

No.

In the Supreme Court of the United States

PRESIDENT DONALD J. TRUMP,
PETITIONER,

v.

E. JEAN CARROLL

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In *United States v. Helstoski*, 442 U.S. 477, 490-491 (1979), this Court held that a Member of Congress cannot be found to have forfeited or waived legislative immunity absent an “explicit and unequivocal renunciation,” “assuming [waiver] is possible” at all. This case concerns Presidential immunity, a parallel immunity that similarly protects the separation of powers. Here, in his initial answer, President Trump asserted his “immunities . . . under the Constitution.” The President then repeatedly invoked Presidential immunity by name throughout the case, including in his answer to the amended complaint and his motion for summary judgment. The first question presented is: Whether a President can be found to have forfeited or waived Presidential immunity without ever expressly renouncing such immunity, solely because his first responsive pleading did not invoke Presidential immunity by name.

2. Whether a sitting President’s public statements defending his fitness for office by denying allegations of wrongdoing, made from the White House in response to press inquiries, are official acts protected by Presidential immunity under *Trump v. United States*, 603 U.S. 593 (2024).

3. Whether the United States should have been substituted as defendant under the Westfall Act after the Attorney General re-certified that President Trump was acting within the scope of his office in making the challenged statements from the White House in response to press inquiries.

PARTIES TO THE PROCEEDING

Petitioner is President Donald J. Trump. Respondent is E. Jean Carroll. The United States moved to substitute itself as defendant before the Second Circuit.

RELATED PROCEEDINGS

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

Carroll v. Trump, No. 1:20-cv-7311 (Feb. 8, 2024)

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

Carroll v. Trump, No. 24-644 (Sept. 8, 2025)

Carroll v. Trump, No. 23-1045 (Dec. 13, 2023)

Carroll v. Trump, No. 20-3977 (Apr. 21, 2023)

District of Columbia Court of Appeals:

Trump v. Carroll, No. 22-SP-745 (Apr. 13, 2023)

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INTRODUCTION

This is the first case in our Nation’s history in which a court has imposed damages liability on a President for his conduct in office. Yet, in upholding the exorbitant \$83.3 million defamation judgment here, the Second Circuit never even decided whether Presidential immunity applies to President Trump’s allegedly defamatory statements—statements made from the White House, in response to press questions, denying allegations of personal misconduct directly questioning his fitness for office. Indeed, the Second Circuit refused to apply Presidential immunity even after this Court recognized that “most of a President’s public communications are likely to fall comfortably within”

that protection. *Trump v. United States*, 603 U.S. 593, 629 (2024).

The Second Circuit instead engaged in procedural contortions to avoid addressing Presidential immunity. The court wrongly held that President Trump had somehow forfeited his immunity because his initial answer asserted his “immunities . . . under the Constitution” without also invoking Presidential immunity by name. In doing so, the Second Circuit erroneously treated Presidential immunity like any other “ordinar[y]” defense that is “deemed to have [been] waived or forfeited” when “not raise[d] at the outset of the litigation.” App., *infra*, 165a. The court thus wrongly rejected President Trump’s express assertions of Presidential immunity, including in his answer to the amended complaint and motion for summary judgment.

The Second Circuit’s imposition of a strict forfeiture rule for Presidential immunity cries out for this Court’s review in this unprecedented case. As Judge Menashi explained in dissenting from the denial of *en banc* review, joined by then-Chief Judge Livingston and Judge Park, the decision below wrongly eviscerates Presidential immunity, affording it less protection than legislative immunity for Members of Congress and sovereign immunity for States. See *United States v. Helstoski*, 442 U.S. 477 (1979) (legislative immunity); *Sossamon v. Texas*, 563 U.S. 277 (2011) (sovereign immunity). Under this Court’s precedents, waiver of such vital structural immunities “can be found only after explicit and unequivocal renunciation,” “assuming such a waiver can be made” at all. *Helstoski*, 442 U.S. at 490-491. The Second Circuit turned that rule on its head, erroneously requiring a President to make an

explicit and unequivocal statement to *retain* Presidential immunity, rather than to *relinquish* it.

If left standing, the decision below will cause significant damage, not only to this President and future Presidents, but also to “the Nation that the Presidency was designed to serve.” *Nixon v. Fitzgerald*, 457 U.S. 731, 753 (1982). As this Court has recognized, it “would seriously cripple the proper and effective administration of” government if Presidents feared that their official acts could result in damages liability. *Id.* at 745 (citation omitted). That is why immunity for official Presidential acts is necessary. Such immunity, however, is hollowed out if it can be lost inadvertently—or, as here, by invoking “immunit[y]” “under the Constitution” without also expressly naming Presidential immunity. Worse still, the Second Circuit’s strict forfeiture rule would force Presidents, while carrying out their singular duties, to closely supervise all personal litigation against them to ensure their immunity is not lost. That is the very “diversion of [Presidential] attention” and “needless worry” that immunity is supposed to prevent. *Trump*, 603 U.S. at 611 (quoting *Clinton v. Jones*, 520 U.S. 681, 694 n.19 (1997)). The Court should grant the first question presented.

The Court should also grant the second question presented and decide now, instead of remanding, whether the challenged Presidential statements “fall comfortably within the outer perimeter” of the President’s official role, which they clearly do. *Trump*, 603 U.S. at 629. This Court has repeatedly held that “[q]uestions about whether the President may be held liable for particular actions” “must be addressed” as early as possible. *Id.* at 636; see *Fitzgerald*, 457 U.S. at 743 (same). That rule applies with even greater

force here, where the President risks an additional \$1 million in post-judgment interest roughly every three months.

The Presidential immunity question is straightforward on the undisputed factual record. Respondent E. Jean Carroll claims that President Trump defamed her when he denied her allegations of long-ago misconduct—first in a statement distributed to reporters by White House staff, and then the next day while answering questions by reporters on the White House lawn. Those statements were not “manifestly or palpably beyond” Presidential authority. *Trump*, 603 U.S. at 618 (citation omitted). To the contrary, a “long-recognized aspect of Presidential power is using the office’s ‘bully pulpit’ to persuade Americans, including by speaking forcefully or critically,” on “matters of public concern.” *Id.* at 629. Because accusations bearing on the President’s fitness for office are unquestionably matters of public concern, Presidential statements responding to press questions about such accusations are plainly official. This Court should say so.

Finally, the Court should grant the third question presented and decide the related statutory immunity that the Second Circuit also contorted to avoid: immunity under the Westfall Act, 28 U.S.C. § 2679(d). Under that statute, if the Attorney General certifies that a federal officer was acting within the “scope of his office” “at the time of the incident” at issue, the United States “shall be substituted” as the defendant. *Ibid.* In 2020, Attorney General Barr issued such a certification in this case. In 2023, as the lower courts were reviewing his determination, Attorney General Garland withdrew that certification. In 2025, however, Attorney General Bondi re-certified that President

Trump was acting within the scope of his office when he made the challenged statements from the White House.

Yet the Second Circuit sidestepped that scope-of-office question, wrongly denying substitution on the sole, baseless ground that Attorney General Bondi moved too late. By its terms, the Westfall Act does not impose the pre-trial motion deadline that the Second Circuit found. As the three *en banc* dissenters recognized, the Second Circuit had “no principled justification for holding that Attorney General Barr’s certification decision could be revisited by Attorney General Garland,” while “Attorney General Garland’s certification decision could not be revisited by Attorney General Bondi.” App., *infra*, 68a (Menashi, J., dissenting from denial of rehearing *en banc*). That heightens the “prospect of an Executive Branch that cannibalizes itself, with each successive” Attorney General denying the Act’s protections to politically disfavored former officials. *Trump*, 603 U.S. at 640.

* * *

The sitting President and the Department of Justice rarely assert, as both have in this case, that a lower court’s ruling will create “serious risks for the institution of the Presidency” and Executive Branch. *Clinton*, 520 U.S. at 689-690. In such extraordinary cases, this Court has granted certiorari every time. *Ibid.*; see, e.g., *Trump*, 603 U.S. 593; *Trump v. Mazars USA, LLP*, 591 U.S. 848 (2020); *Trump v. Vance*, 591 U.S. 786 (2020); *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367 (2004); *Fitzgerald*, 457 U.S. at 743; *United States v. Nixon*, 418 U.S. 683 (1974).

Here, the President of the United States has been ordered to pay nearly \$100 million in damages

(including post-judgment interest) for issuing a press release and answering reporters' questions, from the White House, defending against attacks on his fitness for office. This Court's review is strongly warranted on that basis alone. If left uncorrected, the effects of the Second Circuit's mistreatment of Presidential immunity and the Westfall Act will reverberate far beyond this case. The threat of even a single damages judgment based on official acts will render all Presidents "unable to boldly and fearlessly carry out [their] duties for fear that [they] may be next." *Trump*, 603 U.S. at 640. "The Constitution does not tolerate such impediments to the effective functioning of government." *Id.* at 636-637. This Court's intervention is necessary.

OPINIONS BELOW

The opinions of the court of appeals (App., *infra*, 1a-56a, 146a-192a) are reported at 151 F.4th 50, 148 F.4th 110, and 88 F.4th 418. The order of the court of appeals denying rehearing *en banc* and the opinions concurring in and dissenting from that denial (App., *infra*, 57a-145a) are reported at 175 F.4th 100. The opinions of the district court (App., *infra*, 193a-283a) are reported at 680 F. Supp. 3d 491, 690 F. Supp. 3d 396, and 731 F. Supp. 3d 626.

JURISDICTION

The court of appeals entered judgment on September 8, 2025. The court denied the United States's substitution motion on June 18, 2025, and issued an opinion explaining that order on August 8, 2025. Petitions for rehearing of the relevant orders were denied

on April 29, 2026. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are reproduced in the appendix to this petition. App., *infra*, 284a-287a.

STATEMENT OF THE CASE

A. Background

On June 21, 2019, E. Jean Carroll publicly accused President Donald J. Trump, then serving his first term in office, of assaulting her in a department store dressing room. Ms. Carroll initially could not provide the year of the alleged incident, eventually pointing to sometime in the mid-1990s. 24-644 C.A. App. A501-A502. Ms. Carroll’s claim, which she had never publicly raised before, appeared in an excerpt of her then-forthcoming book published online by *New York*.

Later that same day, President Trump categorically denied Ms. Carroll’s “false accusations” in a statement distributed to reporters by White House staff, stating that he had “never met” Ms. Carroll. 24-644 C.A. App. A582; *see* App., *infra*, 4a. President Trump also stated that false accusations “diminish the severity of real assault,” and “all should condemn [them] and any actual assault in the strongest possible terms.” App., *infra*, 4a. The next day, President Trump again denied the “total false accusation” while answering questions from reporters on the White House lawn. *Id.* at 5a. During that press availability, he also answered questions on economic issues, foreign policy, and nuclear non-proliferation. 24-644 C.A. App. A584-A596. The White House Press Office published a transcript of the President’s statements. *Ibid.*

Ms. Carroll’s accusations and President Trump’s responses resulted in two different cases. The first, *Carroll I*, is the subject of this petition. Ms. Carroll filed this action in New York state court in November 2019, alleging that President Trump had defamed her by making the two statements from the White House.

Three years later, in November 2022, Ms. Carroll filed a different lawsuit against President Trump, *Carroll II*. There, she brought a state-law battery claim based on the alleged incident, made possible by a 2022 New York law that reopened the statute of limitations for such claims. *See* N.Y. C.P.L.R. § 214-j (McKinney 2022).

Carroll II went to judgment first, in May 2023. After a trial marred by a number of “anomalous holdings” and “striking departures” from basic evidentiary principles, *Carroll v. Trump*, 141 F.4th 366, 367-368 (2d Cir. 2025) (Menashi, J., dissenting from denial of rehearing *en banc*), the jury found for Ms. Carroll and awarded \$5 million in damages. The Second Circuit affirmed. President Trump sought this Court’s review of the district court’s evidentiary errors. This Court denied certiorari on June 29, 2026. President Trump then filed a rehearing petition that remains pending. *See* No. 25-573.

Carroll I (this case) did not go to trial until January 2024. Remarkably, the district court improperly limited that trial to damages only, holding that issue preclusion from the flawed judgment in *Carroll II* barred President Trump from disputing that his 2019 statements were defamatory. App., *infra*, 12a. That egregious ruling itself “denied” President Trump “a fair trial.” App., *infra*, 91a (Menashi, J.). The jury awarded Ms. Carroll \$18.3 million in compensatory

relief and \$65 million in punitive damages, for an unprecedented total of \$83.3 million. App., *infra*, 15a. The Second Circuit affirmed. *Id.* at 56a.

B. Relevant Procedural History

This case was delayed by two separate interlocutory appeals on two threshold questions: (i) whether Ms. Carroll’s suit is barred by absolute Presidential immunity; and (ii) whether the United States is the proper defendant under the Westfall Act.

1. Presidential Immunity Litigation

a. In his answer to the initial state-court complaint, before this case was removed to federal court, President Trump stated that the “alleged defamatory statements” here “are privileged or protected by one or more immunities . . . under the Constitution of the United States.” Answer at 11, *Carroll v. Trump*, No. 20-cv-7311 (S.D.N.Y. Sept. 15, 2020), Dkt. 14-69. Over the next several years, the parties litigated another threshold immunity question: whether the United States would be substituted under the Westfall Act. *See infra*, pp. 13-15. In September 2022, the Second Circuit further delayed resolution of the Westfall Act question by certifying it to the D.C. Court of Appeals, finding the issue to be “governed by the District of Columbia’s *respondeat superior* law.” *Carroll v. Trump*, 49 F.4th 759, 766 (2d Cir. 2022). At that point, President Trump moved to stay the district-court proceedings, but the district court denied the motion. *Carroll v. Trump*, 635 F. Supp. 3d 229, 237 (S.D.N.Y. 2022).

President Trump then moved for summary judgment. His lead argument was Presidential immunity: “Defendant is entitled to ‘absolute immunity from damages liability’ predicated on the statements he made to

the media in response to [Ms. Carroll’s] heinous allegations.” 24-644 C.A. App. A415 (quoting *Fitzgerald*, 457 U.S. at 749). Ms. Carroll then claimed that President Trump had “waived his affirmative defense of absolute immunity by failing to raise it in his answer.” 24-644 C.A. App. A457. She noted that, although she used the term “waiver” to “adher[e] to Second Circuit precedent,” her argument would more “properly be characterized as a forfeiture.” 24-644 C.A. App. A456 n.4.

The district court agreed, holding that President Trump was “barred from raising” Presidential immunity because, “under the controlling rules of civil procedure, he waived the defense by failing to plead it as an affirmative defense in his answer.” App., *infra*, 246a. The court denied President Trump’s alternative request for “leave to amend his answer” to specifically reference Presidential immunity, reasoning that amendment would prejudice Ms. Carroll, and that such immunity would not apply regardless. *Id.* at 256a.

Later, the district court granted Ms. Carroll leave to file an amended complaint to add new allegations. 23-1045 Appellant’s C.A. App. A1046-A1047. In his answer to that new pleading, President Trump again specifically asserted Presidential immunity. 24-644 C.A. App. A884-A885. The district court granted Ms. Carroll’s motion to strike that immunity defense, relying on its earlier ruling that President Trump had forfeited that defense. *Carroll v. Trump*, 685 F. Supp. 3d 267, 279-280 (S.D.N.Y. 2023).

b. On December 13, 2023, the Second Circuit affirmed those erroneous rulings on interlocutory appeal. The court held that President Trump had “waived the defense of presidential immunity by failing to raise it as an affirmative defense in his [original]

answer.” App., *infra*, 167a. The court called that result “waiver,” but acknowledged that “the term ‘forfeiture’ [was] more appropriate” because the question was whether President Trump had lost the defense through “inaction,” not whether he had “intentional[ly] relinquish[ed]” it. *Id.* at 165a-166a n.1. The court accordingly “express[ed] no view on whether [President Trump] intended to relinquish his presidential immunity defense.” *Ibid.*

The Second Circuit rejected President Trump’s argument that a President cannot lose Presidential immunity by failing to raise it by name in his initial pleading. The court disagreed that “presidential immunity is a jurisdictional defense” that goes to a court’s “statutory or constitutional power to adjudicate the case.” App., *infra*, 173a. The court ruled that “presidential immunity is to be treated like other forms of immunity,” such as absolute immunity for prosecutors or judges. *Id.* at 181a. “Ordinarily,” the court stated, such defenses “are deemed to have [been] waived or forfeited” when they are “not raise[d] at the outset of the litigation.” *Id.* at 165a.

c. The case proceeded to trial solely on damages. Counsel for Ms. Carroll repeatedly argued that President Trump had abused his official role as President in making the challenged statements. For example, in her opening statement, counsel stated that President Trump had been “[s]peaking from the White House” and “used the most famous platform on earth to lie about what he had done.” 24-644 C.A. App. A1100. Counsel continued: “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.” *Ibid.* In summation, counsel argued

that President Trump had “wield[ed] his position as president” to “attack[]” Ms. Carroll. 24-644 C.A. App. A1781. The district court specifically relied on that argument in upholding the jury’s unprecedented \$65 million punitive damages award. It held that the “jury was entitled to find” that President Trump had behaved reprehensibly because he had “used the office of the presidency” to deny Ms. Carroll’s claims and purportedly “broadcast his lies to millions.” App., *infra*, 206a.

d. Several months later, this Court decided *Trump v. United States*. That decision held that “most of a President’s public communications are likely to fall comfortably within the outer perimeter of his official responsibilities.” 603 U.S. at 629. *Trump* also held that Presidential immunity is a “structural” limit on the power of federal courts that flows from “our system of separated powers.” *Id.* at 636.

Despite that on-point authority from this Court, the Second Circuit upheld the jury’s \$83.3 million damages award without revisiting its incorrect conclusion that President Trump had forfeited Presidential immunity. App., *infra*, 3a. Applying the law of the case doctrine, the court held that *Trump* did not “constitute an intervening change of law justifying reconsideration of our earlier decision.” *Id.* at 17a-18a.

2. Westfall Act Litigation

a. Under the Westfall Act, the Attorney General may certify that a federal officer “was acting within the scope of his office” “at the time of the” conduct at issue. 28 U.S.C. § 2679(d). Upon certification, the action “shall be deemed an action against the United States,” and “the United States shall be substituted as the party defendant.” *Ibid.* The case is then governed by

the Federal Tort Claims Act, which expressly preserves the United States’s sovereign immunity in defamation suits. *Id.* § 2680(h). Certification also triggers removal to federal court if necessary. *Id.* § 2679(d)(2)-(3). Certification is conclusive as to removal, but not substitution, which is subject to judicial review. *De Martinez v. Lamagno*, 515 U.S. 417, 420 (1995).

b. In September 2020, Attorney General Barr (through a designee) issued the first Westfall Act certification in this case. 24-644 C.A. App. A113-A114. The United States removed the case to federal court and moved to substitute itself as defendant. The district court denied the motion, wrongly concluding (among other things) that President Trump had not been acting within the scope of his office when he made the challenged statements from the White House. *Carroll v. Trump*, 498 F. Supp. 3d 422 (S.D.N.Y. 2020).

On interlocutory appeal, the Second Circuit declined to decide that scope-of-office question. *Carroll*, 49 F.4th at 761. The Second Circuit instead certified that question to the D.C. Court of Appeals. *Id.* at 766. The D.C. Court of Appeals responded that it “generally adheres” to the “traditional view of the scope-of-employment inquiry,” but declined to “define the scope of employment of the President of the United States” or otherwise address the facts of this case. *Trump v. Carroll*, 292 A.3d 220, 240 (D.C. 2023). The Second Circuit then remanded to the district court to consider that scope-of-office question. *Carroll v. Trump*, 66 F.4th 91, 94 (2d Cir. 2023).

c. In June 2023, DOJ—then led by Attorney General Garland—reversed Attorney General Barr’s 2020 determination. Attorney General Garland’s designee informed the district court that DOJ’s “prior

certification and motion to substitute ha[d] been overtaken by events,” and that it would now be “declining to certify under the Westfall Act.” App., *infra*, 149a. Following that purported de-certification, the district court did not address whether President Trump’s statements were within the scope of his office. The court later entered the anomalous \$83.3 million judgment for Ms. Carroll after the damages-only trial. *See supra*, p. 9. President Trump appealed.

d. In April 2025, while that appeal was pending, Attorney General Bondi’s designee re-certified this case under the Westfall Act, concluding that President Trump had acted within the scope of his office when he made his statements from the White House. App., *infra*, 150a. The United States and President Trump jointly moved to substitute the United States as defendant. The Second Circuit referred the motion to the merits panel. Two months later, on June 18, 2025—less than one week before oral argument—that panel denied substitution without opinion. Order, *Carroll v. Trump*, No. 24-644 (2d Cir. June 18, 2025).

The panel later issued a per curiam opinion giving two basic reasons for its order. App., *infra*, 146a-164a. *First*, the panel held that the Westfall Act itself barred Attorney General Bondi’s motion to substitute. The court concluded that the Act imposes a pre-trial deadline for substitution motions in cases that originate in state court. *Id.* at 150a-160a.

Second, the panel held that the motion was also untimely under principles of waiver, “fairness and equity.” App., *infra*, 160a-164a. The panel reasoned that “[t]he practical impact of permitting” substitution “would be to unwind” “five years of litigation and a duly-rendered jury verdict” and “deprive Carroll of

any opportunity to pursue her claims.” *Id.* at 163a. The panel thus concluded that Attorney General Bondi could not “now change course” from Attorney General Garland’s de-certification, *id.* at 162a, even as the panel gave effect to Attorney General Garland’s own reversal of Attorney General Barr.

3. *En Banc Proceedings*

After the Second Circuit panel entered final judgment in favor of Ms. Carroll, both the United States and President Trump filed petitions to rehear the case *en banc*. The Second Circuit denied the petitions. App., *infra*, 57a. Judge Menashi dissented, joined in relevant part by then-Chief Judge Livingston and Judge Park.

As relevant here, the *en banc* dissent disagreed with the first panel’s decision, on interlocutory appeal, that “presidential immunity may be waived unintentionally through inadvertence.” App., *infra*, 82a. The dissent saw “no reason to conclude that the waiver of presidential immunity may be any less explicit and unequivocal than the legislative analogue” under the Speech or Debate Clause, which requires at least an “explicit and unequivocal renunciation,” per *Helstoski*, 442 U.S. at 491. App., *infra*, 81a-82a. The dissent further explained that President Trump has “strong arguments” under *Trump v. United States* that he “was speaking in an official capacity” when he denied Ms. Carroll’s allegations from the White House. *Id.* at 89a.

The dissenting judges also would have granted substitution. They explained that “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.” App., *infra*, 59a-60a. The dissent likewise saw “no principled justification for holding that Attorney General Barr’s certification decision could be revisited by Attorney General Garland,” while “Attorney General Garland’s certification decision could not be revisited by Attorney General Bondi.” *Id.* at 68a. The dissent criticized the panel for “invok[ing] these procedural and statutory obstacles to avoid facing the fact that the certifications of Attorneys General Barr and Bondi were correct.” *Id.* at 75a.

REASONS FOR GRANTING THE PETITION

The Presidential conduct in this case—making public statements to the White House press corps directly defending his character and fitness for office—“fall[s] comfortably within the outer perimeter” of Presidential power under this Court’s decision in *Trump*. 603 U.S. at 629. But the Second Circuit specifically avoided deciding the substance of either Presidential immunity or the Westfall Act’s “scope of office” immunity. The court instead erroneously held that (i) a President forfeits Presidential immunity by failing to expressly raise it by name in his first responsive pleading, and (ii) the United States is barred from moving for substitution after trial in cases that began in state court—even where the delay is caused solely by one Attorney General’s withdrawal of his predecessor’s timely substitution motion. These rulings are legally wrong and create “serious risks for the institution of the Presidency.” *Clinton*, 520 U.S. at 689-690. This Court should grant review to decide them.

The Court should also decide now whether Presidential immunity applies (which it plainly does), rather

than remanding. That issue was fully briefed below and requires no further development. The need for prompt resolution of the President’s immunity is especially great here because the wrongful \$83.3 million judgment is against the sitting President, and interest is accruing daily. This case requires the President’s attention, thus implicating the “dominant concern” underlying immunity: avoiding any possible interference with the President’s “singular[ly] important[t]” duties. *Trump*, 603 U.S. at 611 (citation omitted). There is “no reason to leave the public” or the President “in limbo” any longer. *Trump v. Cook*, 609 U.S. ___, ___ (June 29, 2026) (slip op. 24).

I. THE SECOND CIRCUIT’S WAIVER DECISION WARRANTS THIS COURT’S REVIEW.

A. The Decision Below Is Wrong.

The Second Circuit held that a President irretrievably loses “presidential immunity by failing to raise it as an affirmative defense” in his first responsive pleading. App., *infra*, 191a. That is wrong.

1. *This Court’s precedents establish that Presidential immunity cannot be lost through inadvertence.*

a. The President of the United States is “the only person who alone composes a branch of government.” *Trump*, 603 U.S. at 610 (citations omitted). For that reason, “interference with a President’s ability to carry out his public responsibilities is constitutionally equivalent to interference with the ability of the entirety of Congress, or the Judicial Branch, to carry out its public obligations.” *Clinton*, 520 U.S. at 713 (Breyer, J., concurring in the judgment). “[T]he separation-of-powers

doctrine” forbids such impairment by one branch of “another in the performance of its constitutional duties.” *Id.* at 701 (majority opinion) (citation omitted).

That principle “functionally mandate[s]” “absolute immunity from damages liability predicated on [a President’s] official acts.” *Trump*, 603 U.S. at 611 (quoting *Fitzgerald*, 457 U.S. at 749). The threat of such potentially bankrupting liability would “chill[]” the President “from taking the bold and unhesitating action required of an independent Executive.” *Id.* at 613 (citation omitted); *see id.* at 636-637. Immunity protects against that chilling effect, *id.* at 604, by “free[ing]” the President “from [any] lawsuit” based on his official acts, *GEO Group, Inc. v. Menocal*, 607 U.S. 438, 445 (2026).

b. Under this Court’s precedents, immunities that “preserve the constitutional structure” cannot be forfeited or waived in the same way as other defenses, and may not be forfeitable or waivable at all. *Helstoski*, 442 U.S. at 491.

In *Helstoski*, a congressman appeared before a grand jury on ten different occasions to testify and provide documents concerning his legislative acts. 442 U.S. at 481-483. Despite being “aware of” his legislative immunity “at the time he made his first grand jury appearance,” Helstoski failed to “assert any privilege under the Speech or Debate Clause” until his ninth appearance. *Id.* at 482-483 & n.4. The Government argued that Helstoski had “waived the protection of the Clause by testifying” and “voluntarily producing documentary evidence of legislative acts.” *Id.* at 490.

This Court rightly rejected that argument. It left open “whether an individual Member may waive the Speech or Debate Clause’s protection.” 442 U.S. at

490. “Assuming that is possible,” the Court held, “waiver can be found only after explicit and unequivocal renunciation of the protection.” *Id.* at 490-491. The Court reasoned that “[t]he ordinary rules for determining the appropriate standard of waiver do not apply in this setting.” *Id.* at 491. The “purpose” of legislative immunity is “to prevent[] intrusion by the Executive and the Judiciary into the sphere of protected legislative activities” and “free the legislator from executive and judicial oversight.” *Id.* at 491-492 (citation omitted). Adjudicating a case against a legislator without the clearest possible waiver would “risk” that very “intrusion.” *Id.* at 491.

The Court has followed the same rule for state sovereign immunity, which similarly “enforce[s] an important constitutional limitation on the power of the federal courts.” *Sossamon*, 563 U.S. at 284. Although such immunity is not strictly “jurisdictional,” it “sufficiently partakes of the nature of a jurisdictional bar that it may be raised by the State for the first time on appeal.” *Patsy v. Board of Regents of Florida*, 457 U.S. 496, 515 n.19 (1982) (citation omitted). Relinquishment of immunity must also be “unequivocally expressed.” *Sossamon*, 563 U.S. at 284 (citation omitted). “Only by requiring this clear declaration by the State can [a court] be certain that the State in fact consents to suit.” *Ibid.* (citations omitted).

c. These precedents make clear that the “ordinary rules” for determining waiver or forfeiture also “do not apply” to Presidential immunity. *Helstoski*, 442 U.S. at 491. Like legislative immunity and sovereign immunity, Presidential immunity may be relinquished, if at all, only by the President’s express and unequivocal statement. Invoking “immunities . . . under the

Constitution” in an initial pleading in no way results in the permanent loss of Presidential immunity.

First, “there is no reason to conclude that the waiver of presidential immunity may be any less explicit and unequivocal than the legislative analogue” in the Speech or Debate Clause. App., *infra*, 82a (Menashi, J., dissenting). The two immunities serve the same basic purpose: “reinforcing the separation of powers.” *United States v. Johnson*, 383 U.S. 169, 178 (1966). Legislative immunity is not “for the personal or private benefit” of legislators, but is designed to “insur[e] [legislative] independence,” *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 502 (1975). So too, Presidential immunity “seek[s] to protect not the President himself, but the institution of the Presidency.” *Trump*, 603 U.S. at 632. Where a defense “serves to protect primarily” those “structural” or “institutional interests,” the usual “notions of consent and waiver cannot be dispositive.” *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 848, 851 (1986).

Second, the dangers of judicial intrusion on a co-equal branch are even greater for the President. Compared to Members of Congress, the “sheer prominence of the President’s office” and “the effect of his actions on countless people” make him an “easily identifiable target for suits for civil damages.” *Fitzgerald*, 457 U.S. at 752-753. “Cognizance of this personal vulnerability” threatens to “distract a President from his public duties” and distort his official decisionmaking. *Id.* at 753. Thus, even “the possibility” of damages liability for official Presidential acts creates an intolerable “impediment[] to the effective functioning” of the Executive Branch. *Trump*, 603 U.S. at 636-637 (citation omitted).

Presidents are unlikely to be aware of, let alone able to personally supervise, every action filed against them from the inception of such litigation. Yet under the Second Circuit’s unduly strict forfeiture rule, failure to immediately identify Presidential immunity specifically by name in even one such suit may lead to a massive, wrongful damages judgment, as this case illustrates. Requiring Presidents to closely supervise all personal litigation against them to ensure that no case slips through the cracks poses serious risks of “diversion of [Presidential] attention” away from actual duties. *Clinton*, 520 U.S. at 694 n.19. That would “frustrat[e]” the very “purposes immunity is meant to serve.” *Filarsky v. Delia*, 566 U.S. 377, 392 (2012).

Third, Presidential immunity is similar to sovereign immunity in that it “partakes of the nature of a jurisdictional bar.” *Patsy*, 457 U.S. at 515 n.19. The Court has consistently described Presidential immunity as a constraint on the exercise of “judicial power.” *Clinton*, 520 U.S. at 700-701; *see Fitzgerald*, 457 U.S. at 754 (“A court, before *exercising jurisdiction*, must” consider the “dangers of intrusion on the authority and functions of the Executive Branch”) (emphasis added); *Trump*, 603 U.S. at 609 (courts cannot “adjudicate a criminal prosecution that examines” official acts).

Presidential immunity operates like a jurisdictional bar in at least two ways. First, it channels scrutiny of official Presidential acts to the exclusive constitutional forum: impeachment proceedings. When exercising “powers [that] are derived from the constitution,” the President “is beyond the reach of any other department, *except* in the mode prescribed by the constitution through the impeaching power.” *Kendall v. United States ex rel. Stokes*, 37 U.S. 524, 610 (1838) (emphasis

added). Thus, “with respect to acts taken in his public character—that is, official acts—the President may be disciplined principally by impeachment, not by private lawsuits for damages.” *Clinton*, 520 U.S. at 696 (citation omitted). In this respect, Presidential immunity again mirrors legislative immunity, which protects Congress’s exclusive power to discipline its Members.

Presidential immunity also prevents courts from “expressing lack of the respect due [a] coordinate branch[] of government.” *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (citation omitted). Adjudicating a case based on official Presidential acts generally will require the court to “determine the legality” of constitutionally authorized conduct, *Clinton*, 520 U.S. at 705, and thus “inevitably subject Presidential actions to undue judicial scrutiny,” *Fitzgerald*, 457 U.S. at 762 (Burger, C.J., concurring). Deciding such cases exceeds the “appropriate role for the Federal Judiciary” and thus “the courts’ jurisdiction.” *Rucho v. Common Cause*, 588 U.S. 684, 696 (2019) (citation omitted).

d. Notably, even in areas that do not implicate the separation of powers, this Court has recognized a number of “basic rights that [an] attorney cannot waive without the fully informed and publicly acknowledged consent of the client.” *Taylor v. Illinois*, 484 U.S. 400, 417-418 (1988). For example, courts may not “presum[e] waiver” of the right to counsel; instead, the record must show “that an accused was offered counsel but intelligently and understandingly rejected the offer.” *Carnley v. Cochran*, 369 U.S. 506, 516 (1962). Courts similarly cannot find that a defendant has waived the right to a jury trial “from a silent record.” *Boykin v. Alabama*, 395 U.S. 238, 243 (1969).

A President’s immunity from personal liability for his official acts is at least as deserving of solicitude and protection as these individual trial rights. Permitting such suits “would ‘seriously cripple’ the President’s exercise of his official duties” and “threaten [his] independence.” *Trump*, 603 U.S. at 632 n.3. For that reason, Presidential immunity requires *more* robust procedural protections than those “available to every criminal defendant.” *Id.* at 637.

2. *The Second Circuit’s contrary conclusion rested on several deeply flawed premises.*

By positing that Presidential immunity must be either a “defense[] based on subject-matter jurisdiction,” or else an “ordinar[y]” defense that is lost unless “raise[d] at the outset of the litigation,” App., *infra*, 165a, the Second Circuit interlocutory panel erred. As explained above, there are a number of immunity defenses that need not be raised immediately, despite not being “jurisdictional” in the subject-matter sense. *See Patsy*, 457 U.S. at 515 n.19 (sovereign immunity); *Eastland*, 421 U.S. at 511 n.17 (legislative immunity). And certain individual trial rights can be relinquished only by an express and unequivocal statement. *See supra*, p. 23.

The panel also mistakenly treated comparisons to prosecutorial and judicial immunity as dispositive. App., *infra*, 174a-178a. Those immunities, however, derive from the common law, not the separation of powers.¹ Regardless, this Court has never held that judicial or prosecutorial immunity must be raised in the

¹ This Court has never squarely addressed whether the Constitution requires immunity for federal judges.

first responsive filing. The Court has at most suggested that such defenses do not implicate a court's subject-matter jurisdiction. *See Nevada v. Hicks*, 533 U.S. 353, 373 (2001). But again, a protection could be non-jurisdictional and still resist ordinary forfeiture because of the structural interests it serves.

Finally, in refusing to revisit the interlocutory panel's analysis, the Second Circuit merits panel erroneously faulted President Trump for citing *Helstoski* and arguing that Presidential immunity requires at a minimum an "explicit and unequivocal renunciation." App., *infra*, 18a. The merits panel reasoned that President Trump had not made that argument before, but rather had "argued only that presidential immunity could *never* be waived at all," regardless of how clearly such intent is expressed. *Id.* at 19a.

That is wrong. President Trump's counsel did say in briefing and at argument that Presidential immunity is "not waivable." 23-1045 Pet. C.A. Br. 8. To be clear, counsel was using the term "waive" in the same sense as Ms. Carroll and the courts below. As the original panel put it, the question at hand was whether President Trump "waived . . . *by failing to raise*" immunity expressly. App., *infra*, 167a (emphasis added). That more accurately describes forfeiture, not waiver, as the panel itself acknowledged. App., *infra*, 165a-166a n.1. Indeed, the panel made clear that it was addressing only the question of inadvertent forfeiture by going out of its way to "express no view on whether Defendant intended to relinquish his presidential immunity defense." *Ibid.* No matter the label, the issue has always been whether a President irrevocably loses his immunity if he does not specifically and expressly assert it by name in his first responsive filing. The answer is no.

**B. The Question Presented Is Important And
Warrants Review In This Case.**

In prior cases where the President and the Department of Justice warned that a decision below created “serious risks for the institution of the Presidency,” *Clinton*, 520 U.S. at 689-690, the Court has always—100% of the time—granted review, including without a developed circuit conflict. *See* cases cited *supra*, pp. 5-6. Such conflicts rarely have time to develop because disputes involving Presidential powers and immunities are exceptional and require prompt resolution. *Clinton*, 520 U.S. at 689.

This case deserves that same review. As the United States explained to the Second Circuit, an “immunity that can be lost too easily—even unintentionally—is far less potent” than required. 24-644 Gov’t C.A. Br. as Amicus Curiae at 5. The Second Circuit’s erroneous holding thus “damages the institution” of the Presidency and implicates an “issue[] of exceptional importance to the present and future functioning of the federal government.” *Id.* at 1, 6.

For Presidents in particular, an “uncertain immunity is little better than no immunity at all.” *Filarsky*, 566 U.S. at 392. Even a single successful lawsuit—let alone one resulting in an extraordinary \$83.3 million judgment for statements from the White House directly bearing on the President’s fitness for office—sends an ominous signal regarding every future President’s “[v]ulnerability” to damages liability for official acts, and thus risks “dampen[ing] the ardor of all but the most resolute” occupants of that office. *Trump*, 603 U.S. at 620, 636 (citation omitted). If wrongly allowed to stand, the decision below would embolden opponents of President Trump and of all future Presidents to sue

them for their official acts. “The enfeebling of the Presidency and our Government that would result from such a cycle of factional strife is exactly what the Framers intended to avoid.” *Id.* at 640.

The Second Circuit’s strict forfeiture rule also warrants review because it is the sole ground on which a federal court has imposed an unjust \$83.3 million award against a President for his conduct while in office—the first such judgment of any amount in American history. Before that judgment becomes final over the President’s objection, this Court, in light of its institutional role, should itself consider whether the lower courts erred in not applying Presidential immunity.

Alternatively, the Court may wish to grant, vacate, and remand this case, and instruct the Second Circuit to reconsider its initial interlocutory decision in light of *Trump v. United States*. Although that court’s merits decision post-dates *Trump*, its interlocutory decision did not, and the merits panel mistakenly relied on “the law of the case doctrine” to sidestep Presidential immunity. App., *infra*, 16a. That doctrine does not limit this Court. *Trump* “provided important clarifications” regarding Presidential immunity that amply “justified the reconsideration” of the interlocutory panel’s ruling. *Id.* at 85a-86a (Menashi, J.).

II. THIS COURT SHOULD ALSO REACH THE SUBSTANCE AND REVERSE THE JUDGMENT ON IMMUNITY GROUNDS.

In this unprecedented case, the Court should also grant the second question presented and decide the immunity question on its merits, for the benefit of this President, future Presidents, the Presidency, and the

Nation itself. In *Trump*, this Court reiterated that “[q]uestions about whether the President may be held liable for particular actions” “must be addressed at the outset of a proceeding” given their paramount importance. 603 U.S. at 636. Rather than defer resolution of immunity for several more years by remanding to the Second Circuit—which already declined to address immunity despite having full briefing on the question—the Court should grant the second question presented and decide now that Presidential immunity applies.

A. *Trump v. United States* Requires Reversal.

The extreme \$83.3 million judgment in this case conflicts with *Trump* in at least two ways. *First*, the courts below wrongly found the President liable for making statements to the White House press publicly defending his character and fitness for the Presidency—acts that are protected by Presidential immunity. *Second*, the district court wrongly allowed Ms. Carroll to “invite[]” the jury “to scrutinize and punish official acts of the President” during the damages trial, and then erroneously upheld the jury’s improper punitive damages award *because* it thought the jury was justified in that President-specific punishment. App., *infra*, 90a (Menashi, J.).

1. In *Trump*, this Court held that “most of a President’s public communications” are official acts. 603 U.S. at 629. The Court reasoned that “a long-recognized aspect of Presidential power is using the office’s ‘bully pulpit’ to persuade Americans, including by speaking forcefully or critically, in ways that the President believes would advance the public interest,” even on “matters of public concern that may not directly

implicate the activities of the Federal Government.” *Ibid.* *Trump* noted that there “*may*” “be contexts in which the President . . . speaks in an unofficial capacity—*perhaps* as a candidate for office or party leader.” *Ibid.* (emphasis added). At the same time, the President’s “extraordinary power to speak to his fellow citizens” extends to all public statements “not manifestly or palpably beyond” his broad official role. *Id.* at 618, 629 (citation omitted). To determine whether a Presidential statement is in fact “manifestly or palpably” unofficial, courts must conduct an “objective analysis of [its] content, form, and context.” *Id.* at 629 (citation omitted). That includes asking “who was involved in transmitting” the statement and “what else was said contemporaneous[ly].” *Id.* at 630.

Here, President Trump’s White House statements denying Ms. Carroll’s accusations “fall comfortably within” his official authority. *Trump*, 603 U.S. at 629. Start with “who was involved” and “what else was said.” President Trump issued the first statement by providing it to White House Press Office staff, who in turn provided it to a reporter. App., *infra*, 240a & n.5. In that statement, the President denied Ms. Carroll’s allegations while also offering a broader message. “False accusations,” he urged, “diminish the severity of real assault,” and Americans “should condemn false accusations and any actual assault in the strongest possible terms.” *Id.* at 4a. This first statement thus had all the objective trappings of Presidential speech on “matters of public concern.” *Trump*, 603 U.S. at 629. It was an official act.

That is equally true of the second statement, which President Trump gave in response to a question by a reporter before boarding Marine One. 24-644 C.A.

App. A584-A596. President Trump answered the question about Ms. Carroll’s accusations after answering other questions on the stock market, tariffs, immigration enforcement, and potential hostilities with Iran. *Ibid.*

The content of President Trump’s statements underscores their official nature. Accusations regarding the President’s fitness for office are unquestionably a matter of public concern—hence the press’s interest in Ms. Carroll’s allegations and in President Trump’s response. To perform his constitutional duties effectively, every President “need[s] to maintain [his] prestige as an element of Presidential influence.” *Fitzgerald*, 457 U.S. at 757. A President is thus “carrying out [his] responsibilities,” *Trump*, 603 U.S. at 642—or, at least, not manifestly exceeding them—when he publicly responds to claims of wrongdoing of any kind.

Several key precedents predating *Trump* support the conclusion that the challenged statements here were official in nature. In *Barr v. Matteo*, the former Acting Director of the Office of Rent Stabilization (Barr) faced allegations that, under his watch, agency employees had received millions in improper payments. 360 U.S. 564, 566-567 (1959) (plurality opinion). In response, Barr issued a press release announcing the suspension of two employees who he claimed were solely responsible. *Id.* at 567 n.5. When one of the employees later sued Barr for defamation, this Court recognized an “absolute privilege.” *Id.* at 574; *see id.* at 576-577 (Black, J., concurring). It explained that Barr’s “own integrity in his public capacity” “had been directly and severely challenged in charges” “given wide publicity.” *Id.* at 574 (plurality). Issuing a press release denying the charges was thus “within the outer

perimeter of [Barr’s] line of duty” as “Acting Director of an important agency of government.” *Id.* at 574-575.

