No. 22-SP-745

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

DONALD J. TRUMP, *et al.*,
APPELLANTS,

v.

E. JEAN CARROLL,
APPELLEE.

ON A CERTIFIED QUESTION FROM THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

THE DISTRICT OF COLUMBIA'S BRIEF AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE

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INTRODUCTION AND INTEREST OF AMICUS CURIAE

This case requires the Court to answer a single but important question: Is the government liable for a public official's actions when, motivated purely by personal vendetta, he issues a litany of remarks defaming a woman he allegedly assaulted prior to taking office? Under this Court's precedent, the answer to that question is a resounding "no."

The District of Columbia has an interest in the answer to this question, for several reasons. First, the District is frequently a litigant before this Court in tort cases, including cases involving wrongs committed by public officials. Those cases often turn on the *respondeat superior* principles at issue in this case, and the District has a strong interest in maintaining the predictable and well-settled standards that this Court has always applied. Second, the District has an interest in imposing *personal* liability on officials who use their position to pursue purely selfish ends. In those circumstances, it makes no sense to leave taxpayers footing the bill, or to allow officials to evade accountability entirely. Finally, the District regulates local employers and provides support and medical care for indigent residents who may be the victims of torts. The District thus also has an interest in ensuring that employers are liable when employees commit intentional torts meant to benefit their employer.

This Court's longstanding precedent strikes a delicate balance among these competing interests, holding employers liable for employee conduct that they can

control or disincentivize, but not for the purely personal adventures of their employees. That approach reflects a consensus view among state courts, accords with common sense, and should be sustained.

STATEMENT OF THE ISSUE

The United States Court of Appeals for the Second Circuit certified the following question to this Court:

> Under the laws of the District [of Columbia], were the allegedly libelous public statements made, during his term in office, by the President of the United States, denying allegations of misconduct, with regards to events prior to that term of office, within the scope of his employment as President of the United States?

Carroll v. Trump, 49 F.4th 759, 781 (2d Cir. 2022). In response, this Court ordered the parties to address (1) "whether this Court should opine on" the "scope of the President of the United States' employment," and (2) "the extent, if any, to which this [C]ourt's *respondeat superior* case precedents are unclear as applied to this case, and how this [C]ourt might clarify or modify those precedents to help resolve the present dispute." Order at 2, *Trump v. Carroll*, No. 22-SP-745 (D.C. Oct. 25, 2022).

STATEMENT OF THE CASE

As alleged in plaintiff-appellee E. Jean Carroll's complaint, Donald J. Trump raped her more than two decades ago. *See* A28-A30. In 2019, Carroll published an

account of that assault, and Trump—at that time President of the United States—responded with three statements that Carroll alleges defamed her. A37-A38.[1]

First, Trump issued a "public statement" in which he claimed that he had "never met" Carroll, that "her motivation" was to "sell a new book," that her account was a "false stor[y]" she peddled "to get publicity" and "carry out a political agenda," and implied that she was engaged in a conspiracy with the Democratic Party or New York Magazine. A38. Second, when asked by a reporter about his statement that he had never met Carroll, Trump repeated that he "ha[d] no idea who this woman is" and that she made a "totally false accusation." A40. This time, he added that she had "made this charge against others," A40, and implied that Carroll was "paid money to say bad things about [him]," A41. Third, in another interview, Trump stated that Carroll was "not [his] type." A42.

Carroll sued Trump for defamation in New York state court. A24. In response, the United States Department of Justice certified that Trump had acted within the scope of his employment when he made the allegedly defamatory statements, A15, and so removed the case to the United States District Court for the Southern District of New York pursuant to the Westfall Act, 28 U.S.C. § 2679(d)(2). That Act designates certain tort cases against federal employees as lawsuits "against

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[1] Citations to "A[#]" are to pages of the two-volume, 423-page appendix that the Second Circuit transmitted to this Court on September 27, 2022.

the United States" so that plaintiffs may recover from the United States under the Federal Tort Claims Act. *See* 28 U.S.C. § 2679(d)(1); *Carroll*, 49 F.4th at 764-67. Because the Federal Tort Claims Act does not waive the United States' sovereign immunity from defamation actions, *see* 28 U.S.C. § 2680(h), that substitution would leave Carroll without a remedy against Trump or the government in this case.

