UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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MOTION INFORMATION STATEMENT

Docket Number(s): 23-1045; 23-1146

Caption [use short title]

E. Jean Carroll v. Donald J. Trump

Motion for: Stay of mandate pursuant to FRAP 41(d)(1) and stay of district court proceedings pursuant to FRAP 8(a)

Set forth below precise, complete statement of relief sought:

Appellant respectfully requests a 90- day stay of the mandate following the Panel's December 13, 2023 Opinion and an indefinite stay of the district proceedings throughout the remaining pendency of all appellate proceedings.

MOVING PARTY: Donald J. Trump **OPPOSING PARTY:** E. Jean Carroll

☐ Plaintiff ☑ Defendant

☑ Appellant/Petitioner ☐ Appellee/Respondent

MOVING ATTORNEY: Michael T. Madaio **OPPOSING ATTORNEY:** Roberta Kaplan

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Court- Judge/ Agency appealed from: Southern District of New York, Hon. Lewis A. Kaplan

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☐ Unopposed ☑ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:
☑ Yes ☐ No ☐ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUCTIONS PENDING APPEAL:

Has this request for relief been made below? ☑ Yes ☐ No

Has this relief been previously sought in this court? ☑ Yes ☐ No

Requested return date and explanation of emergency: December 29, 2023

Given that trial in this matter is scheduled for January 16, 2024, Appellant's immunity defense will be rendered moot and forever lost if he is forced to stand trial before this issue is resolved.

Is oral argument on motion requested? ☑ Yes ☐ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney:

/s/ Michael T. Madaio **Date:** 12/21/2023 Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

23-1045
23-1146

United States Court of Appeals
For the Second Circuit

E. JEAN CARROLL,

Plaintiff/Appellee,

-against-

DONALD J. TRUMP,

Defendant/Appellant.

MEMORANDUM IN SUPPORT OF EMERGENT MOTION FOR STAY OF MANDATE AND STAY OF DISTRICT COURT PROCEEDINGS

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President Donald J. Trump, Defendant-Counter-Claimant-Appellant herein, hereby moves (1) pursuant to Rule 41(d)(1), for a 90-day stay of the mandate to allow time for evaluation of a petition for writ of certiorari and other procedural options following the Panel's December 13, 2023 Opinion; and (2) pursuant to Rule 8(a), for a stay of the district court proceedings during the remaining pendency of this appeal.

The requested stays are necessary and appropriate to give President Trump an opportunity to fully litigate his entitlement to present an immunity defense in the underlying proceedings, including pursuing the appeal in the Supreme Court if necessary. The denial of this right would upend the longstanding rule that lower courts are divested of jurisdiction for the pendency of an immunity-related appeal. Forcing President Trump to stand trial absent a final determination as to whether his presidential immunity defense is viable would be the "quintessential form of prejudice" and would deprive the immunity of its intended effect. *In re Country Squire Assoc. of Carle Place*, 203 B.R. 182, 183 (2d Cir. 1996).

In addition, the failure to impose a stay would also violate President Trump's constitutional rights. For example, given the ongoing harm arising from foreclosing President Trump's access to this important defense, these motions implicate the First Amendment rights of President Trump and the hundreds of millions of Americans who wish to hear his campaign advocacy—as the leading candidate in the 2024

presidential election—unencumbered by the need to prepare for and attend a January 2024 trial in the district court, in which he is wrongly being denied access to a crucial and meritorious defense.

The significance of these issues is illustrated by, among other things, last week's filings with the Supreme Court by Special Counsel Jack Smith regarding President Trump's presidential immunity appeal arising from a criminal case in the District of Columbia. That case is stayed pending resolution of the appeal, as this case should be, and the possibility that the Supreme Court may soon address President Trump's immunity further supports the requested stays. On the other side of the ledger, there would be no countervailing prejudice to Plaintiff. Accordingly, President Trump respectfully submits that the stay motions should be granted.

I. The Court Should Stay The Mandate

Pursuant to Rule 41(d)(1), President Trump seeks a 90-day stay of the mandate as he evaluates appellate options relating to the Panel's ruling, including: (1) petitions for panel reconsideration and/or reconsideration en banc, which are not due until 45 days after the entry of judgment, *see* Fed. R. App. P. 35(c), 40(a)(1)(D), Local Rules 40.1-2; and (2) a petition for a writ of certiorari in the Supreme Court, which is not due until 90 days after entry of the judgment, *see* Sup. Ct. R. 13(1), *see In re Drexel Burnham Lambert*, 1989 WL 58404 (2d Cir. Apr. 19, 1989) ("[F]ollowing this Court's receipt of notice from the Clerk of the Supreme Court that

a petition for certiorari had been filed, the stay of the mandate has continued and it will remain in effect until the Supreme Court disposes of the case. In our view, to give this stay meaning, we must preserve the status quo with regard to the interests of those who petitioned for certiorari.").

Pursuant to Rule 41(d)(1), a stay of mandate is warranted when a party is able to "show that the petition would present a substantial question and that there is good cause for a stay." Fed. R. App. P. 41(d)(1). Here, both requirements are satisfied.

First, any petition for a writ of certiorari would present a "substantial question." *Id.* As the Panel acknowledged, "[t]his case presents a vexing question of first impression: whether presidential immunity is waivable." *See* Declaration of Michael T. Madaio ("Madaio Dec."), Ex. A (the "Opinion") at 2, 5. This question turns on whether, and to what extent, the constitutional separation of powers prohibits the Judicial Branch from exercising dominion over the President's official acts. The scope of issues to be addressed on further review are fundamentally important to the effective functioning of the tripartite government, will impact the delicate balance between two coordinate political branches, and will define the limits of presidential autonomy.

The Supreme Court has expressly acknowledged that there is a "special solicitude due to claims alleging a breach of essential Presidential prerogatives under the separation of powers." *Nixon v. Fitzgerald*, 457 U.S. 731, 743 (1982); *see also*

id. at 753 ("Courts traditionally have recognized the President's constitutional responsibilities as factors counseling judicial deference and restraint."). To that end, presidential immunity is more than a mere legal defense; it is a "functionally mandated incident to the President's unique office." *id.* at 749. There "exists the greatest public interest in providing" this protection to Presidents, *id.* at 752, since its absence "would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of government," *id.* at 745 (citation omitted).

There is little doubt that the Supreme Court views presidential immunity as indispensable. Although it has had scant opportunity to discuss presidential immunity as a whole, it has made abundantly clear that the defense is "rooted in the constitutional tradition of the separation of powers," *Nixon*, 457 U.S. at 743, and designed to ensure that other branches cannot "curtail the scope of the official powers of the Executive Branch," *Clinton v. Jones*, 520 U.S. 681, 701 (1997). Since these issues are inextricably related to the question of whether presidential immunity is waivable, it is virtually indisputable that this appeal presents a "substantial question." Fed. R. App. P. 41(d)(1).

Second, as explained in Section II(c)(iv) below, the stay motions are supported by "good cause" since there is a significant likelihood of success on appeal. *Id.*

Therefore, a stay of the mandate is warranted while President Trump evaluates his appellate options relating to the Panel's ruling.

II. The Court Should Stay The District Court Proceedings

A stay of district court proceedings is mandated under the longstanding rule that a lower court is divested of jurisdiction throughout the pendency of an immunity-related appeal. *See Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982). It is also independently warranted under the traditional stay factors. *See Hirschfeld v. Bd. of Elections in City of New York*, 984 F.2d 35, 39 (2d Cir. 1993). Therefore, for the reasons outlined below, the instant motion should be granted.

A. The Court Of Appeals Can Issue The Stay

As an initial matter, President Trump is seeking this stay in the Court of Appeals because the district court has already denied this relief. *See* Madaio Dec. Ex. C. As such, it would be "impracticable" to renew the application. Fed. R. App. P. 8(a)(2)(i)-(ii). As the Panel noted, the district court denied President Trump's stay application based on the claim that this appeal was "frivolous." Opinion at 31. Although the Panel did not address that error directly, the district court's inaccurate characterization is refuted by the Panel's finding that the appeal involved "a vexing question of first impression…" *Id*., at 2, 5. Since the district court has made clear that it will not grant the requested relief based on its view of this appeal, it would be impracticable to renew the stay application at that level.

B. The Stay Is Mandatory Because This Appeal Is Not Frivolous

President Trump was—and remains—entitled to a stay of proceedings in the district court pending full resolution of his immunity argument. A stay is mandatory under the divesture rule of *Griggs v. Provident Consumer Discount* so long as an appeal is not frivolous. The instant appeal plainly is not.

"The filing of a notice of appeal is an event of jurisdictional significance – it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs*, 459 U.S. at 58. It therefore is well settled that the filing of an appeal from the denial of an immunity defense divests the district court of jurisdiction from all proceedings until the appeal is resolved. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) ("Until this threshold immunity question is resolved, discovery should not be allowed."); *United States v. Rodgers*, 101 F.3d 247, 251 (2d Cir. 1996) (noting that, in the context of an immunity appeal, the district court is "divest[ed] of jurisdiction" and "does not regain jurisdiction until the issuance of the mandate by the clerk of the court of appeals."); *Williams v. Brooks*, 996 F.2d 728, 729 (5th Cir.1993) ("[T]he traditional rule that the filing of a notice of appeal divests a district court of jurisdiction…applies with particular force in the immunity context."); *Chuman v. Wright*, 960 F.2d 104, 105 (9th Cir. 1992) (holding that when a defendant files a notice of interlocutory appeal on an issue of qualified immunity, "the district court

is automatically divested of jurisdiction to proceed with trial pending appeal"); *see also Coinbase, Inc. v. Bielski*, 599 U.S. 736, 738 (2023) (reasoning that trial court "must stay its pre-trial and trial proceedings while the interlocutory appeal is ongoing." (emphasis added)).