The D.C. Circuit has similarly held that a congressman acted within the scope of his office “when he discussed his marital status in his office, during regular business hours, in response to a reporter’s inquiries.” *Council on American Islamic Relations v. Ballenger*, 444 F.3d 659, 661 (D.C. Cir. 2006). The court reasoned that a “Member’s ability to do his job as a legislator effectively is tied” to his “relationship with the public and in particular his constituents.” *Id.* at 665-666. The congressman was thus protecting his “ability to carry out his representative responsibilities effectively” by “answering [the] reporter’s question about [his] personal life.” *Ibid.*

So too here. Responding to widely publicized accusations that bear on his perceived “integrity” and fitness for office is clearly “within the outer perimeter” of the President’s duties. *Barr*, 360 U.S. at 574-575. Far more than a Member of Congress, the President’s “ability to do his job” and “carry out his . . . responsibilities effectively” depends on his public standing. *Ballenger*, 444 F.3d at 665-666. Indeed, this Court already suggested as much in *Clinton*. There, the Court went out of its way to note that President Clinton’s statements denying allegations of misconduct before he took office were “arguably . . . within the outer perimeter of [his] official responsibilities.” 520 U.S. at 686 & n.3. That conclusion was clearly correct under the analysis required by *Trump*.

2. The lower courts also clearly erred by permitting the jury to award punitive damages based on its disagreement with how President Trump “wielded his position.” App., *infra*, 206a. Ms. Carroll’s counsel

repeatedly urged the jury to punish President Trump especially harshly because he had “used the most famous platform on earth”—the “place where Presidents have signed laws, declared wars, decided the fate of the nation”—to deny Ms. Carroll’s accusations. 24-644 C.A. App. A1100. The district court then wrongly upheld the jury’s award of \$65 million in punitive damages by citing “evidence that Mr. Trump used the office of the presidency—the loudest ‘bully pulpit’ in America”—to “broadcast his [alleged] lies.” App., *infra*, 206a. That is exactly the sort of “second-guessing” of the “propriety” of official Presidential acts that *Trump* forbids. 603 U.S. at 632 n.3. Indeed, the error is even more manifest: the jury was improperly invited to punish a President *more severely* than a private citizen, because he had “used the office of the presidency” to commit the alleged tort.

B. President Trump Is Entitled To Prompt Resolution Of The Immunity Question.

This Court should correct these clear constitutional violations now. It has recognized that “special solicitude” is “due to claims alleging a threatened breach of essential Presidential prerogatives under the separation of powers.” *Fitzgerald*, 457 U.S. at 743; *cf. Eastland*, 421 U.S. at 511 n.17 (courts have a similar “duty to see that” questions of legislative immunity are “swiftly resolved”). In *United States v. Nixon*, for example, the Court decided a novel claim of executive privilege in the first instance, explaining that the “public importance of the issues presented and the need for their prompt resolution” required its immediate review. 418 U.S. at 687. In *Trump*, the Court held that several kinds of alleged Presidential acts were “readily

categorized” as official in nature without first remanding on those questions. 603 U.S. at 617. By contrast, *Trump* remanded other more “fact specific” immunity issues for further development. *Id.* at 617, 628.

That approach strongly supports immediate review of the immunity question in this case. There is no factual dispute about the content, context, form, or circumstances of the two Presidential statements at issue. Nor would there be any unfairness in this Court deciding the immunity question on this record. After *Trump* was decided, both parties fully briefed the immunity question to the court of appeals, which expressly declined to address it. *See* 24-644 Pet. C.A. Br. at 18-24; 24-644 Resp. C.A. Br. at 23-28.

By contrast, further delaying resolution of this case would cause the very harm to the sitting President that immunity is designed to eliminate. President Trump is currently serving under the cloud of an \$83.3 million judgment that should never have been entered. The President was required to obtain and still maintains a supersedeas bond to prevent immediate execution of that judgment. Order, *Carroll v. Trump*, No. 20-cv-7311 (S.D.N.Y. Mar. 12, 2024). Post-judgment interest has already reached nearly \$10 million and grows daily. The whole point of immunity is to eliminate a President’s “vulnerability” to such concerns—a vulnerability that remains as long as this case hangs over the President and the Presidency. *Fitzgerald*, 457 U.S. at 753.

III. THE WESTFALL ACT ISSUE ALSO WARRANTS THIS COURT’S REVIEW.

In addition to absolute Presidential immunity, President Trump has a statutory “personal immunity”

from liability under the Westfall Act. *De Martinez*, 515 U.S. at 426. President Trump was acting “within the scope of his office . . . at the time” he made the statements refuting Ms. Carroll’s allegations. 28 U.S.C. § 2679(d). Thus, under the Westfall Act, the United States is the proper and exclusive defendant. The court of appeals erred by denying the United States’s motion for substitution on procedural grounds. That part of the decision below is also worthy of review.

A. The Second Circuit erred in holding that the United States’s motion to substitute was untimely. The Westfall Act does not impose a pre-trial deadline for motions to substitute in cases, such as this one, “commenced . . . in a State court” and timely removed to federal court. 28 U.S.C. § 2679(d)(2); *see App., infra*, 285a-286a (full provision). Paragraph (d)(2) simply states that, “upon certification by the Attorney General,” the “action or proceeding shall be deemed to be . . . brought against the United States,” “and the United States shall be substituted as the party defendant.” *Ibid.* The Second Circuit had “no authority to add a limitation the statute plainly does not contain.” *Whitfield v. United States*, 574 U.S. 265, 269 (2015).

That conclusion is reinforced by paragraph (d)(1), which governs cases “commenced” in federal court and contains identical language regarding substitution. *See* 28 U.S.C. § 2679(d)(1). Neither Ms. Carroll nor the Second Circuit disputes that paragraph (d)(1) does not impose any time limit on motions to substitute. When Congress uses “identical words and phrases within the same statute,” they “should normally be given the same meaning.” *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007) (citation omitted). There is no reason why Congress would have

authorized post-trial substitution in cases that begin in federal court, but not in cases that begin in state court and are later removed. Where the case starts is irrelevant to the goals of the Westfall Act: at every stage, the federal officer or employee faces the same liability and the same “cost and effort” of continuing to “defend[] the lawsuit.” *Osborn v. Haley*, 549 U.S. 225, 252 (2007). The Westfall Act is specifically meant to eliminate such burdens.

To hold otherwise, the Second Circuit treated paragraph (d)(2)’s time limit on *removal* as if it also limits the time for *substitution*. It does not. The first sentence of (d)(2) states that, upon certification, an action filed in state court may be “*removed* without bond at any time before trial.” 28 U.S.C. § 2679(d)(2) (emphasis added). But that says nothing about the timing of a substitution motion once the case is in federal court. “Congress spoke in discrete sentences in § 2679(d)(2)”: “first of removal, then of substitution,” *De Martinez*, 515 U.S. at 432, and the second sentence simply has no textual timing requirement.

The Second Circuit’s other reasons for refusing to consider substitution are also flawed. As the three-judge *en banc* dissent emphasized, the court of appeals had “no principled justification for holding that Attorney General Barr’s certification decision could be revisited by Attorney General Garland,” while “Attorney General Garland’s certification decision could not be revisited by Attorney General Bondi.” App., *infra*, 68a (Menashi, J.). This Court’s intervening decision in *Trump* provided a compelling reason for Attorney General Bondi’s re-certification. *Trump* made clear that “using the office’s ‘bully pulpit’ to persuade Americans” is a “long-recognized aspect” of the Presidency.

603 U.S. at 629. The Second Circuit also erred by relying on “the practical impact of permitting” substitution, which would be to “deprive Carroll of any opportunity to pursue her claims.” App., *infra*, 163a. The results of properly applying the Westfall Act are not a valid reason to misapply it.

B. This Court’s review is warranted. As the United States explained below, if left uncorrected, the Second Circuit’s procedural rulings will “undermine the Westfall Act’s protections for” all federal officers and employees, “and severely damage the Presidency” in particular. *See* Pet. for Panel Reh’g and En Banc Determination at 3, *Carroll*, No. 24-644 (2d Cir. Aug. 22, 2025). By preferencing one Attorney General’s purported de-certification over the certification of both his predecessor and successor, the Second Circuit’s decision perversely encourages the Executive Branch to “cannibalize[] itself,” *Trump*, 603 U.S. at 640, by removing a critical statutory protection for former officials, especially Presidents.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 28, 2026

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AUGUST TERM 2024
Argued: June 24, 2025
Decided: September 8, 2025

No. 24-644

E. JEAN CARROLL,

*Plaintiff-Counter-
Defendant-Appellee,*

v.

DONALD TRUMP, in his personal capacity,

*Defendant-Counter-
Claimant-Appellant.**

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Before: Chin, Merriam, and Kahn, Circuit Judges.

Per Curiam:

On June 21, 2019, *New York* magazine published an excerpt from E. Jean Carroll's then-forthcoming book in which she alleged that Donald Trump sexually assaulted her at the Bergdorf Goodman department store in 1996. Trump responded -- both when he was President of the

* The Clerk of Court is respectfully directed to amend the official caption as set forth above.

United States and again after he left office -- by publicly accusing Carroll of fabricating her allegations for personal and political motives.

Carroll sued Trump initially for defamation based on statements he made during his first term as President (“*Carroll I*”). Later, following further developments described below, Carroll sued Trump for sexually assaulting her in 1996 and for defamation based on statements he made after his first term as President ended (“*Carroll II*”).

Carroll II was tried first. The jury found that Trump had indeed sexually assaulted Carroll and that he defamed her in statements he made after he left office. The jury awarded Carroll compensatory and punitive damages totaling \$5 million. We affirmed. *See Carroll v. Trump*, 124 F.4th 140 (2d Cir. 2024) (“*Carroll 4*”) (per curiam), *reh’g en banc denied*, 141 F.4th 366 (2d. Cir. 2025).¹

After the jury’s verdict in *Carroll II* (but before this Court affirmed), the district court granted partial summary judgment in *Carroll I* in favor of Carroll on the issue of liability. A jury thereafter awarded Carroll \$83.3 million in compensatory and punitive damages for defamatory statements Trump made while he was still in office.

The present appeal is from the judgment in *Carroll I*. Although a panel of this Court has already rejected Trump’s claim of presidential immunity, *see Carroll v. Trump*, 88 F.4th 418 (2d Cir. 2023) (“*Carroll 3*”) (Cabranes, *J.*), Trump now argues that the Supreme

¹ As noted above, we refer to the two district court cases as *Carroll I* and *Carroll II*. We refer to the four relevant decisions of this Court as *Carroll 1*, *2*, *3*, and *4*, numbered in chronological order.

Court's intervening decision in *Trump v. United States*, 603 U.S. 593, 144 S. Ct. 2312, 219 L.Ed.2d 991 (2024), warrants reconsideration of our prior decision. He also challenges the district court's grant of partial summary judgment in favor of Carroll, its striking a portion of his testimony, its jury instructions on punitive damages, and the size of the jury's compensatory and punitive awards.

For the reasons set forth below, we conclude that Trump has failed to identify any grounds that would warrant reconsidering our prior holding on presidential immunity. We also conclude that the district court did not err in any of the challenged rulings and that the jury's damages awards are fair and reasonable. Accordingly, we AFFIRM the judgment of the district court.

BACKGROUND

I. The Facts²

In 1996, Carroll encountered Trump at the Bergdorf Goodman department store in Manhattan where he sexually assaulted her by forcibly inserting his fingers into her vagina without her consent.³

² The facts related to the 1996 sexual assault and *New York* magazine publication are drawn from the district court's summary judgment decision. All the remaining facts within this section are drawn from the evidence presented at trial, and are construed in favor of Carroll as the prevailing party. *See Saint-Jean v. Emigrant Mortg. Co.*, 129 F.4th 124, 133 (2d Cir. 2025).

³ The district court instructed the jury that these facts had already been decided in *Carroll II* and prohibited the jury from hearing any further evidence regarding the sexual assault. We therefore refer readers back to our prior decision, *Carroll 4*, 124 F.4th at 150-51, for a complete recitation of the facts related to the assault.

On June 21, 2019, *New York* magazine published an excerpt of Carroll's forthcoming book, a portion of which contained her account of being sexually assaulted by Trump. At that time, Trump was serving his first term as President. On June 21 and June 22, 2019, he made two public statements in which he denied knowing Carroll, denied sexually assaulting her, and accused her of fabricating the assault for improper purposes.

On June 21, 2019, just hours after Carroll's accusation went public, Trump provided the following statement to a reporter, who then published it on Twitter:

Statement from President Donald J. Trump:

Regarding the "story" by E. Jean Carroll, claiming she once encountered me at Bergdorf Goodman 23 years ago. I've never met this person in my life. She is trying to sell a new book -- that should indicate her motivation. It should be sold in the fiction section.

Shame on those who make up false stories of assault to try to get publicity for themselves, or sell a book, or carry out a political agenda -- like Julie Swetnick who falsely accused Justice Brett Kavanaugh. It's just as bad for people to believe it, particularly when there is zero evidence. Worse still for a dying publication to try to prop itself up by peddling fake news -- it's an epidemic.

Ms. Carroll & New York Magazine: No pictures? No surveillance? No video? No reports? No sales attendants around?? I would like to thank Bergdorf Goodman for confirming they have no video footage of any such incident, because it never happened.

False accusations diminish the severity of real assault. All should condemn false accusations and any actual assault in the strongest possible terms.

If anyone has information that the Democratic Party is working with Ms. Carroll or New York Magazine, please notify us as soon as possible. The world should know what's really going on. It is a disgrace and people should pay dearly for such false accusations.

App'x at 1887. The next day, on June 22, 2019, Trump had the following exchange with a reporter on the White House lawn:

Reporter: Mr. President, you had said earlier that you never met E. Jean Carroll. There was a photograph of you and her in the late 1980's --

Trump: I have no idea who this woman is. It is a totally false accusation. I think she was married -- as I read; I have no idea who she is -- but she was married to a, actually, nice guy, Johnson -- a newscaster.

Reporter: You were in a photograph with her.

Trump: Standing with [my] coat on in a line -- give me a break -- with my back to the camera. I have no idea who she is. What she did is -- it's terrible, what's going on. So it's a total false accusation and I don't know anything about her.

And, you know, people have to be careful because they're playing with very dangerous territory. And when they do that -- and it's happening more and more. When you look at what happened to Justice Kavanaugh and you look at what's happening to others, you can't do that for the sake of publicity.

New York Magazine is a failing magazine. It's ready to go out of business, from what I hear. They'll do anything they can. But this was about many men, and I was one of the many men that she wrote about. It's a totally false accusation. I have absolutely no idea who she is. There's some picture where we're shaking hands. It looks like at some kind of event. I have my

coat on. I have my wife standing next to me. And I didn't know her husband, but he was a newscaster. But I have no idea who she is -- none whatsoever.

It's a false accusation and it's a disgrace that a magazine like New York -- which is one of the reasons it's failing. People don't read it anymore, so they're trying to get readership by using me. It's not good.

You know, there were cases that the mainstream media didn't pick up. And I don't know if you've seen them. And they were put on Fox. But there were numerous cases where women were paid money to say bad things about me. You can't do that. You can't do that. And those women did wrong things -- that women were actually paid money to say bad things about me.

But here's a case, it's an absolute disgrace that she's allowed to do that.

Id. at 1893-95. The White House Press Office released a transcript of this exchange later that afternoon.

Two days later, on June 24, 2019, the online newspaper publication, *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.* at 599, 1167-68.⁴

⁴ Carroll withdrew her defamation claim based on this statement, but she maintained, however, that it was relevant to the question of punitive damages. At trial, the jury was instructed that no compensatory damages were being sought for this statement, but it was permitted to consider this statement and other subsequent statements "when determining whether [Trump] spoke maliciously when he made the June 21 and 22, 2019 statements, as well as determining the amount of punitive damages, if any" to award. App'x at 1858-59.

II. Proceedings Below

A. The State Court Complaint and Removal to Federal Court

On November 4, 2019, Carroll brought this action in New York state court against Trump in his individual capacity, alleging that his June 2019 statements were defamatory under New York law. In February 2020, Trump moved for a stay of the proceedings by arguing that the Supremacy Clause “bars state-court subject matter jurisdiction over actions against a U.S. President while he or she is in office.” Supp. App’x at 6. Specifically, he argued that the State of New York, by exercising control over him as a sitting President of the United States in the defamation case, “interfere[d] with his ability to carry out his constitutional duty of executing the laws of the United States.” *Id.* at 12 (quoting *Zervos v. Trump*, 171 A.D.3d 110, 131, 94 N.Y.S.3d 75 (1st Dep’t 2019)). He expressly noted, however, that he was only seeking “temporary” immunity from suit. *Id.* at 21 (July 16, 2020 Letter to the Court) (“[N]o one is seeking to ‘escape accountability’ here [Carroll] is free to pursue this action when the President is no longer in office.”). The state court denied the motion on August 3, 2020. Decision and Order on Motion, *Carroll v. Trump*, No. 160694/2019 (N.Y. Sup. Ct. Aug. 3, 2020), Dkt. No. 110.

In September 2020, the Department of Justice intervened in the state court proceedings and certified that Trump had acted “within the scope of his office as President of the United States” when he made the public statements denying Carroll’s allegations. Westfall Act Cert., *Carroll v. Trump*, No. 1:20-cv-7311 (S.D.N.Y.

Sept. 9, 2020), Dkt. No. 6-2.⁵ Based on this certification, the Government removed the case to federal court and moved, pursuant to the Federal Employees Liability Reform and Tort Compensation Act of 1988 (the “Westfall Act”), to substitute the United States as the sole defendant in this case. *See* 28 U.S.C. § 2679(d)(2).

The district court denied the Government’s motion to substitute, and Trump appealed. *See Carroll v. Trump*, 498 F. Supp. 3d 422 (S.D.N.Y. 2020); *Carroll v. Trump*, 49 F.4th 759 (2d Cir. 2022) (“*Carroll 1*”) (Calabresi, *J.*). Litigation on the Westfall Act issues proceeded in federal and state court for the next four years, *see, e.g., Carroll 1*, 49 F.4th at 780-81 (certifying question); *Trump v. Carroll*, 292 A.3d 220 (D.C. 2023) (answering certified question); *Carroll v. Trump*, 66 F.4th 91 (2d Cir. 2023) (“*Carroll 2*”) (per curiam) (remanding to district court), culminating in July 2023, when the Department of Justice declined to issue a new Westfall Act certification, *Carroll I*, Dkt. No. 177-1 (declining to certify).

After the Department of Justice rescinded its certification, neither Trump nor the Department of Justice advanced any argument related to the Westfall Act until after trial concluded. In April 2025, while this appeal from the judgment in *Carroll I* was pending and after it had been fully briefed, Trump and the Government jointly renewed their request to substitute the United States as the sole defendant in this matter. We denied the motion in an order dated June 18, 2025, for the reasons laid out in our subsequent per curiam

⁵ Unless otherwise indicated, docket references are to the district court docket in this case.

decision of August 8, 2025. *See Carroll v. Trump*, 148 F.4th 110 (2d Cir. Aug. 8, 2025) (per curiam).⁶

B. Presidential Immunity and the Interlocutory Appeal

Trump filed his answer to Carroll’s complaint in New York state court in February 2020. He did not assert absolute presidential immunity in his answer -- a fact that Trump’s counsel later “conceded at oral argument” in the interlocutory appeal. *Carroll 3*, 88 F.4th at 430 & n.53 (citing Oral Arg. Audio Recording at 9:59-10:33, 11:53-12:18).⁷ Nor did Trump raise absolute presidential immunity when he moved to amend his answer in January 2022 after the case was removed to the district court below. Instead, he opted to assert a defense and counterclaim under New York’s Anti-Strategic Lawsuit Against Public Participation law (the “anti-SLAPP law”). The district court denied this motion on March 11, 2022.

Trump invoked absolute presidential immunity for the first time in December 2022, in his brief in support of his motion for summary judgment. On July 5, 2023, the

⁶ We refer the reader to this per curiam decision for a full discussion of the procedural history with respect to the Westfall Act issue.

⁷ Rather, as he argued in his state court motion to stay the proceedings, Trump asserted an affirmative defense in his answer 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.” Answer to Complaint, Dkt. No. 14-69 at 11. He also asserted that “[t]he alleged defamatory statements [were] privileged or protected by one or more immunities . . . under the Constitution of the United States.” *Id.* Trump did not assert absolute presidential immunity -- that he was entitled to absolute immunity from suit by virtue of being President of the United States.

district court denied Trump’s motion for summary judgment, ruling, *inter alia*, that Trump had waived any claim to absolute presidential immunity by failing to raise it in his answer to the state court complaint. *See Carroll v. Trump*, 680 F. Supp. 3d 491, 499-504 (S.D.N.Y. 2023). The district court also denied Trump’s request for leave to amend his answer to add absolute presidential immunity as a defense on the grounds of undue delay and prejudice. *Id.* at 504-09.

On June 13, 2023, the district court granted Carroll leave to file an amended complaint that added, among other things, more allegedly defamatory statements by Trump. Trump filed his answer to the amended complaint on June 27, 2023, asserting absolute presidential immunity as an affirmative defense again. The district court struck the defense from the amended answer, ruling that it had been waived and “would have been insufficient as a defense” in any event. *Carroll v. Trump*, 685 F. Supp. 3d 267, 279 (S.D.N.Y. 2023).

In a consolidated interlocutory appeal, we affirmed. *See Carroll 3*, 88 F.4th at 434-35. We held that presidential immunity was waivable and non-jurisdictional; that Trump had in fact waived it; and that the district court did not abuse its discretion in denying Trump’s request to amend his answer. *See id.* at 425-30, 31-32.

C. *Carroll II*

While *Carroll I* was pending, the State of New York passed the Adult Survivors Act (the “ASA”). *See* N.Y. C.P.L.R. § 214-j (McKinney 2022). The ASA provided adult victims of sexual abuse with a new one-year window in which to sue their abusers, even if an otherwise applicable statute of limitations had previously expired. *See id.* In November 2022, Carroll

sued Trump again -- this time, seeking damages for the alleged sexual assault itself and defamation for the following statement made by Trump on October 12, 2022, when he was not President:

This “Ms. Bergdorf Goodman case” is a complete con job She completely made up a story that I met her at the doors of this crowded New York City Department Store and, within minutes, “swooned” her. It is a Hoax and a lie She has no idea what day, what week, what month, what year, or what decade this so-called “event” supposedly took place. The reason she doesn’t know is because it never happened, and she doesn’t want to get caught up with details or facts that can be proven wrong. If you watch Anderson Cooper’s interview with her, where she was promoting a really crummy book, you will see that it is a complete Scam. She changed her story from beginning to end, after the commercial break, to suit the purposes of CNN and Andy Cooper. . . . In the meantime, 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.

Supp. App’x at 108; *Carroll* 4, 124 F.4th at 152. Although *Carroll II* was brought three years after the present lawsuit was initiated, it was tried first, in April and May 2023. Following a nine-day trial, a jury found that Trump sexually abused Carroll at the Bergdorf Goodman in 1996 by digitally penetrating her, and that Trump defamed her in the statement he made in 2022 after he left office. *See Carroll* 4, 124 F.4th at 153-54.⁸

⁸ Carroll also testified that Trump inserted his penis into her vagina; the jury, however, did not find that she proved this part of her claim by a preponderance of the evidence.

The jury awarded Carroll a total of \$5 million in compensatory and punitive damages, and we affirmed. *See id.* at 178.

D. The Proceedings in Carroll I

After the Department of Justice decided not to issue a new Westfall Act certification, proceedings in *Carroll I* resumed. In light of the jury's verdict in *Carroll II*, the district court granted summary judgment in favor of Carroll on her defamation claim in *Carroll I*, based, in part, on the doctrine of issue preclusion. *See generally Carroll v. Trump*, 690 F. Supp. 3d 396 (S.D.N.Y. 2023). Specifically, the court ruled that Trump was barred from disputing whether Trump sexually abused Carroll in 1996, whether his June 2019 statements were false or defamatory, and whether he acted with actual malice in making those statements. *See generally id.* The trial in *Carroll I* was therefore limited to the issue of damages for the June 2019 statements, and the jury was instructed accordingly.

Carroll I proceeded to trial on January 16, 2024. Carroll testified for two days. She described the onslaught of attacks that she received in the aftermath of Trump's June 2019 statements. Many of the messages she received repeated the claims that Trump had made in his June 2019 statements. *See, e.g.*, App'x at 1172 (message stating that Carroll is a "liar," that "[the assault] didn't happen" and she "only brought this accusation to promote a book"); *id.* at 1174 (message telling Carroll that she should be ashamed for "making up a fake story because [she] make[s] it so much harder on the true victims of abuse"); *id.* at 1180 (message asking Carroll "how much George Soros paid you to lie about [P]resident Trump"). Carroll also testified she received hundreds of death threats. *See, e.g., id.* at 1194-

95 (letter stating that Carroll should die by having her “neck stretched immediately after a quick public trial”); *id.* at 1196 (message stating that Carroll should “stick a gun in [her] mouth and pull the trigger”); *id.* at 1193 (Carroll recounting an image sent to her of a “a car accident with a very dead woman on the pavement with some of her brains coming out her head”). Over a dozen of these messages were received into evidence. Carroll testified about her continued fear for her safety and her inability to afford stronger personal security measures.

The jury also heard about the impact of Trump’s statements on Carroll’s reputation and career. Carroll had been a leading advice columnist at *Elle* magazine for 27 years. In the months following Trump’s statements, however, she lost her job, and though she maintained an advice column through a personal blog page, she had only 1,800 paid subscribers as of the date of her testimony. Carroll described the loss of other sources of income as well. For instance, she went from making \$50,000 per year for freelance work in 2017 and 2018 to \$500 in 2023. 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. *See* App’x at 1465-66.

During the five years that this lawsuit was pending, Trump continued to make similar statements about Carroll -- on his social media accounts, in political speeches, at press conferences, and on television. The jury viewed and heard over a dozen of these statements. For example, on May 9 and 10, 2023, within a day or two after the verdict in *Carroll II*, Trump claimed that Carroll’s lawsuit was “the greatest witch hunt of all time,” Dkt. No. 304-14 (PX-96), and a “totally fabricated

accusation,” Dkt. No. 304-16 (PX-98); 304-18 (PX-100) (CNN town hall); *see also* Dkt. No. 304-19 (PX-101) (similar statement made in July 2023). Trump repeated these statements in the weeks leading up to the *Carroll II* trial as well. He stated that the “Bergdorf Goodman” “stuff” is “political” and “all made-up,” Dkt. No. 304-21 (PX-144-T) (Jan. 6, 2024 speech), that he had “no idea who this woman is,” Dkt. No. 333-19 (PX-149-T) (Jan. 11, 2024 press conference), and that Carroll’s account was “totally fabricated” and “nonsense,” Dkt. No. 304-24 (PX-152) (Jan. 14, 2024 post). Trump then made at least four more similar statements publicly during the trial itself. *See* Dkt. No. 304-25 (PX-160) (Jan. 16, 2024 post) (“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 It is a giant Election Interference Scam.”); Dkt. No. 304-27 (PX-164-T) (Jan. 17, 2024 press conference) (“It’s a rigged deal, it’s a made-up, fabricated story.”); Dkt. No. 304-28 (PX-165) (Jan. 18, 2024 post) (“I’ve said it once & I’ll say it again, a thousand times. . . . I never heard of E. Jean Carroll, never had anything to do with her, never would want anything to do with her . . . The whole story is a MADE UP & DISGUSTING HOAX!”); Dkt. 304-29 (PX-166) (Jan. 20, 2024 post) (“I knew nothing about this woman, never heard of her, never touched her THIS IS A FALSE ACCUSATION.”).

Trump testified briefly in his defense. The record also reflects that he made several disruptive comments and gestures in front of the judge and jury. During Carroll’s testimony, for example, her counsel reported that they could hear Trump making loud comments within earshot of the jury, including that her testimony was “false,” “she seems to have now gotten her memory back,” “it is a witch hunt,” and a “con job.” App’x at 1183, 1232. The

court instructed Trump on two occasions to keep his voice down and refrain from making comments. When the court issued its second warning, it stated to Trump: “I hope I don’t have to consider excluding you from the trial or at least from the presence [of the jury]. I understand that you’re probably very eager for me to do that.” *Id.* at 1232. Trump replied, “I would love it.” *Id.* Trump also stood up and walked out of the courtroom during Carroll’s closing argument.

On January 26, 2024, the nine-person jury awarded Carroll \$11 million for “the reputation repair program” and \$7.3 million for other compensatory damages. *Id.* at 1014. The jury also found that Trump made the June 2019 statements with common law malice and awarded Carroll \$65 million in punitive damages. Trump filed a motion for a new trial or to amend the judgment. The district court denied the motion in a memorandum opinion filed April 25, 2024. *See Carroll v. Trump*, 731 F. Supp. 3d 626 (S.D.N.Y. 2024). Judgment in the amount of \$83.3 million was entered in favor of Carroll against Trump on February 8, 2024.

This appeal followed.

DISCUSSION

Trump raises several challenges on appeal. First, Trump argues that the Supreme Court’s decision in *Trump v. United States*, 603 U.S. 593, 144 S. Ct. 2312, 219 L.Ed.2d 991 (2024) (“*Trump*”), casts doubt on our prior decision on presidential immunity, *Carroll 3*, 88 F.4th at 425-29. Next, Trump contends that the district court erred by (1) granting preclusive effect to the judgment in *Carroll II*, (2) striking a portion of his testimony, and (3) providing, as he asserts, erroneous instructions to the jury on the standard for punitive damages. Finally, Trump disputes the amount of the

compensatory and punitive damages awards. We address each issue in turn.

I. Presidential Immunity

On interlocutory appeal in 2023, we held, as a matter of first impression, that presidential immunity is waivable, and that Trump waived his immunity by failing to raise it in his answer to the state court complaint. *See Carroll 3*, 88 F.4th at 430; *see also* Mandate, Dkt. No. 305. Despite our prior ruling, Trump renews his argument that presidential immunity cannot be waived. He also argues, for the first time, that even if presidential immunity is waivable, any such waiver requires an “*explicit and unequivocal renunciation.*” Appellant’s Br. at 14 (quoting *United States v. Helstoski*, 442 U.S. 477, 490-91, 99 S. Ct. 2432, 61 L.Ed.2d 12 (1979)). We hold that both arguments are foreclosed under the law of the case doctrine and reject Trump’s challenge on this ground.

The law of the case doctrine “ordinarily forecloses relitigation of issues expressly or impliedly decided by the appellate court.” *United States v. Frias*, 521 F.3d 229, 234 (2d Cir. 2008) (quoting *United States v. Quintieri*, 306 F.3d 1217, 1229 (2d Cir. 2002)). Moreover, “where an issue was ripe for review at the time of an initial appeal but was nonetheless foregone, it is considered waived and the law of the case doctrine bars . . . an appellate court in a subsequent appeal from reopening such issues unless the mandate can reasonably be understood as permitting it to do so.” *Id.* (quoting *Quintieri*, 306 F.3d at 1229). We “depart[] from the law of the case doctrine ‘sparingly and only when presented with cogent and compelling reasons.’” *Palin v. New York Times Co.*, 113 F.4th 245, 262 (2d Cir. 2024) (quoting *United States v. Aquart*, 92 F.4th 77, 87

(2d Cir. 2024)). “The major grounds justifying reconsideration are an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.” *United States v. Tenzer*, 213 F.3d 34, 39 (2d Cir. 2000) (quoting *Doe v. N.Y.C. Dep’t of Soc. Servs.*, 709 F.2d 782, 789 (2d Cir. 1983)). With respect to an intervening change in law, this Court has made clear that “[t]he law of the case will be disregarded only when the court has a clear conviction of error with respect to a point of law on which its previous decision was predicated.” *Aquart*, 92 F.4th at 93 (internal quotation marks and citation omitted) (alteration in original).

Trump contends that the law of the case does not apply. He submits that *Trump* represents a sufficient intervening change of law and that enforcing our prior decision on immunity would work a manifest injustice in light of that change. We are not persuaded.

First, *Trump*, a case involving the criminal prosecution of a former President, did not alter the prevailing law on whether presidential immunity can be waived. In *Trump*, the Court held that the President does enjoy “at least a *presumptive* immunity from criminal prosecution for . . . acts within the outer perimeter of his official responsibility.” 603 U.S. at 614, 144 S. Ct. 2312.⁹ But the Court did not discuss or even mention whether presidential immunity could be waived or forfeited, or whether such immunity is jurisdictional. In *Trump*, there was no dispute about whether Trump had waived his immunity because, unlike here, he asserted it at the very outset of the proceedings against him. *See id.* at 603, 144 S. Ct. 2312. Thus, *Trump* does

⁹ The *Trump* Court further held that “[a]s for a President’s unofficial acts, there is no immunity.” *Id.* at 615, 144 S. Ct. 2312.

not constitute an intervening change of law justifying reconsideration of our earlier decision.

Trump's second argument -- that a waiver of presidential immunity requires an "explicit and unequivocal renunciation," *Helstoski*, 442 U.S. at 491, 99 S. Ct. 2432 -- is also foreclosed because it was "ripe for review at the time of [Trump's] initial appeal but . . . nonetheless foregone." *Palin*, 113 F.4th at 262 (quoting *Frias*, 521 F.3d at 234). Trump reasons that *Trump* holds that presidential immunity is rooted in the Constitutional separation of powers. According to him, this makes presidential immunity akin to other types of "structural immunities" such as legislative immunity and sovereign immunity, which cannot be waived without an explicit waiver. Thus, he contends that presidential immunity may not be waived without an unequivocal and explicit waiver. In support of his argument, Trump cites *Helstoski*, a case in which the Supreme Court held that a congressman must explicitly waive his legislative immunity under the Speech and Debate Clause.¹⁰ According to Trump, "[t]he reasoning of *Trump* . . . places this case squarely within the line of cases," such as *Helstoski*, "holding that immunity doctrines rooted in the constitutional structure cannot be waived and if a court were to hold otherwise, it would require, at [the] very least, a clear, explicit, and

¹⁰ Trump also cites cases involving federal and state sovereign immunity. See *Lane v. Pena*, 518 U.S. 187, 192, 116 S. Ct. 2092, 135 L.Ed.2d 486 (1996) ("A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text."); *Edelman v. Jordan*, 415 U.S. 651, 673, 94 S. Ct. 1347, 39 L.Ed.2d 662 (1974) (waiver of state sovereign immunity only "where stated by the most express language or by such overwhelming implications from the text" (internal quotation marks and citation omitted)).

affirmative waiver before the immunity can be lost.” Appellant’s Br. at 14.

But *Trump* did not announce new law when it observed that presidential immunity is rooted in the structural separation of powers. It simply reaffirmed long-established principles. See *Trump*, 603 U.S. at 611, 144 S. Ct. 2312 (“[W]e have recognized Presidential immunities and privileges ‘rooted in the constitutional tradition of the separation of powers’” (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 749, 751, 752, n.32, 102 S. Ct. 2690, 73 L.Ed.2d 349 (1982)); *id.* at 638, 144 S. Ct. 2312 (“[T]he Court’s prior decisions, such as *Nixon* and *Fitzgerald*, have long recognized [the separation of powers] doctrine as mandating certain Presidential privileges and immunities”); *Fitzgerald*, 457 U.S. at 750 n.31, 144 S. Ct. 2312 (“[W]e do think that the most compelling arguments [for recognition of presidential immunity] arise from the Constitution’s separation of powers”).¹¹ Indeed, in reliance on these principles, Trump asserted in his prior interlocutory appeal that presidential immunity implicates the “structural safeguard” of “separation of powers.” Appellant’s Br., Nos. 23-1045(L), 23-1146(con), 2023 WL 6461254, at *12–27 (2d Cir. Sept. 28, 2023).

Despite the availability of these arguments in *Carroll 3*, and the fact that *Helstoski* was decided decades ago, Trump argued only that presidential immunity could *never* be waived at all. See *id.* at *12–13. In fact, he conceded in *Carroll 3* that if presidential immunity is

¹¹ See also *Fitzgerald*, 457 U.S. at 750 n.31, 102 S. Ct. 2690 (“Justice Story, writing in 1833, held it implicit in the separation of powers that the President must be permitted to discharge his duties undistracted by private lawsuits.” (quoting 3 J. Story, Commentaries on the Constitution of the United States § 1563, pp. 418-19 (1st ed. 1833)).

waivable, then he had waived it here. *See Carroll 3*, 88 F.4th at 429-30 & n.52. As we have explained, “it would be absurd that a party who has chosen not to argue a point on a first appeal should stand better as regards the law of the case than one who had argued and lost.” *Quintieri*, 306 F.3d at 1229 (quoting *United States v. Ben Zvi*, 242 F.3d 89, 96 (2d Cir. 2001)); *accord Aquart*, 92 F.4th at 87-88 (“[A] contrary construction of the . . . rule would effectively eviscerate it by creating an incentive for parties to hold ripe arguments in reserve.”). Trump had the opportunity and incentive to raise this challenge in his initial appeal and failed to do so; hence, he may not do so now.¹²

In any event, presidential immunity differs in both origin and purpose from the other “structural” immunities that Trump references. Apart from the Supreme Court’s recognition that presidential immunity is rooted in the constitutional structure, *Trump* does not draw any comparisons to these other immunities or reconcile these differences. In the absence of any intervening change of law on this issue, adhering to our prior decision would not work a manifest injustice.

II. The Partial Summary Judgment Ruling

The jury in *Carroll II* -- the closely related case tried in the spring of 2023 -- found that Trump sexually abused Carroll in 1996 and defamed her in a statement made in October 2022. Following *Carroll II*, and after considering submissions from both parties, the district court granted partial summary judgment in favor of Carroll on each of the liability elements of her

¹² Even 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.

defamation claim in the present suit. On appeal, Trump avers that the district court erred in ruling that (1) the *Carroll II* verdict established that Trump’s June 2019 statements were false and that he digitally penetrated Carroll in 1996, and (2) he acted with actual malice in making the June 2019 statements. We find no error in either respect.¹³

We review *de novo* the district court’s ruling on issue preclusion. See *Phoenix Light SF Ltd. v. Bank of N.Y. Mellon*, 66 F.4th 365, 369 (2d Cir. 2023). “The preclusive effect of a judgment rendered by a federal court sitting in diversity . . . is determined by the law of the state in which the rendering court sat” *Id.* at 371. Accordingly, the preclusive effect of the verdict in *Carroll II* -- a diversity case -- is governed by New York law. In New York, collateral estoppel precludes a party from relitigating “an issue when (1) the identical issue necessarily was decided in the prior action and is decisive of the present action, and (2) the party to be precluded from relitigating the issue had a full and fair opportunity to litigate the issue in the prior action.” *Id.* (quoting *Plymouth Venture Partners, II, L.P. v. GTR Source, LLC*, 988 F.3d 634, 642 (2d Cir. 2021)). The “enumeration of these elements,” however, is “intended merely as a framework.” *Buechel v. Bain*, 97 N.Y.2d 295, 740 N.Y.S.2d 252, 766 N.E.2d 914, 919 (2001). “[T]he fundamental inquiry is whether relitigation should be permitted in a particular case in light of . . . fairness to the parties, conservation of the resources of the court

¹³ In his brief, Trump also asserts that the judgment in *Carroll II* is not entitled to preclusive effect because it is erroneous. We need not reach this argument as we affirmed the judgment in *Carroll II* on December 30, 2024, and on June 13, 2025, a majority of active members of this court denied the petition for rehearing *en banc*. See *Carroll 4*, 124 F.4th at 178; *Carroll*, 141 F.4th at 366.

and the litigants, and the societal interests in consistent and accurate results.” *Id.* (quoting *Staatsburg Water Co. v. Staatsburg Fire Dist.*, 72 N.Y.2d 147, 531 N.Y.S.2d 876, 527 N.E.2d 754, 756 (1988)).

A. Whether Trump’s 2019 Statements Were False

We hold that the district court did not err in barring Trump from relitigating the falsity of his statements about Carroll’s allegations. Although the statements at issue in *this* case were made three years earlier than the statement in *Carroll II*, the statements were identical in material respects because both accused Carroll of fabricating the sexual assault allegations for improper purposes. *Compare supra* pp. 60–61 (June 2019 statements), *with supra* pp. 63–64 (October 2022 statement).¹⁴

The truth or falsity of Trump’s statements in both 2019 and 2022 turned on whether Carroll was lying, that is, whether Trump sexually assaulted Carroll in 1996,

¹⁴ For example, in the 2022 statement -- which the *Carroll II* jury determined to be false -- Trump stated, among other things: “I have no idea who [E. Jean Carroll] is.” *Carroll*, 690 F. Supp. 3d at 401. In the June 21, 2019 statement at issue here, Trump said: “I’ve never met this person in my life.” App’x at 1887. Moreover, 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.” Supp. App’x at 108. In the June 21, 2019 statement, Trump said: “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.” App’x at 1887.

irrespective of the specific sexual act committed.¹⁵ The jury in *Carroll II* decided that Carroll was telling the truth. It found by a preponderance of the evidence that Trump sexually abused Carroll and that Trump's October 2022 statement was false. Trump does not dispute that he had a full and fair opportunity to litigate this issue in *Carroll II*. Accordingly, the district court did not err in ruling that Trump's 2019 statements were false based on the doctrine of issue preclusion.