The district court denied the substitution request, holding, among other things, that Trump did not act "within the scope of [his] office or employment," 28 U.S.C. § 2679(d)(3), as the Westfall Act requires, when he made the allegedly defamatory statements. *See Carroll v. Trump*, 498 F. Supp. 3d 422, 443, 457 (S.D.N.Y. 2020). On appeal, the Second Circuit stated that it was unclear whether, under the law of the District of Columbia, Trump acted within the scope of his employment when making those remarks. *See Carroll*, 49 F.4th at 760, 780. Because that legal issue was dispositive, it certified the question to this Court. *Id.* at 781.

SUMMARY OF ARGUMENT

Trump acted outside the scope of his employment when he made personally motivated, vindictive remarks about a woman who accused him of sexually assaulting her long before he took office. According to decades of this Court's precedents, an employer is vicariously liable for its employee's intentional torts only when the employee acted with at least a partial purpose to benefit the employer. Applying that established standard, Trump acted outside the scope of his

employment because his statements were shocking and highly personal, concerned events from decades before his term in office, and followed a pattern of blaming and shaming women that both pre- and post-dates his presidency. They were not at all intended to benefit the United States.

There is no reason to deviate from or otherwise alter that straightforward test. The United States' and Trump's contrary theory would jettison decades of precedents and could sweep into the scope of employment all kinds of arguably foreseeable employee conduct, no matter the motivation. The cases from the D.C. Circuit and elsewhere on which the United States and Trump rely do not justify such a rule. And if there were any question, this en banc Court should reaffirm the purpose-based test it has long applied. That test strikes the correct balance between various competing interests, especially in cases concerning government employees.

ARGUMENT

I. Trump's Conduct Fails This Court's Purpose-Based Scope-Of-Employment Test Because He Acted Out Of Purely Personal Motives.

A. This Court's precedents consistently hold that an employee's intentionally tortious conduct remains outside the scope of his employment when he acts with no purpose to serve the employer.

This Court "ha[s] long endorsed" the Second Restatement of Agency's approach to determining when an employee's intentional tort imposes liability on his employer. *District of Columbia v. Bamidele*, 103 A.3d 516, 525 n.6 (D.C. 2014).

That Restatement brings tortious conduct "within the scope of employment" only when:

> (a) it is of the kind [the employee] is employed to perform;
> (b) it occurs substantially within the authorized time and space limits;
> (c) it is actuated, at least in part, by a purpose to serve the master, and
> (d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.

Restatement (Second) of Agency § 228(1) (1958). Conversely, the Restatement excludes from the scope of employment all conduct "different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master." *Id.* § 228(2).

Through decades of case law, this Court has distilled those factors into two principal requirements. To fall "within the scope of employment, the tortious activity must be [1] actuated, at least in part, by a purpose to further the master's business," and "[2] must also be foreseeable to the employer, meaning that it is a direct outgrowth of the employee's instructions or job assignments." *Bamidele*, 103 A.3d at 525 (internal quotation marks omitted). Both requirements are necessary for an act to fall within the scope of employment; neither alone is sufficient. Still, this Court's cases typically turn on the first factor, since an employee who acts "solely for the accomplishment of [his] independent" ends acts outside the scope of employment whether or not the conduct was foreseeable. *Boykin v. District of Columbia*, 484 A.2d 560, 562 (D.C. 1984). This purpose-based inquiry has been the

linchpin of many cases involving the District, whether liability ultimately fell on the government or not.

For instance, in *District of Columbia v. Coron*, 515 A.2d 435 (D.C. 1986), this Court held that the District could not be vicariously liable for a Metropolitan Police Department ("MPD") officer's assault. *Id.* at 438. There, an off-duty officer harassed and ultimately assaulted a pedestrian who had crossed the street in front of his car. *Id.* at 436. The Court focused on the officer's purpose, explaining that his "entire behavior during th[e] incident reflected that of an individual bent on personal vengeance for a perceived personal affront." *Id.* at 438. It declined to hold the District liable merely because police officers are technically always "on duty" and always carry their badge, explaining that such "dry[] logic[]" would improperly "impose liability on the District regardless of the nature of an officer's conduct." *Id.* As the Court explained in a later case, "[a]t least where intentional torts are concerned, it is not enough that an employee's tortious activity occurs while he is on duty, or even that those duties bear some causal relationship to the tort." *Bamidele*, 103 A.3d at 525. Rather, the employee must act to "further[]" the employer's "interests." *Coron*, 515 A.2d at 438.

