *See CAIR v. Balenger*, 444 F.3d 659, 661 (D.C. Cir. 2006) (“In this defamation action, we consider whether a congressman acted ‘within the scope of employment’ when he discussed his marital status in his office, during regular business hours, in response to a reporter’s inquiries. The District Court held that he did, and we agree.”). Compared to the public communications of a congressman, the President’s public comments present an *easier* case because the Supreme Court has expressly said that public communications fall within the scope of his office.

The decisions here, however, suggested that the President of the United States has a much *narrower* scope of office than a government driver or doctor. The district court rejected Attorney General Barr’s certification on the ground that “the question of whether government employees are acting within the scope of their employment” must be resolved “under the *respondeat superior* doctrine” of the state—or the federal district—

⁵ “[A] long-recognized aspect of Presidential power is using the office’s ‘bully pulpit’ to persuade Americans, including by speaking forcefully or critically,” and the President “is even expected to comment on those matters of public concern that may not directly implicate the activities of the Federal Government.” *Trump*, 603 U.S. at 629.

in which the purportedly tortious conduct occurred. *Carroll v. Trump*, 498 F. Supp. 3d 422, 443-44 (S.D.N.Y. 2020). The district court explained that “the *respondeat superior* doctrines of New York and the District of Columbia” provide that “*respondeat superior* liability does not apply . . . unless the employer exercises, or has the ability to exercise, control over the employee’s relevant actions.” *Id.* at 446. Because no one “directed or controlled President Trump when he commented on the plaintiff’s accusation,” the President “was not acting within the scope of his employment when he made them, and the Attorney General’s certification under the Westfall Act was erroneous.” *Id.* at 450.

That analysis was incorrect. It meant that the President acts within the scope of his office only to the extent that he carries out the orders of someone else. In our constitutional system, however, the President directs executive officers rather than the other way around.⁶ And the head of an organization certainly can act within the scope of his employment.⁷ Putting aside for the moment how bizarre it is to determine the scope of the

⁶ The Constitution “establishes the President as the chief constitutional officer of the Executive Branch, entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity. These include the enforcement of federal law . . . and management of the Executive Branch.” *Nixon v. Fitzgerald*, 457 U.S. 731, 750 (1982); *see also Alpine Sec. Corp. v. FINRA*, 121 F.4th 1314, 1338 (D.C. Cir. 2024) (Walker, J., concurring in the judgment in part and dissenting in part) (“[E]xecutive power can be exercised only by the President (accountable to the nation) and his executive officers (accountable to him).”).

⁷ *Cf. Perconti v. Thornton Oil Corp.*, No. 18630, 2002 WL 982419, at *4 (Del. Ch. May 3, 2002) (considering whether the president and chief executive officer of a corporation acted in his “official corporate capacity”) (alteration omitted).

presidential office by reference to state employment law rather than to the U.S. Constitution,⁸ the analysis of the district court did not make sense even on its own terms. It rendered the President's actions within the scope of his office a null set. That was clearly wrong; the President is the executive official with the broadest scope of office. *See Barr v. Matteo*, 360 U.S. 564, 573 (1959) (“[T]he occasions upon which the acts of the head of an executive department will be protected by the privilege are doubtless far broader than in the case of an officer with less sweeping functions. But that is because the higher the post, the broader the range of responsibilities and duties, and the wider the scope of discretion, it entails.”).

Our court then compounded the error. We said that the scope of the office of the President of the United States “is governed by the District of Columbia’s *respondeat superior* law” but concluded that “the District’s law regarding vicarious liability is sufficiently unclear that we are unable to predict with any confidence how the District’s highest court—the D.C. Court of Appeals—would resolve this issue.” *Carroll v. Trump*, 49 F.4th 759, 766-67 (2d Cir. 2022). So the Second Circuit asked the municipal D.C. court to answer the following certified question: “Under the laws of the District, were the allegedly libelous public statements made, during his term in office, by the President of the United States, denying allegations of misconduct, with regards to events prior to that term of office, within the scope of his employment as President of the United States?” *Id.* at 781. In other words, our court asked whether under the local laws of the District of Columbia the President

⁸ *See infra* note 17.

of the United States had acted within the scope of his employment.

The D.C. Court of Appeals answered the question only “by affirming that the District of Columbia generally adheres to § 228 of the Restatement (Second) of Agency’s traditional view of the scope-of-employment inquiry of *respondeat superior*, although our case precedents construe more expansively some of the concepts set forth therein.” *Trump v. Carroll*, 292 A.3d 220, 240 (D.C. 2023). For example, the Restatement provides that “an employer is liable for an employee’s tortious conduct in circumstances where the conduct is of the kind the person is employed to perform,” but the law of the District of Columbia recognizes that “[m]any employees have informal responsibilities that are as integral to their employment as their formal responsibilities, and therefore are just as sound of a basis for applying *respondeat superior* liability.” *Id.* at 230 (internal quotation marks and alteration omitted).

This purported clarification did not clarify very much, except perhaps to make it more obvious that the President was acting within the scope of his office when responding to reporters at the White House. Nevertheless, according to the panel, this trivial clarification from a local court in D.C. provided “a new legal and factual record” that allowed Attorney General Garland to reconsider the certification of Attorney General Barr. *Carroll v. Trump*, 148 F.4th 110, 120 (2023). Yet the panel further held that Attorney General Bondi was *not* allowed to reconsider the certification of Attorney General Garland: “The government determined that certification was not appropriate under the *respondeat superior* standard as clarified by the D.C. Court of Appeals

and explicitly so advised the District Court. It cannot now change course on appeal. The government has waived its right to bring this belated motion.” *Id.* The panel made several errors by forbidding Attorney General Bondi from making a motion under the Westfall Act.

A

First, the waiver holding made no sense. The panel opinion said that “our law of waiver does not permit a party to withdraw an objection in the district court and then attempt to reassert that objection on appeal, with the benefit of hindsight.” *Carroll*, 148 F.4th at 120. But the United States has never been “a party” to this litigation, and the Attorney General’s certification under the Westfall Act is not an objection, pleading, or argument of a litigant. Congress enacted a statute that authorizes the Attorney General to make a scope-of employment certification, and the statute does not prohibit the Attorney General—or a successive Attorney General—from making a new certification based on a revised assessment of the law or the facts. “Nothing in the [Westfall Act] contemplates anything like the embellishment the [Second] Circuit has adopted. And it is long since settled that a reviewing court is generally not free to impose additional judge-made procedural requirements on agencies that Congress has not prescribed and the Constitution does not compel.” *Garland v. Ming Dai*, 593 U.S. 357, 365 (2021) (internal quotation marks omitted).

At the same time, the panel opinion said that Attorney General Garland—unlike Attorney General Bondi—was entitled to conclude that “[t]he prior certification and motion to substitute have been overtaken by events” given “the D.C. Court of Appeals’ clarification of the

standard for respondeat superior liability under D.C. law,” such that “[t]he Attorney General should therefore be given the opportunity to decide anew whether to certify that Mr. Trump was acting within the scope of his office as President at the time of the incidents out of which the plaintiff’s claim arose.” *Carroll*, 148 F.4th at 114 (quoting Letter, *Carroll v. Trump*, No. 20-CV-7311 (S.D.N.Y. June 9, 2023), ECF No. 166; Letter, *Carroll v. Trump*, No. 20-CV-7311 (S.D.N.Y. July 11, 2023), ECF No. 177-1).

Subsequent to Attorney General Garland’s withdrawal of the Barr certification, however, the United States held an election in which the government’s assessment of this sort of litigation was a matter of public debate.⁹ If the clarification of the D.C. Court of Appeals justified a reconsideration of the government’s position, then so did the election. A “changed view” of the government may be “related to the election of a new President of a different political party” because a “change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency’s reappraisal of the costs and benefits of its programs.” *Motor Vehicle Manufacturers Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part). The Attorney General was entitled to “evaluate priorities in light of the philosophy of the administration.” *Id.* There was no principled justification for holding that Attorney General Barr’s certification decision could be revisited by Attorney General Garland but At-

⁹ See, e.g., Jonathan Turley, *Donald Trump Just Won the Greatest Jury Verdict in American History*, The Hill (Nov. 6, 2024).

torney General Garland’s certification decision could not be revisited by Attorney General Bondi.

The panel opinion indicated that, after Attorney General Garland’s withdrawal of the Barr certification, President Trump himself could have petitioned for the district court “to find and certify that the employee was acting within the scope of his office or employment.” 28 U.S.C. § 2679(d)(3). The panel said that “[b]y declining to seek such relief, Trump waived his right to now bring this motion.” *Carroll*, 148 F.4th at 119-20. In fact, President Trump did seek such relief. On June 9, 2023, Attorney General Garland indicated that the prior certification had been “overtaken by events.” *Id.* at 114. On June 27, 2023, President Trump raised as an affirmative defense that he “made the challenged statements within the scope of his employment, and is therefore immune from suit under the Westfall Act.”¹⁰ Regardless, whether the employee has sought certification under § 2679(d)(3) cannot operate as a waiver of the authority of the Attorney General to certify under § 2679(d)(1) or (d)(2).¹¹

¹⁰ Defendant’s Answer to Plaintiff’s First Amended Complaint, Affirmative Defenses and Counterclaim at 22 ¶ 19, *Carroll v. Trump*, No. 20-CV-7311 (S.D.N.Y. June 27, 2023), ECF No. 171.

¹¹ Moreover, we do not normally require a litigant to make a futile motion before a district court. *See New York, N.H. & H.R. Co. v. Iannotti*, 567 F.2d 166, 180 (2d Cir. 1977) (“The law does not require that one act in vain.”). The district court had already rejected the certification of Attorney General Barr, it treated the withdrawal of the certification by Attorney General Garland as dispositive, and it indicated that it would not entertain further motions on the issue after the government withdrew its certification. *See Order, Carroll v. Trump*, No. 20-CV-7311 (S.D.N.Y. June 13, 2023), ECF No. 169 (“In all the circumstances, any further submission by the United States (including any new or amended certification

B

Second, the panel opinion misinterpreted the Westfall Act to *prohibit* a substitution based on Attorney General Bondi’s certification. According to the panel opinion, when a case begins in federal court, the Attorney General may move for substitution at any time—including after trial. When a case begins in state court, however, the Attorney General’s motion for substitution “must be made *before trial*” even if, as in this case, the trial occurred in federal court. *Carroll*, 148 F.4th at 119. That differential treatment of substitution motions by the Attorney General is arbitrary and lacks a basis in the statute.

Pursuant to the Westfall Act, there is no time limitation on a motion for substitution when the case begins in federal court. The statute provides that:

Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

28 U.S.C. § 2679(d)(1). Everyone agrees that the Attorney General may make a certification pursuant to § 2679(d)(1) and a substitution may occur even after a

and/or motion to substitute) and/or the defendant with respect to substitution of the United States for the defendant shall be served and filed no later than July 13, 2023.”).

trial has concluded.¹² When the case begins in a state court, however, the case may be removed to federal court only until the trial has begun in state court:

Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court *shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending.* Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish

¹² See, e.g., *Sullivan v. United States*, 21 F.3d 198, 205 (7th Cir. 1994) (“Section 2679(d)(1), . . . which applies to suits against government employees commenced in federal court, also places no limitation on the point at which the Attorney General must certify that the employee was acting within the scope of his employment.”); *Melo v. Hafer*, 13 F.3d 736, 747 (3d Cir. 1994) (“[T]he Attorney General may file a certification under § 2679(d)(1) whenever he or she concludes that an employee defendant was acting within the scope of his or her employment at the relevant time or times.”); *Sowell v. Am. Cyanamid Co.*, 888 F.2d 802, 805 (11th Cir. 1989) (“Here, the Department of Justice has determined that Harrison was acting within the scope of his employment, a determination which is obviously correct in light of the testimony *at trial*. Therefore, it follows that the United States should be substituted for the federal employee.”) (emphasis added).

scope of office or employment for purposes of removal.

28 U.S.C. § 2679(d)(2) (emphasis added). It makes sense that removal would need to occur before trial in a state court. Otherwise, a federal court of appeals would be reviewing state-court trial proceedings. But the same logic does not apply to substitution, and indeed Congress provided for substitution in a separate sentence—not modified by the “at any time before trial” language—with language that parallels the provision for substitution in § 2679(d)(1). “Congress does not use the same words to accomplish the opposite objective,” *Everytown for Gun Safety Support Fund v. ATF*, 984 F.3d 30, 34 (2d Cir. 2020), and there is no reason to believe that the substitution language in the two provisions does not have the same scope. The straightforward way to read § 2679(d)(2) is that when the Attorney General makes a certification, (1) the action shall be removed at any time before trial, and (2) the United States shall be substituted as the defendant. The statute does not say, as the panel opinion held, that any certification must be made before trial. “Congress spoke in discrete sentences in § 2679(d)(2) first of removal, then of substitution.” *De Martinez*, 515 U.S. at 432.

The interpretation of the panel opinion is at odds with not only the text but also the structure of the statute. “[T]o foreclose needless shuttling of a case from one court to another,” Congress made “certification conclusive for purposes of removal.” *Id.* at 433 n.10 (internal quotation marks and alterations omitted). That means that § 2679(d)(2) authorizes two different steps: (1) removal, which is automatic and conclusive, and (2) substitution, which occasions further judicial review. The

panel itself emphasized that “[c]ertification is conclusive for purposes of the removal to federal court, but the question of substitution is subject to judicial review.” *Carroll*, 148 F.4th at 113. Given this two-step process, there is no reason to expect removal and substitution to occur simultaneously or even to result from the same certification decision. This very case was removed to federal court—where the trial occurred—because Attorney General Barr’s certification was conclusive for purposes of removal. But the United States was not substituted as the defendant because Attorney General Garland later decided not to certify for purposes of substitution. The panel insisted that because “*removal* must be accomplished before trial” it follows that “the *certification* must be made before trial, too.” *Id.* at 116. But that conclusion does not follow because—as this case illustrates—the removal and the substitution may occur at different times and be governed by different certifications.

The panel opinion insisted that its counterintuitive reading found support in the “broader role and purpose of the Westfall Act,” which it defined narrowly as “supplant[ing] the jury in covered cases because FTCA cases are subject to bench trials.” *Id.* at 117 (internal quotation marks omitted). “Logically,” it said, the substitution “must occur prior to trial” because “[s]upplanting the jury as factfinder has little utility in a case, like this one, that has already been tried to a jury.” *Id.* But in the enacted statement of purpose, Congress said that the purpose of the Westfall Act is “to protect Federal employees from personal liability for common law torts committed within the scope of their employment” based on the congressional finding that “[t]he prospect of such liability will seriously undermine the morale and well be-

ing of Federal employees, impede the ability of agencies to carry out their missions, and diminish the vitality of the Federal Tort Claims Act as the proper remedy for Federal employee torts.” 102 Stat. at 4563-64. The need to protect federal employees does not disappear—and might become more urgent—once a trial has occurred. That is why § 2679(d)(1) does not require that a motion for substitution be made only before trial, and it is why § 2679(d)(2) does not logically do so either. It would *undermine* the congressional purpose if the plaintiff’s mere election to file a complaint in state rather than federal court would restrict the ability of the United States to provide a defense.

The panel opinion also created a circuit split. The D.C. Circuit has held that when a case is timely removed to federal court, a new case is “commenced” in the district court that allows “the United States to substitute itself for [the federal employee defendant] pursuant to 28 U.S.C. § 2679(d)(1).” *Wasserman v. Rodacker*, 557 F.3d 635, 639 (D.C. Cir. 2009). The D.C. Circuit explained that “[w]hile any case removed from a state court necessarily originated outside of district court, its removal creates a federal civil case . . . with a procedural beginning and end. . . . According to the applicable rules of civil procedure, [the federal] action commenced in the district court when removal was effected and the complaint was received by the clerk.” *Id.* (citing Fed. R. Civ. P. 3, 5(d)(2)). As a result, “§ 2679(d)(1) applies” to the removed action and that provision “allows the United States to replace [the federal employee] as the party defendant to the tort claims.” *Id.* Under that rule, § 2679(d)(1) would apply to this removed case and

there would indisputably be no time limitation on the ability of the United States to move for substitution.¹³

It is unsustainable for the availability of Westfall Act substitution to depend on whether the case ends up in the D.C. Circuit or the Second Circuit. The panel might quibble over the details of decisions of the D.C. Circuit and other circuits applying the Westfall Act. But this case either would have come out differently in the D.C. Circuit or would have come out differently in the other circuits if President Trump had simply removed the case on the basis of diversity before the United States moved for substitution. *See Wasserman*, 557 F.3d at 639; *Flohr*, 84 F.3d at 388 n.4; *Melo*, 912 F.2d at 640 n.15. If the circuit courts would reach different outcomes on the same facts, there is a split. I would rehear this case *en banc* to reach a result that is consistent with rather than contrary to the interpretation of the Westfall Act that prevails in the other circuits.