Notwithstanding that Trump's denial of *any* sexual abuse rendered the 2019 and 2022 statements false, Trump primarily argues that the district court erred in instructing the jury on the specific sexual act that he engaged in. The 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." App'x at 1851; *see also id.* at 1085. According to Trump, this instruction was not supported by the verdict in *Carroll II* because the jury could have found that he sexually abused Carroll through lesser

¹⁵ In other words, the application of issue preclusion to the falsity element is proper because Trump's 2019 and 2022 statements did not turn on the specific sexual act he committed. He did not deny, for example, digital penetration specifically. In *all* statements, he denied *any* sexual assault, full stop. The *Carroll II* jury found Trump's 2022 statement to be false because it found that he sexually abused Carroll. *See Tannerite Sports, LLC v. NBCUniversal News Grp., a division of NBCUniversal Media, LLC*, 864 F.3d 236, 242 (2d Cir. 2017) (Under New York law, "to satisfy the falsity element of a defamation claim, [the] plaintiff must allege that the complained of statement is 'substantially false.'" (quoting *Franklin v. Daily Holdings, Inc.*, 135 A.D.3d 87, 21 N.Y.S.3d 6, 12 (1st Dep't 2015))). That finding renders the 2019 statements equally false.

sexual conduct such as nonconsensual kissing or pulling down her tights.¹⁶

Trump, however, ignores the import of the special verdict in *Carroll II* and the district court's finding on this issue. In *Carroll II*, the district court provided the jury with a special verdict form that asked the jury to decide among three theories of liability on the sexual battery claim: whether Trump (1) "raped," (2) "sexually abused," or (3) "forcibly touched" Carroll. App'x at 2214. The jury answered the first question -- whether Trump raped Carroll -- in the negative but found Trump liable on the second theory of sexual battery, sexual abuse. The jury found that Carroll was "injured as a result of Mr. Trump's conduct" and determined that \$2 million would "fairly and adequately compensate her for [that] injury." *Id.*

Trump made no objection to the special verdict form and did not request the jury to make a finding on the specific sexual conduct that he committed. Pursuant to Rule 49(a)(3) of the Federal Rules of Civil Procedure, that omission "waive[d] the right to a jury trial on that issue and permit[ed] the court to make a finding." *Sealey v. Giltner*, 197 F.3d 578, 586 (2d Cir. 1999).¹⁷ Thus, when

¹⁶ Carroll argues that Trump waived this argument by failing to object to the district court's jury instruction on this basis. Because we conclude that the district court did not err, we need not address this waiver argument.

¹⁷ Rule 49(a) of the Federal Rules of Civil Procedure, which governs special verdicts, provides in relevant part:

The court may require a jury to return only a special verdict in the form of a special written finding on each issue of fact. . . . A party waives the right to a jury trial on any issue of fact raised by the pleadings or evidence but not submitted to the jury unless, before the jury retires, the party demands its submission to the jury. If the party does not demand submission, the court may make a finding on the issue. If the court makes no finding,

Trump moved for a new trial in *Carroll II*, arguing that the damages were excessive because the jury could have found that he had engaged in less serious sexual acts, *Carroll II*, No. 1:22-cv-10016 (S.D.N.Y.), Dkt. No. 205 at 1, the district court made a finding on this issue. In so doing, the court was permitted to weigh the evidence and resolve conflicting inferences, subject to clear error review. *See, e.g., Roberts v. Karimi*, 251 F.3d 404, 407-08 (2d Cir. 2001); *accord Anderson v. Cryovac, Inc.*, 862 F.2d 910, 916 (1st Cir. 1988) (“[T]here is every reason to treat the district court’s Rule 49 findings of fact in the same manner as findings of fact made after a bench trial, reviewable under the ‘clearly erroneous’ standard of Fed. R. Civ. P. 52(a).”); *Therrell v. Ga. Marble Holdings Corp.*, 960 F.2d 1555, 1563 (11th Cir. 1992) (same). While the court acknowledged that the jury could conceivably have found that Trump sexually abused Carroll only through nonconsensual kissing or pulling down her tights, it held that such a finding would be inconsistent with the jury’s \$2 million compensatory damages award and the repeated emphasis on digital penetration in the evidence presented at trial.¹⁸ The district court therefore held that “the jury’s response to Question 2 was an

it is considered to have made a finding consistent with its judgment on the special verdict.

Fed. R. Civ. P. 49(a)(1), (a)(3).

¹⁸ At the time that *Carroll II* was tried in 2023, a rape conviction in New York required penile penetration. *See* N.Y. Penal Law § 130.35 (effective Feb. 1, 2001 through Aug. 31, 2024); *id.* § 130.00; *see People v. Berardicurti*, 167 A.D.2d 840, 561 N.Y.S.2d 949, 949-50 (4th Dep’t 1990). Sexual abuse, by contrast, could be accomplished by “any touching of the sexual or other intimate parts of a person” “without consent [and] by the use of forcible coercion.” N.Y. Penal Law §§ 130.00, 130.65. Therefore, the jury’s determination that Trump did not “rape” Carroll “means *only* that the jury was unpersuaded that Mr. Trump’s penis penetrated Ms. Carroll’s vagina.” *Carroll v. Trump*, 683 F. Supp. 3d 302, 324 (S.D.N.Y. 2023).

implicit finding that Mr. Trump forcibly digitally penetrated Ms. Carroll’s vagina” and, in the alternative, the court made the same finding itself. *Carroll v. Trump*, 683 F. Supp. 3d 302, 325 n.70 (S.D.N.Y. 2023). The court’s finding on this issue was not clearly erroneous,¹⁹ was never challenged on appeal in *Carroll II*, and is entitled to preclusive effect.

Accordingly, the district court committed no error in holding that Trump’s 2019 statements were false or in instructing the jury on the specific form of sexual misconduct that Trump committed.

***B. Whether Trump Made the 2019 Statements
with Actual Malice***

Trump also challenges the district court’s decision to grant preclusive effect to the jury’s finding of actual malice in *Carroll II*. We do not reach this question, however, because we agree with the district court’s alternative holding that Carroll satisfied her burden at summary judgment on the element of actual malice.

“Actual malice requires proof that the publisher had a subjective awareness of either falsity or probable falsity of the defamatory statement, or acted with reckless disregard [to] its truth or falsity.” *Celle v. Filipino Rep. Enters. Inc.*, 209 F.3d 163, 182 (2d Cir. 2000). “Although actual malice is subjective, a court typically will infer actual malice from objective facts” such as “the defendant’s own actions or statements, the dubious

¹⁹ For example, several witnesses testified about the physical pain and lasting trauma that Trump’s digital penetration had on Carroll, including Carroll, Carroll’s expert witness Dr. Lebowitz, and one of Carroll’s “outcry witnesses,” Lisa Birnbach. *Carroll*, 683 F. Supp. 3d at 308-11, 314-15, 325-26. No similar testimony was presented to the jury with respect to the non-consensual kissing or any other contact between Carroll and Trump.

nature of his sources, and the inherent improbability of [his] story among other circumstantial evidence.” *Id.* at 183 (alterations adopted) (internal quotation marks and citations omitted); *id.* (“[W]hether [defendant] in fact entertained serious doubts as to the truth of the statement may be proved by inference, as it would be rare for a defendant to admit such doubts.” (quoting *Bose Corp. v. Consumers Union of U.S., Inc.*, 692 F.2d 189, 196 (1st Cir. 1982), *aff’d*, 466 U.S. 485, 104 S. Ct. 1949, 80 L.Ed.2d 502 (1984))).

Here, the district court ruled that Trump’s 2019 statements were made with actual malice based on the undisputed record, observing that Trump had failed to “point to any genuine issue of material fact with respect to whether he knew that his 2019 statements were false or acted with reckless disregard to their truth or falsity.” *Carroll*, 690 F. Supp. 3d at 408.

As an initial matter, Trump does not challenge this alternative holding on appeal, and we can affirm on this independent basis alone. *See Gross v. Reli*, 585 F.3d 72, 95 (2d Cir. 2009).

In any event, we find no error in the district court’s ruling. The starting point is the now-indisputable fact that a jury found in *Carroll II* that Trump sexually abused Carroll in 1996, and that finding is entitled to preclusive effect. *See supra* Discussion Section II.A. Likewise, it is now indisputable that, based on the jury’s findings, Carroll did not lie and that Trump uttered falsehoods in his statements accusing her of lying and acting with improper motivations. *See supra* Discussion Section II.A. Because Trump’s 2019 statements about *his own personal conduct* mirrored the statements he made in 2022, a reasonable juror could only conclude that Trump knew that his statements -- that Carroll lied

about him sexually assaulting her for ulterior purposes -- were false or that he acted with reckless disregard to whether those statements were false.

In addition, the record makes clear that Trump acted with, at a minimum, reckless disregard for the truth. 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.²⁰

Indeed, the jury found by clear and convincing evidence in *Carroll II* that Trump made his materially identical 2022 statement with actual malice. And Trump fails to articulate how any of the objective facts from which actual malice can be inferred were different between 2019 and 2022.

For all these reasons, the district court did not err in granting summary judgment in favor of Carroll on the element of actual malice.

²⁰ In granting summary judgment in favor of Carroll on actual malice, the court was also entitled to rely on evidence of Trump's disdain towards Carroll. "Evidence of ill will combined with other circumstantial evidence indicating that the defendant acted with reckless disregard of the truth or falsity of a defamatory statement may also support a finding of actual malice." *Celle*, 209 F.3d at 183. Trump launched a volley of insults at Carroll during this same deposition, calling her "very deranged," "sick," a "wack job," a "nut job," and vowed to "sue her" once the case ended. *See* Supp. App'x at 106 ¶ 24.

III. The Exclusion of a Portion of Trump's Testimony

During Trump's direct examination, his counsel asked: "Did you ever instruct anyone to hurt Carroll in your statements?" Trump responded, "No. I just wanted to defend myself, my family, and frankly, the presidency." App'x at 1692. Carroll's counsel objected and the district court sustained the objection, instructing the jury to disregard everything after the word "no." *Id.* Trump argues that the court's ruling was erroneous because it curtailed his ability to introduce evidence relevant to common law malice, and that the error necessitates a new trial.²¹

We review evidentiary rulings for abuse of discretion, *see Carroll 4*, 124 F.4th at 157, "mindful that [the trial court] sees the witnesses, the parties, the jurors, and the attorneys, and is thus in a superior position to evaluate the likely impact of the evidence," *United States v. Paulino*, 445 F.3d 211, 217 (2d Cir. 2006) (internal quotation marks omitted).²² Even if we find manifest

²¹ Actual malice and common law malice are distinct. The former is an element of defamation per se and was not at issue at the trial in *Carroll I*, because the district court granted summary judgment to Carroll on that element. But, and as discussed in greater detail *infra*, to be entitled to an award of punitive damages, Carroll had to show that Trump made the statements with common law malice; that is, with "spite or ill will." *Chandok v. Klessig*, 632 F.3d 803, 815 (2d Cir. 2011) (citing *Liberman v. Gelstein*, 80 N.Y.2d 429, 590 N.Y.S.2d 857, 605 N.E.2d 344, 347 (1992)). "The critical difference between common-law malice and constitutional [*i.e.*, 'actual'] malice . . . is that the former focuses on the defendant's attitude toward the plaintiff, the latter on the defendant's attitude toward the truth." *Id.* (quotation marks and citation omitted).

²² Trump submits that our review should be *de novo* because, according to him, the ruling was based on legal error. He asserts that it was legal error to (1) prevent him from stating that believed

error, we will affirm and not require a retrial if we conclude that the error was harmless. *See Cameron v. City of New York*, 598 F.3d 50, 61 (2d Cir. 2010). “[A]n erroneous evidentiary ruling warrants a new trial only when ‘a substantial right of a party is affected,’ as when ‘a jury’s judgment would be swayed in a material fashion by the error.’” *Lore v. City of Syracuse*, 670 F.3d 127, 155 (2d Cir. 2012) (quoting *Arlio v. Lively*, 474 F.3d 46, 51 (2d Cir. 2007)).

We conclude that the district court did not err, and that, even if it did, any error was harmless in light of the other evidence submitted at trial.

At the outset, Trump forfeited this challenge on appeal because he failed to object to the exclusion of this specific testimony below. “To preserve an evidentiary claim on appeal, a party must ‘timely object’ *and* ‘state the specific ground, unless it is apparent from context.’” *United States v. Williams*, 930 F.3d 44, 64 (2d Cir. 2019) (alterations adopted) (quoting Fed. R. Evid. 103(a)). “This Court ‘ordinarily applies Rule 103(a) strictly’ . . .” *Id.* (alteration adopted) (quoting *United States v. Hutcher*, 622 F.2d 1083, 1087 (2d Cir. 1980)).

his statements to be true because this was relevant to actual malice, and (2) to exclude testimony about his state of mind because this was relevant to common law malice. But as discussed above, there was no legal error with respect to the district court’s summary judgment ruling on actual malice. The district court also acknowledged that Trump’s state of mind was relevant to common law malice. *See, e.g.*, App’x 1116-17 (permitting defense counsel, over plaintiff’s objection, to argue in opening statements that Trump was defending himself when he made the 2019 statements). Thus, we must decide whether the district court erred in excluding potentially relevant testimony. We review such rulings for abuse of discretion only.

The district judge asked counsel to proffer the testimony that would be elicited from Trump during his direct examination. Counsel listed only three questions she wished to ask: (1) whether Trump stood by his October 2022 deposition testimony, (2) why Trump made the statements in response to Carroll's accusation, and (3) whether Trump ever instructed anyone to hurt Carroll.²³ Only Trump's response to the third question is at issue on appeal. Defense counsel proposed the form of this question and assured the court that it would be a "simple yes or no question." App'x at 1685. When Trump went beyond a "yes or no" answer, Carroll's counsel objected. The defense made no argument in response to that objection. The district court sustained the objection and struck everything after "No." The defense did not object.

Regardless, we find neither an abuse of discretion nor plain error in the court's decision to exclude this portion of Trump's testimony. "To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means." Fed. R. Evid. 103(d). In addition, "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of," among other things, "unfair prejudice, confusing the issues, [or] misleading the jury." Fed. R. Evid. 403.

Here, despite the district court's collateral estoppel and summary judgment rulings on the issues of falsity and actual malice, Trump repeatedly sought to relitigate

²³ The district court rejected the form of the second question and instructed defense counsel that she could only ask Trump: "Did you deny the allegation because Ms. Carroll made an accusation?" App'x at 1691. While defense counsel objected to that limitation, she made no objection to the proposed format of the third question. *See id.* at 1692.

these issues. During opening statements, defense counsel suggested that Carroll went public with the assault for personal gain. *See* App'x at 1118 (“She waited 30 years for the opportune time when she actually was making less to maximize coverage.”); *id.* at 1120 (“[B]efore she came out with her allegation against Donald Trump, her career was dwindling and it needed a spark.”). Trump also continued to claim that Carroll was lying throughout the trial—in open court, on his social media accounts, and at press conferences. With this context in mind, the district court’s ruling was neither arbitrary nor irrational. Trump’s statement, “I just wanted to defend myself, my family, and frankly, the presidency,” not only went beyond the scope of the agreed-upon “yes or no” question but also implied that Carroll’s accusations were false and improper. The district court reasonably sought to prevent the jury from hearing testimony that bore on elements of Carroll’s claim that had been previously decided.

Further, any potential error was harmless because the jury received ample other evidence of Trump’s state of mind toward Carroll, as relevant to common law malice. *See Yates v. Evatt*, 500 U.S. 391, 403, 111 S. Ct. 1884, 114 L.Ed.2d 432 (1991) (explaining that an error is harmless when the proof at issue is “unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record”). For instance, Trump confirmed that he “den[ied] [Carroll’s] allegation[s] because [she had] made an accusation.” App’x at 1691. The intended and apparent import of this testimony was to show that Trump made the statements to defend himself. *See id.* at 1684 (defense counsel explaining that she “would just like [Trump] to confirm that he stands by all the testimony at his deposition, also that he made the statements in response to her

accusations”). Defense counsel was able to make a similar point during her opening statement as well. *See id.* at 1116 (“The evidence will show that [P]resident Trump was merely defending himself.”).

Most significantly, Trump’s 2022 deposition was played for the jury in which he testified about his state of mind in relation to the substantively identical defamatory statement from 2022. In that deposition, he explained that he issued the 2022 statement “[b]ecause [he] was offended at this woman’s lie . . . [and he] was offended that she could just make up a story out of cold air” *Id.* at 2190. Trump’s state of mind with respect to his 2022 statement was highly probative of his state of mind in relation to the materially identical 2019 statements.²⁴ Trump was able to establish this connection as well. In a colloquy prior to Trump’s direct examination, his counsel noted that “[a]s long as we have the deposition, your Honor, I think we will be fine.” *Id.* at 1690. Then, during his examination, defense counsel asked Trump “[d]o you stand by your testimony at the deposition?” *Id.* at 1691. He replied, “100 percent. Yes.” *Id.*²⁵ Any possible error was harmless on this record in

²⁴ Moreover, in the deposition, Trump was asked to read both his June 21 and June 22, 2019 statements. After each, he was asked, “[s]itting here today, do you stand by th[ese] statement[s]?” to which he replied, “[y]es.” App’x at 2168; *id.* at 2171 (“Q. I take it you stand by that statement today? A. Yes.”).

²⁵ Throughout the deposition, Trump made numerous other comments relevant to his state of mind concerning Carroll. *See* App’x at 2185 (“This woman is sick. There’s something wrong with her, and it’s a false story.”); *id.* at 2190 (“The woman -- there’s something wrong with her in my opinion.”); *id.* at 2193 (“I think she’s a wack job.”); *id.* at 2194 (“I think she’s sick, mentally sick.”); *id.* at 2197 (“She’s a liar and she’s a sick person in my opinion. Really sick. Something wrong with her.”).

light of the other evidence that the jury considered with respect to Trump’s state of mind.

IV. The District Court’s Jury Instructions on Punitive Damages

Trump argues that the trial court’s jury instructions on punitive damages were erroneous in two respects. “We review challenges to a district court’s jury instructions *de novo*.” *Saint-Jean v. Emigrant Mortg. Co.*, 129 F.4th 124, 147 (2d Cir. 2025). “We will overturn a verdict on a challenge to jury instructions only if (1) the instructions were erroneous, and (2) the error was prejudicial.” *Id.* Because Carroll brought her defamation claim against Trump under New York state law, we are “bound to apply New York law as determined by the New York Court of Appeals.” *Engel v. CBS, Inc.*, 182 F.3d 124, 125 (2d Cir. 1999) (per curiam).

A. The Common Law Malice Charge

The parties below agreed that, to recover punitive damages, Carroll was required to show that when Trump made the June 2019 statements, he was motivated by common law malice. Trump, however, requested a jury instruction that would have permitted the jury to award punitive damages only if it found that he was *solely* motivated by common law malice when he made the defamatory statements. The district court rejected that request both at trial and in its decision denying Trump’s new trial motion. The district court concluded 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 . . . common law malice and nothing else.” *Carroll*, 731 F. Supp. 3d at 631. Upon our *de novo* review of the relevant case law, we agree; a defendant must be *solely*

motivated by common law malice *only* where he is otherwise entitled to a qualified or conditional privilege.

To impose punitive damages based on a finding of common law malice, the New York Court of Appeals requires a showing that the conduct at issue is “malicious, wanton, reckless, or in willful disregard for another’s rights” and motivated by “hatred, ill will, spite, [or a] criminal mental state.” *Prozeralik v. Cap. Cities Commc’ns, Inc.*, 82 N.Y.2d 466, 605 N.Y.S.2d 218, 626 N.E.2d 34, 42 (1993). Thus, unlike “actual malice,” in the constitutional sense, which focuses on the defendant’s state of mind with respect to the truth or falsity of the defamatory statement(s), *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80, 84 S. Ct. 710, 11 L.Ed.2d 686 (1964), “common-law malice focuses on the defendant’s mental state *in relation to the plaintiff* and the motive in publishing the falsity,” *Prozeralik*, 605 N.Y.S.2d 218, 626 N.E.2d at 42 (emphasis added).

Proof of malice in the common law sense serves two distinct purposes in New York defamation cases. First, as relevant here, a plaintiff may not recover punitive damages for defamation unless she demonstrates that the defendant acted with common law malice. *See id.*, 605 N.Y.S.2d 218, 626 N.E.2d at 41-42. Separately, proof of common law malice is also required to overcome a conditional or qualified privilege against a defamation suit. *See Stukuls v. State*, 42 N.Y.2d 272, 397 N.Y.S.2d 740, 366 N.E.2d 829, 833-34 (1977).

With respect to the latter purpose, “[c]ourts have long recognized that the public interest is served by shielding certain communications, though possibly defamatory, from litigation, rather than risk stifling them altogether.” *Lieberman v. Gelstein*, 80 N.Y.2d 429, 590 N.Y.S.2d 857, 605 N.E.2d 344, 349 (1992). One

conditional privilege, known as the “common interest privilege,” “extends to a communication made by one person to another upon a subject in which both have an interest.” *Id.* (internal quotation marks omitted) (applying privilege to statements between members of a tenants’ organization); *Stukuls*, 397 N.Y.S.2d 740, 366 N.E.2d at 830 (communications between members of a faculty committee).

Although the standard for recovering punitive damages and overcoming a qualified privilege both require proof of common law malice, they require different showings. In the privilege context, common law malice must be “the one and only cause for the publication.” *Lieberman*, 590 N.Y.S.2d 857, 605 N.E.2d at 350 (quoting *Stukuls*, 397 N.Y.S.2d 740, 366 N.E.2d at 835); *see also Chandok v. Klessig*, 632 F.3d 803, 815 (2d Cir. 2011) (“[W]hile either actual malice or common-law malice will suffice to defeat a conditional privilege, common-law malice will defeat such a privilege only if it was the one and only cause for the publication.”) (internal quotation marks and citations omitted)). That is because 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.” *Lieberman*, 590 N.Y.S.2d 857, 605 N.E.2d at 350. No similar rationale is present with respect to a punitive damages award. The policy underlying punitive damages is “to punish a person for outrageous conduct which is malicious, wanton, reckless, or in willful disregard for another’s rights.” *Prozeralik*, 605 N.Y.S.2d 218, 626 N.E.2d at 42 (quoting *Vassiliades v. Garfinckel’s, Brooks Bros.*, 492 A.2d 580, 593 (D.C. 1985)). It is the “outrageous conduct” itself that warrants punishment -- not whether the speaker was motivated *solely* by a desire to harm. Accordingly, common law malice may be

a partial motivation for the defendant's defamatory statement for the purpose of sustaining a punitive damages award.

Despite this distinction and the absence of any state-law privilege in this case, Trump seeks to import the "sole intent" requirement to *every* defamation action in which a plaintiff seeks punitive damages. But, consistent with our view, the New York Court of Appeals has never ruled that common law malice must be the *only* motivation behind a defamatory statement to sustain an award of punitive damages. *See, e.g., id.* 605 N.Y.S.2d 218, 626 N.E.2d at 42 (elaborating on the definition of common law malice required to sustain a punitive damages award in a defamation case). The New York Civil Pattern Jury Instructions on punitive damages in defamation cases and Second Circuit cases applying New York law likewise have not recognized any similar requirement to cases not involving a privilege. *See* N.Y. Pattern Jury Instr. -- Civil 3:30 (2024) (no requirement that malice be the "sole" motivation for punitive damages to be warranted); *DiBella v. Hopkins*, 403 F.3d 102, 122 (2d Cir. 2005) (recognizing that *Prozeralik* is the controlling standard for the purpose of punitive damages in a defamation case and that "New York Pattern Jury Instruction § 3:30" is "in accord with that standard"); *see also* 44 N.Y. Jur. 2d, Defamation and Privacy § 230.

In urging otherwise, Trump relies on *Morsette v. "The Final Call"*, 309 A.D.2d 249, 764 N.Y.S.2d 416 (1st Dep't 2003). There, the Appellate Division for the First Department held that an award of punitive damages for defamation required the plaintiff to show "that the speaker was *solely* motivated by a desire to injure plaintiff." *Id.* at 421. In so holding, however, the First Department exclusively cited cases that applied malice

in the context of overcoming a conditional privilege against litigation. In doing so, it improperly extended the “sole motivation requirement” from the privilege context into the punitive damages context without any reasoning. *See id.* (collecting cases).²⁶ New York Court of Appeals decisions make clear that this is not the law in New York.²⁷

Accordingly, New York defamation law does not require a plaintiff to show that the defendant was solely motivated by common law malice to sustain an award of punitive damages. *See Prozeralik*, 605 N.Y.S.2d 218, 626 N.E.2d at 42; *see also* N.Y. Pattern Jury Instr. -- Civil

²⁶ *Present v. Avon Prods. Inc.*, 253 A.D.2d 183, 687 N.Y.S.2d 330, 334 (1st Dep’t 1999) (explaining that the malice must be the “one and only cause” for the publication to overcome the common interest privilege); *Stukuls*, 42 N.Y.2d at 282, 397 N.Y.S.2d 740, 366 N.E.2d 829 (same); *Thanasoulis v. Nat’l Ass’n for Specialty Foods Trade, Inc.*, 226 A.D.2d 227, 640 N.Y.S.2d 562, 563-64 (1st Dep’t 1996) (same); *Ackerman v. Bechhoefer*, 270 A.D.2d 878, 706 N.Y.S.2d 286, 287 (4th Dep’t 2000) (same); *Grier v. Johnson*, 232 A.D.2d 846, 648 N.Y.S.2d 764, 767 (3d Dep’t 1996) (same); *Weir v. Equifax Servs., Inc.*, 210 A.D.2d 944, 620 N.Y.S.2d 675, 677 (4th Dep’t 1994) (same).

Trump cites three additional cases that, like *Morsette*, hold that an award of punitive damages requires the speaker to be solely motivated by a desire to injure the plaintiff. Each case, however, relies solely on *Morsette* for this proposition. *See Verdi v. Dinowitz*, 204 A.D.3d 627, 168 N.Y.S.3d 24, 26 (1st Dep’t 2022); *Verdi v. Dinowitz*, 188 A.D.3d 441, 133 N.Y.S.3d 567, 569 (1st Dep’t 2020); *Robertson v. Doe*, No. 05-cv-7046, 2010 WL 11527317, at *5 (S.D.N.Y. May 11, 2010).

²⁷ Moreover, Trump argues that the New York Court of Appeals in *Prozeralik* cited *Lieberman v. Gelstein*, 80 N.Y.2d 429, 590 N.Y.S.2d 857, 605 N.E.2d 344 (1992), and thus the *Prozeralik* court required that malice be the sole motivation. But *Lieberman*, too, was a privilege case.

3:30 (2024).²⁸ Here, 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.” App’x at 1857. The court’s instructions were consistent with New York Civil Pattern Jury Instruction 3:30 and the standard for common law malice for the purpose of recovering punitive damages under New York law.

B. The Burden of Proof Charge

Trump also contends that the district court erred in charging the jury on the appropriate standard of proof for sustaining a punitive damages award. Trump submits that Carroll was required to prove common law malice by “clear and convincing evidence” to sustain an award of punitive damages and that the district court erred in instructing the jury that the burden of proof was by a “preponderance of the evidence.” We disagree.

In *Corrigan v. Bobbs-Merrill Co.*, the New York Court of Appeals declared that a public-figure defamation plaintiff may recover punitive damages upon proof “by a *fair preponderance of evidence* that [the] defendant (1) was animated, in such publication, by conscious ill will toward him, or (2) did not publish the [alleged libel] in good faith and in the honest belief that it was fiction, but

²⁸ The district court below also persuasively observed that “the current [2023] instructions for punitive damages are consistent with how the New York Pattern Jury Instructions were written *before* the *Morsette* decision as well, indicating that its authors did not consider *Morsette* to have changed the relevant law on punitive damages at all.” *Carroll*, 731 F. Supp. 3d at 631 n.19 (citing N.Y. Pattern Jury Instr. -- Civil § 3.30 (2000)). Moreover, in the commentary to the instructions, the authors acknowledge that *Morsette* is an outlier. *See* N.Y. Pattern Jury Instr. -- Civil § 3.30 (2000).

was indifferent as to whether [it] would injure some real party actually referred to by the author.” 228 N.Y. 58, 126 N.E. 260, 263 (1920) (emphasis added). Likewise, in *Celle v. Filipino Reporter Enterprises Inc.*, which involved a New York public figure defamation claim, we held that the plaintiffs must “prove by a *preponderance of the evidence* that the libelous statements were made out of hatred, ill will, or spite” to sustain an award of punitive damages. 209 F.3d at 184 (emphasis added) (alteration adopted) (internal quotation marks and citation omitted)); *cf. Chandok*, 632 F.3d at 816 (“Preponderance is the normal quantum of proof applicable in civil cases, and none of the New York cases discussed above suggests that more than a preponderance is required to establish common-law malice [necessary for overcoming a qualified privilege].”). In light of these decisions, the district court correctly concluded that the first prong of the standard announced in *Corrigan* -- the burden of proof relating to common law malice -- remains the authoritative law of the highest court of the state and applied it accordingly.²⁹

²⁹ Our prior decisions have offered conflicting views on the burden of proof for punitive damages under New York law. Compare *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 850-51 (2d Cir. 1967) (holding that the burden of proof for punitive damages in products liability cases is clear and convincing evidence), with *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277, 282 (2d Cir. 1990) (“[B]urden of proof under New York law for punitive damages in products liability cases is ‘preponderance of the evidence.’”). However, in our two most recent cases on the issue, including *Celle*, we concluded that the burden of proof under New York law for punitive damages is preponderance of the evidence. See *Celle*, 209 F.3d at 184; *Simpson*, 901 F.2d at 282; see also *Chandok*, 632 F.3d at 816 (common law malice provable by a preponderance). District courts within this Circuit continue to apply

Trump argues that *Corrigan* has been “effectively overruled” by *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L.Ed.2d 686 (1964). We have explained, however, that *Sullivan* “established clear and convincing evidence as the burden of proof necessary only for actual malice, without expressly altering the burden of proof” for any other elements of libel. *Celle*, 209 F.3d at 181 (citing *Goldwater v. Ginzburg*, 414 F.2d 324, 341 (2d Cir. 1969)). Accordingly, while *Sullivan* abrogated the second prong of the *Corrigan* standard, relating to *actual* malice, its holding had no impact on the first prong of the test relating to common law malice. Moreover, we have identified no New York Court of Appeals decision that suggests the evidentiary standard for punitive damages in defamation cases has been overruled post-*Sullivan*. See *West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 236, 61 S. Ct. 179, 85 L.Ed. 139 (1940) (“[T]he highest court of the state is the final arbiter of what is state law. When it has spoken, its pronouncement is to be accepted by federal courts as defining state law unless it has later given clear and persuasive indication that its pronouncement will be modified, limited or restricted.”). In accordance with *Sullivan*, the district court here applied the “clear and convincing” burden of proof to the “actual malice” element of Carroll’s defamation claim in *Carroll I* and *Carroll II*.

Trump also cites several New York cases -- from the Appellate Divisions for the First and Second Departments -- that required clear and convincing

the preponderance standard as well. See, e.g., *Paravas v. Tran*, No. 21-cv-807, 2022 WL 718842, at *9 (S.D.N.Y. Feb. 22, 2022), *report and recommendation adopted*, 2022 WL 718587 (S.D.N.Y. Mar. 10, 2022); *Fischer v. OBG Cameron Banfill LLP*, No. 08-cv-7707, 2010 WL 3733882, at *3 (S.D.N.Y. Sept. 24, 2010).

evidence for the imposition of punitive damages. But none of these cases involved a defamation claim. See *Randi A.J. v. Long Island Surgi-Ctr.*, 46 A.D.3d 74, 842 N.Y.S.2d 558, 562, 568 (2d Dep’t 2007) (claims for breach of confidentiality, privacy, and fiduciary duty against a medical clinic for disclosing confidential information); *Camillo v. Geer*, 185 A.D.2d 192, 587 N.Y.S.2d 306, 308-09 (1st Dep’t 1992) (personal injury negligence action against a corporation); *Sladick v. Hudson Gen. Corp.*, 226 A.D.2d 263, 641 N.Y.S.2d 270, 270-71 (1st Dep’t 1996) (personal injury action).³⁰ Indeed, Trump fails to cite a single defamation case in which the plaintiff was required to prove punitive damages by “clear and convincing evidence.”³¹

The New York Court of Appeals decision in *Corrigan* made clear that the burden of proof for punitive damages in defamation cases is preponderance of the evidence. Indeed, the New York Court of Appeals has continued to cite *Corrigan* approvingly with respect to

³⁰ Trump also cites *Cleghorn v. N.Y. Cent. & H.R.R. Co.*, 56 N.Y. 44, 48 (1874). In *Cleghorn*, a personal injury negligence action, the Court of Appeals held that an employer is liable in punitive damages for only the “gross misconduct” of his employee, which must be “reckless[,] . . . of a criminal nature, and clearly established.” *Id.* at 47-48. But to the extent *Cleghorn* imposed a heightened burden of proof for punitive damages, it has been overruled, at least in the defamation context, by the subsequent New York Court of Appeals decision in *Corrigan*.

³¹ The New York defamation cases that have employed a heightened burden of proof have done so with respect to the elements of actual malice and falsity -- not punitive damages. See *Freeman v. Johnston*, 84 N.Y.2d 52, 614 N.Y.S.2d 377, 637 N.E.2d 268, 271 (1994) (requiring clear and convincing evidence that the speaker acted with actual malice); *Mahoney v. Adirondack Publ’g Co.*, 71 N.Y.2d 31, 523 N.Y.S.2d 480, 517 N.E.2d 1365, 1367 (1987) (assessing whether the plaintiff satisfied his burden of proving actual malice and declining to reach the issue of punitive damages).

punitive damages. *See Mahoney v. Adirondack Publ'g Co.*, 71 N.Y.2d 31, 523 N.Y.S.2d 480, 517 N.E.2d 1365, 1368 (1987). The district court's charge on punitive damages was consistent with the law announced by the Court of Appeals in *Corrigan* and therefore was not erroneous.

V. Damages

Trump's final challenge to the judgment below concerns the jury's award of damages. He contends that the damages were excessive and that the district court erred abused its discretion in denying his motion for remittitur.³² We address the compensatory damages first, before turning to the award of punitive damages.

A. Compensatory Damages

On the issue of compensatory damages, 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. App'x at 1853-54. The jury was then asked to decide on two categories of compensatory damages. First, it was asked to assign a dollar amount to the "damages attributable to the June 21 and 22 statements, *excluding the reputation repair program* that was discussed during Professor Humphreys's testimony." *Id.* at 1856 (emphasis added). Second, it was asked to fill in the amount of damages, if any, that it awarded "*for the reputation repair program.*" *Id.* (emphasis added); *see id.* at 1014 (verdict form). The jury awarded Carroll \$7.3

³² "Remittitur is the process by which a court compels a plaintiff to choose between reduction of an excessive verdict and a new trial." *Stampf v. Long Island R.R. Co.*, 761 F.3d 192, 204 (2d Cir. 2014) (citation omitted).

million in compensatory damages other than for the reputation repair program and \$11 million for the reputation program itself. While Trump does not challenge the \$11 million reputation repair program award on appeal, he submits that the district court erred in denying his motion for remittitur as to the jury's award of \$7.3 million because it was solely for emotional distress and therefore subject to substantial constraints. The district court found that Carroll's compensatory damages "were not awarded solely for her emotional distress; they were not for garden variety harms; and they were not excessive." *Carroll v. Trump*, 731 F. Supp. 3d at 633. As set forth below, we find no basis to disturb the district court's determinations.

In reviewing the amount of damages awarded on a New York state law claim, federal courts are bound to apply substantive New York law. *See Cross v. N.Y.C. Transit Auth.*, 417 F.3d 241, 258 (2d Cir. 2005). In New York, an award is "excessive or inadequate if it deviates materially from what would be reasonable compensation." *Patterson v. Balsamico*, 440 F.3d 104, 119 (2d Cir. 2006) (quoting N.Y. C.P.L.R. § 5501(c)). "To determine whether a jury award is excessive within the meaning of § 5501(c), New York courts compare it with awards in similar cases." *Stampf v. Long Island R.R. Co.*, 761 F.3d 192, 204 (2d Cir. 2014). The relevant standard "is not whether an award deviates *at all* from past awards -- it is whether an award deviates *materially* from *reasonable compensation*." *Id.* (quoting *Okraynets v. Metro. Transp. Auth.*, 555 F. Supp. 2d 420, 439 (S.D.N.Y. 2008)). "This standard requires a more exacting review than the 'shocks the conscience' standard generally applied by federal courts." *Patterson*, 440 F.3d at 119.

We, in turn, review the district court's decision on a motion for remittitur for abuse of discretion. *Stampf*, 761 F.3d at 204. "The calculation of damages is the province of the jury, and we will not vacate or reduce a jury award merely because we would have granted a lesser amount of damages." *Turley v. ISG Lackawanna, Inc.*, 774 F.3d 140, 162 (2d Cir. 2014) (internal quotation marks and citations omitted). Nonetheless, this discretion has limits "and whether that has been surpassed is not a question of fact with respect to which reasonable men may differ, but a question of law." *Stampf*, 761 F.3d at 204 (quoting *Payne v. Jones*, 711 F.3d 85, 97-98 (2d Cir. 2013)). Courts have "an obligation to ensure that" awards for "intangibles" such as emotional and mental distress are "fair, reasonable, predictable, and proportionate." *Id.* at 205 (quoting *Payne*, 711 F.3d at 93).

First, we reject Trump's contention that the \$7.3 million award was limited to emotional distress damages. The jury here was permitted to consider more than emotional distress for the first category of damages, so long as it excluded the reputation repair program costs. Again, the jury was asked to assign a dollar amount for two distinct categories of damages: (1) any compensatory damages you award "*other than for the reputation repair program*" and (2) any compensatory damages you award "*for the reputation repair program only*." App'x at 1014 (verdict form). The second category was limited to the cost of Professor Humphreys's reputational repair program. For the first category, however, the jury was permitted to consider the fair compensation for Carroll's humiliation, mental anguish, *and other* reputational harms -- such as the loss of Carroll's career at *Elle*, the reduction in freelance work, and the cost of increased security measures. *See*

App'x at 1853 (instructing the jury that “[a] person who has been defamed is entitled to fair and just compensation for the injury to her reputation *and* for any humiliation and mental anguish in her public and private lives that was caused by the defamatory statement in question” (emphasis added)). Moreover, in determining the amount of damages for this category, the jury was instructed to consider five other factors that were not necessarily tied to emotional distress: Carroll’s “standing in the community, the nature of Mr. Trump’s statements made about her[,] . . . the extent to which those statements were circulated, the tendency of those statements to injure a person such as Ms. Carroll and all of the other facts and circumstances of the case.” *Id.* at 1854; *see also* N.Y. Pattern Jury Instr. -- Civil 3:29 (2024).

Trump argues that this reading of the verdict means that Carroll was compensated twice for the same reputational harm. We disagree. At the outset, the jury was instructed that it could “not award compensatory damages more than once for the same injury.” App'x at 1854. Moreover, there is a difference between the costs required to *repair* an individual’s reputation and the costs arising from the damaged reputation itself. Professor Humphreys’s damages estimate was based only on the former category -- 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.” *Id.* at 1460. These costs are distinct from the other damages that

flowed from the reputational harm.³³ For these reasons, the \$7.3 million award in this case was not limited to emotional distress.

Second, the district court did not abuse its discretion in finding that the award was reasonable under New York law. The district court correctly determined that Carroll's \$7.3 million award falls within the range of compensatory damages that have been upheld in other New York defamation claim cases. In *Prozeralik v. Capital Cities Communications*, a businessman sued a television and radio station for falsely reporting him as the victim of an abduction and stating that he was under investigation by the FBI for debt owed to organized crime figures. 188 A.D.2d 178, 593 N.Y.S.2d 662, 664-67 (4th Dep't 1993) ("*Prozeralik I*"), *rev'd on other grounds*, 82 N.Y.2d 466, 605 N.Y.S.2d 218, 626 N.E.2d 34 (1993). The Appellate Division upheld an award of \$4 million for non-economic "humiliation, mental anguish and injury" to plaintiff's reputation. *Prozeralik I*, 593 N.Y.S.2d at 667. Following remand on other grounds and a new trial, the Appellate Division affirmed an even larger award -- \$6 million for non-economic "injury to the plaintiff's reputation and standing in the

³³ Trump points out that Carroll's counsel stated in summation that the first bucket of compensatory damages was for "pain and suffering." See App'x at 1775-76. But she discussed the other injuries that Carroll suffered in her closing argument as well. See, e.g., *id.* at 1769 (recounting how Carroll's five-decade career as an advice columnist was "shattered" in "less than 24 hours"); *id.* at 1770-71 (discussing Carroll's blog with only 1,800 paid subscribers and the reduction in freelance work). The district court also reminded the jury that the attorneys' arguments were "not evidence," *id.* at 1862, and that it was required to "follow the rules of law" as the court gave them, *id.* at 1874; see *United States v. Salameh*, 152 F.3d 88, 116 (2d Cir. 1998) ("Juries are presumed to follow their instructions." (alteration adopted and citation omitted)).

community,” and \$3.5 million for non-economic “emotional and physical injuries.” *Prozeralik v. Cap. Cities Commc’ns, Inc.*, No. 48424, 1995 WL 17810583 (N.Y. Sup. Ct. Mar. 24, 1995) (“*Prozeralik II*”); *Prozeralik v. Cap. Cities Commc’ns, Inc.*, 222 A.D.2d 1020, 635 N.Y.S.2d 913, 914 (4th Dep’t 1995). Though Carroll did not claim physical injury, the \$9.5 million non-economic compensatory award in *Prozeralik II* is instructive. Taking inflation into account, its value is close to triple the amount of the \$7.3 million award here, and surpasses the total compensatory award of \$18.3 million as well.³⁴ See also *Cantu v. Flanigan*, 705 F. Supp. 2d 220, 226-31 (E.D.N.Y. 2010) (upholding award of \$150 million in non-economic damages for the defamation of a prominent Mexican businessman who was falsely accused of engaging in criminal conduct); *Osorio v. Source Enters., Inc.*, No. 5-cv-10029, 2007 WL 683985, at *10 (S.D.N.Y. 2007) (upholding award of \$3.5 million in non-economic compensatory damages for the defamation of an employee of a hip-hop magazine who had been falsely accused of extortion).³⁵

Finally, we cannot say that the jury’s award was unreasonable based on the factors it was instructed to consider under New York law and the evidence that was presented at trial. It is well-settled in New York that “[t]he question of the amount of damages to be awarded

³⁴ According to the Bureau of Labor Statistics’ Inflation Calculator, \$9.5 million in December 1995 amounts to nearly \$20 million in June 2025. *CPI Inflation Calculator*, U.S. Dep’t of Lab., http://www.bls.gov/data/inflation_calculator.htm [<https://perma.cc/D F6P-C6JP>] (last visited July 29, 2025).

³⁵ These awards amount to approximately \$5.65 million (*Osorio*) and \$222 million (*Cantu*) in 2025 dollars. See *CPI Inflation Calculator*, U.S. Dep’t of Lab., http://www.bls.gov/data/inflation_calculator.htm [<https://perma.cc/H55H-FB6B>] (last visited July 29, 2025).

in defamation actions is peculiarly within the jury's province," *Prozeralik I*, 593 N.Y.S.2d at 667, and "the discretion of a . . . court over damage awards should be exercised sparingly," *Calhoun v. Cooper*, 206 A.D.2d 497, 614 N.Y.S.2d 762, 762 (2d Dep't 1994). After Trump released his statements, which were viewed by between 85.8 to 104 million people, Carroll was instantly and continuously attacked on Twitter and Facebook and in emails. She received thousands of such attacks, including hundreds of death threats. *See supra* p. 64. Carroll described how she continued to fear for her safety as a result of these attacks, but that she could not afford stronger personal security measures.

