No. _____

In The
Supreme Court of the United States

CHARLES ALLEN FISCHER,

Petitioner,

vs.

STATE OF TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The Texas Court Of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Due Process Clause is offended by a statute that authorizes criminal convictions on the basis of character conformity and propensity.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Charles Allen Fischer. Respondent is the State of Texas. No party is a corporation.

STATEMENT OF RELATED CASES

This case was tried in a single proceeding in the 299th Judicial District Court of Travis County, Texas, styled *State of Texas v. Charles Allen Fischer*, under docket numbers D-1-DC-12-900145, D-1-DC-12-900147, and D-1-DC-16-904072. The date of entry of the judgment was November 17, 2016.

The judgment was appealed to the Third Court of Appeals of Texas, styled *Charles Allen Fischer v. State*, under docket numbers 03-17-00025-CR, 03-17-00026-CR, and 03-17-00027-CR. The date of entry of the judgment of the Third Court of Appeals of Texas was December 28, 2018. On February 25, 2019, the Third Court of Appeals of Texas denied a motion for rehearing. The Texas Court of Criminal Appeals refused petitioner's Petition for Discretionary Review on May 8, 2019, under docket numbers PD-0298-19, PD-0297-19, and PD-0299-19.

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Petitioner Charles Fischer asks that this Court issue a writ of certiorari to review the judgment of the Texas Court of Appeals.

CITATION TO OPINION BELOW

The opinion of the Texas Court of Appeals is attached to this petition as Appendix A. *Fischer v. State*,

Nos. 03-17-00025-CR, 03-17-00026-CR, and 03-17-00027-CR (Tex.App. – Austin, delivered December 28, 2018) (not designated for publication). The Court of Appeals refused to reconsider its opinion on February 25, 2019. The Texas Court of Criminal Appeals' refusal of petitioner's *Petition for Discretionary Review* on May 8, 2019 is attached as Appendix B.

JURISDICTION

The Texas Court of Appeals entered its judgment on December 28, 2018 and the Texas Court of Criminal Appeals denied Petitioner's *Petition for Discretionary Review* on May 8, 2019. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(a), Mr. Fischer having asserted below and asserting in this petition the deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the United States Constitution, which provides, "No State shall . . . deprive any person of life, liberty, or property, without due process of law[.]" U.S. CONST. amend. XIV, Section 1.

STATEMENT OF THE CASE

A. Prior Proceedings

Mr. Fischer sought review in the state court of last resort, the Texas Court of Criminal Appeals. The state court refused his petition for discretionary review. U.S. Supreme Court Rule 13.1.

B. Procedural History

The State of Texas charged Mr. Fischer in four indictments with indecency with a child and aggravated sexual assault of a child under multiple counts. On November 17, 2016, a jury convicted him of ten counts of indecency with a child by contact and four counts of sexual assault of a child, and assessed his punishment at 20 years of imprisonment and a $10,000 fine for each offense except for one count of indecency with a child, for which it recommended probation.

On appeal, the Third Court of Appeals rejected Mr. Fischer's Due Process Clause challenge to Article 38.37 of the Code of Criminal Procedure. *Fischer v. State*, Nos. 03-17-00025-CR, 03-17-00026-CR, and 03-17-00027-CR (Tex.App. – Austin, delivered December 28, 2018) (not designated for publication).

C. How the Issues Were Raised and Decided Below

Article 38.37 is a Texas statute that authorizes propensity and character conformity evidence to be introduced in prosecutions for sex crimes against

children for the express purpose of proving propensity and character conformity. Mr. Fischer challenged the statute under the Fourteenth Amendment's Due Process Clause. The Court of Appeals held that the statute did not violate the Due Process Clause because it left discretion to judges to exclude the evidence under Rule 403 of the Texas Rules of Evidence.

D. Factual Background

The State of Texas prosecuted Mr. Fischer through three indictments. One charged him with indecency against D.W.; a second charged him with indecency against A.M.; and a third indictment charged him with sexual assault and indecency against J.G. Under the Texas statute challenged herein, the prosecution then introduced extensive testimony of four additional persons involving Mr. Fischer's extraneous sexual misconduct.

B.R. testified that Mr. Fischer fondled and sexually assaulted him fifty years earlier, when B.R. was a child and a teenager more than fifty times. W.C. testified that Mr. Fischer showed him gay pornography and displayed his erect penis to him, twenty-four years earlier when W.C. was a teenager. D.R. testified that he asked Mr. Fischer to perform oral sex on him when D.R. was a teenager and that they later had anal sex. Z.L. testified that when he was a teenager, Mr. Fischer exposed his penis to him, and they later engaged in oral and anal sex.

REASONS FOR GRANTING THE WRIT

I. The Texas Court of Appeals, like most state courts and federal appellate courts, has interpreted the Due Process Clause in a way that cannot be reconciled with this Court's jurisprudence regarding the admissibility of propensity evidence in criminal cases.

