Nos. 20-3977 & 20-3978

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

E. JEAN CARROLL,
Plaintiff-Appellee,

v.

DONALD J. TRUMP,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Movant-Appellant.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF APPELLANT UNITED STATES OF AMERICA

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page(s)**

U. S. Constitution:

Statutes:

Legislative Materials:

Other Authorities:

STATEMENT OF JURISDICTION

This appeal arises from the denial of a motion to have the United States substituted as the defendant in a tort action where the United States has certified that the named defendant was a government employee acting within the scope of his office or employment. *See* 28 U.S.C. § 2679(d) (providing for substitution under those circumstances). On October 27, 2020, the district court entered an order denying the United States' substitution motion. SPA61.[1] On November 25, 2020, the United States filed a timely notice of appeal from the denial of substitution. A421. President Donald J. Trump, who is the named defendant in the tort action, also filed a notice of appeal that same day. A423. This Court has jurisdiction pursuant to 28 U.S.C. § 1291. *See Osborn v. Haley*, 549 U.S. 225, 238 (2007) (holding that denial of substitution under 28 U.S.C. § 2679(d) is a "collateral order" that "qualifies as a reviewable final decision within the compass of 28 U.S.C. § 1291").

STATEMENT OF THE ISSUES

Under the Federal Employees Liability Reform and Tort Compensation Act of 1988, which is commonly known as the Westfall Act, when "any employee of the government" is sued in his individual capacity under state tort law and the Attorney General certifies that the employee "was acting within the scope of his office or employment at the time of the incident out of which the claim arose," the action is

[1] Citations of the form "SPA__" reference the Special Appendix attached to this brief. Citations of the form "A__" reference the joint appendix.

deemed to be a suit against the United States pursuant to the Federal Tort Claims Act (FTCA), and the United States is substituted as the sole defendant. 28 U.S.C. § 2679(b), (d).

This appeal arises from a defamation suit brought against President Donald J. Trump in his individual capacity. The Attorney General's delegate certified that the alleged defamation occurred while the President was acting within the scope of his office or employment. The district court rejected the United States' motion to be substituted as the defendant. The court concluded that the President is not an "employee of the government" for purposes of the FTCA and the Westfall Act. The court concluded, in the alternative, that the defamation alleged in the complaint did not fall within the scope of the President's office or employment.

The issues presented are:

1. Whether the President is an "employee of the government" for purposes of the FTCA and the Westfall Act.

2. Whether the President was acting within the scope of his office or employment when he made allegedly defamatory statements to reporters in the course of responding to publicized accusations of past misconduct.

STATEMENT OF THE CASE

This litigation was originally filed in November 2019 in the Supreme Court of the State of New York, County of New York. A24-A51. The single-count complaint alleges that in June 2019, President Donald J. Trump defamed plaintiff E. Jean Carroll

in the course of making three statements to the media denying an accusation by Ms. Carroll that he had sexually assaulted her decades earlier. A49-A50.

On September 8, 2020, the United States filed a certification by a delegate of the Attorney General stating that the conduct alleged in the complaint occurred while the President was acting with the scope of his office or employment. A53-A54. That same day, the United States filed a notice of removal of the suit to the U.S. District Court for the Southern District of New York, *see* 28 U.S.C. 2679(d)(2), and a motion to have the United States substituted as the sole defendant. A2-A3, A12; *see also* A19-A21. Ms. Carroll opposed the substitution motion and, on October 27, 2020, the Hon. Lewis A. Kaplan issued an opinion denying the motion to substitute. SPA1-SPA61. The district court's decision will be reported and is currently available at 2020 WL 6277814.

A. Statutory Background

The Federal Tort Claims Act creates a cause of action against the United States for the tortious acts of "any employee of the Government" that occur while the employee was acting "within the scope of his office or employment." 28 U.S.C. § 1346(b)(1); *see id.* §§ 2671-2680. The statute defines "[e]mployee of the government" to "include[]," among many other categories, "officers or employees of any federal agency." 28 U.S.C. § 2671. The term "[f]ederal agency," in turn, is defined to "include[] . . . the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States,

and corporations primarily acting as instrumentalities or agencies of the United States." *Id.*

In 1988, Congress adopted the Westfall Act, which provides that when a tort action is brought against a federal employee in the employee's individual capacity, the Attorney General, or his delegate, may certify "that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose," whereupon the employee is dismissed from the action, the United States "shall be substituted" as the sole defendant, and the suit "shall be deemed an action against the United States" under the FTCA. 28 U.S.C. § 2679(d)(1). When a certification is filed in a case that was originally brought in state court, the action "shall be removed" to federal court. *Id.* § 2679(d)(2). The certification is "conclusive[]" of federal jurisdiction for purposes of the removal, *id.*, but whether the employee was acting within the scope of his office or employment is subject to judicial review, *see Gutierrez de Martinez v. Lamagno*, 515 U.S. 417 (1995).

B. Factual Background And Prior Proceedings

1. In 2019, Ms. Carroll published a book excerpt in which she alleged that she was sexually assaulted by President Trump in the 1990s while he was still a private citizen. SPA3. In response to this accusation, President Trump made three statements that denied the allegations and questioned Ms. Carroll's credibility and motivations. SPA12-SPA14. The first denial was made in a written statement released by the White House Office of the Press Secretary to media outlets within

hours of publication of the book excerpt. SPA12. Over the ensuing three days, President Trump denied the allegations twice more in direct response to questions from reporters: once during a "press gaggle" as he was departing the White House for Camp David, and once during a wide-ranging press interview in the Oval Office. SPA13-SPA14. The first two statements appear in the Daily Compilation of Presidential Documents, *see* Daily Comp. Pres. Docs., 2019 DCPD No. 410 (June 21, 2019); Daily Comp. Pres. Docs., 2019 DCPD No. 414 (June 22, 2019).

2. In November 2019, Ms. Carroll filed suit in New York state court against President Trump in his personal capacity. The single-count complaint alleged that the three statements made by the President constituted defamation under New York state law. A24-A51. Ten months after the suit was filed, the Director of the Torts Branch of the Civil Division of the U.S. Department of Justice certified on behalf of the Attorney General that the President was acting within the scope of his office or employment with respect to the allegations in the complaint. A53-A54.

In conjunction with filing this certification, the United States filed a notice of removal of the action to the U.S. District Court for the Southern District of New York (A19), and filed a motion to have itself substituted as the defendant on the basis of the certification (A12). Ms. Carroll opposed substitution, arguing that the President is not an employee of the federal government for purposes of the Westfall Act and that, in any case, the conduct alleged in the complaint fell outside the scope of the President's office or employment. A314-A358. In reply, the United States

explained that the text of the statute as well as its policies make clear that the President falls within the scope of the statute. A404-A408. The government also explained that statements by an elected office holder in response to accusations calling into question his fitness to hold the public trust fall within the scope of employment, even assuming that the response may later be adjudged defamatory. A398-A404.