Moreover, in the months following the attack, Carroll lost her decades-long career at *Elle* where she had been one the most prominent and successful advice columnists in the country. Carroll's replacement blog only had 1,800 paid subscribers, and her income from freelance work decreased by 99%. Other business opportunities, such as invitations to appear on TV shows, completely dried up as well.

On this record, we find no abuse of discretion in the district court's decision to deny remittitur. The \$7.3 million award for Carroll's harm was fair and did not deviate materially from what has been found to be reasonable compensation in other New York defamation cases.

B. Punitive Damages

Finally, Trump argues that the jury's punitive damages award of \$65 million was grossly excessive under constitutional and federal common law principles. Given the unique and egregious facts of this case, we conclude that the punitive damages award did not

exceed the bounds of reasonableness under either standard.

We review the district court’s denial of remittitur under federal common law “pursuant to the federal appellate courts’ supervisory authority over trial courts.” *Turley*, 774 F.3d at 164.³⁶ While this review is limited to abuse of discretion, “the degree of discretion enjoyed by trial courts in these matters is relatively narrow” and “a degree of excessiveness less extreme than ‘grossly excessive’ will support remanding for a new trial or remittitur of damages.” *Id.* (quoting *Payne*, 711 F.3d at 97, 100). We must ensure that the punitive damage award is “‘fair, reasonable, predictable, and proportionate,’ to avoid extensive and burdensome social costs, and to reflect the fact that punitive awards are imposed without the protections of criminal trials.” *Id.* (quoting *Payne*, 711 F.3d at 93-96). Our review under constitutional principles is *de novo* and an award will be found excessive under the Constitution only if it is “grossly excessive.” *Id.*³⁷

³⁶ Carroll asserts that federal common law is inapplicable because Trump never asserted that the punitive damages violated New York law. Our review under federal common law, however, derives from our supervisory authority over federal district courts and applies regardless of whether the case involved state or federal claims. *See Payne*, 711 F.3d at 96-97, 100 (observing that a federal appellate court’s review of a *state court* damages award is limited to a constitutional analysis while a federal court’s review of a federal district court’s damages award is reviewed under both federal common law and the Constitution).

³⁷ Although Trump does not challenge the punitive award under state law, as with the compensatory damages, “a federal court in a case governed by state law must apply the state law standard for appropriateness of remittitur.” *Payne*, 711 F.3d at 97 n.8. Therefore, as discussed above, damages awards are excessive under New York law if they “deviate[] materially from what would be

The Supreme Court has identified three “guideposts” for reviewing punitive damages awards, which “apply irrespective of whether our review is constitutional or supervisory in nature.” *Turley*, 774 F.3d at 165. We review (1) “‘the degree of reprehensibility’ associated with the defendants’ actions,” (2) “‘the disparity between the harm or potential harm suffered’ and the size of the punitive award,” and (3) “‘the difference between the remedy in this case and the penalties imposed in comparable cases.’” *Id.* (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575, 116 S. Ct. 1589, 134 L.Ed.2d 809 (1996)). The first factor, the “degree of reprehensibility,” is “the most important indicium of the award’s reasonableness.” *Motorola Credit Corp. v. Uzan*, 509 F.3d 74, 85 (2d Cir. 2007) (quoting *Gore*, 517 U.S. at 575, 116 S. Ct. 1589) (alteration adopted).

1. *The Degree of Reprehensibility*

The record in this case supports the district court’s determination that the “‘the degree of reprehensibility’ of Mr. Trump’s conduct was remarkably high, perhaps unprecedented.” *Carroll*, 731 F. Supp. 3d at 634. There was ample evidence that Trump was recklessly indifferent to Carroll’s health and safety. As the district court explained, Trump “issue[d] multiple statements castigating Ms. Carroll as a politically and financially motivated liar, insinuating that she was too unattractive for him to have sexually assaulted [her], and threatening that she would ‘pay dearly’ for speaking out.” *Id.* at 634-35. Trump’s statements had a domino effect: As

reasonable compensation.” N.Y. C.P.L.R. § 5501(c). Nonetheless, we do not make two different rulings because we conclude that the punitive damages award was not unreasonable under either standard. *See Payne*, 711 F.3d at 97 n.8 (declining to make two distinct rulings).

discussed more fully above, *see supra* p. 64, Carroll was subjected to ongoing and prolific harassment as a result of these statements, including a multitude of death threats and other threats of physical injury. *See Gore*, 517 U.S. at 581, 116 S. Ct. 1589 (considering, when reviewing punitive damages awards, “the harm likely to result from the defendant’s conduct as well as the harm that actually has occurred” (emphasis omitted)).

Moreover, Trump’s attacks against Carroll were not isolated; rather, they continued throughout the pendency of the nearly five-year litigation and became more extreme and frequent as the trial approached. *See Turley*, 774 F.3d at 149 (considering, for purposes of punitive damages award, defendants’ “campaign of racial harassment” which included actions taken in the years after the incidents specifically alleged in the operative complaint and “intensified” during pendency of litigation). Trump repeated his attacks -- despite the jury’s finding in *Carroll II* that his 2022 statement was defamatory and despite the district court’s summary judgment ruling in this case finding his 2019 statements defamatory as well. He also continued these same attacks during the trial itself. In one such statement, issued two days into the trial, Trump proclaimed that he would continue to defame Carroll “a thousand times.” Dkt. No. 304-28 (PX-165).

In sum, as observed by the district court, the conduct here supports a significant punitive damages award—it involved malice and deceit, caused severe emotional injury, and continued over at least a five-year period. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419, 123 S. Ct. 1513, 155 L.Ed.2d 585 (2003) (setting out the factors for assessing the degree of reprehensibility); *see also Stampf*, 761 F.3d at 209 (“Conduct that involves deceit or malice is more

reprehensible than conduct involving mere negligence. Likewise, conduct that could cause serious physical or emotional injury is more reprehensible than conduct that risks only minor injuries or economic damages.” (citations omitted)).

2. Disparity Between the Harm and Size of the Punitive Award

The ratio of the \$65 million punitive damages award to Carroll’s \$18.3 million compensatory award is approximately 3.6:1. We acknowledge that this ratio approaches the upper limit of reasonableness. *See State Farm*, 538 U.S. at 425, 123 S. Ct. 1513 (“[A]n award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety.”); *Turley*, 774 F.3d at 165 (Where “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.” (internal quotation marks and citation omitted)). Nonetheless, the Supreme Court has “repeatedly stressed the impossibility of making any bright-line test, as the propriety of the ratio can *vary enormously* with the particular facts of the case.” *Payne*, 711 F.3d at 102 (emphasis added); *e.g.*, *Gore*, 517 U.S. at 582-83, 116 S. Ct. 1589 (“We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case.”); *accord Johnson v. Nextel Commc’ns Inc.*, 780 F.3d 128, 149 (2d Cir. 2015) (“[T]here is no rigid upper limit on a ratio of punitive damages to compensatory damages.”). Moreover, “[e]ven where compensatory damages are substantial, punitive damages awards that are a multiple higher may be warranted because of the deterrent

function of punitive damages.” *Jennings v. Yurkiw*, 18 F.4th 383, 391-92 (2d Cir. 2021) (upholding a punitive damages award representing a 4:1 ratio to compensatory damages “[g]iven the constellation of intentional misbehavior by the [defendants]”); accord *Lee v. Edwards*, 101 F.3d 805, 809 (2d Cir. 1996) (quoting *Vasbinder v. Scott*, 976 F.2d 118, 121 (2d Cir. 1992) (“In gauging excessiveness, we must keep in mind the purpose of punitive damages: ‘to punish the defendant and to deter him and others from similar conduct in the future.’”).

In fashioning the punitive award, the jury was instructed to consider, among other factors, the amount “necessary to deter Mr. Trump from continuing to defame Ms. Carroll.” App’x at 1858. Upon review of the evidence, we agree with the district court that the jury was entitled to find that Trump would not stop defaming Carroll unless he was subjected to a substantial financial penalty.³⁸ See *Carroll*, 731 F. Supp. 3d at 635. For nearly five years, Trump never wavered or relented in his public attacks on Carroll -- even when faced with the jury’s unanimous verdict in *Carroll II* and the district court’s ruling in this case. He made three of these attacks within 48 hours of the verdict in *Carroll II*, Dkt. No. 304-14 (PX-96); see also Dkt. No. 304-16 (PX-98); 304-18 (PX-100), and launched similar attacks against Carroll in the days and weeks leading up to this trial, see Dkt. No. 304-21 (PX-144-T); Dkt. No. 333-19 (PX-149-T); Dkt. No. 304-24 (PX-152). He then made at least four

³⁸ The jury was asked to also consider “Mr. Trump’s financial condition and the impact that any punitive damages you may award will have on him.” App’x at 1858. While we have noted that “the defendant’s financial status has occupied no place in the Supreme Court’s due process review,” *Motorola*, 509 F.3d at 85, it remains relevant to the question of deterrence, see *Lee*, 101 F.3d at 813.

more statements during the course of the trial itself. The statements all shared common themes: Trump continued to assert that Carroll was lying about the 1996 sexual assault and that she was motivated to do so for personal, financial, and political reasons, and to imply that Carroll was too unattractive to be sexually assaulted. He also began to claim that Carroll's lawsuit was part of a conspiracy to interfere with the 2024 election, Dkt. No. 304-27 (PX-164-T); Dkt. No. 304-25 (PX-160), and vowed to continue to make similar statements in the future, Dkt. No. 304-28 (PX-165). Given this extraordinary and unprecedented conduct, we conclude that the 3.6:1 ratio was neither unpredictable nor unreasonable in relation to the actual harm that had occurred and "the harm likely to result." *Payne*, 711 F.3d at 102 (emphasis omitted).

3. Comparison with Penalties Imposed in Similar Cases

Finally, the punitive damages award here is not out of step with awards in other recent and comparable defamation suits. *See Payne*, 711 F.3d at 104 ("Courts have often found it helpful in deciding whether a particular punitive award is excessive to compare it to court rulings on the same question in other cases."). In 2023, for example, former New York City Mayor Rudolph Giuliani was ordered to pay \$75 million in punitive damages to two election workers he had falsely accused of ballot fraud. *See Freeman v. Giuliani*, 732 F. Supp. 3d 30, 41 (D.D.C. 2024). More recently, in 2024, the Connecticut Court of Appeals upheld an award of \$321,650,000 in common law punitive damages in the form of attorneys' fees to 11 plaintiffs against Alex Jones who had falsely stated that the Sandy Hook shooting was a staged event. *See Lafferty v. Jones*, 229 Conn. App. 487, 327 A.3d 941, 951, 981 (2024). Likewise, a New

York state trial court awarded Louis Bacon \$100 million in punitive damages against fashion mogul Peter Nygard for defamation. Order Awarding Damages at 4, *Bacon v. Nygard*, No. 150400/2015 (N.Y. Sup. Ct. June 6, 2023), Dkt. No. 1287. While that judgment was vacated and remanded due to a defect in service of process, *Bacon v. Nygard*, 232 A.D.3d 407, 220 N.Y.S.3d 286, 286-87 (1st Dep’t 2024), it remains a useful point of reference as to the amounts that other courts have found acceptable.

We have determined that each of the *Gore* factors supports the jury’s award of punitive damages in this case. Accordingly, we conclude that the district court did not err in denying Trump’s motion for remittitur with respect to punitive damages.

CONCLUSION

We hold that the district court did not err in any of the challenged rulings and that the jury’s duly rendered damages awards were reasonable in light of the extraordinary and egregious facts of this case. For the reasons set forth above, we AFFIRM the district court’s judgment.

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APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 24-644

April 29, 2026

E. JEAN CARROLL,

*Plaintiff-Counter-
Defendant-Appellee,*

v.

DONALD TRUMP, in his personal capacity,

*Defendant-Counter-
Claimant-Appellant.**

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*.

* The Clerk of Court is respectfully directed to amend the official caption as set forth above.

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.

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 previously 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

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.

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 (2d Cir. 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 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

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.”).

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 Constitution 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. Ballenger*, 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—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

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.

“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 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.

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).

⁸ *See infra* note 17.

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 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 (2d Cir. 2025). 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 Attorney 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

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

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

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

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 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.”).

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 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:

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).

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) (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 being 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

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”).

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.

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);

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.

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).

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”).

In this case, the district court rejected the notion that the President's remarks to the press could fall within 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 Semiquincentennial 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 doctrine of presidential immunity by the Supreme Court of the

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)).

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 only after explicit and unequivocal renunciation of the protection.” *United States v.*

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.”).

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

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

²⁴ *Id.*

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

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).

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 considered 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

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 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

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.

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 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

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”).

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

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

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 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

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

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 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.

arguably the most powerful and famous man in the world to broadcast his lies to millions of dedicated followers”).

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 President 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.*

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*).

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 application 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 preclusion, “[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.

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).

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).

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 weighing 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

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.

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 “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

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).

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:

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 *Liberman v. Gelstein*, 80 N.Y.2d 429, 439 (1992)).

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.”).

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 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.’” *Liberman*, 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

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.”).

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)).

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 invaded 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 (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

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

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-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.

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 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

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.”).

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 erroneous 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.

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

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. 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.”

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)).

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 freelance 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 proportionate,’ 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 “reputation 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 “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

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.”).

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 Connecticut, 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 “indiciu[m] 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 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

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>.

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 Court affirmed, *Carroll v. Trump*, 124

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*.

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 rehearing of *Carroll 6*.⁴ Neither petition identifies how

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.

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.

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 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 litigated 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 with 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,

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.

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 § 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 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

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”).

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).

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. 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.

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.

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 *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,

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 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).

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.

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

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.

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 interpreting § 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

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

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”) (citation 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. Flagman*, 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.”).

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 (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

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

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.

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

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.

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 Supreme 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 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

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 (emphasis 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.

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 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.

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).

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 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

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.*

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 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).

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.

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.

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 (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 (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 *Liberman* and other cases about qualified privilege do not change the fact that punitive 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 C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AUGUST TERM 2024
Argued: June 24, 2025
Decided: August 8, 2025

No. 24-644

E. JEAN CARROLL,

Plaintiff-Appellee,

v.

DONALD J. TRUMP, in his personal capacity,

Defendant-Appellant,

UNITED STATES OF AMERICA,

*Movant.**

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Before: Chin, Merriam, and Kahn, Circuit Judges.

Per Curiam:

On April 11, 2025, after this appeal was fully briefed, defendant-appellant President Donald J. Trump and the

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

government 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 proceeded 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, 115 S. Ct. 2227, 132 L.Ed.2d 375 (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 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

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.

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 under D.C. law, *see Trump v. Carroll*, 292 A.3d 220 (D.C. 2023), as well as new factual developments, the Department of Justice is declining to certify under the Westfall Act, 28 U.S.C. § 2679(d), that defendant Donald J. Trump was acting within the scope of his office and employment as President of the United States when he made the statements that form the

basis of the defamation claims in plaintiff's Amended Complaint in this action.

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

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

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

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.

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:

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

The Westfall Act was enacted in direct response to the Supreme Court’s decision in *Westfall v. Erwin*, 484 U.S. 292, 108 S. Ct. 580, 98 L.Ed.2d 619 (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, 115 S. Ct. 2227. Congress responded through the Westfall Act, and “delete[d] the ‘discretionary function’ requirement, finding it an unwarranted judicial imposition.” *Id.* at 426, 115 S. Ct. 2227. 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)).

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, 127 S. Ct. 881, 166 L.Ed.2d 819 (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, 115 S. Ct. 2227; *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, 115 S. Ct. 2227.

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, 115 S. Ct. 2227 (“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, 75 S. Ct. 513, 99 L.Ed. 615 (1955) (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152, 2 S. Ct. 391, 27 L.Ed. 431 (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, 127 S. Ct. 881. 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, 127 S. Ct. 881 (citing *Hunter v. Bryant*, 502 U.S. 224, 228, 112 S. Ct. 534, 116 L.Ed.2d 589 (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, 107 S. Ct. 3034, 97 L.Ed.2d 523 (1987) (“[I]mmunity questions should be resolved at the earliest possible stage of litigation.”)). We are many years removed from “the earliest opportunity.”⁴

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

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 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,

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, 115 S. Ct. 2227.

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, 93

S. Ct. 2201, 37 L.Ed.2d 48 (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

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

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, 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.

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

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.

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

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 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, 115 S. Ct. 2227.

first instance, so we must vacate the order and remand for findings of fact.”).

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 D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AUGUST TERM 2023
Nos. 23-1045-cv (L) & 23-1146-cv (Con)

E. JEAN CARROLL,

*Plaintiff-Counter-
Defendant-Appellee,*

v.

DONALD TRUMP, in his personal capacity,

*Defendant-Counter-
Claimant-Appellant.**

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Argued: October 23, 2023
Decided: December 13, 2023

Before: Cabranes, Chin, and Kahn, Circuit Judges.

José A. Cabranes, Circuit Judge:

Ordinarily, defendants are deemed to have waived or forfeited defenses that they did not raise at the outset of the litigation.¹ But defenses based on subject-matter

* The Clerk of Court is respectfully directed to amend the official caption as set forth above.

¹ See *Kaplan v. Bank Saderat PLC*, 77 F.4th 110, 117 (2d Cir. 2023). “While the terms ‘waiver’ and ‘forfeiture’ are often used

jurisdiction—“the courts’ statutory or constitutional power to adjudicate the case”²—are nonwaivable. Defendants can raise such defenses “at any stage in the litigation.”³

Presidential immunity is a defense that stems from “the President’s unique office, rooted in the constitutional tradition of the separation of powers and supported by our history,” and entitles the President to “absolute . . . immunity from damages liability for acts within the outer perimeter of his official

interchangeably because they have similar effects, they have slightly different meanings.” *Id.* at 117 n.10. “The term ‘waiver’ is best reserved for a litigant’s intentional relinquishment of a known right. Where a litigant’s action or inaction is deemed to incur the consequence of loss of a right, or, as here, a defense, the term ‘forfeiture’ is more appropriate.” *Doe v. Trump Corp.*, 6 F.4th 400, 409 n.6 (2d Cir. 2021) (quotation marks and comma omitted). E. Jean Carroll (“Plaintiff”), Donald J. Trump (“Defendant”), and the District Court refer to Defendant’s failure to raise presidential immunity as “waiver.” For purposes of this consolidated appeal, whether Defendant forfeited rather than waived presidential immunity matters not. Thus, “[w]e use the term [‘waiver’] in this opinion for ease of discussion,” but we express no view on whether Defendant intended to relinquish his presidential immunity defense, “which is a question of fact reserved for the district court.” *Kaplan*, 77 F.4th at 117 n.10; *see, e.g., LCS Grp., LLC v. Shire Dev. LLC*, No. 20-2319, 2022 WL 1217961, at *5 n.2 (2d Cir. Apr. 26, 2022) (summary order) (“Although it may be more accurate to refer to [Appellant] as having forfeited, rather than waived, many of the arguments it raises here, for convenience we refer to both their action and inaction here in terms of ‘waiver.’”).

² *Lightfoot v. Cendant Mortg. Corp.*, 580 U.S. 82, 92, 137 S. Ct. 553, 196 L.Ed.2d 493 (2017) (quotation marks omitted).

³ *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506, 126 S. Ct. 1235, 163 L.Ed.2d 1097 (2006); *see also* Fed. R. Civ. P. 12(h)(3) (“If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.”).

responsibilities.”⁴ For example, the Supreme Court held in *Nixon v. Fitzgerald* that presidential immunity protected former President Richard Nixon from a lawsuit by an ex-Air Force employee who alleged that Nixon fired him in retaliation for testifying before Congress about cost overruns.⁵ Conversely, the Court held in *Clinton v. Jones* that presidential immunity did not shield President Clinton from civil liability for actions allegedly taken when he was Governor of Arkansas because they were not official presidential acts.⁶

This case presents a vexing question of first impression: whether presidential immunity is waivable. We answer in the affirmative and further hold that Donald J. Trump (“Defendant”) waived the defense of presidential immunity by failing to raise it as an affirmative defense in his answer to E. Jean Carroll’s (“Plaintiff’s”) complaint, which alleged that Defendant defamed her by claiming that she had fabricated her

⁴ *Nixon v. Fitzgerald*, 457 U.S. 731, 749, 756, 102 S. Ct. 2690, 73 L.Ed.2d 349 (1982) (quotation marks omitted). Other Government officials are likewise protected by absolute immunity under certain circumstances. For example, prosecutorial immunity is a form of absolute immunity that shields “[a] prosecutor acting in the role of an advocate in connection with a judicial proceeding . . . for all acts ‘intimately associated with the judicial phase of the criminal process.’” *Simon v. City of New York*, 727 F.3d 167, 171 (2d Cir. 2013) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 430, 96 S. Ct. 984, 47 L.Ed.2d 128 (1976)). And judges are entitled to absolute judicial immunity “for acts ‘committed within their judicial discretion.’” *Peoples v. Leon*, 63 F.4th 132, 138 (2d Cir. 2023) (quoting *Cleavinger v. Saxner*, 474 U.S. 193, 199, 106 S. Ct. 496, 88 L.Ed.2d 507 (1985)).

⁵ See *Nixon*, 457 U.S. at 733-40, 756-58.

⁶ *Clinton v. Jones*, 520 U.S. 681, 694-95, 117 S. Ct. 1636, 137 L.Ed.2d 945 (1997).

account of Defendant sexually assaulting her in the mid-1990s.

Accordingly, we **AFFIRM** the July 5, 2023 order of the United States District Court for the Southern District of New York (Lewis A. Kaplan, *Judge*) denying Defendant's motion for summary judgment insofar as it rejected Defendant's presidential immunity defense and denied his request for leave to amend his answer to add presidential immunity as a defense. We likewise **AFFIRM** the District Court's August 7, 2023 order insofar as it struck Defendant's presidential immunity defense from his answer to Plaintiff's amended complaint. We **DISMISS** for lack of appellate jurisdiction the appeal of the District Court's July 5, 2023 order insofar as it determined that Defendant's statements about Plaintiff were defamatory per se. Finally, we **REMAND** the case to the District Court for further proceedings consistent with this opinion.

I. BACKGROUND

The relevant facts in this appeal are undisputed. We summarize them below.

A. Factual Background

On June 21, 2019, Plaintiff publicly accused Defendant of sexually assaulting her in the mid-1990s.⁷ Defendant, who was President of the United States at the time of the accusations, denied Plaintiff's claims in a series of public statements. In the first, released that same day,

⁷ See E. Jean Carroll, *Hideous Men: Donald Trump Assaulted Me in a Bergdorf Goodman Dressing Room 23 Years Ago. But He's Not Alone on the List of Awful Men in My Life*, THE CUT (June 21, 2019), <https://www.thecut.com/2019/06/donald-trump-assault-e-jean-carroll-other-hideous-men.html> [<https://perma.cc/HX9T-8MPK>].

he claimed that “it never happened,” he “never met” Plaintiff, and that “[s]he is trying to sell a new book—that should indicate her motivation.”⁸ The next day, he stated that “[t]his is a woman who has also accused other men of things . . . It is a totally false accusation.”⁹

On November 4, 2019, Plaintiff responded by suing Defendant for defamation in New York State Supreme Court. Defendant filed his answer on January 23, 2020. On September 8, 2020, the United States removed the case to the United States District Court for the Southern District of New York pursuant to the Westfall Act.¹⁰

⁸ Appellant’s Appendix (“A”) 573.

⁹ *Id.* at 580. On June 24, 2019, Defendant further stated that “she’s not my type” and that it “never happened.” *Id.* at 590. As of November 15, 2023, Defendant’s June 24 statement is no longer the subject of Plaintiff’s defamation claim, although Plaintiff contends it remains relevant to the question of punitive damages. *See* Def. 28(j) Letter, *Carroll v. Trump*, No. 23-1045 (Nov. 17, 2023), ECF No. 121; Pl. Letter, *Carroll v. Trump*, No. 23-1045 (Nov. 20, 2023), ECF No. 124. We take judicial notice of this development, *see Liberty Mut. Ins. Co. v. Rotches Pork Packers, Inc.*, 969 F.2d 1384, 1388 (2d Cir. 1992), but it does not alter our analysis.

¹⁰ The Westfall Act immunizes federal employees acting within the scope of their office or employment from tort liability. *See* 28 U.S.C. § 2679(b)(1). Under the Act, the United States may remove a state court civil case to federal court upon certification by the Attorney General that the employee was acting within the scope of his employment at the time of the alleged incident. *See id.* § 2679(d)(2); *Osborn v. Haley*, 549 U.S. 225, 229-30, 127 S. Ct. 881, 166 L.Ed.2d 819 (2007). Whether the Westfall Act immunizes Defendant is not before us today. *Cf. Carroll v. Trump*, 66 F.4th 91 (2d Cir. 2023) (recounting the procedural history of this case’s Westfall Act dispute and remanding to the District Court). After we remanded to the District Court, the Government decided not to issue Defendant a new Westfall Act certification in light of the filing of Plaintiff’s amended complaint.

B. Procedural Background

On December 22, 2022, Defendant moved for summary judgment.¹¹ In his reply brief, filed on January 19, 2023, he raised for the first time the argument that presidential immunity barred liability. On July 5, 2023, the District Court denied Defendant’s motion for summary judgment after determining that Defendant waived presidential immunity and denied Defendant’s request for leave to amend his answer to add presidential immunity as a defense (“July 5 Order”).¹² The Court denied Defendant’s request for leave to amend on two independent grounds: first, that the request was futile, and second, that Defendant unduly delayed in raising the defense and granting the request would prejudice Plaintiff.¹³ The Court also rejected Defendant’s argument that his statements were not defamatory per se.¹⁴ Defendant appealed the July 5 Order on July 19, 2023.

Meanwhile, on May 22, 2023, Plaintiff filed an amended complaint that added, *inter alia*, more

¹¹ One month before Defendant moved for summary judgment, Plaintiff filed a separate lawsuit against Defendant for sexual assault and defamation. The defamation claim arose out of an October 2022 statement by Defendant denying Plaintiff’s assault allegation. See Complaint, *Carroll v. Trump*, No. 22-cv-10016 (“*Carroll II*”) (S.D.N.Y. Nov. 24, 2022). In May 2023, the *Carroll II* jury awarded Plaintiff \$5 million in damages. The verdict is the subject of a separate appeal currently pending before this Court. See *Carroll II*, appeal docketed, No. 23-793 (2d Cir. May 11, 2023).

¹² Memorandum Opinion Denying Defendant’s Motion for Summary Judgment (Corrected), *Carroll v. Trump* (“*Carroll I*”), No. 20-cv-7311, — F. Supp. 3d —, 2023 WL 4393067 (S.D.N.Y. July 5, 2023) (“July 5 Order”).

¹³ *Id.* at —, 2023 WL 4393067, at *9-13.

¹⁴ *Id.* at —, 2023 WL 4393067, at *13-14.

statements by Defendant alleging that Plaintiff's accusations were false and politically motivated. Defendant filed his answer to Plaintiff's amended complaint on June 27, 2023. The amended answer for the first time raised presidential immunity as an affirmative defense. On August 7, 2023, the District Court struck Defendant's presidential immunity defense from his amended answer on the ground that it had been waived and, even if not, "would have been insufficient as a defense" ("August 7 Order").¹⁵ On August 10, 2023, Defendant appealed the August 7 Order.

Defendant sought a stay from the District Court, arguing that his appeal of the District Court's July 5 Order, which rejected Defendant's presidential immunity defense, divested the District Court of jurisdiction. On August 18, 2023, the District Court denied Defendant's stay motion upon determining his appeal to be frivolous.¹⁶ Defendant then sought an emergency stay from our Court, which a motions panel denied on September 13, 2023. The same day, the motions panel ordered the consolidation of Defendant's appeals of the July 5 Order and the August 7 Order and set an expedited briefing schedule.

¹⁵ Memorandum Opinion Granting Plaintiff's Motion to Dismiss Defendant's Counterclaim and Certain Purported Affirmative Defenses, *Carroll v. Trump*, No. 20-cv-7311, — F. Supp. 3d at —, 2023 WL 5017230, at *9 (S.D.N.Y. Aug. 7, 2023) ("August 7 Order"). The August 7 Order also dismissed Defendant's counterclaim that Plaintiff defamed him by accusing him of rape. *Id.* at — - —, 2023 WL 5017230, at *5-8. The District Court's dismissal of Defendant's counterclaim is not before us today.

¹⁶ Memorandum Opinion Denying Defendant's Motion to Stay, *Carroll I*, No. 20-cv-7311, — F. Supp. 3d at — - —, 2023 WL 5312894, at *7-8 (S.D.N.Y. Aug. 18, 2023).

II. DISCUSSION

This case concerns appeals from two related orders by the District Court. The July 5 Order denied Defendant’s motion for summary judgment on the ground that Defendant waived his presidential immunity defense and further denied Defendant’s request for leave to amend his answer to add presidential immunity as an affirmative defense. The August 7 Order struck Defendant’s affirmative defense of presidential immunity from his answer to Plaintiff’s amended complaint on the ground that Defendant had already waived this defense.

We hold that presidential immunity is waivable and that Defendant waived this defense.¹⁷ Thus, the District Court did not err in its order denying Defendant’s motion for summary judgment, nor did it err, much less “abuse its discretion,” in denying his belated request for leave to amend his answer to add presidential immunity as a defense.¹⁸ We also hold that the District Court did not err in striking Defendant’s presidential immunity defense from his answer to Plaintiff’s amended complaint.¹⁹ Nor did the District Court err in retaining jurisdiction after Defendant filed his notice of appeal on July 19, 2023.²⁰ Finally, we hold that we lack appellate jurisdiction to consider whether Defendant’s statements were defamatory per se.²¹

¹⁷ See Section II.A, *post*.

¹⁸ See Sections II.A-II.B, *post*.

¹⁹ See Section II.C, *post*.

²⁰ See Section II.D, *post*.

²¹ See Section II.E, *post*.

A. Whether Defendant Waived Presidential Immunity²²

Is presidential immunity waivable? And if so, did Defendant waive it? The answer to both questions is yes.

1. Whether Presidential Immunity Is Waivable

Defendant argues that presidential immunity is a jurisdictional defense and is thus nonwaivable.²³ We disagree. The Supreme Court recognized in *Nevada v. Hicks* that “[t]here is no authority whatever for the proposition that absolute- and qualified-immunity defenses pertain to the court’s jurisdiction.”²⁴ And we

²² We review the District Court’s determination that Defendant waived his presidential immunity defense for “abuse of discretion.” See *Amara v. Cigna Corp.*, 53 F.4th 241, 256 (2d Cir. 2022). We review the District Court’s denial of summary judgment and its determination that presidential immunity can be waived *de novo*. See *Johnson v. Killian*, 680 F.3d 234, 236 (2d Cir. 2012); *Berg v. Kelly*, 897 F.3d 99, 105 (2d Cir. 2018). We have appellate jurisdiction under the collateral order doctrine to review the District Court’s determination that Defendant is not entitled to absolute immunity. See *Shmueli v. City of New York*, 424 F.3d 231, 236 (2d Cir. 2005) (“As the existence of absolute immunity protects an official not only from liability but also from suit, the validity of the defense should be determined at an early stage. Hence, an interlocutory order rejecting the defense is immediately appealable under the collateral order doctrine to the extent that the rejection turned on an issue of law.”).

²³ See Def. Br. at 12-34; see also notes 1-6, *ante* (explaining concepts of waiver and presidential immunity).

²⁴ 533 U.S. 353, 373, 121 S. Ct. 2304, 150 L.Ed.2d 398 (2001); see also *Smith v. Scalia*, 44 F. Supp. 3d 28, 40 n.10 (D.D.C. 2014) (Jackson, J.) (“[A]bsolute judicial immunity is a non-jurisdictional bar.”), *aff’d*, No. 14-cv-5180, 2015 WL 13710107 (D.C. Cir. 2015). Qualified immunity shields officials from civil damages liability “insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person

have repeatedly distinguished absolute immunity defenses from defenses based on subject-matter jurisdiction.²⁵

Rather than acknowledge *Hicks* or our precedents, Defendant points to scattered references to “jurisdiction” in Supreme Court cases involving presidential immunity.²⁶ But as we have recently been reminded by the Supreme Court, “[t]he mere fact that [the Supreme] Court previously described something without elaboration as jurisdictional . . . does not end the inquiry.”²⁷ We must ask if the prior decision addressed whether the provision or defense is “technically jurisdictional”—whether it truly operates as a limit on a court’s subject-matter jurisdiction—and whether anything in the decision ‘turn[ed] on that characterization.’”²⁸ Accordingly, “[i]f a decision simply states that ‘the court is dismissing “for lack of jurisdiction” when some threshold fact has not been

would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L.Ed.2d 396 (1982). Absolute immunity, by contrast, “confers complete protection from civil suit.” *Tulloch v. Coughlin*, 50 F.3d 114, 116 (2d Cir. 1995). The parties do not dispute that presidential immunity is a form of absolute, rather than qualified, immunity.

²⁵ See, e.g., *Chen v. Garland*, 43 F.4th 244, 252 n.6 (2d Cir. 2022); *Mitchell v. Fishbein*, 377 F.3d 157, 165 (2d Cir. 2004); see also *Beechwood Restorative Care Ctr. v. Leeds*, 436 F.3d 147, 154 n.3 (2d Cir. 2006) (holding absolute immunity defense to be waived because not adequately preserved for appellate review).

²⁶ See Def. Br. at 15-16, 19, 22, 31 (quoting *Mississippi v. Johnson*, 71 U.S. 475, 500-01, 4 Wall. 475, 18 L.Ed. 437 (1867); *Nixon*, 457 U.S. at 754, 102 S. Ct. 2690; and *Clinton*, 520 U.S. at 710, 117 S. Ct. 1636).

²⁷ *Wilkins v. United States*, 598 U.S. 152, 159-60, 143 S. Ct. 870, 215 L.Ed.2d 116 (2023) (quotation marks omitted).

²⁸ *Id.* at 160 (quoting *Arbaugh*, 546 U.S. at 512, 126 S. Ct. 1235) (some quotation marks omitted).

established,’ it is understood as a ‘drive-by jurisdictional ruling’ that receives no precedential effect.”²⁹

None of the cases on which Defendant relies indicate that presidential immunity is jurisdictional—indeed, quite the opposite. Defendant relies primarily on the following passage in *Nixon*:

[A] court, before exercising jurisdiction, must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch. When judicial action is needed to serve broad public interests . . . the exercise of jurisdiction has been held warranted. In the case of this merely private suit for damages based on a President’s official acts, we hold it is not.³⁰

But *Nixon* hurts, not helps, Defendant’s case. The passage quoted above follows a threshold analysis of whether the Supreme Court had subject-matter jurisdiction over the dispute.³¹ Pursuant to the usual practice in the federal courts,³² only once assured of its

²⁹ *Id.* (quoting *Arbaugh*, 546 U.S. at 511, 126 S. Ct. 1235) (alteration adopted).

³⁰ *Nixon*, 457 U.S. at 754, 102 S. Ct. 2690 (citations omitted); see Def. Br. at 19, 22-23, 30-31, 33.

³¹ *Nixon*, 457 U.S. at 741-43, 102 S. Ct. 2690; see also *id.* at 741, 102 S. Ct. 2690 (“Before addressing the merits of this case, we must consider two challenges to our jurisdiction.”).

³² See, e.g., *Ashcroft v. Iqbal*, 556 U.S. 662, 671, 129 S. Ct. 1937, 173 L.Ed.2d 868 (2009) (“We first address whether the Court of Appeals had subject-matter jurisdiction”); *In re Clinton Nurseries, Inc.*, 53 F.4th 15, 22 (2d Cir. 2022) (“At the outset, we must consider whether this Court has subject matter jurisdiction”); *Lanier v. Bats Exch., Inc.*, 838 F.3d 139, 146 (2d Cir. 2016) (“As a threshold matter, we must first satisfy ourselves that we have subject matter jurisdiction.”); *Rogers v. Petroleo Brasileiro, S.A.*, 673 F.3d 131, 137 (2d Cir. 2012) (“Notwithstanding our grave concerns regarding the merits of the complaint, we

subject-matter jurisdiction did the Supreme Court proceed to the “merits”—*i.e.*, to whether the President was entitled to immunity.³³

Nor do the passing references to “jurisdiction” in *Mississippi v. Johnson* or in *Clinton v. Jones* support Defendant’s position. In *Johnson*, the question was whether a state could obtain an injunction to prevent the President from carrying out an Act of Congress, not whether a President is liable for damages in a private civil suit.³⁴ And like *Nixon*, *Clinton* first held that the Supreme Court had subject-matter jurisdiction before proceeding to the immunity question.³⁵ Neither *Nixon* nor *Clinton* addressed whether presidential immunity is “technically jurisdictional,” nor did “anything in the decision[s] turn[] on that characterization.”³⁶ Thus, *Clinton*’s reference to “jurisdiction”—the Court’s determination that “[t]he Federal District Court has jurisdiction to decide this case”³⁷—is, like *Nixon*’s, best characterized as a “drive-by jurisdictional ruling” that “should be accorded no precedential effect” because it ultimately does not bear on the question of whether presidential immunity is jurisdictional.³⁸

All in all, Defendant provides no case that turns on whether presidential immunity is jurisdictional, much less one holding that it *is* jurisdictional, and *Nixon*—

proceed, as we must, first to determine issues of subject matter jurisdiction.”).

³³ *Nixon*, 457 U.S. at 741, 743 n.23, 102 S. Ct. 2690.

³⁴ *See generally Johnson*, 71 U.S. 475.

³⁵ *See Clinton*, 520 U.S. at 685, 117 S. Ct. 1636.

³⁶ *Wilkins*, 598 U.S. at 160, 143 S. Ct. 870 (quotation marks omitted).

³⁷ *Clinton*, 520 U.S. at 710, 117 S. Ct. 1636.

³⁸ *Wilkins*, 598 U.S. at 160-61, 143 S. Ct. 870 (quotation marks omitted and alteration adopted).

described by Defendant’s counsel at oral argument as the “main case” and “the only binding precedent” on presidential immunity—points in the opposite direction.³⁹

Next, Defendant contends that “the separation-of-powers doctrine” renders presidential immunity nonwaivable because “an impermissible inter-branch conflict will always arise when a court seeks to impute civil liability on a President for the performance of his official acts.”⁴⁰ But separation-of-powers considerations militate in favor of, not against, recognizing presidential immunity as waivable. A President’s autonomy should be protected; thus, a President *should* be able to litigate if he chooses to do so. Indeed, at least one President has declined to invoke presidential immunity, opting instead to settle two civil suits out of court.⁴¹ Recognizing presidential immunity as a jurisdictional defense would, the District Court observed, “risk encroachment by the

³⁹ Oral Arg. Audio Recording at 4:14-22; *cf. Blassingame v. Trump*, Nos. 22-7030, 22-7031, 87 F.4th 1 (D.C. Cir. Dec. 1, 2023) (affirming district court’s order denying Defendant’s presidential immunity defense without analyzing whether the defense is jurisdictional).

⁴⁰ Def. Br. at 12-13.

⁴¹ See Answer to Complaint, *Bailey v. Kennedy*, No. 757,200 (Cal. Super. Ct. Jan. 19, 1961); Answer to Complaint, *Hills v. Kennedy*, No. 757,201 (Cal. Super. Ct. Jan. 19, 1962); see also *Clinton*, 520 U.S. at 692, 117 S. Ct. 1636 (summarizing the Kennedy litigation). In addition, lawsuits filed against Presidents Franklin D. Roosevelt and Harry S. Truman were dismissed without, it appears, either President invoking presidential immunity. See *Jones v. Clinton*, 72 F.3d 1354, 1362 n.10 (8th Cir. 1996), *aff’d*, 520 U.S. 681, 117 S. Ct. 1636, 137 L.Ed.2d 945.

judiciary into the president's domain by eliminating the president's ability to choose" whether to litigate.⁴²

Moreover, avoiding undue judicial intrusion on the executive branch undergirds the doctrines of both prosecutorial immunity and presidential immunity. That said, Defendant does not dispute that prosecutorial immunity is waivable. Rather, he argues that the President's unique constitutional role distinguishes presidential immunity from other forms of absolute immunity such as prosecutorial immunity and judicial immunity.⁴³ But as Defendant acknowledges,⁴⁴ the Supreme Court has made clear that absolute immunity for prosecutors and judges, on the one hand, and presidential immunity on the other, are closely related. "As is the case with prosecutors and judges," the Court stated in *Nixon*, "a President must concern himself with matters likely to 'arouse the most intense feelings.'"⁴⁵ And the Court has recently reinforced the "careful analogy" it drew in *Nixon*, reasoning that "a President, like [judges and prosecutors], must . . . not be made 'unduly cautious in the discharge of [his official] duties' by the prospect of civil liability for official acts."⁴⁶

Nor do the Court's references in *Nixon* and *Harlow v. Fitzgerald*—*Nixon*'s companion case—to the

⁴² July 5 Order, *Carroll I*, — F. Supp. 3d at —, 2023 WL 4393067, at *8.

⁴³ Def. Br. at 28-30.

⁴⁴ *Id.* at 28-29.

⁴⁵ *Nixon*, 457 U.S. at 751-52 (quoting *Pierson v. Ray*, 386 U.S. 547, 554 (1967)); see also *id.* at 758 ("For the President, as for judges and prosecutors, absolute immunity merely precludes a particular private remedy for alleged misconduct in order to advance compelling public ends.").

⁴⁶ *Trump v. Vance*, — U.S. —, 140 S. Ct. 2412, 2426, 207 L.Ed.2d 907 (2020) (quoting *Nixon*, 457 U.S. at 752 n.32, 102 S. Ct. 2690).

President's unique status in comparison with other Government officials support Defendant's position.⁴⁷ Those passages contrasted the President to other *executive* officials—such as presidential aides and Cabinet officers—to conclude that, unlike the qualified immunity of these lower-level executive officials, presidential immunity is absolute.⁴⁸ And although the Supreme Court in *Nixon* recalled the “special solicitude due to claims alleging a threatened breach of essential Presidential prerogatives under the separation of powers,” the passage in question concerned not whether presidential immunity was waivable, but whether the district court's order rejecting Nixon's immunity defense was a “serious and unsettled” question that could be raised on interlocutory appeal.⁴⁹

Finally, Defendant argues that Article III of the Constitution, which vests judicial power in the federal courts, makes presidential immunity nonwaivable. He reasons as follows. First, violations of Article III—for example, the improper exercise of federal judicial power by a non-Article III entity—are not waivable. Next,

⁴⁷ See *Nixon*, 457 U.S. at 750, 102 S. Ct. 2690 (“The President's unique status under the Constitution distinguishes him from other executive officials.”); *Harlow v. Fitzgerald*, 457 U.S. 800, 811 n.17, 102 S. Ct. 2727, 73 L.Ed.2d 396 (1982) (“As we explained in [*Nixon*], the recognition of absolute immunity for all of a President's acts in office derives in principal part from factors unique to his constitutional responsibilities and station. Suits against other officials—including Presidential aides—generally do not invoke separation-of-powers considerations to the same extent as suits against the President himself.”).

