NO. 22-SP-0745

IN THE DISTRICT OF COLUMBIA
COURT OF APPEALS

DONALD J. TRUMP, *et al.*,

Appellants,

v.

E. JEAN CARROLL,

Appellee.

On Certified Question of Law from the
United States Court of Appeals for the Second Circuit

BRIEF FOR APPELLEE E. JEAN CARROLL

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INTRODUCTION

In June 2019, E. Jean Carroll revealed that former President Donald J. Trump had sexually assaulted her decades earlier. Although Trump denied it, he did not stop there. He launched a series of vicious, personal attacks. He implied that she was too ugly to rape; that she had falsely accused other men of sexual assault; and that she had invented her story for money, or to sell books, or to advance a political plot. None of this was true. Trump knew who Carroll was when he attacked her, he knew who she was in 2019, and he knew what he was doing when he went on a rampage designed to punish and humiliate her for daring to reveal his decades-old crime.

The only two judges who have reached the issue found that these statements revealed a man pursuing a personal vendetta, not a federal officer advancing public purposes. On that basis, they concluded that Trump acted outside the scope of his federal employment under the District's law of *respondeat superior* (which applies under the Westfall Act). The majority of a Second Circuit panel, however, held that relevant District law is unclear—and therefore certified the question to this Court. Trump and the Department of Justice, for their part, have responded to that development by asking this Court to announce a categorical rule that elected officials always and automatically act within their employment whenever they address the public. This Court should reject that position and hold that Trump acted outside the scope of his federal employment when he repeatedly defamed Carroll in June 2019.

STATEMENT OF JURISDICTION

On September 27, 2022, the United States Court of Appeals for the Second Circuit issued an opinion in which it certified a question of District law to this Court. *See* D.C. App. R. 22. On October 25, 2022, this Court agreed to consider the certified question *en banc*. The Court has jurisdiction pursuant to D.C. Code § 11-723.

STATEMENT OF THE ISSUE

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?

STATEMENT OF THE CASE

A. Factual Background[1]

One evening in the mid-1990s, Carroll went to shop at the Bergdorf Goodman department store in Manhattan after work. A28 ¶ 22. As she was exiting through the revolving glass doors on the north side of the building, Trump entered through the same doors from 58th Street. A28 ¶ 23. Trump recognized Carroll—they had met at least once before, they traveled in similar circles, and Carroll was then a frequent

[1] Citations to "A__" are to the Joint Appendix that is part of the record transmitted to this Court by the Second Circuit. Citations to "Dist. Ct. Doc. No. __" are to the United States District Court for the Southern District of New York docket, No. 20 Civ. 7311 (S.D.N.Y.). Citations to "NYSCEF Doc. No. __" are to the New York state court docket, No. 160694/2019 (N.Y. Sup. Ct.).

guest on the *Today* show as well as the host of her own daily *Ask E. Jean* television show. A28 ¶ 24. Trump put his hand up to stop Carroll, saying, "Hey, you're that advice lady!" A28 ¶ 25. Trump told Carroll that he was at Bergdorf's to buy a present for "a girl" and asked Carroll to advise him. A28 ¶ 26. Carroll thought the encounter might make for a funny story, so she agreed to help Trump. *Id.*

Carroll suggested various items: first a handbag, then a hat. A28 ¶ 27. Trump decided on lingerie. A29 ¶ 29. When they arrived at the lingerie department, it was practically empty, with no attendant in sight. A29 ¶ 30. Trump snatched a see-through bodysuit and insisted that Carroll try it on. A29 ¶¶ 30-31. Bemused, Carroll responded that he should try it on himself. A29 ¶ 31.

Suddenly, Trump grabbed Carroll's arm and said, "Let's put this on." A29 ¶ 32. He maneuvered Carroll into a dressing room, shut the door, and lunged at her—knocking her head against the wall. A29 ¶¶ 33-36. He then forcibly put his mouth on her lips. A29 ¶ 36. Shocked by Trump's behavior, Carroll shoved him back and burst out in awkward laughter, hoping that he would retreat. A29 ¶ 37. Instead, Trump seized both of Carroll's arms and pushed her up against the wall again. A29 ¶ 38. Trump then jammed his hand under her coatdress and pulled down her tights. *Id.* He opened his overcoat, unzipped his pants, pushed his fingers around Carroll's genitals, and forced his penis inside of her. A30 ¶ 39. Carroll resisted, struggling to break free. A30 ¶ 40. She tried to stomp Trump's foot. She tried to push him away.

Id. Finally, she raised her knee high enough to push him off her. *Id.* Carroll ran out of the dressing room, out of Bergdorf's, and onto Fifth Avenue. A30 ¶ 41.

Immediately after Trump attacked her, Carroll told two close friends about what had happened; both of them have since publicly confirmed her account of these events. A30-31 ¶¶ 43, 47. One urged her to report the crime, but the other warned her that Trump would ruin her life if she did. A30-31 ¶¶ 44-48. Carroll chose silence. She knew how brutal Trump could be and was convinced that nobody would believe her. Like so many other survivors of sexual assault, Carroll also blamed herself. A31 ¶¶ 49-50. Carroll did not mention the assault to another soul for over twenty years—not wanting to be perceived or to see herself as a victim of rape. A31 ¶ 53.

For the next two decades, Carroll pursued her career as a writer and advice columnist while concealing her own trauma. A32 ¶ 55; A33 ¶¶ 59-60. During the last month of the 2016 election, several women publicly revealed that Trump had engaged in sexual misconduct. A33 ¶ 61. During this period, however, Carroll was focused on attending to her dying mother, who was then in hospice care. A33-34 ¶ 62. Carroll feared that speaking up would provoke a media storm and destroy any peace in her mother's remaining time. *Id.* It was only after her mother died—and the #MeToo movement empowered survivors of sexual assault to come forward—that Carroll decided to reveal the truth. A34-36 ¶¶ 65-73. A writer to her core, determined to tell her story on her own terms, Carroll described Trump's attack in a book

released on July 2, 2019. A37 ¶¶ 77, 80. On June 21, 2019, *New York* magazine published an excerpt from Carroll's book detailing Trump's attack. A37 ¶ 79.

Trump then unleashed a series of vicious, personal attacks over a four-day period. He denied her accusation and insisted they had never met. A38-41 ¶¶ 81-96. But he went much further than that. He insulted her physical appearance, implying that he could not have attacked her because "she's not my type"—in other words, that Carroll was too unattractive for him to have raped her. A42 ¶ 97. He accused Carroll of lying about the rape to make money, to increase book sales, or to carry out a political agenda. A26 ¶ 11; A38 ¶ 82; A40 ¶¶ 88-90. He also implied that she had falsely accused other unspecified men of sexual assault. A40 ¶ 91; A41 ¶ 95. And Trump did all this while fully aware that he *in fact* had raped Carroll: he thus acted with actual malice in every sense of the term. A44-48 ¶¶ 106-28. He sought to punish and humiliate Carroll for speaking up, and to bury her in defamatory lies. Ultimately, his repeated attacks caused Carroll significant harm. A48-49 ¶¶ 129-36.

B. Procedural Background

To redress her injuries, Carroll filed a defamation action in New York court in November 2019. Trump first evaded service of the complaint. *See* NYSCEF Doc. Nos. 6, 15. He then sought dismissal based on a specious claim that the court lacked personal jurisdiction. *See* NYSCEF Doc. Nos. 33, 36. Finally, he sought a stay based

on a theory of absolute immunity unsupported by precedent—as was soon confirmed by *Trump v. Vance*, 140 S. Ct. 2412 (2020). *See* NYSCEF Doc. Nos. 49, 110.

By September 8, 2020, Trump faced a choice: either engage in discovery or appeal the denial of a stay. Instead, Trump induced the Department of Justice (DOJ) to intervene. At his urging, DOJ removed this case to federal court and sought to substitute the United States as defendant. *See* Dist. Ct. Doc. No. 3. The hook for that maneuver was the Westfall Act, which allows the United States to be sued for money damages in federal district court in certain circumstances. *See* 28 U.S.C. § 1346(b)(1). If a plaintiff sues a federal employee instead of suing the United States, the United States may move to substitute itself for that employee upon the Attorney General's (judicially reviewable) certification that the employee was "acting within the scope of his [federal] office or employment." 28 U.S.C. § 2679(d)(2).

Although Westfall Act removals are commonplace (*e.g.*, in cases involving car accidents caused by U.S. Postal Service employees), the circumstances here were exceedingly irregular. DOJ intervened ten months after the state court action was first filed, during which time neither Trump nor DOJ made "any suggestion that the government of the United States had anything whatever to do with [the case]." *Carroll v. Trump*, No. 20 Civ. 7311, 2022 WL 6897075, at *1 (S.D.N.Y Oct. 12, 2022). Attorney General William Barr later confirmed that DOJ had intervened at Trump's urging. *See* Katie Benner & Charlie Savage, *White House Asked Justice*

Dept. to Take Over Defamation Suit Against Trump, Barr Says, N.Y. Times (Sept. 9, 2020). And in a prior case where a President faced defamation claims based on his reaction to revelations of prior sexual misconduct, DOJ never suggested that the matter implicated the Westfall Act. *Cf. Clinton v. Jones*, 520 U.S. 681, 685 (1997).