3. The district court scheduled an in-person hearing for consideration of the substitution motion. A391. However, on the day of the hearing, counsel for the United States was unable to gain entry to the courthouse because of pandemic-related travel restrictions. A414. The United States moved to have the hearing continued, but the court denied the motion and held the hearing, with government counsel participating by telephone. A414, A415-A419, A420. In response to the government's request to have the substitution motion submitted on the papers, plaintiff asked for the opportunity to submit a sur-reply brief, which the government opposed. A417-A418. The court determined that the "fairest" result would be to consider the motion on the existing papers and to invoke "the time-honored principle that new arguments raised for the first time in a reply brief will not be considered." A418. The United States agreed to this approach. A418.

4. The district court denied the motion for substitution. SPA1-SPA61. The court first concluded that the President is not an "employee of the government" for purposes of the FTCA and the Westfall Act and, thus, that it would never be proper for the United States to substitute itself for the President. SPA16-SPA35. In reaching

that conclusion, the court found that the United States had waived its primary statutory interpretation argument (SPA19 n.48), and, in any case, that the statute is best read to exclude the President (SPA18-SPA26). The court found additional support for its restrictive interpretation of the term "employee of the government" in the legislative history of the Westfall Act and the presumption against judicial review of the President's official acts. SPA26-SPA33.

The district court further held that the conduct alleged in the complaint was not within the scope of the President's office or employment. SPA35-SPA61. The court stated that the Westfall Act is applicable only when the employee is acting within the scope of a master-servant relationship; because the President has no master, the court reasoned, he could not have been acting within the scope of his employment. SPA43-SPA47. The court also determined that in responding to Ms. Carroll's accusation, the President was acting outside the scope of his employment under the law of either the District of Columbia (SPA47-SPA59) or New York (SPA59-SPA61). The district court acknowledged that its scope of employment analysis under D.C. law was at odds with that of the D.C. Circuit in *Council on American Islamic Relations v. Ballenger*, 444 F.3d 659, 665-66 (D.C. Cir. 2006). SPA49-SPA53. The court concluded, however, that the D.C. Circuit's opinion "misstates D.C. law." SPA51. The court also again invoked waiver principles in rejecting the United States' argument that the President's duties include responding to accusations of wrongdoing that threaten his ability to govern effectively. SPA54.

SUMMARY OF ARGUMENT

In this suit, Ms. Carroll seeks to impose common law tort liability on President Trump in his individual capacity, alleging that the President defamed her in the course of responding through the White House media to Ms. Carroll's public accusation that he committed a serious criminal offense. Under the Westfall Act, the exclusive remedy for common law torts committed by federal officers acting within the scope of their offices is a suit against the United States pursuant to the FTCA. *See* 28 U.S.C. § 2679(b)(1); *see also id.* § 2671. As many courts have recognized, an elected official acts within the scope of his office when he comments on matters of public concern. That is the case when the official addresses an issue potentially relevant to his ability to perform the duties of his office effectively. *See, e.g.*, *Council on Am. Islamic Relations v. Ballenger*, 444 F.3d 659 (D.C. Cir. 2006). Consistent with that body of precedent, the Attorney General's delegate certified that the President was acting within the scope of his office in connection with the allegations in this suit and the United States sought to have itself substituted as the defendant. *See* 28 U.S.C. § 2679(d).

The district court denied substitution on two principal grounds, neither of which withstands scrutiny. First, the court mistakenly concluded that the President is not an employee of the government for purposes of the Westfall Act. The court reached this conclusion notwithstanding the extraordinary breadth of the statutory definition and the Supreme Court's admonition that "[w]hen Congress wanted to limit the scope of immunity available under [the Westfall Act], it did so expressly[.]" *United*

States v. Smith, 499 U.S. 160, 173 (1991). *See also Levin v. United States*, 568 U.S. 503, 509 (2013) (describing the Westfall Act as "[s]hielding all federal employees from personal liability without regard to agency affiliation or line of work"). The court reached its holding largely on the theory that Congress did not mean to apply the statute's comprehensive coverage to parts of the Executive Branch; that the statute applied only to "departments"; and that the White House is not a department. The court's restrictive reading proceeds from a mistaken premise that is at odds with both the statute's text and the longstanding interpretation of the statute as reflected in the historical practice of all three branches of government. The court's opinion also fails to grapple with the fact that the Westfall Act has been applied on many prior occasions not only to the President, but also to an array of other White House officials whose coverage under the statute has never before been questioned and who would be left unprotected under the district court's novel statutory interpretation. And contrary to the district court's determination, the United States did not waive entitlement to a proper construction of the statute.

Second, the district court also erred in concluding that the defamation alleged by Ms. Carroll falls outside the scope of the President's office. The court recognized that its determination that District of Columbia scope-of-employment law would not cover the conduct at issue here departed from decisions of other courts applying District of Columbia precedents in Westfall Act cases. The court simply dismissed as wrongly decided a line of cases from the D.C. Circuit applying D.C. law under closely

related circumstances. But the district court's own analysis of D.C. law was cursory and failed to show any error in the D.C. Circuit's decisions.

The district court also declared that the scope of employment analysis is limited to circumstances in which a servant is fulfilling duties to his master. Since the President has no master, he cannot be said to have acted within the scope of his employment. This line of reasoning is without basis in the statute's text and would also exclude from the statute's ambit other high ranking constitutional officers, including judges and Members of Congress, who are explicitly covered by the FTCA and do not act under any superior official.

The district court also raised the possibility that New York law, rather than D.C. law, should govern its inquiry. That suggestion is wrong but, in any case, the district court's analysis would fail under New York law as well.

STANDARD OF REVIEW

This Court reviews the district court's legal conclusions regarding the denial of immunity under the Westfall Act *de novo* and its factual findings for clear error. *Bowles v. United States*, 685 F. App'x 21, 24 (2d Cir. 2017) (unpublished); *see also Leitner v. Westchester Cmty. Coll.*, 779 F.3d 130, 134 (2d Cir. 2015) (describing standard of review in sovereign immunity cases).