⁴⁸ *Nixon*, 457 U.S. at 750, 102 S. Ct. 2690; *Harlow*, 457 U.S. at 811 & n.17, 102 S. Ct. 2727. For the difference between qualified immunity and absolute immunity, see note 24, *ante*.

⁴⁹ *Nixon*, 457 U.S. at 743, 102 S. Ct. 2690 (quotation marks omitted).

separation-of-powers considerations inform both Article III and presidential immunity. Thus, presidential immunity is not waivable. But apart from *Nixon* (discussed above), none of the cases Defendant draws to our attention concern immunity at all, much less presidential immunity.⁵⁰ More to the point, it is not accurate to assert that separation-of-powers defenses or arguments are *ipso facto* nonwaivable.⁵¹

To summarize: notwithstanding scattered references to “jurisdiction” in some presidential immunity cases, the Supreme Court has indicated that immunity

⁵⁰ See Def. Br. at 23-27 (citing *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 133 S. Ct. 1138, 185 L.Ed.2d 264 (2013); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 112 S. Ct. 2130, 119 L.Ed.2d 351 (1992); *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 106 S. Ct. 3245, 92 L.Ed.2d 675 (1986); *Lo Duca v. United States*, 93 F.3d 1100 (2d Cir. 1996); *Austin v. Healey*, 5 F.3d 598 (2d Cir. 1993); *Samuels, Kramer & Co. v. Comm’r*, 930 F.2d 975 (2d Cir. 1991); *Wellness Int’l Network, Ltd. v. Sharif*, 575 U.S. 665, 682, 135 S. Ct. 1932, 191 L.Ed.2d 911 (2015); *Kuretski v. Comm’r*, 755 F.3d 929, 937 (D.C. Cir. 2014); *Nixon*, 457 U.S. 731, 102 S. Ct. 2690; *Nixon*, 457 U.S. 731, 102 S. Ct. 2690 (Burger, C.J., concurring); *Johnson*, 71 U.S. 475).

⁵¹ See *Wellness Int’l Network*, 575 U.S. at 682 n.11, 135 S. Ct. 1932 (“The proposition that legal defenses based upon doctrines central to the courts’ structural independence can never be waived simply does not accord with our cases.”) (alteration adopted) (quoting *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 231, 115 S. Ct. 1447, 131 L.Ed.2d 238 (1995)); *United States v. Donziger*, 38 F.4th 290, 303 (2d Cir. 2022) (“[S]tructural constitutional claims . . . have no special entitlement to review. A party forfeits the right to advance on appeal a nonjurisdictional claim, structural or otherwise, that he fails to raise at trial.”) (quoting *Freytag v. Comm’r*, 501 U.S. 868, 893-94, 111 S. Ct. 2631, 115 L.Ed.2d 764 (1991) (Scalia, J., concurring in part and concurring in judgment)), *cert. denied*, — U.S. —, 143 S. Ct. 868, 215 L.Ed.2d 288 (2023); *United States v. Nelson*, 277 F.3d 164, 206 (2d Cir. 2002) (“[W]e do not imply that all claims of structural error . . . are unwaivable.”).

defenses are not jurisdictional, and that presidential immunity is to be treated like other forms of immunity that Defendant does not dispute are waivable. Moreover, *Nixon*—the leading presidential immunity case—treats presidential immunity as nonjurisdictional. Finally, recognizing presidential immunity as waivable reinforces, not undermines, the separation of powers and the President’s decisionmaking authority by affording the President an opportunity to litigate if he so chooses. Accordingly, we hold that presidential immunity is waivable.

2. Whether Defendant Waived Presidential Immunity

Having determined that presidential immunity is waivable, we reach the question: Did Defendant waive his presidential immunity defense? We hold that he did.

Defendant filed his answer to Plaintiff’s original complaint in New York state court in January 2020. But the answer did not invoke presidential immunity. The District Court thus determined that Defendant had waived this defense, a holding Defendant does not challenge in this appeal.⁵² Indeed, Defendant’s counsel conceded at oral argument that assuming the defense of presidential immunity is waivable, Defendant had waived that defense.⁵³

Accordingly, the District Court did not err in denying Defendant’s motion for summary judgment on the ground that he had waived his presidential immunity defense. We turn next to whether the District Court

⁵² See July 5 Order, *Carroll I*, — F. Supp. 3d at —, 2023 WL 4393067, at *5 n.18 (“It accordingly is clear that Mr. Trump does not dispute that if absolute presidential immunity can be waived, he in fact waived it in this case.”). See *generally* Def. Br.

⁵³ Oral Arg. Audio Recording at 9:59-10:33, 11:53-12:18.

correctly rejected his attempt to revive it—first in his request for leave to amend his answer, then in his answer to Plaintiff’s amended complaint.

B. Defendant’s Request for Leave to Amend

“We review a district court’s denial of leave to amend for abuse of discretion, unless the denial was based on an interpretation of law, such as futility, in which case we review the legal conclusion *de novo*.”⁵⁴ The District Court did not err, much less “abuse its discretion,”⁵⁵ when it denied Defendant’s request for leave to amend his answer to add the defense of presidential immunity on grounds of undue delay and prejudice.⁵⁶

First, Defendant unduly delayed in raising presidential immunity as a defense.⁵⁷ Three years passed

⁵⁴ *Empire Merchs., LLC v. Reliable Churchill LLLP*, 902 F.3d 132, 139 (2d Cir. 2018) (quotation marks omitted).

⁵⁵ “[A]buse of discretion’ . . . is a nonpejorative term of art” that “implies no misconduct on the part of the district court.” *United States v. Bove*, 888 F.3d 606, 607 n.1 (2d Cir. 2018). “The term simply describes the circumstance in which a district court bases its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence, or renders a decision that cannot be located within the range of permissible decisions.” *Id.* (quotation marks omitted and alterations adopted).

⁵⁶ That the amendment would have been futile constituted an independent basis for the District Court’s decision. *See* July 5 Order, *Carroll I*, — F. Supp. 3d at — —, 2023 WL 4393067, at *9-11. Because we affirm the District Court’s determination on grounds of undue delay and undue prejudice, we do not reach the question whether the proposed amendment would have been futile.

⁵⁷ Black’s Law Dictionary defines “undue” as “[e]xcessive or unwarranted.” *Undue*, BLACK’S LAW DICTIONARY (11th ed. 2019); *see also Groff v. DeJoy*, 600 U.S. 447, 469, 143 S. Ct. 2279, 216 L.Ed.2d 1041 (2023) (holding that, in the context of the phrase “undue hardship,” “the modifier ‘undue’ means . . . ‘excessive’ or ‘unjustifiable’”) (quoting RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1547 (1966)).

between Defendant’s answer and his request for leave to amend his answer. A three-year delay is more than enough, under our precedents, to qualify as “undue.”⁵⁸ And Defendant’s excuse for not timely raising the defense—that the question of whether the Westfall Act immunized Defendant was pending before the District Court, this Court, and the District of Columbia Court of Appeals between September 2020 and June 2023—is unpersuasive.⁵⁹ Defendant does not explain how the Westfall Act dispute precluded him from raising a defense of presidential immunity. Indeed, Defendant first raised presidential immunity in January 2023—that is, during the pendency of the Westfall Act dispute.

We next conclude that Defendant’s delay unduly prejudiced Plaintiff. “Prejudice,” like “abuse of discretion,” is a legal term of art.⁶⁰ In gauging whether a proposed amendment would prejudice a party, “we

⁵⁸ See, e.g., *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 202 (2d Cir. 2007) (1 year and 9 months); *Zahra v. Town of Southold*, 48 F.3d 674, 686 (2d Cir. 1995) (2 years and 3.5 months); *Evans v. Syracuse City Sch. Dist.*, 704 F.2d 44, 47 (2d Cir. 1983) (2 years and 9 months); *AEP Energy Servs. Gas Holding Co. v. Bank of Am., N.A.*, 626 F.3d 699, 726 (2d Cir. 2010) (3 years); see also *City of New York v. Grp. Health Inc.*, 649 F.3d 151, 158 (2d Cir. 2011) (3 years and 2 months). To be sure, we have allowed amendments to pleadings when similar or longer lengths of time have passed. See *Rachman Bag Co. v. Liberty Mut. Ins. Co.*, 46 F.3d 230, 235 (2d Cir. 1995) (“more than four years”); *Richardson Greenshields Sec., Inc. v. Lau*, 825 F.2d 647, 653 n.6 (2d Cir. 1987) (collecting cases). But those cases did not involve a finding of prejudice to the non-moving party.

⁵⁹ See note 10, *ante* (describing the Westfall Act); *Carroll v. Trump*, 66 F.4th 91 (2d Cir. 2023) (discussing the procedural history of this case’s Westfall Act dispute).

⁶⁰ See *Prejudice*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining “prejudice” as “[d]amage or detriment to one’s legal rights or claims”); see also note 55, *ante* (“defining abuse of discretion”).

consider, among other factors, whether an amendment would require the opponent to expend significant additional resources to conduct discovery and prepare for trial or significantly delay the resolution of the dispute.”⁶¹ Although “mere delay, absent a showing of bad faith or undue prejudice, does not provide a basis for a district court to deny the right to amend,” “the longer the period of an unexplained delay, the less will be required of the nonmoving party in terms of a showing of prejudice.”⁶² Finally, requests to amend that come at a late stage of the litigation, after discovery has closed and a motion for summary judgment has been filed, are more likely to be prejudicial.⁶³

Had Defendant raised presidential immunity before discovery closed, Plaintiff claims, she would have engaged in discovery on whether Defendant’s actions fell within his official duties.⁶⁴ First, Plaintiff would have asked Defendant for more detail on the process through which he issued and prepared the June 2019 statements, including how the process compared to his pre- and post-presidential processes.⁶⁵ Second, Plaintiff would have sought third-party discovery from White House personnel allegedly involved in preparing and issuing the statements.⁶⁶ Third, Plaintiff would have sought expert testimony from former White House officials and requested internal White House documents from the

⁶¹ *Ruotolo v. City of New York*, 514 F.3d 184, 192 (2d Cir. 2008) (quotation marks omitted).

⁶² *Pasternack v. Shrader*, 863 F.3d 162, 174 (2d Cir. 2017) (quotation marks omitted and alterations adopted); *Block v. First Blood Assocs.*, 988 F.2d 344, 350 (2d Cir. 1993) (quotation marks omitted).

⁶³ See *AEP Energy Servs.*, 626 F.3d at 727.

⁶⁴ Pl. Br. at 45; Oral Arg. Audio Recording at 26:06-30:02.

⁶⁵ Oral Arg. Audio Recording at 26:06-27:44.

⁶⁶ *Id.* at 27:45-28:22.

National Archives regarding former presidents' processes for issuing statements denying wrongdoing.⁶⁷ Plaintiff's counsel represents that they avoided doing so because "the risk of prolonging the litigation and creating complex executive privilege fights did not seem worth it to us, as measured against the absence of an absolute immunity defense, which Mr. Trump had not raised."⁶⁸

Against all this, Defendant contends that the discovery Plaintiff would have pursued regarding presidential immunity (whether the statements fell within the President's official duties) was already explored by Plaintiff in the discovery she pursued regarding the Westfall Act (whether the statements fell within the President's scope of employment).⁶⁹ But as counsel for Defendant concedes, the two tests are different.⁷⁰ The Westfall Act's scope-of-employment test is subjective, while presidential immunity's official-duties test is objective.⁷¹ And Defendant has no response to Plaintiff's contention that Defendant's failure to timely raise presidential immunity informed her decision not to engage in discovery on whether Defendant's actions fell within his official duties.

In sum, three years passed before Defendant raised the defense of presidential immunity, significant additional resources to conduct discovery would be

⁶⁷ *Id.* at 28:23-29:20.

⁶⁸ *Id.* at 28:57-29:04.

⁶⁹ *Id.* at 39:40-40:28.

⁷⁰ *Id.* at 39:50-40:05.

⁷¹ Compare *Trump v. Carroll*, 292 A.3d 220, 234 (D.C. 2023) (Westfall Act inquiry's "focus is on the subjective state of mind of the tortfeasor-employee"), with *Nixon*, 457 U.S. at 756, 102 S. Ct. 2690 (presidential immunity analysis rejecting "inquiry into the President's motives").

required were Defendant to amend his answer, and the request arose at a late stage of litigation—after discovery closed and Defendant moved for summary judgment. Under these circumstances, we hold that the District Court did not “abuse its discretion” in denying Defendant’s request for leave to amend his answer on grounds of undue delay and prejudice.

C. Defendant’s Answer to Plaintiff’s Amended Complaint

After the District Court denied Defendant’s request for leave to amend his answer, Plaintiff filed an amended complaint. In response, Defendant filed an answer to the amended complaint asserting presidential immunity. The District Court struck Defendant’s presidential immunity defense from his amended answer, reasoning that “[t]here is nothing new in the amended complaint that would make Mr. Trump’s presidential immunity defense any more viable or persuasive now than it would have been before.”⁷²

We review a district court decision striking an affirmative defense *de novo*.⁷³ Although “an amended complaint ordinarily supersedes the original, and renders it of no legal effect,” an amended complaint “does not automatically revive all of the defenses and objections that a defendant has waived in response to the original complaint.”⁷⁴ Defenses that “involve[] the core issue of a party’s willingness to submit a dispute to judicial resolution,” such as lack of personal jurisdiction, improper venue, insufficiency of process, insufficiency of

⁷² August 7 Order, *Carroll I*, — F. Supp. 3d at —, 2023 WL 5017230, at *9.

⁷³ See *Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1128 (2d Cir. 1994).

⁷⁴ *Id.* (quotation marks omitted).

service, or the existence of an arbitration agreement, are “not automatically revived by the submission of an amended complaint” if initially waived.⁷⁵ To revive such claims, a party “must show that the amended complaint contains charges that, in fairness, should nullify its earlier waiver and allow it to reassess its strategy.”⁷⁶

Presidential immunity involves the party’s willingness to submit the dispute to judicial resolution and is distinguishable from revivable, merits-based defenses.⁷⁷ Indeed, the only reason we have jurisdiction over this appeal is that the denial of presidential immunity is a collateral order, a requirement of which is that the issue on appeal be “completely separate from the merits of the action.”⁷⁸ What’s more, Defendant does not identify any changes to the complaint “that, in fairness, should nullify [his] earlier waiver and allow [him] to reassess [his] strategy.”⁷⁹ Accordingly, in the unusual circumstances presented here, we hold that the District Court did not err in striking presidential immunity as an affirmative defense from Defendant’s answer to Plaintiff’s amended complaint.

⁷⁵ *Gilmore v. Shearson/Am. Exp. Inc.*, 811 F.2d 108, 112 (2d Cir. 1987), *abrogated in part on other grounds by Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 108 S. Ct. 1133, 99 L.Ed.2d 296 (1988).

⁷⁶ *Id.* at 113.

⁷⁷ *See, e.g., Shields*, 25 F.3d at 1128 (failure to plead fraud with particularity is a revivable defense).

⁷⁸ *Will v. Hallock*, 546 U.S. 345, 349, 126 S. Ct. 952, 163 L.Ed.2d 836 (2006) (quotation marks omitted). Defendant suggests that the only non-revivable defenses are those listed in Federal Rule of Civil Procedure 12(b)(2)-(5). Def. Br. at 42; Reply Br. at 27-29. Defendant is mistaken. A motion to compel arbitration, for instance, is non-revivable, even though it is not listed as a defense in Rule 12. *See Gilmore*, 811 F.2d at 112.

⁷⁹ *Gilmore*, 811 F.2d at 113.

D. Whether the District Court Retained Jurisdiction After Defendant Appealed

“The filing of a notice of appeal ordinarily divests the district court of jurisdiction over issues decided in the order being appealed.”⁸⁰ We have previously noted that “[t]he divestiture of jurisdiction rule is, however, not a per se rule. It is a judicially crafted rule rooted in the interest of judicial economy, designed to avoid confusion or waste of time resulting from having the same issues before two courts at the same time. Hence, its application is guided by concerns of efficiency and is not automatic.”⁸¹ For example, district courts may retain jurisdiction notwithstanding appeal if the appeal is frivolous.⁸²

The District Court determined that it retained jurisdiction because Defendant’s appeal was frivolous. We need not decide whether Defendant’s appeal is frivolous, for we conclude that under the singular circumstances presented here, considerations of judicial economy and efficiency favor the District Court’s retention of jurisdiction. To hold otherwise would require the District Court on remand to possibly undertake the rather pointless exercise of re-adopting the orders it has issued since July 19, 2023, the

⁸⁰ *Mead v. Reliastar Life Ins. Co.*, 768 F.3d 102, 113 (2d Cir. 2014) (alteration adopted) (quoting *Webb v. GAF Corp.*, 78 F.3d 53, 55 (2d Cir. 1996)).

⁸¹ *United States v. Rodgers*, 101 F.3d 247, 251 (2d Cir. 1996) (quotation marks and citations omitted).

⁸² *See, e.g., United States v. Salerno*, 868 F.2d 524, 539-40 (2d Cir. 1989); *see also Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 629, 129 S. Ct. 1896, 173 L.Ed.2d 832 (2009) (“Appellate courts can . . . authorize the district court’s retention of jurisdiction when an appeal is certified as frivolous.”).

date Defendant appealed the July 7 Order.⁸³ “[O]ur application of the divestiture rule must be faithful to the principle of judicial economy from which it springs,”⁸⁴ and “it should not be employed to defeat its purposes or to induce endless paper shuffling.”⁸⁵ This Court has declined to apply the divestiture rule under similar circumstances in the past, and we reach the same result here.⁸⁶

E. Whether We May Consider Whether Defendant’s Statements Were Defamatory Per Se

Apart from appeals taken under the collateral order doctrine,⁸⁷ orders denying summary judgment are, in

⁸³ See *United States v. Rodríguez-Rosado*, 909 F.3d 472, 478 (1st Cir. 2018) (“We think applying the bench-made divestiture rule today would surely short-circuit its aim of judicial efficiency [W]ith jurisdiction back in its hands, the district court, undoubtedly, would again deny [defendant’s] motion, like every other time it has confronted—and denied—the motion. And then, chances are that [defendant] would once more appeal his case to us. Which would present to us [another] variation on the original theme of this case, like an encore, featuring the very same parties, the very same motion, the very same denial order, and the very same arguments on the merits. That seems to us too much to ask of a rule fashioned to ferret imprudence out of the courts.”); see also *United States v. Hickey*, 580 F.3d 922, 927 (9th Cir. 2009) (“[B]ecause [defendant’s] interlocutory appeal was ultimately a losing one, any claimed error in proceeding with limited pretrial matters was harmless and no useful purpose would be served by requiring that court to redecide the pre-trial motions.” (quotation marks omitted)).

⁸⁴ *Rodgers*, 101 F.3d at 251.

⁸⁵ 20 MOORE’S FEDERAL PRACTICE - CIVIL § 303.32 (3d ed. 2023).

⁸⁶ See *Rodgers*, 101 F.3d at 251-52 (collecting cases).

⁸⁷ See note 22, *ante* (explaining that we have appellate jurisdiction under the collateral order doctrine to review the

general, not immediately appealable.⁸⁸ And collateral-order doctrine appeals—such as Defendant’s appeals of the July 5 Order and the August 7 Order—do not render other aspects of the case immediately reviewable unless they are “inextricably intertwined” or “necessary to ensure meaningful review” of the collateral orders.⁸⁹

Defendant argues that none of his statements about Plaintiff were defamatory per se under New York law because they did not tend to cause injury to her trade, business, or profession, and that the District Court applied the wrong legal standard to his statements.⁹⁰

Far from being inextricably intertwined with or necessary to ensure meaningful review of the District Court’s denial of presidential immunity, whether Defendant’s statements fell within the outer perimeter of his official presidential duties has nothing to do with whether the statements qualify as defamatory per se. Because we have no appellate jurisdiction over the District Court’s determination that Defendant’s statements were defamatory per se, we do not consider Defendant’s argument that the District Court erred in this respect.

III. CONCLUSION

To summarize, we hold that:

- (1) Presidential immunity is a waivable defense.

District Court’s determination that Defendant is not entitled to absolute immunity).

⁸⁸ See *Tarpon Bay Partners LLC v. Zerez Holdings Corp.*, 79 F.4th 206, 221 (2d Cir. 2023).

⁸⁹ *Bolmer v. Oliveira*, 594 F.3d 134, 141 (2d Cir. 2010).

⁹⁰ Def. Br. at 56-61.

(2) Defendant waived the defense of presidential immunity by failing to raise it as an affirmative defense in his answer.

(3) The District Court did not err in denying Defendant's motion for summary judgment insofar as it rejected Defendant's presidential immunity defense on the ground that he had waived this defense.

(4) Defendant unduly delayed in raising presidential immunity as a defense, and permitting Defendant to amend his answer to add the defense would unduly prejudice Plaintiff. Thus, the District Court did not err, much less "abuse its discretion," in denying Defendant's request for leave to amend his answer to add presidential immunity as a defense.

(5) Presidential immunity is not a defense that is automatically revived by the submission of an amended complaint if initially waived. Thus, the District Court did not err in striking Defendant's presidential immunity defense from his answer to Plaintiff's amended complaint.

(6) Under the singular circumstances presented here, considerations of judicial economy and efficiency favor the District Court's retention of jurisdiction after Defendant's notice of appeal was filed on July 19, 2023. Thus, the District Court did not err in retaining jurisdiction after July 19, 2023.

(7) Whether Defendant's statements about Plaintiff were defamatory per se is neither inextricably intertwined with nor necessary to ensure meaningful review of the District Court's denial of presidential immunity. Thus, we lack appellate jurisdiction to consider whether Defendant's statements about Plaintiff were defamatory per se.

Accordingly, we **AFFIRM** the July 5, 2023 order of the District Court denying Defendant's motion for summary judgment insofar as it rejected Defendant's presidential immunity defense and denied his request for leave to amend his answer to add presidential immunity as a defense. We likewise **AFFIRM** the District Court's August 7, 2023 order insofar as it struck Defendant's presidential immunity defense from his answer to Plaintiff's amended complaint. We **DISMISS** for lack of appellate jurisdiction the appeal of the District Court's July 5, 2023 order insofar as it determined that Defendant's statements about Plaintiff were defamatory per se. Finally, we **REMAND** the case to the District Court for further proceedings consistent with this opinion.

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 20-cv-7311 (LAK)

E. JEAN CARROLL,

Plaintiff,

-against-

DONALD J. TRUMP, in his personal capacity,

Defendant.

Signed April 25, 2024

MEMORANDUM OPINION

Lewis A. Kaplan, District Judge.

The jury in a closely related case tried previously found that Donald Trump forcibly sexually abused plaintiff E. Jean Carroll in the mid-1990s and maliciously defamed her in an October 2022 statement. In *this* case, another jury awarded Ms. Carroll \$17.3 million in compensatory and \$65 million in punitive damages against Mr. Trump for defaming her in two other statements that Mr. Trump issued from the White House on June 21 and 22, 2019.¹ Mr. Trump now moves

¹ The procedural background of the two cases and the reasons that they were tried in the order in which they were tried have been laid out in earlier decisions, familiarity with which is assumed. *See, e.g., Carroll v. Trump*, No. 20-CV-7311 (LAK), 687 F. Supp. 3d 394

for a new trial or, alternatively, for judgment as a matter of law dismissing this case.

New Trial

Mr. Trump’s new trial motion argues that (1) the Court erred in excluding evidence and in instructing the jury on common law malice; (2) the \$7.3 million and \$11 million compensatory damages awards each were excessive and must be remitted; and (3) the \$65 million punitive damages award was excessive and must be remitted. The motion is without merit for the numerous and compelling reasons articulated by Ms. Carroll in her opposition.² The Court writes, however, to emphasize four points that perhaps might have been articulated more thoroughly in the briefing.

A. The Charge on Punitive Damages

Mr. Trump contends that the Court erred by failing to instruct 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 — that is, only if it found that Mr. Trump was motivated solely by common law malice and nothing else.³ The Court rejects that argument essentially for the reasons stated by Ms. Carroll in her opposition, although it takes this opportunity to develop the point in greater depth.

New York Times Co. v. Sullivan and its progeny limited on First Amendment grounds the reach of liability in some categories of defamation cases.⁴ Among other things, it required, as prerequisite to liability in

(S.D.N.Y. 2023) (“*Carroll I*”); *Carroll v. Trump*, 664 F. Supp. 3d 550 (S.D.N.Y. 2023) (“*Carroll II*”).

² See Dkt 330 (Pl. Mem.).

³ Dkt 312 (Def. Mem.) at 2-5.

⁴ 376 U.S. 254, 84 S. Ct. 710, 11 L.Ed.2d 686 (1964).

some cases, proof of what it referred to as “actual malice.” It held that a defamatory statement is made with “actual malice” when it is made “with knowledge that it was false or with reckless disregard of whether it was false or not.”⁵ In other words, “actual” or “constitutional malice” concerns the defendant’s state of mind *with respect to truth or falsity*.

New York — the law of which governs in this case — long has employed a different concept known as common law malice. Common law malice exists when a tortfeasor breaches a legal duty to a plaintiff “with deliberate intent to injure or . . . out of hatred, ill will, or spite or . . . with wilful, wanton or reckless disregard of another’s rights.”⁶ Thus, “common law malice” is concerned with a defendant’s *motive vis-a-vis the plaintiff* injured by the defendant’s conduct. And proof of “common law malice” long has been both a necessary and a sufficient basis for the recovery of punitive damages in New York tort cases, whether in actions for defamation or for other torts. But it has played another role in defamation cases as well.

“Courts have long recognized that the public interest is served by shielding certain communications, though possibly defamatory, from litigation, rather than risk stifling them altogether. When compelling public policy requires that the speaker be immune from suit,

⁵ *Id.* at 280, 84 S. Ct. 710.

The U.S. Supreme Court later held that reckless disregard is satisfied only by proof that the statement was made with “a ‘high degree of awareness’ of the statement’s probable falsity or that the defendant ‘in fact’ entertained ‘serious doubts’ as to its truth. *Garrison v. Louisiana*, 379 U.S. 64, 74, 85 S. Ct. 209, 13 L.Ed.2d 125 (1964); *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S. Ct. 1323, 20 L.Ed.2d 262 (1968).

⁶ N.Y. Pattern Jury Instrs. – Civil § 3.30 (2023).

the law affords an absolute privilege, while statements fostering a lesser public interest are only conditionally privileged.

“One such conditional, or qualified, privilege extends to a ‘communication made by one person to another upon a subject in which both have an interest.’ This ‘common interest’ privilege has been applied, for example, to employees of an organization, members of a faculty tenure committee and constituent physicians of a health insurance plan. The rationale for applying the privilege in these circumstances is that so long as the privilege is not abused, the flow of information between persons sharing a common interest should not be impeded.”⁷

The test for whether a conditional privilege in a libel case has been abused long has been whether the defamatory statement was made in whole *or in part* to serve the public interest that gives rise to the conditional privilege. Thus, the existence of common law malice does not defeat the conditional privilege unless it is the *sole* motive for the defamation.⁸

This exposition of the relevance of common law malice remains the law of New York today. Indeed, when the New York Court of Appeals first clarified the relationship between actual, or constitutional, malice and common law malice in *Prozeralik v. Capital Cities Communications, Inc.*, it held that proof of actual or constitutional malice alone is insufficient to justify an

⁷ *Lieberman v. Gelstein*, 80 N.Y.2d 429, 437, 590 N.Y.S.2d 857, 605 N.E.2d 344 (1992) (internal citations omitted).

⁸ *E.g.*, *Stukuls v. State of New York*, 42 N.Y.2d 272, 281, 397 N.Y.S.2d 740, 366 N.E.2d 829 (1977) (citing RESTATEMENT (SECOND) OF TORTS §§ 603, 605 (1979)); *see also Foster v. Churchill*, 87 N.Y.2d 744, 752, 642 N.Y.S.2d 583, 665 N.E.2d 153 (1996); *Lieberman*, 80 N.Y.2d at 439, 590 N.Y.S.2d 857, 605 N.E.2d 344.

award of punitive damages.⁹ In order to recover punitive damages, it said, a libel plaintiff must prove “common-law malice”—the “malicious, wanton, reckless, or [] willful disregard for another’s rights” — in addition to satisfying any requirement of actual or constitutional malice.¹⁰ Significantly, it said nothing to suggest that a seeker of punitive damages must prove that common law malice was the *sole* motive for a defendant’s defamation. And since then, the New York Court of Appeals (and the Second Circuit) repeatedly have applied the *Prozeralik* common law malice test for punitive damages without ever adding a “sole motivation” requirement.¹¹

Despite this clear and consistent history, the defendant relies on a 2003 decision by a sharply divided panel of the Appellate Division’s First Department in which that court overturned a punitive damages award in a libel case for lack of *any* evidence that “malice or ill will was directed specifically at plaintiff.”¹² It then went on, unnecessarily, to assert that the First Department and the Court of Appeals previously had held “that 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 that *there must be some evidence that the animus was the one and*

⁹ 82 N.Y.2d 466, 479-80, 605 N.Y.S.2d 218, 626 N.E.2d 34 (1993).

¹⁰ *Id.* (internal citations and quotation marks omitted).

¹¹ See *Ross v. Louise Wise Servs., Inc.*, 8 N.Y.3d 478, 489, 836 N.Y.S.2d 509, 868 N.E.2d 189 (2007); *Dupree v. Giugliano*, 20 N.Y.3d 921, 924, 958 N.Y.S.2d 312, 982 N.E.2d 74 (2012); *Purgess v. Sharrock*, 33 F.3d 134, 143 (2d Cir. 1994); *Celle v. Filipino Rep. Enters. Inc.*, 209 F.3d 163, 184 (2d Cir. 2000); *DiBella v. Hopkins*, 403 F.3d 102, 122 (2d Cir. 2005).

¹² *Morsette v. “The Final Call”*, 309 A.D.2d 249, 255, 764 N.Y.S.2d 416 (1st Dep’t 2003).

only cause for the publication.”¹³ It thus erroneously carried over this “one and only cause” language from the conditional privilege context into the punitive damages context for defamation.¹⁴

In light of this history, *Morsette* has no application to the present case for multiple reasons. First, *every* case cited by *Morsette* for the proposition that common law malice must be the sole motivation for the defamatory publication to warrant punitive damages in fact stands for the entirely different proposition that common law malice must be the defendant’s sole motivation *to overcome an applicable qualified privilege*.¹⁵ The *Morsette* panel, apparently inadvertently (and in any event mistakenly) applied the law applicable to overcoming a conditional privilege defense to the very different question of the availability of punitive damages.

Second, even if *Morsette* had meant to adopt a new rule applicable to punitive damages — *i.e.*, that common law malice must be the *sole* motive for the defamatory publication in order to find punitive damages — its comments were *dicta*. As a simple reading of the opinion reflects, the Appellate Division majority already had overturned the punitive damages award because there

¹³ *Id.* (second emphasis added) (quoting *Stukuls*, 42 N.Y.2d at 281, 397 N.Y.S.2d 740, 366 N.E.2d 829).

¹⁴ *Id.*

¹⁵ *Id.* (internal quotation marks omitted) (citing *Present v. Avon Prods., Inc.*, 253 A.D.2d 183, 189, 687 N.Y.S.2d 330 (1st Dep’t 1999); *Stukuls*, 42 N.Y.2d at 282, 397 N.Y.S.2d 740, 366 N.E.2d 829; *Thanasoulis v. Nat’l Ass’n for Specialty Foods Trade, Inc.*, 226 A.D.2d 227, 229, 640 N.Y.S.2d 562 (1st Dep’t 1996); *Ackerman v. Bechhoefer*, 270 A.D.2d 878, 706 N.Y.S.2d 286 (4th Dep’t 2000); *Grier v. Johnson*, 232 A.D.2d 846, 848, 648 N.Y.S.2d 764 (3d Dep’t 1996); *Weir v. Equifax Servs., Inc.*, 210 A.D.2d 944, 945, 620 N.Y.S.2d 675 (4th Dep’t 1994)).

was no evidence that the defendant bore *any* common law malice toward plaintiff.¹⁶ Indeed, the defamation in *Morsette* arose from the *random* selection and use of plaintiff's photograph and its alteration to illustrate a story in a magazine in a way that falsely implied that plaintiff and others depicted had been imprisoned.¹⁷ The plaintiff was simply a random victim, not a target of spite or ill will. Thus, the "sole motive" discussion in the majority opinion was gratuitous.

This Court is mindful that it "is bound to apply the law as interpreted by a state's intermediate appellate courts unless there is persuasive evidence that the state's highest court would reach a different conclusion."¹⁸ Here, the 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 — that is, if it found that Mr. Trump was motivated only by common law malice and nothing else. Indeed, the well established case law of New York's highest court persuasively indicates that it long ago did so in substance.¹⁹

¹⁶ *Morsette*, 309 A.D.2d at 255, 764 N.Y.S.2d 416.

¹⁷ *Id.* at 250-21, 764 N.Y.S.2d 416.

¹⁸ *Chufen Chen v. Dunkin' Brands, Inc.*, 954 F.3d 492, 499 (2d Cir. 2020) (internal citation and quotation marks omitted).

¹⁹ That is reflected in the current edition of the New York Pattern Jury Instructions, which regularly are applied by both state and federal judges. N.Y. Pattern Jury Instrs. – Civil § 3.30 (2023). And the current instructions for punitive damages are consistent with how the New York Pattern Jury Instructions were written *before* the *Morsette* decision as well, indicating that its authors did not consider *Morsette* to have changed the relevant law on punitive damages at all. *See, e.g.*, N.Y. Pattern Jury Instrs. – Civil § 3.30 (2000).

B. Standard of Proof on Punitive Damages

Defendant next contends that he is entitled to a new trial because this Court erroneously charged the jury that the plaintiff's burden of proof with respect to punitive damages was a preponderance of the evidence. He argues that it should have charged that the plaintiff was obliged to prove punitive damages by clear and convincing evidence.²⁰ He relies on cases in two of the four Appellate Divisions of the New York Supreme Court.

Mr. Trump's argument is incorrect for the reasons advanced in plaintiff's answering memorandum.²¹ But one more point bears mention.

As the parties agree, this issue too is governed by the substantive law of New York. In applying New York law, this Court is bound by the decisions of New York's highest court, the Court of Appeals.²² That court held over one hundred years ago in a defamation case that "[i]n order to recover punitive damages, plaintiff [i]s bound to satisfy the jury by a *fair preponderance of evidence* that defendant (1) was animated, in such publication, by conscious ill will toward him. . . ." ²³ Despite this clear statement, the Appellate Divisions

²⁰ Dkt 312 (Def. Mem.) at 15-17.

²¹ Dkt 330 (Pl. Mem.) at 4-5.

²² *West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 236, 61 S. Ct. 179, 85 L.Ed. 139 (1940) ("[T]he highest court of the state is the final arbiter of what is state law. When it has spoken, its pronouncement is to be accepted by federal courts as defining state law unless it has later given clear and persuasive indication that its pronouncement will be modified, limited or restricted."); *Engel v. CBS, Inc.*, 182 F.3d 124, 125 (2d Cir. 1999) (the Court is "bound to apply New York law as determined by the New York Court of Appeals").

²³ *Corrigan v. Bobbs-Merrill Co.*, 228 N.Y. 58, 66-67, 126 N.E. 260 (1920) (emphasis added).

have since split on whether to apply the preponderance or clear and convincing standard for punitive damages, with those that have increased the burden of proof all having failed to recognize the *Corrigan* decision and unwittingly imputed the “clear and convincing” standard for *actual* (or *constitutional*) malice to apply to common law malice as well.²⁴ But the New York Court of Appeals never has so much as hinted that it would modify, limit, or restrict its rule in *Corrigan*, and the Second Circuit has made clear that it takes the fair preponderance standard as the binding statement of New York law on this point.²⁵

²⁴ See *Camillo v. Geer*, 185 A.D.2d 192, 194, 587 N.Y.S.2d 306 (1st Dep’t 1992); *Orange & Rockland Utils., Inc. v. Muggs Pub, Inc.*, 292 A.D.2d 580, 581, 739 N.Y.S.2d 610 (2d Dep’t 2002); *Sladick v. Hudson Gen. Corp.*, 226 A.D.2d 263, 264, 641 N.Y.S.2d 270 (1st Dep’t 1996); *Munoz v. Poretz*, 301 A.D.2d 382, 384, 753 N.Y.S.2d 463 (1st Dep’t 2003).

²⁵ *Celle*, 209 F.3d at 184; *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277, 282-83 (2d Cir. 1990).

In *Roginsky v. Richardson-Merrell, Inc.* — the first Second Circuit case really to discuss the issue for *unintentional tort* cases — the court held that punitive damages in such cases “must be clearly established.” 378 F.2d 832, 850-51 (2d Cir. 1967) (internal citations and quotation marks omitted). In doing so, however, the panel inexplicably did not address the New York Court of Appeals’ *Corrigan* decision and instead cited to *Cleghorn v. New York Cent. & H.R.R. Co.* — an earlier case that focused on the substantive conduct necessary to justify punitive damages rather than on the applicable standard of proof. 56 N.Y. 44, 48 (1874). Moreover, the *Roginsky* panel explicitly noted defamation as an exception to the “clearly established” standard for punitive damages, again relying on earlier Court of Appeals cases instead of the more recent *Corrigan* decision. *Roginsky*, 378 F.2d at 843 n.20. In any event, the Second Circuit implicitly overturned *Roginsky* in *Simpson v. Pittsburgh Corning Corp.*, holding in that products liability case that the appropriate standard of proof for punitive damages under New York law is preponderance of the evidence unless Congress or

Thus, the New York law binding this Court is that the standard of proof of punitive damages in defamation cases is the preponderance of the evidence. Indeed, in the most thorough analysis in this district of the relevant case law, then-Judge Sotomayor reached the same conclusion,²⁶ and numerous other courts in the New York system correctly have continued to apply the preponderance of the evidence standard.²⁷ There was no error in the Court's charge to the jury on this point.

C. Alleged Excessiveness of the Compensatory Damages Award

Contrary to the defendant's arguments, Ms. Carroll's compensatory damages were not awarded solely for her emotional distress; they were not for garden variety harms; and they were not excessive, for all of the

a higher authority said otherwise. 901 F.2d at 282-83. And as noted, the Second Circuit in 2000 specifically reaffirmed the preponderance standard for defamation cases in *Celle*, 209 F.3d at 184.

²⁶ *Greenbaum v. Svenska Handelsbanken, N.Y.*, 979 F. Supp. 973, 975-83 (S.D.N.Y. 1997).

²⁷ See, e.g., *In re Seventh Jud. Dist. Asbestos Litig.*, 190 A.D.2d 1068, 1069, 593 N.Y.S.2d 685 (4th Dep't 1993); *Stryker v. HSBC Sec. (USA)*, No. 16-CV-9424 (JGK), 2021 WL 5403720, at *1 (S.D.N.Y. Nov. 17, 2021); *Wat Bey v. City of New York*, No. 01-CV-9406 (AJN), 2013 WL 12082743, at *24 (S.D.N.Y. Sept. 4, 2013), *aff'd sub nom. Rivera v. City of New York*, 594 F. App'x 2 (2d Cir. 2014); *Tse v. UBS Fin. Servs., Inc.*, 568 F. Supp. 2d 274, 309 (S.D.N.Y. 2008); *Marcoux v. Farm Serv. & Supplies, Inc.*, 283 F. Supp. 2d 901, 908 (S.D.N.Y. 2003); *Webber v. Dash*, 607 F. Supp. 3d 407, 412 (S.D.N.Y. 2022); *Bouveng v. NYG Cap. LLC*, No. 14-CV-5474 (S.D.N.Y. June 29, 2015), Dkt 221 at 3; *Fischer v. OBG Cameron Banfill LLP*, No. 08-CV-7707, 2010 WL 3733882, at *3 (S.D.N.Y. Sept. 24, 2010); *Paravas v. Tran*, No. 21-CV-807, 2022 WL 718842, at *9 (S.D.N.Y. Feb. 22, 2022), *report and recommendation adopted*, 2022 WL 718587 (S.D.N.Y. Mar. 10, 2022).

reasons stated in Ms. Carroll's opposition brief.²⁸ Though no more need be said on the matter, it is appropriate to draw attention to several defamation cases in which courts upheld comparable verdicts many years ago and, moreover, did so on much thinner evidence of harm.

Mr. Trump's malicious and unceasing attacks on Ms. Carroll were disseminated to *more than 100 million* people. They included public threats and personal attacks, and they endangered Ms. Carroll's health and safety. The jury was entitled to conclude that Mr. Trump derailed the career, reputation, and emotional well-being of one of America's most successful and prominent advice columnists and authors — to which she testified repeatedly²⁹ — and award her \$18.3 million in compensatory damages. By comparison, in *Prozeralik*, the Appellate Division almost thirty years ago upheld a \$6 million award for reputational injury and \$3.5 million award for emotional and physical injury resulting from merely local television and radio broadcasts which had suggested that the plaintiff had been the victim of an abduction due to ties to organized crime.³⁰ In *Purgess v. Sharrock*, the Second Circuit thirty years ago upheld a \$3.5 million compensatory damages award for reputational and economic injury for an anesthesiologist whose medical background and record were defamed by

²⁸ The Court applies to the alleged excessiveness of the compensatory damages award the standard articulated in defendant's similar motion in the related case between these parties. *Carroll v. Trump*, 683 F. Supp. 3d 302, 323-34, No. 22-CV-10016 (LAK) (S.D.N.Y. July 19, 2023).

²⁹ *See, e.g.*, Dkt 292 (Trial Tr.) at 70:25-71:24, 126:2-135:6, 137:2-139:21, 178:19-183:20.