When an appeal involves presidential immunity in particular, courts are unflinching in their application of the divestiture rule. For example, in *Clinton*, the district court entered a stay order because, "upon the filing of a notice of appeal in an immunity case, '[j]urisdiction has been vested in the court of appeals and the district court should not act further.'" *Jones v. Clinton*, 879 F. Supp. 86, 87-88 (E.D. Ark. 1995) (quotation omitted). More recently, the district court presiding over the District of Columbia criminal case against President Trump stayed its proceedings pending resolution of President Trump's appeal of that court's denial of his immunity and double jeopardy defenses. *See United States v. Trump*, 2023 WL 8615775, at *1 (D.D.C. Dec. 13, 2023) ("[T]he court agrees with both parties that Defendant's appeal *automatically stays* any further proceedings that would move this case towards trial or impose additional burdens of litigation on Defendant." (emphasis added)). Consistent with the court's reasoning regarding the "automatic" nature of the stay, the court cited *Blassingame v. Trump*, which, as here, involves false allegations relating to conduct while President Trump acted as Commander In Chief. *See* 2023 WL 8291481 (D.C. Cir. Dec. 1, 2023). In *Blassingame*, the

necessity of a mandatory stay during the pendency of President Trump's immunity-related appeal was so obvious that it is not referenced on the district court's docket. *See* Dkt. No. 21-cv-400 (D.D.C.).

Here, the district court only managed to circumvent the divestiture rule by certifying that the instant appeal is frivolous. *See Carroll v. Trump*, 20-CV-7311-LAK, 2023 WL 5312894, at *8 (S.D.N.Y. Aug. 18, 2023) ("[T]his Court certifies that Mr. Trump's appeal is frivolous and therefore has not divested this Court of jurisdiction."). It is evident that the Panel did not agree with this frivolity finding based on its acknowledgment that this matter presents a "vexing question of first impression[.]" Opinion at 2, 5. Despite so finding, the Panel declined to affirm that this appeal is not frivolous, reasoning that "under the singular circumstances presented here, considerations of judicial economy and efficiency favor the District Court's retention of jurisdiction." *Id*. at 31. The Panel's sole justification for failing to do so was that it sought to avoid the "rather pointless exercise" of requiring the district court to "re-adopt[] the orders it has issued since July 19, 2023, the date [President Trump] appealed the July 7 Order." *Id.*

The Panel relied on *United States v. Rodgers* to support its conclusion that "considerations of judicial economy and efficiency favor the District Court's retention of jurisdiction." Opinion at 31. *Rodgers*, however, involved "a plainly unauthorized notice of appeal which confers on this court the power to do nothing

but dismiss the appeal." 101 F.3d at 252. The "circumstances" here are not "similar," Opinion at 32, and *Rodgers* is inapposite with respect to the "vexing" issues of "first impression" presented by this appeal, *id*. at 2, 5. In light of those issues and their significance to the public—as well as future presidents—enforcing the *Griggs* principle at this juncture would not be a "rather pointless exercise." *Id.* at 31.

In addition, the Panel seemingly failed to consider the significant and irreversible harm that President Trump will suffer if he is forced to stand trial before final resolution of his immunity-related appeal. *See In re Country Squire*, 203 B.R.at 183 (noting that it is the "quintessential form of prejudice" when "absent a stay pending appeal…the appeal will be rendered moot."). The divesture rule applies until the appeal has been *fully* resolved and all potential avenues for appeal have been exhausted. *See Coinbase*, 599 U.S. at 741 ("*Griggs* dictates that the district court must stay its proceedings while the interlocutory appeal…is ongoing."). Therefore, an affirmation that the instant appeal is not frivolous is critically important since it will ensure that district court proceedings are stayed throughout the duration of any remaining appellate proceedings, including those before this Court and/or the Supreme Court.

Finally, assuming, *arguendo*, that the Panel correctly concluded that President Trump's immunity argument is not a matter of subject matter jurisdiction—an issue

we dispute—the stay is still mandatory. This Court made that clear by issuing a stay order in *United States v. Turkiye Halk Bankasi*, which involved immunity arguments under the Foreign Sovereign Immunities Act that were ultimately addressed by the Supreme Court. *See* Doc. 49, *Turkiye Halk Bankasi,* No. 20-3499 (2d Cir. Dec. 23, 2020).

Accordingly, controlling precedent requires this Court to issue a determination as to whether the instant appeal is frivolous. Since it plainly is not, the district court must be divested of jurisdiction until the presidential immunity question has been fully and finally resolved and all appeals have been exhausted.

C. A Traditional Factors Militate In Favor Of A Stay

Aside from the divesture issue, a stay is also independently supported by the factors that "are considered before staying the actions of a lower court." *Hirschfeld*, 984 F.2d at 39. Namely, those factors are:

> (1) whether the movant will suffer irreparable injury absent a stay, (2) whether a party will suffer substantial injury if a stay is issued, (3) whether the movant has demonstrated a substantial possibility, although less than a likelihood, of success on appeal, and (4) the public interests that may be affected.

Id. (cleaned up).

For the reasons set forth below, these factors weigh decisively in granting a stay pending resolution of President Trump's petition for writ of certiorari and any resulting proceedings before the Supreme Court.

i. The Public Interest Supports A Stay

The public interest supports staying the district court proceedings so that President Trump can litigate the "vexing" issues presented. Opinion at 2, 5.

First, this appeal involves fundamentally important issues which touch upon the president's independence and autonomy, the separation of powers between the Judicial and Executive Branches, and structural protections which help maintain the effective functioning of government. Second, the public has a First Amendment interest in President Trump's campaign advocacy that is parallel to the First Amendment's protections of President Trump's campaign speech. Consequently, continued proceedings in the district court during the pendency of this appeal violates *Griggs* and harms the public's interest in a full and fair airing of the questions presented by this appeal.

a. The Public Has An Interest In Final Resolution Of This Vexing Issue

Any appeal involving presidential immunity is inherently important because the results are effectively certain to guide the manner in which future Presidents carry out their presidential duties. This case is no different.

In contrast to the district court's dismissive treatment of President Trump's immunity argument, Special Counsel Jack Smith asserted to the Supreme Court last week that the immunity issue presents a "weighty and consequential…constitutional question[]," which is of "exceptional national importance." Motion to Expedite

Briefing at 1, 4, *United States v. Trump*, No. 23-624 (Dec. 11, 2023). In a related filing, the Special Counsel asserted that "[i]t is of imperative public importance" that President Trump's "claims of immunity be resolved by this Court" because "only" the Supreme Court "can definitely resolve them." Petition for a Writ of Certiorari Before Judgment at 2-3, *United States v. Trump*, No. 23-624 (Dec. 11, 2023). While President Trump disagrees with the Special Counsel's view on the merits and the Special Counsel's efforts to prevent the D.C. Circuit from first addressing the appeal, Mr. Smith is correct about the significance of the moment.

Plaintiff's counsel took a position similar to the Special Counsel's in an amicus brief filed in *Blassingame*. There, counsel argued that (1) "the doctrine of absolute immunity vindicates important constitutional principles, including the separation of powers"; (2) "the doctrine of absolute presidential immunity serves important purposes in our legal system"; (3) "[d]enying absolute immunity to a President (or former President) is rightly a rare thing"; and (4) "[t]hese principles have significant real-world implications." Amicus Br. at 4, 6, 8, 25, *Blassingame v. Trump*, No. 22-5069 (D.C. Cir. Sept. 30, 2022) (Document #1967073).

Likewise, in a prior appellate ruling, this Court opined that whether President Trump's conduct is immune from liability is a "question of extreme public importance" because it "touches upon the duties of the President of the United States,

and the personal tort liability he and his successors may (or may not) face[.]" *Carroll v. Trump*, 49 F.4th 759, 780 (2d Cir. 2022).

The Supreme Court has also recognized that there "exists the greatest public interest" in ensuring that the President is immunized from liability for the performance of his official acts, and that the absence of such immunity "would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of government," *Nixon*, 457 U.S. at 745. The Supreme Court has reasoned that this protection is necessary to afford the President the "the maximum ability to deal fearlessly and impartially with the duties of his office" since he is an "easily identifiable target for suits for civil damages." *Id.* at 752-753 (citations omitted). The Panel's finding that presidential immunity is waivable, however, cuts against the spirit of *Nixon* Supreme Court's and diminishes the latitude of protection afforded to all future Presidents. The possibility that presidential immunity could be forfeited, even unintentionally, will render Presidents "unduly cautious in the discharge of [their] duties," which would be to "the detriment of not only the President and his office but also the Nation that the Presidency was designed to serve." *Id.* at 752.

Therefore, there is a tremendous public interest in obtaining final resolution as to nature and extent to which presidential immunity protects a President from liability in the performance of his official acts.

b. Ongoing District Court Proceedings Abridge First Amendment Rights

The district court has scheduled a trial in the proceedings below to begin on January 16, 2024. The public has an interest in a stay of the trial pending final resolution of this appeal for the additional reason that the trial will interfere with campaign-related First Amendment rights. *See, e.g.*, *New York Progress v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013) ("[S]ecuring First Amendment rights is in the public interest."); *Texans for Free Enter. v. Texas Ethics Comm'n*, 732 F.3d 535, 539 (5th Cir. 2013) ("'[I]junctions protecting First Amendment freedoms are always in the public interest.'" (quotation omitted)).