¹³ The Eleventh Circuit has also said that § 2679(d)(1) “governs not only actions that are ‘commenced’ in district court (under any statute giving the court subject matter jurisdiction to hear the case) but also any case properly removed to district court.” *Flohr v. Mackovjak*, 84 F.3d 386, 388 n.4 (11th Cir. 1996). It qualified the statement by saying that the removal must be “under a removal statute other than 28 U.S.C. § 2679(d),” but that would mean President Trump could have removed this case on the basis of diversity and then the United States could have obtained substitution. *Id.*; *see also Melo v. Hafer*, 912 F.2d 628, 640 n.15 (3d Cir. 1990) (allowing certification under § 2679(d)(1) after the employee “removed the action pursuant to other provisions of the United States Code”).

C

Third, the panel opinion invoked these procedural and statutory obstacles to avoid facing the fact that the certifications of Attorneys General Barr and Bondi were correct. When a court considers a Westfall Act certification that a driver or doctor was acting within the scope of federal employment, the question is whether the driver was driving on government business or the doctor was treating patients as part of his federal employment. It is not whether the government employment specifically required him to hit a pedestrian or to injure a patient. As the Westfall Act puts it, the certification is that “the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose.” 28 U.S.C. § 2679(d)(1)-(2). The overall conduct, not the incident itself, must be within the scope of the office or employment. *See Ballenger*, 444 F.3d at 664 (explaining that a focus on whether the “allegedly defamatory statement *itself* was not conduct of the kind he is employed to perform” reflects “a misunderstanding of D.C. scope-of-employment law (not to mention the plain text of the Westfall Act), which directs courts to look beyond alleged intentional torts themselves”).¹⁴

¹⁴ It would render the applicable case law incoherent to focus on whether the allegedly tortious conduct itself was part of the employee’s duties. *See, e.g., Johnson v. Weinberg*, 434 A.2d 404, 409 (D.C. 1981) (concluding that a reasonable jury could find that a laundromat employee acted within the scope of his employment when he shot a customer during a dispute over missing shirts); *Lyon v. Carey*, 533 F.2d 649, 652 (D.C. Cir. 1976) (concluding that a jury reasonably found that a mattress deliveryman acted within the scope of his employment when he assaulted and raped a customer following a delivery-related dispute).

As a result—even assuming that the conventional framework applicable to drivers and doctors applies to the President of the United States—the question here is whether it is within the scope of the President’s office to issue press releases or to respond to press inquiries. That is not a difficult question. “It is ‘incontestable’ that the Presidency comes with the power to use the office’s ‘bully pulpit.’” *Associated Press v. Budowich*, No. 25-5109, 2025 WL 1649265, at *12 (D.C. Cir. June 6, 2025) (quoting *Blassingame v. Trump*, 87 F.4th 1, 14-15 (D.C. Cir. 2023)). When the President engages in “public communications,” he is discharging “official responsibilities” and acting within the scope of his office. *Trump*, 603 U.S. at 629.¹⁵

The D.C. Circuit has held that “[s]peaking to the press during regular work hours in response to a reporter’s inquiry falls within the scope of a congressman’s ‘authorized duties.’” *Ballenger*, 444 F.3d at 664. For that reason, even a statement the congressman made during the conversation that “elaborated on the reasons why he and his wife had separated” fell within the scope of his office. *Id.* at 662. For a defamation claim based on such a remark, “the proper defendant under the Westfall Act is the United States.” *Id.* at 666.

In this case, the district court rejected the notion that the President’s remarks to the press could fall within

¹⁵ See also *Wilson v. Libby*, 535 F.3d 697, 712 (D.C. Cir. 2008) (explaining that executive branch officials who “spoke to the press” to address “criticism of the Executive’s handling of pre-war intelligence” engaged in conduct “of the type that the defendants were employed to perform” and therefore the conduct “was in the defendants’ scope of employment regardless of whether it was unlawful or contrary to the national security of the United States”).

the scope of his office because the President does not have an employer at whose behest he makes the remarks. *See Carroll*, 498 F. Supp. 3d at 449-50. But the D.C. Circuit had no problem concluding that the congressman's remarks—even about his personal affairs—were “actuated, even in part, to serve the master” because “even a *partial* desire to serve the master is sufficient,” and the congressman “wanted to maintain the continued trust and respect of his constituents in order to preserve his ability to carry out his legislative responsibilities.” *Ballenger*, 444 F.3d at 665 (internal quotation marks and alterations omitted). The D.C. Circuit recognized that the congressman’s “conduct was motivated—at least in part—by a legitimate desire to discharge his duty as a congressman.” *Id.* President Trump explained that he made the remarks giving rise to this case for similar reasons: “I just wanted to defend myself, my family, and frankly, the presidency.” App’x 2109.

The Fifth Circuit has also decided that a congressman’s “statements, including the alleged defamatory remarks and even assuming such remarks are defamatory, [which] were made in the context of an interview addressing [matters of public concern], clearly fell within the course and scope of his position as a Member of Congress.” *Williams v. United States*, 71 F.3d 502, 507 (5th Cir. 1995). The Sixth Circuit has decided that legislators’ social media posts describing high school students as exemplifying “blatant hate” and a lack of “common decency” were “calculated to serve the interests of Defendants’ constituents (i.e., employers) by informing them of Defendants’ views.” *Does 1-10 v. Haaland*, 973 F.3d 591, 594, 602 (6th Cir. 2020). And the Third Circuit has held that commissioners of the United States Semi-

quincennial Commission acted within the scope of their employment when allegedly “engaging in a campaign of libel, slander, and smearing” that involved statements made “in interactions with the press.” *Giordano v. Hohns*, 159 F.4th 179, 183, 201 (3d Cir. 2025) (alteration omitted). Other courts have reached similar conclusions.¹⁶ The decision in this case—regarding the President of the United States—stands alone on the other side.

The Attorney General’s certification “constitute[s] *prima facie* evidence that the employee was acting within the scope of his employment,” *Ballenger*, 444 F.3d at 662, and a “plaintiff challenging the government’s scope-of-employment certification bears the burden of coming forward with specific facts rebutting the certification,” *id.* (quoting *Stokes v. Cross*, 327 F.3d 1210, 1214 (D.C. Cir. 2003)). The plaintiff in this case cannot meet that burden.

¹⁶ See *Musgrave v. Mace*, No. 25-1823, 2025 WL 4482991, at *2 (D.S.C. Aug. 20, 2025) (noting that the federal courts “have consistently held that statements made to the press and on social media are within the scope of employment of members of Congress” and “have reasoned that press interviews are part of a congressperson’s job”); see also *Chapman v. Rahall*, 399 F. Supp. 2d 711, 715 (W.D. Va. 2005) (explaining that a congressman’s “remarks, made to the media to ensure his effectiveness as a legislator, can fairly and reasonably be deemed to be an ordinary and natural incident or attribute of his job as a legislator” and “were therefore made within the scope of his employment”) (internal quotation marks omitted); *Operation Rescue Nat’l v. United States*, 975 F. Supp. 92, 108-09 (D. Mass. 1997) (explaining that by making remarks “in response to questions posed by the media,” a senator “was providing political leadership and a basis for voters to judge his performance in office” and “the Westfall Act provides Senator Kennedy immunity for his remarks”), *aff’d*, 147 F.3d 68 (1st Cir. 1998).

It is strange to think that the scope of the office of President of the United States should be decided by reference to state employment law, and the Supreme Court may want to consider whether that is how the Westfall Act applies to the President.¹⁷ But even under the framework that applies to other government employees, the motion of the United States for substitution should have been granted. I would rehear the case *en banc* and grant the motion for substitution.

II

As noted above, the panel in this case determined that the “clarification” of *respondeat superior* liability by the D.C. Court of Appeals created a “new legal and factual record” that allowed Attorney General Garland to submit a new certification decision in place of the prior certification by Attorney General Barr. *Carroll*, 148 F.4th at 120. But when it came to the merits, the same panel determined that the clarification of the doc-

¹⁷ Cf. *Trump*, 603 U.S. at 639-40 (“[U]nlike anyone else, the President is a branch of government, and the Constitution vests in him sweeping powers and duties.”); *Nixon*, 457 U.S. at 756 (“Under the Constitution and laws of the United States the President has discretionary responsibilities in a broad variety of areas, many of them highly sensitive. In many cases it would be difficult to determine which of the President’s innumerable ‘functions’ encompassed a particular action.”); *Trump v. Vance*, 591 U.S. 786, 800-01 (2020) (“[T]he Constitution guarantees ‘the entire independence of the General Government from any control by the respective States.’ As we have often repeated, ‘States have no power to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress.’ It follows that States also lack the power to impede the President’s execution of those laws.”) (citations and alteration omitted) (quoting *Farmers’ & Mechanics’ Sav. Bank v. Minnesota*, 232 U.S. 516, 521 (1914); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436 (1819)).

trine of presidential immunity by the Supreme Court of the United States in *Trump v. United States* was so inconsequential that President Trump should not be allowed to revisit that issue. “*Trump* did not announce new law when it observed that presidential immunity is rooted in the structural separation of powers,” the panel said. “It simply reaffirmed long-established principles.” *Carroll*, 151 F.4th at 67. According to the panel, *Trump v. United States* provided no intervening change in law that would allow the President to make an argument about presidential immunity that he could not have raised earlier. *See id.* So the panel decided that it would not reconsider the issue of presidential immunity or its prior determination that President Trump had waived his immunity defense. *See id.* at 65-68.

In fact, the prior determination that President Trump waived the defense was incorrect. But even if he had waived it, the claim that *Trump v. United States* provided no meaningful clarification about the scope of presidential immunity is wrong. If there is one thing on which the proponents and the critics of *Trump v. United States* agree, it is that the decision made a difference to the law of presidential immunity. Another panel of our court has vacated and remanded the decision of a district court because that court did “not appear to have adequately considered whether *Trump v. United States* represented a change in controlling law.” *New York v. Trump*, 158 F.4th 458, 466 (2d Cir. 2025). At least that much should have occurred here.

A

There was no waiver of the immunity defense. President Trump consistently raised the defense of presidential immunity throughout this litigation. He did so in his

initial answer to the complaint,¹⁸ a motion for summary judgment,¹⁹ a motion to amend the answer to raise presidential immunity more specifically if necessary,²⁰ an answer to the amended complaint,²¹ and his appeal.²² The Supreme Court has explained that to the extent that *legislative* immunity may be waived, “waiver can be found

¹⁸ See Answer at 11 ¶ 149, *Carroll v. Trump*, No. 20-CV-7311 (S.D.N.Y. Sept. 15, 2020), ECF No. 14-69 (“The alleged defamatory statements are privileged or protected by one or more immunities . . . under the Constitution of the United States.”).

¹⁹ See Memorandum in Support of Defendant’s Motion for Summary Judgment at 3-4, *Carroll v. Trump*, No. 20-CV-7311 (S.D.N.Y. Dec. 22, 2022), ECF No. 109 (“It is blackletter law that a President is entitled to absolute immunity from damages liability predicated on his official acts. . . . Presidential immunity serves a vital function for the office of the presidency.”) (internal quotation marks omitted); *id.* at 19 (“[I]n accordance with long-established Supreme Court precedent, Defendant is entitled to absolute immunity from damages liability.”) (internal quotation marks omitted).

²⁰ See Reply Memorandum of Law in Further Support of Defendant’s Motion for Summary Judgment at 5, *Carroll v. Trump*, No. 20-CV-7311 (S.D.N.Y. Jan. 19, 2023), ECF No. 122 (“[S]hould this Court accept Plaintiff’s position regarding waiver, Defendant should be permitted to assert presidential immunity as a defense in the interest of justice.”); *see also Carroll*, 680 F. Supp. 3d at 504 (“In the alternative, Mr. Trump argues that the Court should construe his motion for summary judgment as a motion for leave to amend his answer to resurrect the previously waived absolute presidential immunity defense.”).

²¹ See Defendant’s Answer to Plaintiff’s First Amended Complaint, *supra* note 10, at 20-21 ¶ 1 (“[T]he alleged defamatory statements are privileged and protected under the doctrine of presidential absolute immunity.”).

²² See Brief for Appellant at 7, *Carroll v. Trump*, No. 24-644 (2d Cir. Sept. 20, 2024), ECF No. 51.1 (“[T]he doctrine of absolute Presidential immunity bars any liability.”).

only after explicit and unequivocal renunciation of the protection.” *United States v. Helstoski*, 442 U.S. 477, 491 (1979). The Court emphasized that “[t]he ordinary rules for determining the appropriate standard of waiver do not apply” to an immunity designed “to preserve the constitutional structure of separate, coequal, and independent branches of government.” *Id.* Like legislative immunity, presidential “immunity from damages liability predicated on his official acts” is “rooted in the constitutional tradition of the separation of powers.” *Nixon*, 457 U.S. at 749. There is no reason to conclude that the waiver of presidential immunity may be any less explicit and unequivocal than the legislative analogue.

In this case, however, the Second Circuit held that presidential immunity may be waived unintentionally through inadvertence. Our court held that the reference to constitutional immunity in the President’s initial answer was too general to invoke presidential immunity, and the President “unduly delayed in raising presidential immunity as a defense” in a more specific filing. *Carroll v. Trump* (*Carroll 3*), 88 F.4th 418, 429-30 (2d Cir. 2023). The panel opinion adhered to that decision on two grounds. First, the panel concluded that there has been no “intervening change of law” on presidential immunity. *Carroll*, 151 F.4th at 68. Second, the panel concluded that “[e]ven assuming a waiver of presidential immunity must be ‘explicit and unequivocal,’ surely Trump’s concession in *Carroll 3*—that if presidential immunity were waivable, he waived it—meets this standard.” *Id.* at 68 n.12.

By making that second point, the panel opinion relied on a statement of counsel at oral argument in the *Carroll 3* appeal. In response to questioning, counsel for Presi-

dent Trump accepted the counterfactual premises of the question that (1) presidential immunity is subject to ordinary waiver rules applicable to any defense, (2) President Trump was properly denied leave to amend his answer to specify the defense of presidential immunity rather than constitutional immunities generally, and (3) no amended complaint was ever filed such that President Trump never filed a new answer in response. Based on those premises, counsel answered that the statement in President Trump’s initial answer might have been too general for presidential immunity to have been “properly raised at that point.”²³ Counsel immediately added, however, that “given the filing of the amended complaint,” the defense “was properly raised” even under ordinary waiver rules.²⁴

That exchange during oral argument in no way established an “explicit and unequivocal renunciation of the protection” of presidential immunity. *Helstoski*, 442 U.S. at 491. The premise of the question was that the ordinary rules allowing waiver by inadvertence or oversight would apply in this context. But “[t]he ordinary rules for determining the appropriate standard of waiver do not apply.” *Id.* The panel in *Carroll 3* did not believe that anything said at oral argument qualified as an intentional renunciation of presidential immunity. The *Carroll 3* opinion expressly stated that “we express no view on whether Defendant intended to relinquish his presidential immunity defense.” *Carroll 3*, 88 F.4th at 422 n.1. The panel opinion in this case erred by treating the counterfactual statement of counsel at oral argu-

²³ Oral Argument Audio Recording at 10:30, *Carroll v. Trump*, No. 23-1045 (2d Cir. Oct. 23, 2023).

²⁴ *Id.*

ment as an explicit and unequivocal renunciation of presidential immunity. It was not.