³⁰ *Prozeralik v. Cap. Cities Commc'ns, Inc.*, 222 A.D.2d 1020, 1020, 635 N.Y.S.2d 913 (4th Dep't 1995); *Prozeralik*, 82 N.Y.2d at 470-72, 605 N.Y.S.2d 218, 626 N.E.2d 34.

his employer to other local hospitals after the plaintiff was terminated.³¹ In *Osorio v. Source Enterprises, Inc.*, this district seventeen years ago upheld \$3.5 million in compensatory damages awarded to an employee of a hip-hop magazine against its co-owner for emotional damages for publishing falsely that the employee had attempted to extort them.³² And in *Cantu v. Flanigan*, the court fourteen years ago affirmed a \$150 million award for non-economic damages — after the Second Circuit *already* had affirmed a \$38 million award for economic damages — against a defendant who had defamed a Mexican business owner by asserting that he was running a racketeering enterprise and conspiring with the Mexican government, drug cartels, and Saddam Hussein.³³

None of these prior examples involved publication of defamations as widespread and destructive as Mr. Trump’s defamation of Ms. Carroll, and none involved a publisher of defamation who was a president of the United States or anyone nearly as high-profile. And yet, after adjusting for inflation to 2024 dollars,³⁴ the compensatory damages upheld in these cases against claims of excessiveness would have been as follows:

- \$5.3 million for emotional damages in *Osorio*;
- \$7.3 million for reputational and economic damages in *Purgess*;
- \$19.2 million for emotional and reputational injury in *Prozeralik*; and

³¹ 33 F.3d 134, 142 (2d Cir. 1994).

³² No. 05-CV-10029 (JSR), 2007 WL 683985, at *10 (S.D.N.Y. Mar. 2, 2007).

³³ 705 F. Supp. 2d 220, 226-31 (E.D.N.Y. 2010).

³⁴ *CPI Inflation Calculator*, Bureau of Labor Statistics (Feb. 2024).

- \$267.6 million for economic and non-economic damages in *Cantu*.

In sum, an award of \$11 million in reputational and \$7.3 million in non-reputational compensatory damages is far from a historical anomaly in New York, before even considering the unique scale of the defamation at hand. Mr. Trump’s argument that widespread and repeated defamation at the hands of the United States president produced “garden variety” harms with a recoverable limit of roughly \$125,000 simply ignores reality and basic logic. Thus, the compensatory damages awards were not excessive as a matter of New York law.

D. The Constitutionality of the Punitive Damages Award

The Supreme Court has set out three “guideposts” governing the constitutional review of punitive damages awards: “(1) the degree of reprehensibility associated with the defendants’ actions; (2) the disparity between the harm or potential harm suffered and the size of the punitive award; and (3) the difference between the remedy in this case and the penalties imposed in comparable cases.”³⁵ The Court agrees with plaintiff that each of these three guideposts more than justifies the punitive damages awarded by the jury. However, it is worth emphasizing the particular reprehensibility and severity that the jury could have found accurately characterized Mr. Trump’s conduct, which the Supreme Court has said is “[p]erhaps the most important indicium of the reasonableness of a punitive damages award.”³⁶

³⁵ *Turley v. ISG Lackawanna, Inc.*, 774 F.3d 140, 165 (2d Cir. 2014) (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575, 116 S. Ct. 1589, 134 L.Ed.2d 809 (1996)) (cleaned up).

³⁶ *Gore*, 517 U.S. at 575, 116 S. Ct. 1589 (1996).

The jury was entitled to find that “the degree of reprehensibility” of Mr. Trump’s conduct was remarkably high, perhaps unprecedented.³⁷ Far from being purely “defensive,” 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 as a politically and financially motivated liar, insinuating that she was too unattractive for him to have sexually assaulted, and threatening that she would “pay dearly” for speaking out.³⁸ The 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 in an effort to destroy Ms. Carroll’s credibility, to punish her for coming forward, and to deter other women from doing so as well. It could have found also that he continued his attacks over the nearly *five* years that it took this case to come to a jury verdict.³⁹ And there was evidence that Mr. Trump’s statements about Ms. Carroll only increased in frequency and vitriol as trial approached, with Mr. Trump repeating the same or similar attacks on Ms. Carroll despite knowing that a jury and the Court already had held his similar 2022 statement to have been defamatory.⁴⁰

The jury in this case at least arguably was entitled, moreover, to conclude that Mr. Trump’s continued defamation of Ms. Carroll — *even during the course of trial* — in turn warranted a finding that he would not stop attacking Ms. Carroll unless faced with a

³⁷ *Id.*

³⁸ See Dkt 304-4; Dkt 304-5; *Carroll*, No. 20-CV-7311, Pl. Ex. 3 at 2.

³⁹ See, e.g., Dkt 304-14-29.

⁴⁰ *Id.*

significant deterrent, a critical function of substantial punitive damages awards.⁴¹ But beyond his out-of-court statements disparaging Ms. Carroll during trial — many of which were introduced in evidence⁴² — the jury could have found that Mr. Trump’s demeanor and conduct *in the courtroom itself* put his hatred and disdain on full display. Mr. Trump could be heard repeatedly complaining to his counsel about the proceedings, so much so that plaintiff’s counsel twice requested that the Court instruct him to stop.⁴³ In particular, during Ms. Carroll’s testimony, the jury could have found, Mr. Trump could be heard making audible comments that Ms. Carroll’s testimony was false, that the proceedings were a “witch hunt” and a “con job,” and most notably, that his earlier statements disparaging Ms. Carroll were “true.”⁴⁴ And, most dramatically, mere minutes after plaintiff’s counsel began her closing argument, Mr.

⁴¹ See *Jennings v. Yurkiw*, 18 F.4th 383, 392 (2d Cir. 2021) (“[P]unitive damages awards that are a multiple higher may be warranted because of the deterrent function of punitive damages.”) (footnote omitted).

⁴² See, e.g., Dkt 304-27-29.

⁴³ See, e.g., Dkt 292 (Trial Tr.) at 118:17-24 (plaintiff’s counsel’s first application to the Court concerning Mr. Trump’s interruptions during the proceedings); *id.* at 120:17-20 (the Court instructing Mr. Trump to “take[] special care to keep his voice down when he’s conferring with counsel so that the jury does not overhear it”); *id.* at 163:16-19 (Mr. Trump requesting in front of the jury that a video exhibit be played in full); *id.* at 167:3-11 (plaintiff’s counsel’s second application to the Court concerning Mr. Trump’s interruptions); *id.* at 167:12-18 (the Court’s second warning to Mr. Trump to contain his errant remarks).

⁴⁴ *Id.* at 118:17-24, 167:3-11.

When the Court issued its second warning to Mr. Trump concerning his actions and cautioned that they might result in him being excluded from the courtroom, Mr. Trump silenced any doubt as to his intentions by responding “I would love it.” *Id.* at 167:12-19.

Trump conspicuously stood and walked out of the courtroom for no apparent reason save to evidence his disapproval, though he was present again when Court resumed later that morning and remained for his own counsel's entire summation.⁴⁵

On this exceptional record, the punitive damages evidence passes constitutional muster.

Judgment as a Matter of Law

Mr. Trump argues in substance that the jury could not reasonably have found that his June 21 and 22, 2019 statements caused *any* harm to Ms. Carroll because the proof failed to exclude the possibility that *some part* of the damage to Ms. Carroll, however small, was attributable at least in part to Ms. Carroll's own allegations against Mr. Trump, which were published in an article in *The Cut*, along with a White House denial, a few hours before the first of the two statements that were the subjects of this action.

Mr. Trump's argument is entirely without merit both as a matter of law and as a matter of fact for all of the

⁴⁵ Dkt 301 (Trial Tr.) at 695:7-10, 733:8-9.

As the Court would have reached exactly the same result here even in the absence of Mr. Trump's actions during the trial, it has no occasion to discuss whether a defendant's actions in the jury's presence during the course of a trial appropriately may be considered in determining punitive damages. *But see Herbert v. Lando*, 441 U.S. 153, 164 n.12, 99 S. Ct. 1635, 60 L.Ed.2d 115 (1979) ("any competent evidence, either direct or circumstantial, can be resorted to, and all the relevant circumstances surrounding the transaction may be shown, provided they are not too remote, including threats, prior or subsequent defamations, subsequent statements of the defendant, circumstances indicating the existence of rivalry, ill will, or hostility between the parties, facts tending to show a reckless disregard of the plaintiff's rights. . . ."); *Celle*, 209 F.3d at 184-85 (citing *Herbert*).

reasons articulated in Ms. Carroll's memorandum of law in opposition to his motion.⁴⁶ Among other things, it ignores the fact that, as the jury and/or the Court concluded, Mr. Trump's June 21 and 22 statements were false, defamatory, and made with both actual and common law malice. It ignores the fact that those defamatory statements were viewed between at least 85 to 104 *million* times, whereas there is no evidence at all as to the dissemination of *The Cut* article to which defendant seeks to assign all of the damages suffered by Ms. Carroll and which was not even alleged to have been defamatory. It ignores as well the fact that the jury was entitled to believe Ms. Carroll's testimony as to the impact of the June 21 and 22 statements on her. And it ignores the lack of any persuasive legal authority supporting Mr. Trump's contention.⁴⁷ Indeed, the law is

⁴⁶ Dkt 332 (Pl. Mem.).

⁴⁷ The defendant's reliance on *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 51 S. Ct. 248, 75 L.Ed. 544 (1931), is seriously misplaced.

First, he relies on this purported quotation from that decision: "any degree of speculation in computing the amount of damages unless and until causation of damages is first established." Dkt 310 (Def. Mem.) at 4 (citing *Story Parchment*, 282 U.S. at 562, 51 S. Ct. 248). In fact, however, that language does not appear in the Supreme Court's opinion. Indeed, the erroneous quotation in defendant's memorandum does not make linguistic sense.

Second, *Story Parchment* was decided under the federal antitrust laws. It has nothing to do with defamation cases governed by New York law.

Finally, *Story Parchment* stands simply for the general proposition that uncertainty as to the *amount* of damages, rather than the *fact* of damages, does not preclude recovery for their reasonable and approximate amount. *Story Parchment*, 282 U.S. at 562-63, 51 S. Ct. 248; *contra* Dkt 312 (Def. Mem.) at 19-25. It does not support Mr. Trump's contention that courts should overturn a jury verdict as a matter of law where the parties present competing evidence of causation — indeed, *Story* states essentially the

clear that when competing theories and evidence are presented at trial, the issue of causation ultimately is one for the jury, which the Court should not ordinarily disturb.⁴⁸ In short, the argument — which Mr. Trump previously made to the jury, conspicuously without success, and which defies common sense — does not warrant dismissal as a matter of law.

CONCLUSION

Accordingly, Mr. Trump’s motions for a new trial and for a judgment as a matter of law (Dkt 309 & 311) are DENIED.

SO ORDERED.

opposite. *Story Parchment*, 282 U.S. at 566, 51 S. Ct. 248 (“Whether the unlawful acts of respondents or conditions apart from them constituted the proximate cause of the [injury] was a question, upon the evidence in this record, for the jury, ‘to be determined as a fact, in view of the circumstances of fact attending it.’” (citing *Milwaukee & St. Paul Ry. Co. v. Kellogg*, 94 U.S. 469, 474, 24 L.Ed. 256 (1876))).

⁴⁸ See *id.*; *Ernest v. Red Creek Cent. Sch. Dist.*, 93 N.Y.2d 664, 674, 695 N.Y.S.2d 531, 717 N.E.2d 690 (1999) (“Proximate cause is a question of fact for the jury where varying inferences are possible”) (quoting *Mirand v. City of New York*, 84 N.Y.2d 44, 51, 614 N.Y.S.2d 372, 637 N.E.2d 263 (1994)); see also *Mertsaris v. 73rd Corp.*, 105 A.D.2d 67, 83, 482 N.Y.S.2d 792 (2d Dep’t 1984) (“[A] plaintiff need not eliminate entirely all possibility that a defendant’s conduct was not a cause. It is enough that he offer sufficient evidence from which reasonable men might conclude that it is more probable than not that the injury was caused by the defendant.”); N.Y. Pattern Jury Instrs. — Civil § 2.70 (2023) (“[The jury] may . . . decide that a cause is substantial”).

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 20-cv-7311 (LAK)

E. JEAN CARROLL,

Plaintiff,

-against-

DONALD J. TRUMP, in his personal capacity,

Defendant.

Signed September 6, 2023

MEMORANDUM OPINION

Lewis A. Kaplan, District Judge.

This is a defamation case against Donald Trump brought by writer E. Jean Carroll for certain allegedly defamatory statements he made while he was president in 2019 in response to Ms. Carroll’s public accusation that he sexually assaulted (“raped”) her in the mid 1990s. In a closely related second case known as *Carroll II*, Ms. Carroll brought two other claims against Mr. Trump.¹ The first was a sexual battery claim pursuant to

¹ The Court assumes familiarity with its prior decisions in this case (“*Carroll I*”) and in *Carroll II*, which detail the facts and procedural histories of both cases. *E.g.*, Dkt 32, *Carroll v. Trump*, 498 F. Supp. 3d 422 (S.D.N.Y. 2020), *rev’d in part, vacated in part*, 49 F.4th 759 (2d Cir. 2022); Dkt 73, *Carroll v. Trump*, 590 F. Supp.

the Adult Survivors Act (“ASA”), a new law enacted by New York in 2022 that created a one-year period within which persons who were sexually assaulted as adults could sue their alleged assaulters even if their claims otherwise would have been untimely. The second was a defamation claim for a statement published by Mr. Trump on social media in 2022. In that statement, like in his 2019 statements, Mr. Trump denied Ms. Carroll’s accusation, stated that he did not know her, and claimed that she fabricated her accusation for ulterior and improper purposes.

Carroll II was tried in this Court in April and May 2023. The jury unanimously determined that Mr. Trump “sexually abused” Ms. Carroll as that term is defined in the New York Penal Law.² It found also that he defamed

3d 575; Dkt 96, *Carroll v. Trump*, 635 F. Supp. 3d 229 (S.D.N.Y. 2022); Dkt 145, *Carroll v. Trump*, No. 20-CV-7311 (LAK), 660 F. Supp. 3d 196 (S.D.N.Y. Mar. 10, 2023); Dkt 173, *Carroll v. Trump*, 680 F. Supp. 3d 491 (S.D.N.Y. 2023); Dkt 200, *Carroll v. Trump*, No. 20-CV-7311 (LAK), 2023 WL 5017230, (S.D.N.Y. Aug. 7, 2023); Dkt 208, *Carroll v. Trump*, No. 20-CV-7311 (LAK), 687 F. Supp. 3d 394 (S.D.N.Y. Aug. 18, 2023); Doc. No. 22-cv-10016 (*Carroll II*), Dkt 38, *Carroll v. Trump*, No. 22-CV-10016 (LAK), 650 F. Supp. 3d 213 (S.D.N.Y. Jan. 13, 2023); *Carroll II*, Dkt 56, *Carroll v. Trump*, No. 22-CV-10016 (LAK), — F.R.D. —, 2023 WL 2006312 (S.D.N.Y. Feb. 15, 2023); *Carroll II*, Dkt 92, *Carroll v. Trump*, No. 22-CV-10016 (LAK), 2023 WL 3000562 (S.D.N.Y. Mar. 20, 2023); *Carroll II*, Dkt 95, *Carroll v. Trump*, No. 22-CV-10016 (LAK), 2023 WL 2652636 (S.D.N.Y. Mar. 27, 2023); *Carroll II*, Dkt 96, *Carroll v. Trump*, No. 22-CV-10016 (LAK), 664 F. Supp. 3d 550 (S.D.N.Y. Mar. 28, 2023), *Carroll II*, Dkt 212, *Carroll v. Trump*, No. 22-CV-10016 (LAK), 683 F. Supp. 3d 302 (S.D.N.Y. July 19, 2023).

Unless otherwise indicated, Dkt references are to the docket in this case.

² For the reasons discussed in the Court’s recent decisions, “based on all of the evidence at trial and the jury’s verdict as a whole, the jury’s finding that Mr. Trump ‘sexually abused’ Ms.

her in his 2022 statement. In doing so, it found by a preponderance of the evidence that his statement was *defamatory* – that it tended to disparage Ms. Carroll in the way of her profession and/or exposed her to contempt or an evil or unsavory opinion in the minds of a substantial number of people in the community. It found also by clear and convincing evidence that his statement was *false* (not substantially true) and made with *actual malice* (knowing that the statement was false or with reckless disregard to its truth or falsity). It awarded Ms. Carroll \$5 million in damages: \$2.02 million in compensatory and punitive damages for her battery claim, and \$2.98 million in compensatory and punitive damages for her defamation claim.

The matter now is before the Court on the parties’ competing motions with respect to the issue preclusive (or “collateral estoppel”) effect of the jury’s verdict in *Carroll II* in this action. Ms. Carroll argues also that she is entitled to summary judgment on each liability element of her defamation claim in *Carroll I*. She accordingly contends that the trial in this case need address only the issue of damages. Mr. Trump disputes the issue preclusive effect of the *Carroll II* jury’s findings on liability. He contends instead that the verdict in *Carroll II* requires that any compensatory damages that might be awarded to Ms. Carroll in this case must be limited by the compensatory damages the jury

Carroll implicitly determined that he forcibly penetrated her digitally – in other words, that Mr. Trump in fact did ‘rape’ Ms. Carroll as that term commonly is used and understood in contexts outside of the New York Penal Law.” *Carroll*, 2023 WL 5017230, at *1. *See also id.*, 683 F. Supp. 3d at 325–27. In the alternative, the Court found, pursuant to Federal Rule of Civil Procedure 49, that “Mr. Trump forcibly digitally penetrated Ms. Carroll’s vagina.” *Id.*, 683 F. Supp. 3d at 325 n.70.

awarded in *Carroll II*.³ For the reasons discussed below, Ms. Carroll's motion for partial summary judgment is granted. The trial in this case shall be limited to the issue of damages only. Mr. Trump's motion is denied.

Facts

Mr. Trump's 2019 Statements

Ms. Carroll's accusation that Mr. Trump sexually assaulted ("raped") her first became public on June 21, 2019, when *New York* magazine published on the Internet an excerpt from Ms. Carroll's then-forthcoming book in which she described the incident with Mr. Trump. In the ensuing hours and days, Mr. Trump issued three statements that are the subjects of this case:

Statement One – June 21, 2019

"Regarding the 'story' by E. Jean Carroll, claiming she once encountered me at Bergdorf Goodman 23 years ago. I've never met this person in my life. She is trying to sell a new book – that should indicate her motivation. It should be sold in the fiction section.

Shame on those who make up false stories of assault to try to get publicity for themselves, or sell a book, or carry out a political agenda – like Julie Swetnick who falsely accused Justice Brett Kavanaugh. It's just as bad for people to believe it, particularly when there is

³ Mr. Trump moved also to preclude Ms. Carroll "from arguing that her defamatory statement was not false" in relation to his previously filed counterclaim alleging that Ms. Carroll defamed him in her interview statements following the *Carroll II* verdict. Dkt 194 (Def. Mem.) at 3. On August 7, 2023, this Court dismissed Mr. Trump's counterclaim. Dkt 200. Accordingly, Mr. Trump's application with respect to his previously filed counterclaim is denied on the ground that it is moot.

zero evidence. Worse still for a dying publication to try to prop itself up by peddling fake news – it’s an epidemic.

Ms. Carroll & New York Magazine: No pictures? No surveillance? No video? No reports? No sales attendants around I would like to thank Bergdorf Goodman for confirming that they have no video footage of any such incident, because it never happened.

False accusations diminish the severity of real assault. All should condemn false accusations and any actual assault in the strongest possible terms.

If anyone has information that the Democratic Party is working with Ms. Carroll or New York Magazine, please notify us as soon as possible. The world should know what’s really going on. It is a disgrace and people should pay dearly for such false accusations.”⁴

Statement Two – June 22, 2019

“[Reporter]: [Y]ou had said earlier that you never met E. Jean Carroll. There was a photograph of you and her in the late 1980’s —

[Trump]: I have no idea who this woman is. This is a woman who has also accused other men of things, as you know. It is a totally false accusation. I think she was married – as I read; I have no idea who she is – but she was married to a, actually, nice guy, Johnson – a newscaster.

[Reporter]: You were in a photograph with her.

[Trump]: Standing with coat on in a line – give me a break – with my back to the camera. I have no idea who she is. What she did is – it’s terrible, what’s going

⁴ Dkt 157-1 (Pl. Amend. Cpt.) at 15-16, ¶ 83.

on. So it's a total false accusation and I don't know anything about her. And she's made this charge against others.

And, you know, people have to be careful because they're playing with very dangerous territory. And when they do that – and it's happening more and more. When you look at what happened to Justice Kavanaugh and you look at what's happening to others, you can't do that for the sake of publicity.

New York Magazine is a failing magazine. It's ready to go out of business, from what I hear. They'll do anything they can. But this was about many men, and I was one of the many men that she wrote about. It's a totally false accusation. I have absolutely no idea who she is. There's some picture where we're shaking hands. It looks like at some kind of event. I have my coat on. I have my wife standing next to me. And I didn't know her husband, but he was a newscaster. But I have no idea who she is – none whatsoever.

It's a false accusation and it's a disgrace that a magazine like New York – which is one of the reasons it's failing. People don't read it anymore, so they're trying to get readership by using me. It's not good.

You know, there were cases that the mainstream media didn't pick up. And I don't know if you've seen them. And they were put on Fox. But there were numerous cases where women were paid money to say bad things about me. You can't do that. You can't do that. And those women did wrong things – that women were actually paid money to say bad things about me.

But here's a case, it's an absolute disgrace that she's allowed to do that.”⁵

⁵ *Id.* at 18, ¶ 92.

Statement Three – June 24, 2019

“I’ll say it with great respect: Number one, she’s not my type. Number two, it never happened. It never happened, OK?”⁶

Mr. Trump’s 2022 Statement

On October 12, 2022, Mr. Trump published the following statement, which was the subject of Ms. Carroll’s defamation claim in *Carroll II*, on Truth Social, his social media platform:

“This ‘Ms. Bergdorf Goodman case’ is a complete con job[.] . . . She completely made up a story that I met her at the doors of this crowded New York City Department Store and, within minutes, ‘swooned’ her. It is a Hoax and a lie[.] . . . She has no idea what day, what week, what month, what year, or what decade this so-called ‘event’ supposedly took place. The reason she doesn’t know is because it never happened, and she doesn’t want to get caught up with details or facts that can be proven wrong. If you watch Anderson Cooper’s interview with her, where she was promoting a really crummy book, you will see that it is a complete Scam. She changed her story from beginning to end,

⁶ *Id.* at 20, ¶ 98.

Mr. Trump contends that the jury in *Carroll II* did not consider the portion of his statement that Ms. Carroll is not his type. Ms. Carroll counters that she “has never argued that this portion of [Mr.] Trump’s June 24, 2019 statement is false or defamatory” and instead contends that this portion “is relevant because it reveals [Mr.] Trump’s mental state and malicious intent.” Dkt 213 (Pl. Second Reply Mem.) at 4, n. 2. That leaves only the second portion of Mr. Trump’s June 24, 2019 statement, “[I]t never happened. It never happened, OK?”. Given that neither party adequately has addressed whether or not summary judgment should be granted or denied as to that allegedly defamatory portion of the June 24, 2019 statement, the Court does not now decide the issue.

after the commercial break, to suit the purposes of CNN and Andy Cooper In the meantime, 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.”⁷

The Jury's Findings in Carroll II

As this Court previously has set forth, the jury in *Carroll II* made the following explicit findings reflected in its special verdict form, which consisted of factual questions going to liability and damages on both of Ms. Carroll's claims. With respect to Ms. Carroll's sexual battery claim, the jury found by a preponderance of the evidence that:

- “Mr. Trump sexually abused Ms. Carroll.
- Mr. Trump injured her in doing so.
- Mr. Trump's conduct was willfully or wantonly negligent, reckless, or done with a conscious disregard of the rights of Ms. Carroll, or was so reckless as to amount to such disregard.
- Ms. Carroll was entitled to compensatory and punitive damages on the sexual battery claim of \$2.02 million (\$2 million in compensatory damages and \$20,000 in punitive damages).”⁸

With respect to her defamation claim, the jury found by clear and convincing evidence that:

- “Mr. Trump's October 12, 2022 statement was . . . false (*i.e.*, not substantially true).

⁷ *Carroll II*, 22cv10016, Dkt 1 (Cpt.) 18, ¶ 92.

⁸ *Carroll*, 683 F. Supp. 3d at 321–22 (footnote, internal quotation marks, and emphases omitted).

- Mr. Trump made that statement with actual malice – that is, that when he made the statement, Mr. Trump knew that it was false, had serious doubts as to its truth, or had a high degree of awareness that the statement probably was false.”⁹

It found also by a preponderance of the evidence that:

- “Mr. Trump’s October 12, 2022 statement was defamatory [*i.e.*, that the statement tended to disparage Ms. Carroll in the way of her profession and/or exposed her to contempt or an evil or unsavory opinion in the minds of a substantial number of people in the community)]
- Ms. Carroll was injured as a result of Mr. Trump’s publication of the October 12, 2022 statement.
- Mr. Trump acted maliciously, out of hatred, ill will, spite or wanton, reckless, or willful disregard of the rights of another.
- Ms. Carroll was entitled to \$2.98 million in compensatory and punitive damages on the defamation claim relating to the October 12, 2022 statement (\$1.7 million in compensatory damages for the reputation repair program only, \$1 million in compensatory damages for damages other than the reputation repair program, and \$280,000 in punitive damages).”¹⁰

⁹ *Id.* at 321–22 (footnote, internal quotation marks, and emphases omitted).

¹⁰ *Id.* (footnotes, internal quotation marks, and emphases omitted).

The “reputation repair program” refers to the efforts to repair the harm to Ms. Carroll’s reputation caused by Mr. Trump’s 2022 statement based on the testimony of Ms. Carroll’s expert, Professor Ashlee Humphreys.

Discussion

Legal Standard

The parties’ motions concern the standards governing issue preclusion (“collateral estoppel”) as well as summary judgment. In this case, New York law governs the issue preclusive effect of the jury’s verdict in *Carroll II*.¹¹ Under New York law, “[c]ollateral estoppel comes into play when four conditions are fulfilled: ‘(1) the issues in both proceedings are identical, (2) the issue in the prior proceeding was actually litigated and decided, (3) there was a full and fair opportunity to litigate in the prior proceeding, and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits.’”¹²

¹¹ *E.g.*, *Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508, 121 S. Ct. 1021, 149 L.Ed.2d 32 (2001); *Plymouth Venture Partners, II, L.P. v. GTR Source, LLC*, 988 F.3d 634, 642 (2d Cir.), *certified question accepted*, 36 N.Y.3d 1077, 142 N.Y.S.3d 875, 166 N.E.3d 1053, *and certified question answered*, 37 N.Y.3d 591, 163 N.Y.S.3d 467, 183 N.E.3d 1185 (2021).

Mr. Trump has appealed the *Carroll II* judgment and claims that he “will be vigorously contesting the jury’s verdict before the [Second Circuit].” Dkt 206 (Def. First Opp. Mem.) at 3. He concedes, however, that under New York law “the ‘pendency of an appeal does not prevent the use of the challenged judgment as the basis of collateral estoppel[.]’” *Id.* (quoting *Anonymous v. Dobbs Ferry Union Free Sch. Dist.*, 19 A.D.3d 522, 522, 797 N.Y.S.2d 120 (2d Dept. 2005)). His assertion that he “reserves all rights to seek to vacate any preclusive effect that the *Carroll II* judgment may be granted in the instant action” should the Circuit decide in his favor in his appeal is of no relevance or import to this decision. *Id.*

¹² *Conason v. Megan Holding, LLC*, 25 N.Y.3d 1, 17, 6 N.Y.S.3d 206, 29 N.E.3d 215 (2015) (quoting *Alamo v. McDaniel*, 44 A.D.3d 149, 153, 841 N.Y.S.2d 477, (1st Dept. 2007)).

Ms. Carroll points out that “New York courts are divided on whether there is an additional, fifth requirement: namely, that the specific issue must also be decisive of the present action to have

The standards governing summary judgment are well settled:

“Summary judgment may be granted only where there is no genuine issue as to any material fact and the moving party . . . is entitled to a judgment as a matter of law In ruling on a motion for summary judgment, a court must resolve all ambiguities and draw all factual inferences in favor of the nonmoving party To grant the motion, the court must determine that there is no genuine issue of material fact to be tried.”¹³

A party may be entitled to summary judgment based upon the application of facts established by reason of collateral estoppel.¹⁴

Mr. Trump’s 2019 Statements Were Defamatory

To prevail on her defamation claim, Ms. Carroll bears the burden of proving by a preponderance of the evidence that Mr. Trump’s 2019 statements (1) were

preclusive effect.” Dkt 190 (Pl. Mem.) at 11. As Mr. Trump does not rely on any contention that any of the findings in *Carroll II* should be denied issue preclusive effect because it was not decisive, there is no need to address this question.

¹³ *McClellan v. Smith*, 439 F.3d 137, 144 (2d Cir. 2006) (citations omitted).

¹⁴ *E.g.*, *SEC v. Lorin*, No. 90-CV-7461 (PNL), 1993 WL 77372, at *1 (S.D.N.Y. Mar. 15, 1993), *aff’d*, 14 F.3d 591 (2d Cir. 1993) (“The SEC is entitled to summary judgment by reason of collateral estoppel as to those facts alleged by the SEC in its complaint that were necessarily found to have been established by the jury in its return of a verdict of guilty on the five counts of the criminal indictment against [the defendant.]”); *Carney v. Illarramendi*, No. 3:12-CV-00165 (SRU), 2018 WL 1472510, at *10 (D. Conn. Mar. 26, 2018), *aff’d*, 768 F. App’x 88 (2d Cir. 2019) (“Because the material facts are established by operation of collateral estoppel, all that remains is to determine whether the receiver is entitled to judgment as a matter of law.”).

published to a third party, (2) were of and concerning Ms. Carroll, and (3) were likely to be understood as defamatory by the ordinary person.¹⁵ In addition, she must prove by clear and convincing evidence that Mr. Trump’s statements were (4) false, and (5) published with actual malice, “that is, [with] either knowledge of falsity or reckless disregard of the truth.”¹⁶

The jury in *Carroll II* found that Mr. Trump defamed Ms. Carroll in his 2022 statement. In doing so, it determined – in accordance with the Court’s instructions – that Mr. Trump’s 2022 statement “tend[ed] to disparage a person in the way of that person’s business or office or profession or trade” or that “it tend[ed] to expose someone to hatred or contempt or aversion or to induce an evil or an unsavory opinion of that person in the minds of a substantial number of people in the community, even though it may impute no moral turpitude to the person.”¹⁷

As Ms. Carroll contends, “the content of the June 2019 statements and the October 2022 statements are ‘substantially the same.’”¹⁸ In each of his first two 2019 statements, Mr. Trump claimed that Ms. Carroll lied about him sexually assaulting her for improper and

¹⁵ *E.g., Celle v. Filipino Rep. Enterprises Inc.*, 209 F.3d 163, 176 (2d Cir. 2000).

Mr. Trump does not dispute the first two liability elements, that his 2019 statements were published to a third party and that they were of and concerning Ms. Carroll. Summary judgment therefore is granted in favor of Ms. Carroll with respect to those two elements.

¹⁶ *Church of Scientology Int’l v. Behar*, 238 F.3d 168, 173 (2d Cir. 2001).

¹⁷ *Carroll II*, 22cv10016, Dkt 201 (Trial Tr.) at 1429:17-23 (emphasis added).

¹⁸ Dkt 190 (Pl. Mem.) at 16 (quoting *Napoli v. Breaking Media, Inc.*, 187 A.D.3d 1026, 1028 (2d Dept. 2020)).

ulterior purposes.¹⁹ He asserted also in those statements a variation of his claim in his 2022 statement that “E. Jean Carroll is . . . a woman who I had nothing to do with, [and] didn’t know”²⁰ Accordingly, given that the substantive content of Mr. Trump’s 2022 statement, which the jury in *Carroll II* found to be defamatory, is identical to the substantive content of Mr. Trump’s 2019 statements, the jury’s finding in *Carroll II* is controlling in this case.

Mr. Trump contends that “the substance of the June 2019 statements differs in several significant respects from the October 2022 statement.”²¹ He argues first that “the October 2022 statement does not contain any allegation that Plaintiff fabricated the allegations in order to promote her book.”²² Second, he points to the fact that “the statement made no mention of Plaintiff furthering a political agenda, nor did it assert that she was receiving funding from outside sources to further

¹⁹ *E.g.*, *Carroll II*, 22cv10016, Dkt 1 (Cpt.) 18, ¶ 92 (“She [(Ms. Carroll)] completely made up a story[.] . . . It is a Hoax and a lie[.] . . . If you watch Anderson Cooper’s interview with her, where she was promoting a really crummy book, you will see that it is a complete Scam. She changed her story from beginning to end, after the commercial break, to suit the purposes of CNN and Andy Cooper.”); Dkt 157-1 (Pl. Amend. Cpt.) at 16, ¶ 83 (“She is trying to sell a new book – that should indicate her motivation. . . . Shame on those who make up false stories of assault to try to get publicity for themselves, or sell a book, or carry out a political agenda.”); *Id.* at 18, ¶ 92 (“It is a totally false accusation. . . . When you look at what happened to Justice Kavanaugh and you look at what’s happening to others, you can’t do that for the sake of publicity.”).

²⁰ *E.g.*, Dkt 157-1 (Pl. Amend. Cpt.) at 16, ¶ 83 (“I’ve never met this person [(Ms. Carroll)] in my life.”); *Id.* at 18, ¶ 92 (“I have no idea who this woman is.”).

²¹ Dkt 211 (Def. Second Opp. Mem.) at 12.

²² *Id.*

her claims.”²³ These points, however, undermine rather than support Mr. Trump’s position.

If the jury in *Carroll II*, as Mr. Trump argues, did not determine that his 2022 statement was defamatory because it accused Ms. Carroll of fabricating her sexual assault allegation to promote her book and/or for political purposes, then by Mr. Trump’s own logic, the jury must have determined that his statement was defamatory on the ground that it accused Ms. Carroll of lying about the sexual assault. That issue is common to and decisive of the defamatory nature of Mr. Trump’s 2019 statements. The possibility that Mr. Trump’s 2019 statements were more egregiously defamatory than his 2022 statement (an issue that the Court need not resolve here) does not diminish the issue preclusive effect of the jury’s finding in *Carroll II*. The question is whether Mr. Trump defamed Ms. Carroll in his 2019 statements, not whether he defamed her in those statements to an extent *greater* than he did in his 2022 statement.

In any event, Mr. Trump does not address *at all* Ms. Carroll’s alternative argument that she is “entitled to summary judgment because no reasonable juror could find that [Mr.] Trump’s June 2019 statements lacked defamatory meaning: he accused [Ms.] Carroll of fabricating a sexual assault allegation in order to make money, advance political goals, and achieve other plainly improper purposes.”²⁴ She contends that “[s]uch 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 unsavory opinion of her in the minds of a substantial

²³ *Id.*

²⁴ Dkt 190 (Pl. Mem.) at 17.

number of people in the community.”²⁵ In the absence of any opposition by Mr. Trump, let alone any showing of the existence of a genuine issue of material fact with respect to the defamatory meaning of his 2019 statements, the Court agrees that Ms. Carroll is entitled to summary judgment on this element regardless of any issue preclusive effect of the verdict in *Carroll II*.²⁶

Mr. Trump’s 2019 Statements Were False

The jury’s verdict in *Carroll II* plainly established that Mr. Trump’s 2019 statements were false (not substantially true). In *Carroll II*, the truth or falsity of Mr. Trump’s 2022 statement – which, as set forth above, accused Ms. Carroll of lying about Mr. Trump sexually assaulting her for improper and ulterior purposes – depended upon whether Mr. Trump sexually assaulted Ms. Carroll. The jury answered that question in the affirmative twice. First, it found by a preponderance of the evidence that Mr. Trump sexually abused Ms. Carroll. Second, it determined by clear and convincing evidence that Mr. Trump’s 2022 statement was false. As this Court instructed the jury:

“[W]hether Mr. Trump’s [2022] statement is false or true depends *largely or entirely* on whether you find

²⁵ *Id.*

²⁶ See *Curry v. Roman*, 217 A.D.2d 314, 318-19 (4th Dept. 1995) (“Once the court concludes that the statements are reasonably susceptible of a defamatory connotation, it becomes a jury function, if the words are susceptible of several different meanings, to determine whether that was the sense in which the words were likely to be understood by the ordinary and average reader or listener If the words, however, are unambiguous and admit but one meaning, the court should resolve the issue We conclude that the words used by defendants, which accused plaintiffs of specific criminal conduct . . . , were clear and unambiguous, and were defamatory as a matter of law.”) (citations omitted).

that Mr. Trump raped or sexually abused or forcibly touched or otherwise sexually attacked Ms. Carroll.”²⁷

Pursuant to the presumption that the jury followed the Court’s instructions, its finding that Mr. Trump’s 2022 statement was false necessarily implies that it determined by clear and convincing evidence that Ms. Carroll did not fabricate her sexual assault accusation.

Mr. Trump’s 2019 statements raise this identical issue. “The core of Ms. Carroll’s defamation claim [in this case] is that Mr. Trump *lied in accusing her of fabricating her sexual assault allegation against him in order to increase sales of her book and for other improper purposes* and that he thus caused Ms. Carroll professional and reputational harm as well as emotional pain and suffering.”²⁸ The truth or falsity of Mr. Trump’s 2019 statements therefore depends – like the truth or falsity of his 2022 statement – on whether Ms. Carroll lied about Mr. Trump sexually assaulting her. The 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.²⁹

²⁷ *Carroll II*, 22cv10016, Dkt 201 (Trial Tr.) at 1431:2-6 (emphasis added).

²⁸ *Carroll*, 683 F. Supp. 3d at 308–09 (emphasis added).

²⁹ In theory, it is possible that the jury in *Carroll II* could have determined that Mr. Trump’s 2022 statement was false because Ms. Carroll did not possess any nefarious purpose, without regard to whether she lied about the assault. Mr. Trump does not make this argument. In fact, he repeatedly contends the opposite. *E.g.*, Dkt 206 (Def. First Opp. Mem.) at 5 (“The only question that the jury considered on the issue of falsity was whether it believed that the sexual assault occurred.”); Dkt 211 (Def. Second Opp. Mem.) at 13-14 (“[I]n the context of the October 2022 statement, the jury was singularly tasked with determining whether the sexual assault occurred[.]”); (“[T]he jury was specifically tasked to consider whether the sexual assault occurred[.]”); (“At bottom, the only true

Mr. Trump's contrary arguments are all unpersuasive. He contends that "the jury was not asked to – and in fact did not – consider whether the October 2022 statement was made pursuant to a 'nefarious purpose' to [Ms. Carroll's] sexual assault allegations, nor whether [Mr. Trump] lied when he claimed that he did not know [Ms. Carroll]."³⁰ His argument defies common sense and mischaracterizes Ms. Carroll's defamation claim. Of course, the jury's finding that the sexual assault occurred necessarily implies that Ms. Carroll did not lie about it for a nefarious or any other purpose and that Mr. Trump met and knew her.³¹ In any event, Ms.

question the *Carroll II* jury was tasked with finding is whether it believed that the sexual assault occurred."). Moreover, crediting this theoretical possibility would require assuming that (1) the jury did not follow the Court's instruction that is stated above, and (2) the jury found that the statement was not substantially true *solely* because it was convinced that Ms. Carroll did not lie – if she did – "to suit the purposes of CNN and Andy Cooper" "where she was promoting a really crummy book." *Carroll II*, 22cv10016, Dkt 1 (Cpt.) 18, ¶ 92. There is no support for either proposition. In any event, Mr. Trump does not dispute, and implicitly concedes by his repeated assertions, that the jury in *Carroll II* found by clear and convincing evidence that his 2022 statement was false because it determined that Ms. Carroll did not fabricate her sexual assault accusation.

³⁰ Dkt 206 (Def. First Opp. Mem.) at 5.

³¹ Mr. Trump argues also that "a finding that [he] lied when he asserted that [Ms. Carroll] may have been motivated for financial or political purposes was clearly not essential to the ultimate judgment, given that the jury had not been instructed as such, nor were these assertions even contained in the October 12[, 2022] Statement." Dkt 211 (Def. Second Opp. Mem.) at 14. For the reasons discussed above, his argument is inapposite. Even assuming for the sake of argument that Mr. Trump's 2022 statement did not include those specific assertions, the jury's determination in *Carroll II* that Ms. Carroll did not fabricate her sexual assault accusation necessarily subsumes any assertion that she did so for any reason.

Carroll did not sue Mr. Trump simply for stating that he did not know her. His statement that he did not know her is a subcomponent of the core of Ms. Carroll's defamation claim, which, as stated above, is that Mr. Trump defamed her in this case and in *Carroll II* by accusing her of concocting a sexual assault allegation for improper purposes. There accordingly is no merit to Mr. Trump's arguments with respect to the falsity of his 2019 statements.

Mr. Trump's 2019 Statements Were Made With Actual Malice

The verdict in *Carroll II* established also that Mr. Trump's 2019 statements were made with actual malice. "To show actual malice, a plaintiff must prove that the defendant either knew his statements were false or acted with reckless disregard as to whether they were false."³² A defendant acted with reckless disregard if he or she was "entertaining serious doubts as to the truth of the statement or having a high degree of awareness that the statement is probably false."³³ In *Carroll II*, the jury found by clear and convincing evidence that Mr. Trump made the 2022 statement with actual malice. In other words, it determined – as this Court instructed the jury – that:

"Mr. Trump, when he made his October 12[, 2022] statement, *knew that it was false, had serious doubts*

Mr. Trump's other argument, that the jury's finding that he sexually abused Ms. Carroll cannot be afforded preclusive effect because that finding was made by a preponderance of the evidence rather than by clear and convincing evidence, similarly is irrelevant. Neither the Court nor Ms. Carroll rely on the jury's sexual abuse finding to determine that the verdict in *Carroll II* establishes the falsity of Mr. Trump's 2019 statements.

³² *Conti v. Doe*, 535 F. Supp. 3d 257, 279 (S.D.N.Y. 2021).

³³ *Id.*

*as to its truth, or had a high degree of awareness that the statement probably was false.”*³⁴

To be more specific, the jury found that Mr. Trump knew that his statement that Ms. Carroll lied about him sexually assaulting her for improper and ulterior purposes was false or that he acted with reckless disregard to whether it was false.

Whether Mr. Trump made the 2019 statements with actual malice raises the same issue. Accordingly, as Ms. Carroll argues, “[n]o reasonable person could believe that [Mr.] Trump acted with actual malice in October 2022, but lacked it in June 2019.”³⁵ “To do so, [a reasonable person] would have to believe that [Mr.] Trump willfully lied (or doubted the truth of his own statement) in October 2022, but somehow did not willfully lie (or doubt his own statements) in June 2019, even though the statements were substantively identical, even though [Mr.] Trump’s attacks on [Ms.] Carroll never wavered and never varied, and even though [Mr.] Trump (by his own admission) made absolutely no effort in this time period to investigate the issue or to discover any new information about the truth of [Ms.] Carroll’s underlying allegations.”³⁶

Alternatively, even if the jury’s finding in *Carroll II* that Mr. Trump made his 2022 statement with actual malice was not issue preclusive in this case, Ms. Carroll nonetheless has satisfied her burden on summary judgment. As discussed above, the jury’s finding that Mr. Trump’s 2022 statement was false is controlling in this case. And that is significant with respect to actual

³⁴ *Carroll II*, 22cv10016, Dkt 201 (Trial Tr.) at 1431:25-1432:3 (emphasis added).