ARGUMENT

I. The Westfall Act Applies To The President

A. The text and purpose of the Federal Tort Claims Act provide no basis for excluding the President of the United States from the ambit of the Westfall Act

1. The FTCA provides a waiver of sovereign immunity and creates a cause of action against the United States for the allegedly wrongful acts of "any employee of the government" committed while the employee was acting within the scope of his office or employment. 28 U.S.C. § 1346(b)(1); *see id.* §§ 2671-2680. In amending the FTCA, the Westfall Act made that statute's remedy the "exclusive" means of recovery in suits predicated on the "wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." *Id.* § 2679(b). To effectuate this provision, the Westfall Act created a mechanism by which the United States can substitute itself as the defendant in an individual capacity suit brought against a government employee upon certification by the Attorney General or his delegate "that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose[.]" *Id.* § 2679(d)(1). If the suit was commenced in state court, the certification triggers removal to federal district court. *Id.* § 2679(d)(2). Once the United States has been substituted as defendant, the suit proceeds against the government as the sole defendant subject to the provisions of the FTCA.

The FTCA defines "employee of the government" in sweeping terms. It "includes . . . officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged [in certain training or duty], and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation." 28 U.S.C. § 2671. And "federal agency" is defined in similarly expansive terms to include all "executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States." *Id.*

It would have been difficult to draft more all-embracing definitions. Under those definitions, a qualifying "employee" includes those officers at the pinnacle of government—Members of Congress, Justices of the Supreme Court, and the generals and admirals who command our armed forces. *See, e.g.*, *Does 1-10 v. Haaland*, 973 F.3d 591, 597-98 (6th Cir. 2020). And it extends equally to unpaid individuals temporarily acting in the service of any agency. *See* S. Rep. No. 79-1400, at 31 (1946) (expressing Congress's expectation that the FTCA would cover "all Federal officers and employees").

Broad as this enumeration is, moreover, it is not exclusive. That is clear from the text of the statute, which defines both "employee of the government" and "federal agency" as "includ[ing]" the listed categories. 28 U.S.C. § 2671; *see also*

Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 162 (2012) (concluding that use of the word "includes" in a definition "is significant because it makes clear that the examples enumerated in the text are intended to be illustrative, not exhaustive"). Case law has accordingly recognized that the list of entities enumerated in the definition of "federal agency" is "not an exclusive definition" of the term. *McNamara v. United States*, 199 F. Supp. 879, 880 (D.D.C 1961).

All three branches of government have long treated the FTCA's coverage as sweeping beyond the specific entities listed in the statutory definitions. Although the statute did not expressly refer to the legislative or judicial branches until a clarifying amendment in 1988, *see* Pub. L. No. 100-694, § 3, 102 Stat. 4563, 4564 (1988), the statute was construed even prior to that amendment as reaching beyond the executive branch. Shortly after the FTCA was enacted, the Comptroller General explained that "while only the executive departments and independent establishments of the United States are mentioned specifically in the definition of a Federal agency, an examination of the entire act and its legislative history requires a conclusion that no agencies or employees are excluded from the operation of the act" and, thus, that the Library of Congress falls within the scope of the FTCA. *Federal Tort Claims Act—Applicability to Agencies in Other Than Executive Branch of Government*, 26 Comp. Gen. 891, 892 (1947). Congress apparently agreed with the Comptroller General's interpretation and appropriated funds to the Library of Congress for the payment of FTCA claims. *See, e.g.*, Pub. L. No. 80-641, ch. 467, 62 Stat. 423, 434 (1948).

The Senate also understood the FTCA to reach beyond the executive branch prior to the 1988 amendment, authorizing the Sergeant at Arms of the Senate, with approval of the Committee on Rules and Administration, to settle tort claims under the FTCA. *See* S. Res. 492, 97th Cong. 2d Sess. (1982), *reprinted in* S. Doc. No. 113-1, at 194-95 (2014);[2] *see also* S. Rep. No. 97-649, at 1 (1982) ("It is the opinion of the Senate Legal Counsel, the Senate Legislative Counsel, the Department of Justice, and the General Accounting Office that the Federal Tort Claims Act does include the Legislative Branch."). Similarly, "the Administrative Office of the United States Courts . . . adjudicated [FTCA] claims against employees of the judiciary" long before the 1988 amendment. *United States v. LePatourel*, 571 F.2d 405, 409 (8th Cir. 1978).

Particularly against that backdrop, the phrase "employee of the government" is most naturally read to reach the President. The President is employed by the government in a literal sense. He renders services to the United States in return for a salary and other compensation, including government-provided housing and a pension. *See* U.S. Const. art. II, § 1, cl. 8; 3 U.S.C. § 102. He has no employer other than the United States. *Cf.* U.S. Const. art. II, § 1, cl. 8. The Supreme Court has accordingly recognized the President as a salaried employee of the United States and has referred to him as such. *See United States v. Hatter*, 532 U.S. 557, 563 (2001). The

[2] https://www.govinfo.gov/content/pkg/SMAN-113/pdf/SMAN-113.pdf.

President is thus properly considered an employee of the government under the plain language of the FTCA.

2. No basis exists for inferring the exclusion of the President of the United States from the otherwise comprehensive scope of the FTCA. The Supreme Court has recognized that "[w]hen Congress wanted to limit the scope of immunity available under [the Westfall Act], it did so expressly, as it did in preserving employee liability for *Bivens* actions and for actions brought under a federal statute authorizing recovery against the individual employee." *United States v. Smith*, 499 U.S. 160, 173 (1991) (citing 28 U.S.C. § 2679(b)(2)). Congress did not include any such express exclusion for the President. *See Levin v. United States*, 568 U.S. 503, 509 (2013) (describing the Westfall Act as "[s]hielding all federal employees from personal liability without regard to agency affiliation or line of work"); *Hui v. Castaneda*, 559 U.S. 799, 810 (2010) (explaining that the Westfall Act "applies to all federal employees").

The district court believed it significant that the President is entitled to absolute immunity for his official acts, reasoning that he therefore must not need the Westfall Act's protections and, as a result, falls outside the purposes of the Act. SPA27-SPA28. As discussed below, *see infra* p. 26, that reasoning is mistaken on its own terms. But in focusing narrowly on the issue of liability, the court disregarded the important concerns, often stressed in the context of qualified immunity, raised when government officials are embroiled in litigation in connection with their official acts. As the Supreme Court has explained, the purpose of the Westfall Act is to "immunize

covered federal employees not simply from liability, but from suit." *Osborn v. Haley*, 549 U.S. 225, 238 (2007). Were the Westfall Act inapplicable, the President, unlike every other government officer or employee, would bear the burden of responding to suits in state and federal courts across the country.