B

The most glaring error of the panel opinion, however, was its dismissal of *Trump v. United States* as too insignificant to justify reconsideration of the application of presidential immunity to this case. Everyone except for the panel in this appeal believes that *Trump v. United States* materially affected the law of presidential immunity.²⁵ By “[e]xplaining only that nothing in the Supreme Court’s opinion affects the previous conclusion” about “the bounds of executive authority,” the panel opinion “bypassed what we consider to be important issues bearing on the ultimate issue” of presidential im-

²⁵ See, e.g., *Trump*, 603 U.S. at 657 (Sotomayor, J., dissenting) (arguing that the decision “reshapes the institution of the Presidency”); Saikrishna Bangalore Prakash, *The Fearless Executive, Crime, and the Separation of Powers*, 111 Va. L. Rev. 1, 4 (2025) (explaining that “[i]n *Trump v. United States*, the Supreme Court supplied some answers” to “profound questions about the nature of our government” and effected “a bestowal of a capacious immunity”); Robert Delahunty & John Yoo, *The Presidential Immunity Decision*, 2024 Harv. J.L. & Pub. Pol’y Per Curiam 34, at *1 (2024) (“In *Trump v. United States*, the Supreme Court issued one of the most resounding defenses of executive power in its history.”) (footnote omitted); Shalev Gad Roisman, *Trump v. United States and the Separation of Powers*, 173 U. Pa. L. Rev. Online 33, 33 (2025) (“*Trump v. United States* is a blockbuster decision that has been reviled and celebrated by different quarters of American society.”); Jack Goldsmith, *The Presidency After Trump v. United States*, 2024 Sup. Ct. Rev. 1, 3 (2024) (noting “the novelty in these rulings and their potentially very broad implications”); Akhil Reed Amar, *Something Has Gone Deeply Wrong at the Supreme Court*, The Atlantic (July 2, 2024); Laurence H. Tribe, *The Trump Decision Reveals Deep Rot in the System*, N.Y. Times (July 1, 2024).

munity. *Trump*, 158 F.4th at 469 (internal quotation marks and alterations omitted).

The Supreme Court in *Trump v. United States* recognized that “only a limited number of our prior decisions guide determination of the President’s immunity.” 603 U.S. at 610. It therefore provided important clarifications. The President has immunity for “official actions” but not “unofficial ones.” *Id.* at 617. Yet “some Presidential conduct—for example, speaking to and on behalf of the American people—certainly can qualify as official even when not obviously connected to a particular constitutional or statutory provision,” so presidential immunity “extends to the ‘outer perimeter’ of the President’s official responsibilities, covering actions so long as they are ‘not manifestly or palpably beyond his authority.’” *Id.* at 618 (citation and alteration omitted) (quoting *Blassingame*, 87 F.4th at 13). And the immunity prevents not only liability for official acts but also the use of evidence of official acts even when the jury is ultimately asked to evaluate “charges that purport to be based only on his unofficial conduct.” *Id.* at 631. In that way, the immunity is implicated whenever the “President’s immune conduct” is subjected to “examination by a jury.” *Id.* The government in *Trump* believed that it could introduce evidence of official acts, but the Supreme Court explained that the government’s “proposal threatens to eviscerate the immunity we have recognized” and that “[i]t would permit a prosecutor to do indirectly what he cannot do directly—invite the jury to examine acts for which a President is immune.” *Id.*

The panel in this case decided that when “the D.C. Court of Appeals clarified the standard for *respondeat superior* liability,” the new legal landscape justified the

reconsideration of earlier decisions regarding the scope of the presidential office. *Carroll*, 148 F.4th at 119. It would seem to follow from that premise that when the Supreme Court clarified the scope of presidential immunity, the new legal landscape likewise justified the reconsideration of earlier decisions about the defense of presidential immunity. But the panel insisted that it did not. *See Carroll*, 151 F.4th at 68 (“In the absence of any intervening change of law on this issue, adhering to our prior decision would not work a manifest injustice.”). That was wrong. Indeed, a subsequent panel of our court has recognized that it was wrong. *See Trump*, 158 F.4th at 466 (concluding that a district court “does not appear to have adequately considered whether *Trump v. United States* represented a change in controlling law”).²⁶

²⁶ The panel opinion suggested that the relevant question might be whether *Trump v. United States* represented an intervening change in law on the specific issue of “whether presidential immunity could be waived or forfeited.” *Carroll*, 151 F.4th at 66. That is not the relevant question. When an intervening change in law alters the availability of a claim or a defense, an earlier failure to invoke that claim or defense cannot operate as a waiver. “[T]he mere failure to interpose such a defense prior to the announcement of a decision which might support it cannot prevent a litigant from later invoking such a ground” because “an effective waiver must . . . be one of a ‘known right or privilege.’” *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 143 (1967) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). If *Trump v. United States* authorized a broader defense of presidential immunity than was previously available, the President cannot be said to have waived that defense by failing to raise it before *Trump v. United States* was decided. Just as *Trump v. United States* did not specifically address the issue of waiver, it did not address what qualifies as “good cause” for a delay in filing a notice of removal under 28 U.S.C. § 1455(b)(1). But our court held that a district court did “not appear to have adequately con-

The decision in *Trump v. United States* makes clear that President Trump has a serious claim that the district court conducted the trial in this case in violation of presidential immunity. The Supreme Court explained that “most of a President’s public communications are likely to fall comfortably within the outer perimeter of his official responsibilities.” *Trump*, 603 U.S. at 629. To the extent that a public communication would fall outside those responsibilities, it would be because there may “be contexts in which the President, notwithstanding the prominence of his position, speaks in an unofficial capacity—perhaps as a candidate for office or party leader.” *Id.* To distinguish those contexts, a court must engage in “the classification of each communication” based on, for example, “who was involved in transmitting the electronic communications” or “what else was said contemporaneous to the excerpted communications.” *Id.* at 630. This is a “fact specific” inquiry that entails an “objective analysis of ‘content, form, and context,’” *id.* at 629 (quoting *Snyder v. Phelps*, 562 U.S. 443, 453 (2011)), and a recognition that “there is not always a clear line between the President’s personal and official

sidered whether *Trump v. United States* represented a change in controlling law that could support a finding of good cause.” *Trump*, 158 F.4th at 466-67. The decision in *Trump v. United States* could support a finding of good cause because it altered the scope of presidential immunity—and therefore provided broader grounds for removal than were previously available. The principle is that a defendant cannot be faulted for failing to raise a ground for removal that was not previously available. In this case, the decision in *Trump v. United States* provided a broader defense of presidential immunity than was previously available, but the panel opinion faulted the President for failing to raise a defense based on that decision before the decision was issued.

affairs,” *id.* (alteration omitted) (quoting *Mazars*, 591 U.S. at 868).

Neither the district court nor our court engaged in the contextual analysis that the Supreme Court has said is required. Instead, the district court said that a “comment about government action, public policy, or even an election is categorically different than a comment about an alleged sexual assault that took place roughly twenty years before the president took office.” *Carroll*, 498 F. Supp. 3d at 453. According to the district court, such a comment can never be said in an official capacity because “President Trump’s views on the plaintiff’s sexual assault allegation may be interesting to some, but they reveal nothing about the operation of government.” *Id.* The Supreme Court, however, has explained that the President is “expected to comment on those matters of public concern that may not directly implicate the activities of the Federal Government.” *Trump*, 603 U.S. at 629. His “speaking to and on behalf of the American people certainly can qualify as official even when not obviously connected to a particular constitutional or statutory provision,” *id.* at 618 (citation omitted), and “even when no specific federal responsibility requires his communication,” *id.* at 627.

At a minimum, the President should be able to argue that the newly clarified doctrine of presidential immunity precludes liability in this case. The district court performed an acontextual and unpersuasive analysis, and the Second Circuit refused even to consider the arguments. It cannot be said that the same arguments were previously available. *Cf. In re Vivendi, S.A. Sec. Litig.*, 838 F.3d 223, 243 (2d Cir. 2016) (“[T]he intervening authority must have established an argument that was ‘not

known to be available’ to the party seeking to excuse waiver at the first opportunity that the party had to raise the argument.”) (quoting *Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 135 (2d Cir. 2014)). The decision in *Trump v. United States* allowed the President to argue that his “public communications” fall “within the outer perimeter of his official responsibilities” even “when no specific federal responsibility requires his communication.” *Trump*, 603 U.S. at 627-29. And it allowed him to argue that he has a defense of presidential immunity based on the use of evidence of such official acts regardless of the ultimate reason for liability.²⁷ The intervening change in law that supported these arguments—not some development in waiver doctrine—required reconsideration of the presidential immunity defenses. See *supra* note 26.

President Trump raises strong arguments based on *Trump v. United States*. The jury in this case imposed

²⁷ Compare *Trump*, 603 U.S. at 631 (“If official conduct for which the President is immune may be scrutinized to help secure his conviction, even on charges that purport to be based only on his unofficial conduct, the intended effect of immunity would be defeated. . . . Use of evidence about such conduct, even when an indictment alleges only unofficial conduct, would thereby heighten the prospect that the President’s official decisionmaking will be distorted.”) (internal quotation marks omitted), with *United States v. Nixon*, 418 U.S. 683, 709 (1974) (“[I]t is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.”); *Trump*, 603 U.S. at 656 (Barrett, J., concurring in part) (“[T]he rules of evidence are equipped to handle that concern on a case-by-case basis. . . . I see no need to depart from that familiar and time-tested procedure here.”); *id.* at 681 (Sotomayor, J., dissenting) (arguing that the majority’s “draconian approach to official-acts evidence” is “extraordinary” and “has no basis in law”).

liability for statements made in a press release from the White House Press Office²⁸ and made by the President in a press briefing on the south lawn of the White House.²⁹ The officials and entities involved in distributing the statements—as well as the context, involving direct inquiries to the White House and other comments on matters of public policy—indicate that the President was speaking in an official capacity. Even if he were not, the records of the statements—documents issued from the White House Press Office—appear to be evidence of official acts.

At the trial, counsel for Carroll emphasized the official character of the statements as evidence of the harm Carroll had suffered. In her opening statement, counsel said that the President was “[s]peaking from the White House” and “used the most famous platform on earth to lie about what he had done.” App’x 1100. “He said these things from the White House. The White House, a place where presidents have signed laws, declared wars, decided the fate of the nation.” *Id.* In her summation, she said that the President had “attacked her integrity and her honesty” while “[w]ielding his position as president.” *Id.* at 1781. Carroll’s complaint alleged that “the most powerful man on the planet” used “that platform” of the presidency “to attack her integrity.” *Id.* at 71-72. She won summary judgment on the ground that the “statements, *especially when issued by the sitting President* and broadcast widely, would inevitably tend to expose Ms. Carroll to hatred and contempt or to induce an

²⁸ App’x 1887; *see* <https://perma.cc/K8LC-TWBG>.

²⁹ App’x 584-96; *see* <https://perma.cc/3A8E-V97R>.

unsavory opinion of her in the minds of a substantial number of people in the community.”³⁰

These statements indicate that the jury was invited to scrutinize and to punish official acts of the President.³¹ But no court has even considered that question. At the very least, the President is entitled to have a court evaluate whether and to what extent this trial implicated presidential immunity as the Supreme Court elaborated the doctrine in *Trump v. United States*. The panel opinion refused to conduct any analysis on the application of presidential immunity. I would rehear the case *en banc* in order to do so.

C

The President was denied a fair trial in yet another respect. The district court imposed a judgment of \$87 million in damages for allegedly defamatory statements that President Trump made to reporters at the White House in June 2019. But the district court decided that President Trump was not even entitled to a trial on whether those statements were defamatory or spoken with actual malice. It denied him that trial because the

³⁰ *Carroll v. Trump*, 690 F. Supp. 3d 396, 405 (S.D.N.Y. 2023) (alteration omitted) (emphasis added) (quoting Memorandum of Law in Support of Plaintiff’s Motion for Partial Summary Judgment at 17, *Carroll v. Trump*, No. 20-CV-7311 (S.D.N.Y. Aug. 2, 2023), ECF No. 190).

³¹ *See Carroll v. Trump*, 731 F. Supp. 3d 626, 634-35 (S.D.N.Y. 2024) (upholding the award of punitive damages because “there was evidence that Mr. Trump used the office of the presidency—the loudest ‘bully pulpit’ in America and possibly the world—to issue multiple statements castigating Ms. Carroll” and because “[t]he jury could have found that Mr. Trump wielded his position as arguably the most powerful and famous man in the world to broadcast his lies to millions of dedicated followers”).

district court had held a separate trial over whether different statements made via social media in October 2022 were defamatory and spoken with actual malice. Because of that other trial concerning the 2022 statements, the district court “ruled that Trump was barred from disputing . . . whether his June 2019 statements were false or defamatory, and whether he acted with actual malice in making those statements.” *Carroll*, 151 F.4th at 64. The district court instructed the jury that the President was guilty of defamation for the 2019 statements and held a trial limited to how much he should be required to pay in damages. The jury returned a record-setting damages award.

That is not how trials are supposed to work. Even putting aside the problems with the first trial,³² that trial at most could have established that the 2022 statements were defamatory and said with actual malice. The district court nevertheless concluded that the “truth or falsity of Mr. Trump’s 2019 statements” depends “on whether Ms. Carroll lied about Mr. Trump sexually assaulting her,” so “[t]he jury’s finding that she did not therefore is binding in this case and precludes Mr. Trump from contesting the falsity of his 2019 statements.” *Carroll*, 690 F. Supp. 3d at 406. But the jury did not make that finding. The accusation to which Pres-

³² The district court in the first trial unjustifiably excluded evidence of President Trump’s state of mind, allowed the introduction of propensity evidence to establish liability, and overrode the mandate of Rule 403 to exclude stale witness testimony. “The result was a jury verdict based on impermissible character evidence and few reliable facts. No one can have any confidence that the jury would have returned the same verdict if the normal rules of evidence had been applied.” *Carroll*, 141 F.4th at 386 (Menashi, J., dissenting from the denial of rehearing en banc).

ident Trump responded in 2019 was the publication of “an excerpt from Ms. Carroll’s then-forthcoming book, in which Ms. Carroll wrote that Mr. Trump raped her.” *Carroll v. Trump*, 124 F.4th 140, 151 (2d Cir. 2024). The jury in the first trial concluded that President Trump did not rape her. As the panel opinion recounts, “[t]he jury answered the first question [on the special verdict form]—whether Trump raped Carroll—in the negative.” *Carroll*, 151 F.4th at 70. The jury found President Trump liable only for sexual abuse, and both the district court and our court “acknowledged that the jury could conceivably have found that Trump sexually abused Carroll only through nonconsensual kissing or pulling down her tights.” *Id.*

But the district court, on its own, determined “that such a finding would be inconsistent with the jury’s \$2 million compensatory damages award.” *Id.* So the district court decided that “the jury *implicitly* found[] that Mr. Trump deliberately and forcibly penetrated Ms. Carroll’s vagina with his fingers.” *Carroll v. Trump*, 683 F. Supp. 3d 302, 307 (S.D.N.Y. 2023) (emphasis added). In the second trial, therefore, “[t]he district court told the jury that it must accept as true that ‘Mr. Trump sexually abused Ms. Carroll by forcibly inserting his fingers into her vagina without her consent.’” *Carroll*, 151 F.4th at 69 (quoting App’x 1851). No jury ever made that finding—and, more important, a similar chain of inferences from the verdict could as easily lead to the conclusion that the initial jury determined that Carroll was *not* telling the truth about being raped because that jury determined that she was *not* raped.

The panel opinion defended the decision of the district court to deny President Trump a trial as an appli-

cation of Rule 49(a) of the Federal Rules of Civil Procedure. According to the panel opinion, because the special verdict form in the first trial “did not request the jury to make a finding on the specific sexual conduct that he committed,” when following trial President Trump argued “that the damages were excessive because the jury could have found that he had engaged in less serious sexual acts, the district court made a finding on this issue.” *Carroll*, 151 F.4th at 70 (citation omitted). And its finding was “entitled to preclusive effect” in the second defamation case. *Id.* at 71.

It is true that following the first trial the district court needed to resolve a motion for “a new trial or remittitur” based on the damages award. *Carroll*, 683 F. Supp. 3d at 324. But no court has ever given preclusive effect to a Rule 49(a) finding made to resolve a remittitur motion. That is because Rule 49(a) has no application under these circumstances. Rule 49(a) “was designed to have the court supply an omitted subsidiary finding which would complete the jury’s determination or verdict.” *Kinnel v. Mid-Atl. Mausoleums, Inc.*, 850 F.2d 958, 965 (3d Cir. 1988); see *Kerman v. City of New York*, 374 F.3d 93, 120 (2d Cir. 2004) (“Rule 49 permits the trial court, in some circumstances, to supply an omitted finding that would *complete a jury’s verdict*.”) (emphasis added). When, for example, “no individual elements of a misrepresentation cause of action were specifically framed for the jury to answer, . . . the district court could ‘fill in’ those subsidiary elements when the jury returned a verdict” finding that the defendant committed misrepresentation. *Kinnel*, 850 F.2d at 965. “Subsumed within that ultimate jury finding were the five elements of misrepresentation . . . each of which could be deemed to have been supplied by the court in

accordance with the jury's judgment once the jury's ultimate verdict was known." *Id.* at 965-66.