³⁵ Dkt 190 (Pl. Mem.) at 20.

³⁶ *Id.*

malice because, as Ms. Carroll argues, given that Mr. Trump’s “2022 statement concerned his own personal conduct and knowledge, no reasonable juror could find that [Mr.] Trump’s October 2022 statement was false, but also conclude that Trump was unaware of the relevant facts in June 2019.”³⁷ Moreover, as Ms. Carroll points out:

“The record makes clear that [Mr.] Trump’s conduct in 2019 reflected gross and willful disregard for the truth. As [Mr.] Trump testified, he never read [Ms.] Carroll’s book or the excerpt of it published in *New York Magazine*, . . . he never contacted Bergdorf’s despite representing otherwise in his public statements, . . . [Mr.] Trump had absolutely no personal knowledge as to [Ms.] Carroll’s financial circumstances, the details of [Ms.] Carroll’s book deal, or her political affiliation or party registration, . . . nor did he remember anyone contacting him with such information despite asking for people do to so in his June 21[, 2019] statement, . . . [Mr.] Trump took no steps to investigate [Ms.] Carroll’s account, nor did he direct anyone in the White House or the administration to do so, . . . and [Mr.] Trump did not consult with any other White House or administration official (apart from his wife and daughter) in making the June 2019 statements”³⁸

Mr. Trump does not point to any genuine issue of material fact with respect to whether he knew that his 2019 statements were false or acted with reckless disregard to their truth or falsity.³⁹ Indeed, he has not

³⁷ *Id.* at 21.

³⁸ *Id.* at 21-22 (citations omitted).

³⁹ In his response to Ms. Carroll’s Rule 56.1 Statement of Facts, Mr. Trump disputes some of the facts recited by Ms. Carroll that are reproduced above. For example, he contends that “the cited

contended – either here or in *Carroll II* – that he would not have acted with actual malice even if his denial that the alleged incident ever occurred was proven false. He instead argues that “the record does not establish . . . that [Mr. Trump] published the June 2019 statements with actual malice” because (1) “the jury in *Carroll II* was specifically precluded from considering the statements made in June 2019,” and (2) there is not “any actual solidarity” between the 2019 statements and the 2022 statement because the 2022 statement “does not contain a single reference to [Ms. Carroll’s] potential political motivations, nor does it directly state that [Ms. Carroll] made her allegations to advance her book sales.”⁴⁰

Both arguments are unpersuasive. Although he is correct that the Court instructed the jury in *Carroll II* not to consider the 2019 statements, that point does not change the fact that the jury considered and decided issues that are common to both cases – including whether Mr. Trump falsely accused Ms. Carroll of fabricating her sexual assault charge and, if that were so, that he did it with knowledge that his accusation was false and the he knew it was false or acted with reckless disregard as to its truth. And his second argument is

deposition testimony of Defendant can support only that he could not recall each and every person he may have spoken with about Plaintiff’s allegations” and that “the cited deposition testimony of Defendant can support only that he could not [*sic*] whether a member of his team performed research as it relates to Plaintiff’s claims.” Dkt 212 (Def. Response to Pl. 56.1 Statement) at 6, ¶ 14, 7, ¶ 17. Based upon this record and in these circumstances, these disagreements do not constitute genuine issues of material fact. Even accepting Mr. Trump’s versions of these facts, Ms. Carroll has satisfied her burden on summary judgment with respect to actual malice.

⁴⁰ Dkt 211 (Def. Second Opp.) at 17.

irrelevant to actual malice. It again misses the common sense point. If he knew his statements concerning Ms. Carroll were false (or had a high degree of awareness of probable falsity) – as the jury in *Carroll II* found – he of course knew that she did not lie for political or any other reasons. The jury’s verdict in *Carroll II*, as well as (and alternatively) the undisputed facts, establish that Mr. Trump’s 2019 statements were made with actual malice.

The Carroll II Verdict Does Not Warrant a Reduction Of Any Damages In Carroll I

Mr. Trump contends that any damages award Ms. Carroll might receive in this case “must be limited in accordance with the judgment of *Carroll II*.”⁴¹ As noted above, the jury in *Carroll II* awarded Ms. Carroll \$2.7 million in compensatory damages for her defamation claim – \$1.7 million for the reputation repair program based on Professor Humphreys’s testimony, and \$1 million for damages other than the reputation repair program. Professor Humphreys submitted an expert report in this case as well, in which she calculated that “the minimum appropriate corrective campaign . . . would cost at least \$10 million.”⁴² Ms. Carroll alleges also – as she did in *Carroll II* with respect to Mr. Trump’s 2022 statement – that his 2019 statements caused her professional harm as well as emotional pain and suffering.

⁴¹ Dkt 194 (Def. Mem.) at 7.

⁴² Dkt 157-1 (Pl. Amend. Cpt.) at 29 ¶ 147. *See also* Dkt 204 (Pl. Opp. Mem.) at 2 (“In her expert report, Professor Humphreys designed a program to remedy the negative impressions associated with [Mr.] Trump’s June 2019 statements; she estimated that the cost of such a reputation repair program would fall between \$3,333,058.72 and \$20,998,861.18, depending upon factors she described, with a conservative, middle range between \$9,999,176.17 and \$12,599,316.71.”).

Mr. Trump first argues that any compensatory damages in this case other than those in relation to the reputation repair program “cannot exceed the one million dollar award in *Carroll II*” because in *Carroll II*, he argues that Ms. Carroll “explained that the damage she suffered as a result of the October 12, 2022 statement was identical to – potentially even greater than – the harm she incurred as a result of the June 2019 statements.”⁴³ He relies on Ms. Carroll’s testimony at trial in *Carroll II* that the messages she received after Mr. Trump’s 2022 statement were “*equally disparaging and hurtful*” to those she received after his 2019 statements, “but these [(post-2022 messages)] particularly hurt because [she] thought [she] had made it through and there they are again.”⁴⁴ He contends that Ms. Carroll’s “testimony that the impact of the October 2022 statement was ‘equally disparaging and hurtful’ as that of the June 2019 statements” is controlling in this case because it satisfies the four elements of issue preclusion.⁴⁵ There is no merit to Mr. Trump’s argument.

As an initial matter, issue preclusion is available only with respect to determinations by the Court or jury of issues necessary to support the judgment. It has nothing to do with testimonial statements by parties. Mr. Trump’s contention thus mixes apples with oranges.

In any case, his argument misinterprets the jury’s findings on damages in *Carroll II*. This Court instructed the jury that, with respect to compensatory damages other than the reputation repair program, it should:

⁴³ Dkt 194 (Def. Mem.) at 7-8.

⁴⁴ *Carroll II*, 22cv10016, Dkt 189 (Trial Tr.) at 329:5-7 (emphasis added).

⁴⁵ Dkt 209 (Def. Reply Mem.) at 2.

“[A]ward an amount that, in the exercise of your good judgment and common sense, you decide is fair and just compensation for the injury to the plaintiff’s reputation and the humiliation and mental anguish in her public and private life which you decide was caused by the defendant’s [2022] statement. In fixing that amount, if you fix one, you should consider the plaintiff’s standing in the community, the nature of Mr. Trump’s statement made about Ms. Carroll, the extent to which the statement was circulated, the tendency of the statement to injure a person such as Ms. Carroll, and all of the other facts and circumstances in the case.”⁴⁶

At no point was the jury instructed to determine whether the harm Ms. Carroll suffered as a result of Mr. Trump’s 2022 statement was equal to the harm she allegedly suffered as a result of his 2019 statements. Nor is there any permissible inference from the jury’s \$1 million award in *Carroll II* that it implicitly determined Ms. Carroll could not be accorded more for the alleged harm she suffered from Mr. Trump’s 2019 statements simply based on Ms. Carroll’s “equally disparaging and hurtful” testimony. Indeed, as Mr. Trump acknowledges, the Court explicitly instructed the jury that “the question of whether there was any adverse effect by virtue of the 2019 statements and, if there was, how much adverse effect is not at issue in this case. It is not for you to determine.”⁴⁷ Given that the issue Mr. Trump seeks to “carr[y] over” from the *Carroll II* trial to this action was never actually decided, there is no basis to prospectively cap any damages award Ms.

⁴⁶ *Carroll II*, 22cv10016, Dkt 201 (Trial Tr.) at 1433:1-11.

⁴⁷ *Id.*, Dkt 197 at 1158:3-6.

Carroll might receive other than for the reputation repair program at \$1 million.⁴⁸

Nor is there any merit to Mr. Trump's second argument, *i.e.*, that any award Ms. Carroll might receive in relation to the reputational repair program must be reduced by \$1.7 million to avoid double recovery. Mr. Trump contends that "[g]iven that the two programs are identical in their design and function, there will be a complete overlap in their remedial effect on [Ms. Carroll's] reputation."⁴⁹ His argument ignores the fact that even if Professor Humphreys "utilized the same methodologies and criteria" to determine the reputation repair programs in *Carroll I* and *Carroll II*, those proposed programs – and the ultimate calculations Professor Humphreys reaches – are different in both cases.⁵⁰ In any event, Mr. Trump fails to demonstrate how the jury in *Carroll II* decided the monetary value, if any, to accord to Professor Humphreys' reputational repair program with respect to Mr. Trump's 2019 statements. For the reasons stated above, it of course did not do so. I have considered Mr. Trump's other arguments and found them all unpersuasive.⁵¹

CONCLUSION

For the foregoing reasons, Ms. Carroll's motion for partial summary judgment (Dkt 189) is granted except

⁴⁸ Dkt 209 (Def. Reply Mem.) at 2.

⁴⁹ Dkt 194 (Def. Mem.) at 15.

⁵⁰ *Id.* at 14.

⁵¹ In a footnote, Ms. Carroll "contend[s] that it would be appropriate for the Court to consider drawing on its inherent authority to issue an order to show cause why [Mr.] Trump's counsel should not be required to pay our attorneys' fees in connection with responding to his motion" "[g]iven the manifest frivolity of [Mr.] Trump's legal arguments." Dkt 204 (Pl. Opp. Mem.) at 9 n.2. The Court declines to do so in this instance.

with respect to Mr. Trump's June 24, 2019 statement. Mr. Trump's motion with respect to the issue preclusive effect of the *Carroll II* verdict in this action (Dkt 193) is denied.

SO ORDERED.

APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 20-cv-7311 (LAK)

E. JEAN CARROLL,

Plaintiff,

-against-

DONALD J. TRUMP,

Defendant.

Signed July 5, 2023

**MEMORANDUM OPINION DENYING
DEFENDANT’S MOTION FOR SUMMARY
JUDGMENT (Corrected)**

Lewis A. Kaplan, District Judge.

This is a defamation case brought by writer E. Jean Carroll against President Donald Trump, as he then was, for statements Mr. Trump made in June 2019 shortly after Ms. Carroll publicly accused him of sexual assault. In those statements, Mr. Trump denied Ms. Carroll’s accusation, stated that he “has no idea who this woman is,” and suggested that she fabricated her accusation for ulterior and improper purposes, including to increase sales of her then-forthcoming book in which she discusses having been sexually assaulted by Mr. Trump and other men.

In a second and very closely related case (“*Carroll II*”), Ms. Carroll sued Mr. Trump for the alleged sexual assault itself and for defamation based on a statement that Mr. Trump published on his social media platform in October 2022 that was substantially similar to his June 2019 statements. That case was tried in April and May 2023. The jury unanimously found that Mr. Trump had sexually abused Ms. Carroll and defamed her in his October 2022 statement.¹ It awarded Ms. Carroll a total of \$5 million in compensatory and punitive damages: \$2.02 million for her sexual assault claim, and \$2.98 million for her defamation claim.²

In this case (“*Carroll I*”), Ms. Carroll seeks damages and other relief for defamation for Mr. Trump’s June

¹ It found also that Ms. Carroll had not established that Mr. Trump “raped” her within the relevant definition of that term in the New York Penal Law.

² The Court assumes familiarity with its prior decisions, which describe in detail the facts and procedural histories of both cases. Dkt 32, *Carroll v. Trump*, 498 F. Supp. 3d 422 (S.D.N.Y. 2020), *rev’d in part, vacated in part*, 49 F.4th 759 (2d Cir. 2022); Dkt 73, *Carroll v. Trump*, 590 F. Supp. 3d 575 (S.D.N.Y. 2022); Dkt 96, *Carroll v. Trump*, No. 20-cv-7311 (LAK), 635 F. Supp. 3d 229 (S.D.N.Y. Oct. 12, 2022); Dkt 145, *Carroll v. Trump*, No. 20-cv-7311 (LAK), 660 F. Supp. 3d 196 (S.D.N.Y. Mar. 10, 2023); Doc. No. 22-cv-10016 (*Carroll II*), Dkt 38, *Carroll v. Trump*, No. 22-cv-10016 (LAK), 640 F. Supp. 3d 213 (S.D.N.Y. Jan. 13, 2023); *Carroll II*, Dkt 56, *Carroll v. Trump*, No. 22-CV-10016 (LAK), — F.R.D. —, 2023 WL 2006312 (S.D.N.Y. Feb. 15, 2023); *Carroll II*, Dkt 92, *Carroll v. Trump*, No. 22-CV-10016 (LAK), 2023 WL 3000562 (S.D.N.Y. Mar. 20, 2023); *Carroll II*, Dkt 95, *Carroll v. Trump*, No. 22-cv-10016 (LAK), 2023 WL 2652636 (S.D.N.Y. Mar. 27, 2023); *Carroll II*, Dkt 96, *Carroll v. Trump*, No. 22-CV-10016 (LAK), 664 F. Supp. 3d 550 (S.D.N.Y. Mar. 28, 2023).

Except where preceded by “*Carroll II*”, “Dkt” references are to the docket in this case.

2019 statements only.³ The matter now is before me on Mr. Trump's motion for summary judgment dismissing the action on four grounds:

- (1) Mr. Trump is entitled to absolute presidential immunity
- (2) Mr. Trump's statements were not defamatory *per se* and Ms. Carroll cannot establish special damages
- (3) the majority of Mr. Trump's statements were nonactionable opinion
- (4) Ms. Carroll consented to Mr. Trump's allegedly defamatory statements.⁴

He argues also that punitive damages in any case would be unwarranted on Ms. Carroll's defamation claim. His arguments are without merit.

FACTS

Mr. Trump's Allegedly Defamatory June 2019 Statements

Ms. Carroll's accusation that Mr. Trump sexually assaulted her first became public on June 21, 2019, when *New York* magazine published on the Internet an excerpt from her then-forthcoming book in which Ms. Carroll described Mr. Trump's alleged assault of her, which she referred to as "rape." Over the next several

³ When Ms. Carroll brought this lawsuit in 2019, she presumably was foreclosed from suing for sexual battery by New York's then-existing statute of limitations. As noted above, the Adults Survivors Act enacted by New York in 2022 temporarily revived the ability to bring such claims without regard to the otherwise applicable statute of limitations. She therefore was permitted to bring that claim in her second lawsuit now referred to as *Carroll II*.

⁴ For avoidance of confusion: In his memorandum, Mr. Trump argues what is identified as ground four here before what is identified as ground three here. This opinion discusses Mr. Trump's arguments in the sequence noted above.

hours and days, Mr. Trump issued three allegedly defamatory statements in response to Ms. Carroll's accusation.

Statement One

Two hours and seventeen minutes after Ms. Carroll's accusation became public, Mr. Trump published this statement on Twitter⁵ :

"Regarding the 'story' by E. Jean Carroll, claiming she once encountered me at Bergdorf Goodman 23 years ago. I've never met this person in my life. She is trying to sell a new book—that should indicate her motivation. It should be sold in the fiction section.

"Shame on those who make up false stories of assault to try to get publicity for themselves, or sell a book, or carry out a political agenda—like Julie Swetnick who falsely accused Justice Brett Kavanaugh. It's just as bad for people to believe it, particularly when there is zero evidence. Worse still for a dying publication to try to prop itself up by peddling fake news—it's an epidemic.

"Ms. Carroll & New York Magazine: No pictures? No surveillance? No video? No reports? No sales attendants around I would like to thank Bergdorf Goodman for confirming that they have no video footage of any such incident, because it never happened.

"False accusations diminish the severity of real assault. All should condemn false accusations and any actual assault in the strongest possible terms.

⁵ Mr. Trump testified in his deposition that he provided the statement to his staff to give to the press. Dkt 135-3 (Def. Dep.) at 59:20-23.

“If anyone has information that the Democratic Party is working with Ms. Carroll or New York Magazine, please notify us as soon as possible. The world should know what’s really going on. It is a disgrace and people should pay dearly for such false accusations.”⁶

Statement Two

The next day, Mr. Trump made the following comments that were reported in the national press and published in a White House press release entitled “Remarks by President Trump Before Marine One Departure” issued on June 22, 2019:

“[Reporter]: [Y]ou had said earlier that you never met E. Jean Carroll. There was a photograph of you and her in the late 1980’s—

“[Trump]: I have no idea who this woman is. This is a woman who has also accused other men of things, as you know. It is a totally false accusation. I think she was married—as I read; I have no idea who she is—but she was married to a, actually, nice guy, Johnson—a newscaster.

“[Reporter]: You were in a photograph with her.

“[Trump]: Standing with coat on in a line—give me a break—with my back to the camera. I have no idea who she is. What she did is—it’s terrible, what’s going on. So it’s a total false accusation and I don’t know anything about her. And she’s made this charge against others.

⁶ Dkt 157-1 (Pl. Amend. Compl.) at 15-16, ¶ 83.

On June 13, 2023, this Court granted Ms. Carroll’s motion to amend her complaint. The amended complaint did not add any new claims or otherwise change the focus of her original complaint. Unless indicated otherwise, citations to Ms. Carroll’s complaint are to the amended complaint.

“And, you know, people have to be careful because they’re playing with very dangerous territory. And when they do that—and it’s happening more and more. When you look at what happened to Justice Kavanaugh and you look at what’s happening to others, you can’t do that for the sake of publicity.

“New York Magazine is a failing magazine. It’s ready to go out of business, from what I hear. They’ll do anything they can. But this was about many men, and I was one of the many men that she wrote about. It’s a totally false accusation. I have absolutely no idea who she is. There’s some picture where we’re shaking hands. It looks like at some kind of event. I have my coat on. I have my wife standing next to me. And I didn’t know her husband, but he was a newscaster. But I have no idea who she is—none whatsoever.

“It’s a false accusation and it’s a disgrace that a magazine like New York—which is one of the reasons it’s failing. People don’t read it anymore, so they’re trying to get readership by using me. It’s not good.

“You know, there were cases that the mainstream media didn’t pick up. And I don’t know if you’ve seen them. And they were put on Fox. But there were numerous cases where women were paid money to say bad things about me. You can’t do that. You can’t do that. And those women did wrong things—that women were actually paid money to say bad things about me.

“But here’s a case, it’s an absolute disgrace that she’s allowed to do that.”⁷

Statement Three

Finally, on June 24, 2019, Mr. Trump stated in an interview with the newspaper *The Hill*: “I’ll say it with

⁷ *Id.* at 18, ¶ 92.

great respect: Number one, she's not my type. Number two, it never happened. It never happened, OK?"⁸

Ms. Carroll's Defamation Claim

Ms. Carroll initiated this lawsuit against Mr. Trump in November 2019 for defaming her in these statements. The case originally began in a state court in New York before being removed to this Court for reasons explained in the Court's previous decisions.⁹ Ms. Carroll alleges that:

"When [her] account [of the alleged assault] was published, Trump lashed out with a series of false and defamatory statements. He denied the sexual assault. But there was more: he also denied ever having met Carroll or even knowing who she was. Through express statements and deliberate implications, he accused Carroll of fabricating her allegations in order to increase book sales, carry out a political agenda, advance a conspiracy with the Democratic Party, and make money. He also deliberately implied that she had falsely accused other men of assault. For good measure, he insulted her physical appearance."¹⁰

The core of Ms. Carroll's defamation claim is that Mr. Trump lied in accusing her of fabricating her sexual assault allegation against him in order to increase sales of her book and for other improper purposes and that he thus caused Ms. Carroll professional and reputational harm as well as emotional pain and suffering.

⁸ *Id.* at 20, ¶ 98.

⁹ *E.g., Carroll v. Trump*, No. 22-CV-10016 (LAK), — F.R.D. at —, 2023 WL 2006312, at *4 (S.D.N.Y. Feb. 15, 2023); *Carroll v. Trump*, 498 F. Supp. 3d 422 (S.D.N.Y. 2020), *rev'd in part, vacated in part*, 49 F.4th 759 (2d Cir. 2022), *remanded in part*, 66 F.4th 91 (2d Cir. 2023).

¹⁰ Dkt 157-1 (Pl. Amend. Compl.) at 3, ¶ 11.

Mr. Trump's Answer

In his formal answer to Ms. Carroll's complaint, which originally was filed in state court in February 2020, Mr. Trump raised nine affirmative defenses, including as relevant here that:

- “[t]he [c]omplaint fails to state a cause of action,”
- “Plaintiff’s claim is barred because defendant is immune, under the Supremacy Clause of the United States Constitution, from suit in state court while serving as President of the United States,”
- “[t]he allegedly defamatory statements are privileged or protected by one or more immunities, including, but not limited to, under the Constitution of the United States,”
- “Plaintiff is not entitled to punitive damages as a matter of law,”
- “Plaintiff has not sufficiently alleged defamation *per se*,” and
- “Plaintiff has failed to plead damages with the required specificity.”¹¹

Noticeably missing from this list is any mention of the absolute presidential immunity defense that Mr. Trump now asserts for the first time.¹²

Discussion*Legal Standard*

The standards for summary judgment are well established. In brief:

¹¹ Dkt 14-69 (Def. Answer).

¹² Nor did Mr. Trump seek to add this defense to his answer when he moved to amend his answer in January 2022 to add an affirmative defense and counterclaim based on New York’s “anti-SLAPP” law. Dkt 63.

“Summary judgment may be granted only where there is no genuine issue as to any material fact and the moving party . . . is entitled to a judgment as a matter of law. . . . In ruling on a motion for summary judgment, a court must resolve all ambiguities and draw all factual inferences in favor of the nonmoving party. . . . To grant the motion, the court must determine that there is no genuine issue of material fact to be tried. . . . The Supreme Court teaches that ‘all that is required [from a nonmoving party] is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties’ differing versions of the truth at trial.’ . . . It is a settled rule that ‘[c]redibility assessments, choices between conflicting versions of the events, and the weighing of evidence are matters for the jury, not for the court on a motion for summary judgment.’”¹³

“A material fact is one that might ‘affect the outcome of the suit under the governing law,’ and a dispute about a genuine issue of material fact occurs if the evidence is such that ‘a reasonable [fact finder] could return a verdict for the nonmoving party.’”¹⁴

Ground One: Absolute Presidential Immunity

In *Nixon v. Fitzgerald*,¹⁵ the Supreme Court held that the President of the United States is entitled to “absolute Presidential immunity from damages liability

¹³ *McClellan v. Smith*, 439 F.3d 137, 144 (2d Cir. 2006) (alterations in original) (citations omitted).

¹⁴ *Madison Nat. Life Ins. Co. v. Travelers Prop. Cas. Co. of Am.*, 462 F. App’x 102, 103–04 (2d Cir. 2012) (alteration in original) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986)).

¹⁵ 457 U.S. 731, 102 S. Ct. 2690, 73 L.Ed.2d 349 (1982).

for acts within the ‘outer perimeter’ of his official responsibility.”¹⁶ Mr. Trump argues that the allegedly defamatory statements in this case came within this “outer perimeter” because he made those statements “in direct response to Plaintiff’s allegations which impugned his character and, in turn, threatened his ability to effectively govern the nation.”¹⁷

Before the Court even may address the merits of Mr. Trump’s absolute immunity defense, it must decide a threshold question: whether Mr. Trump is barred from raising this defense because he waived it by failing to raise it earlier. Mr. Trump does not dispute that, under the controlling rules of civil procedure, he waived the defense by failing to plead it as an affirmative defense in his answer.¹⁸ Instead, he contends that any such waiver can have no effect because absolute presidential immunity is an unwaivable obstacle to any court exercising subject matter jurisdiction over any claim within its ambit. In the alternative, if the Court determines that absolute presidential immunity can be

¹⁶ *Id.* at 756, 102 S. Ct. 2690.

¹⁷ Dkt 109 (Def. Mem.) at 17.

¹⁸ In the table of contents to Mr. Trump’s reply brief, the first argument heading reads: “Defendant did not waive his entitlement to presidential immunity.” Dkt 122 (Def. Reply Mem.) at i. However, that heading never reappears in his brief. Instead, the first heading of his argument section is “Presidential immunity cannot be waived,” followed by his argument that Ms. Carroll’s claim that he waived his absolute immunity defense by failing to raise it in his answer “is flawed in its premise” because absolute presidential immunity is not waivable. *Id.* at 1. In a recent letter, Mr. Trump again did not dispute that he waived the defense and instead wrote that he “unequivocally stated that absolute immunity is a non-waivable question of subject matter jurisdiction.” Dkt 160 at 2. It accordingly is clear that Mr. Trump does not dispute that if absolute presidential immunity can be waived, he in fact waived it in this case.

waived, Mr. Trump argues that his motion for summary judgment should be construed as a motion for leave to amend his answer so that he can assert the absolute immunity defense. Neither argument is persuasive.

Absolute Presidential Immunity Can Be Waived

Mr. Trump argues that “whether presidential immunity applies in this case is a non-waivable question of subject matter jurisdiction.”¹⁹ His argument relies on the theory that absolute presidential immunity is non-waivable because it is different from absolute immunity available to judges and prosecutors – which decidedly is waivable – due to what he claims, mistakenly, is “its unique rooting in the separation of powers doctrine.”²⁰

Absolute presidential immunity is no such anomaly. There is nothing so exceptional about absolute immunity available to a president that makes it non-waivable unlike other types of absolute immunity. For starters, “[m]ost immunities are affirmative defenses.”²¹ Failure to assert an affirmative defense, including absolute immunity, in an answer or other responsive pleading results in waiver of that defense.²² Moreover, as the

¹⁹ Dkt 122 (Def. Reply Mem.) at 5.

²⁰ *Id.* at 1.

²¹ *In re Stock Exchanges Options Trading Antitrust Litig.*, 317 F.3d 134, 151 (2d Cir. 2003). *See also San Filippo v. U.S. Tr. Co. of New York*, 737 F.2d 246, 252 (2d Cir. 1984) (“In their answer and amended answer, defendants asserted several affirmative defenses, including their absolute immunity from § 1983 liability for their grand jury testimony or prior discussions with the prosecutor.”).

²² As noted above, Mr. Trump’s answer first was filed in a state court in New York before this case was removed to this Court. Assuming his answer was governed by New York’s Civil Practice Law and Rules, he was required to plead absolute immunity as an affirmative defense in his answer or in a pre-answer motion. N.Y. CPLR § 3018(b) (“A party shall plead all matters which if not

Supreme Court has stated, “[t]here is no authority whatever for the proposition that absolute- and qualified-immunity defenses pertain to the court’s jurisdiction.”²³ To prevail in his argument, Mr. Trump must demonstrate that absolute immunity available to a

pleaded would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading.”); *Pitts v. State*, 166 A.D.3d 1505, 1506 (4th Dept. 2018) (“Defendant waived that affirmative defense [of governmental function immunity] inasmuch as defendant did not plead it in its amended answer.”) (citing cases).

The result would be the same if Mr. Trump’s answer were governed by Federal Rule of Civil Procedure 8(c), which requires a party to “affirmatively state any . . . affirmative defense” in responding to a pleading. *E.g.*, 5 C. Wright, A. Miller & E. Cooper, *FEDERAL PRACTICE AND PROCEDURE* § 1278 (4th ed.) (“It is a frequently stated proposition of virtually universal acceptance by the federal courts that a failure to plead an affirmative defense as required by [Rule] 8(c) results in the waiver of that defense and its exclusion from the case.”) (citing cases); *Beechwood Restorative Care Ctr. v. Leeds*, 436 F.3d 147, 154 n.3 (2d Cir. 2006) (“Appellees mention an absolute immunity defense in passing, but that defense is considered waived since it only appears in a footnote. . . . And we decline to overlook the waiver.”); *Desi’s Pizza, Inc. v. City of Wilkes-Barre*, 321 F.3d 411, 428 (3d Cir. 2003) (“Absolute immunity is an affirmative defense that should be asserted in an answer.”); *Collyer v. Darling*, 98 F.3d 211, 222 (6th Cir. 1996) (“It is well established that unless affirmatively pleaded, the defenses of qualified and absolute immunity are waived.”); *Bentley v. Cleveland Cnty. Bd. of Cnty. Comm’rs*, 41 F.3d 600, 604 (10th Cir. 1994) (“[T]his Court has long held that both qualified and absolute immunity are affirmative defenses that must be pleaded.”); *Cozzo v. Tangipahoa Par. Council--President Gov’t*, 279 F.3d 273, 283 (5th Cir. 2002) (“Absolute immunity is an affirmative defense that is waived if it is not pleaded.”).

²³ *Nevada v. Hicks*, 533 U.S. 353, 373, 121 S. Ct. 2304, 150 L.Ed.2d 398 (2001). *See also Mordkofsky v. Calabresi*, 159 F. App’x 938, 939 (11th Cir. 2005) (“[J]udicial immunity is an affirmative defense and does not divest the court of subject matter jurisdiction.”).

president deviates from these well-settled norms. He has not done so.

The focal point of Mr. Trump's reasoning is the foundation of absolute presidential immunity in separation of powers principles. His argument goes: (1) absolute presidential immunity is grounded in the separation of powers doctrine, (2) "the separation of powers doctrine is a creature of Article III standing" and "Article III standing, in turn, is an issue of subject matter jurisdiction,"²⁴ and (3) absolute presidential immunity therefore is an unwaivable obstacle to the exercise of subject matter jurisdiction. His theory fails for two reasons. First, absolute presidential immunity is not the only type of absolute immunity that raises separation of powers concerns. Second, and more importantly, "separation of powers" is not a magic phrase that automatically transforms any issue it touches into an impediment to the exercise of subject matter jurisdiction. Indeed, a determination that absolute presidential immunity is an issue of subject matter jurisdiction would present its own separation of powers concerns and contravene many of the same principles that underpin absolute presidential immunity.

The Supreme Court in *Nixon v. Fitzgerald* determined that absolute presidential immunity is "a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history."²⁵ In reaching its decision, the Court discussed common law precedents that recognized immunity for government officials, including absolute immunity for judges and

²⁴ Dkt 122 (Def. Reply Mem.) at 3.

²⁵ 457 U.S. at 749, 102 S. Ct. 2690.

prosecutors.²⁶ These precedents, the Court noted, “have been guided by the Constitution, federal statutes, and history” and “at least in the absence of explicit constitutional or congressional guidance,” they “have been informed by the common law.”²⁷ With respect to absolute presidential immunity, the Court explained:

“Because the Presidency did not exist through most of the development of common law, any historical analysis must draw its evidence primarily from our constitutional heritage and structure. Historical inquiry thus merges almost at its inception with the kind of ‘public policy’ analysis appropriately undertaken by a federal court. This inquiry involves policies and principles that may be considered implicit in the nature of the President’s office in a system structured to achieve effective government under a constitutionally mandated separation of powers.”²⁸

The heart of the separation of powers doctrine invoked in *Fitzgerald* is respect for the independence of the three branches of government. “In the often-quoted words of Justice Jackson: ‘While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.’”²⁹ Accordingly, one of the central bases justifying absolute *judicial* immunity is the need to protect the “independence without which no judiciary

²⁶ *Id.* at 744-48, 102 S. Ct. 2690.

²⁷ *Id.* at 747, 102 S. Ct. 2690.

²⁸ *Id.* at 748, 102 S. Ct. 2690.

²⁹ *Morrison v. Olson*, 487 U.S. 654, 694, 108 S. Ct. 2597, 101 L.Ed.2d 569 (1988) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 72 S. Ct. 863, 96 L.Ed. 1153 (1952) (Jackson, J., concurring)).

can be either respectable or useful.”³⁰ Absolute *prosecutorial* immunity, although perhaps a bit removed from the constitutional doctrine of separation of powers, similarly is rooted in the “concern that harassment by unfounded litigation” could “shade [a prosecutor’s] decisions instead of exercising the independence of judgment required by his public trust.”³¹ Given the overlaps in reasoning, it is unsurprising that the Court in *Fitzgerald* compared explicitly the absolute immunity it recognized for the president with that already recognized for judges and prosecutors.³²

³⁰ *Bradley v. Fisher*, 80 U.S. 335, 347, 13 Wall. 335, 20 L.Ed. 646 (1871). *See also id.* (“If civil actions could be maintained in such cases against the judge, because the losing party should see fit to allege in his complaint that the acts of the judge were done with partiality, or maliciously, or corruptly, the protection essential to judicial independence would be entirely swept away.”).

³¹ *Imbler v. Pachtman*, 424 U.S. 409, 423, 96 S. Ct. 984, 47 L.Ed.2d 128 (1976).

³² 457 U.S. at 758, 102 S. Ct. 2690 (“For the President, as for judges and prosecutors, absolute immunity merely precludes a particular private remedy for alleged misconduct in order to advance compelling public ends.”); *id.* at 751-52, 102 S. Ct. 2690 (“As is the case with prosecutors and judges—for whom absolute immunity now is established—a President must concern himself with matters likely to ‘arouse the most intense feelings.’”) (citation omitted). *See also Trump v. Vance*, 591 U.S. 786, 140 S. Ct. 2412, 2426, 207 L.Ed.2d 907 (2020) (“We instead [(in *Fitzgerald*)] drew a careful analogy to the common law absolute immunity of judges and prosecutors, concluding that a President, like those officials, must ‘deal fearlessly and impartially with the duties of his office’—not be made ‘unduly cautious in the discharge of [those] duties’ by the prospect of civil liability for official acts.”) (quoting *Fitzgerald*, 457 U.S. at 751-752 & n.32, 102 S. Ct. 2690).

Perhaps aware of these comparisons, Mr. Trump does not argue specifically that absolute presidential immunity is distinct from absolute judicial and prosecutorial immunity by its foundation in separation-of-powers principles. Instead, he cites a footnote in

Moreover, the fact that presidential immunity is grounded in separation of powers principles does not convert it into a jurisdictional issue. Mr. Trump relies chiefly on two points in support of his argument to the contrary. Neither withstands analysis.

First, he quotes the following from *Fitzgerald*:

“[O]ur cases [] have established that a court, before exercising jurisdiction, must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch. When judicial action is needed to serve broad public interests—as when the Court acts, not in derogation of the separation of powers, but to maintain their proper balance . . . or to vindicate the public interest in an ongoing criminal prosecution . . . the exercise of jurisdiction has been held warranted. In the case of [a] merely private suit for damages based on a President’s official acts, we hold it is not.”³³

Mr. Trump’s selected passage, however, omits the sentence preceding it, that “[i]t is settled law that the

Harlow v. Fitzgerald, in which the Supreme Court stated that “the recognition of absolute immunity for all of a President’s acts in office derives in principal part from factors unique to his constitutional responsibilities and station. Suits against other officials—including Presidential aides—generally do not invoke separation-of-powers considerations to the same extent as suits against the President himself.” 457 U.S. 800, 811 n.17, 102 S. Ct. 2727, 73 L.Ed.2d 396 (1982). *Harlow*, however, dealt with the scope of immunity available to aides and advisers of the President and held that presidential aides are entitled to qualified, rather than absolute, immunity. It therefore is inapposite here.

³³ Dkt 122 (Def. Reply Mem.) at 2 (alterations in original) (emphasis omitted) (quoting *Fitzgerald*, 457 U.S. at 754, 102 S. Ct. 2690).

separation-of-powers doctrine does not bar every exercise of jurisdiction over the President of the United States.”³⁴ Even more to the point, “[j]urisdiction . . . is a word of many, too many, meanings.”³⁵ And the Court in *Fitzgerald* did not use the word “jurisdiction” in reference to a federal court’s fundamental ability to adjudicate a case on its merits. Indeed, it there specifically left unresolved the “the immunity question as it would arise if Congress expressly had created a damages action against the President of the United States.”³⁶ If the Court had understood presidential immunity as a restriction on a court’s exercise of subject matter jurisdiction, there would have been no need for the Court to have left that question open. The possibility would have been foreclosed by the long-standing principle that Congress cannot expand the scope of federal courts’ jurisdiction beyond what is permitted by Article III.³⁷

This detail helps to underscore the confusion in Mr. Trump’s second point that “the separation of powers doctrine is a creature of Article III standing.”³⁸ As the cases Mr. Trump quotes make clear, it is Article III standing that “is built on separation-of-powers

³⁴ *Fitzgerald*, 457 U.S. at 753-54, 102 S. Ct. 2690.

³⁵ *Wilkins v. United States*, 598 U.S. 152, 143 S. Ct. 870, 875, 215 L.Ed.2d 116 (2023) (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510, 126 S. Ct. 1235, 153 L.Ed.2d 1097 (2006)).

³⁶ *Fitzgerald*, 457 U.S. at 748 n.27, 102 S. Ct. 2690.

³⁷ *Marbury v. Madison*, 5 U.S. 137, 138, 1 Cranch 137, 2 L.Ed. 60 (1803); *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 65, 116 S. Ct. 1114, 134 L.Ed.2d 252 (1996); *Garanti Finansal Kiralama A.S. v. Aqua Marine & Trading Inc.*, 697 F.3d 59, 66 (2d Cir. 2012) (“Neither we nor Congress may [expand the federal courts’ subject matter jurisdiction], for the Constitution alone defines the outer limits of subject-matter jurisdiction.”).

³⁸ Dkt 122 (Def. Reply Mem.) at 3.

principles,” not *vice versa*.³⁹ Therefore, although Article III standing of course is an issue of subject matter jurisdiction, it does not follow that the separation of powers doctrine in all circumstances is as well. Mr. Trump’s argument in this respect lacks logical coherence and plainly is frivolous.

More fundamentally, Mr. Trump’s argument that absolute presidential immunity is jurisdictional runs afoul of many of the same principles on which the immunity is based. As the Supreme Court stated in *Clinton v. Jones*,⁴⁰ the “dominant concern [in *Fitzgerald*] was with the diversion of the President’s attention during the decisionmaking process caused by needless worry as to the possibility of damages actions stemming from any particular official decision.”⁴¹ The Court was concerned with intruding on the president’s scope of authority and ability to make decisions to govern effectively. It sought to protect the president’s autonomy, not diminish it by denying the president the ability to choose whether or not to defend himself or herself in a civil lawsuit in federal court. As law professor Akhil Amar and former Acting Solicitor General Neal Katyal wrote:

“[The president’s] immunity is of course waivable. Surely the President in whatever spare time he has should be allowed to litigate civil damage actions — or to watch basketball for that matter — but he should not be legally obliged to do either. As a practical matter, politics may sometimes create strong pressure to litigate now —or, again, to watch a basketball game

³⁹ *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 408, 133 S. Ct. 1138, 185 L.Ed.2d 264 (2013).

⁴⁰ 520 U.S. 681, 117 S. Ct. 1636, 137 L.Ed.2d 945 (1997).

⁴¹ *Id.* at 694 n.19, 117 S. Ct. 1636.

—but political pressure should not be confused with legal obligation. In a civil damage action in the early 1960s, then-President John Kennedy asserted litigation immunity under a statute. When that failed, he settled the case instead of asserting presidential immunity”⁴²

Yet the rule Mr. Trump advocates would remove this choice from the president. Under Mr. Trump’s approach, each time a president is sued in federal court, the court would be obligated to raise and resolve the issue of absolute presidential immunity *sua sponte* and, if the defense applied, it would be obligated to dismiss the case for want of subject matter jurisdiction *even if* the president wished to litigate in that case. Such a requirement would contradict the results in many of the other civil lawsuits filed against Mr. Trump for actions during his presidency, in at least one of which, as Ms. Carroll points out, Mr. Trump agreed with the plaintiff that absolute presidential immunity was not a “threshold issue[] that must be decided before reaching the merits.”⁴³ More importantly, it would risk encroachment

⁴² Akhil Reed Amar & Neal Kumar Katyal, *Executive Privileges and Immunities: The Nixon and Clinton Cases*, 108 HARV. L. REV. 701, 726 n.53 (1995).

⁴³ *K&D, LLC v. Trump Old Post Off., LLC*, No. CV 17-731 (RJL), 2018 WL 6173449, at *3 n.2 (D. D.C. Nov. 26, 2018), *aff’d*, 951 F.3d 503 (D.C. Cir. 2020) (emphasis omitted).

There possibly is an argument that Mr. Trump is judicially estopped from taking the opposite position now in this case. *See Clark v. AII Acquisition, LLC*, 886 F.3d 261, 264 (2d Cir. 2018) (“[T]he equitable doctrine of judicial estoppel . . . ‘prevents a party from asserting a factual position in one legal proceeding that is contrary to a position that it successfully advanced in another proceeding.’”) (citation omitted). Given that neither party has briefed this issue and it is unnecessary to my decision, I do not address it here.

by the judiciary into the president's domain by eliminating the president's ability to choose. There is no indication in *Fitzgerald* or in its progeny that absolute presidential immunity ever was meant to be so patronizing.

Leave to Amend Mr. Trump's Answer Is Not Warranted

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. The standard governing this request is clear. Although Rule 15(a) provides that leave to amend "shall be freely given when justice so requires,"⁴⁴ "it is within the sound discretion of the district court to grant or deny leave to amend."⁴⁵ "A district court has discretion to deny leave for good reason, including futility, bad faith, undue delay, or undue prejudice to the opposing party."⁴⁶

Mr. Trump's request is denied on two independent grounds. First, it is denied on the ground that the proposed amendment would be futile. In the alternative, it is denied on the ground that Mr. Trump delayed unduly in raising his presidential immunity defense and granting his request would prejudice Ms. Carroll unfairly.

Futility of Mr. Trump's Proposed Amendment

A motion for leave to amend an answer to assert an affirmative defense may be denied as futile when the

⁴⁴ Fed. R. Civ. P. 15(a).

⁴⁵ *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 200 (2d Cir. 2007) (citation omitted).