The First Amendment's "constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 162 (2014) (quotation omitted). The "protection afforded is to the communication, to its source and to its recipients both." *Virginia State Bd. v. Virginia Citizens.*, 425 U.S. 748, 756 (1976); *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 390 (1969) ("It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."). "[T]he right to receive ideas follows ineluctably from the sender's First Amendment right to send them." *Bd. of Educ. v. Pico*, 457 U.S. 853, 867 (1982). And this "right to receive ideas," *id.*, and right to "listen," *Packingham v. North Carolina*, 582 U.S. 98, 104 (2017), have their "fullest and most urgent application" when it comes to voters'

ability to receive the campaign message of the leading candidate for the highest office in the Nation. *Susan B. Anthony List*, 573 U.S. at 162. These First Amendment rights provide additional support for President Trump's stay motions.

ii. President Trump Will Suffer Irreparable Injury Absent The Stay

Subjecting President Trump to continued merits litigation in the district court while he vindicates his ability to present an immunity defense will result in irreparable injury.

While the immunity issue is pending, President Trump must not be subject to "additional burdens of litigation." *Trump*, 2023 WL 8615775, at *1; *Blassingame*, 2023 WL 8291481, at *22 ("Official immunity, including the President's official-act immunity…is 'an entitlement not to stand trial or face the other burdens of litigation.'" (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)); *cf. Davidson v. Scully*, 114 F.3d 12, 14 (2d Cir. 1997) (reasoning that qualified immunity "is designed to relieve government officials of the burdens of litigation as well as of the threat of damages." (cleaned up)); *Mitchell*, 472 U.S. at 525 ("[T]he essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action.").

Indeed, the very purpose of immunity is inherently and unavoidably frustrated by acknowledging a defendant's immunity only *after* he is forced to stand trial. Forcing President Trump to stand trial before he is able to obtain final resolution on

his presidential immunity defense would be the "quintessential form of prejudice" since, after the trial is concluded, "the appeal will be rendered moot." *In re Country Squire*, 203 B.R. at 183; *see also Brooks*, 996 F.2d at 730 n.2 (immunity "'is effectively lost' if a case is erroneously permitted to proceed…while an interlocutory appeal of a denial of immunity is pending."). Stated differently, President Trump's "right to interlocutory appeal…without an automatic stay of the district court proceedings…is therefore like a lock without a key, a bat without a ball, a computer without a keyboard—in other words, not especially sensible." *Coinbase*, 599 U.S. at 741. Therefore, in this scenario, "*Griggs* dictates that the district court *must* stay its proceedings while the interlocutory appeal…is ongoing."[1] *Id.*

Further, in the absence of the requested stays, subjecting President Trump to continued litigation in the district court will cause irreparable harm and damage to his Sixth Amendment right to prepare his defenses in the criminal cases pending against him. Media coverage relating to the January 2024 trial, which should not occur until the immunity issue is fully resolved, will also prejudice President Trump by tainting the pools of potential jurors for scheduled criminal trials in the District of Columbia (March 4), the Supreme Court of New York (March 25), and the

[1] While *Coinbase* concerned a stay under the Federal Arbitration Act, the case presented a straightforward application of the *Griggs* principle that "[a]n appeal…divests the district court of its control over those aspects of the case involved in the appeal." *Coinbase*, 599 U.S. at 740. In *Coinbase*, as here, "the entire case [was] essentially 'involved in the appeal.'" *Id.* at 741.

Southern District of Florida (May 20). *See, e.g.*, *Patton v. Yount*, 467 U.S. 1025, 1031 (1984) ("[A]dverse pretrial publicity can create such a presumption of prejudice in a community that the jurors' claims that they can be impartial should not be believed.").

Therefore, President Trump will be irreparably harmed absent a stay of proceedings.

iii. A Stay Will Not Cause Substantial Injury To Plaintiff

To overcome the irreparable harm a defendant will suffer when litigation is not stayed pending review of their claim for immunity, a plaintiff must make a showing of significant and particularized hardship. *See e.g.*, *In Re World Trade Ctr. Disaster Site Litig*., 503 F.3d 167, 170 (2d Cir. 2007). Here, Plaintiff is unable to make any such showing.

Mere delay, on its own, is not sufficient justification to deny a stay pending appeal. *See*, *e.g.*, *Goodman v Samsung Elecs*., 17-CV-5539 (JGK), 2017 WL 5636286, at *3 (S.D.N.Y. Nov. 22, 2017) ("[M]ere delay in the litigation does not establish undue prejudice for purposes of a motion to stay."); *Molo Design v. Chanel*, 21-CV-01578-VEC, 2022 WL 2135628, at *3 (S.D.N.Y. May 2, 2022) ("Mere delay does not constitute prejudice."). Likewise, "[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." *FTC v.*

Standard Oil, 449 U.S. 232, 244 (1980); *see also Coinbase*, 599 U.S. at 746 (noting that "litigation-related burdens" do not "constitute irreparable harm.").

Further, President Trump disputes that Plaintiff was in any was prejudiced by the timing of his presentation of the immunity defense. The type of focused and narrow discovery relating to immunity that would be required here is exactly what the D.C. Circuit recently suggested in *Blassingame*. *See* 2023 WL 8291481, at *22 ("[D]iscovery bearing on the immunity question itself might be in order if the circumstances warrant it."). In any event, these stay motions would not require any discovery or impose additional costs on Plaintiff during the pendency of the appeal. Rather, the motions would simply require Plaintiff and the district court to maintain the *status quo* while President Trump evaluates and pursues legal options that are well within his rights. "[I]n cases of extraordinary public moment," a party "may be required to submit to delay not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted." *Landis v. North American.*, 299 U.S. 248, 256 (1936). This appeal presents such a case.

iv. There Is A Substantial Likelihood Of Success On The Merits

President Trump respectfully submits that there is also a "substantial possibility" of success on the merits. *Hirschfeld*, 984 F.2d at 39.

"The necessary 'level' or 'degree' of possibility of success will vary according to the court's assessment of the other stay factors." *Mohammed v. Reno*, 309 F.3d 95, 101 (2d Cir. 2002); *see*, *e.g.*, *MyWebGrocer v. Hometown*, 375 F.3d 190, 192 (2d Cir. 2004) (noting that "sufficiently serious questions going to the merits" will satisfy this prong); *Citigroup v. VCG.*, 598 F.3d 30, 37 (2d Cir. 2010) (applying the "serious questions" standard).

Here, it is beyond dispute that this appeal presents serious questions since it involves the novel and unresolved question of whether presidential immunity is waivable. Regardless, under any standard, President Trump has a substantial likelihood of success on appeal.

For the reasons stated above in Part II(B), the district court's failure to stay the proceedings pending resolution of this appeal violated binding appellate precedent in *Griggs*, as illustrated by the stays that were imposed in *Clinton* and *Halkbank*, as well as the more recent stays in *Trump* and *Blassingame*. As discussed *supra*, the Panel's reliance on *Rodgers* was misplaced since the instant appeal does not involve "a plainly unauthorized notice of appeal which confers on this court the power to do nothing but dismiss the appeal." 101 F.3d at 252. To the contrary, it involves a "vexing" question of "first impression." Opinion at 2, 5. Therefore, under the controlling precedent of *Griggs* and *Coinbase*, a stay of district court proceedings is mandatory.

Moreover, the Panel's reasoning regarding subject matter jurisdiction turns in large part on the precarious—and, we submit, erroneous—decision to discard as a series of "'drive-by jurisdictional ruling[s]" the Supreme Court's binding jurisdictional analysis in *Nixon*, *Clinton*, and *Mississippi v. Johnson*. Opinion at 16 (quoting *Wilkins v. United States*, 598 U.S. 152, 159-60 (2023)). A "drive-by jurisdictional ruling" is a decision that "simply states that 'the court is dismissing for lack of jurisdiction when some threshold fact has not been established.'" *Wilkins*, 598 U.S. at 160 (quoting from *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 512 (2006)). Unlike this appeal, *Wilkins* and *Arbaugh* are statutory interpretation cases. The "drive-by" concept discussed in those opinions concerns whether an allegation relating to a statutory element is properly characterized as jurisdictional. *See Wilkins*, 598 U.S. at 165 ("[N]either this Court's precedents nor Congress' actions established that § 2409a(g) is jurisdictional."); *Arbaugh*, 546 U.S. at 516 ("[W]e hold that the threshold number of employees for application of Title VII is an element of a plaintiff's claim for relief, not a jurisdictional issue."); *see also Reed Elsevier v. Muchnick*, 559 U.S. 154, 161 (2010) (describing "a marked desire to curtail…drive-by jurisdictional rulings" that "have sometimes mischaracterized claim-processing rules or elements of a cause of action as jurisdictional limitations, particularly when that characterization was not central to the case, and thus did not require close analysis").

Wilkins did not authorize this intermediate appellate court to depart from the Supreme Court's pertinent guidance. In *Nixon*, the Court devoted a paragraph-long subsection of the opinion to "exercising jurisdiction" and "whether separation-of-powers doctrine" barred "every exercise of jurisdiction over the President of the United States." 457 U.S. at 753-54. *Clinton* was hardly a "drive-by," either. The Court repeatedly discussed "jurisdiction" throughout the opinion, including three references to the scope of "Article III jurisdiction." 520 U.S. at 701, 702, 703. The Panel's distinction regarding the type of claim in *Mississippi v. Johnson*, Opinion at 15-16, does no violence to the fact that the decision represents another example of the Supreme Court addressing presidential immunity in jurisdictional terms: "[W]e are fully satisfied that this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties." 71 U.S. 475, 501 (1866). Accordingly, the reasoning of *Nixon*, *Clinton*, and *Johnson* supports President Trump's position to a much greater extent than the Panel acknowledged.