Importantly, when assessing purpose, this Court considers the employee's intent in committing *the specific tortious conduct alleged*. For instance, in *Boykin v. District of Columbia*, this Court held that the District could not be vicariously liable

for a District of Columbia public school employee's sexual assault of a student. 484 A.2d at 561, 564. Although the employee assaulted the student while fulfilling his "dut[y]" of taking the student on a training walk, and even though that "assignment necessarily included some physical contact," it merely "afforded [the employee] the *opportunity* to pursue his personal adventure." *Id.* at 561-63. The actual act of assault was "done solely for the accomplishment of [the employee's] independent, malicious, mischievous and selfish purposes," so the District could not be liable for it. *Id.* at 562; *see Moseley v. Second New St. Paul Baptist Church*, 534 A.2d 346, 348 (D.C. 1987) (per curiam) (similar reasoning for private employer).

Likewise, in *District of Columbia v. Bamidele*, even where off-duty MPD officers testified that they "initially . . . intended to take police action against" certain third parties who allegedly triggered a brawl, that testimony did not establish the officers' "motivation to further the District's interests" when they assaulted the plaintiffs, who were bystanders. 103 A.3d at 525. Since the specific assault alleged was a drunken officer's disproportionate reaction to a comment that one plaintiff made, it remained personal and hence outside the scope of employment. *Id.* at 526; *see also, e.g.*, *Schecter v. Merchs. Home Delivery, Inc.*, 892 A.2d 415, 428 (D.C. 2006) (retailer not liable for employees' theft from customer's home during an appliance installation, despite authorizing employees to install the appliance there).

By contrast, where an employee is motivated *throughout* the "unfolding" of events to benefit his employer, that employee's tortious conduct comes within the scope of employment. *Blair v. District of Columbia*, 190 A.3d 212, 227 (D.C. 2018). For example, in *Brown v. Argenbright Secs., Inc.*, 782 A.2d 752 (D.C. 2001), this Court overturned a grant of summary judgment to the employer of a store security officer who allegedly conducted an inappropriate physical search of a customer. *Id.* at 758. Although the Court acknowledged that "the vast majority of sexual assaults arise from purely personal motives," the security officer in that case "initiated" the search "only after he had reason to believe that his employer's interests had been affected (*i.e.*, that merchandise had been stolen by the person he was about to search)." *Id.* Thus, the Court considered it a jury question "[a]t what point, if ever, [his] personal desires motivated" the specific "alleged physical contact" giving rise to the claim. *Id.*[2]

Similarly, in *Blair v. District of Columbia*, the Court held that an MPD officer's alleged assault was not "a purely personal venture unmotivated in any way by furthering the interests of [MPD]." 190 A.3d at 228. The officer-defendant in that case displayed his badge before the assault and was reacting to a threat to public

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[2] The D.C. Circuit has similarly clarified that acts of sexual violence, just like other acts of violence, fall within the scope of employment only where they are "motivated" at least in part to serve the employer. *Lyon v. Carey*, 533 F.2d 649, 655 (D.C. Cir. 1976).

safety, as District law required him to do. *Id.* at 227-28; *see* D.C. Code § 5-115.03. A jury could therefore infer that his alleged assault was an "outgrowth of the [District's] instructions or job assignment," not a "purely personal venture." *Id.* at 228. In short, this Court has repeatedly insisted that an employer *can* be held liable for an employee's intentional torts, but only when the employee was acting at least in part to further the employer's interests.

B. This Court has never endorsed a foreseeability test that removes an employee's purpose from the scope-of-employment inquiry.

Although the Second Circuit recognized that the District "has endorsed th[e] more traditional" purpose-based test, it observed that some of this Court's cases "appear, in fact, to be all about internalizing costs within the business enterprise." *Carroll*, 49 F.4th at 774. That cost-internalization theory, the court explained, would hold employers liable for any "faults that may be fairly regarded as risks of his business, whether they are committed in furthering it or not." *Id.* (internal quotation marks omitted). Specifically, the Second Circuit thought that in cases like *Penn Central Transportation Co. v. Reddick*, 398 A.2d 27 (D.C. 1979), and *Johnson v. Weinberg* (*Johnson I*), 434 A.2d 404 (D.C. 1981), this Court applied that cost-internalization approach despite "purport[ing]" to be faithful to the purpose-based test. *Carroll*, 49 F.4th at 775-77, 780. But this Court has never adopted an internalization theory that turns solely on foreseeability and disregards purpose.