DOJ's removal petition in this case presented the question whether Trump was covered by the Westfall Act—and, if so, whether he had committed his tortious acts within the scope of his employment. Following briefing and a hearing (where DOJ declined to present argument), Judge Kaplan denied DOJ's motion to substitute itself as the defendant. *Carroll v. Trump*, 498 F. Supp. 3d 422, 457 (S.D.N.Y. 2020). He based this decision on two grounds: *first*, that the Westfall Act does not cover the President; and *second*, that Trump had acted outside the scope of his employment under District law, thereby forfeiting any Westfall Act protections. *Id.* at 443, 457.

In analyzing these issues, Judge Kaplan noted the awkwardness of applying scope-of-employment concepts to this case. Ordinarily, a principal can be held liable for certain acts by his agent (acts within the "scope of employment") because the principal can "control and direct the servant in the performance of his work and the manner in which the work is to be done." *Id.* at 448. But here, "holding that [Trump] is a 'servant' whom a 'master' 'has the right to control and direct' when he speaks to reporters, or otherwise, would be absurd." *Id.* Judge Kaplan elaborated: "No one

gives him permission to speak. No one can require him to say, or not to say, anything at all. No one has the authority to cut him off." *Id.* at 450.

More fundamentally, Judge Kaplan found that Trump had acted outside the scope of his employment because his conduct was "too little actuated by a purpose to serve the master." *Id*. As he explained: "President Trump's comments concerned media reports about an alleged sexual assault that took place more than twenty years before he took office. Neither the media reports nor the underlying allegations have any relationship to his official duties." *Id.* at 455-56. Thus, "the undisputed facts demonstrate that President Trump was not acting in furtherance of any duties owed to any arguable employer when he made the statements at issue." *Id.* at 457.

Trump and DOJ appealed Trump subsequently sought a stay, which was denied. Dist. Ct. Doc. No. 56. Months later, Trump sought leave to amend his answer to allege a counterclaim against Carroll. Dist. Ct. Doc. No. 64. Judge Kaplan denied that motion, too, observing that Trump's "litigation tactics have had a dilatory effect and, indeed, strongly suggest that he is acting out of a strong desire to delay any opportunity [Carroll] may have to present her case against him." *Carroll v. Trump*, 590 F. Supp. 3d 575, 588 (S.D.N.Y. 2022). Ultimately, the parties agreed to a discovery schedule. Dist. Ct. Doc. Nos. 76-77.

Meanwhile, the Second Circuit heard argument on December 3, 2021. There, Judge Guido Calabresi expressed confusion over the District's standard for scope-

of-employment analysis, and all three judges on the panel explored District law concerning employee action driven by private (as opposed to job-related) motives.

On September 27, 2022, a divided panel of the Second Circuit issued its decision. *See Carroll v. Trump*, 49 F.4th 759 (2d Cir. 2022). The majority (Judges Calabresi and William Nardini) held that the Westfall Act does apply to the President and certified to this Court the question whether Trump's defamatory statements targeting Carroll occurred within the scope of his federal employment. *See id*. at 780.

In dissent, Judge Denny Chin saw "no question that Trump was acting outside the scope of his employment when he made at least some of the alleged defamatory remarks about Carroll's accusations." *Id.* at 789. "In the context of an accusation of rape, the comment 'she's not my type' surely is not something one would expect the President of the United States to say in the course of his duties." *Id.* Together, "Carroll's allegations plausibly paint a picture of a man pursuing a personal vendetta against an accuser, not the United States' 'chief constitutional officer' engaging in 'supervisory and policy responsibilities of utmost discretion and sensitivity.'" *Id.*

The day after the Second Circuit issued its opinion, Trump filed a third motion to stay the proceedings. Dist. Ct. Doc. No. 92. Judge Kaplan denied this motion as well, finding that Trump "should not be permitted to run the clock out on [Carroll's] attempt to gain a remedy for what allegedly was a serious wrong." *Carroll*, 2022 WL 6897075, at *6. Fact and expert discovery in the district court have since closed.

On October 25, 2022, this Court (proceeding *en banc*) accepted the Second Circuit's certified question and established a briefing schedule for the parties.

On November 24, 2022, Carroll filed a second action against Trump, in which she alleges one count of battery under New York law for the underlying rape and one count of defamation for a series of statements that Trump posted on Truth Social in October 2022. *See Carroll v. Trump*, No. 22 Civ. 10116 (S.D.N.Y.).

On November 29, 2022, recognizing this Court's expedited consideration of the appeal, Judge Kaplan set a trial date of April 10, 2022. Dist. Ct. Doc. No. 100.

STANDARD OF REVIEW

The Second Circuit has certified a question of law that the Court addresses *de novo*. *See Rivera v. Lew*, 99 A.3d 269, 271 (D.C. 2014); *see also Carroll*, 49 F.4th at 772 ("[W]e review the scope of employment issue *de novo*.").

SUMMARY OF ARGUMENT

The certified question asks this Court to decide whether Trump acted outside the scope of his employment in repeatedly defaming Carroll after she revealed that he had raped her decades before being elected to office. The Court should provide a direct answer to that question—and should make clear that Trump's conduct placed him beyond the scope of his employment. In doing so, the Court can address the Second Circuit's general uncertainty about District law, the proper understanding of

that law in this particular context, and the error in Trump and DOJ's request for this court to adopt a new, categorical rule applicable only to elected public officials.

I. Because the question here is whether Trump acted with private motives in defaming Carroll, the Court need not undertake a general definition of the scope of the President's employment.

II. Trump's defamatory statements targeting Carroll after she revealed that he had raped her were outside the scope of his employment as President: he acted with private motives, and not in furtherance of any official federal purpose or function, in seeking to punish and humiliate Carroll for revealing his decades-old crime.

II.A. The Second Circuit asked this Court to clarify whether, under District law, an employee's motives for tortious conduct can place him outside the scope of his employment. The answer to that question is "yes." Through most of the twentieth century, this Court consistently held that employees act outside their employment if they lack a purpose to serve their employer. Nearly four decades ago, this Court briefly considered an alternative approach (which the Second Circuit referred to as "internalization") that would prioritize the foreseeability of employee conduct and treat employee motives as irrelevant. But the Court almost immediately returned to its traditional emphasis on employee motivation. Ever since, it has adhered to the widely accepted rule that an employee acts outside the scope of his employment if

he is too little actuated by a job-related purpose in committing an intentional tort. The Court should confirm that this remains the law of the District.

II.B. The Second Circuit also asked this Court to clarify how its legal standard applies here. Because of the appeal's unusual procedural posture, that is a question of law. Given the Second Circuit's admission of uncertainty and the undue delays that have already plagued this case, the Court should reach that issue directly and hold that Trump acted outside the scope of his employment in repeatedly defaming Carroll. That conclusion, which has already been endorsed by Judges Chin and Kaplan, follows from the undisputed facts and from the application of precedent identifying indicia of personal motivation in the scope-of-employment setting.

II.C. Trump and DOJ, largely ignoring the facts of this case and the issues as framed by the Second Circuit, urge this Court to adopt a categorical rule that whenever an elected official speaks publicly on any matter of public concern, he is acting within the scope of his employment. This approach should be rejected: it defies core precepts of *respondeat superior* jurisprudence, offends our constitutional traditions, and is unsupported by (indeed, it is inconsistent with) precedent.

ARGUMENT

I. THIS COURT NEED NOT DEFINE THE SCOPE OF EMPLOYMENT FOR THE PRESIDENT OF THE UNITED STATES

The Court has directed the parties to address the necessity of opining on "the scope of the President of the United States' employment." Order, *Trump v. Carroll*,

No. 22-SP-0745 (D.C. 2022). We believe that this is unnecessary; the Court can and should resolve this appeal without comprehensively defining the precise bounds of the President's employment. For purposes of the *respondent superior* analysis at issue here, the question is not whether Trump engaged in an act that by its very nature is beyond the scope of the President's employment. Instead, the only question is whether Trump's conduct—as alleged by Carroll in the Complaint—was too little actuated by a job-related purpose. The answer to that question turns on Trump's own motives (as evidenced by the nature and particular circumstances of his conduct), and on the distinction between personal and employment-related motives that has been applied in a wide range of *respondeat superior* cases for over a century.

That said, Trump and DOJ urge this Court to adopt a new, categorical rule that would effectively exempt the President (and other officials) from the standard scope-of-employment test. As we explain in Part II.C below, that proposal is meritless as a matter of agency law and inconsistent with constitutional traditions.

II. TRUMP'S DEFAMATORY STATEMENTS TARGETING CARROLL WERE OUTSIDE THE SCOPE OF HIS FEDERAL EMPLOYMENT

The Second Circuit has asked this Court to address whether Trump's repeated defamatory attacks on Carroll were undertaken within the scope of his employment. It certified that *respondeat superior* issue based partly on its belief that District law is torn between "two competing views." *Carroll v. Trump*, 49 F.4th 759, 776 (2d Cir. 2022). On one view, an employee acts outside the scope of employment where

he is "too little actuated by a purpose to serve the master." Restatement (Second) of Agency § 228 (1958). On the other view, when an employee's acts result from any foreseeable risks of running a business, their conduct is treated as within the scope of employment, thus forcing the employer to internalize all costs connected to its enterprise. *See Carroll*, 49 F.4th at 773-74. Importantly, an employee's state of mind when committing a tort can remove him from the scope of his employment under the Restatement approach, but not under a pure internalization approach.