Finally, in light of the extraordinary importance of presidential immunity, which has been consistently recognized by the Supreme Court, was largely conceded by Plaintiff's counsel in *Blassingame*, and is further illustrated by the Special Counsel's recent filings, there is a substantial likelihood that President Trump will ultimately prevail on his argument that the district court abused its direction by declining to allow him to amend his answer to include the defense. Plaintiff would

not have been prejudiced in a cognizable way by such an amendment, as Plaintiff's fees and costs were being covered by a wealthy Democratic donor and discovery has continued on other issues (including a deposition on December 11, 2023).[2] For all of these reasons, this Court should stay the district court proceedings until President Trump has had a complete opportunity to pursue all procedural operations and vindicate the important rights at issue.

WHEREFORE, President Trump respectfully requests that the instant motion be granted in its entirety.

Date: December 21, 2023
New York, New York

/s/ Michael T. Madaio
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[2] *See* D.Ct. Doc. 237-2; Br. of Defendant-Appellant at 41, *Carroll v. Trump*, 23-0793 (2d Cir. Nov. 20, 2023) (Document 74) ("In April 2023, two weeks prior to trial, Plaintiff disclosed through counsel that she 'now recalls that at some point her counsel secured additional funding from a nonprofit organization to offset certain expenses and legal fees.'").

WORD COUNT CERTIFICATION

I certify that this brief complies with the word limit requirements in Second Circuit Local Rule 27.1 and Federal Rule of Appellate Procedure 27(d)(2) because this brief contains 5,158 words.

/s/ Michael T. Madaio
MICHAEL T. MADAIO

23-1045
23-1146

United States Court of Appeals
For the Second Circuit

E. JEAN CARROLL,

Plaintiff-Counter
Plaintiff-Appellee

-against-

DONALD J. TRUMP,

Defendant-Counter
Claimant-Appellant.

DECLARATION OF MICHAEL T. MADAIO, ESQ. IN SUPPORT OF DEFENDANT-APPELLANT'S EMERGENCY MOTION FOR A STAY OF MANDATE AND STAY OF DISTRICT COURT PROCEEDINGS

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DECLARATION

I, Michael T. Madaio, declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the following is true and correct:

1. I am counsel for the Defendant-Counter-Claimant-Appellant, Donald J. Trump ("President Trump"). I submit this declaration in support of President Trump's emergency motion for a stay of mandate pursuant to Rule 41(d)(1) and a stay of district court proceedings pursuant to Rule 8(a).

2. Attached as **Exhibit A** is a true and correct copy of the Opinion issued by the Second Circuit on December 13, 2023.

3. Attached as **Exhibit B** is a true and correct copy of the Order by the Honorable Lewis A. Kaplan dated July 5, 2023 denying President Trump's Motion for Summary Judgment.

4. Attached as **Exhibit C** is a true and correct copy of the Order by the Honorable Lewis A. Kaplan dated August 18, 2023 denying President Trump's Motion for a Stay Pending Litigation.

5. Attached as **Exhibit D** is a true and correct copy of Email Correspondence to Counsel for Plaintiff-Counter-Defendant-Appellee, E. Jean Carroll ("Plaintiff-Appellee").

6. On December 20, 2023, I contacted counsel for the Plaintiff-Appellee by e-mail, to advise that President Trump would be filing an emergent motion for a stay and inquired as to whether they consented to or opposed the relief sought. Counsel advised that they intended to oppose President Trump's request for a stay. *See* **Exhibit D**.

7. In accordance with Local Rule 27.1(d)(1), my office contacted the Clerk of the Second Circuit on December 21, 2023, via telephone, to advise of the instant application.

8. This request is urgent and time-sensitive, and emergent relief is necessary, due to the upcoming trial in the underlying action which is currently scheduled to commence on January 16, 2024 a mere twenty-six days from the date of this filing. Since this appeal goes directly to President Trump's immunity from suit altogether—a particular concern for prominent political figures such as President Trump—a decision applying such immunity ***after*** President Trump is forced to stand trial will render his presidential immunity defense moot. In such a scenario, the defense will be forever lost and President Trump will be irreparably harmed.

9. President Trump respectfully submits that his right to the requested relief will be irreparably lost if this Court does not grant a stay.

10. For the reasons explained in the attached Memorandum of Law, and pursuant to Local Rule 27.1(d)(4), President Trump respectfully requests that the Court: (i) enter an order pursuant to Fed. R. App. P. 41(d)(1) for a 90-day stay of the mandate pending the filing of a petition for writ of certiorari following the Panel's December 13, 2023 Opinion, to allow time for evaluation of a petition for writ of certiorari and other procedural options; and (ii) enter an order pursuant to Fed. R. App. P. 8(a) granting an emergency stay of all proceedings and deadlines before the District Court until all questions concerning the viability of President Trump's presidential immunity defense have been fully and finally resolved.

11. Given the emergent nature of the instant request for a stay, President Trump requests a return date of December 29, 2023, or as soon as is otherwise practicable.

Dated: December 21, 2023

Respectfully submitted,

s/ Michael T. Madaio

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Attorneys for Defendant-Appellant,
President Donald J. Trump

Exhibit A

In the
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 J. 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*.

Ordinarily, defendants are deemed to have waived or forfeited defenses that they did not raise at the outset of the litigation. But defenses based on subject-matter jurisdiction—the courts' statutory or constitutional power to adjudicate the case—are nonwaivable. Defendants can raise such defenses at any stage in the litigation.

Presidential immunity is a defense that entitles the President to absolute immunity from damages liability for acts within the outer perimeter of his official responsibilities. 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 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.

JOSHUA MATZ (Kate Harris, Roberta A. Kaplan, Trevor W. Morrison, *on the brief*), Kaplan Hecker & Fink LLP, New York, NY, *for Plaintiff-Counter-Defendant-Appellee* E. Jean Carroll.

MICHAEL T. MADAIO (Alina Habba, *on the brief*), Habba Madaio & Associates LLP, Bedminster, NJ, *for Defendant-Counter-Claimant-Appellant* Donald J. Trump.

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

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

defenses based on subject-matter 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

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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 (2017) (quotation marks omitted).

[3] *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506 (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.").

within the outer perimeter of his official 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

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[4] *Nixon v. Fitzgerald*, 457 U.S. 731, 749, 756 (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 (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 (1985)).

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

[6] *Clinton v. Jones*, 520 U.S. 681, 694-95 (1997).

in his answer to E. Jean Carroll's ("Plaintiff's") complaint, which alleged that Defendant defamed her by claiming that she had fabricated her 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, 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

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[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].

[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.

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]

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.

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[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 (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.

[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).

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 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

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[12] Memorandum Opinion Denying Defendant's Motion for Summary Judgment (Corrected), *Carroll v. Trump* ("*Carroll I*"), No. 20-cv-7311, 2023 WL 4393067 (S.D.N.Y. July 5, 2023) ("July 5 Order").

[13] *Id.* at *9-13.

[14] *Id*. at *13-14.

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.

II. DISCUSSION

This case concerns appeals from two related orders by the District Court. The July 5 Order denied Defendant's motion for

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[15] Memorandum Opinion Granting Plaintiff's Motion to Dismiss Defendant's Counterclaim and Certain Purported Affirmative Defenses, *Carroll I*, No. 20-cv-7311, 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 *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, 2023 WL 5312894, at *7-8 (S.D.N.Y. Aug. 18, 2023).

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]

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[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 Immunity[22]

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

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[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).

pertain to the court's jurisdiction."[24] And we 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

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[24] 533 U.S. 353, 373 (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 would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (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 (1867); *Nixon*, 457 U.S. at 754; and *Clinton*, 520 U.S. at 710).

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 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

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[27] *Wilkins v. United States*, 598 U.S. 152, 159-60 (2023) (quotation marks omitted).

[28] *Id.* at 160 (quoting *Arbaugh*, 546 U.S. at 512) (some quotation marks omitted).

[29] *Id.* (quoting *Arbaugh*, 546 U.S. at 511) (alteration adopted).

> 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 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

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

[31] *Nixon*, 457 U.S. at 741-43; *see also id.* at 741 ("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 (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 proceed, as we must, first to determine issues of subject matter jurisdiction.").

[33] *Nixon*, 457 U.S. at 741, 743 n.23.

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*—described by Defendant's counsel at oral

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

[35] *See Clinton*, 520 U.S. at 685.

[36] *Wilkins*, 598 U.S. at 160 (quotation marks omitted).

[37] *Clinton*, 520 U.S. at 710.

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

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

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[39] Oral Arg. Audio Recording at 4:14-22; *cf. Blassingame v. Trump*, Nos. 22-5069, 22-7030, 22-7031, 2023 WL 8291481 (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 (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.

encroachment by the 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

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[42] July 5 Order, *Carroll I*, 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.").

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 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

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[46] *Trump v. Vance*, 140 S. Ct. 2412, 2426 (2020) (quoting *Nixon*, 457 U.S. at 752 n.32).

[47] *See Nixon*, 457 U.S. at 750 ("The President's unique status under the Constitution distinguishes him from other executive officials."); *Harlow v. Fitzgerald*, 457 U.S. 800, 811 n.17 (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; *Harlow*, 457 U.S. at 811 & n.17. For the difference between qualified immunity and absolute immunity, see note 24, *ante*.

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, 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

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[49] *Nixon*, 457 U.S. at 743 (quotation marks omitted).

[50] *See* Def. Br. at 23-27 (citing *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013); *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (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 (2015); *Kuretski v. Comm'r*, 755 F.3d 929, 937 (D.C. Cir. 2014); *Nixon*, 457 U.S. 731; *Nixon*, 457 U.S. 731 (Burger, C.J., concurring); *Johnson*, 71 U.S. 475).

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 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.

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[51] *See Wellness Int'l Network*, 575 U.S. at 682 n.11 ("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 (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 (1991) (Scalia, *J.*, concurring in part and concurring in judgment)), *cert. denied*, 143 S. Ct. 868 (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.").