Article 38.37 of the Texas Code of Criminal Procedure authorizes the admission of extraneous evidence of sex crimes against children for the express purpose of proving "the character of the defendant and acts performed in conformity with the character of the defendant." Tex. Code Crim. Pro. art. 38.37 §2(b). Despite numerous Due Process Clause challenges to this Article since its enactment, the Texas Court of Criminal Appeals has repeatedly declined to settle the issue. *Perez v. State*, 562 S.W.3d 676 (Tex.App. – Fort Worth 2018, *pet. ref'd*); *Buxton v. State*, 526 S.W.3d 666 (Tex. App. – Houston [1st Dist.] 2017, *pet. ref'd*); *Robisheaux v. State*, 483 S.W.3d 205 (Tex.App. – Austin 2016, *pet. ref'd*); *Bezerra v. State*, 485 S.W.3d 133 (Tex.App. – Amarillo 2016, *pet. ref'd*); *Baez v. State*, 486 S.W.3d 592 (Tex.App. – San Antonio 2015, *pet ref'd*), *cert. denied*, 2016 U.S. LEXIS 6202, 137 S.Ct. 303, 196 L.Ed. 217 (2016); and *Harris v. State*, 475 S.W.3d 395 (Tex.App. – Houston [14th Dist.] 2015, *pet. ref'd*). Because sex offenses are primarily prosecuted in the States, a petition for writ of certiorari from a state appellate court is likely the only vehicle to resolve the issue whether this or any other statute that explicitly permits the introduction of character conformity and propensity

evidence for its own sake violates the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

The Texas statutory scheme challenged in this petition traces its origins to the Violent Crime Control and Law Enforcement Act of 1994. In that Act, Congress, over the unanimous opposition of federal judges and 900 evidence law professors, among others,[1] enacted Rules 413 and 414 of the Federal Rules of Evidence. Pub. L. No. 103-322, § 320935, 108 Stat. 1796, 2135-2137 (1994). These controversial rules permit propensity and character evidence to be introduced in federal sex offense trials for its own sake. *United States v. Mound*, 157 F.3d 1153, 1153 (8th Cir. 1998) (Arnold, J., dissenting from denial of rehearing en banc) ("[T]he members of two committees, consisting of 40 persons in all, and appointed by the Judicial Conference of the United States to examine Fed. R. Evid. 413 before its passage, all but unanimously urged that Congress not adopt the rule because of deep concerns about its fundamental fairness.").

After its enactment, this propensity/character law spread to other States in various forms, including

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[1] Federal Judicial Conference of the United States, Report of the Judicial Conference on the Admission of Character Evidence in Certain Sexual Misconduct Cases (1994), 159 F.R.D. 51, 52-54 (1995), *reprinted*, Glen Weissenberger & James J. Duane, Federal Rules of Evidence: Rules, Legislative History, Commentary and Authority, app. A at 848-849 (2001) (recommending that "Congress . . . reconsider its decision on the policy questions underlying the new rules").

Texas. In 2013, the Texas Legislature followed the congressional example by passing a law which authorized the admission of propensity and character evidence in prosecutions for most sex crimes against children in order to prove the accused's propensity to commit bad sexual acts and the defendant's bad character for sexual propriety. Tex. Code Crim. Pro. art. 38.37 §2(b). The Texas language mimics the relevant federal rules of evidence, as noted *infra*.

This Court long ago recognized that character conformity evidence is inadmissible because it "only tend[s] to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community[.]" *Boyd v. United States*, 142 U.S. 450, 458 (1892). More recently, this Court observed that there is "no question that propensity would be an 'improper basis' for conviction[.]" *Old Chief v. United States*, 519 U.S. 172, 181-182 (1997). This Court has also famously recognized the power and inherent unfairness of character conformity evidence: such evidence "weigh[s] too much with the jury and to so over persuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." *Michelson v. United States*, 335 U.S. 469, 475-476 (1948) (citations omitted); *Spencer v. Texas*, 385 U.S. 554, 572-575 (1967) (Warren, C.J., concurring in part and dissenting in part) ("evidence of prior crimes introduced for no purpose other than to show criminal disposition would violate the Due Process Clause. Evidence of

prior convictions has been forbidden because it jeopardizes the presumption of innocence of the crime currently charged."). Leading evidence scholars agree. *See*, *e.g.*, Imwinkelreid, *Uncharged Prior Misconduct*, Sec. 1.02 (1984) ("Evidence of uncharged misconduct strips the defendant of the presumption of innocence.").

This Court has noted that it has never reached the specific issue presented in this case. *Estelle v. McGuire*, 502 U.S. 62, 75 n.5 (1991) ("Because we need not reach the issue, we express no opinion on whether a state law would violate the Due Process Clause if it permitted the use of 'prior crimes' evidence to show propensity to commit a charged crime."). Consequently, state legislatures remain free to copy Congress' elimination of the traditional bar to the introduction of propensity and character evidence. Because there is now an unmistakable trend among state and federal legislatures and courts, as discussed *infra*, this Court should confront this issue.