First, in *Penn Central*, this Court did not repudiate the purpose-based test—it embraced it. There, the Court held that a railroad employer could not be liable for its employee's assault of a taxi driver. 398 A.2d at 32. While acknowledging that some courts had embraced a novel "theory" resembling a "foreseeability" test, the Court nevertheless held that it would not impose vicarious liability for "those willful acts, intended by the agent only to further his own interest, not done for the (employer) at all." *Id.* at 30-31 (internal quotation marks omitted). The Court concluded that "[t]he violent and unprovoked nature of [the employee's] attack" on a taxi driver "suggest[ed] a personal as distinguished from business-related motive" and hence was outside the scope of employment. *Id.* at 32. Foreseeability, in other words, did not supplant purpose.

The *Johnson* cases are not to the contrary. In *Johnson I*, this Court held that a jury could potentially conclude that a laundromat employee's assault came within the scope of his employment—in that case, where the employee shot a customer who repeatedly complained about missing clothes. 434 A.2d at 406, 409. It reiterated the purpose-based test that "an employer will not be deemed liable" where the employee acts "solely in furtherance of the [employee's] own interests, and not those of the employer." *Id.* at 408. Though the Court referenced foreseeability, *see id.*, it never held that foreseeability was sufficient rather than merely necessary for liability. Indeed, the Court's analysis focused on the employee's purpose in

furthering the employer's business—namely, that the assault "was triggered by a dispute over the conduct of the employer's business (missing shirts)." *Id.* at 409.

When the case returned to this Court, it clarified that it "did not substitute foreseeability for intent." *Weinberg v. Johnson (Johnson II)*, 518 A.2d 985, 989 (D.C. 1986). A jury still had to "find the shooting was intended, at least in part, to further the master's business, and not solely the servant's personal agenda." *Id.* at 991. Critically, although *Johnson II* did again discuss a "trend" towards widening liability, it cabined that trend to "cases concerning intentional torts committed during a servant's dispute with a customer," in which foreseeability can approximate motive. *Id.* Indeed, this Court later clarified that *Johnson*, like the D.C. Circuit's decision in *Lyon*, "originated in a job-related quarrel between the employee and the plaintiff," and it declined to "extend the holdings of *Johnson* and *Lyon* to impose vicarious liability" where an employee engaged in "no confrontation" with the plaintiff and "committed a theft solely for his own benefit." *Schecter*, 892 A.2d at 430-31. And in a case even more akin to *Johnson* where an employee assaulted a customer that he accused of stealing merchandise, this Court looked not to foreseeability, but to whether the employee was "motivated by a desire to require [the customer] to pay." *Hechinger Co. v. Johnson*, 761 A.2d 15, 24-25 (D.C. 2000).

In any case, and as the Second Circuit acknowledges, *see Carroll*, 49 F.4th at 779 (listing cases), this Court's "more recent cases" have expressly cabined the

Johnson analysis and plainly applied the purpose-based test, *Haddon v. United States*, 68 F.3d 1420, 1425-26 (D.C. Cir. 1995), *abrogated on other grounds by Osborn v. Haley*, 549 U.S. 225 (2007). In *Boykin*, for instance, this Court explained that *Johnson I* "approaches the outer limits of the liability that may be imposed" vicariously, and that this Court never "suggest[ed] that an employer could be held liable where the employee was not motivated, at least in part, by an intent to further his employer's business." 484 A.2d at 563 & n.2. This Court has since repeated and relied on that purpose-based test. *See Coron*, 515 A.2d at 438 (placing "particular importance" on fact that the employee "at no time" acted "in furtherance of the [employer's] interests" and exhibited the "behavior" of "an individual bent on personal vengeance"); *Brown*, 782 A.2d at 758 (similar); *Schecter*, 892 A.2d at 430 (similar). And even in cases where the Court has found conduct to be within the scope of employment, it has carefully explained how the employee's conduct was motivated by the employer's interest. *See, e.g.*, *Blair*, 190 A.3d at 226-27; *Brown*, 782 A.2d at 758. There is little question, then, that this Court requires a purpose to serve the employer, and not merely foreseeability, to bring conduct within the scope of employment.