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 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.

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[52] *See* July 5 Order, *Carroll I*, 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.

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]

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[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*, 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.

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

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[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 (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)).

[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).

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 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

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[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").

[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).

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 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

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[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.

[67] *Id.* at 28:23-29:20.

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

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[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 (presidential immunity analysis rejecting "inquiry into the President's motives").

discovery would be 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

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[72] August 7 Order, *Carroll I*, 2023 WL 5017230, at *9.

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

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 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,

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[74] *Id.* (quotation marks omitted).

[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 (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 (2006) (quotation marks omitted). Defendant suggests that the only non-revivable defenses are those listed in Federal

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.

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

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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.

[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)).

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 date Defendant appealed the July 7 Order.[83] "[O]ur application of the

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[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 (2009) ("Appellate courts can . . . authorize the district court's retention of jurisdiction when an appeal is certified as frivolous.").

[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]

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 general, not immediately

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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."); s*ee 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 District Court's determination that Defendant is not entitled to absolute immunity).

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.

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[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.

III. CONCLUSION

To summarize, we hold that:

(1) Presidential immunity is a waivable defense.

(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.

Exhibit B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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E. JEAN CARROLL,

Plaintiff,

-against- 20-cv-7311 (LAK)

DONALD J. TRUMP,

Defendant.

- x

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

Appearances:

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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

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[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), 2022 WL 6897075 (S.D.N.Y. Oct. 12, 2022); Dkt 145, *Carroll v. Trump*, No. 20-cv-7311 (LAK), 2023 WL 2441795 (S.D.N.Y. Mar. 10, 2023); Doc. No. 22-cv-10016 (*Carroll II*), Dkt 38, *Carroll v. Trump*, No. 22-cv-10016 (LAK), 2023 WL 185507 (S.D.N.Y. Jan. 13, 2023); *Carroll II*, Dkt 56, *Carroll v. Trump*, No. 22-CV-10016 (LAK), 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), 2023 WL 2669790 (S.D.N.Y. Mar. 28, 2023).

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

for Mr. Trump's June 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 hours and days, Mr. Trump issued three allegedly

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[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.

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 Twitter[5]:

> "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.

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[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

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[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.

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."[7]

Statement Three

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

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7 *Id.* at 18, ¶ 92.

8 *Id.* at 20, ¶ 98.

9 *E.g.*, *Carroll v. Trump*, No. 22-CV-10016 (LAK), 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).

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.

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

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

- "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:

> "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

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[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.

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 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

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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 (1986)).

15 457 U.S. 731 (1982).

16 *Id.* at 756.

17 Dkt 109 (Def. Mem.) at 17.

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 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

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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.

19 Dkt 122 (Def. Reply Mem.) at 5.

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 Supreme Court has stated, "[t]here is no

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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 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

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 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

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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 (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.").

24 Dkt 122 (Def. Reply Mem.) at 3.

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 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

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25 457 U.S. at 749.

26 *Id.* at 744-48.

27 *Id.* at 747.

28 *Id.* at 748.

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 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]

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29 *Morrison v. Olson*, 487 U.S. 654, 694 (1988) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (Jackson, J., concurring)).

30 *Bradley v. Fisher*, 80 U.S. 335, 347 (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 (1976).

32 457 U.S. 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."); *id.* at 751-52 ("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*, 140 S. Ct. 2412, 2426 (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).

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 *Harlow v. Fitzgerald*, in which the Supreme Court stated that "the recognition of absolute immunity

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 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,

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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 (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).

34 *Fitzgerald*, 457 U.S. at 753-54.

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 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

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35 *Wilkins v. United States*, 143 S. Ct. 870, 875 (2023) (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510 (2006)).

36 *Fitzgerald*, 457 U.S. at 748 n.27.

37 *Marbury v. Madison*, 5 U.S. 137, 138 (1803); *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 65 (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.

39 *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013).

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 — 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]

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40 520 U.S. 681 (1997).

41 *Id.* at 694 n.19.

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).

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 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

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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.

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 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]

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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.*

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).

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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 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."
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> "Moreover, when defining the scope of an immunity for acts clearly taken *within* an official capacity, we have applied a functional approach. 'Frequently our

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49 *Fitzgerald*, 457 U.S. at 756.

50 *Id.*

> 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 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

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51 520 U.S. at 692–95 (emphasis in original) (citations omitted).

52 Dkt 109 (Def. Mem.) at 17.

53 *Id.* (citations omitted).

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 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

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54 *Id.* at 16.

55 *Id.* at 17. *See Snyder v. Phelps,* 562 U.S. 443, 453 (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).

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.

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 ...

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56 *Thompson v. Trump*, 590 F. Supp. 3d 46, 79–80 (D. D.C. 2022) (emphasis added) (citations omitted).

57 *Fitzgerald*, 457 U.S. at 751–53.

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] 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*

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58 *Id.* at 756.

59 Mr. Trump compares this case to *Barr v. Matteo*, 360 U.S. 564 (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]e 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. 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. Carroll's defamation claim, suffices to render his presidential immunity defense meritless.

> *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.

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

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60 *Block v. First Blood Assocs.*, 988 F.2d 344, 350 (2d Cir. 1993) (emphasis added) (citations omitted).

61 *Carroll v. Trump*, No. 22-CV-10016 (LAK), 2023 WL 2960061 (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), 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), 2022 WL 6897075 (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).

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 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

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[62] *Carroll*, 590 F. Supp. 3d at 588.

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 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.

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[63] Dkt 113 (Pl. Opp. Mem.) at15.

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 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,

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64 *Carroll v. Trump*, No. 22-CV-10016 (LAK), 2023 WL 185507, at *10-11 (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 (2d Dept. 1982), *rev'd on other grounds*, 59 N.Y.2d 205 (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).

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. 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

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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 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.

> 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 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

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69 *Carroll*, 2023 WL 185507, at *11 (emphases and alterations in original).

70 Dkt 122 (Def. Reply Mem.) at 9.

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 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

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71 Dkt 109 (Def. Mem.) at 30.

72 *Id.* at 33.

73 *Hotchner v. Castillo-Puche*, 551 F.2d 910, 913 (2d Cir. 1977).

74 *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 290 (1986).

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 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

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75 *Davis v. Boeheim*, 24 N.Y.3d 262, 269–70 (2014) (citations omitted).

76 *Id.* (alterations in original) (internal quotation marks and citation omitted).

77 *Id.* at 271.

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 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

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78 *Jacobus v. Trump*, 51 N.Y.S.3d 330, 342 (N.Y. Sup. Ct. 2017), *aff'd*, 156 A.D.3d 452 (1st Dept. 2017).

79 Dkt 109 (Def. Mem.) at 33.

being proven true or false.[80] Importantly, Mr. Trump did not use speculative 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

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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 (1977) ("The ordinary and average reader 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 (3d Dept. 2010).

82 *Huggins v. Povitch*, No. 131164/94, 1996 WL 515498, at *4 (N.Y. Sup. Ct. Apr. 19, 1996).

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 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]

All three factors therefore weigh in favor of a determination that Mr. Trump's statements were factual assertions rather than expressions of opinion.[85]

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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 (1989). The court's judgment was vacated, 497 U.S. 1021 (1990), and that statement did not appear again in the court's opinion on remand. 77 N.Y.2d 235 (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))." 42 N.Y.2d at 954 & n.1. 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. 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

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 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

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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 (4th Dept. 1959).

87 *Sleepy's LLC v. Select Comfort Wholesale Corp.*, 779 F.3d 191, 199 (2d Cir. 2015) (citing cases).

> 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 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]

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88 *Id.* (alteration in original) (citations omitted).

89 WILLIAM L. PROSSER AND JOHN W. WADE, RESTATEMENT (SECOND) OF TORTS § 583 (1977).

90 *Id.* § 892, Comment b (1979) (emphasis added).

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 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,

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91 Dkt 109 (Def. Mem.) at 29-30.

92 Dkt 113 (Pl. Opp. Mem.) at 31.

93 *Handlin v. Burkhart*, 220 A.D.2d 559, 559 (2d Dept. 1995).

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 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,

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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, Jun. 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).

96 *Van-Go Transp. Co. v. New York City Bd. of Educ.*, 971 F. Supp. 90, 104 (E.D.N.Y. 1997).

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. 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

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97 Dkt 116-1 (Pl. Dep.) at 166:2-6, 167:3-7.

98 *Id.* at 166:9-15.

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.

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 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

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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 (1st Dept. 2003) (emphasis in original) (citation omitted).

102 *Celle*, 209 F.3d at 185.

103 Dkt 109 (Def. Mem.) at 34 (quoting *Morsette*, 309 A.D. at 255).

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.

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 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.

Dated: June 29, 2023

Corrected: July 5, 2023

Lewis A. Kaplan
United States District Judge

Exhibit C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

E. JEAN CARROLL,

Plaintiff,

-against- 20-cv-7311 (LAK)

DONALD J. TRUMP, in his personal capacity,

Defendant.

- x

MEMORANDUM OPINION DENYING DEFENDANT'S MOTION TO STAY

Appearances:

Roberta Kaplan
Joshua Matz
Shawn Crowley
Matthew Craig
Trevor Morrison
Michael Ferrara
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LEWIS A. KAPLAN, *District Judge.*

A little less than four years ago, writer E. Jean Carroll commenced this defamation lawsuit against then-president Donald Trump for certain statements he made in 2019 shortly after

Ms. Carroll publicly accused him of sexually assaulting ("raping") her in the mid 1990s. This case was largely stalled for years due in large part to Mr. Trump's repeated efforts to delay, which are chronicled in the Court's prior decisions.[1] Mr. Trump's latest motion to stay – his *fourth* such request – is yet another such attempt to delay unduly the resolution of this matter.