It is therefore unsurprising that the substitution of the United States for the President was not questioned in any of the four cases of which we are aware in which substitution occurred. *See Saleh v. Bush,* 848 F.3d 880, 891 (9th Cir. 2017) (United States substituted for former President); *Ali Jaber v. United States,* 155 F. Supp. 3d 70, 73 n.1 (D.D.C.) (United States substituted for sitting President), *aff'd,* 861 F.3d 241 (D.C. Cir. 2016); *Klayman v. Obama,* 125 F. Supp. 3d 67, 72, 85 (D.D.C. 2015) (same); *West v. Trump,* No. 3:19-CV-2522, 2020 WL 4721291, at *3 n.6 (N.D. Tex. July 23, 2020) (same). Likewise, in at least three cases, courts of appeals have rejected contentions that Members of Congress are not government employees for purposes of the Westfall Act, *Does 1-10*, 973 F.3d at 598; *Williams v. United States*, 71 F.3d 502, 505 (5th Cir. 1995); *Operation Rescue Nat'l v. United States*, 147 F.3d 68, 70-71 (1st Cir. 1998), even though Members generally also enjoy a broad grant of absolute civil immunity under the Speech or Debate Clause, *see Gravel v. United States*, 408 U.S. 606, 615-16 (1972). Emphasizing the breadth of the statute's text, which provides a broad grant of immunity, two of those courts properly described the statute's scope as reaching "all officers, up to the president." *Does 1-10*, 973 F.3d at 598 (quoting *Operation Rescue*, 147 F.3d at 71).

B. The district court's contrary textual analysis is mistaken

1. The district court's contrary conclusion is based on mistaken inferences regarding the definitions of both "federal agency" and "employee of the government."

The district court concluded that Congress had excluded the President from the scope of the FTCA because, in the court's view, the statutory definition of "federal agency" was limited to the list of entities in § 2671 (*i.e.*, "the executive departments, the judicial and legislative branches, the military departments, [and] independent establishments of the United States"), and the Presidency is not on that list. SPA18-SPA26. But the statute says not that the term "federal agency" is *limited* to those entities, but rather that it "include[s]" them. 28 U.S.C. § 2671. As explained above, "include" indicates that "federal agency" sweeps more broadly than the listed entities, which are merely illustrative. *See supra* pp. 12-13; *SmithKline*, 567 U.S. at 162.

In any event, the district court's reasoning fails on its own terms, for the President is an employee of "the executive departments" within the meaning of § 2761. Relying on "the White House's website," the court stated that the term "executive departments" in § 2671 must refer only to the "fifteen executive departments—each headed by a cabinet secretary appointed by the President." SPA24 (quoting the website) (alteration omitted). Yet the court did not explain why a general definition on a website that is geared to be understandable to the general public and addresses a different context would be relevant to the legal interpretation

of § 2761's text. To the contrary, the meaning of "department" depends on context and can be broader than just the cabinet-level agencies. For Appointments Clause purposes, for example, an "inferior officer" may be appointed by the "Heads of Departments." U.S. Const. art. II, § 2. The Supreme Court has held that for purposes of this provision, "Departments" are not limited to cabinet agencies, and that the Securities and Exchange Commission is a "Department" headed collectively by its several commissioners. *See Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 511 (2010).

The district court offered no sound basis for concluding that officers and employees of the Executive Office of the President (EOP) are not officers or employees of a "department" for purposes of the FTCA. The court may have based its conclusion on the ground that many offices in the EOP are not "agencies" for purposes of the Freedom of Information Act or the Administrative Procedure Act. *See Main St. Legal Servs., Inc. v. National Sec. Council*, 811 F.3d 542 (2d Cir. 2016). But those contexts are inapposite here in light of the FTCA's express and expansive definition of "federal agency." Indeed, many courts have allowed substitution under the Westfall Act in cases involving officers or employees of those parts of the EOP that are not "agencies" for purposes of those other statutes. *See, e.g.*, *Wilson v. Libby*, 535 F.3d 697, 712 (D.C. Cir. 2008) (Vice President and Vice President's chief of staff); *Alexander v. Federal Bureau of Investigation*, 691 F. Supp. 2d 182, 196-97 (D.D.C. 2010) (Director of White House Office of Personal Security and White House Counsel),

aff'd, 456 F. App'x 1 (D.C. Cir. 2011); *Al-Tamimi v. Adelson*, 264 F. Supp. 3d 69, 82 (D.D.C. 2017) (President's Deputy National Security Advisor). Those decisions are consistent with longstanding practice under the FTCA. Indeed, in the years immediately following the adoption of the FTCA, at a time when FTCA claims were paid with appropriated funds, Congress specifically appropriated funds to establishments within the Executive Office of the President for the payment of FTCA claims. *See, e.g.*, Pub. L. No. 80-269, ch. 359, tit. I, 61 Stat. 585, 586 (1947); Pub. L. No. 81-206, ch. 506, tit. I, 63 Stat. 631, 632 (1949). Those appropriations would be inexplicable if the EOP were not a "federal agency" within the meaning of the FTCA.[3]

The district court also erred in believing that its narrow reading of the statute's application to the Executive Branch was justified because the statute refers to the Judicial and Legislative "branches," but only to the executive "departments." 28 U.S.C. § 2671. Surmising that "department" is narrower than "branch," the court concluded that Congress must have wished to omit some part of the Executive Branch from the definition of "federal agency." SPA20-SPA21. That conclusion was unwarranted because the definition's reference to "executive departments" dates to

[3] Likewise, in recent years, the United States has paid several judgments and settlements based on FTCA claims arising from the EOP. *See* Judgement Fund Search Page, https://jfund.fiscal.treasury.gov/jfradSearchWeb/JFPymtSearchAction.do (database searched using Executive Office of the President as the Defendant Agency).

the original enactment of the FTCA, whereas the reference to the judicial and legislative branches was not added to the definition of "federal agency" until some four decades later. *See* Pub. L. No. 79-601, ch. 753, tit. IV, § 402, 60 Stat. 812, 842 (1946) (original definition, which contains the reference to "executive departments"); Pub. L. No. 100-694, § 3, 102 Stat. 4563, 4564 (1988) (amending 28 U.S.C. § 2671 to insert words "the judicial and legislative branches" into the statutory definition of "Federal agency"). Language added to the statute in 1988 does not inform the meaning of the phrase "executive departments" in 1946.

2. The district court's reliance on several other statutory provisions also was misplaced.

The district court concluded, for example, that the definition of employee could not encompass the President because settlements of claims under the FTCA generally must be approved by the Attorney General. The court declared that "[i]t is difficult to imagine that Congress intended, without any explicit affirmative statement, to require the president to seek the approval of the Attorney General, one of his subordinates, before settling, on behalf of the federal government, claims against the United States." SPA22. But claims under the FTCA are, as the court recognized, claims against the United States, and the Attorney General, who is responsible for directing the government's litigation, is vested with responsibility for approving settlements of such claims. *See* 28 U.S.C. § 2672. There is thus no incongruity in that arrangement. Indeed, the Attorney General unquestionably may settle cases in which

the United States is substituted as a defendant under the Westfall Act for federal judges and Members of Congress, even though those individuals belong to independent and coequal Branches. *See id.* In any event, the court was wrong even on its own terms: the President's power to remove the Attorney General provides ample control over the latter's exercise of settlement authority in any given case (including one initially brought against the President himself). *See Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2191-92 (2020).