As the Second Circuit recognized, this Court has expressly held that the District adheres to the Second Restatement. But looking mainly to a handful of cases from the mid-1980s, the Second Circuit asked this Court to clarify whether it had *sub silentio* abandoned the Restatement in favor of internalization.

In their briefs, Trump and DOJ largely ignore this question. Rather than address the general rule of *respondeat superior* liability in the District, they devote their attention to a different argument: namely, that there is a new and distinct rule of *respondeat superior* liability that they say applies only to certain high-ranking or elected public officials. Under this supposed rule, whenever such officials address the public on a matter of public concern, they are categorically held to have acted within the scope of their employment—without any consideration of motive or context. Trump and DOJ impute this rule to a few D.C. Circuit cases and to a single District precedent: *District of Columbia v. Jones*, 919 A.2d 604 (D.C. 2007), which

did not address any scope-of-employment issue (indeed, the phrases "scope of employment" and "*respondeat superior*" appear nowhere in the *Jones* opinion).

We first describe the general rule of *respondeat superior* doctrine in the District. We then apply that general rule in these particular circumstances. And we conclude by explaining the substantial errors in Trump and DOJ's position.

A. This Court Should Confirm the Rule that an Employee's Motive for Tortious Conduct is Crucial to Scope-of-Employment Analysis

The Second Circuit asked this Court to clarify District law concerning the general standard for *respondeat superior*. The Court should reaffirm its century-old adherence to the rule that an employee acts outside the scope of his employment if (at the moment he engaged in his tortious conduct) he was too little actuated by a purpose to serve his employer. This fact-intensive and context-sensitive rule is not only the longstanding law of the District, but it also reflects sound public policy and constitutes the decisive majority view among American jurisdictions. The handful of older cases cited by the Second Circuit reflected only a short-lived, abortive foray into merging internalization and Restatement concepts. More modern cases from the District have made clear that an employee's purposes remain central to the inquiry.

1. The Early Development of *Respondeat Superior* Law in the District Identified Employee Intent as a Key Consideration

In 1909, agents of the Washington Gaslight Company suspected that Anna Axman was stealing gas. So they broke into her house to inspect her gas meter. In

response, Axman sued their employer. That course of events led to an early pronouncement on *respondeat superior* law. *See Axman v. Washington Gaslight Co.*, 38 App. D.C. 150 (D.C. Cir. 1912). There, the court sought to strike a balance. On the one hand, if an employee's "recklessness or lack of judgment cause[s] loss or damage" while carrying out his employer's business, the employer who "selected and commissioned him" should be held accountable. *Id.* at 158. On the other hand, "the moment the agent turns aside from the business of the principal and commits an independent trespass, the principal is not liable." *Id.* Thus, employers could not be held liable where their employees acted in furtherance of "some real or fancied personal grievance," rather than to further their employer's business. *Id.* at 159.

Over the following decades, the D.C. Circuit issued several opinions building on *Axman*. In *Grimes v. B.F. Saul Co.*, 47 F.2d 409, 410 (D.C. Cir. 1931), it held that *respondeat superior* did not apply where a janitor employed by a real estate business assaulted a tenant in her apartment. The court reasoned that "[t]he act of a servant done to effect some independent purpose of his own and not with reference to the service in which he is employed, or while he is acting as his own master for the time being, is not within the scope of his employment so as to render the master liable therefor." *Id.* (citation omitted). This same principle controlled in *Park Transfer Co. v. Lumbermens Mut. Cas. Co.*, 142 F.2d 100 (D.C. Cir. 1944), which concerned a construction company's liability for an assault by one of its workers

who had been provoked with racist slurs. Citing *Axman* and *Grimes*, the court held the worker was outside his employment: "unless an assault, or other tort, is actuated in part at least by a purpose to serve a principal, the principal is not liable." *Id.*

In 1958, the Restatement (Second) of Agency arrived on the scene and described four independent requirements of an employee's conduct, each of which must be met to trigger *respondeat superior* liability: "(a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; (c) *it is actuated, at least in part, by a purpose to serve the master*, and (d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master." § 228 (emphasis added). In other words, "[c]onduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or *too little actuated by a purpose to serve the master*." *Id.* (emphasis added). The Second Restatement thus treated employee motivation as central to any scope-of-employment determination.

The Second Restatement's approach closely tracked existing District law—and the District deepened its commitment to that view over the following decades. *See District of Columbia v. Bamidele*, 103 A.3d 516, 525 n.6 (D.C. 2014) ("We have long endorsed the Second Restatement's approach."). In case after case, this Court explained that an employee acts outside the scope of his employment if he was too little actuated by a job-related purpose. *See Meyers v. Nat'l Detective Agency, Inc.*,

281 A.2d 435, 437 (D.C. 1971); *District of Columbia v. Davis*, 386 A.2d 1195, 1203 (D.C. 1978); *Waldon v. Covington*, 415 A.2d 1070, 1074 n.13 (D.C. 1980).

That rule flowed from sound public policy concerns. *Respondeat superior* developed from the premise that employers should have to bear the costs of conduct committed for their benefit. *See Axman*, 38 App. D.C. at 158. This is both fair and efficient: employers are morally and financially on the hook when conduct carried out at their direction (and for their benefit) causes harm to third parties. In practice, that rule pushes employers to exercise care in managing and supervising employees.

The calculus changes, however, when an employee acts largely on personal motives. In those cases, the employer is ill-equipped to prevent his conduct. *See* William M. Landes & Richard A. Posner, *The Economic Structure of Tort Law* 208-09 (1987) ("If the employee is actuated by purely personal motives, the employer's practical ability to prevent the tort will be slight."). The economic and moral arguments for imposing liability in such circumstances are correspondingly frail. *See* Restatement (Third) of Agency § 7.07 cmt. b. (2006). Therefore, courts (including this one) hold that employees who are "too little actuated" by job-related motives have acted outside the scope of their employment under *respondeat superior*.

2. From 1976 to 1986, this Court Revisited its *Respondeat Superior* Doctrine but Adhered to the Restatement

Through 1976, this Court stated many times that purpose was crucial to its analysis. In the Second Circuit's view, however, this Court muddied the waters in a

series of decisions issued between 1976 to 1984. But a chronological review of those decisions makes clear that the District's flirtation with internalization was partial and short lived. By the late 1980s, the District's adherence to the Restatement stood firm.

That story begins with *Lyon v. Carey*, 533 F.2d 649 (D.C. Cir. 1976)—an opinion issued by the D.C. Circuit, not by this Court. There, a mattress deliveryman had raped a customer after a dispute arose during a delivery. *Id.* at 650. Admitting that "the assault was perhaps at the outer bounds of *respondeat superior*," the court nonetheless concluded that the scope-of-employment issue should be decided by a jury, rather than by a judge. *Id.* at 651. It reasoned that the "dispute arose out of the very transaction which had brought [the employee] to the premises" and "out of the employer's instructions to get cash only before delivery." *Id.* at 652. On that basis, it believed a jury could potentially find that deliveryman's actions were not part of a "personal adventure," but instead reflected a job-related motivation. *Id.* at 651. As the Second Circuit noted in *Carroll*, this decision tended toward imposing employer liability for *any* foreseeable employee misconduct (*i.e.*, an internalization approach).

Three years later, this Court issued a more wide-ranging opinion on these issues: *Penn Central Transportation Co. v. Reddick*, 398 A.2d 27 (D.C. 1979). *Penn Central* involved a railroad employee who had attacked a taxi driver when the driver said he needed to use the restroom before departing. *See id.* at 29. The Court held that he had acted outside the scope of his employment. In doing so, it described the

traditional Restatement view and a "present trend [to] extend liability for intentional torts to situations where the employment provides a 'peculiar opportunity and … incentive for such loss of temper." *See id.* at 30-31. However, even for the latter approach, the Court treated motives as crucial: "The employer will not be held liable for those willful acts, intended by the agent only to further his own interest, not done for the employer at all." *Id.* at 31 (cleaned up). Ultimately, the Court seemed to apply *both* modes of analysis, holding on the one hand that the attack suggested a "personal as distinguished from business-related motive," but also that it was not foreseeable as "a direct outgrowth of the employee's instruction or job assignment, nor an integral part of the employer's business activity, interests or objectives." *Id.* at 32.

Two years later, in *Johnson v. Weinberg*, this Court followed *Lyon* in stepping toward an internalization model. *See* 434 A.2d 404 (D.C. 1981). There, a laundromat had directed its employees to empty out washing machines after each cycle. *Id.* at 406. When a customer lost his shirts and confronted an employee, the employee shot the customer. *Id.* In analyzing whether the laundromat itself could be held liable, this Court began with the Restatement, but suggested that if an employee's intentional tort resulted from any foreseeable job-related controversy, he was within the scope of his employment. *See id.* at 408-09. Relying on that logic—and citing the absence of any relationship between the customer and the employee that might suggest "that the tort was personal"—the Court held this to be an issue for the jury. *Id.* at 409.