After litigating this case for over three years, Mr. Trump, in his motion for summary judgment filed in December 2022, for the first time asserted that he has absolute presidential immunity for his 2019 statements about Ms. Carroll. This Court rejected the argument. It first held that Mr. Trump had waived his absolute presidential immunity defense by failing to plead or otherwise raise it earlier. It denied also, on two independent grounds, Mr. Trump's alternative request to amend his answer to raise the defense now: (1) the proposed amendment would be futile because the presidential immunity defense would be without merit, and (2) Mr. Trump in any case delayed unduly in raising the defense, and granting his request would prejudice Ms. Carroll unfairly.

Mr. Trump filed an interlocutory appeal of that decision. He now seeks to stay this case pending resolution of his appeal. For the reasons stated below, his request is denied.

Facts

The Court assumes familiarity with its prior decisions in this case ("*Carroll I*") and in a second closely related case ("*Carroll II*"), which detail the facts and procedural histories of both

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[1] *E.g.*, *Carroll v. Trump*, No. 20-CV-7311 (LAK), 2023 WL 4393067, at *12 (S.D.N.Y. July 5, 2023); *Carroll v. Trump*, No. 20-CV-7311 (LAK), 2022 WL 6897075 (S.D.N.Y. Oct. 12, 2022); *Carroll v. Trump*, 590 F. Supp. 3d 575 (S.D.N.Y. 2022).

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cases.[2]

Ms. Carroll Files This Lawsuit In November 2019

In the hours and days immediately after Ms. Carroll first publicly accused Mr. Trump of sexually assaulting ("raping") her in a department store in New York in the mid 1990s, Mr. Trump issued public statements in which he denied the accusation, stated that he did not know and never had met Ms. Carroll, and claimed that she fabricated the accusation for ulterior and improper purposes. Approximately five months later, in November 2019, Ms. Carroll brought this lawsuit alleging that Mr. Trump defamed her in his statements and seeking damages and other relief. The case was filed originally in a state court in New York before being removed to this Court in September 2020 in circumstances discussed previously.

Mr. Trump's Previous Motions To Stay This Case

This motion is Mr. Trump's fourth attempt to stay this case.

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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*, 590 F. Supp. 3d 575; Dkt 96, *Carroll*, 2022 WL 6897075; Dkt 145, *Carroll v. Trump*, No. 20-cv-7311 (LAK), 2023 WL 2441795 (S.D.N.Y. Mar. 10, 2023); Dkt 173, *Carroll*, 2023 WL 4393067; Dkt 200, *Carroll v. Trump*, No. 20-CV-7311 (LAK), 2023 WL 5017230, (S.D.N.Y. Aug. 7, 2023); Doc. No. 22-cv-10016 (*Carroll II*), Dkt 38, *Carroll v. Trump*, No. 22-cv-10016 (LAK), 2023 WL 185507 (S.D.N.Y. Jan. 13, 2023); *Carroll II*, Dkt 56, *Carroll v. Trump*, No. 22-CV-10016 (LAK), 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-100l6 (LAK), 2023 WL 2652636 (S.D.N.Y. Mar. 27, 2023); *Carroll II*, Dkt 96, *Carroll v. Trump*, No. 22-CV-10016 (LAK), 2023 WL 2669790 (S.D.N.Y. Mar. 28, 2023), *Carroll II*, Dkt 212, *Carroll v. Trump*, No. 22-CV-10016 (LAK), 2023 WL 4612082, (S.D.N.Y. July 19, 2023).

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

He first moved to stay it while it still was in state court, where he moved to stay the proceedings pending a decision by the New York Court of Appeals in a different lawsuit against him.[3] The state court denied that motion, and the case was removed to this Court a month later.

Mr. Trump's second and third motions to stay, made before this Court, also were denied. Both were related to a motion by the Department of Justice to substitute the United States for Mr. Trump as the defendant in this case pursuant to the Westfall Act based on the theory that Mr. Trump was an "employee" of the United States within the meaning of the Westfall Act and that he had acted within the scope of his employment as president when he made the allegedly defamatory statements. In October 2020, this Court denied the government's then motion to substitute the United States in place of Mr. Trump.[4] Both Mr. Trump and the government appealed, and Mr. Trump moved in this Court to stay all proceedings pending appeal. He argued that this Court was "divested of jurisdiction" because its "'rejection of certification and substitution effectively denied [defendant] the protection afforded by the Westfall Act, a measure designed to immunize covered federal employees *not simply from liability, but from suit*.'"[5] The Court denied Mr. Trump's motion to stay

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3 *Carroll v. Trump*, Index No. 160694/2019 (NY. Sup. Ct.), Dkt 43.

4 In June 2023, the government stated that in its view, "the prior certification [under the Westfall Act] and motion to substitute have been overtaken" by developments subsequent to the government's initial certification, which included decisions on the substitution issue by the Second Circuit and the District of Columbia Court of Appeals. Dkt 166. On July 11, 2023, the government informed the Court and the parties of its decision not to renew its Westfall Act certification in this case. Dkt 177.

5 Dkt 47 (Def. Letter Request to Stay) at 1 (emphasis and alteration in original) (quoting *Osborn v. Haley*, 549 U.S. 225, 238 (2007)).

without prejudice.[6] Mr. Trump neither sought a stay from the Second Circuit nor renewed his motion in this Court.

Mr. Trump moved a third time to stay this case in conjunction with a second motion, that one filed by Mr. Trump, to substitute the United States in his place. Both requests came shortly after the Second Circuit's decision on Mr. Trump's and the government's appeal of this Court's Westfall Act decision, in which the Circuit certified the question of the whether Mr. Trump had acted within the scope of his employment to the District of Columbia Court of Appeals. This Court denied both motions – the stay motion and Mr. Trump's motion to substitute the United States, and explained:

> "As an initial matter, discovery in this case has virtually concluded. Mr. Trump has conducted extensive discovery of the plaintiff, yet produced virtually none himself. The principal open items, as the Court understands it, are the depositions of Ms. Carroll and Mr. Trump, scheduled for October 14 and 19, respectively. Completing those depositions – which already have been delayed for years – would impose no undue burden on Mr. Trump, let alone any irreparable injury. . . . Given his conduct so far in this case, Mr. Trump's position regarding the burdens of discovery is inexcusable. On December 10, 2020, he moved for a stay pending appeal. His arguments then in support of that motion were almost identical to those advanced here. This Court denied the motion on September 15, 2021. And since that motion was denied, he has taken discovery against plaintiff when the circumstances

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[6] Dkt 56.

were not materially different.

> "[A] stay [also] would cause substantial injury to plaintiff. As the Court noted in an earlier opinion in this case, 'defendant'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 plaintiff may have to present her case against him.' Delay is a more serious concern in this case than usual for several reasons. First, the appeal from my order denying substitution already has consumed 20 months from the day it was noticed and it is not over yet. The remaining question has been certified to the D.C. Court of Appeals, a process that reasonably may be expected to be lengthy. Perhaps most significant, both plaintiff and defendant – and perhaps other witnesses – already are of advanced age. The defendant should not be permitted to run the clock out on plaintiff's attempt to gain a remedy for what allegedly was a serious wrong."[7]

Current Status Of This Case

There have been several developments relevant to this case following the Court's October 2022 denial of Mr. Trump's third motion to stay. Most significantly, in November 2022, Ms. Carroll filed a second lawsuit against Mr. Trump in a case now known as "*Carroll II*" in which she brought two claims. The first was a sexual battery claim under 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

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[7] *Carroll*, 635 F. Supp. 3d at 236-37.

would have been untimely. She brought also a defamation claim for a statement Mr. Trump published on social media in 2022 that was substantially similar to his 2019 statements.

By the time *Carroll II* was filed, discovery in this case had been completed.[8] The parties submitted a joint pretrial order, which this Court approved, and decided Mr. Trump's motion for summary judgment and both parties' pretrial *in limine* motions.[9] This case originally was set for trial on February 6, 2023, and later was adjourned until April 10, 2023. The Court subsequently adjourned the April 10, 2023 trial date *sine die* given the then still pending certified questions in the District of Columbia Court of Appeals on the Westfall Act issue. Following the D.C. court's ruling on the certified questions, a remand of this case by the Second Circuit, and completion of the trial in *Carroll II*, the Court set a new trial date of January 15, 2024 in this case. At present, the only matter that remains open prior to trial is completion of reply memoranda on the issue of preclusive effect, if any, of the findings in *Carroll II* in this action.

Carroll II was tried in this Court from April 25, 2023 to May 9, 2023. The jury in that case unanimously determined that Mr. Trump "sexually abused" Ms. Carroll and that he defamed her in his 2022 statement, awarding her $2.02 million for her sexual battery claim and $2.98

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[8] The deadline to complete all discovery in this case was November 16, 2022. Dkt 77.

[9] Ms. Carroll notes that "[i]f cross-applied to this proceeding, as they should be, the Court's decisions on the motions *in limine* submitted in *Carroll II* would resolve the bulk of the outstanding *Carroll I* evidentiary issues (though of course the parties may wish to submit additional motions in limine in advance of the trial scheduled for January 2024)." Dkt 202 (Pl. Opp. Mem.) at 6 n.7. As this issue is not presently before the Court, it does not now decide or take any position with respect to it.

million for her defamation claim.[10]

Discussion

Legal Standard

The legal standards governing a motion to stay are well settled:

> "'The proponent of a stay bears the burden of establishing its need.' *Clinton v. Jones*, 520 U.S. 681, 708 (1997). Even where irreparable injury might result, a stay is 'not a matter of right.' *Virginian Ry. Co.*, 272 U.S. 658, 672 (1926). Rather, it is 'an exercise of judicial discretion,' and '[t]he propriety of its issue is dependent upon the circumstances of the particular case.' *Id.* at 672–73. Yet the Court's discretion is not unguided. *Nken v. Holder*, 556 U.S. 418, 434 (2009). Courts weighing motions to stay consider four factors: '(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.' *Id.* at 434 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)); *see also Sailor v. Scully*, 666 F.Supp. 50, 51 (S.D.N.Y.1987) (describing the four factors regulating issuance of a stay pursuant to Federal Rule of Civil Procedure 62). Courts treat these four factors 'like a sliding scale.' *Thapa v. Gonzales*, 460 F.3d 323, 334

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[10] The precise meaning of the jury's "sexual abuse" finding has been detailed in the Court's prior decisions and need not be repeated here. *E.g.*, *Carroll*, 2023 WL 5017230; *Carroll*, 2023 WL 4612082.