The district court also noted that under the FTCA, claims must first be presented to the relevant agency. 28 U.S.C. § 2675. The court declared that "[t]his would make little sense if it were applied to the president" and that "the government has not suggested that an individual with a tort claim based on actions of the president first must present that claim to the president and obtain the president's final written denial before bringing suit." SPA23. But courts have held that claims against the President must be administratively presented as required by Section 2675(a). *See, e.g.*, *West v. Trump,* 2020 WL 4721291, at *4. The district court apparently found it implausible that the President would personally review an administrative claim under the FTCA, but administrative claims are often reviewed by subordinate officials rather than the agency head. In suits against members of the judiciary, for example, claims are reviewed by the Administrative Office of the Courts, not the Chief Justice. *See Wilson v. United States Gov't*, 735 F. App'x 50, 52 (3d Cir. 2018). Applying the FTCA to

the President would not necessitate the President's personal involvement in reviewing claims.

The district court was equally wide of the mark in concluding that a congressional reporting requirement for FTCA settlements, *see* 28 U.S.C. § 2673, was unlikely to apply to the President and therefore indicated that the President was not subject to the FTCA. SPA23. The reporting requirement was repealed in 1965. *See* Pub. L. No. 89-348, 79 Stat. 1310, 1310 (1965). But, in any case, the court cited no basis for concluding that a reporting provision could not apply to the White House. Indeed, prior to the provision's repeal, entities within the Executive Office of the President did report to Congress following the payment of FTCA claims. *See* 105 Cong. Rec. 27 (1959); 106 Cong. Rec. 16,460 (1960). Nor did the district court explain why applying such a requirement to the White House would be more incongruous than applying it to members of the legislative and judicial branches.

C. The United States did not waive entitlement to have the statute properly construed

In rejecting the government's arguments, including those based on the plain text of the Act, the district court stated that the United States waived the argument that the list of entities enumerated in the statutory definition of "federal agency" is illustrative rather than exhaustive when it agreed to be bound by the "time-honored principle that new arguments raised for the first time in a reply brief will not be considered." A418, SPA19 n.48.

The district court's ruling was incorrect because the government did not violate that principle. In its opening motion papers, the United States sought substitution under the Westfall Act on the basis of the certification completed by the Attorney General's delegate. A18 (arguing that substitution should be granted because "the Attorney General's delegate has certified that President Trump was acting within the scope of his office as President of the United States at the time of the incidents out of which the Plaintiff's defamation claim arose"); *see Osborn v. Haley,* 549 U.S. 225, 230 (2007) ("Upon the Attorney General's certification, the employee is dismissed from the action, and the United States is substituted as defendant in place of the employee."); *cf. Bowles v. United States*, 685 F. App'x 21, 24 (2d Cir. 2017) (recognizing the certification is prima facie evidence that substitution is appropriate). The government had no reason to anticipate either that plaintiff would assert that the President is not an employee of the government for purposes of the FTCA and the Westfall Act, or that the district court would be the first court ever to adopt such arguments.

That issue first surfaced in plaintiff's opposition to the motion. A332-A342. Thus, until its reply brief, when the United States had to respond to this objection, the government had no reason to argue that the statute's use of the word "includes" helps confirm that the President is covered by the Westfall Act. This was not a new argument, but rather simply a response to an argument raised in the opposition brief. The rule against raising new arguments in a reply brief does not pertain to this

scenario. *See, e.g.*, *Hoyt v. Lane Constr. Corp.*, 927 F.3d 287, 295 n.2 (5th Cir. 2019), (distinguishing because "a rebuttal" and a new argument for purposes of forfeiture because it would be unreasonable to "require a litigant to anticipatorily rebut all potential arguments his adversary may raise"); *see also Holmes v. Spencer*, 685 F.3d 51, 66 (1st Cir. 2012) (recognizing that forfeiture does not apply to points first made in the reply brief when the reply is "the earliest point when it was logical" to raise the issue); *United States v. Van Smith*, 530 F.3d 967, 973 (D.C. Cir. 2008) ("To be sure, an appellant may use his reply brief to respond to a contention made by the appellee.").

In any event, as the Supreme Court has long recognized, "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992). Here, the relevant claim is that the United States should properly be substituted for President Trump pursuant to the Westfall Act. The United States is entitled to rely on the text of that statute in support of its claim that substitution is appropriate. Indeed, courts should independently "identify and apply the proper construction of governing law" regardless of the parties' legal theories and arguments. *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 99 (1991). The district court thus misapplied waiver principles in rejecting the United States' textual argument.

D. Reading the FTCA to cover the President is consistent with both the President's immunity and *Franklin v. Massachusetts*

The district court also relied on two non-textual bases for concluding that the President is not subject to the Westfall Act. Neither rationale withstands scrutiny.

1. The district court reasoned that Congress would not have included the President within the coverage of the Westfall Act because prior to the adoption of the Westfall Act, the Supreme Court had already held in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), that the President is entitled to absolute immunity from damages liability predicated on his official acts (and thus had no need for Westfall Act immunity). SPA26-SPA28. There are three principal flaws in this reasoning.

First, the relevant portions of the definitions of "employee of the government" and "federal agency" trace back to the original enactment of the FTCA. *See* Pub. L. No. 79-601, § 402, 60 Stat. at 842-43. The definitions thus long pre-date both the Westfall Act and *Nixon*, and the district court erred in treating Congress's constructive knowledge of *Nixon* as relevant to the interpretation of those definitions.

Second, the Supreme Court has already squarely rejected the argument that the Westfall Act should be construed narrowly to exclude employees with pre-existing immunities. *See United States v. Smith*, 499 U.S. 160, 173 (1991) (recognizing that the Westfall Act's "plain language makes no distinction between employees who are covered under pre-Act immunity statutes and those who are not"). And the Westfall Act indisputably covers other categories of employees with broad pre-existing

absolute immunities including prosecutors, *see Imbler v. Pachtman*, 424 U.S. 409, 421-24 (1976), judges, *see Butz v. Economou*, 438 U.S. 478, 508 (1978), and Members of Congress, *see Gravel*, 408 U.S. at 615-16.