The zenith of this Court's trend toward a pure foreseeability analysis came in *Howard University v. Best*, 484 A.2d 958 (D.C. 1984). There, a former professor alleged that a dean had sexually harassed her on multiple occasions, including in front of other faculty members and during official meetings. *Id.* at 981-82. This Court devoted merely two paragraphs in a 27-page opinion to analyzing her claim that the University itself should be held liable. In those two paragraphs, it did not disavow the relevance of motives; instead, it reasoned only that the dean had acted within his employment because "many of the incidents of alleged sexual harassment occurred during faculty, administrative or other professional meetings." *Id.* at 987.

The Second Circuit's certification to this Court cited *Lyon*, *Penn Central*, *Johnson*, and *Best* as reflecting confusion in District law. In its view, these cases leaned toward treating motive as irrelevant to the scope-of-employee analysis. But this Court never went so far: it consistently adhered to the Second Restatement approach while in some cases privileging foreseeability as a paramount concern. The relevance of foreseeability was most clear when (unlike in this case) the employer exercised direct supervision and control over the relevant employee, and when the employer was positioned to take steps to avoid tortious conduct by his employees.

Importantly, however, none of these cases actually rejected a motive-based analysis. And in the years that followed, the Court recalibrated its jurisprudence, returning to the Restatement standard and affirming that motive remains crucial.

That retrenchment began as early as 1983, when then-Judge Antonin Scalia (joined by Judges Abner Mikva and Harry T. Edwards) provided a broad survey of District law in *Jordan v. Medley*, 711 F.2d 211 (D.C. Cir. 1983). Remarking on the recent invocation of foreseeability, Judge Scalia described District law as "less than entirely clear." *Id.* at 213. "It is possible," he wrote, "to apply this 'foreseeability' principle as a substitute for the requirement of intent to further the employer's business." *Id.* But that interpretation struck him as mistaken: foreseeability analysis had not, in practice, displaced motive; instead, it had liberalized a distinct part of the *respondeat superior* inquiry concerned with how closely the employee's act was connected to the employer's business. *See id. at* 214-15. On that basis, he held that District law adhered to the rule that an employee is beyond the scope of employment when acting for personal reasons rather than to further an employer's interests. *Id.*

One year later—and three weeks after the *Best* decision—this Court made clear that it agreed with *Jordan*. In *Boykin v. District of Columbia*, which concerned a school's liability for sexual misconduct by a teacher, the Court held that *Johnson* "approaches the outer limits of the liability that may be imposed under *respondeat superior*." 484 A.2d 560, 563 (D.C. 1984). It then narrowed and distinguished *Lyon*, as well. *See id.* at 563-64. Finally, it "agree[d]" with *Jordan*'s observation that "an approach that would substitute foreseeability for intent to further the employer's

business" would be "inconsistent with previous cases in this jurisdiction." *Id.* at 563 n.2; *see also id.* (emphasizing that *Johnson* itself did not actually adopt that rule).

Two years later, the Court doubled down on that position in *District of Columbia v. Coron*, 515 A.2d 435 (D.C. 1986). *Coron* invoked the Restatement as "clarify[ing] conduct that is not within the scope of employment," and held that the employee at issue had acted outside the scope of his employment because "at no time was [his] conduct in furtherance of [his employer's] interests." *Id.* at 437-38.

Chronology thus helps to clarify the Second Circuit's confusion about District law. In the late 1970s and early 1980s, the Court partly embraced a more expansive view of "scope of employment," drawing on ideas (like foreseeability) associated with internalization. In doing so, however, it merged those concerns with its longstanding commitment to an approach modeled by the Second Restatement (but dating back even earlier), which assigned heavy weight to whether the employee was too little actuated by a purpose to serve the master. Then, in a series of decisions issued from 1984 to 1986, the Court made clear that it had recalibrated its doctrine back to the settled Restatement model, which remains the law of the District.

3. Recent Cases Confirm that the District Adheres to the Restatement and Treats Employee Motives as Crucial

Since the 1980s, this Court has developed a stable and consistent approach to scope-of-employment analysis—one that follows the familiar Second Restatement model and subjects employee motives to fact-intensive scrutiny. Applying that

approach, this Court has rejected a view of scope of employment that would cover virtually all employee conduct. Indeed, over the past 21 years, this Court has *never* held that an employee's tortious conduct fell within the scope of employment as a matter of law. Instead, the Court has held either that the employee's conduct was clearly beyond the scope of employment, or that this was a fact question to be decided by a jury. And in each case, the Court has assigned substantial weight to the employee's motive for engaging in the alleged tortious conduct. *See, e.g.*, *Blair v. District of Columbia*, 190 A.3d 212, 226 (D.C. 2018); *District of Columbia v. Bamidele*, 103 A.3d 516, 525 (D.C. 2014); *Schecter v. Merchants Home Delivery, Inc.*, 892 A.2d 415, 428 (D.C. 2006); *Herbin v. Hoeffel*, 886 A.2d 507, 509 (D.C. 2005); *Brown v. Argenbright Sec., Inc.*, 782 A.2d 752, 758 (D.C. 2001).

Two of the Court's most recent *respondeat superior* cases—both involving off-duty police officers—illustrate that approach. *District of Columbia v. Bamidele* involved off-duty officers who got into an altercation at a restaurant and, during the ensuing mayhem, attacked another patron. *See* 103 A.3d at 519. This Court held that they had acted outside the scope of their employment in doing so, relying on the rule that "conduct of a servant that is too little actuated by a purpose to serve the master is not within the scope of employment." *Id.* at 525 (cleaned up). Confirming its pivot from *Johnson* and *Howard*, the Court further clarified that its inquiry into the employees' motives was independent of any foreseeability analysis—and that, "at

least where intentional torts are concerned, it is not enough that an employee's tortious activity occurs while he is on duty, or even that those duties bear some causal relationship to the tort." *Id.* Because the off-duty officers did not intend to take police action against the plaintiffs, and instead assaulted them as vengeance for a perceived personal affront, they had not acted within the scope of their employment. *Id.* at 526.

Four years later, in *Blair v. District of Columbia*, the Court applied the same legal framework where an off-duty officer (working as a bouncer at a bar) used force against a patron after identifying himself as an officer and instructing that patron to leave the premises. 190 A.3d at 216. Like *Bamidele*, *Blair* identified motivation and foreseeability as distinct requirements—and held that "[t]o be within the scope of employment, the tortious activity must be actuated, at least in part, by a purpose to further the master's business." *Id.* at 226 (cleaned up). On the facts before it, the Court concluded that a reasonable jury could find that the officer's "professional and personal motives for his actions toward [the patron] were significantly intertwined," and therefore reversed a grant of summary judgment. *Id.* at 227-29.

Together, *Bamidele* and *Blair* make clear that scope-of-employment analysis in the District requires a context-sensitive analysis of the employee's motives for his tortious conduct. These cases also confirm that where an employee is "too little actuated" by a purpose to serve their employer, they are outside the scope of their employment as a matter of law. And it follows from these cases, as well as the others

cited above, that the District does not adhere to an internalization approach. While Carroll believes this is already clear, confirming these points would respond to a significant aspect of the Second Circuit's confusion about District law.[2]

In that vein, the Court might use this opportunity to offer one point of further clarification. Over time, the Court has used varied formulations to describe how the purpose requirement should be applied. In some cases, it has stated that if even a mere iota of an employee's motives for a tort were job-related, then the employee acted within the scope of his employment. *E.g.*, *Blair*, 190 A.3d at 228. Elsewhere, and consistent with the text of the Second Restatement, the Court has highlighted the "too little actuated" standard (which was invoked by the district court in this case)—and has further held that an employee's intentional tort is not within the scope

[2] The Second Circuit identified *Hechinger Co. v. Johnson*, 761 A.2d 15 (D.C. 2000), and *Brown v. Argenbright Security, Inc.*, 782 A.2d 752 (D.C. 2001), as cases that "stretched employer benefit very far." *Carroll*, 49 F.4th at 779. Respectfully, that is mistaken. *Hechinger* concerned a challenge to a jury verdict, and this Court held only that a reasonable jury could find that a supervisor acted within the scope of his employment in pushing a patron amid a heated altercation about whether the patron was entitled to certain items for free. 761 A.2d at 25. *Brown* concerned a security guard who improperly touched a woman while searching her; it held only that the scope-of-employment issue had to go to a jury, since "[w]hile it is probable that the vast majority of sexual assaults arise from purely personal motives," this guard may have had job-related reasons for how he searched a suspected shoplifter. 758 A.2d at 758. Both *Hechinger* and *Brown* reflect a straightforward application of the Second Restatement standard and neither altered settled District law. *Cf. Mathis v. United States*, 579 U.S. 500, 514 (2016) ("[A] good rule of thumb for reading our decisions is that what they say and what they mean are one and the same.").

of employment merely because his employment afforded the opportunity or means to pursue a fundamentally personal motive. *E.g.*, *Bamidele*, 103 A.3d at 525-26.[3]

In practice, this is often a distinction without a difference. Here, for instance, the record supports a finding that Trump acted outside the scope of his employment under either standard. If the Court agrees, it need not go any further.