In this case, the district court did not make its finding to complete the jury's verdict. When President Trump made the motion for remittitur, the verdict was already complete. No inferences were necessary. "Remittitur is 'the process by which a court compels a plaintiff to choose between reduction of an excessive verdict and a new trial.'" *Cross v. N.Y.C. Transit Auth.*, 417 F.3d 241, 258 (2d Cir. 2005) (quoting *Earl v. Bouchard Transp. Co.*, 917 F.2d 1320, 1328 (2d Cir. 1990)). To determine whether remittitur is appropriate, "a district court reviews the evidence presented at trial in support of the challenged damage award and compares the award to other New York cases in which evidence of similar injuries was presented." *Presley v. USPS*, 317 F.3d 167, 173 (2d Cir. 2003). That involves a comparison of the evidentiary records in comparable cases.³³ But it does not involve entering new factual findings on behalf of the jury under Rule 49(a). No such findings would be subsidiary to a jury verdict. And because remittitur is a question of New York state law, *see Presley*, 317 F.3d at 173 (citing N.Y. C.P.L.R. § 5501(c)), it would not make sense for a court to rely on a federal rule to conduct the analysis.

In this case, no jury ever made a finding about digital penetration, and such a finding was not subsidiary to any verdict entered by any jury. Instructing one jury that it must accept a fact that was not necessarily decided in a previous trial—as the district court did here—is legally erroneous. For the purposes of issue preclu-

³³ *See, e.g., Nivar v. Sadler*, No. 13-CV-7141, 2016 WL 3647957, at *4-6 (S.D.N.Y. July 1, 2016); *Szabo v. Rodriguez*, No. 09-CV-2048, 2012 WL 6161936, at *3-4 (E.D.N.Y. Dec. 11, 2012).

sion, “[w]hen a fact is not *necessarily* determined in a former trial, the possibility that it *may* have been does not prevent re-examination of that issue.” *United States v. Hamilton*, 118 F.4th 655, 660 (5th Cir. 2024) (emphasis added) (quoting *United States v. Brackett*, 113 F.3d 1396, 1398 (5th Cir. 1997)). The “inquiry does not focus on what the jury *may* have decided, but rather on what it *must* have decided.” *Id.* (quoting *United States v. Sarabia*, 661 F.3d 225, 232 (5th Cir. 2011)).³⁴ Here, the district court gave preclusive effect to an issue that was neither actually decided by the jury nor essential to the previous judgment. That was an error.

And in this case, the failure to follow the law of issue preclusion raises Seventh Amendment concerns. The conclusion of the district court about the implicit factual finding invaded the province of the jury. “[T]he drawing of legitimate inferences from the facts” is one of the “jury functions, not those of a judge.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The district court “could not itself determine the issues of fact . . . for this would cut off the plaintiff’s unwaived right to have the issues of fact determined by a jury.” *Balt. & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 658 (1935). “While it is correct practice for the judge to instruct in an absolute form on an admitted state of the case, he is not authorized to take from the jury the right of weigh-

³⁴ See *Postlewaite v. McGraw-Hill*, 333 F.3d 42, 48 (2d Cir. 2003) (“[I]n order for a judgment to be preclusive, the issue in question must have been actually decided, and its determination must have been essential to the judgment. If an issue was not actually decided in the prior proceeding, or if its resolution was not necessary to the judgment, its litigation in a subsequent proceeding is not barred by collateral estoppel.”) (citation omitted).

ing the evidence bearing on controverted facts.” *Mut. Life Ins. Co. v. Snyder*, 93 U.S. 393, 394-95 (1876). The district court here made its own inference based on a debatable record and gave it preclusive effect in a new proceeding. The district court thereby acted as the jury in addition to the judge.³⁵

D

The ambiguous conclusion of the first jury with respect to the truth or falsity of Carroll’s accusation and President Trump’s denial was not the only problem with imposing automatic liability on President Trump without a trial. The district court further determined that “[t]he verdict in *Carroll II* established also that Mr. Trump’s 2019 statements were made with actual malice.” *Carroll*, 690 F. Supp. 3d at 407.

That makes no sense. Actual malice means that the defendant made the statement “with knowledge that it was false or with reckless disregard of whether it was false or not.” *Church of Scientology Int’l v. Behar*, 238 F.3d 168, 174 (2d Cir. 2001) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964)). It must be established with “clear and convincing evidence” that

³⁵ The panel opinion asserted that the truth or falsity of President Trump’s 2019 statements “did not turn on the specific sexual act he committed.” *Carroll*, 151 F.4th at 69 n.15. Carroll accused him of rape. The first jury determined that he did not commit rape but a sexual abuse. The panel opinion identified these 2019 statements: “‘Shame on those who make up false stories of assault to try to get publicity for themselves,’ ‘I would like to thank Bergdorf Goodman for confirming that they have no video footage of any such incident, because it never happened,’ and ‘[f]alse accusations diminish the severity of real assault.’” *Id.* at 69 n.14. The truth or falsity of these statements turns on whether the particular accusation that Carroll made—of rape—was true or false.

“the defendant in fact entertained serious doubts as to the truth of his publication.” *Id.* Because the showing depends on the state of mind of the speaker at the time of publication, we have specifically held that “information acquired after the publication of defamatory material cannot be relevant to the publisher’s state of mind of his alleged malice at the time of publication.” *Herbert v. Lando*, 781 F.2d 298, 306 (2d Cir. 1986). In violation of these principles, the district court held that a determination that President Trump spoke with actual malice in 2022 necessarily means that he spoke with actual malice when making a different statement after just hearing the accusation *three years earlier*.³⁶ It is “self-evident” that any verdict about a defendant’s state of mind in 2022 does not predetermine a verdict about his state of mind three years earlier. *Herbert*, 781 F.2d at 306.

The panel opinion did not even attempt to defend the decision of the district court. The panel opinion instead endorsed “the district court’s alternative holding that Carroll satisfied her burden at summary judgment on the element of actual malice.” *Carroll*, 151 F.4th at 71. But the reasoning of the panel opinion on this point was no more defensible. The panel opinion held that President Trump “acted with, at a minimum, reckless disregard for the truth” because he did not undertake an independent investigation of Carroll’s accusations before issuing a denial:

³⁶ See *Carroll*, 690 F. Supp. 3d at 408 (“Accordingly, as Ms. Carroll argues, ‘no reasonable person could believe that Mr. Trump acted with actual malice in October 2022, but lacked it in June 2019.’”) (alterations omitted) (quoting Memorandum of Law in Support of Plaintiff’s Motion for Partial Summary Judgment, *supra* note 30, at 20).

In his deposition testimony, Trump admitted that prior to making his 2019 statements, he never read Carroll's book or the *New York* magazine publication, never contacted Bergdorf Goodman's, never did any research on Carroll, and never had anyone working for him research Carroll. He also admitted that, before issuing his 2019 statements, he had no knowledge of Carroll's book deal, financial circumstances, or political affiliation.

Id. at 71-72. None of that established actual malice. "The reckless conduct needed to show actual malice 'is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing,' but by whether there is sufficient evidence 'to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.'" *Church of Scientology*, 238 F.3d at 174 (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)). President Trump was not required to read Carroll's book before speaking in order to avoid liability for defamation. Carroll instead was required to identify clear and convincing evidence that President Trump spoke without subjectively "believing the truth of the publication." *Karedes v. Ackerley Grp., Inc.*, 423 F.3d 107, 114 (2d Cir. 2005) (quoting Sack on Defamation: Libel, Slander, and Related Problems § 5.5.1.1 (3d ed. 2005)).

In every other defamation case, the actual malice standard raises "the plaintiff's burden of proof to an almost impossible level." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 771 (1985) (White, J., concurring in the judgment). In the first trial against President Trump, however, "the district court excluded evidence of the defendant's contemporaneous state of

mind, ensuring that the plaintiff easily met the actual malice standard.” *Carroll*, 141 F.4th at 368 (Menashi, J., dissenting from the denial of rehearing en banc). In this case, the district court went even further—imposing liability for actual malice without any evidence or any trial at all. It was not a fair judicial proceeding.

E

On top of the errors already discussed, the panel opinion upheld an unlawful and grossly excessive award of damages. The damages award in this case included (1) damages that were unauthorized under New York law, (2) compensatory damages that were duplicative, and (3) an overall award that was record-breakingly excessive.

1

In New York, a showing of actual malice “is insufficient by itself to justify an award of punitive damages, because that malice focuses on the defendant’s state of mind in relation to the truth or falsity of the published information.” *Prozeralik v. Cap. Cities Commc’ns, Inc.*, 82 N.Y.2d 466, 479 (1993). The “common-law malice” that “would allow an award of punitive damages” involves “the defendant’s mental state in relation to the plaintiff and the motive in publishing the falsity.” *Id.* at 479-80. For an award of punitive damages, the plaintiff must establish that the statements were made with common-law malice so that those damages serve “to punish a person for outrageous conduct which is malicious, wanton, reckless, or in willful disregard for another’s rights.” *Id.* at 479-80 (quoting *Vassiliades v. Garfinckel’s*, 492 A.2d 580, 593 (D.C. 1985)).

In this case, “the district court instructed the jury that ‘[a] statement is made maliciously . . . if it is made with a deliberate intent to injure or out of hatred, ill will or spite, or in willful, wanton, or reckless disregard of another’s rights.’” *Carroll*, 151 F.4th at 77 (quoting App’x 1857). President Trump requested that the jury be instructed that, to award punitive damages, the malicious intent to injure must be the speaker’s sole motivation. The district court rejected that request,³⁷ and the panel opinion held that it was right to do so. According to the panel opinion, the New York courts impose a requirement that “common law malice must be ‘the one and only cause for the publication’” only “to overcome a conditional or qualified privilege against a defamation suit.” *Carroll*, 151 F.4th at 75-76 (quoting *Lieberman v. Gelstein*, 80 N.Y.2d 429, 439 (1992)).

President Trump’s position has support in the case law,³⁸ and in any event the panel opinion was wrong that no qualified privilege applied in this case. When a

³⁷ See *Carroll*, 731 F. Supp. 3d at 631 (“[T]he persuasive evidence is that New York’s highest court would reject defendant’s contention that the Court should have instructed the jury that it could award punitive damages only if it found that Mr. Trump was motivated *solely* by a desire to injure Ms. Carroll.”).

³⁸ See, e.g., *Morsette v. The Final Call*, 309 A.D.2d 249, 256 (1st Dep’t 2003) (“[A] triable issue of common-law malice is raised only if a reasonable jury could find that the speaker was *solely* motivated by a desire to injure plaintiff, and . . . there must be some evidence that the animus was the one and only cause for the publication.”) (internal quotation marks omitted); *Verdi v. Dinowitz*, 204 A.D.3d 627, 627 (1st Dep’t 2022) (“The pleadings allege that the defamatory statements were made with political and racial motivations, as well as a desire to shift blame, rather than, as required for punitive damages in a defamation claim, that defendant was motivated solely by malice.”).

speaker defends himself against an accusation of wrongful conduct, a qualified privilege arises that allows liability for defamation “only if a jury could reasonably conclude that ‘malice was the one and only cause for the publication.’” *Lieberman*, 80 N.Y.2d at 439 (quoting *Stukuls v. New York*, 42 N.Y.2d 272, 282 (1977)). As President Trump explained to the district court, “in these types of circumstances, New York courts have recognized a qualified privilege of reply when accused of charges of unlawful activity.”³⁹ That is correct: “New York courts recognize a qualified privilege of reply” based on the speaker’s “right to defend himself” from accusations of wrongful conduct. *Giuffre v. Dershowitz*, 410 F. Supp. 3d 564, 574 (S.D.N.Y. 2019). One of our colleagues has explained the privilege this way:

[A] person also has a right to defend himself or herself from charges of unlawful activity. An individual is privileged to publish defamatory matter in response to an attack upon his or her reputation; the speaker is given more latitude in such a situation than if the statements were not provoked.

Id. (alteration omitted) (quoting Sack on Defamation: Libel, Slander, and Related Problems § 9.2.1 (5th ed. 2017)). And the Second Restatement of Torts puts it this way:

A conditional privilege exists . . . when the person making the publication reasonably believes that his interest in his own reputation has been unlawfully in-

³⁹ Memorandum of Law in Support of Defendant’s Motion for Summary Judgment at 34, *Carroll v. Trump*, No. 20-CV-7311, 2022 WL 21889346 (S.D.N.Y. Dec. 22, 2022), ECF No. 109 (citing *Kane v. Orange Cnty. Pubs.*, 232 A.D.2d 526, 527 (2d Dep’t 1996)).

vaded by another person and that the defamatory matter that he publishes about the other is reasonably necessary to defend himself. . . . Thus the defendant may publish in an appropriate manner anything that he reasonably believes to be necessary to defend his own reputation against the defamation of another, including the statement that his accuser is an unmitigated liar.

Restatement (Second) of Torts § 594 cmt. k (1977). The “general rule” in New York is that a defamation defendant “had the right to repel the attack upon it and to retort upon its assailant, in case such retort was a necessary part of its defense or fairly arose out of the charges made against it.” *Collier v. Postum Cereal Co.*, 150 A.D. 169, 178 (1st Dep’t 1912). The privilege of “reply to defamatory attack” is “available to one who has been defamed in the first instance, and who, in response to the attack, responds in kind.” *Shenkman v. O’Malley*, 2 A.D.2d 567, 574 (1st Dep’t 1956). The privilege means that “[t]he defendant plainly had the right to characterize the plaintiff’s charges as false, and mere vehemence, even exaggerated statement, will not as matter of law destroy the privilege or necessarily present a question of fact.” *Collier*, 150 A.D. at 178. The privilege also entails “the right to impugn the motives of its assailant,” *id.*, because the accuser has placed those motives at issue.⁴⁰

⁴⁰ See *Shenkman*, 2 A.D.2d at 574 (“One who makes a public attack upon another subjects his own motives to discussion. It is a contradiction in terms to say that the one attacked is privileged only to speak the truth and not to make a counterattack, or that legitimate self-defense consists only in a denial of the charge or a statement of what is claimed to be the truth respecting its subject-

The qualified privilege of reply is well-established.⁴¹ In this case, President Trump responded to an accusation that he committed rape by denying the charge, by stating “that his accuser is an unmitigated liar,” Restatement (Second) of Torts § 594 cmt. k, and by “impugn[ing] the motives of [his] assailant,” *Collier*, 150 A.D. at 178. Even putting aside presidential immunity,⁴² that was a qualifiedly privileged communication.⁴³

The district court rejected the application of the privilege of reply on the ground that “any such claim of a qualified privilege . . . depends on weighing the evidence of Mr. Trump’s motives for making the allegedly defamatory statements.” *Carroll v. Trump*, 680 F. Supp. 3d 491, 516 n.103 (S.D.N.Y. 2023). That was

matter. One in self-defense is not confined to parrying the thrusts of his assailant. Of course, the counterattack must not be unrelated to the charge, but surely the motives of the one making it are pertinent.”) (quoting *Collier*, 150 A.D. at 178).

⁴¹ See *Kane*, 232 A.D.2d at 527 (“[S]ince the open letter was the funeral director’s response to unfavorable publicity against him—publicity concededly generated ‘with the cooperation of plaintiffs’—it was covered by a qualified privilege.”); *Fowler v. New York Herald Co.*, 184 A.D. 608, 611 (1st Dep’t 1918) (explaining that when “he was denounced by the plaintiff publicly as an imposter, the defendant’s natural course” was to mount a defense “even if such defense called forth a revelation or explanation of the infirmities or peculiarities of the plaintiff” and that “[t]he defendant had a qualified privilege so to do”); see also *Phifer v. Foe*, 443 P.2d 870, 871 (Wyo. 1968) (“After an attack on a defendant by a plaintiff, defendant has a right to defend himself against plaintiff’s charges, even if he defames the plaintiff in so doing.”); J.A. Bryant, *Libel and Slander: Qualified Privilege of Reply to Defamatory Publication*, 41 A.L.R.3d 1083 (Originally published in 1972).

⁴² See Restatement (Second) of Torts § 591 cmts. a-b.