C. Trump did not act even in part to serve his employer when he made the allegedly defamatory statements.

Applying this Court's purpose-based test, Trump was "engaged in a purely personal venture unmotivated" by the United States' "interests" when he made the

statements at issue. *Blair*, 190 A.3d at 228. Carroll alleges, and neither appellant disputes, that Trump accused her of "conspir[ing] with the Democratic Party," A40, of "invent[ing] the rape accusation" for monetary gain, A40, and of "falsely accus[ing] other men of rape," A41. He also "insult[ed] her physical appearance." A26. The outrageous and personal nature of these statements reveal Trump's "independent, malicious, mischievous and selfish purposes" in making them. *Boykin*, 484 A.2d at 562.

To be sure, many or even most statements that public officials make to the press may be motivated by an employment-related purpose, including statements denying wrongdoing. Officials must maintain the public trust to remain effective in achieving their political goals. *Cf.* U.S. Br. 19. But just as a teacher taking a student on a walk can veer into a tortious course of conduct driven purely by personal motives, so too can public officials engage in verbal detours motivated by personal animus. Just like the school employee in *Boykin*, here Trump's employment is relevant "only in the sense that" his frequent interactions with the press as President "afforded him the *opportunity* to pursue his personal adventure." *Boykin*, 484 A.2d at 563. His statements themselves were "utterly without relation to the service which he was employed to render." *Id.* at 564; *see also* Restatement (Third) of Agency § 7.07 cmt. d, illus. 10-11 (2006) (explaining that an employee's use of a work

phone "to make statements defamatory" to "a personal enemy" remains outside the scope even when employer expressly permits "personal use of the" phone).[3]

As Carroll notes (Br. 33-37), several facets of Trump's conduct indicate that his defamatory remarks were solely personally motivated—and distinguish this case from most scenarios where officials address the press. *First*, the shocking and outrageous nature of the comments point to a personal motive. *See* Restatement (Second) of Agency § 235 cmt. c ("The fact that an act is done in an outrageous or abnormal manner has value in indicating that the servant is not actuated by an intent to perform the employer's business."). Put simply, Trump "did not handle the situation in a manner expected" of a President. *Coron*, 515 A.2d at 438. *Second*, Trump's allegations about Carroll concern their "previous dealings" from his private life, which can "indicate that the tort was personal." *Boykin*, 484 A.2d at 563; *cf.* *Johnson I*, 434 A.2d at 409 (noting that employee "had no previous relations with [customer] which would indicate that the tort was personal"). *Third*, the remarks follow a pattern of denigrating and personally attacking women who credibly accuse

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[3] Nor does it matter whether the employer incidentally benefitted from the conduct. Even if the statements legitimately "address[ed] [public] concerns regarding" Trump's "fitness" for office, U.S. Br. 12, Trump's entirely personal motivations for making them leave his conduct outside the scope of his employment. *See* Restatement (Third) § 7.07 cmt. c, illus. 8-9 (explaining that cargo driver who tails another car out of personal spite acts outside the scope of employment even though his "physical actions take the cargo closer to" the employer's destination).

Trump of sexual misconduct—a pattern that originated well before his presidency and continues today. *See* Carroll Br. 36-37. Taken together, those factors establish that Trump's tortious conduct was in no way intended to serve the United States' goals.

This Court need not opine on the duties of the presidency or public officials generally to reach the straightforward conclusion that the statements here were personally motivated. Under this Court's cases, that should be the end of the matter.

II. This Case Presents No Reason To Deviate From This Court's Purpose-Based Test.

Perhaps acknowledging that it cannot succeed under this Court's purpose-based test, the United States and Trump propose an alternative, expansive rule: any time a public official "speak[s] to the press" in any way that arguably relates to "a matter of public concern," the official is necessarily acting within the scope of his or her employment. U.S. Br. 12; *see* Trump Br. 13. That proposed carveout cannot be reconciled with this Court's fact-intensive, purpose-driven inquiry. *Boykin*, 484 A.2d at 563 & n.2. Even the non-binding cases that the United States and Trump cite do not support their theory. If anything, this Court should reinforce, rather than reject, its simple and sensible purpose-based test. That test reflects the consensus view of the states, reasonably allocates costs, and ensures the predictability that is essential to institutional litigants like the District.

A. The cases the United States cites are distinguishable, non-binding, and provide no cause to revisit this Court's purpose-based test.