Third, the district court was not correct that "there was no need to extend the protections of the Westfall Act to the president." SPA27. As noted, the Westfall Act provides not only an immunity from liability, but also creates an immunity from suit and tasks the Attorney General with defending suits alleging misconduct that falls within the statute's scope. *See* 28 U.S.C. § 2679(c). And through the certification procedures, *id.* § 2679(d), the Westfall Act creates a mechanism that allows for the substitution of government counsel in cases where a plaintiff pursues an individual-capacity suit. In *Nixon*, by contrast, former-President Nixon was represented by private counsel, not the Department of Justice. The possibility of substitution is valuable independent of the immunity it provides. Thus, the Westfall Act extends protections and benefits to the President beyond those already available under *Nixon*. Nor is the scope of immunity available to the President under the Westfall Act wholly duplicative of his immunity under *Nixon*. *Cf. Jamison v. Wiley*, 14 F.3d 222, 227 n.2 (4th Cir. 1994) (suggesting the potential for differences under the respective tests, which look to different bodies of law).

2. The district court went similarly astray in concluding that under the logic of *Franklin v. Massachusetts*, 505 U.S. 788 (1992), the Westfall Act should not be read to cover the President. SPA28-SPA33. In *Franklin*, the Supreme Court held that the

President's actions are not reviewable under the Administrative Procedure Act, reasoning that in the absence of a clear legislative statement, it would be wrong to assume that Congress would invite judicial scrutiny of whether the President abused his discretion in the performance of his official duties. *Franklin*, 505 U.S. at 801. From this holding, the district court presumed that the Westfall Act should not cover the President in the absence of a clear statement.

The district court's analysis overlooks crucial distinctions between the APA and the FTCA. The APA specifically tasks courts with determining whether government action was "arbitrary, capricious, [or] an abuse of discretion." 5 U.S.C. § 706(2). Thus, a holding that the President is subject to the APA necessarily would require assuming that Congress "intended the President's performance of his statutory duties to be reviewed for abuse of discretion." *Franklin*, 505 U.S. at 801.

The FTCA, by contrast, precludes the imposition of liability "based upon the exercise or performance or the failure to exercise or perform a discretionary function . . . whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). The Supreme Court has explained that the discretionary function exception to the FTCA "prevent[s] judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *United States v. Gaubert*, 499 U.S. 315, 323 (1991). In fact, this Court has previously applied the discretionary function exception to bar a tort suit that ultimately sought to attack a policy decision made by the President. *See In re "Agent*

Orange" Prod. Liab. Litig., 818 F.2d 194, 198-99 (2d Cir. 1987) (holding that 28 U.S.C. § 2680(a) barred claims for injuries resulting from exposure to chemical defoliant during Vietnam War given that "ultimate policy decision to use Agent Orange was made by President Kennedy"). Because the discretionary function exception would shield the President's discretionary exercise of his official powers from judicial second-guessing, applying the FTCA and the Westfall Act to the President does not give rise to the concerns that *Franklin* identified would result from applying the APA to the President.

If anything, applying the FTCA and the Westfall Act to the President would further the principle underlying *Franklin*: that the President's exercise of discretion in the discharge of his official duties generally should be immune from judicial scrutiny. The district court's ruling turns *Franklin* on its head; for rather than shield the President from having to personally defend tort suits, it exposes him to such suits—including in state courts. The district court acknowledged that the "poles in some sense are reversed" here from the circumstances in *Franklin*. SPA31. That "revers[al]" should have led it to conclude that *Franklin* supports, not undermines, the applicability of the Westfall Act here.

II. The District Court Was Wrong To Reject The Attorney General's Certification That The President Was Acting Within The Scope Of His Duties

A. The President was acting within the scope of his office when he responded to Ms. Carroll's allegations

Because the President is an "employee of the government" for purposes of the Westfall Act, the "exclusive" remedy for a "negligent or wrongful act or omission" by the President is a suit against the United States under the FTCA, as long as the President was "acting within the scope of his office." 28 U.S.C. § 2679(b)(1). Here, the Attorney General's delegate correctly certified that the President was acting within the scope of his employment when making the statements giving rise to this suit. The district court thus erred in rejecting that certification.

1. Whether a governmental employee was acting within the scope of his employment under the FTCA is determined by the law of the place where the act or omission occurred. *See* 28 U.S.C. § 1346(b)(1); *Fountain v. Karim*, 838 F.3d 129, 135 (2d Cir. 2016). Here, as the district court recognized, all of the allegedly defamatory statements were made in the District of Columbia and, thus, D.C. law applies. SPA36-SPA37.

The district court nevertheless posited (but did not hold) that New York defamation law might apply pursuant to District of Columbia choice of law principles. SPA37. But whatever the merit of that contention, it does not answer the separate question of which jurisdiction's scope-of-employment law should be controlling.

That distinct legal issue must be analyzed separately from the question of which jurisdiction's substantive tort law applies. *See Bailey v. J & B Trucking Servs., Inc.*, 590 F. Supp. 2d 4, 10 (D.D.C. 2008) (applying D.C. choice of law principles and concluding that the *respondeat superior* analysis was governed by a different body of law from the negligence analysis); *see also Barimany v. Urban Pace LLC*, 73 A.3d 964, 967 (D.C. 2013) (holding that "choice of law analyses are properly conducted, as necessary, on an even finer basis [than claim by claim] and should be considered issue by issue").

The District of Columbia's interest in the application of its own substantive law here easily outstrips any interest of New York because the employment relationship between the President and the United States is centered in D.C. (which is also the place where all of the allegedly defamatory statements were made). Thus, D.C. scope-of-employment principles control. *See Jacobs v. Vrobel*, 724 F.3d 217, 221 (D.C. Cir. 2013) ("In determining whether an employee acted within the scope of his employment [under the Westfall Act], we consider the substantive law of the jurisdiction where the employment relationship exists—here, the law of the District of Columbia."); *Bailey*, 590 F. Supp. 2d at 10 (concluding that under D.C. choice-of-law principles, *respondeat superior* inquiry is governed by the law of the jurisdiction where the employment relationship was centered, not the site of the alleged tort).

2. Under D.C. law, the President was acting within the scope of his employment when he made the three statements that plaintiff alleges are defamatory. To be clear, the question here is not whether a decades-old assault would fall within

the scope of the performance of Presidential duties. Nor is the issue whether the President's statements were in fact defamatory. Rather, the scope of employment inquiry asks only whether the President committed the alleged *defamation* while acting within the scope of his employment. In the specific context of defamation claims, D.C.'s definition of "scope of employment" is broad—generally a *plaintiff*-friendly approach, for it expands the circumstances in which the employer is held responsible if the plaintiff ultimately prevails. *See Council on Am. Islamic Relations v. Ballenger*, 444 F.3d 659, 664 (D.C. Cir. 2006) (explaining that the scope of employment inquiry addresses not whether the plaintiff's job responsibilities include the commission of defamation, but rather, whether the alleged defamation occurred within a broader conversation that was within the scope of the official's employment); *see also Bowles*, 685 F. App'x at 23 (holding Westfall Act applies so long as the "allegedly defamatory statements were made on duty at the time and place of an 'incident' alleged in a complaint" without regard to the "truth or falsity" of the allegedly defamatory statements) (quotation marks omitted). Plaintiff herself describes D.C.'s approach as "expansive." A354.