But if the Court finds that the difference matters, it should not apply an unduly expansive view of Trump's scope of employment here, for reasons arising from the fundamental policies that animate this doctrine. As explained above, *respondeat superior* reflects the principle that an employer—who controls and supervises an employee—should be held responsible when its employee harms third parties while engaged in conduct for the employer's benefit. This case, however, defies that principal-agent logic. As Judge Kaplan observed, the employer here (the American electorate) has virtually no direct supervisory power or control over its employee (the President), and it is poorly positioned to take any concrete steps to avoid or sanction that employee's tortious actions. *See Carroll v. Trump*, 498 F. Supp. 3d 422, 450 (S.D.N.Y. 2020) ("No one even arguably directed or controlled President Trump when he commented on the plaintiff's accusation, which had nothing to do

[3] The Restatement (Third) of Agency § 7.07 (2006) proposed restating the scope-of-employment inquiry as whether the employee committed "an independent course of conduct not intended by the employee to serve any purpose of the employer." Since then, this Court has on numerous occasions adhered to the Second Restatement, which remains a widely accepted authority. *See, e.g.*, *Bamidele*, 103 A.3d at 525.

with the official business of government, that he raped her decades before he took office. And no one had the ability to control him."). As a result, the understanding of employer control that ordinarily frames scope-of-employment analysis is on shaky footing when applied in this particular employment context. Moreover, this case does not involve mere negligence, but instead involves an intentional tort—which, by its nature, is more likely to evade employer control. *See Majano v. United States*, 469 F.3d 138, 141 (D.C. Cir. 2006) (explaining that an intentional tort "by its nature is willful and thus more readily suggests personal motivation").

In these circumstances, it is logical and fair to ask whether job-related motives in fact contributed in some material respect to Trump's tortious conduct. Therefore, if necessary to resolve the issues presented here, the Court should clarify that Trump acted outside his employment if he was "too little actuated" by job-related motives.

4. The Vast Majority of Jurisdictions Similarly Treat Employee Motive as Crucial to Scope-of-Employment Analysis

For the reasons given above, this Court should confirm that an employee acts outside the scope of their employment when their intentional tortious conduct is too little actuated by a purpose to serve the master. Recognizing that this Court has at times looked to the law of other jurisdictions, it bears emphasis that such a holding would keep this Court aligned with the strong majority of state courts, which either

expressly state that rule or incorporate it through the Second Restatement.[4] *See* Catherine M. Sharkey, *Institutional Liability for Employees' Intentional Torts: Vicarious Liability As A Quasi-Substitute for Punitive Damages*, 53 Val. U. L. Rev. 1, 12 (2018) ("The majority position [among states] is that intentional torts are only within the scope of employment when committed to serve the employer's interest.").

Like this Court did in the 1980s, many courts have considered and then rejected a pure internalization approach. *E.g.*, *Patterson v. Blair*, 172 S.W.3d 361,

[4] *See, e.g.*, *Synergies3 Tec Servs., LLC v. Corvo*, 319 So. 3d 1263, 1273 (Ala. 2020); *Engler v. Gulf Interstate Eng'g, Inc.*, 280 P.3d 599, 601-02 (Ariz. 2012); *Grease Monkey Int'l, Inc. v. Montoya*, 904 P.2d 468, 472 (Colo. 1995); *Fiano v. Old Saybrook Fire Co. No. 1, Inc.*, 209 A.3d 629, 635 (Conn. 2019); *Sherman v. State Dep't of Pub. Safety*, 190 A.3d 148, 157 (Del. 2018); *Clo White Co. v. Lattimore*, 590 S.E.2d 381, 382-83 (Ga. 2003); *Nava v. Rivas-Del Toro*, 264 P.3d 960, 964 (Idaho 2011); *State v. Hoshijo ex rel. White*, 76 P.3d 550, 562-63 (Haw. 2003); *Giudicessi v. State*, 868 N.W.2d 418, 421-24 (Iowa Ct. App. 2015); *Antonio v. SSA Sec., Inc.*, 110 A.3d 654, 658 (Md. 2015); *Hamed v. Wayne Cnty.*, 803 N.W.2d 237, 244 (Mich. 2011); *Plains Res., Inc. v. Gable*, 682 P.2d 653, 661 (Kan. 1984); *Dragomir v. Spring Harbor Hosp.*, 970 A.2d 310, 314 (Me. 2009); *Burroughs v. Com.*, 673 N.E.2d 1217, 1219 (Mass. 1996); *Parmenter v. J & B Enterprises, Inc.*, 99 So. 3d 207, 216 (Miss. App. Ct. 2012); *L.B. v. United States*, 515 P.3d 818, 825 (Mont. 2022); *Strong v. K & K Invs., Inc.*, 343 N.W.2d 912, 916 (Neb. 1984); *Porter v. City of Manchester*, 921 A.2d 393, 399 (N.H. 2007); *Spurlock v. Townes*, 368 P.3d 1213, 1216 (N.M. 2016); *Aldridge v. Metro. Life Ins. Co.*, No. 18 CVS 1050, 2019 WL 7374878, at *20 (N.C. Super. Ct. Dec. 31, 2019); *Sitton v. Massage Odyssey, LLC*, 158 N.E.3d 156, 159 (Ohio Ct. App. 2020); *Baker v. Saint Francis Hosp.*, 126 P.3d 602, 605-07 (Okla. 2005); *Harkness v. Platten*, 375 P.3d 521, 532 (Or. 2016); *Spitsin v. WGM Transp., Inc.*, 97 A.3d 774, 778 (Pa. Super Ct. 2014); *Pineda v. Chase Bank USA, N.A.*, 186 A.3d 1054, 1058-59 (R.I. 2018); *Kase v. Ebert*, 707 S.E.2d 456, 458 (S.C. Ct. App. 2011); *Bernie v. Catholic Diocese of Sioux Falls*, 821 N.W.2d 232, 238 (S.D. 2012); *Drew v. Pac. Life Ins. Co.*, 496 P.3d 201, 214 (Utah 2021); *Doe v. Forrest*, 853 A.2d 48, 54 (Vt. 2004).

366-69 (Ky. 2005); *Bratton v. Calkins*, 870 P.2d 981, 987 (Wash. Ct. App. 1994); *VECO, Inc. v. Rosebrock*, 970 P.2d 906, 924 n.36 (Alaska 1999); *Sandman v. Hagan*, 154 N.W.2d 113, 118-19 (Iowa 1967). Thus, to the extent the Second Circuit implied that internalization represents the prevailing approach, it was mistaken.

Accordingly, under District law—which follows the clear majority view—Trump acted outside the scope of his federal employment in committing a series of intentional torts against Carroll if he was too little actuated by a job-related purpose. As we will next explain, the allegations here overwhelmingly support that finding.

B. Trump Acted Outside the Scope of his Employment as President in Repeatedly Defaming and Insulting Carroll

The Second Circuit certified to this Court the question whether Trump's defamatory statements concerning Carroll were within the scope of his employment as President. This certification partly reflected uncertainty about the general standard for *respondeat superior*. But it also reflected uncertainty—expressed at argument—concerning how this Court defines private- versus employment-related motives and undertakes such inquiries. For that reason, and to facilitate a more expeditious resolution of the case (which has been pending for over three years and is otherwise ready for trial), the Court should directly resolve the certified question. Although scope-of-employment issues are ordinarily reserved for juries, here the scope issue presents a legal question properly decided by this Court: the relevant facts are undisputed, and the scope-of-employment issue must be resolved within judicial

review of the Westfall Act determination. *See Carroll* 49 F.4th at 772, 781; *see also Osborn v. Haley*, 549 U.S. 225, 251-52 (2007) (explaining lack of jury process).[5]

Under District law, the answer to the certified question is clear: Trump acted outside the scope of his federal employment when he repeatedly defamed Carroll as punishment for revealing that he had raped her decades earlier. Both federal judges in this case who actually reached the issue have agreed that Trump "was not serving any purpose of the federal government" in slandering Carroll. *Carroll*, 49 F.4th at 789 (Chin, J., dissenting); *see Carroll*, 498 F. Supp. 3d at 457 ("[T]he undisputed facts demonstrate that President Trump was not acting in furtherance of any duties owed to any arguable employer when he made the statements at issue.").

This conclusion flows directly from the factual record before the Court, which consists exclusively of the particularized factual allegations in the Complaint (since Trump and DOJ have not adduced any evidence of their own). *See* A44-48 ¶¶ 106-28. Although those allegations must be accepted as true for purposes of this appeal, Trump and DOJ hardly address them. To summarize: Trump knew exactly who Carroll was when he raped her, A44-45 ¶¶ 106-12; he knew in June 2019 that he had raped her and that his denials were false, A45 ¶¶ 113-15; he deliberately lied, and spoke with no concern for the truth, in accusing Carroll of fabricating her account of

[5] We are not aware of a case under the Westfall Act where the threshold scope-of-employment issue was submitted to a jury rather than decided by a court.

the rape in exchange for payment, or as part of a political conspiracy, or as a plot to increase book sales, A45-46 ¶¶ 116-18; he deliberately lied, or spoke with no concern for the truth, in implying that Carroll had falsely accused other men of sexual assault, A46 ¶¶ 118-19; he not only lied about her with full knowledge that he was lying, but he also doubled down on his retaliation by describing her as too ugly for him to have raped her, A42 ¶ 97; and he engaged in these personal attacks because they were his *modus operandi*—before and during his time in office—for responding to reports that he had sexually assaulted women, A46-48 ¶¶ 122-27.