The United States cites to several cases from the D.C. Circuit and other jurisdictions that purportedly establish a blanket rule that public officials' statements to the press are within the scope of their employment. But that is not what the cases say. Moreover, each case is distinguishable—none involve the personal entanglement and vindictive motivation present here. To the extent they are not distinguishable, this Court is the final arbiter of District law. *See M.A.P. v. Ryan*, 285 A.2d 310, 312 (D.C. 1971). If there is any doubt, the Court should clarify that to fall within the scope of one's employment, the relevant course of conduct, up to and including the allegedly tortious act, must be motivated at least in part by an intent to further the business.

The United States leans heavily on *Council on American Islamic Relations v. Ballenger*, 444 F.3d 659 (D.C. Cir. 2006), *see* U.S. Br. 2, 6, 8, 20, but it overstates the holding and logic of that case. There, the D.C. Circuit found that a congressman's allegedly defamatory statement describing a political organization at the heart of his then-unfolding divorce came within the scope of his employment. *See Ballenger*, 444 F.3d at 662. Specifically, the congressman had suggested to a reporter that his wife was "uncomfortable" living near the Council on American-Islamic Relations ("CAIR"), which he called the "fund-raising arm for Hezbollah." *Id.*

To begin, *Ballenger* does not establish a hard-and-fast rule that comments to the press are within the scope of an elected official's employment. The Court specifically stated that it intended its decision neither to "immunize" any "federal employees for any gratuitous slander in the context of statements of a purely personal nature," nor to govern every "statement by a congressman to the press." *Ballenger*, 444 F.3d at 666 (internal quotation marks omitted). Rather, its assessment turned "on the context in which the statement was made." *Id.* *Ballenger*, like this Court, recognized the scope-of-employment question as a fact-bound one not amenable to categorical resolution, *see Penn Central*, 398 A.2d at 29, and rejected the broad reading that Trump and the United States now ascribe to it.

In addition, the facts in *Ballenger* were the exact inverse of the allegations here and hence distinguishable: the *Ballenger* record contained testimony from the congressman that his remarks were intended to preserve his effectiveness as a legislator; there was no record of a prior personal history with CAIR; and the events at issue all transpired during his term of office. *See Ballenger*, 444 F.3d at 665. In addition, the remarks concerned a congressman's viewpoint about the funding activities of a political organization—a far cry from the personal act of criticizing a rape survivor's appearance.

To be sure, in *Ballenger*, the Circuit suggested 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." 444 F.3d at 664 (internal quotation marks omitted). But that language comes from the Court's discussion of whether the defamatory statement was "conduct of the kind he is employed to perform," *id.*—a separate requirement of the Second Restatement—*not* whether the conduct was "actuated, even in part, to serve the master," *id.* at 665. As to the distinct question of the congressman's *purpose*, the *Ballenger* court focused on the congressman's proffered reasons for his statements, concluding that they were "motivated—at least in part—by a legitimate desire to discharge his duty as a congressman." *Id.* Trump, by contrast, has not offered any evidence explaining the reasons for his statements.

Notably, if *Ballenger* were not distinguishable, it is an outlier even among D.C. Circuit cases, and this Court should decline to adopt its reasoning. All the other analogous D.C. Circuit cases that Trump and the United States cite involve statements about a squarely political controversy occurring during the official's term in office. *See, e.g.*, *Wilson v. Libby*, 535 F.3d 697, 702 (D.C. Cir. 2008) (statement disclosing identity of agent involved in federal investigation); *Wuterich v. Murtha*, 562 F.3d 375, 384 (D.C. Cir. 2009) (statements made in media interviews "about the pressures on American troops"); *Smith v. Clinton*, 886 F.3d 122, 127 (D.C. Cir. 2018) (per curiam) (statements responding to political controversy around attack on an embassy). Indeed, appellants have cited no case in which a court placed comments about personal events that occurred before an official campaigned for

office within the official's scope of employment, let alone in which the statements were so highly personal and incendiary. Nor is the District aware of one.[4]

Moreover, some of *Ballenger*'s language may be in tension with this Court's precedents. To the extent that *Ballenger* assessed the congressman's motivation only with respect to his decision to sit for the interview in the first place, not his motivation to malign the organization, *Ballenger*, 444 F.3d at 665, that discussion departs from this Court's usual approach. As explained, District law considers the employee's purpose throughout the course of conduct, including the specific intentional tort (here, the defamatory statements). *See supra* Part I.A.[5]