Under that expansive approach, an office holder responsible to the electorate is acting within the scope of his office when he responds to accusations and attendant media inquiries that call into question his fitness to hold the public trust. Office holders generally, and the President in particular, must be able to respond under those circumstances. In *Ballenger*, for example, the D.C. Circuit recognized that such

responses fall within the scope of an office holder's work under the Westfall Act, and thus held that a congressman acted within the scope of his duties in making an allegedly defamatory statement when he responded to an inquiry from a reporter regarding his personal life. 444 F.3d at 665-66. The court explained that "[s]peaking to the press during regular work hours in response to a reporter's inquiry falls within the scope of a congressman's 'authorized duties'" because a "Member's ability to do his job as a legislator effectively is tied . . . to the Member's relationship with the public and in particular his constituents and colleagues in the Congress." *Id.* at 664-65. In responding to the question, the congressman acted at least in part to defuse an issue that could impair his ability to advance his legislative agenda. *Id.* at 665. As a result, "there was a clear nexus between the congressman answering a reporter's question about the congressman's personal life and the congressman's ability to carry out his representative responsibilities effectively." *Id.* at 665-66.

The D.C. Circuit applied the principles from *Ballenger* in *Wuterich v. Murtha*, 562 F.3d 375 (D.C. Cir. 2009), to conclude that another congressman acted within the scope of his employment in allegedly committing defamation in responding to a question from a reporter. *Id.* at 384-85. And the D.C. Circuit also drew on *Ballenger* in recognizing that for high-ranking executive branch employees, "discredit[ing] public critics of the Executive Branch" falls within the scope of their employment, even when the officials acted in ways that were alleged to be unlawful and contrary to the national security of the United States. *Wilson*, 535 F.3d at 712. *See also Smith v. Clinton*,

886 F.3d 122, 126 (D.C. Cir. 2018) (collecting cases demonstrating that "[e]xtensive precedent makes clear that alleging a federal employee violated policy or even laws in the course of her employment—including specific allegations of defamation or of potentially criminal activities—does not take that conduct outside the scope of employment"); *Does 1-10*, 973 F.3d at 600 (finding "unsolicited comments by elected officials on an event of widespread public interest" within scope); *Williams*, 71 F.3d at 507 (finding statements made during press interview within scope).

Under these precedents, the conduct alleged by Ms. Carroll falls comfortably within the scope of the President's office or employment. The President, no less than the members of Congress in *Ballenger* and *Wuterich*, is expected to respond to questions from the media on matters of public concern. He thus acts within the scope of his office when, in this context, he seeks to defuse personal issues that threaten to impair his ability to achieve his agenda. Likewise, the President, no less than the other high ranking executive branch officials sued in *Wilson*, acts within the scope of his office when he responds to public critics.

The holdings in *Ballenger*, *Wuterich*, and *Wilson* are particularly significant because in each of those cases, the D.C. Circuit applied District of Columbia law, which also governs the scope of employment inquiry here. The district court identified no respect in which the present case is meaningfully distinguishable from *Ballenger*. Rather, the district court was of the view that the D.C. Circuit's decisions, particularly *Ballenger*, misstated D.C. law. SPA51; *see also* SPA52-SPA53 & n.145

(faulting *Wuterich* for failing to limit *Ballenger* to its facts); *but cf. Bowen v. Massachusetts*, 487 U.S. 879, 908 (1988) ("We have a settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law."). But the district court cited no statement from a D.C. court disapproving of *Ballenger*. And, in fact, the D.C. Court of Appeals has on at least one occasion cited *Ballenger* with apparent approval. *See District of Columbia v. Jones*, 919 A.2d 604, 608-09 (D.C. 2007).

The district court here did not examine D.C. precedent, but relied on the principle—which is also stated in *Ballenger* itself—that an employee will not be acting within the scope of his employment when he is "too little actuated by a purpose to serve the master." SPA48, SPA52, SPA54 (quoting *District of Columbia v. Bamidele*, 103 A.3d 516, 525 (D.C. 2014)); *see also Ballenger*, 444 F.3d at 663. The court concluded that in responding to Ms. Carroll's accusation, President Trump was not sufficiently actuated by a desire to fulfill the duties of his office to receive the protection of the Westfall Act. But the court did not explain how any precedent from D.C. courts would support application of that limitation on the scope of employment test here.

The district court expressed a policy concern that under *Ballenger*, "virtually any remarks that Members of Congress make to the press would constitute conduct within the scope of their employment." SPA52. But as *Ballenger* itself makes clear, its holding does not immunize federal employees for all cases of alleged defamation or slander. 444 F.3d at 666. Moreover, Ms. Carroll's suit does not implicate the extreme scenarios that the district court worried would follow from an overbroad reading of

Ballenger. For present purposes, all this Court need draw from *Ballenger* is the principle that an elected official acts within the scope of his office when he publicly addresses an issue that threatens to impair that official's ability to perform his duties effectively. In any event, the district court's policy concerns should not have overridden faithful application of District of Columbia precedent.

Finally, the district court erred in concluding that the United States had waived the argument that an elected official's statements refuting allegations that call into question his fitness for office are within the scope of employment because the statements further his ability to govern effectively. SPA54. This waiver holding suffers from the same defects as the court's conclusion that the United States waived the right to a proper construction of the term "employee of the government." *See supra* Part I.C. The United States argued in its opening motion papers that the President acted within the scope of his office and even cited *Ballenger* and *Wuterich* as support (among other cases). A17. Ms. Carroll understood the United States to be relying on precedents recognizing that elected officials may need to comment on their private lives in order to perform their jobs effectively, and she responded to that argument in her opposition brief. A355. In its reply brief, the United States expanded on its argument in rebutting Ms. Carroll's objections, but did not raise any new arguments. Regardless, this Court can and should apply District of Columbia law consistent with D.C. Circuit precedent to conclude that the President acted within the scope of his office with regard to the actions alleged in the complaint.

B. The district court's "master-servant" analysis proceeds from an erroneous premise and is, in any case, mistaken

In rejecting the straightforward conclusion under District of Columbia law that the President's statements were made within the scope of his employment, the district court also opined that the scope of employment analysis is dependent on the existence of a master, and a President has none. SPA43-SPA47.