At bottom, Trump "knew he was lying when he said that Carroll had fabricated her rape accusation for a hodgepodge of unsavory reasons that he himself had invented out of whole cloth." A48 ¶ 128. Trump insulted Carroll's appearance to advance that same underlying lie. A42 ¶ 97. And Trump did not attack Carroll intending to advance any federal interest. Instead, he lied to protect himself from the truth and to destroy Carroll for daring to speak up. After knowingly lying about his decades old criminal act, "he surrounded that central lie with a swarm of related lies in an effort to explain why [Carroll] would invent an accusation of rape." A26 ¶ 13.[6]

[6] The record on appeal is undisputed and closed. We note for the Court's awareness, however, that since the Second Circuit issued its decision, the parties have completed fact discovery, including depositions of both Trump and Carroll in which issues such as Trump's mental state when he made the alleged defamatory statements and the truth of the statements themselves were fully explored.

Reviewing this evidence, Judge Kaplan saw "no basis for concluding that a D.C. court would ignore the nature and context of [Trump's] statements and hold that anything he says is within the scope of his employment." *Carroll*, 498 F. Supp. 3d at 453. To the contrary: "A comment about government action, public policy, or even an election is categorically different than a comment about an alleged sexual assault that took place roughly twenty years before the president took office" and that plainly had no "relationship to [Trump's] official duties." *Id.* at 453, 456.

This conclusion is bolstered by four additional considerations, each reflecting tried-and-true judicial measures of personal motivation for intentional torts.

First, the nature and content of Trump's statements powerfully indicate a personal motive. Trump did not simply deny Carroll's claim. Instead, with full awareness of his lies, Trump used the loudest megaphone on the planet to launch a shockingly personal attack. He implied Carroll was too ugly for him to sexually assault; he implied that she had falsely accused other unknown men of rape; and he devised a malicious narrative under which Carroll lied to make money or increase book sales. A26 ¶ 11. If this is not evidence of personal ill will and spite, it is hard to imagine what would be. Trump sought to destroy and humiliate Carroll after she revealed that he had raped her decades ago. There is no basis here to find that Trump had any presidential obligation to make these statements, or that Trump did so to advance any federal purpose. *See Carroll*, 49 F.4th at 789 (Chin, J., dissenting).

The more natural conclusion—bolstered by this Court's precedents—is that Trump behaved "in an outrageous manner" and "inflict[ed] a punishment out of all proportion to the necessities of his master's business" because he had "departed from the scope of employment in performing the act." Restatement (Second) of Agency § 245 cmt. f. Where (as here), an employee "did not handle the situation in a manner expected" of his employment—and instead behaved like "an individual bent on personal vengeance for a perceived personal affront"—courts have not hesitated to find personal motivations. *See, e.g.*, *Coron*, 515 A.2d at 438. In *Penn Central*, for example, this Court found that the "violent and unprovoked nature of [an] attack indeed suggests a personal as distinguished from business-related motive." 398 A.2d at 32. And *Armstrong v. Thompson* applied District law to conclude that "an air of contempt and deprecation" in alleged defamatory statements strongly suggested "personal motives." 759 F. Supp. 2d 89, 95 (D.D.C. 2011). So too in this case.[7]

Second, Trump's conduct was not only outrageous, but it was intentional. Trump and DOJ gloss over the point, but it bears emphasis: Trump made each of these statements with actual malice—both literally and technically. *See Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 666 (1989). That willful state of

[7] To be clear, the point is not simply that Trump departed from how prior Presidents generally conducted themselves when accused of wrongdoing. It is that his behavior toward Carroll—which far exceeded any public purpose and seemed calculated to punish and retaliate against her for revealing his earlier private sexual misconduct—evinced every recognized hallmark of a personally motivated attack.

mind powerfully supports finding that he acted for personal reasons, rather than in furtherance of his job duties. As the D.C. Circuit has recognized, "it would be unusual to find, as a matter of law, that an employee was acting within the scope of her employment [under D.C. law] when she committed an intentional tort." *Majano*, 469 F.3d at 141; *accord Bamidele*, 103 A.3d at 525. As a presumptive matter, intentional torts do not further any employer interests—and certainly should not be treated as automatically advancing the interests of the government. Indeed, it would send a troubling message for the Court to find that Trump's repeated defamatory attacks on Carroll were simply part of his job. No court has ever held that officials enjoy total civil immunity for willfully slandering private citizens as retribution for revealing private misconduct that they committed before taking office.

Third, the prior dealings between Trump and Carroll, as well as the sexual nature of Trump's misconduct, further establish personal motivation. This case is very different from proceedings in which there was "no evidence that the employee and [his victim] had had previous dealings that would indicate that the tort was personal." *Boykin*, 484 A.2d at 563. As alleged, Trump raped Carroll. He knew who she was when he did it, and he knew who she was when he defamed her. That is exactly the kind of "previous dealing[]" that suggests personal motive—particularly in the context of sexual misconduct and associated defamatory statements, which often involve and evoke personal motivations. *See, e.g.*, *Brown*, 782 A.2d at 758;

Boykin, 484 A.2d at 563; *Grimes*, 47 F.2d at 410; *see also, e.g.*, *Perks v. Town of Huntington*, 251 F. Supp. 2d 1143, 1166-67 (E.D.N.Y. 2003); *Ross v. Mitsui Fudosan, Inc.*, 2 F. Supp. 2d 522, 531 (S.D.N.Y. 1998) ("New York courts consistently have held that sexual misconduct and related tortious behavior arise from personal motives and do not further an employer's business, even when committed within the employment context."); *Walters v. Homestaff Health Care*, No. Civ. 950146961S, 1996 WL 88058, at *1 n.1 (Conn. Super. Ct. Feb. 8, 1996).

Fourth, and finally, the personal nature of Trump's conduct is illuminated by its striking consistency with the personal attacks he has launched for decades (and continues to launch) against women who accuse him of sexual misconduct. *See* A46-47 ¶¶ 122-27; *see also Carroll*, 49 F.4th at 789 (Chin, J., dissenting) (noting that Trump "made these comments because they were part of his 'playbook' of public response to credible reports that he had assaulted women"). Simply put, Trump's attacks on Carroll did not reflect anything unique to his high office, nor did they arise from any distinctively presidential consideration. Rather, they followed directly from a *modus operandi* stretching back decades into his life as a private citizen. And he has persisted in that *modus operandi* since leaving office. In October 2022, Trump again defamed Carroll, denigrating her as not his "type" and claiming that her story was a "[h]oax and a lie" and a "scam" to "promot[e] a really crummy book." Donald J. Trump (@realDonaldTrump), Truth Social (Oct. 12, 2022, 10:38

PM). This stark consistency across time supports the conclusion that Trump's efforts to destroy and discredit Carroll were simply how he responds to any woman who accuses him of sexual abuse; they had nothing to do with any federal purpose.

Taken together, these considerations confirm what is clear from the face of Trump's statements: his attacks on Carroll, which sought to humiliate and punish her for revealing a crime he committed decades earlier, reflected "a man pursuing a personal vendetta against an accuser, not the United States' Chief Constitutional Officer engaging in supervisory and policy responsibilities of utmost discretion and sensitivity." *Carroll*, 49 F.4th at 789 (Chin, J., dissenting) (cleaned up).

Trump and DOJ contend that Trump's statements were job-related because they occurred while he spoke to the press. But this Court has long recognized that an employee can commit intentional torts outside the scope of his employment even "while he is on duty" and "even if those duties bear some causal relationship to the tort." *Bamidele*, 103 A.3d at 525; *see also Majano*, 469 F.3d at 142 ("[T]he key inquiry is the employee's intent at the moment the tort occurred."); *Schecter*, 892 A.2d at 427 ("[T]he moment the agent turns aside from the business of the principal and commits an independent trespass, the principal is not liable."). Here, as Judges Kaplan and Chin have concluded, that is exactly what happened. This Court should therefore answer the certified question by confirming under District law that Trump

acted beyond the scope of his employment when he targeted Carroll with repeated defamatory statements to punish and humiliate her.[8]

C. Appellants' Proposed Categorical Rule Conflicts with Settled District Jurisprudence and American Constitutional Traditions

Trump and DOJ have almost nothing to say about the District's *respondeat superior* precedents or (even more remarkably) the facts of this case. In their view, whenever an elected federal official "communicat[es] with the press and constituents on a matter of public concern," he is always automatically within the scope of his employment. DOJ Br. at 8; *accord* Trump Br. at 1 (asserting that "a public official's statements to the press definitively fall within the scope of employment").