(2d Cir.2006). '[M]ore of one excuses less of the other.' *Id.* (quoting *Mohammed v. Reno*, 309 F.2d 95, 101 (2d Cir.2002))."[11]

Mr. Trump contends that this case should be stayed pending appeal because (1) there is a substantial likelihood he will succeed in his appeal, (2) he would suffer irreparable harm in the absence of a stay, (3) a stay would not harm Ms. Carroll, and (4) the public interest favors a stay. His argument fails on each criterion.

Likelihood of Success

Mr. Trump argues that there is a sufficient probability of success on the merits of his

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[11] *Whitehaven S.F., LLC v. Spangler*, No. 13-CV-8476 (ER), 2014 WL 5510860, at *1 (S.D.N.Y. Oct. 31, 2014) (footnote omitted). *See also, e.g.*, *New York v. United States Dep't of Homeland Sec.*, 974 F.3d 210, 214 (2d Cir. 2020) ("The factors relevant in assessing a motion for a stay pending appeal are the applicant's 'strong showing that he is likely to succeed on the merits,' irreparable injury to the applicant in the absence of a stay, substantial injury to the nonmoving party if a stay is issued, and the public interest.") (citation omitted); *In re World Trade Ctr. Disaster Site Litig.*, 503 F.3d 167, 170 (2d Cir. 2007) ("The four factors to be considered in issuing a stay pending appeal are well known: '(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.'") (footnote omitted) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)).

Mr. Trump points out that courts in this Circuit have differed in the "exact phrasing" of the four factors relevant to a motion to stay, specifically with respect to the first factor on likelihood of success. Dkt 186 (Def. Mem.) at 2. The Second Circuit has acknowledged that "some uncertainty has developed as to the first factor because of the various formulations used to describe the *degree* of likelihood of success that must be shown," and has stated that "'[t]he necessary 'level' or 'degree' of possibility of success will vary according to the court's assessment of the other [stay] factors.'" *Mohammed v. Reno*, 309 F.3d 95, 100 (2d Cir. 2002) (emphasis in original) (quoting *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir.1977)). Mr. Trump identifies "[m]ore recent holdings" that he claims have "recogniz[ed] the appropriateness of staying litigation where there is at least a 'serious question going to the merits' pending appeal." Dkt 186 (Def. Mem.) at 3 (citing *Trump v. Vance*, 481 F.Supp.3d 161, 164 (S.D.N.Y. 2020)). The Court need not and does not now decide between these various formulations because it finds that Mr. Trump's motion would fail under any of the applicable formulations.

appeal of the absolute presidential immunity decision principally for the same reasons he advanced unsuccessfully in his summary judgment motion. Indeed, many of Mr. Trump's points in his current motion repeat almost verbatim those offered in his prior briefing in support of his assertion that presidential immunity is a non-waivable issue of subject matter jurisdiction. But he does not address any of this Court's reasoning in rejecting his argument. Nor does he engage in any meaningful way with this Court's conclusion that permitting him amend to raise his purported presidential immunity defense at this late date in any event would be futile because the defense is legally insufficient. His only other argument – that the Second Circuit has jurisdiction immediately to review the Court's decision that he waived his presidential immunity defense – is irrelevant to the question of whether he has any significant likelihood of success on appeal.

In sum, Mr. Trump has not provided a single reason for the Court to find that there is any likelihood that he will succeed on appeal, let alone a "strong showing." Accordingly, this factor weighs against Mr. Trump.[12]

Irreparable Harm

Mr. Trump's arguments with respect to irreparable harm also are unpersuasive. He contends that he would be subjected to irreparable harm in the absence of a stay because, he argues,

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[12] To the extent Mr. Trump relies on the court's articulation of the standard in *Trump v. Vance*, 481 F.Supp.3d 161 (S.D.N.Y. 2020), that "[t]he movant must show . . . either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in the movant's favor,'" his argument fares no better. *Id.* at 164 (citation omitted). Even accepting for the sake of argument that the latter standard would apply here and that Mr. Trump's appeal presents "sufficiently serious questions going to the merits," the "balance of hardships" in this case is far from "decidedly in the movant's favor" for the reasons discussed below. *Id.* Indeed, the balance of hardships in these circumstances strongly disfavors a stay.

"the entire purpose of an immunity is inherently and unavoidably frustrated when a Court acknowledges the viability of an immunity only *after* the conclusion of litigation, at which point the immunity from suit has already been irreparably and indisputably forfeited."[13] While that argument is convincing in many circumstances, it entirely is without merit in the unusual circumstances in this case.

First, by litigating this case for *over three years* before even raising his presidential immunity defense – and waiting another *seven months* between first raising his immunity defense and moving to stay this case on that basis – Mr. Trump effectively has forfeited any claim to irreparable harm in the absence of a stay. He has not offered any explanation for either delay despite ample opportunity to do so.[14] Although he now argues that his "presidential immunity defense will be 'effectively lost'" without a stay because he otherwise "will be required to proceed to trial without final resolution as to whether his presidential immunity defense is viable," his loss of that defense was the product of his own decision not to raise it until the tail end of this litigation.[15] In other words, any purported harm resulting from his having to stand trial despite a potential claim to immunity would be entirely of his own doing.

Second, Mr. Trump's argument for irreparable harm is even weaker in this case's current posture. As noted above, discovery in this case was completed in November 2022. Almost

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13 Dkt 186 (Def. Mem.) at 8 (emphasis in original).

14 *New York v. United States Dep't of Com.*, 339 F. Supp. 3d 144, 148 (S.D.N.Y. 2018) ("'[I]nexcusable delay in filing' a motion to stay 'severely undermines the . . . argument that absent a stay irreparable harm would result.'") (quoting *Hirschfeld v. Bd. of Elections*, 984 F.2d 35, 39 (2d Cir. 1993)).

15 Dkt 186 (Def. Mem.) at 10 (citation omitted).

all of the pretrial litigation is complete, and trial is less than five months away. Moreover, while the precise scope of the trial in this case is yet to be determined, the Court already has concluded that the jury's finding in *Carroll II* that Mr. Trump sexually abused Ms. Carroll "is conclusive with respect to this case."[16] Thus, having completed already the pretrial burdens to which he refers in his argument, the only purported harm Mr. Trump reasonably may claim he would suffer in this case would be having to stand trial. In these somewhat unusual and extraordinary circumstances where immunity is being litigated essentially on the eve of trial, Mr. Trump has not satisfied his burden of establishing that he would suffer irreparable harm in the absence of a stay.

Injury to Plaintiff and Public Interest

By contrast, a stay almost certainly would injure both Ms. Carroll and the public interest.

Mr. Trump contends that a stay would cause minimal harm, if any, to Ms. Carroll. He argues that:

> "While it is true that this action has been pending for several years, Plaintiff was able to utilize discovery gathered in this action to proceed to trial in an expedited basis in the related matter of *Carroll II*. In this context, the harm of delay is significantly diminished. Indeed, it cannot be reasonably disputed that Defendant's entitlement to be heard on the threshold question of whether he is entitled to absolute immunity from liability outweighs Plaintiff's desire to expeditiously hold a second

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[16] *Carroll*, 2023 WL 5017230, at *7.

trial on similar and related claims. Therefore, this factor tips in Defendant's favor."[17] But his argument mistakenly conflates the relief Ms. Carroll was awarded in *Carroll II* (which now is pending on appeal) and the relief she seeks for the distinct injuries she allegedly suffered as a result of the alleged defamation asserted in this case. The fact that the claims in both cases are "similar and related" has nothing to do with whether Ms. Carroll would be injured by a stay in this case. And for reasons this Court has discussed previously, she almost certainly would. As the Court explained in denying Mr. Trump's request for leave to raise his absolute immunity defense on the alternative basis of undue delay and unfair prejudice:

> "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 [this] Court, the Second Circuit and the D.C. Court of Appeals, and devoted untold hours and resources to pursuing her claim. . . . [A]n 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.' 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

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[17] Dkt 186 (Def. Mem.) at 11.

now at the eleventh hour when he could have done so years ago."[18]

That analysis applies here too. In addition to all of these reasons that delaying trial would injure Ms. Carroll, a stay in these circumstances also could – as Ms. Carroll points out – "cause a spiral of further delays" given that "a rescheduled trial may have to compete with the end of [Mr.] Trump's presidential campaign, any number of other civil and criminal trials [that Mr. Trump currently faces], the possibility of a prison sentence, and/or conceivably the start of a second Trump presidency."[19] The injury likely to result to Ms. Carroll therefore counsels against a stay.