⁴⁶ *Id.*

affirmative defense would be meritless.⁴⁷ “In fact, it is unexceptional for federal courts to deny leave to amend on the basis of futility where the proposed amended pleading would not withstand a motion to dismiss.”⁴⁸

As noted above, the president is entitled to absolute immunity from liability in civil damages lawsuits “for acts within the ‘outer perimeter’ of [the president’s] official responsibility.”⁴⁹ The expansive scope of this immunity is based on “the special nature of the President’s constitutional office and functions,” the president’s “discretionary responsibilities in a broad variety of areas, many of them highly sensitive,” and the “difficult[y] [in] determin[ing] which of the President’s innumerable ‘functions’ encompass[] a particular action.”⁵⁰ Implicit in that statement of the scope of presidential immunity, however, is the acknowledgment that there indeed is an “outer perimeter” of the president’s official duties, and that the president is not immune from liability for acts outside that perimeter. As the Supreme Court explained in *Jones*:

“The principal rationale for affording certain public servants immunity from suits for money damages arising out of their official acts is inapplicable to unofficial conduct. . . . As we explained in *Fitzgerald*, ‘the sphere of protected action must be related closely to the immunity’s justifying purposes.’ . . . Because of

⁴⁷ *Monahan v. New York City Dep’t of Corr.*, 214 F.3d 275, 283 (2d Cir. 2000); *Quanta Specialty Lines Ins. Co. v. Investors Capital Corp.*, 403 F. App’x 530, 532–33 (2d Cir. 2010); *Fireman’s Fund Ins. Co. v. Krohn*, No. 91-cv-3546 (PKL), 1993 WL 299268, at *3 (S.D.N.Y. Aug. 3, 1993) (citing cases).

⁴⁸ *Carroll v. Trump*, 590 F. Supp. 3d 575, 579 (S.D.N.Y. 2022) (citing cases).

⁴⁹ *Fitzgerald*, 457 U.S. at 756, 102 S. Ct. 2690.

⁵⁰ *Id.*

the President's broad responsibilities, we recognized in that case an immunity from damages claims arising out of official acts extending to the 'outer perimeter of his authority.' . . . But we have never suggested that the President, or any other official, has an immunity that extends beyond the scope of any action taken in an official capacity."

"Moreover, when defining the scope of an immunity for acts clearly taken *within* an official capacity, we have applied a functional approach. 'Frequently our decisions have held that an official's absolute immunity should extend only to acts in performance of particular functions of his office.' . . . As our opinions have made clear, immunities are grounded in 'the nature of the function performed, not the identity of the actor who performed it.'" ⁵¹

Mr. Trump argues that he is entitled to absolute presidential immunity because he "made the three alleged defamatory statements in direct response to Plaintiff's allegations which impugned his character and, in turn, threatened his ability to effectively govern the nation."⁵² He states that:

"As both the leader of the nation and head of the Executive Branch, [he] could not sit idly while a 'media frenzy' erupted around allegations that attempted to paint him as a rapist. Indeed, faced with this widely-reported, unprovoked attack on his character, the President had a duty to respond; at a minimum, this action was necessary to 'maintain the continued trust and respect of [his] constituents' and to 'preserve his ability to carry out his [] responsibilities.' . . . Thus, it

⁵¹ 520 U.S. at 692–95, 117 S. Ct. 1636 (emphasis in original) (citations omitted).

⁵² Dkt 109 (Def. Mem.) at 17.

cannot be reasonably disputed that [Mr. Trump's] conduct was 'presidential' in nature because he was addressing an issue of grave public concern that weighed on the character and competency of the leader of the nation."⁵³

Mr. Trump accordingly contends that his responses to Ms. Carroll's accusation "fell squarely within the 'outer perimeter' of [his] official duties as President."⁵⁴

The fatal flaw in Mr. Trump's reasoning is that he ignores the precise acts that are the subject of this lawsuit. For the sake of argument, the Court assumes that, when Mr. Trump responded to Ms. Carroll's sexual assault accusation, he was addressing a matter of public concern because the accusation "impugned his character and, in turn, threatened his ability to effectively govern the nation."⁵⁵ It accepts also, for the sake of argument, that the president's speech on a matter of public concern comes within the president's official responsibilities. These points, however, do not lead to the conclusion that Mr. Trump's statements in this case came within the outer perimeter of his official duties as president. As Judge Mehta thoughtfully wrote in another case where Mr. Trump asserted an absolute presidential immunity defense, an analysis with which this Court agrees:

"[T]o say that speaking on matters of public concern is a function of the presidency does not answer the

⁵³ *Id.* (citations omitted).

⁵⁴ *Id.* at 16.

⁵⁵ *Id.* at 17. *See Snyder v. Phelps*, 562 U.S. 443, 453, 131 S. Ct. 1207, 179 L.Ed.2d 172 (2011) ("Speech deals with matters of public concern when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community,' . . . or when it 'is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public[.]'" (citations omitted)).

question at hand: Were President Trump's words in this case uttered in performance of official acts, or were his words expressed in some other, unofficial capacity? The President's proposed test—that whenever and wherever a President speaks on a matter of public concern he is immune from civil suit—goes too far. It mirrors what the Supreme Court has said cannot be the basis for absolute immunity: '[T]o construct an immunity from suit for unofficial acts grounded purely in the identity of [the President's] office is unsupported by precedent.' . . . And the Supreme Court has recognized different capacities in which the person occupying the Office of the President can act: 'Presidents and other officials face a variety of demands on their time, . . . some private, some political, and some as a result of official duty.' . . . Thus, to say that the President spoke on a matter of public concern does not dispositively answer the question of whether he enjoys absolute immunity for such speech.

"Consider some examples. At a rally promoting his reelection, an incumbent President touts his policy accomplishments and makes promises about a second term, but during his speech he instructs members of the crowd to 'punch' a protester 'in the face right now.' Or, take a President who speaks at a party fundraising event before a group of high-dollar donors, where he not only discusses pending legislation but also falsely and with malice accuses a political opponent who is blocking the legislation of running a child-trafficking operation. Or, consider a President who appears at a campaign event for a candidate of his party who is running for Congress, and during his remarks touts the candidate because his election will help advance his agenda, but also calls on the crowd to destroy

property as a sign of support. In each of these scenarios, the conduct of the President comes in the context of words uttered on matters of public concern, but it is doubtful that anyone would consider the President immune from tort liability for harm resulting from his speech. To be sure, these scenarios may seem far-fetched, but they illustrate an important point: blanket immunity cannot shield a President from suit merely because his words touch on matters of public concern. *The context in which those words are spoken and what is said matter.*⁵⁶

The conduct at issue here consists not only of what Mr. Trump did (*i.e.*, make public statements in response to Ms. Carroll’s accusation) but also, and importantly, the *content* of his statements (*i.e.*, what he said in his statements). Mr. Trump did not merely deny Ms. Carroll’s accusation of sexual assault. Instead, he accused Ms. Carroll of lying about him sexually assaulting her in order to increase sales of her book, gain publicity, and/or carry out a political agenda. Even assuming that the president’s decision publicly to deny an accusation of personal wrongdoing comes within the outer perimeter of his official duties, it does not follow that the president’s own personal attacks on his or her accuser equally fall within that boundary. Mr. Trump does not identify any connection between the allegedly defamatory content of his statements – that Ms. Carroll fabricated her sexual assault accusation and did so for financial and personal gain – to any official responsibility of the president. Nor can the Court think of any possible connection.

⁵⁶ *Thompson v. Trump*, 590 F. Supp. 3d 46, 79–80 (D. D.C. 2022) (emphasis added) (citations omitted).

The justifying purposes of presidential immunity support this determination. The fundamental purpose of presidential immunity is to avoid “diversion of [the president’s] energies” and “distract[ing] a President from his [or her] public duties” by subjecting the president to “concern with private lawsuits.”⁵⁷ It is not a “get out of damages liability free” card that permits the president to say or do anything he or she desires even if that conduct is disconnected entirely from an official function. On the facts presented here, there is no concern that the president “would [be] subject . . . to trial on virtually every allegation that an action was unlawful, or was taken for a forbidden purpose.”⁵⁸ The question of whether presidential immunity applies in this case turns not on an allegation that Mr. Trump acted unlawfully or made the statements with actual and common law malice, but on whether the act itself – accusing an individual who has charged the president with a personal wrongdoing of fabricating the charge for ulterior and improper purposes – is within the outer perimeter of the president’s official responsibility.⁵⁹

⁵⁷ *Fitzgerald*, 457 U.S. at 751–53, 102 S. Ct. 2690.

⁵⁸ *Id.* at 756, 102 S. Ct. 2690.

⁵⁹ Mr. Trump compares this case to *Barr v. Matteo*, 360 U.S. 564, 79 S. Ct. 1335, 3 L.Ed.2d 1434 (1959), where the Supreme Court determined that the director of a federal agency was protected by an absolute privilege in a libel action brought by former employees based on a press release in which the director announced his intention to suspend the employees. The Court stated that “[t]he fact that the action here taken was within the outer perimeter of [the director’s] line of duty is enough to render the privilege applicable, despite the allegations of malice in the complaint.” *Id.* at 575, 79 S. Ct. 1335. The decision in that case makes no difference to the analysis here. As noted above, the question of whether presidential immunity applies here does not require crediting Ms. Carroll’s allegation of malice or any consideration of Mr. Trump’s motives. His accusation against Ms. Carroll, which forms the basis of Ms.

Subjecting the president to damages liability for making a personal attack that is unrelated to the president's official responsibilities would not threaten to distract the president from his or her official duties.

Undue Delay and Unfair Prejudice

Leave to amend is denied also on the basis of undue delay, dilatory motive, bad faith and/or prejudice to the opposing party.

“The rule in this Circuit has been to allow a party to amend its pleadings in the absence of a showing by the nonmovant of prejudice or bad faith. . . . However, *‘the longer the period of an unexplained delay, the less will be required of the nonmoving party in terms of a showing of prejudice.’* . . . In determining what constitutes ‘prejudice,’ we consider whether the assertion of the new claim would: (I) require the opponent to expend significant additional resources to conduct discovery and prepare for trial; (ii) significantly delay the resolution of the dispute; or (iii) prevent the plaintiff from bringing a timely action in another jurisdiction. . . . ‘Mere delay, however, absent a showing of bad faith or undue prejudice, does not provide a basis for a district court to deny the right to amend.’”⁶⁰

Mr. Trump's three-year delay in raising his presidential immunity defense, for which he offers no explanation, coupled with the unfair prejudice that would result from an amendment for this purpose to Ms. Carroll, warrant denial of leave to amend.

Carroll's defamation claim, suffices to render his presidential immunity defense meritless.

⁶⁰ *Block v. First Blood Assocs.*, 988 F.2d 344, 350 (2d Cir. 1993) (emphasis added) (citations omitted).

The Court has set forth in its prior opinions the record of Mr. Trump’s efforts to delay both this case and *Carroll II*.⁶¹ Those details need not be repeated here. It suffices for present purposes to note that the Court denied Mr. Trump’s prior request for leave to amend his answer in January 2022. Mr. Trump then sought leave to amend to assert an affirmative defense and counterclaim based on New York’s “anti-SLAPP” law and to argue that Ms. Carroll’s defamation claim is baseless and intended for harassment. That motion was denied on two alternative grounds. First, on the basis that the proposed amendment would be futile. Second, on the additional ground that Mr. Trump’s motion was delayed unduly and made at least in part for a dilatory purpose. As the Court explained:

“[D]efendant’s actions have been dilatory throughout the litigation. As [Ms. Carroll] aptly puts it, he ‘has slow-rolled his defenses, asserting or inventing a new one each time his prior effort to delay the case fails. . . . Taken together, these actions [(the history of defendant’s motions to stay and other litigation conduct)] demonstrate that defendant’s litigation tactics have had a dilatory effect and, indeed, strongly

⁶¹ *Carroll v. Trump*, No. 22-CV-10016 (LAK), 669 F. Supp. 3d 249 (S.D.N.Y. Apr. 17, 2023) (denying Mr. Trump’s application for a month-long postponement of the trial of *Carroll II*); *Carroll v. Trump*, No. 22-CV-10016 (LAK), — F.R.D. —, 2023 WL 2006312 (S.D.N.Y. Feb. 15, 2023) (denying Mr. Trump’s offer to provide a DNA sample in exchange for production by Ms. Carroll of an undisclosed appendix to a report examining the DNA found on the dress Ms. Carroll wore when she was assaulted); *Carroll v. Trump*, No. 20-CV-7311 (LAK), 635 F. Supp. 3d 229 (S.D.N.Y. Oct. 12, 2022) (denying Mr. Trump’s motion to substitute the United States for him as the defendant and to stay the action); *Carroll v. Trump*, 590 F. Supp. 3d 575 (S.D.N.Y. 2022) (denying Mr. Trump’s motion for leave to amend his answer).

suggest that he is acting out of a strong desire to delay any opportunity plaintiff may have to present her case against him.”⁶²

Since that decision was issued in March 2022, Mr. Trump’s conduct both in this case and in *Carroll II* – as discussed in detail in my prior decisions and incorporated herein by reference – only has corroborated the Court’s earlier hypothesis of his dilatory motive.

These facts perhaps would suffice on their own to deny Mr. Trump’s request for leave to amend. But the Court does not rely solely on them in denying the relief Mr. Trump seeks. The unfair prejudice to Ms. Carroll if leave to amend were granted also is clear.

The effect of granting leave, and thus relieving Mr. Trump of his prior waiver, even assuming his absolute immunity defense were meritorious, would be the dismissal of this case. And, to be sure, the dismissal, in and of itself, would not be *unfair* prejudice to Ms. Carroll because it would reflect the fact that there was an insurmountable obstacle to her claim in the first place. But such a dismissal cannot be considered in isolation. Ms. Carroll now has litigated this case for more than three and a half years. She has completed discovery, engaged in extensive motion practice, resisted the government’s attempt to defeat her claim before Court, the Second Circuit and the D.C. Court of Appeals, and devoted untold hours and resources to pursuing her claim. And that weighs very heavily in the analysis. For, if Mr. Trump’s absolute immunity argument were valid, his failure to assert it at the outset of this lawsuit needlessly, unfairly, and inexcusably subjected Mr. Carroll to all of those burdens. The undue

⁶² *Carroll*, 590 F. Supp. 3d at 588.

delay in asserting the defense thus was inherently and unfairly prejudicial even if this Court is mistaken in concluding that it is legally insufficient.

Finally, there is the one more consideration. If Mr. Trump were granted leave to amend and this Court were to reject his absolute immunity claim, the order doing so likely would be appealable. No doubt Mr. Trump would appeal. And an appeal likely would cause “significant additional delays in this litigation arising from a defense that Trump chose not to assert for the first three years of the proceedings.”⁶³ Were this Court’s rejection of his defense upheld on appeal, those additional delays would further prejudice Ms. Carroll unfairly. She now is 79 years old and, as just mentioned, has been litigating this case for more than three and a half years. There is no basis to risk prolonging the resolution of this litigation further by permitting Mr. Trump to raise his absolute immunity defense now at the eleventh hour when he could have done so years ago.

For all these reasons, leave to amend would be unjustified.

Ground Two: Defamatory Per Se

Mr. Trump’s remaining arguments concern the substance of his allegedly defamatory statements. First, he argues that his statements were not defamatory *per se*. As this Court stated in denying Mr. Trump’s motion to dismiss Ms. Carroll’s defamation claim in *Carroll II* on the same basis:

“There are two categories of defamation under New York law: *libel*, for written statements, and *slander*, for spoken statements. Written statements actionable

⁶³ Dkt 113 (Pl. Opp. Mem.) at 15.

as libel include statements published on social media outlets and on the Internet. . . .

“A written statement is libelous *per se* if it ‘tends to disparage a person in the way of his [or her] office profession or trade.’ A writing also is libelous *per se* if it ‘tends to expose a person to hatred, contempt or aversion, or to induce an evil or unsavory opinion of him [or her] in the minds of a substantial number of the community, even though it may impute no moral turpitude to him [or her].’ . . .

“Mr. Trump’s argument to dismiss this claim is premised on his mistaken conflation of the higher standard applied to slander *per se* with the lower standard for libel *per se*. Mr. Trump argues that there are ‘four narrowly defined categories of statements which are considered to be defamatory *per se*,’ and that Ms. Carroll has failed to state a claim for defamation *per se* ‘because it does not, on its face, defame [P]laintiff in her trade, business or profession,’ one of the four categories. However, nearly every authority Mr. Trump cites, including the case identifying those four categories and the cases describing the category of injury in one’s profession are slander *per se*, not libel, cases. Unlike a libelous *per se* statement, a slanderous *per se* statement ‘must be made with reference to a matter of significance and importance for that purpose [(of defaming a person in his or her trade, business, or profession)], rather than a more general reflection upon the plaintiff’s character or qualities.’ Moreover, if a complaint fails to allege sufficient facts to state a claim for slander *per se*, ‘the plaintiff must show . . . that the statement complained of caused him or her special harm’ – generally “the loss of something having economic or pecuniary value.’ The more stringent standard for slander *per se* is

grounded in sound logic: ‘What gives the sting to the writing is its permanence of form. The spoken word dissolves, but the written one abides and perpetuates the scandal.’”⁶⁴

Much of the same analysis applies to Mr. Trump’s argument with respect to his 2019 statements. Mr. Trump concedes that his June 21, 2019 statement, which he provided in written form to his staff to distribute to the press, “can be considered under the libel per se standard.”⁶⁵ His other two statements similarly sound in libel rather than slander. “Where a defamatory statement is oral, but is expected by the speaker to be reduced to writing and published, and is subsequently communicated in written form, such statement constitutes a libel.”⁶⁶ “A statement made to a person known to be by the speaker to be a working newspaper reporter, for example, will be treated as libel, provided the statement is thereafter communicated in written form.”⁶⁷ Mr. Trump made the other two June 2019 statements to individuals he knew to be reporters. He does not argue that he did not understand his remarks would be publicly reported in writing.⁶⁸ All three of Mr.

⁶⁴ *Carroll v. Trump*, No. 22-CV-10016 (LAK), 650 F. Supp. 3d at 224–27 (S.D.N.Y. Jan. 13, 2023) (emphases and alterations in original).

⁶⁵ Dkt 122 (Def. Reply Mem.) at 9.

⁶⁶ *Park Knoll Assocs. v. Schmidt*, 89 A.D.2d 164, 168, 454 N.Y.S.2d 901 (2d Dept. 1982), *rev’d on other grounds*, 59 N.Y.2d 205, 464 N.Y.S.2d 424, 451 N.E.2d 182 (1983) (citing ROBERT D. SACK, LIBEL AND SLANDER AND RELATED PROBLEMS § 2:3, p. 44); *see also Macineirghe v. Cnty. of Suffolk*, No. 13-cv-1512 (ADS)(SIL), 2015 WL 4459456, at *9 (E.D.N.Y. July 21, 2015).

⁶⁷ ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS § 2:3 (4th ed. 2011).

⁶⁸ Indeed, with respect to the June 22, 2019 statement that Mr. Trump made to reporters before boarding Marine One, when Mr.

Trump's June 2019 statements therefore properly are assessed under the libel *per se* standard.

Ms. Carroll adequately has alleged that Mr. Trump's statements are libelous *per se*. As in his 2022 statement, in his 2019 statements – particularly in his first two statements issued on June 21, 2019 and June 22, 2019, respectively – he accuses Ms. Carroll of making up a “totally false accusation” “to sell a new book” and “for the sake of publicity.” As the Court wrote previously:

“Ms. Carroll is a ‘writer, advice columnist, and journalist.’ Honesty and credibility are critical to these professions, which rely heavily on the trust and confidence of their audiences. A writer who writes about his or her own experiences, as Ms. Carroll did, depends on his or her readers believing the writer, which they may be less inclined to if the writer is called dishonest. The October 12 statement – in addition to accusing Ms. Carroll of ‘completely ma[king] up a story’ about Mr. Trump – states that Ms. Carroll ‘changed her story from beginning to end’ during an interview ‘where she was promoting a . . . book.’ Drawing all reasonable inferences in favor of plaintiff, the October 12 statement on the whole can be construed as Ms. Carroll falsely accusing Mr. Trump of rape in order to promote her book and increase its sales. Based on the facts alleged in the complaint, Ms. Carroll has sufficiently pleaded a claim of libel *per se* because the October 12 statement may

Trump was asked during his deposition whether it is “fair to say that when [he] made comments while [he was] president on [his] way to somewhere . . . on [his] way to boarding Air Force One or Marine One that a transcript would be created like this [(transcript of the June 22, 2019 statement)] and released by [his] press office,” he responded “oftentimes.” Dkt 117-6 (Def. Dep.) at 64:4-10.

have affected her in her profession by ‘imputing to [her] . . . fraud, dishonesty, [and/or] misconduct. . . .’”⁶⁹

Similarly, Mr. Trump’s 2019 statements reasonably can be construed as tending to disparage Ms. Carroll in the way of her profession and/or by exposing her to hatred, contempt or aversion or inducing an evil or unsavory opinion of her in the minds of a substantial number of the community. Mr. Trump’s contention that the statements “do not reference Plaintiff’s profession as an advice columnist, nor do they touch upon Plaintiff’s ‘Ask E. Jean’ column” is inapposite to the libel *per se* standard, which requires no such specific references.⁷⁰ Nor was Ms. Carroll required to plead special damages because she has sufficiently pleaded the elements of a libel *per se* claim. Mr. Trump’s second argument to dismiss Ms. Carroll’s claim therefore is without merit.

Ground Three: Nonactionable Opinion

Related also to the substance of his allegedly defamatory statements, Mr. Trump argues that “nearly all of the content contained in the statements are immaterial since they constitute protected opinion speech.”⁷¹ Specifically, he contends that “aside from [his] repudiation of Plaintiff’s contention that he sexually assaulted her, the remainder of the language contained in the alleged defamatory statements is protected opinion speech. Therefore, these statements are not actionable as defamation.”⁷²

Statements of opinion are not actionable as defamation “however unreasonable the opinion or vituperous the

⁶⁹ *Carroll*, 650 F. Supp. 3d at 226–27 (emphases and alterations in original).

⁷⁰ Dkt 122 (Def. Reply Mem.) at 9.

⁷¹ Dkt 109 (Def. Mem.) at 30.

⁷² *Id.* at 33.

expressing of it may be.”⁷³ “While it is clear that expressions of opinion receive absolute constitutional protection . . . , determining whether a given statement expresses fact or opinion may be difficult. The question is one of law for the court and one which must be answered on the basis of what the average person hearing or reading the communication would take it to mean.”⁷⁴

The New York Court of Appeals has identified three factors relevant to determining whether an average person would understand a statement as conveying fact or opinion:

“(1) [W]hether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal . . . readers or listeners that what is being read or heard is likely to be opinion, not fact[.]”

“The third factor ‘lends both depth and difficulty to the analysis’ . . . , and requires that the court consider the content of the communication as a whole, its tone and apparent purpose. Thus, we have adopted a holistic approach to this inquiry. Rather than sifting through a communication for the purpose of isolating and identifying assertions of fact, the court should look to the over-all context in which the assertions were made and determine on that basis ‘whether the reasonable reader would have believed that the

⁷³ *Hotchner v. Castillo-Puche*, 551 F.2d 910, 913 (2d Cir. 1977).

⁷⁴ *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 290, 508 N.Y.S.2d 901, 501 N.E.2d 550 (1986).

challenged statements were conveying facts about the . . . plaintiff.”⁷⁵

“The dispositive inquiry . . . is whether a reasonable [reader] could have concluded that [the statements were] conveying facts about the plaintiff.”⁷⁶

Mr. Trump has not addressed the first and third factors. In any event, both weigh against his position. Mr. Trump “used specific, easily understood language to communicate” that Ms. Carroll made up a false story about Mr. Trump sexually assaulting her to increase sales of her book, to get publicity, and/or for political reasons.⁷⁷ Indeed, the third sentence of his June 21, 2019 statement makes plain his central message that “[s]he [(Ms. Carroll)] is trying to sell a new book – that should indicate her motivation.” Considering each statement as a whole, there is nothing vague or ambiguous about the statements that would make it difficult for an average reader to appreciate their main point: that Ms. Carroll lied and her motives for lying.

The contexts in which the statements were made also convey that they were assertions of fact. The heading of the June 21, 2019 statement reads “Statement from President Donald J. Trump” and was prepared by Mr. Trump to distribute to the press. The June 22, and June 24, 2019 statements were made to reporters, the former expected by Mr. Trump to be transcribed and released by his press office and the latter made by Mr. Trump in the course of an exclusive interview with a newspaper focused on political coverage. Unlike other contexts that

⁷⁵ *Davis v. Boenheim*, 24 N.Y.3d 262, 269–70, 998 N.Y.S.2d 131, 22 N.E.3d 999 (2014) (citations omitted).

⁷⁶ *Id.* (alterations in original) (internal quotation marks and citation omitted).

⁷⁷ *Id.* at 271, 998 N.Y.S.2d 131, 22 N.E.3d 999.

courts have determined tended to signal expressions of opinion, such as the Republican presidential primary debate or a character-limited post on Twitter,⁷⁸ the circumstances here indicate that Mr. Trump's apparent purpose was to state that Ms. Carroll falsely accused him of sexual assault for financial and/or personal gain as a matter of fact, not as a matter of his personal belief or opinion.

The only factor that Mr. Trump touches upon is the second, whether the statements are capable of being proven true or false. Mr. Trump argues that his statements are “no more than non-actionable opinions about Plaintiff's state of mind and are not capable of being proven true or false” and he “was merely opining on Plaintiff's state of mind and motivations for coming forward with her allegation, thus invalidating Plaintiff's claims.”⁷⁹ Courts have determined that statements that an individual made a false accusation or lied for financial or for personal gain are capable of being proven true or false.⁸⁰ Importantly, Mr. Trump did not use speculative

⁷⁸ *Jacobus v. Trump*, 55 Misc.3d 470, 51 N.Y.S.3d 330, 342 (N.Y. Sup. Ct. 2017), *aff'd*, 156 A.D.3d 452, 64 N.Y.S.3d 889 (1st Dept. 2017).

⁷⁹ Dkt 109 (Def. Mem.) at 33.

⁸⁰ *E.g.*, *Mr. Chow of New York v. Ste. Jour Azur S.A.*, 759 F.2d 219, 225 n.4 (2d Cir. 1985) (“In *Edwards*, we distinguished the epithet ‘liar’ from the epithet ‘paid liar.’ We found that unlike calling someone a liar, charging someone with being a paid liar was an assertion of fact. We explained: ‘[T]o call the appellees, all of whom were university professors, paid liars clearly involves defamation that far exceeds the bounds of the prior controversy. . . . And, to say a scientist is paid to lie implies corruption, and not merely a poor opinion of his scientific integrity. Such a statement requires a factual basis. . . .’”) (alteration in original) (quoting *Edwards v. Nat'l Audubon Soc., Inc.*, 556 F.2d 113, 121 n.5 (2d Cir. 1977)); *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 382, 397 N.Y.S.2d 943, 366 N.E.2d 1299 (1977) (“The ordinary and average reader

language in stating Ms. Carroll's motives for falsely accusing him of sexual assault. Instead, he stated "[s]hame on those who make up false stories of assault to try to get publicity for themselves, or sell a book, or carry out a political agenda" and "you can't do that for the sake of publicity." In another portion of his June 21, 2019 statement, he wrote "[t]he world should know what's really going on" after requesting anyone who "has information that the Democratic Party is working with Ms. Carroll" to notify Mr. Trump and his staff. The specificity of Mr. Trump's statements makes clear that he was not merely guessing or speculating as to Ms. Carroll's motive. Instead, he attributes to Ms. Carroll specific and objectively verifiable motives for fabricating her sexual assault accusation.

The cases Mr. Trump cites are inapposite. For example, "the loose and generalized statement that [the plaintiffs who brought a sexual harassment lawsuit] 'do not want to work' or 'hold jobs' and simply 'want to make easy money' . . ." ⁸¹ and the statement "I think he wanted me to divorce him," ⁸² are a far cry from Mr. Trump's clear and definite statement that Ms. Carroll "is trying to sell a new book—that should indicate her motivation," among other assertions he made. Although some courts have been reluctant to find statements concerning a "plaintiff's frame of mind and motivation" to be capable

would likely understand the use of these words [(that the plaintiff is "probably corrupt")], in the context of the entire article, as meaning that plaintiff had committed illegal and unethical actions.").

⁸¹ *Gentile v. Grand St. Med. Assocs.*, 79 A.D.3d 1351, 1353, 911 N.Y.S.2d 743 (3d Dept. 2010).

⁸² *Huggins v. Povitch*, No. 131164/94, 1996 WL 515498, at *4 (N.Y. Sup. Ct. Apr. 19, 1996).

of being objectively verifiable,⁸³ whether or not that is so is a case-specific determination dependent on the specific statements at issue and the other factors relevant to this analysis. Here, although there perhaps was a subjective component to Mr. Trump's statements that Ms. Carroll was trying to increase sales of her book and gain publicity, in these circumstances, her "state of mind is a fact question [susceptible to proof] the same as any other fact."⁸⁴

⁸³ *E.g.*, *Treppel v. Biovail Corp.*, No. 03-cv-3002 (PKL), 2004 WL 2339759, at *14 (S.D.N.Y. Oct. 15, 2004), *on reconsideration*, 2005 WL 427538 (S.D.N.Y. Feb. 22, 2005); *Coleman v. Grand*, 523 F. Supp. 3d 244, 264 (E.D.N.Y. 2021).

In *Immuno AG. v. Moor-Jankowski*, the New York Court of Appeals stated that "[s]peculations as to the motivations and potential future consequences of proposed conduct generally are not readily verifiable, and are therefore intrinsically unsuited as a foundation for libel." 74 N.Y.2d 548, 560, 549 N.Y.S.2d 938, 549 N.E.2d 129 (1989). The court's judgment was vacated, 497 U.S. 1021, 110 S. Ct. 3266, 111 L.Ed.2d 776 (1990), and that statement did not appear again in the court's opinion on remand. 77 N.Y.2d 235, 566 N.Y.S.2d 906, 567 N.E.2d 1270 (1991). Notably, the original opinion cited to *Rinaldi v. Holt* (cited above, *supra* n.80). In *Rinaldi*, however, Judge Gabrielli wrote in his dissent: "[a]s the majority quite properly observes, the charge that plaintiff is 'probably corrupt' is a statement of fact and not an expression of opinion," and in a footnote to that statement, he wrote "[a] charge of corruption goes essentially to the motive behind an individual's acts. As one court has noted, '(t)he state of a man's mind is as much a fact as the state of his digestion' (*Edgington v. Fritzmaurice*, 29 Ch.D. 459, 483 (CA))." *Sigety v. Leventhal*, 42 N.Y.2d 953 at 954 & n.1, 398 N.Y.S.2d 137, 367 N.E.2d 644 (1977). It therefore is possible that some of the modern case law on whether a statement as to an individual's state of mind is objectively verifiable is based in part on a misconstruction of the precedents on this issue.

⁸⁴ *Am. Acad. of Religion v. Napolitano*, 573 F.3d 115, 134 (2d Cir. 2009) (quoting *In re Air Disaster at Lockerbie Scotland on Dec.*

All three factors therefore weigh in favor of a determination that Mr. Trump's statements were factual assertions rather than expressions of opinion.⁸⁵

Ground Four: Consent

Mr. Trump contends also that Ms. Carroll's claim is barred because she consented to Mr. Trump's allegedly defamatory statements. Under New York law, "[c]onsent is a bar to a recovery for defamation under the general principle of *volenti non fit injuria* or, as it is sometimes put, the plaintiff's consent to the publication of the defamation confers an absolute immunity or an absolute privilege upon the defendant[.]."⁸⁶ "Decisions of New York's intermediate appellate courts have established that the consent of the person defamed to the making of a defamatory statement bars that person from suing for the defamation, and that, in some circumstances, a person's intentional eliciting of a statement she expects will be defamatory can constitute

21, 1988, 37 F.3d 804, 838 (2d Cir. 1994) (Van Graafeiland, J., dissenting)).

⁸⁵ Neither party addresses specifically Mr. Trump's June 24, 2019 statement, in which he said only: "I'll say it with great respect: Number one, she's not my type. Number two, it never happened. It never happened, OK?". In her complaint, Ms. Carroll alleges that all three June 2019 statements were defamatory. However, as stated above, the crux of Ms. Carroll's defamation claim lies in Mr. Trump's statements that Ms. Carroll lied for financial and/or personal gain. Indeed, Mr. Trump appears to ground his argument that "the majority" of his statements are nonactionable opinion on the assumption that Ms. Carroll does not allege his "general repudiation of Plaintiff's allegations" in itself was defamatory. Dkt 109 (Def. Mem.) at 32. As the parties have not adequately addressed this point, the Court does not now decide it.

⁸⁶ *Teichner v. Bellan*, 7 A.D.2d 247, 251, 181 N.Y.S.2d 842 (4th Dept. 1959).

her consent to the making of the statement.”⁸⁷ As the Second Circuit has stated:

“The contours and purposes of the rule are somewhat illuminated by the Restatement (Second) of Torts (1977), which in defamation cases has been cited with approval by the highest court of New York. . . . Section 583 of the Restatement provides, ‘Except as stated in § 584, the consent of another to the publication of defamatory matter concerning him is a complete defense to his action for defamation.’ Comment d to this Section says, ‘It is not necessary that the other know that the matter to the publication of which he consents is defamatory in character. It is enough that . . . he has reason to know that it may be defamatory.’ As an illustration, the Restatement notes that a summarily discharged school teacher who ‘demands that the reason for his dismissal be made public . . . has consented to the publication [of the reason] though it turns out to be defamatory.’ Restatement (Second) of Torts § 583 cmt. d (1977).”⁸⁸

The Reporter’s Note to Section 583 of the Restatement provides that “[t]he plaintiff’s consent is a defense even though he procures the publication for the purpose of decoying the defendant into a lawsuit.”⁸⁹ The Restatement states also that:

“[c]onsent means that the person concerned *is in fact willing* for the conduct of another to occur. Normally this willingness is manifested directly to the other by words or acts that are intended to indicate that it

⁸⁷ *Sleepy’s LLC v. Select Comfort Wholesale Corp.*, 779 F.3d 191, 199 (2d Cir. 2015) (citing cases).

⁸⁸ *Id.* (alteration in original) (citations omitted).

⁸⁹ WILLIAM L. PROSSER AND JOHN W. WADE, RESTATEMENT (SECOND) OF TORTS § 583 (1977).

exists. It need not, however, be so manifested by words or by affirmative action. It may equally be manifested by silence or inaction, if the circumstances or other evidence indicate that the silence or inaction is intended to give consent. Even without a manifestation, consent may be proved by any competent evidence to exist in fact, and when so proved it is as effective as if manifested.”⁹⁰

Mr. Trump argues that Ms. Carroll consented to Mr. Trump’s allegedly defamatory remarks because she (1) “purposefully chose to publish her account in *New York Magazine* to garner as much attention as possible” and (2) “waited 27 years to publicly raise her allegations, a time when Defendant was the sitting President of the United States,” leaving him “with no choice but to defend himself against th[e] heinous allegations.”⁹¹ Neither of these points demonstrates that Ms. Carroll had any reason to expect Mr. Trump to make statements that would be defamatory. Indeed, Mr. Trump’s argument amounts to suggesting that any time an individual comes forward with an accusation of wrongdoing against a public official, that person thereby consents to the official stating anything he or she wishes in response, no matter how calumnious. As Ms. Carroll aptly states, “[w]hen a survivor of sexual assault makes the choice to speak up, that choice does not constitute consent to whatever defamatory lies their abuser may unleash in response.”⁹²

The only evidence that Ms. Carroll possibly “had reason to anticipate that [Mr. Trump’s] response [to her

⁹⁰ *Id.* § 892, Comment b (1979) (emphasis added).

⁹¹ Dkt 109 (Def. Mem.) at 29-30.

⁹² Dkt 113 (Pl. Opp. Mem.) at 31.

accusation] might be a defamatory one”⁹³ – which Mr. Trump entirely ignores – comes from her own words in the excerpt of her book published in *New York Magazine*:

“*Why haven’t I ‘come forward’ before now?*

“Receiving death threats, being driven from my home, being dismissed, being dragged through the mud, and joining the 15 women who’ve come forward with credible stories about how the man [(Mr. Trump)] grabbed, badgered, belittled, mauled, molested, and assaulted them, only to see the man turn it around, deny, threaten, and attack them, never sounded like much fun. Also, I am a coward.”⁹⁴

It nevertheless fails to establish consent. First, as observed by another court in this circuit, “[a] review of case law indicates that the type of consent accepted as a complete[] defense to a defamation action is *specific* consent, typically initiated by the plaintiff, which clearly indicates that the plaintiff was aware of and agreed to the possibility that defamatory statements might be published.”⁹⁵ Ms. Carroll’s generalized concern that she might be subject to the same attacks that other women, as she stated, have experienced after coming forward with their accusations against Mr. Trump does not demonstrate her awareness of and agreement to the possibility that Mr. Trump might defame her in

⁹³ *Handlin v. Burkhardt*, 220 A.D.2d 559, 559, 632 N.Y.S.2d 608 (2d Dept. 1995).

⁹⁴ E. Jean Carroll, *Hideous Men: Donald Trump assaulted me in a Bergdorf Goodman dressing room 23 years ago. But he’s not alone on the list of awful men in my life*, THE CUT, NEW YORK MAGAZINE, June 21, 2019, <https://www.thecut.com/2019/06/donald-trump-assault-e-jean-carroll-other-hideous-men.html>.

⁹⁵ *McNamee v. Clemens*, 762 F. Supp. 2d 584, 604–05 (E.D.N.Y. 2011) (emphasis added) (citing cases).

response to her specific accusation of sexual assault and rape.

Second, there is no evidence to suggest that Ms. Carroll had reason to know the type or content of a public statement, if any, Mr. Trump might make in response to her accusation, let alone that she agreed to it. “Implicit in the concept of consent is the conception that the consenting party have the power to control the publication. Thus, there can be no finding of consent where, as here, there is no effective control over the dissemination of the defamatory material.”⁹⁶ Indeed, when asked in her deposition how she expected Mr. Trump would react to her sexual assault accusation, Ms. Carroll testified that:

“I didn’t think he would deny it. I thought he would just say it didn’t happen that way. She agreed to it or it was consensual sex. . . . I just was shocked that he absolutely denied it because he was there and he denied it. That’s what gets me every time. He was there, he denied it.”⁹⁷

She testified also that she “ha[s] no idea” if she would have sued Mr. Trump if he had instead said that it was consensual sex because “it would have been him saying yeah, it happened and then we could have disagreed and then I could have vehemently said no, I did not consent.”⁹⁸

Drawing all factual inferences in favor of Ms. Carroll, as the Court must on this motion for summary judgment, Ms. Carroll’s testimony makes clear that any generalized concern Ms. Carroll harbored based on Mr.

⁹⁶ *Van-Go Transp. Co. v. New York City Bd. of Educ.*, 971 F. Supp. 90, 104 (E.D.N.Y. 1997).

⁹⁷ Dkt 116-1 (Pl. Dep.) at 166:2-6, 167:3-7.

⁹⁸ *Id.* at 166:9-15.

Trump’s “den[ials], threat[s], and attack[s]” against his other accusers did not translate to her consenting to the possibility the same would occur with her.⁹⁹

Punitive Damages

Lastly, Mr. Trump argues that Ms. Carroll’s punitive damages claim should be dismissed because she cannot demonstrate that Mr. Trump acted with common law malice.

“Punitive damages may only be assessed under New York law if the plaintiff has established common law malice in addition to the other elements of libel. . . . To do so, plaintiffs must prove by a preponderance of the evidence that the libelous statements were made out of ‘hatred, ill will, [or] spite.’”¹⁰⁰ The Appellate Division, First Department, one of New York’s intermediate appellate courts, has “held that 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 that there must be some evidence that the animus was ‘the one and only cause for the publication.’”¹⁰¹ “Common law malice is established by examining all of the relevant circumstances surrounding the dispute, including any rivalries and

⁹⁹ In the alternative, there at least is a genuine issue of material fact based on the evidence as to whether Ms. Carroll consented to Mr. Trump’s allegedly defamatory statements, precluding dismissal as a matter of law on summary judgment.

¹⁰⁰ *Celle v. Filipino Rep. Enterprises Inc.*, 209 F.3d 163, 184 (2d Cir. 2000).

¹⁰¹ *Morsette v. “The Final Call”*, 309 A.D.2d 249, 255, 764 N.Y.S.2d 416 (1st Dept. 2003) (emphasis in original) (citation omitted).

earlier disputes between the parties so long as they are not too remote.”¹⁰²

Mr. Trump contends that his “statements could not have been ‘motivated by a desire to injure plaintiff’” because “they were strictly made in Defendant’s own defense.”¹⁰³ His argument merely presents his characterization of his own conduct, which of course is favorable to him. He fails to address any of the relevant evidence, including, for example, his deposition testimony with respect to the circumstances in which he made the statements and whether he ever read the *New York* magazine article or Ms. Carroll’s book that contain her sexual assault accusation.

Furthermore, it is relevant – although not dispositive – that the jury in *Carroll II* in fact awarded punitive damages to Ms. Carroll for her defamation claim for Mr. Trump’s 2022 statement, which as discussed above substantially is similar to Mr. Trump’s statements in this case. To do so, the jury was required to find and did find that Ms. Carroll proved (1) Mr. Trump knew it was false or acted in reckless disregard of its truth or falsity when

¹⁰² *Celle*, 209 F.3d at 185.

¹⁰³ Dkt 109 (Def. Mem.) at 34 (quoting *Morsette*, 309 A.D. at 255, 764 N.Y.S.2d 416).

In passing, Mr. Trump raises also the point that “[i]ndeed, in these types of circumstances, New York courts have recognized a qualified privilege of reply when accused of charges of unlawful activity.” *Id.* at 34 (citing cases). First, his argument arguably has been waived because it was not raised in his answer and is “adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation.” *United States v. Botti*, 711 F.3d 299, 313 (2d Cir. 2013). In any event, any such claim of a qualified privilege – as with his main argument against punitive damages – depends on weighing the evidence of Mr. Trump’s motives for making the allegedly defamatory statements.

he made the statement accusing Ms. Carroll of lying about her sexual assault accusation to promote her book (actual malice) and (2) Mr. Trump made the statement with deliberate intent to injure or out of hatred, ill will, or spite or with willful, wanton or reckless disregard of another's rights (common law malice). This outcome undermines Mr. Trump's argument that the same result is impossible in this closely related case.

In all the circumstances, Mr. Trump has failed to establish that there is not a genuine issue of material fact as to whether the prerequisites to a punitive damages award in this case have been satisfied.

CONCLUSION

For the foregoing reasons, Mr. Trump's motion for summary judgment dismissing the complaint (Dkt 107) and his alternative request for leave to amend his answer to assert the absolute presidential immunity defense are denied.

SO ORDERED.

APPENDIX H

STATUTORY PROVISIONS INVOLVED

1. 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 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.

(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 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.