This categorical position totally precludes any possibility that an elected federal official could act with purely (or decisively) personal motives while speaking publicly—no matter how private the subject matter, how unrelenting and incendiary the official's statements, how patently disconnected from any government business, or how plainly consistent with that official's prior personal conduct. Trump and DOJ

[8] Trump cites a few cases where juries found—or could reasonably have found—that an employee acted within the scope of his employment. Trump Br. at 25. None supports his position. In *Blair*, for instance, an off-duty police officer's "professional and personal motives" were "significantly intertwined" during an altercation outside a nightclub, largely because that officer had announced he was on duty, displayed his badge, and instructed people to leave the premises. *See* 190 A.3d at 216-17, 227-28. Even then, this Court left the issue for a jury. *See id.* at 229. In *Hechinger* the defendant pushed a patron amid a job-related dispute over the patron's right to take wood scraps from the store for free. *See* 761 A.2d at 25. These cases both involved much more powerful indicia of job-related motivation than are present here.

reason that public statements are always within an official's scope of employment because they may incidentally affect his perceived fitness to hold office. On that basis, Trump and DOJ ask this Court to announce a doctrine of categorical immunity for public officials, affording them *carte blanche* to use the public platform inherent in their office to defame any private citizen—anywhere, anytime, for any reason.

That categorical position is not (and should never be) the law. As we will show, it defies basic principles of *respondeat superior* jurisprudence, offends our constitutional traditions, and arises from a misreading of precedent. It is also wrong in a much deeper sense. No President should be heard to argue that he is free to willfully injure and punish a private citizen who revealed that he raped her because inflicting such punishment might incidentally help him politically. That reasoning dishonors the American Presidency and the rule of law—if anything, it most immediately calls to mind King Louis XIV's declaration, "L'état, c'est moi."

1. The Categorical Position Is Inconsistent with District Law

The first flaw in Trump and DOJ's position is that it defies District precedent (and the Second Restatement) by collapsing the settled, multi-factor standard for *respondeat superior* analysis into a single factor. As Trump and DOJ see it, the *only* relevant question is whether an official is speaking to the press about a matter of potential public concern. If so, they insist, the analysis is complete and the official was acting within the scope of their employment, since speaking to the public is the

type of thing that officials typically do as part of their jobs. But as this Court has repeatedly held, the fact that an employee is on duty (or is doing the kind of work he is employed to perform) is *never* the end of the inquiry. Instead, it is just one among several factors in a scope-of-employment analysis. *See Bamidele*, 103 A.3d at 525 ("It is not enough that an employee's tortious activity occurs while he is on duty, or even that those duties bear some causal relationship to the tort."); *see also Majano*, 469 F.3d at 142; *Armstrong*, 759 F. Supp. 2d at 94; *Brown*, 782 A.2d at 758; *Coron*, 515 A.2d at 438; *Boykin*, 484 A.2d at 563; *Penn Central*, 398 A.2d at 30.

Indeed, a central premise of the District's multi-factor *respondeat superior* analysis is that an employee might satisfy one factor (*e.g.*, his conduct "is of the kind he is employed to perform"), but still fall outside the scope of his employment because he does not satisfy others (*e.g.*, his conduct occurred beyond authorized space and time limits, or was motivated by personal interests). *See* Restatement (Second) of Agency § 228. Trump and DOJ thus offend a fundamental precept of the District's *respondeat superior* jurisprudence by advocating a categorical rule that writes off most of the relevant legal standard—including any consideration of the employee's purposes, which (as we explained above) has long ranked among the crucial features of scope-of-employment analysis in the District.[9]

[9] This Court has issued many opinions finding that individuals otherwise engaged in the customary duties of their position veered outside their employment because some

A related and equally fundamental flaw in Trump and DOJ's position is that it treats facts and context as totally irrelevant in defining employment for a whole category of employees. This would be unprecedented in District law, which has consistently applied a single fact-intensive standard to a wide range of settings. It would also defy the principle that "the determination of scope of employment is dependent upon the facts and circumstances of each case." *Penn Central*, 398 A.2d at 29. And it would collide with this Court's frequent admonition that "as a general rule, whether an employee is acting 'within the scope of his employment' is a question of fact for the jury." *Boykin*, 484 A.2d at 562. Accordingly, the Court should not accept Trump and DOJ's invitation to hold categorically (and as a matter of law) that the fact-intensive scope-of-employment test is automatically met whenever an elected official speaks in public, no matter the context and no matter his motives.

2. The Categorical Position Offends Constitutional Traditions

The arguments advanced by Trump and DOJ are not only inconsistent with *respondeat superior* doctrine; they are also offensive to our constitutional traditions.

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intentional tort they committed was motivated by private purposes. *M.J. Uline Co. v. Cashdan*, 171 F.2d 132 (D.C. Cir. 1948), offers a vivid example. There, a hockey player hit the puck at a bystander in the middle of a game. The district court instructed the jury that the player was acting within the scope of his employment, but the D.C. Circuit reversed, since he "may have been, at the moment when he struck the blow, completely indifferent to the work he was employed to do and actuated only by anger or hostility toward the man he tried to injure." *Id.* at 134.

There is no denying that the Presidency is a very broad job, and that one of the President's duties includes communicating with the public. *See Trump v. Vance*, 140 S. Ct. 2412, 2425 (2020); *Trump v. Hawaii*, 138 S. Ct. 2392, 2417-18 (2018). Trump and DOJ would extrapolate from this premise that every time the President (among others) communicates with the public, he is necessarily engaged in conduct bearing on his duties, and in that respect is within the scope of his employment.

But the Presidency is not boundless—and not every public statement by the President is an official act. In rejecting royal rule, the Framers rightly foresaw that Presidents would engage in private acts with private motives that might well violate the law. To address that risk, James Wilson emphasized in the ratification debates that "[f]ar from being above the laws," the President "is amenable to them in his private character as a citizen."[10] Consistent with Wilson's guidance, the Supreme Court has held that the President may face civil liability for private acts beyond the "'outer perimeter' of his official responsibility," *Nixon v. Fitzgerald*, 457 U.S. 731, 756 (1982); that he remains fully "subject to the laws for his purely private acts," *Clinton v. Jones*, 520 U.S. 681, 696 (1997); and that he can be investigated while in office for private crimes, *see Vance*, 140 S. Ct. at 2426-27. Time and again, the Court has declined to treat every act by the current President as an act by the Office of the

[10] James Wilson, Debates in the Convention of the State of Pennsylvania (Dec. 4, 1787), *in* 2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 480 (Jonathan Elliot ed., Washington, 2d ed. 1836).

Presidency. *See* Laurence H. Tribe, *American Constitutional Law* 631 (3d ed. 2000) (recalling that the President "is a person as well as an institution").

This rule reflects experience. In the earliest days of the Republic, Chief Justice Marshall saw that the demands of a President's "duties as chief magistrate" are not so "unremitting" as to consume "his whole time." *United States v. Burr*, 25 F. Cas. 30, 34 (Va. Cir. Ct. 1807). More recently, Trump insisted that aspects of his conduct while in office were entirely private, including profitable business deals with foreign nations and censoring critics on Twitter. Although Trump was mistaken that these claims freed him of legal constraint, these statements show that Trump subjectively understood himself as acting in a purely personal capacity—and as pursuing private motives—while dealing with the public throughout his tenure in office.[11]

Trump and DOJ thus go too far in contending that any public statement by a President on a matter of public concern is automatically within his employment.

[11] *See, e.g.*, Petition for Writ of Certiorari at 14, *Trump v. Knight First Amendment Institute*, No. 20-197 (U.S. Aug. 20, 2020) ("[B]locking third-party accounts from interacting with the @realDonaldTrump account is a purely personal action."); Mem. in Supp. of Mot. to Dismiss at 31, *District of Columbia v. Trump*, No. 17 Civ. 1596 (D. Md. Sept. 29, 2017) (arguing in Emoluments Clause litigation that President Trump was free to profit from private commercial transactions with foreign powers, so long as he did not receive "compensation for services rendered … in an official capacity or in an employment (or equivalent) relationship with a foreign government"); *see also* Br. of Donald J. Trump, *Trump v. United States*, No. 22-13005 (11th Cir. Nov. 10, 2022) (arguing—albeit unconvincingly—that classified documents created during Trump's tenure in office and taken to Mar-a-Lago from the White House should be considered "personal" rather than governmental records).

Indeed, Judge Amit Mehta of the D.C. District Court recently rejected a version of that claim in *Thompson v. Trump*, a civil suit arising from Trump's conduct on January 6, 2021. *See* 590 F. Supp. 3d 46, 84 (D.D.C. 2022). Moreover, DOJ itself took a position in that case at odds with its filing here: it argued that an elected federal official (Rep. Mo Brooks) had acted outside the scope of his employment when he spoke at the January 6 rally, reasoning that Brooks's statements at the rally (which were public statements on a matter of public concern) were not "actuated … by a purpose to serve" his employer. *See* Br. of U.S. at 8-19, *Swalwell v. Trump*, No. 21 Civ. 586 (D.D.C. July 27, 2021) (opposing Westfall Act certification).[12]

If accepted, Trump and DOJ's position would collapse a core distinction between the presidential office and its temporary occupant. That categorical view would not only depart from the constitutional plan, but would also conflict with the Supreme Court's intensely fact-dependent analysis in related doctrinal contexts. Consider, for example, how *Clinton v. Jones* addressed the defamation claim that Paula Jones had alleged against Clinton and his associates (including his press secretary). *See* 520 U.S. at 685. Rather than hold that Clinton automatically enjoyed immunity as to this claim—as would seem to follow from Trump and DOJ's categorical position here—the Supreme Court proceeded cautiously, noting only that

[12] Judge Mehta did not reach this issue because he held that the claims against Brooks were foreclosed by the First Amendment. *See Thompson*, 590 F. Supp. 3d at 125-26.

the defamation claim "arguably may involve conduct within the outer perimeter of the President's official responsibilities." *Id.* at 686. This modest observation reflects the Supreme Court's context-sensitive approach to the line between personal and presidential conduct, particularly where a president's private wrongs are at issue.[13]

For these reasons, too, the categorical position advocated by Trump and DOJ cannot be squared with our constitutional traditions concerning the Presidency.