Finally, public interest considerations disfavor a stay. Mr. Trump contends that "there 'exists the greatest public interest in providing' the President immunity from his official acts, and that deprivation of such immunity would be to the 'detriment of not only the President and his office but also the Nation that the Presidency was designed to serve.'"[20] His argument again fails to take into account the fact that this Court already has held that his immunity defense, even if his answer were amended to assert it at this late date, would fail on the merits, a determination with which Mr. Trump has not engaged at all other than by incorporating his prior unsuccessful arguments by reference. While there is a public interest in immunizing presidents for actions properly taken within the scope of their duties, there is a public interest also in ensuring that even presidents will be held accountable for actions that – as this Court already has determined in this case – do not come within

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18 *Carroll*, 2023 WL 4393067, at *12-13.

19 Dkt 202 (Pl. Opp. Mem.) at 9.

20 Dkt 186 (Def. Mem.) at 12 (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 752 (1982)).

that scope.[19] Moreover, although the Second Circuit has acknowledged "a public interest in vindicating the immunity of [a defendant] who might be entitled to immunity from suit," it has recognized also – as Mr. Trump concedes – "a public interest in having [a plaintiff] who might be entitled to recovery receive compensation while still living and able to use it to . . . improve the quality of [his or her life]."[20] As noted above, both parties are of advanced age, and a stay of this case pending resolution of Mr. Trump's appeal would threaten delaying any compensation to which Ms. Carroll might be entitled by at least several months, if not a year or more. The public interest therefore weighs against a stay.

Given that all four factors weigh against Mr. Trump's request to stay this case, his motion is denied on that basis.

This Court Has Not Been Divested Of Jurisdiction

In a one page argument at the end of his brief, Mr. Trump contends that this action "must also be stayed on the independent basis that this Court is currently divested of jurisdiction" because "as presidential immunity confers immunity from suit in its entirety, appeals involving immunity from suit therefore pertain to – and divest jurisdiction from the trial court over – the

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19 Mr. Trump argues also that the public interest favors a stay because he claims his appeal raises "important and novel questions concerning the doctrine of presidential immunity, the separation of powers doctrine, and the interplay between the Executive Branch and Judicial Branch." Dkt 207 (Def. Reply Mem.) at 1-2. His bare assertion that the issues raised by his immunity defense are "important and novel," without demonstrating that there is any merit to those issues, plainly is irrelevant to the question of where the public interest lies.

20 *In re World Trade Ctr. Disaster Site Litig.*, 503 F.3d at 170.

entirety of the litigation."[21] His argument is without merit.

Without now deciding the issue, the Court assumes *arguendo* that its decision that Mr. Trump waived his immunity defense properly is immediately appealable under the collateral order doctrine.[22] It does not follow, however, that this Court is divested of jurisdiction as a result of that appeal. Even where an interlocutory appeal of a denial of an immunity defense otherwise might divest a district court of jurisdiction, "[c]ourts having considered this question have uniformly applied the 'dual jurisdiction rule'. . . , under which 'the filing of an appeal under the collateral order doctrine respecting a right not to be tried divests the district court of jurisdiction to proceed with the trial [against the appealing defendant] *unless the district court certifies that the appeal is*

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21 Dkt 186 (Def. Mem.) at 13.

22 Ms. Carroll contends that "the Second Circuit has made clear that '[t]he divestiture of jurisdiction rule is … not a *per se* rule'" and instead "'is a judicially crafted rule' grounded in 'concerns of efficiency.'" Dkt 202 (Pl. Opp. Mem.) at 12 (emphasis in original) (quoting *United States v. Rodgers*, 101 F.3d 247, 251 (2d Cir. 1996)). The question in *Rodgers*, however, was "whether filing a notice of appeal from a district court order that is *patently nonappealable* divested the district court of jurisdiction to resentence." 101 F.3d at 251 (emphasis added). *See also In re Facebook, Inc., IPO Sec. & Derivative Litig.*, 42 F. Supp. 3d 556, 561 (S.D.N.Y. 2014) ("*Rodgers,* . . . however, is not directly on point as it does not bear directly on cases involving the appeal of a denial of qualified immunity."). Ms. Carroll does not argue that Mr. Trump's appeal is "patently nonappealable." Moreover, courts in this Circuit have adopted the principle, as discussed above, that *unless an appeal is frivolous*, a district court is divested of jurisdiction "immediately upon the filing of a request for interlocutory review under the collateral order doctrine . . . in cases 'respecting a right not to be tried,' such as double jeopardy, foreign sovereign immunity, Eleventh Amendment immunity, and qualified immunity." *In re S. Afr. Apartheid Litig.*, No. 02-CV-4712 (SAS), 2009 WL 5183832, at *1 (S.D.N.Y. July 7, 2009) (citation omitted) (emphasis added). Accordingly, and in the absence of fuller briefing by the parties on this issue, the Court assumes without now deciding that Mr. Trump's appeal is immediately reviewable but nonetheless determines that it is not divested of jurisdiction because the appeal is frivolous.

frivolous[.]'"[23]

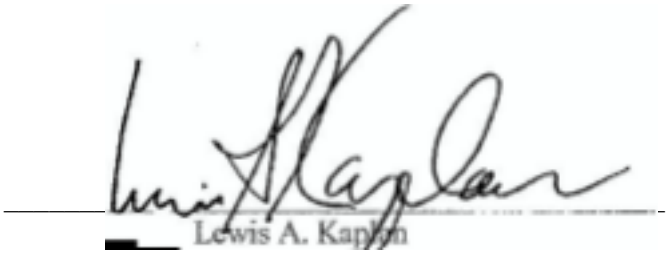
As stated above, Mr. Trump has not made any argument different from the points contained in his summary judgment briefing – all of which this Court has rejected – that would permit a determination that absolute presidential immunity is a nonwaivable question of subject matter jurisdiction. What is more, even if the Circuit were to disagree on that question, this Court already has determined also that Mr. Trump's immunity defense would fail on the merits. He has not engaged with this Court's analysis of either question and thus shown no likelihood of success on appeal. Accordingly, this Court certifies that Mr. Trump's appeal is frivolous and therefore has not divested this Court of jurisdiction.

Conclusion

For the foregoing reasons, Mr. Trump's motion for a stay pending appeal (Dkt 185) is denied. This Court certifies that the appeal itself is frivolous.

SO ORDERED.

Dated: August 18, 2023



Lewis A. Kaplan
United States District Judge

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[23] *New York v. Locke*, No. 08-CV-2503 (CPS) (RLM), 2009 WL 2413463, at *3 (E.D.N.Y. Aug. 3, 2009) (second and third alterations in original) (emphasis added) (citation omitted). *See also, e.g.*, *Davis v. City of New York*, No. 12-CV-3297 (PGG), 2018 WL 10070503, at *1 (S.D.N.Y. Dec. 14, 2018) ("The Supreme Court has approved the 'dual jurisdiction' approach as an appropriate method to deal with frivolous interlocutory appeals. *Behrens v. Pelletier*, 516 U.S. 299, 310 (1996). Accordingly, this Court must determine whether [defendant's] appeal [(including of the denial of qualified immunity)] is frivolous."); *Garcia v. Bloomberg*, No. 11-CV-6957 (JSR), 2012 WL 3127173, at *1 (S.D.N.Y. July 27, 2012) ("An interlocutory appeal, *unless frivolous*, generally divests the district court of jurisdiction respecting the issues raised and decided in the order on appeal . . . .") (emphasis added); *In re World Trade Ctr. Disaster Site Litig.*, 469 F. Supp. 2d 134, 137 (S.D.N.Y. 2007) ("I hold, following full consideration of Defendants' arguments, that their notice of appeal is legally ineffective to divest the district court of its jurisdiction."); *City of New York v. Beretta U.S.A. Corp.,* 234 F.R.D. 46, 51-53 (E.D.N.Y. 2006) (Weinstein, J.).

Exhibit D

RE: Carroll v. Trump (2nd Circuit; Nos. 23-1045 & 23-1146) - Notice of Emergent Motion Pursuant to FRAP 41(d)(1) & 8(a)(2)

Joshua Matz <jmatz@kaplanhecker.com>

Wed 12/20/2023 5:25 PM

To:Michael Madaio <mmadaio@habbalaw.com>;Roberta Kaplan <rkaplan@kaplanhecker.com>;Shawn G. Crowley <scrowley@kaplanhecker.com>;Matthew Craig <mcraig@kaplanhecker.com>;Trevor Morrison <tmorrison@kaplanhecker.com>;Kate Harris <kharris@kaplanhecker.com>
Cc:Alina Habba, Esq. <ahabba@habbalaw.com>;Peter Gabra <pgabra@habbalaw.com>;Peter Swift <pswift@habbalaw.com>

Counsel,

Ms. Carroll will oppose this motion and reserves all rights.

Once we have seen your motion, we will assess our position with respect to a briefing schedule.

Sincerely,
Joshua

Joshua Matz | Kaplan Hecker & Fink LLP

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From: Michael Madaio <mmadaio@habbalaw.com>
Sent: Wednesday, December 20, 2023 5:14 PM
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Subject: Carroll v. Trump (2nd Circuit; Nos. 23-1045 & 23-1146) - Notice of Emergent Motion Pursuant to FRAP 41(d)(1) & 8(a)(2)

Counsel,

With respect to the above-referenced matter, please be advised that Defendant-Appellant, Donald J. Trump, intends to file an emergent motion seeking: (i) a stay of mandate pursuant to FRAP 41(d)(1); and (ii) a stay of district court proceedings pursuant to FRAP 8(a)(2). We anticipate that the motion will be filed tomorrow afternoon.

The Second Circuit shall notify the parties of the date and time of the hearing; however, we will be requesting that the motion be heard as soon as practicable and not later than Friday, December 29. We are also amendable to discussing a briefing scheduling.

This e-mail correspondence shall constitute notice under FRAP 8(a)(2)(c). Please advise whether Plaintiff-Appellee intends to oppose this motion or consents to the relief requested.

Thank you,
Michael

Michael T. Madaio, Esq.

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