⁴³ See *id.* § 594 cmt. k.

wrong. Once the qualified privilege attaches, the question of whether the defendant exceeded the privilege is submitted to the jury: “Whether the defendant in its publication *went beyond its legal privilege and should be charged with malice* was a question of fact for the jury, both in determining defendant’s liability and also in determining the amount of punitive damages which should be awarded in case liability were found.” *Fowler*, 184 A.D. at 611 (emphasis added).⁴⁴

The panel opinion held that the district court did not need to instruct the jury that common-law malice must have been the sole reason for the allegedly defamatory statement. But that is *how* the jury must determine whether the defendant exceeded the privilege. As the panel opinion explained, “if ‘the defendant’s statements were made to further the interest protected by the privilege,’ it does not matter if the ‘defendant *also* despised plaintiff.’” *Carroll*, 151 F.4th at 76 (quoting *Liberman*, 80 N.Y.2d at 439). It stands to reason that a speaker would have animosity toward someone who accused him of criminal wrongdoing.

Because the jury was not instructed that it needed to “conclude that malice was the one and only cause for the publication,” *Liberman*, 80 N.Y.2d at 439 (internal quotation marks omitted), the jury instructions were erro-

⁴⁴ See also *Mencher v. Chesley*, 193 Misc. 829, 832 (N.Y. Sup. Ct. 1948) (“Plaintiff contends . . . that the defendant in any event went beyond his legal privilege in repelling the attack and that consequently his privilege affords him no protection. The court does not agree with plaintiff’s contention. It seems that the reply made by the defendant was relevant to the issues made by plaintiff, and that the question whether the defendant went beyond his privilege is one of fact for the jury to determine, and that it cannot be disposed of as a matter of law.”).

neous and the award of damages—especially the punitive damages award—was improper.⁴⁵

2

In addition to the unauthorized damages, this case involved a duplicative compensatory damages award. The jury was instructed that it should calculate compensatory damages in two steps. “First, it was asked to assign a dollar amount to the ‘damages attributable to the June 21 and 22 statements,’” excluding something called “the reputation repair program.” *Carroll*, 151 F.4th at 79 (emphasis omitted) (quoting App’x 1856). “Second, it was asked to fill in the amount of damages, if any, that it awarded ‘for the reputation repair program.’” *Id.* (emphasis omitted) (quoting App’x 1856). “The jury awarded Carroll \$7.3 million in compensatory damages other than for the reputation repair program and \$11 million for the reputation program itself.” *Id.*

In other words, the jury awarded compensatory damages both for the cost attributable to the harm and for the cost of repairing the harm and thereby making the plaintiff whole. The panel opinion held that this was permissible because “there is a difference between the costs required to *repair* an individual’s reputation and the costs arising from the damaged reputation itself.” *Id.* at 81.

No, there is not. These are two ways of measuring the same harm. It is well-established throughout the law that “compensatory damages may be measured by *either* (1) cost of repair or (2) diminution in value.” *Lichtefeld v. Mactec Eng’g & Consulting, Inc.*, 239 F.

⁴⁵ Nor was the privilege defeated by a showing of actual malice. See *supra* Part II.D.

App'x 97, 102 (6th Cir. 2007) (emphasis added).⁴⁶ It cannot be both. “A basic principle of compensatory damages is that an injury can be compensated only once.” *Bender v. City of New York*, 78 F.3d 787, 793 (2d Cir. 1996).

The district court believed that the jury awarded “\$11 million in *reputational* and \$7.3 million in *non-reputational* compensatory damages.” *Carroll*, 731 F. Supp. 3d at 634 (emphasis added). But that led to President Trump’s argument that “the \$7.3 million award was limited to emotional distress damages.” *Carroll*, 151 F.4th at 80. The panel opinion rejected that argument on the ground that the \$7.3 million provided compensation for “*other* reputational harms—such as the loss of Carroll’s career at *Elle*, the reduction in free-

⁴⁶ See, e.g., *Scribner v. Summers*, 138 F.3d 471, 472 (2d Cir. 1998) (“Under New York law, ‘the proper measure of damages for permanent injury to real property is the lesser of the decline in market value and the cost of restoration.’”) (quoting *Jenkins v. Etlinger*, 55 N.Y.2d 35, 39 (1982)); *Rainbow Travel Serv., Inc. v. Hilton Hotels Corp.*, 896 F.2d 1233, 1242-43 (10th Cir. 1990) (“Awarding [the plaintiff] both the full extent of injury to its good will, however, *and* the means to repair that damage amounts to a double recovery.”); *Ostano Commerzanstalt v. Telewide Sys., Inc.*, 880 F.2d 642, 649 (2d Cir. 1989) (“[T]he plaintiffs cannot recover both benefit-of-the-bargain damages for breach of contract and warranty *and* out-of-pocket expenses for fraud. Such a double recovery would put them in a better position than they would have been in had the contract been satisfactorily performed.”); *O’Brien Bros. v. The Helen B. Moran*, 160 F.2d 502, 505 (2d Cir. 1947) (“The damages sustained by an automobile in a collision may be established by showing the reasonable cost of the repairs necessary to restore it to its former condition, although the general rule is that the measure of damages to personal property is the difference between its market value immediately before and immediately after the injury.”) (quoting *Gass v. Agate Ice Cream, Inc.*, 264 N.Y. 141, 143 (1934)).

lance work, and the cost of increased security measures.” *Id.* But the “reputation repair program” was expressly designed to compensate Carroll for those harms. The expert report providing the basis for the program describes her career at *Elle*,⁴⁷ her freelance work,⁴⁸ and the harms to those interests.⁴⁹ The expert testified that the “reputation repair program” aimed to be “an appropriate means of removing any harm that would have been caused by the June 24th statement.”⁵⁰ And Carroll’s attorneys described the program as “a series of public relations steps necessary to fix the harm that Donald Trump’s defamatory statements caused.”⁵¹ There is no evident distinction between the cost of reputation repair and the cost of a damaged reputation.

⁴⁷ See, e.g., Expert Report of Professor Ashlee Humphreys, PhD, at 4, *Carroll v. Trump*, No. 20-CV-7311 (S.D.N.Y. Aug. 2, 2023), ECF No. 192-9 (“Once a popular advice columnist at *Elle* Magazine, Ms. Carroll had invested many years in forming and maintaining a person brand as a wise, personable, and insightful truth-seeker. As a celebrated writer, she had a broad readership, reaching about 4.5 million *Elle* readers.”).

⁴⁸ See, e.g., *id.* at 6 (“Her work was featured in numerous major publications including *Rolling Stone*, *GQ*, and *Playboy*.”).

⁴⁹ See, e.g., *id.* at 45 (“One in four *Elle* readers being receptive to [Trump’s] Statements is a considerable portion of readers to critically damage Ms. Carroll’s brand as a columnist for the magazine.”).

⁵⁰ Deposition Transcript of Ashlee Humphreys at 12:5-9, *Carroll v. Trump*, No. 20-CV-7311 (S.D.N.Y. Dec. 13, 2023), ECF No. 237-2.

⁵¹ Trial Transcript of 1/26/24, at 708:17-19, *Carroll v. Trump*, No. 20-CV-7311 (S.D.N.Y. Feb. 27, 2024), ECF No. 301.

On top of the duplicative compensatory damages award of \$18.3 million, the jury awarded \$65 million in punitive damages, which the district court refused to remit. *See Carroll*, 731 F. Supp. 3d at 628. That resulted in a ratio of 3.6:1—an amount so “grossly excessive,” *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003), that even the panel opinion acknowledged that it “approaches the upper limit of reasonableness,” *Carroll*, 151 F.4th at 84. And that is before one recognizes that the compensatory damages award was inflated with a double recovery and the damages award was based on insufficient jury findings under New York law.

“[T]he Constitution imposes a substantive limit on the size of punitive damages awards.” *Honda Motor Co. v. Oberg*, 512 U.S. 415, 420 (1994). In particular, “[t]he Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor.” *State Farm*, 538 U.S. at 416. “Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.” *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996). “To the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property.” *State Farm*, 538 U.S. at 417.

Apart from that constitutional guarantee, our court purports to “exercise relatively stringent control over the size of punitive awards in order to ensure that such damages are ‘fair, reasonable, predictable, and propor-

tionate,’ to avoid extensive and burdensome social costs, and to reflect the fact that punitive awards are imposed without the protections of criminal trials.” *Turley v. ISG Lackawanna, Inc.*, 774 F.3d 140, 164 (2d Cir. 2014) (quoting *Payne v. Jones*, 711 F.3d 85, 93 (2d Cir. 2013)). Under that standard, “a degree of excessiveness less extreme than ‘grossly excessive’ will support remanding for a new trial or remittitur of damages.” *Id.* (internal quotation marks omitted). We have said that we exercise strict “supervisory powers” over such awards, *id.*, such that “the degree of discretion enjoyed by trial courts in these matters is relatively narrow,” *id.* (quoting *Payne*, 711 F.3d at 100).

So much for that. The panel opinion in this case abdicated our purported supervisory responsibility. We previously claimed that when “the compensatory damages award is imprecise because of the nature of the injury and high when compared with similar cases, ‘a lesser ratio, perhaps *only equal to compensatory damages*, can reach the outermost limit of the due process guarantee.’” *Id.* at 165 (emphasis added) (quoting *State Farm*, 538 U.S. at 425). The compensatory damages award in this case is nothing if not imprecise. As the panel itself explained, “the jury was broadly instructed to decide the ‘fair and just compensation for the injury to Ms. Carroll’s reputation and the *humiliation and mental anguish in her public and private lives* that was caused by’ Trump’s statements.” *Carroll*, 151 F.4th at 79 (alterations omitted) (emphasis added).

We have before us a full trial record and the opinion of an appellate court, yet no one can coherently describe the harms that the compensatory damages award was designed to remedy that are distinct from the “reputa-

tion repair program.” Nor is it clear why the measure of compensatory damages for reputational harm should involve the purported cost of running a nationwide public-relations campaign designed to persuade Republicans not to believe what President Trump said about Carroll.⁵² Even if some leeway to measure compensatory damages were justified given the imprecision involved—though it is hard to justify *that much* leeway—the panel opinion could at least have adhered to the *Turley* rule that no more than an amount of punitive damages “equal to compensatory damages” could follow. *Turley*, 774 F.3d at 165 (quoting *State Farm*, 538 U.S. at 425). It did not even do that.

The Supreme Court has said that “the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant’s conduct,” *Gore*, 517 U.S. at 575, and it has

⁵² See *Carroll*, 151 F.4th at 64 (“Professor Ashley Humphreys, Carroll’s reputation repair expert, testified that Trump’s statements were viewed by between 85.8 and 104 million people and that it would cost between \$7.2 and \$12.1 million to run a successful campaign to repair Carroll’s reputation.”); *id.* at 81 (explaining that “Professor Humphreys’s damages estimate was based” on “the amount it would take to run a successful reputation repair campaign aimed at changing the minds of people who believed Trump’s false statements about Carroll. As Professor Humphreys testified at trial, a reputation repair campaign consists of hiring ‘a number of trusted sources’ who are tasked with sharing positive messages about ‘the attitude that you want to change.’”) (quoting App’x 1460); Expert Report of Professor Ashlee Humphreys, *supra* note 47, at 45 (“76% of Republicans polled either found the allegations of sexual harassment and sexual assault made against Mr. Trump to be not credible or needed more information about the claims, which I consider to mean that they are receptive to believing the Statements in this case.”).

“instructed courts to determine the reprehensibility of a defendant by considering” certain factors, *State Farm*, 538 U.S. at 419. One is whether “the harm caused was physical as opposed to economic.” *Id.* The allegedly defamatory 2019 statements did not inflict a physical injury. Another is whether “the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others,” *id.*, such as the deceptive sale of an unsafe product, *see Gore*, 517 U.S. at 576. The 2019 statements involved denials of wrongdoing in a press release and comments to reporters. A third is whether “the harm was the result of intentional malice, trickery, or deceit, or mere accident.” *State Farm*, 538 U.S. at 419. In the 2019 statements, President Trump *responded* to an accusation that Carroll published in *New York* magazine and to reporters’ questions about it. The district court said that a jury could find that “‘the degree of reprehensibility’ of Mr. Trump’s conduct was remarkably high, perhaps unprecedented.” *Carroll*, 731 F. Supp. 3d at 634. But no reasonable person could have expected anything other than a vehement denial.

The panel opinion decided that the punitive damages award in this case is “not out of step” with awards in “comparable defamation suits.” *Carroll*, 151 F.4th at 85. It identified a default judgment against Mayor Giuliani relating to the 2020 election, *see Freeman v. Giuliani*, 691 F. Supp. 3d 32, 71 (D.D.C. 2023), which resulted in punitive damages of \$75 million, *see Freeman v. Giuliani*, 732 F. Supp. 3d 30, 41 (D.D.C. 2024). It identified a state-court “award of \$321,650,000 in common law punitive damages in the form of attorneys’ fees to 11 plaintiffs against Alex Jones” related to Sandy Hook. *Carroll*, 151 F.4th at 85 (citing *Lafferty v. Jones*, 229 Conn. App. 487, 493 (2024)). It turns out, however, that “[i]n Con-

necticut, common-law punitive damages, also called exemplary damages, primarily are compensatory in nature.” *Lafferty v. Jones*, No. 18-6046436, 2022 WL 18110184, at *3 (Conn. Super. Ct. Nov. 10, 2022); *see also Iino v. Spalter*, 192 Conn. App. 421, 466 (2019). And the panel opinion explained that “a New York state trial court awarded Louis Bacon \$100 million in punitive damages against fashion mogul Peter Nygard for defamation” even though “that judgment was vacated and remanded due to a defect in service of process.” *Carroll*, 151 F.4th at 85 (citing *Bacon v. Nygard*, 232 A.D.3d 407, 407-08 (1st Dep’t 2024)). In fact, the appellate court vacated the default judgment “granting plaintiff summary judgment on his claims without opposition submitted by defendant” as well as “the related Special Referee order awarding damages.” *Bacon*, 232 A.D.3d at 407.⁵³

The point of “[c]omparing the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct” is to identify an “indicium of the reasonableness of a punitive damages award.” *Gore*, 517 U.S. at 583, 575. The panel had to search for these highly idiosyncratic cases to find anything remotely comparable to the punitive damages award here—and even then, the cases involved either default judgments or non-punitive damages. That is an indictment of rather than a justification for the panel’s

⁵³ The unopposed judgment resulted in “the highest defamation judgment in New York State history” based on findings of a special referee that the defendant “executed a global, decade-long, multi-media defamation campaign ‘to personally and professionally destroy Bacon.’” Susman Godfrey, Press Release, Susman Godfrey Secures \$203 Million Win for Louis Bacon in Defamation Suit Against Peter Nygard (Oct. 4, 2023), <https://perma.cc/X4XT-NVZP>.

conclusion that the grossly excessive award was reasonable.

At a minimum, our court should eliminate the double recovery in the compensatory damages award and adhere to our precedent in allowing punitive damages in an amount no greater than “equal to compensatory damages.” *Turley*, 774 F.3d at 165 (quoting *State Farm*, 538 U.S. at 425).

* * *

In this case, (1) the United States should have been substituted as the defendant, (2) the district court should have considered the defense of presidential immunity, (3) President Trump should not have been denied a trial on liability, (4) the jury should have been properly instructed on common-law malice, (5) the compensatory damages should have been limited to a single recovery, and (6) the grossly excessive punitive damages award should have been remitted. Put together, these proceedings represent a manifest miscarriage of justice. I would rehear the case *en banc*. I dissent from the decision of the court not to do so.

CHIN, *Senior Circuit Judge*, in support of the denial of rehearing *en banc*:

As a member of the three-judge panel that decided this case, I write to more fully explain why our two *per curiam* decisions in this case were correct, and why a majority of our Court appropriately declined to rehear those decisions *en banc*.¹

These are the third and fourth times our Court has voted to deny *en banc* rehearing of rulings in this case, which concerns defamation and sexual assault claims brought by E. Jean Carroll against Donald Trump. The two *per curiam* decisions at issue in this round of *en banc* voting—the fifth and sixth opinions by our Court in this case—arise from two related suits. The first (“*Carroll I*”) asserted defamation claims based on statements made by Trump in June 2019 while he was President, and the second (“*Carroll II*”) asserted a sexual assault claim as well as defamation claims based on statements made by Trump in October 2022 after he left office. Although *Carroll I* was filed first, *Carroll II* was tried first; in May 2023, the jury in *Carroll II* found, following a nine-day trial, that Trump sexually abused Carroll at Bergdorf Goodman in 1996 by digitally penetrating her and that he defamed her with comments he made in 2022 after he left office. The jury awarded Carroll \$5 million in compensatory and punitive damages, and this

¹ As a senior judge, I have no vote on whether to rehear a case *en banc*. See 28 U.S.C. § 46(c); Fed. R. App. P. 40(c). Pursuant to this Court’s protocols, however, senior judges who were members of the panel deciding the case that is subject to the *en banc* petition may file a statement expressing their views where, as here, an active judge on this Court has filed a dissent from the denial of a petition for rehearing *en banc*.