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[4] The out-of-jurisdiction cases appellants cite follow this same pattern. *See, e.g.*, *Williams v. United States*, 71 F.3d 502, 507 (5th Cir. 1995) (statements about the lobbying fees a plaintiff charged to advocate for a specific congressional appropriation); *Operation Rescue Nat'l v. United States*, 147 F.3d 68, 69 (1st Cir. 1998) (statements about an organization's political activities that speaker's bill sought to counter); *Does 1-10 v. Haaland*, 973 F.3d 591, 593, 602 (6th Cir. 2020) (observing that as in *Williams* and in *Operation Rescue National*, "the allegedly defamatory statements" at issue were made "as part of [representatives'] advocacy—whether for or against—current legislation"); *Chapman v. Rahall*, 399 F. Supp. 2d 711, 713 (W.D. Va. 2005) (congressman's statements about an individual who had accused him of fundraising activities tied to terrorist groups).

[5] When the *Ballenger* court addressed the level of generality applied to the scope-of-employment test, it was yet again discussing whether the congressman's acts were "the kind he is employed to perform"—*not* whether his purpose was to serve the master. Restatement (Second) of Agency § 228(1) (setting these out as distinct requirements); *see Ballenger*, 444 F.3d at 664 ("[T]he appropriate question, then, is whether that telephone conversation—not the allegedly defamatory sentence—was the kind of conduct Ballenger was employed to perform."). It is this prong of the inquiry—not the purpose test—that the court characterized as "broad" and "liberally construed." *Ballenger*, 444 F.3d at 664 (cleaned up).

Finally, contrary to the United States' suggestion, *see* U.S. Br. 17-18, this Court did not adopt a broad version (or any version) of *Ballenger*'s reasoning in *District of Columbia v. Jones*, 919 A.2d 604, 608 (D.C. 2007). That case concerned a different question: whether a suit against the District's former Mayor alleging defamation and related torts was precluded by the doctrine of *absolute immunity*, which shields discretionary actions within the Mayor's official duties. *Id.* at 606-09. Indeed, this Court clarified that "[w]hen determining whether an act qualifies for absolute immunity, the court does not inquire into an official's motives." *Id.* at 610. *Jones*'s citation to *Ballenger* is accordingly irrelevant here, where motive—a question *Jones* never considered—is the crux of the dispute.

B. The purpose-based test is sensible, and this case presents no reason to deviate from it.

This Court's fact-intensive, purpose-based test for deciding whether tortious conduct falls within the scope of employment achieves a sensible balance: it sets a fair and administrable standard for employer liability that brings much of employees' intentional conduct within their scope of employment but excludes entirely personal adventures. Were there any question about its applicability, this Court should sustain it en banc, for several reasons.

First, adopting a different test would make the District an outlier. Aside from California—where courts "pay lip service" to cost internalization, Daniel Harris, *The Rival Rationales of Vicarious Liability*, 20 Fla. St. U. Bus. Rev. 49, 67 (2021)—most

state courts have adhered to the Second Restatement's approach. The "[d]ominance" of the purpose-based rule is clear, and scholars have catalogued state after state that embraces it. *Id.* at 67-74. Even critics of the Restatement's approach acknowledge that it is "[t]he majority position." Catherine M. Sharkey, *Institutional Liability for Employees' Intentional Torts: Vicarious Liability as a Quasi-Substitute for Punitive Damages*, 53 Val. U. L. Rev. 1, 14 & nn. 44, 50 (2018); *see* Gregory C. Keating, *The Theory of Enterprise Liability and Common Law Strict Liability,* 54 Vand. L. Rev. 1285, 1325 (2001). Indeed, the authors of the Third Restatement have endorsed and retained the purpose-based approach. *See* Restatement (Third) of Agency § 7.07.

Second, a purpose-based test reasonably requires employers to atone for their employees' acts only when they can exercise some degree of control over them. Courts are "especially wary of the imposition of vicarious employer liability" for intentional torts, and for good reason. Sharkey, *supra*, at 15. Vicarious liability, after all, is "a form of strict liability" that leaves no room for actual fault on the part of the employer. *Id.* at 23. At best, imposing such liability without considering employee purpose will incentivize employers to "proctor[] the minutiae of a worker's daily life." *Garnett v. Remedi Seniorcare of Va., LLC*, 892 F.3d 140, 144 (4th Cir. 2018). At worst, it will unfairly hold employers liable for conduct they have already "taken reasonable precautions against." Restatement (Third) of

Agency § 7.07 cmt. b. When an employee acts "for the sole purpose of furthering [his] interests or those of a third party, the employee's conduct will often lie beyond the employer's effective control." *Id.* Employers should not be held vicariously liable for conduct they can do nothing to prevent.