3. The Categorical Position Is Unsupported by Precedent

Given the many flaws in their position, it is unsurprising that Trump and DOJ cannot identify any case that has endorsed it. Instead, they seek to attribute it to a single District case that in fact said nothing about *respondeat superior*, and to a couple of D.C. Circuit cases that are inapposite and distinguishable.

First consider District law: Trump and DOJ both cite *District of Columbia v. Jones*, which concerned a defamation claim by Marc Jones, former Deputy Chief of Staff to Mayor Anthony Williams. *See* 919 A.2d 604, 606 (D.C. 2007). Jones alleged that Williams defamed him in public statements responding to reports of official

[13] The position pressed by Trump and DOJ would have other nonsensical results. Imagine if a business-minded President appeared at one of his own privately-owned hotels and made false, unlawful statements about a competitor while urging listeners to stay at his hotel. Or consider a President who appeared at a campaign event and declared that he would publicly celebrate anybody who burned down his political opponent's private residence. Or take a President who publicly threatens his child's teacher to turn an "F" into an "A." In these scenarios, treating his conduct as automatically within the scope of his presidential employment—without any further analysis or consideration of motive—would be at odds with the rule of law.

misconduct in fundraising activities of the Mayor's Executive Office. *See id.* Williams sought dismissal based on absolute immunity. *See id.* at 610. Under settled District law, absolute immunity is very different than scope-of-employment analysis: "When determining whether an act qualifies for absolute immunity, the court *does not inquire* into an official's motives." *Id.* (emphasis added). Applying this rule, the Court held that Williams's motives for his statements were irrelevant. *See id.* at 610-11. It further held that Williams's statements—which concerned "Jones's performance on duty," "the Mayor's own knowledge of and responsibility for those actions," and "the conduct of persons serving in the Office of the Mayor"—were "within the 'outer perimeter' of [Williams's] duties." *Id.* at 608.

Jones has no bearing on this case. It did not involve *respondeat superior*; to the contrary, it involved a distinct legal doctrine that precludes any consideration of motive. Further, the statements at issue in *Jones* concerned the Mayor's knowledge of misconduct in his own office by a former senior staffer. The fact that such statements were within the outer perimeter of his official duties says nothing about whether Trump's statements attacking Carroll were within his employment. *Jones* certainly does not stand for the sweeping proposition that anything an elected official tells the press is always, automatically an official act or within his employment.

This leaves only Trump and DOJ's reliance on a few federal cases, most of which are easily set aside: they arose from workaday statements by Members of

Congress on pending legislative or oversight matters, and they did not present any evidence of private motivation, targeted animus, or personal wrongdoing on the part of the federal official.[14] If anything, these cases cut *against* the categorical view pushed by Trump and DOJ, since the painstaking and exceptionally fact-intensive analysis that those courts undertook into the scope-of-employment inquiry would have been totally unnecessary if a categorical rule covered such circumstances.

Of course, Trump and DOJ rely most heavily on the D.C. Circuit's opinion in *Council on American-Islamic Relations v. Ballenger*, 444 F.3d 659 (D.C. Cir. 2006).[15] There, a congressman spoke to a reporter about the dissolution of his

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[14] *See Does 1-10 v. Haaland*, 973 F.3d 591, 600-01 (6th Cir. 2020) (Rep. Deb Haaland and Senator Elizabeth Warren acted within employment while "reasonably connecting Plaintiffs' rhetoric and clothing to President Trump in order to comment on an event that had received widespread press attention and that resonated with the pressing issue of funding for the border wall"); *Wuterich v. Murtha*, 562 F.3d 375 (D.C. Cir. 2009) (Ranking Member of the House Appropriations Subcommittee on Defense acted within his employment in criticizing the Defense Secretary's handling of the Iraq War, including when he made a claim that a particular squad was responsible for civilian deaths in Haditha); *Williams v. United States*, 71 F.3d 502, 507 (5th Cir. 1995) (Chairman of the House Appropriations Committee acted within employment when he criticized a lobbyist's conduct while discussing the status of a pending appropriations bill pushed by that same lobbyist); *Operation Rescue Nat'l v. United States*, 975 F. Supp. 92, 94-95 (D. Mass. 1997) (Senator Ted Kennedy acted within employment when he criticized a violent anti-abortion organization while speaking about a bill he had sponsored—which was set for a vote the next day—meant to protect access to women's health clinics from that very group).

[15] Trump and DOJ also cite *Wilson v. Libby*, but that case is easily distinguished on its facts, as it involved executive officials who made statements while motivated in substantial respects by executive branch debates over United States public and foreign policy. *See* 535 F.3d 697, 712-13 (D.C. Cir. 2008) (holding that senior

marriage (which he thought his constituents would care about) and, in the course of that discussion, glancingly stated that CAIR was the "fund-raising arm for Hezbollah." *Id.* at 662. When CAIR sued for libel, the D.C. Circuit upheld dismissal of its claim, concluding that the Congressman's "conduct was motivated—at least in part—by a legitimate desire to discharge his duty as a congressman," since it believed that there was a "nexus" between answering questions about his personal life and his ability to carry out a political agenda in Congress. *Id.* at 664-66.

Although this case and *Ballenger* both involve the discussion of an elected official's personal life, that is where the similarity ends. In *Ballenger*, the evidence did not disclose any particular reason for the statement about CAIR. There was no evidence of any animus or retaliatory motive. It appears the Congressman randomly made a single stray comment about CAIR—a group engaged in lobbying and governmental affairs—while explaining his wife's dissatisfaction with life in D.C.

Here, in contrast, there is overwhelming evidence that Trump willfully and repeatedly singled out Carroll for malicious, humiliating lies. He attacked her three times over four days. He implied that she was too ugly to rape. He accused her of falsifying experiences of sexual assault by other men. He concocted dark schemes and nefarious motives. He did all this against a private citizen (not a leading civil

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officials who acted with the goal of defending the administration's handling of war-related intelligence were within the scope of their employment in revealing a CIA operative whose husband had published criticism of U.S. intelligence policy).

rights and advocacy organization actively involved in political deliberations). And he acted with obvious private motives—consistent with his prior practice—to punish and retaliate against her for revealing his decades-old crime. Whereas the statement about CAIR in *Ballenger* registered as reckless, Trump knew exactly what he was doing (and who he was doing it to), and he targeted Carroll with vicious precision.

For these reasons, *Ballenger* is distinguishable on its facts. While there may be limited circumstances in which an official publicly discusses aspects of his private life for reasons related to his job, it simply does not follow that elected officials always and everywhere (as a matter of law) act within their employment when speaking about decades-old private misconduct. Trump and DOJ seek to extract that principle from *Ballenger*, but *Ballenger* itself denied any such broad-based rule of immunity for "gratuitous slander in the context of statements of a purely personal nature." *Id.* at 666. Indeed, it then emphasized that its result "cannot be divorced from its facts"—which differ mightily from those presented here. *See id.*

More fundamentally, as the Second Circuit explained while certifying the issue, this Court—not the D.C. Circuit—is the final arbiter of District law. Read fairly, *Ballenger* does not hold that elected officials categorically act within the scope of their official employment when defaming private citizens. Indeed, it would be dangerous and undemocratic to declare that whenever an official might benefit politically from slandering a private citizen who reveals their personal misconduct,

the law creates an irrebuttable presumption that they must have acted in furtherance of official motives in seeking to destroy that person. And to the extent *Ballenger* might be taken as supporting that doubtful proposition, it is well within this Court's authority to clarify the proper interpretation of District law. *See Carroll*, 498 F. Supp. 3d at 452 (concluding that "*Ballenger*'s reasoning is wanting").

* * *

In exchange for a promise to serve the country and all who live here, elected officials are vested with great power. It is a betrayal of this public trust to weaponize that power while pursuing selfish interests in punishing and humiliating those who reveal private malfeasance. Presidents are free to deny allegations of misconduct. But a White House job is not a promise of unlimited authority to brutalize victims of prior wrongdoing through vicious, personal, defamatory attacks. That is not the law—and this Court should not make it so. *See Clark v. McGee*, 404 N.E.2d 1283, 1286 (N.Y. 1980) ("Public office does not carry with it a license to defame at will, for even the highest officers exist to serve the public, not to denigrate its members.").

CONCLUSION

For the reasons given above, the Court should answer the certified question by holding that under District law, Trump acted outside the scope of his employment when he made the defamatory statements about Carroll at issue in this case.

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CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2022, I caused the foregoing brief to be electronically filed with the District of Columbia Court of Appeals using the online e-filing system. Service will be accomplished on all parties through that system.

Joshua Matz