Court affirmed, *Carroll v. Trump*, 124 F.4th 140 (2d Cir. 2024) (*per curiam*) (“*Carroll 4*”), and denied rehearing *en banc*, 141 F.4th 366 (2d Cir. 2025).²

Carroll I was tried in January 2024. The jury awarded Carroll \$83.3 million in compensatory and punitive damages. On appeal of the judgment, the panel issued two decisions. First, in April 2025, while the appeal was pending and after it had been fully briefed, Trump moved before us to substitute the United States as the defendant under the Westfall Act, 28 U.S.C. § 2679. The panel denied the motion by order last June, and issued an opinion explaining our reasoning in August. *Carroll v. Trump*, 148 F.4th 110 (2d Cir. 2025) (*per curiam*) (“*Carroll 5*”). Second, in September, the panel rejected Trump’s attempt to reassert a defense based on presidential immunity, and affirmed the district court’s rulings and the jury’s damages award. *Carroll v. Trump*, 151 F.4th 50 (2d Cir. 2025) (*per curiam*) (“*Carroll 6*”). It is these two panel rulings—*Carroll 5* and *Carroll 6*—that are the subject of these *en banc* petitions.

Trump and the United States have petitioned for rehearing of *Carroll 5*,³ and Trump has petitioned for re-

² As in our panel opinions, I refer to the six decisions of this Court as *Carroll 1-6*, numbered in chronological order. As previously indicated, *supra* at 1, I refer to the two underlying suits as *Carroll I* (defamation claims based on June 2019 statements) and *Carroll II* (sexual assault claim and defamation claims based on October 2022 statements).

³ Petition for Panel Rehearing and *En Banc* Determination of the United States and President Donald J. Trump, *Carroll v. Trump*, No. 24-644 (2d Cir. Aug. 22, 2025), Dkt. No. 132.

hearing of *Carroll* 6.⁴ Neither petition identifies how our decisions conflict with precedent of this Circuit, another Circuit, or the Supreme Court, or pose a question of “exceptional importance” justifying *en banc* review. See Fed. R. App. P. 40(b)(2)(A)-(D).

The dissent goes further than either of the filed petitions, challenging rulings in our decisions, as well as prior decisions of this Court, that neither Trump nor the Government contests in their petitions for rehearing. *En banc* review of these issues, which were not raised by the petitioning parties, was properly denied. See *Trump v. Illinois*, 607 U.S. ---, 146 S. Ct. 432, 437 (2025) (Alito, *J.*, dissenting from denial of stay) (“If a party passes up what seems to us a promising argument, we do not assume the role of advocate. Instead, we normally decide the questions that the parties choose to present.”); *Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia, *J.*, concurring in part and concurring in judgment) (“Our adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief.”).

A familiar principle cautions that rehearing *en banc* is “not favored,” and is indeed exceedingly rare in our Circuit. Fed. R. App. P. 40(c); see generally Jon O. Newman, *In Banc Practice in the Second Circuit: The Virtues of Restraint*, 50 Brook. L. Rev. 365 (1984). I write to respond in greater detail to some of Trump’s and the

⁴ Petition for Rehearing *En Banc* of President Donald J. Trump, *Carroll v. Trump*, No. 24-644 (2d Cir. Sep. 23, 2025), Dkt. No. 138. The Government filed an *amicus* brief on the presidential immunity issue. Brief for the United States as *Amicus Curiae*, *Carroll v. Trump*, No. 24-644 (2d Cir. Sep. 29, 2025), Dkt. No. 139.

dissent’s arguments, which a majority of this Court correctly determined did not warrant *en banc* review.

BACKGROUND

The full history of this litigation is detailed in *Carroll* 6, 151 F.4th at 59-66. I summarize it as relevant here.

On June 21, 2019, *New York* magazine published an excerpt from Carroll’s book in which she alleged that Trump sexually assaulted her at Bergdorf Goodman in 1996. Trump—who was serving his first term as President at the time—responded mere hours later, asserting that “[he’d] never met [Carroll] in [his] life,” “[f]alse accusations diminish the severity of real assault,” and “people should pay dearly for such false accusations.” *Id.* at 60. The next day, Trump told a reporter: “It’s a totally false accusation. I have absolutely no idea who [Carroll] is.” *Id.* at 61. Two days after that, *The Hill* released an interview in which Trump stated: “I’ll say it with great respect: Number one, she’s not my type. Number two, it never happened. It never happened, OK?” *Id.*

In November 2019, Carroll filed *Carroll I* in state court alleging defamation based on these statements. In September 2020, the Government intervened pursuant to the Westfall Act, which permits the United States to be substituted as the defendant in certain tort suits against federal employees. The then-Attorney General certified that Trump made the allegedly defamatory statements while acting “within the scope of his employment,” removed the case to the Southern District of New York, and moved to substitute the United States for Trump as the defendant. *Carroll* 5, 148 F.4th at 113. The district court denied the motion to substitute, Trump appealed, and the Westfall Act issue was liti-

gated for the next four years, including in the D.C. Court of Appeals. *See id.*; *see also Carroll v. Trump*, 49 F.4th 759 (2d Cir. 2022) (“*Carroll 1*”) (certifying question of D.C. scope of employment law); *Trump v. Carroll*, 292 A.3d 220 (D.C. 2023) (answering certified question); *Carroll v. Trump*, 66 F.4th 91 (2d Cir. 2023) (*per curiam*) (“*Carroll 2*”) (remanding to district court with instructions to apply clarified law).

When the case was remanded to the district court in 2023, the district court issued an order giving the Government and Trump an opportunity to address Westfall certification and substitution within a thirty-day window. *Carroll 5*, 148 F.4th at 114. The Government did so and wrote that, in light of the D.C. Court of Appeals’ decision and 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 in question. *Id.* (citation modified). Trump did not respond at all. *Id.*

No further action was taken on the Westfall issue until April 2025, when the Government and Trump jointly moved, in our Court, to substitute the United States for Trump under the Westfall Act. *Id.* The panel denied the motion in *Carroll 5*. *Id.*

While the Westfall Act appeals were pending, litigation on the merits continued in *Carroll I*, including over the import of presidential immunity. Trump did not assert presidential immunity as a defense in his state court answer or amended answer after removal, instead invoking it for the first time on summary judgment in December 2022. *Carroll 6*, 151 F.4th at 62. The district

court denied Trump’s attempt to assert immunity at that point, reasoning that, *inter alia*, he had waived it by failing to raise it in earlier responsive pleadings. A different panel of this Court affirmed in a consolidated interlocutory appeal, *Carroll v. Trump*, 88 F.4th 418, 434-35 (2d Cir. 2023) (“*Carroll 3*”), and the majority of active judges voted to deny rehearing *en banc*, No. 23-1045, 2024 WL 96249 (2d Cir. Jan. 8, 2024). *Carroll 3* held that presidential immunity is waivable and non-jurisdictional, and that Trump had waived it here—rulings that the panel then adhered to in *Carroll 6* as binding law of the case, and that Trump and the dissent now again ask us to reconsider *en banc*.

While the appeals of *Carroll I* were proceeding, Carroll filed *Carroll II* based on the Adult Survivors Act for sexual assault and for defamation based on a different statement Trump made in October 2022, when he was no longer President. In that statement, Trump called Carroll’s allegations “a Hoax and a lie” and repeated that she “is not telling the truth, is a woman who I had nothing to do with, didn’t know, and would have no interest in knowing her if I ever had the chance.” *Carroll 6*, 151 F.4th at 63. As noted above, the *Carroll II* jury found that Trump sexually abused Carroll in 1996 and that he defamed her in 2022. We affirmed in *Carroll 4*, and the Court again denied *en banc* review. 124 F.4th at 150, *reh’g en banc denied*, 141 F.4th 366 (2d Cir. 2025).

Proceedings then restarted in *Carroll I*. In light of the jury verdict in *Carroll II*, the district court granted summary judgment for Carroll on her defamation claim in part because Trump was collaterally estopped from disputing whether he sexually abused Carroll in 1996, whether his June 2019 statements were false, and

whether the statements were made with actual malice. *See Carroll 6*, 151 F.4th at 68-71. The district court concluded in the alternative that even if Trump was not collaterally estopped from disputing actual malice, Carroll was still entitled to summary judgment because a reasonable jury could only so conclude on the record before the court. *Id.* at 71. Trump did not challenge the district court's alternative holding on appeal. *Id.* The case then went to trial on damages in January 2024. *Id.* at 64. Carroll testified for two days, describing the onslaught of attacks and death threats she had received since the statements, the loss of her job at *Elle* and other sources of income, and her inability to afford stronger personal security measures despite fearing for her physical safety. *Id.* In addition, Carroll's expert testified that running a successful campaign to repair her reputation would cost between \$7.2 and \$12.1 million. *Id.*

The jury also heard evidence that Trump had continued to make disparaging statements about Carroll during the four years that *Carroll I* was pending. These included comments made by Trump leading up to the *Carroll II* trial (repeating that he had “no idea who this woman is,” and that the “Bergdorf Goodman” “stuff” is “all made-up”), immediately after the *Carroll II* verdict (calling the lawsuit “the greatest witch hunt of all time”), and while the *Carroll I* trial was taking place (“I am going to the Biden encouraged Witch Hunt in Lower Manhattan to fight against a FAKE Case from a woman I have never met, seen, or touched. . . .”). *See id.* at 64-65 (citations modified). After testifying in *Carroll I*, Trump was warned on multiple occasions by the district court to stop making audible comments about the case near the jury, and he walked out during Carroll's closing argument. *Id.*

The jury awarded Carroll \$11 million for the “reputation repair program,” \$7.3 million for other compensatory damages, and \$65 million in punitive damages—a total of \$83.3 million. *Id.*

DISCUSSION

I begin with a discussion of *Carroll 5*, the panel’s decision concerning substitution under the Westfall Act. I then discuss *Carroll 6*, the panel’s decision on presidential immunity, the district court’s rulings, and the damages award in *Carroll I*.

I. The Westfall Act Decision (Carroll 5)

The Westfall Act permits the United States to be substituted as the defendant in certain tort suits against federal employees if the alleged conduct occurred within the “scope of [the employee’s] office or employment.” 28 U.S.C. § 2679(d). If the United States were to be substituted as the defendant in this case, Carroll’s defamation claims—which have been litigated now for more than six years—would be barred by the Federal Tort Claims Act (the “FTCA”), which does not waive sovereign immunity for the tort of defamation. *See* 28 U.S.C. § 2680(h); *Carroll 1*, 49 F.4th at 766.

The Westfall Act lays out a process for obtaining substitution in three types of cases: (1) cases filed in federal court where the Attorney General has “certified” that the employee was acting within his scope of employment (§ 2679(d)(1)), (2) cases filed in state court where the Attorney General has issued such a certification (§ 2679(d)(2)), and (3) cases where the Attorney General has declined to issue a certification, regardless of the court in which the case commenced (§ 2679(d)(3)).

Carroll I was filed in state court, a situation covered by § 2679(d)(2). That sub-section provides:

Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond *at any time before trial* by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

28 U.S.C. § 2679(d)(2) (emphasis added).

Sub-section (d)(2) contemplates a three-step process: the Attorney General first issues a scope-of-employment certification, then removes the case to federal court, and lastly moves for the United States to be substituted as the defendant. As our decision in *Carroll 5* explains, the critical time limitation in (d)(2) is that certification and removal must occur “before trial” for subsequent substitution to be proper. *See* 148 F.4th at 116-17.

Initially, *Carroll I* followed the three-step process outlined above: Carroll filed her defamation suit in state court, the Attorney General issued a Westfall Act certification about a year later and removed the case, and the district court considered and denied the Government’s motion to substitute. *See* 49 F.4th at 760-61; *see also De Martinez v. Lamagno*, 515 U.S. 417, 434 (1995) (noting that while certification is conclusive for purposes of

removal, substitution is subject to judicial review). All of this occurred at the preliminary stages of the case, well “before trial.” *Carroll 5*, 148 F.4th at 116-17.

The typicality ended there, as the Westfall issues were then litigated in three courts over the course of four years. *See id.* at 113-14. The critical juncture for present purposes was when the Westfall Act issue was presented on remand before the district court in June and July 2023. At that time, the Attorney General expressly declined to issue a Westfall certification or to otherwise seek substitution, and Trump did not take any action with respect to certification or substitution. *Id.* at 114; *see* 28 U.S.C. § 2679(d)(3) (allowing the employee to petition for certification where the Attorney General has declined to certify). The Westfall issue lay settled until April 2025, when the Government and Trump revived their efforts to have the United States substituted as the defendant in the case by moving for that relief in *this* Court. *Carroll 5*, 148 F.4th at 114.

The *Carroll 5* panel denied the Government’s post-trial motion to substitute for three separate reasons: (1) the Government and Trump had waived substitution by failing to request it before the district court prior to trial; (2) the 2025 request was untimely under the Westfall Act; and (3) as a matter of equity in light of the procedural posture of the case. *See id.* at 116-21. These rulings were correct as a matter of law and did not warrant *en banc* review.

A. Trump and the Government waived their right to certify and substitute.

I begin, as does the dissent, with waiver.⁵ Both the Government and Trump waived their right to seek substitution. Although the district court gave them an opportunity in June 2023 to weigh in on the issue, the Government explicitly elected not to seek substitution, and Trump took no action—neither seeking certification or substitution at the time, nor otherwise objecting to the Government’s decision. *Id.* at 114. They did not raise the issue again until after the case had been tried, judgment had been entered, an appeal was taken, and the appeal had been fully briefed on the merits. *Id.*

The dissent suggests that the panel decision treats the Attorneys General in different administrations inconsistently, because we permitted Attorney General Garland’s “withdrawal” of certification in 2023, but denied Attorney General Bondi’s attempt to issue a new certification in 2025. *See Menashi, J.*, dissenting from the denial of reh’g *en banc* (“Dissent”) at 9. This ignores two important realities. *First*, Garland’s decision not to certify followed substantive legal developments in this case, including the D.C. Court of Appeals’ intervening decision clarifying its *respondeat superior* law, a remand from our Court to apply that law (*Carroll 2*), and an order for additional briefing by the district court. No such legal developments preceded Bondi’s post-trial certification. *Second*, and more importantly, Garland’s withdrawal occurred “before trial”—the critical time limitation for certification and substitution under

⁵ I note, however, that rehearing *en banc* on the basis of waiver was not warranted in any event because it was presented in the alternative to our statutory holding. *See Carroll 5*, 148 F.4th at 119.

§ 2679(d)(2). That is the dispositive reason why the Bondi certification, which occurred fifteen months *after* trial, was untimely under the statute.

Contrary to the dissent’s contention, the Government does not escape the express time limitations of § 2679(d)(2) simply because it is not “a party” to the litigation. *See* Dissent at 8. Indeed, the entire mechanism of the Westfall Act contemplates that the Government is initially *not* a party to a suit brought against an employee-defendant, but has rights and obligations to assert its interests under the Act. The fact that Congress authorized the Attorney General to issue certifications does not mean that the Attorney General cannot waive this statutory right.⁶ After all, the dissent appears to agree that if the Government failed to *remove* an action “before trial,” as is expressly required by § 2679(d)(2), it would waive its statutory right to do so. *See* Dissent at 13. There is no reason to treat certification or substitution any differently.

As noted in *Carroll 5*, Trump also had the option to petition the district court for certification under § 2679(d)(3) after the Government declined to certify in 2023. 148 F.4th at 119. If the Attorney General refuses to certify, sub-section (d)(3) provides that “the employee may at any time *before trial* petition the court” to certify

⁶ *Cf., e.g., United States v. Coonan*, 826 F.2d 1180, 1184 (2d Cir. 1987) (statutory right to detention hearing within five days of initial appearance under Bail Reform Act is waivable); *Lilly v. City of New York*, 934 F.3d 222, 237 (2d Cir. 2019) (“[I]t is not against public policy for litigants to waive their statutory rights to attorney’s fees. . . . ”); *United States v. Tigano*, 880 F.3d 602, 611 (2d Cir. 2018) (“[A] defendant may waive his statutory right to a speedy trial by failing to raise it. . . . ”).

and substitute. 28 U.S.C. § 2679(d)(3) (emphasis added). Here, the district court even solicited “any further submission by . . . the defendant with respect to substitution,” and Trump took no action. *Carroll 5*, 148 F.4th at 114 (citation modified). On this point, even the dissent does not dispute that a *litigant* like Trump can waive his right to petition for certification and substitution. Indeed, Courts of Appeals have routinely held that litigants waive their rights to assert a Westfall certification position on appeal where they have taken a contrary position below.⁷

B. The Government’s April 2025 certification was untimely.

Carroll 5’s primary holding is that the text of the Westfall Act does not permit certification and substitution after trial. Again, § 2679(d)(2) provides: “Upon certification by the Attorney General . . . any civil action . . . in a State court shall be removed . . . at any time *before trial*.” 28 U.S.C. § 2679(d)(2) (emphasis added). The natural reading of this language is that certification and removal must happen “before trial” for any subsequent substitution to occur.