This Court's purpose standard makes eminent sense particularly as applied to government employees. When the government is held liable for a tort, it is ultimately taxpayers who foot the bill. In cases where the government can be faulted for failing to control its employees, it makes sense for the public fisc to bear the expense. On the other hand, the purpose test ensures that taxpayers are not made to pay for the purely personal actions of District employees unintended to further any District interest. *See, e.g.*, *Coron*, 515 A.2d at 438; *Bamidele*, 103 A.3d at 526; *Boykin*, 484 A.2d at 563. In that scenario, the employee should bear the cost.

Third, the purpose test is predictable, which is especially important for institutional employers like the District. As the Third Restatement notes, tests hinging on foreseeability alone tend to "generate outcomes that are less predictable than intent-based formulations." Restatement (Third) of Agency § 7.07 cmt. b. Because conceptions of foreseeability can differ vastly, using it as the primary criterion for vicarious liability "risks confusion" and uncertainty. *Id.* Since foreseeability lies in the eye of the beholder, it cannot predictably distinguish work-related "mishaps and slippage" (which the employer may be able to deter or control)

from the consequences of an employee's purely personal adventures (which the employer cannot control). *Id.* Any "human frailty," after all, can be called foreseeable. *Id.* Retaining the well-worn and predictable purpose standard, by contrast, would aid the District in valuing and settling cases where the government ought to be held accountable for the employee's tort—providing plaintiffs with surer and swifter relief.

Finally, retaining the current standard will not leave victims of intentional torts without a remedy. Of course, for cases where an employee's tortious conduct *was* in part intended to further the employer's interests, this Court would permit *respondeat superior* liability. And even in cases concerning purely personally motivated intentional torts, victims have successfully sued employees' supervisors for intentionally inflicting emotional distress through their failure to respond to the tortious conduct. *See, e.g.*, *King v. Kidd*, 640 A.2d 656, 674 (D.C. 1993). Victims can also sue employers directly for "negligent[ly] hiring, training, and supervis[ing]" employees. *Blair*, 190 A.3d at 229. And they can sue employers for maintaining a hostile work environment. *See, e.g.*, *Psychiatric Inst. of Wash. v. D.C. Comm'n on Hum. Rts.*, 871 A.2d 1146, 1152 (D.C. 2005). Victims may also be able to recover against the tortfeasor, who should certainly be held accountable for an intentional tort motivated by purely selfish purposes. Given these and other remedies, extending

vicarious liability beyond the bounds of this Court's precedent is neither prudent nor necessary.

* * *

Appellants' argument boils down to a claim that, as a matter of law, public officials necessarily act within the scope of their employment when they attack individuals who have accused them of past misconduct. But calculated statements like Trump's, repeated over the course of several days, are easily identified as serving a personal purpose to malign the plaintiff in light of the tortfeasor's personal history with her. If Trump and the United States are correct, then public officials are free to viciously defame individuals with whom they have a personal history, and taxpayers must defend and sometimes pay for those actions. Moreover, because the United States has declined to waive its sovereign immunity for the tort of defamation, *see* 28 U.S.C. § 2680(h), such a rule would permit federal employees—many of whom work in the District—to make defamatory statements to the press with no consequence whatsoever. That is not, and should not be, the law in the District.

CONCLUSION

This Court should answer the certified question by holding that Trump's statements fall outside the scope of his employment.

Respectfully submitted,

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REDACTION CERTIFICATE DISCLOSURE FORM

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:
   - An individual's social-security number
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   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;

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     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;

     (4) the year of the individual's birth;

     (5) the minor's initials; and

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2. Any information revealing the identity of an individual receiving mental-health services.

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4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); see also 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the

purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

/s/ Caroline S. Van Zile
Signature

22-SP-745
Case Number

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CERTIFICATE OF SERVICE

I certify that on December 8, 2022, this brief was served through this Court's electronic filing system to:

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