The district court erred by injecting into the "scope of employment" test a novel "master-servant" requirement that is contrary to both precedent and statutory text. By its terms, the Westfall Act applies so long as only two requirements are satisfied: the alleged tortfeasor must (1) be "an employee of the Government" and (2) have been "acting within the scope of his office or employment." 28 U.S.C. § 2679(b). There is no additional requirement that a master-servant relationship exist. The only required relationship between the alleged tortfeasor and the United States is that the tortfeasor must be an "employee of the government." As we explained in Part I, *supra*, that requirement is satisfied here.

The district court misconstrued case law holding that in evaluating whether an employee was acting within the scope of his employment, courts look to the *respondeat superior* law of the jurisdiction where the tort occurred. SPA35-SPA36 (citing *Fountain*, 838 F.3d at 135). The court noted that under D.C. law, *respondeat superior* liability requires showing both that (1) a master-servant relationship existed between the employer and the employee, and (2) the incident at issue occurred while the workers

or contractors were acting within the scope of their employment. SPA42-SPA43. The district court thus concluded that the United States would be required to show both of the elements of *respondent superior* liability under D.C. law.

That conclusion was mistaken. As this Court has explained, the scope of employment requirement is interpreted "in accordance" with the *respondeat superior* law of the jurisdiction where the tort occurred, *Fountain*, 838 F.3d at 135; but that does not mean the FTCA incorporates the entirety of the jurisdiction's *respondeat superior* law. Instead, state law is relevant in this context only to assess whether the employee was acting within the scope of his employment (*i.e.*, the second of the two elements of the D.C. *respondeat superior* test). *See Palmer v. Flaggman*, 93 F.3d 196, 202 (5th Cir. 1996) (recognizing that while "it is true that we are required to apply [state] *respondeat superior* law to determine [the federal employee's] scope of employment, we are not required to apply the entire body of *respondeat superior* law, but only that portion of the law that resolves the scope of employment issue" and not any separate requirement that the employer "control" the employee's actions).

The first element of the D.C. *respondeat superior* test—the existence of a master-servant relationship—is irrelevant under the FTCA, which expressly establishes a *different* test to determine the universe of individuals for whom the United States will accept responsibility: namely, whether that individual is an "employee of the government," a defined term in the Act. *See* 28 U.S.C. § 2671. That is a question of federal statutory law, not state *respondeat superior* law. *See Leone v. United States*, 910 F.2d

46, 49 (2d Cir. 1990) ("Whether a person is a government employee . . . is a question of federal law."). Imposing a separate "master-servant" requirement would thus override Congress's judgment that the FTCA and the Westfall Act should apply to all government officials and employees as defined in those statutes, without any requirement of a master-servant relationship.

Indeed, were the district court correct that the scope-of-employment test under the FTCA includes a master-servant requirement, it not only would categorically exclude the President from the protections of the Westfall Act, but would also likely exclude other constitutional officers that are not subject to the direct control of any superior official or master—such as judges and Members of Congress. Yet Congress did not leave these officials unprotected. *See Sullivan v. United States*, 21 F.3d 198, 203 & n.8 (7th Cir. 1994) (recognizing that that "the plain language of the Act must trump any 'control test'" imposed by state law and noting that a control requirement would be incompatible with the Westfall's Act's undisputed coverage of federal judges), *abrogated on other grounds as recognized in Glade ex rel. Lundskow v. United States*, 692 F.3d 718, 723 (7th Cir. 2012).

Finally, the district court's reasoning is questionable even on its own terms. While executive power is extensive, it is not boundless, and the President's authority is subject to various constitutional and statutory limits. *E.g.*, U.S. Const. art. II, § 2, cl. 2 (appointment power and treaty power limited by Senate consent requirement); *see also* U.S. Const. art. II, § 3 (specifying that the President is to take care that the laws of the

United States are faithfully executed). The President is also subject to checks imposed by two co-equal branches of government, and by an array of formal and informal checks. *See Nixon*, 457 U.S. at 757. Indeed, the President ultimately is responsible to the American public, whom he has sworn to serve and from whose fisc he is paid. *See* U.S. Const. art. II, § 1, cls. 8-9; 3 U.S.C. § 102.

C. Even if New York law were applicable, the district court's holding would be incorrect

The district court's reliance on New York law (SPA59-SPA61) was misplaced. Even if it were proper to consider New York law, *but see supra* pp. 29-30, the court's holding would still be incorrect. The court wrongly assumed that Ms. Carroll's allegations "have no relationship to the official business of the United States" and so the President's statements denying the allegations were not made within the scope of his employment. SPA60-SPA61. For the reasons explained previously, that assumption is mistaken no matter what State's law applies.

The district court apparently thought it relevant that "New York courts consistently have held that sexual misconduct and related tortious behavior arise from personal motives" and thus do not give rise to *respondeat superior* liability. SPA60 (quoting *Ross v. Mitsui Fudosan, Inc.*, 2 F. Supp. 2d 522, 531 (S.D.N.Y. 1998)). But the tort at issue here is not the alleged sexual assault from the 1990s, but rather, the alleged defamation that occurred in 2019. And *respondeat superior* "doctrine's application to suits for defamation has been long established." *Rausman v. Baugh*, 248

A.D.2d 8, 11 (N.Y. App. Div. 1998). Under New York doctrine, an "employer may be liable when the employee acts negligently or intentionally, so long as the tortious conduct is generally foreseeable and a natural incident of the employment." *Rivera v. State*, 142 N.E.3d 641, 645 (N.Y. 2019) (quotation marks omitted). For the reasons already discussed, the allegations here fall within the scope of that test because the allegedly tortious conduct here is a natural outgrowth of the President's public response to allegations challenging his fitness for office.

Other courts, applying the laws of an array of jurisdictions, likewise have concluded that high ranking elected officials acted within the scope of their offices when they allegedly committed defamation in responding to media inquiries or were speaking on matters of public concern. *See Ballenger*, 444 F.3d at 665 (D.C. law); *Does 1-10*, 973 F.3d at 602 (Kentucky law); *Williams*, 71 F.3d at 507 (Texas law); *Operation Rescue Nat'l v. United States*, 975 F. Supp. 92, 107 (D. Mass. 1997), *aff'd*, 147 F.3d 68 (1st Cir. 1998) (Massachusetts law); *Chapman v. Rahall*, 399 F. Supp. 2d 711, 714 (W.D. Va. 2005) (West Virginia law). There is no reason to believe that New York would depart from the consensus governing that unique context. *Cf. Riviello v. Waldron*, 391 N.E.2d 1278, 1281 (N.Y. 1979) (describing *respondeat superior* liability as "elastic" and dependent on the specific factual circumstances of the case).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

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