The dissent acknowledges—as it must—that removal must occur before trial. *See* Dissent at 13. But it goes on to argue that this limitation does not apply to certification or substitution. *Id.* This is incorrect. If removal must occur before trial, so too must certification, because certification is what prompts the removal in the first place. *See Carroll 5*, 148 F.4th at 116; *Sullivan v.*

⁷ *See, e.g., Jakuttis v. Town of Dracut*, 95 F.4th 22, 35-36 (1st Cir. 2024); *Beary v. Harris Cnty.*, No. 24-20371, 2025 WL 1577820, at *4 (5th Cir. June 4, 2025).

United States, 21 F.3d 198, 205 (7th Cir. 1994) (citation modified) (noting that (d)(2) “permits removal, and therefore certification, at any time before trial”).⁸ Moreover, sub-section (d)(3) similarly requires certification “at any time *before trial*” and substitution only “[u]pon such certification.” § 2679(d)(3) (emphasis added). Accordingly, the Government’s post-trial certification was untimely under the text of (d)(2). And because substitution can only occur following proper certification and removal, the Government could not move to substitute, after trial and on appeal of the merits, based on an untimely certification.

The dissent next argues that our holding creates a circuit split, pointing to the D.C. Circuit’s decision in *Wasserman v. Rodacker*, 557 F.3d 635, 639 (D.C. Cir. 2009). *See* Dissent at 15. The dissent contends that, under *Wasserman*, Carroll’s case is actually governed by § 2679(d)(1), which applies to cases commenced in *federal* court.⁹ For support, the dissent draws on a line in

⁸ The dissent selectively cites to *Sullivan* elsewhere to support its reading of sub-section (d)(1). *See* Dissent at 12 & n.12. Sub-section (d)(1), however, governs cases filed in *federal* court, and therefore does not apply here.

⁹ The dissent cites to three cases analyzing the timing of certification and substitution under sub-section (d)(1), which does not contain the “before trial” language present in (d)(2). *See* Dissent at 12 n.12. Two of those decisions pertain to certification and substitution issues in cases initiated before the Westfall Act was enacted, *see Sullivan*, 21 F.3d at 205-06; *Sowell v. Am. Cyanamid Co.*, 888 F.2d 802, 804-05 (11th Cir. 1989), and the other decision concerns whether district courts may permit reasonable discovery and order an evidentiary hearing to resolve issues presented in a Westfall Act certification that conflict with what is alleged in a complaint, *Melo v. Hafer*, 13 F.3d 736, 747 (3d Cir. 1994). These holdings are of questionable relevance to this case. As to the dissent’s

Wasserman stating that “when a case is timely removed to federal court, a new case is ‘commenced’ in the district court that allows ‘the United States to substitute itself for [the federal employee] pursuant to 28 U.S.C. § 2679(d)(1).’” *Id.* (citing *Wasserman*, 557 F.3d at 639).

In *Wasserman*, a *pro se* plaintiff who was arrested by a U.S. Park Police officer for walking his dogs without a leash sued the officer in the D.C. Superior Court, alleging that the officer violated his constitutional and civil rights. 557 F.3d at 636-37. The officer removed the case to the D.C. District Court pursuant to 28 U.S.C. § 1441 and § 1442. *Id.* at 637.¹⁰ Notably, removal and substitution both occurred before trial. *Id.* The D.C. Circuit held that certification and substitution was proper on “two grounds”—either because when the officer’s case was removed, the action was “commenced . . . in a United States district court” for purposes of (d)(1), or because the D.C. Superior Court should be considered a “state court” for purposes of (d)(2). *Id.* at 639.

arguments about (d)(1), it is an open question in our Circuit as to whether that sub-section also requires that certification and substitution occur before trial, and at least one other Circuit has held that it does. *See Brown v. Armstrong*, 949 F.2d 1007, 1012 (8th Cir. 1991) (“[C]hallenges to the Attorney General’s certification must be resolved before trial, as soon after the motion for substitution as practicable, even if an evidentiary hearing is needed to resolve relevant fact disputes.”). Regardless, we did not decide that question in *Carroll 5*, and indeed did not make any holding as to the interpretation or operation of (d)(1).

¹⁰ The notice of removal was also filed on the behalf of the United States, but states that the defendant, identified as Rodacker (the police officer), was removing the case pursuant to § 1441 and § 1442. *See Wasserman*, 557 F.3d at 637.

To force a circuit split, the dissent would have us adopt an implausibly broad reading of *Wasserman*'s first ground, and completely ignore the second. *Wasserman* indeed states that when the officer's case was removed, the action was "commenced . . . in a United States district court." *Id.* at 639. But the D.C. Circuit clearly was not holding that every state court case removed pursuant to (d)(2) then, upon removal, becomes a new federal case governed by (d)(1)—an interpretation that would render (d)(2) entirely superfluous. That is an implausible reading, not least because removal in *Wasserman* was effected by 28 U.S.C. § 1441 and § 1442, not the Westfall Act. Instead, *Wasserman* resolved the narrow question of whether federal employees who are sued in the D.C. Superior Court—as opposed to any state court—are entitled to certification and substitution under § 2679(d). *See id.* at 639-40. And the dissent altogether ignores the D.C. Circuit's alternative holding that the D.C. Superior Court is a state court for purposes of (d)(2), a proposition that "seemed obvious" under that circuit's caselaw. *Id.* at 638-39 (noting that in no prior cases did the D.C. Circuit even see a need to "elaborate on the reasons why the Superior Court was a State court under the Westfall Act").

In any event, there is no question that Carroll initiated her action here in state court, or that her action was removed after certification pursuant to (d)(2). *Carroll* 5 thus accords with *Wasserman* in reasoning that removals of actions filed *in state court* are effectuated under (d)(2) and are therefore subject to its time limitations. This reading is consistent both with precedent of our Court interpreting substantially similar language in related statutes, and with that of other Circuits interpret-

ing § 2679(d). *See Carroll 5*, 148 F.4th at 118-19 (collecting cases).

Nor does our holding misconstrue or undermine the Westfall Act’s purpose, which is to “relieve covered employees from the cost and effort of defending the lawsuit, and to place those burdens on the Government’s shoulders.” *Id.* at 117 (quoting *Osborn v. Haley*, 549 U.S. 225, 252 (2007)). Despite the dissent’s contentions, *see* Dissent at 14, requiring certification and substitution before trial does not undercut the Westfall Act’s purpose of immunizing employees in covered suits. That the Westfall Act creates immunity does not mean that it does so indefinitely, especially given the Supreme Court’s repeated instruction that “[i]mmunity-related issues” under the Act “should be decided at the earliest opportunity.” *Osborn*, 549 U.S. at 253. I see no reason why enforcing the limitations Congress enacted would upset this purpose.

C. Carroll 5 contained no substantive scope-of-employment or substitution analysis.

The final “error” alleged by the dissent is not actually about this decision at all. Instead, the dissent advances a new theory of the President’s scope of employment not asserted by any of the parties, and criticizes three prior decisions of three different courts applying well-settled law that scope of employment questions under the Westfall Act are determined according to state *respondeat superior* law. *See Carroll v. Trump*, 498 F. Supp. 3d 422 (S.D.N.Y. 2020) (the district court’s 2020 decision on the Government’s initial motion for substitution); *Carroll 1*, 49 F.4th 759 (this Court’s 2022 decision certifying the scope-of-employment question); *Trump v. Carroll*, 292

A.3d 220 (D.C. 2023) (the D.C. Court of Appeals’ decision clarifying its *respondeat superior* law).

The dissent asserts that these three courts all erred by looking to state law to analyze whether Trump’s statements were made within his scope of employment. *See* Dissent at 20. But to be clear, the panel’s decision in *Carroll 5* did not address this question. It merely held that the Government’s attempt to certify and substitute post-trial was untimely under the Westfall Act. *Carroll 5* therefore created no split on any substantive scope of employment law with the D.C. Circuit or any other circuit, notwithstanding the dissent’s suggestions otherwise. *Contra id.* at 18-19. Moreover, even assuming the panel *had* weighed in on the scope-of-employment issue, the applicable law is well-settled and did not merit *en banc* review. The principle that the dissent calls “bizarre” and “strange”—that federal courts should resolve scope of employment questions under the FTCA in accordance with state *respondeat superior* law—*see id.* at 6, 20, is based on the text of the FTCA itself¹¹ and has been applied consistently by this and every other Court of Appeals for decades.¹²

¹¹ The FTCA provides federal courts with “exclusive jurisdiction of civil actions on claims against the United States, for money damages, . . . for [tortious conduct] of any employee of the Government while acting within the scope of his office or employment, under circumstances *where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.*” 28 U.S.C. § 1346(b)(1) (emphases added). Accordingly, the Act expressly incorporates state substantive law.

¹² *See, e.g., Hamm v. United States*, 483 F.3d 135, 138 (2d Cir. 2007) (“scope of employment” is defined “by the respondeat superior law of the jurisdiction in which the accident occurred”) (cita-

The dissent instead urges us to adopt a new scope-of-employment test that applies only when the “employee” is the President. *See id.* at 4-6. Tellingly, even the *Government* did not make this argument below, and instead urged application of D.C. *respondeat superior* law.¹³ And neither the Government nor Trump argued for such a new test in their *en banc* petition, which appropriately limited its challenges to our actual holding on the timeliness of certification.¹⁴ As reflected by the vote of the majority of active judges on this Court, there is no reason to convene *en banc* to consider a legal theory—not advanced by any party—that would contravene statutory text, our own precedent, and the law in every other Court of Appeals.

* * *

At bottom, I agree with the dissent that “the same rules should apply equally to all defendants.” *Id.* at 3

tion modified); *Fountain v. Karim*, 838 F.3d 129, 135 (2d Cir. 2016) (same). Every other Circuit also looks at state *respondeat superior* law. *See Aversa v. United States*, 99 F.3d 1200, 1208 (1st Cir. 1996); *Lomando v. United States*, 667 F.3d 363, 374 (3d Cir. 2011); *Jamison v. Wiley*, 14 F.3d 222, 237 (4th Cir. 1994); *Palmer v. Flaggman*, 93 F.3d 196, 202 (5th Cir. 1996); *Chandonais v. U.S. Dep’t of Air Force*, No. 90-2103, 934 F.2d 322 (table), 1991 WL 93096 (6th Cir. June 3, 1991); *St. John v. United States*, 240 F.3d 671, 676 (8th Cir. 2001); *Saleh v. Bush*, 848 F.3d 880, 888 (9th Cir. 2017); *Hockenberry v. United States*, 42 F.4th 1164, 1170 (10th Cir. 2022); *Bennett v. United States*, 102 F.3d 486, 489 (11th Cir. 1996); *Plevnik v. Sullivan*, 146 F.4th 1174, 1182 (D.C. Cir. 2025).

¹³ *See Carroll 1*, 49 F.4th at 766 (“The parties all agree that the second issue presented (scope of employment) is governed by the District of Columbia’s *respondeat superior* law.”).

¹⁴ *See generally* Petition for Panel Rehearing and *En Banc* Determination of the United States and President Donald J. Trump, *supra* note 3.

(quoting *Carroll*, 141 F.4th at 368 (Menashi, *J.*, dissenting from the denial of rehearing *en banc*)). The fact of the matter is that no other defendant would be permitted to move to substitute the United States in his place, fifteen months after trial and the entry of judgment against him. The Court appropriately declined to convene *en banc* to revisit this issue.

II. The Merits Decision (Carroll 6)

A month after the panel issued *Carroll 5*, we decided the merits of the appeal in which Trump and the United States again requested substitution. In *Carroll 6*, the panel concluded that it was bound by this Court's prior holding on presidential immunity, affirmed the district court's summary judgment rulings and jury instructions, and upheld the jury's award of \$83.3 million in compensatory and punitive damages. 151 F.4th at 59.

Trump petitioned for *en banc* review of our rulings on presidential immunity, for which the Government has also filed an *amicus* brief, and on punitive damages.¹⁵ The dissent argues our Court should also have conducted *en banc* review of the district court's grant of partial summary judgment for Carroll on two elements of liability not raised by Trump for rehearing: its jury instructions on punitive damages, and the jury's compensatory damages award. *See* Dissent at 32-49. To the extent the dissent goes further in challenging our decisions than the parties did, those criticisms are unpersuasive.

¹⁵ *See* Petition for Rehearing *En Banc* of President Donald J. Trump, *supra* note 4, at 4, 16; Brief for the United States as Amicus Curiae, *supra* note 4.

I begin by discussing immunity and punitive damages, the two rulings challenged by Trump. I then address the dissent's additional opposition to our rulings regarding summary judgment, jury instructions, and compensatory damages.

A. *Carroll 3 was binding law of the case on presidential immunity.*

In 2023, a previous panel of our Court confronted as a matter of first impression the question of whether presidential immunity could be waived. *Carroll 3*, 88 F.4th at 425. At that time, Trump had asserted that presidential immunity was categorically not waivable, and did not even brief the argument that his actions in this case did not constitute waiver. *See id.* at 429 & n.52.

The *Carroll 3* panel explained in an extensive opinion that, contrary to Trump's argument, presidential immunity is "not jurisdictional" and is instead "treated like other forms of immunity that [Trump] does not dispute are waivable." *Id.* at 429. It then held that Trump waived his immunity defense here by, among other things, failing to assert it in his answer to Carroll's complaint in state court and conceding to it at oral argument. *Id.* at 429-30. Rehearing *en banc* was denied, with no active judge calling for a vote. *Carroll v. Trump*, No. 23-1045, 2024 WL 96249 (2d Cir. Jan. 8, 2024).

Two years later in *Carroll 6*, we adhered to these rulings when Trump again asserted that presidential immunity cannot be waived. 151 F.4th at 66. In this appeal, Trump also argued for the first time that even if immunity could be waived, such waiver requires an "explicit and unequivocal renunciation." *Id.* (citation modified). The panel rejected this renewed argument because *Carroll 3* was law of the case, and because the Su-

preme Court’s decision in *Trump v. United States*, 603 U.S. 593 (2024) (“*Trump*”), did not alter the prevailing law on whether and how presidential immunity could be waived.

Although the dissent critiques our Court’s decision in *Carroll 3*, the panel was bound to follow it as law of the case. Under our Circuit’s precedent, we revisit issues explicitly or implicitly decided on prior appeal only when there is an “intervening change of controlling law” that creates “a clear conviction of error with respect to a point of law on which [the] previous decision was predicated,” when there is new evidence, or “to correct a clear error or to prevent manifest injustice.” *United States v. Aquart*, 92 F.4th 77, 87, 93 (2d Cir. 2024) (citation modified). None of those justifications were present here.

Carroll 3 pertained to waiver. Accordingly, the question is whether *Trump* “made clear a change in prevailing Circuit law” on that issue, and if it did so in a manner that “departed *significantly* from controlling precedent.” *Id.* at 92 (citation modified). The answer is no. *Trump*—a case about the scope of presidential immunity in criminal prosecutions—said nothing about whether or how immunity could be waived in a civil case. That observation does not discount the magnitude of *Trump*’s impact on other dimensions of presidential immunity.¹⁶

¹⁶ The dissent points to another decision of this Court in which our colleagues remanded a case to the district court with instructions to consider “whether *Trump v. United States* represented a change in controlling law.” Dissent at 22 (quoting *New York v. Trump*, 158 F.4th 458, 466 (2d Cir. 2025) (per curiam)). The dissent omits the end of the quoted sentence from *New York v. Trump*, which explains that *Trump* may have changed “controlling law *that could support a finding of good cause.*” 158 F.4th at 466-67 (em-

But to the extent *Trump* changed the prevailing law on the scope of such immunity, no part of it “departed significantly” from the prior law concerning waiver on which *Carroll 3* relied. *Id.* at 92 (citation modified).

In arguing that both *Carroll 3* and *Carroll 6* were incorrect, the dissent mischaracterizes both opinions as deciding a question not analyzed by either decision—whether Trump’s 2019 statements about Carroll *would* be covered by presidential immunity had he not waived the defense. But neither *Carroll 3* nor *Carroll 6* opined on the scope of presidential immunity, or analyzed whether Trump’s 2019 statements were protected by it. So the question of whether *Trump* “materially affected the law of presidential immunity,” Dissent at 25, is simply not the relevant inquiry. *Carroll 3* remains law of the case. But even if it did not, we appropriately declined to convene *en banc* to craft new law on waiver. Trump argued, for the first time on appeal in *Carroll 6*, that any waiver of presidential immunity requires an “explicit and unequivocal renunciation.” See 151 F.4th at 66 (citation modified). For this new argument, he relies on *United States v. Helstoski*, 442 U.S. 477 (1979), a

phasis added). As can be surmised when the instruction is read in full, the question in *New York v. Trump* was whether Trump’s untimely attempt to remove his criminal hush money prosecution could be excused for “good cause” because the prosecution was one “for or relating to” his official acts as President. *Id.* at 467. The panel noted that whether removal was proper turned on whether the State relied on evidence “relate[d] to immunized official acts” in a manner precluded by the intervening decision in *Trump*. *Id.* at 468. On the other hand, despite the dissent’s attempts at recharacterization, *Trump* does not change the prevailing law laid down by *Carroll 3*, which did not discuss whether the 2019 statements fell within the bounds of Trump’s official responsibilities as President.

case decided over forty years ago holding that legislative immunity under the Speech and Debate Clause could only be waived in this manner. *Id.* at 490-91. Trump (and the dissent) now argue that presidential immunity should also be subject to this waiver standard, because something in *Trump* transformed presidential immunity into the type of structural constitutional immunity that is on par with the Speech or Debate immunity at issue in *Helstoski*. See Dissent at 23; Petition for Rehearing *En Banc* of President Donald J. Trump at 11, *Carroll v. Trump*, No. 24-644 (2d Cir. Sep. 23, 2025) (“Trump Petition”).

As *Carroll 6* explained and as *Trump* itself reasoned, the notion that presidential immunity derives from structural separation of powers principles existed long before the Supreme Court’s decision in *Trump*. See *Carroll 6*, 151 F.4th at 66; *Trump*, 603 U.S. at 611-13, 638 (discussing and quoting, *inter alia*, *United States v. Nixon*, 418 U.S. 683 (1974); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982)). To the extent *Trump* reaffirmed that presidential immunity is “rooted in the constitutional tradition of the separation of powers,” it did not identify a new structural source of this immunity that would heighten the bar for waiver. See *Carroll 6*, 151 F.4th at 67. Nor does *Trump* suggest that the standard for waiving presidential immunity should or must mirror, for example, congressional abrogations of state sovereign immunity derived from the text of the Eleventh Amendment. *Contra Trump Petition* at 12.

The dissent contends that Trump did not waive immunity here. But that argument is clearly belied by the record. Presidential immunity was not raised for the first three years of this case. See *Carroll 3*, 88 F.4th at

430. Trump did not mention immunity in his answer to Carroll’s complaint in state court.¹⁷ He did not invoke immunity when he moved to amend his answer after the case was removed in 2022. *See Carroll 6*, 151 F.4th at 62. Instead, Trump argued that presidential immunity barred liability for the first time in his summary judgment papers filed in December 2022 and January 2023. *Id.* In *Carroll 3*, this Court affirmed the district court’s ruling that Trump waived his presidential immunity defense by failing to invoke it in his first state court answer—a decision that Trump did not even challenge in that appeal. 88 F.4th at 429 & n.52. Moreover, Trump’s counsel conceded at that oral argument that “assuming the defense of presidential immunity is waivable, Defendant had waived that defense.” *Id.* at 430. If any other litigant had failed to raise an affirmative defense in this way, there would be no question as to whether he waived his right to assert it.

In sum, *Carroll 3* correctly held that presidential immunity is waivable and that Trump waived it here. The

¹⁷ The dissent points to Trump’s answer in his state court motion to stay the proceedings, in which he raised an affirmative defense that he was “immune, under the Supremacy Clause of the United States Constitution, from suit in state court while serving as President of the United States” and that “[t]he alleged defamatory statements [were] privileged or protected by one or more immunities . . . under the Constitution of the United States.” Dissent at 22 n.18; *see Carroll 6*, 151 F.4th at 62 n.7. This vague, passing reference to “one or more immunities” is insufficient to meet the requirements to assert an affirmative defense in a responsive pleading under state or federal civil procedure rules. *See Carroll v. Trump*, 680 F. Supp. 3d 491, 499 n.22 (S.D.N.Y. July 5, 2023) (collecting cases).

dissent points to no change in controlling law on waiver that renders *Carroll 3* inapplicable law of the case.

B. The jury’s punitive damages award was correct.

The only other argument Trump raises in his petition is that the \$65 million punitive damages award in this case—representing about a 3.6:1 ratio to the \$18.3 million total compensatory award—was grossly excessive. *See* Trump Petition at 16. Trump and the dissent argue that the award violates due process under our decision in *Turley v. ISG Lackawanna, Inc.*, 774 F.3d 140 (2d Cir. 2014). Trump Petition at 17; Dissent at 49-50. It does not.

Nowhere in *Turley* did we pronounce a “rule” that “no more than an amount of punitive damages ‘equal to compensatory damages’ could follow.” Dissent at 51 (quoting *Turley*, 774 F.3d at 165). In fact, we affirmed a 2:1 ratio of punitive to compensatory damages in *Turley* itself, while reasoning that awards of a ratio lower than 4:1 generally do not violate due process in other types of cases. *See* 774 F.3d at 165-66; *see also State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003). We explained that a lower ratio for cases like *Turley*—which involved a Title VII hostile work environment claim—was appropriate because the award for emotional damages was “imprecise because of the nature of the injury,” and because the overall award was “high when compared with similar cases.” 774 F.3d at 165.

This is not a hostile work environment case, but instead one for defamation arising out of sexual abuse. And Carroll’s injuries are not “imprecise” like the intangible emotional damages in *Turley*. Instead, these compensatory damages were quantified based on extensive

testimony about the loss of Carroll’s career at *Elle* and other sources of income, and the concrete cost of rehabilitating her reputation. *Carroll 6*, 151 F.4th at 64. Beyond labeling the comparator cases to which our decision cites as “highly idiosyncratic,” Dissent at 53, the dissent does not point to any basis for ignoring them, especially when the Supreme Court has noted our history of “providing for sanctions of double, treble, or quadruple damages to deter and punish.” *State Farm*, 538 U.S. at 425.

Critically, “the most important indicium” of a punitive damages award’s reasonableness is “the degree of reprehensibility of the defendant’s conduct.” *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996); *accord* Dissent at 51. The dissent characterizes Trump’s conduct as merely statements “*respond[ing]* to an accusation that Carroll published,” to which “no reasonable person could have expected anything other than a vehement denial.” Dissent at 52 (emphasis in original). But as detailed in *Carroll 6*, the record showed that Trump made multiple statements over many years accusing Carroll of lying for political and financial gain, and suggesting that Carroll was too unattractive for Trump to have sexually assaulted her. 151 F.4th at 83. As a result of Trump’s statements, Carroll was harassed and humiliated, subjected to death threats, and feared for her physical safety for years. *Id.* And Trump showed no remorse, continuing his attacks against Carroll during and after two federal trials, and even proclaiming two days into the *Carroll I* trial that he would continue to defame her “a thousand times.” *Id.* at 84. Together, this conduct went far beyond a “vehement denial.”

C. The district court’s summary judgment rulings were correct.

Trump’s petition for rehearing ended there, but the dissent further critiques each remaining aspect of our decision in *Carroll 6*. I address these briefly in turn.

After the jury in *Carroll II* found that Trump had sexually abused Carroll in 1996 and had defamed her in his 2022 statement, the district court granted partial summary judgment for Carroll in *Carroll I* on the liability elements of her defamation claim—namely, that Trump’s 2019 statements were (a) false and (b) made with actual malice. *See Carroll 6*, 151 F.4th at 68.

On falsity, the district court held that Trump was collaterally estopped from relitigating the falsity of his statements based on the jury’s findings in *Carroll II*. The jury in *Carroll II* was given a special verdict form and asked to decide among three theories of liability: whether Trump (1) raped, (2) sexually abused, or (3) forcibly touched Carroll. *Id.* It answered no to (1) but yes to (2). *Id.* Trump did not request a special finding from the jury on the specific sexual conduct constituting “sexual abuse,” thereby permitting the district court to make that determination pursuant to Rule 49(a)(3). *Id.* Accordingly, when Trump moved for remittitur, the district court held that the jury implicitly found that Trump had digitally penetrated Carroll, and made the same finding itself in the alternative—a conclusion that was well-supported by the record in this respect. *See id.* at 69-71. Contrary to the dissent’s contention, we are permitted to treat a district court’s Rule 49 findings in the same manner as typical findings of fact subject to clear error review. *See Roberts v. Karimi*, 251 F.3d 404, 407-

08 (2d Cir. 2001). There was therefore nothing improper about according this finding preclusive effect.

Moreover, the dissent does not actually dispute the reasoning behind our holding—that Trump was precluded from relitigating the falsity of the 2019 statements because their truth or falsity did not turn on the specific sexual act Trump committed. As *Carroll 6* explains, the truth or falsity of both the 2019 and 2022 statements depended on whether Carroll was lying about being sexually abused by Trump in 1996, not *how* he abused her. 151 F.4th at 69.¹⁸ There is no question that the *Carroll II* jury found that Trump’s 2022 statements about not knowing or sexually abusing Carroll were false. Accordingly, the 2019 statements—including that he “never met [Carroll] in [his] life” and that the abuse “never happened”—were equally false. *Id.* at 69 & n.14.

On actual malice, the district court held that even if Trump were not precluded from relitigating actual malice, Carroll was still entitled to summary judgment because Trump failed to raise a triable issue of fact as to whether he knew that his 2019 statements were false or

¹⁸ In the 2019 statements, Trump said: “I’ve never met [Carroll] in my life,” “[s]hame on those who make up false stories of assault to try to get publicity for themselves,” “I would like to thank Bergdorf Goodman for confirming that they have no video footage of any such incident, because it never happened,” and “[f]alse accusations diminish the severity of real assault.” *Carroll 6*, 151 F.4th at 69 n.14 (citation modified). In the 2022 statement, Trump said: “She completely made up a story that I met her . . . and, within minutes, ‘swooned’ her. It is a Hoax and a lie,” “it never happened,” and “for the record, E. Jean Carroll is not telling the truth, is a woman who I had nothing to do with, didn’t know, and would have no interest in knowing her if I ever had the chance.” *Id.*

acted with reckless disregard to their truth or falsity. *Id.* at 71. Trump failed to challenge this alternative holding on appeal, and as noted in our opinion, that fact alone merited affirmance. *Id.* Nonetheless, *Carroll 6* went on to conclude that Trump had indeed raised no genuine issue of material fact as to actual malice. *Id.* Although the dissent chides this as “not a fair judicial proceeding,” Dissent at 40, it also fails to point to any disputed facts on this issue. Indeed, given the preclusive effect of the first jury’s finding that Trump did sexually abuse Carroll, there is abundant evidence of actual malice here.¹⁹

On this record, a reasonable juror could only conclude that Trump made his statements about Carroll knowing they were false or with reckless disregard of their truth or falsity. See *Celle v. Filipino Rep. Enters. Inc.*, 209 F.3d 163, 182 (2d Cir. 2000).

D. The remaining challenges to the jury’s damages award are meritless.

The dissent further challenges two additional elements of the jury’s damages award not raised in the petition for rehearing.

¹⁹ Over the course of six years, Trump called Carroll’s allegations “a Hoax and a lie” and suggested that it was made up “for the sake of publicity,” said he had “never met [Carroll] in [his] life” despite there being a photo of them together in the 1980s, labeled this case “a complete con job,” accused Carroll of being “very deranged” and a “wack job,” and vowed to “sue her” during a deposition in this very case. *Carroll 6*, 151 F.4th at 60, 63, 69 n.14, 72 n.20. He repeatedly disparaged Carroll leading up to and during both trials, called the case a “witch hunt” and a “con job” within earshot of the jury, and walked out of the courtroom during Carroll’s summation. *Id.* at 65.

First, the panel opinion explains why punitive damages awarded here were permitted under New York law. Just as Trump did initially on appeal, the dissent conflates the role of common law malice for purposes of recovering punitive damages and for overcoming a qualified or conditional privilege under New York law. *See* Dissent at 41-45. There are two distinct concepts at play. New York law recognizes certain qualified privileges when it comes to defamation that can be overcome if common law malice was “the one and only cause for the publication.” *Lieberman v. Gelstein*, 605 N.E.2d 344, 350 (N.Y. 1992) (citation modified). This is not true for punitive damages, the purpose of which is to “punish a person for outrageous conduct which is malicious, wanton, reckless, or in willful disregard for another’s rights.” *Prozeralik v. Cap. Cities Commc’ns, Inc.*, 626 N.E.2d 34, 42 (N.Y. 1993) (citation modified). As *Carroll 6* explains, New York law does not import the “sole motivation” requirement for overcoming a qualified privilege into the punitive damages context. *See* 151 F.4th at 76 (citation modified); *Prozeralik*, 626 N.E.2d at 42 (explaining that punitive damages are allowed when behavior “measure[s] up to the level of outrage or malice underlying the public policy”); N.Y. Pattern Jury Instr.—Civil 3:30 (2024) (containing no “sole motivation” requirement for punitive damages). Our decision also addressed how the case on which the dissent relies made this very mistake and was acknowledged to be an outlier by New York authorities. *See* Dissent at 42 n.38; *Carroll 6*, 151 F.4th at 76-77 & n.28 (discussing *Morsette v. “The Final Call,”* 764 N.Y.S.2d 416 (1st Dep’t 2003)). The dissent’s repeated invocations of *Lieberman* and other cases about qualified privilege do not change the fact that pu-

nitive damages here were permitted under New York law.²⁰

Second, the compensatory damages awarded in this case were not duplicative. The *Carroll I* jury was asked to quantify two distinct categories of damages. The first category was damages that Carroll suffered because of the defamatory statements, including her “humiliation and mental anguish,” loss of her career at *Elle* and other sources of income, and ongoing economic injury, excluding the costs of the reputation repair program. *Carroll 6*, 151 F.4th at 79-80. The second was the cost of the reputation repair program itself—i.e., compensatory damages required to *fix* the damage Trump caused to Carroll’s reputation. *Id.* As we noted, the latter costs “are distinct from the other damages that flowed from the reputational harm.” *Id.* at 81. The dissent fails to acknowledge that the district court instructed the jury that it could “not award compensatory damages more than once for the same injury,” *id.* (citation modified), an instruction we “presume[]” the jury followed. *United*

²⁰ The dissent also contends that the district court erred in its punitive damages instruction because Trump’s statements were protected by the qualified privilege of reply under New York law. *See* Dissent at 40-45. Trump waived this argument by failing to assert it as an affirmative defense below, *see Carroll v. Trump*, 680 F. Supp. 3d 491, 517 n.103 (S.D.N.Y. 2023) (“[Trump’s] argument [regarding the qualified privilege of reply] arguably has been waived because it was not raised in his answer. . . .”), and by failing to pursue the issue on appeal or in his petition for rehearing *en banc*. In any event, the question of whether Trump’s remarks were privileged under New York law is irrelevant to the standard for awarding punitive damages, which, as explained in *Carroll 6* and again above, may be awarded without a “sole motivation” finding.

States v. Salameh, 152 F.3d 88, 116 (2d Cir. 1998) (citation modified).

CONCLUSION

These two *per curiam* decisions mark the due conclusion of two related cases that have been litigated in our Circuit for over six years. Neither Trump nor the Government identified any rulings by the panel that, upon review, conflict with precedent from our Circuit, another Circuit, or the Supreme Court, or raise questions of exceptional importance. To the extent the dissent goes further than the relevant parties did in critiquing our rulings, we appropriately declined to expend our collective judicial resources to review them. The Court correctly denied these petitions for rehearing *en banc*.

APPENDIX E

28 U.S.C. 2679 provides:

Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government—

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or pro-

ceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4)¹ of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same

¹ So in original. Probably should be a reference to Rule 4(i).

manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if—

(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and

(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.