The question of whether propensity evidence violates the Due Process Clause is squarely joined in this case. The statute explicitly authorizes propensity and character evidence to be introduced for the express purpose of proving bad propensity and bad character for its own sake. It could not be more plainly inconsistent with this Court's jurisprudence.

II. States are divided on the question whether the introduction of propensity and character evidence for its own sake violates substantive due process.

While this Court has not squarely held that propensity evidence to prove the accused's bad character violates due process, two States have made exactly that declaration. In *State v. Ellison*, 239 S.W.3d 603 (Mo. 2007), *superseded by constitutional amendment*, *State v. Williams*, 548 S.W.3d 275 (Mo. 2018), a unanimous Supreme Court of Missouri held that evidence "admitted purely to demonstrate the defendant's criminal propensity [ ] violates one of the constitutional protections vital to the integrity of our criminal justice system." *Id*. at 608. The Supreme Court of Iowa struck down a similar statute because it violated "fundamental conceptions of fairness." *State v. Cox*, 781 N.W.2d 757, 768-769 (Iowa 2010). Because this Court has reserved the question, both state courts have relied on their respective state constitutions.

III. The Texas Court of Appeals' decision, as well as all other state and federal courts that have considered this issue, is wrong.

Like other state and federal courts, the Texas Court of Appeals, in reliance on its previous opinion in *Robisheaux v. State*, 483 S.W.3d 205, 211 (Tex.App. – Austin 2016, *pet. ref'd*), held the statute constitutional because of one key provision. The one provision that permits these propensity laws to survive both state and federal challenges is the retention of Rule 403. *See*,

e.g., *United States v. Charley*, 189 F.3d 1251, 1259 (10th Cir. 1999) ("Rule 414 is not unconstitutional on its face" because Rule 403 "should always result in the exclusion of evidence that is so prejudicial that it violates a defendant's due process right to a fair trial.") (internal quotations and citations omitted); *United States v. LeMay*, 260 F.3d 1018, 1026 (9th Cir. 2001) ("As long as the protections of Rule 403 remain in place[,] . . . the right to a fair trial remains adequately safeguarded."); *State v. Williams*, 548 S.W.3d 275, 284 (Mo. 2018) (reviewing "every federal circuit court to address the question" and agreeing that Rule 403 saves similar propensity provisions from a due process challenge); *State v. Williams*, 346 P.3d 455, 464 (Or. 2015) (requiring Rule 403 and concluding it to be a safeguard); *Horn v. State*, 204 P.3d 777, 781 (Okla.Crim.App. 2009) (relying on federal courts for same conclusion). However, the protection is illusory. Rule 403's balancing test does nothing to provide due process.

Both Texas Rule 403 and its federal counterpart in almost identical language authorize courts to exclude relevant evidence "if its probative value is substantially outweighed"[2] by the danger of unfair prejudice,

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[2] Rule 403 of the Texas Rules of Evidence states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence."

Rule 403 of the Federal Rules of Evidence states: "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue

its potential to confuse or mislead the jury, or because the evidence is pointless or redundant. When the propensity rule applied, this balancing test ordinarily requires the judge to weigh the probative force of non-propensity evidence against its tendency toward unfair prejudice. *Huddleston v. United States*, 485 U.S. 681, 685 (1988) (recognizing evidentiary rules "generally prohibit the introduction of evidence of extrinsic acts that might adversely reflect on the actor's character, unless that evidence bears upon a relevant issue in the case such as motive, opportunity, or knowledge"); *Spencer v. Texas*, 385 U.S. at 560-561 ("Because such evidence is generally recognized to have potentiality for prejudice, it is usually excluded except when it is particularly probative in showing such things as intent; an element in the crime; identity; motive; a system of criminal activity; or when the defendant has raised the issue of his character, or when the defendant has testified and the State seeks to impeach his credibility.") (citations omitted). The nonexclusive list of non-propensity purposes is found in Rule 404(b): "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Tex. R. Evid. 404(b). But with the non-propensity purposes removed from the scale, there is nothing to weigh against admission of the evidence.

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delay, wasting time, or needlessly presenting cumulative evidence."

All states, either by rule or caselaw, provide this same rule. *Why Federal Rule of Evidence 403 Is Unconstitutional, and Why That Matters*, 47 U. Rich. L. Rev. 1077, 1078, n.8 (2013).

No trial court in Texas can exclude propensity evidence under the Due Process Clause because a propensity or character rationale is never irrelevant or improper, confusing or distracting. On the contrary, propensity evidence is profoundly relevant and always statutorily proper. Jurors are in no way confused or distracted by the notion that because the defendant did it then, he did it again this time – it is a readily understandable demonstration of his character. Juries will be told to undertake precisely this rationale under written judicial instructions. With every consideration piled up in favor of admission, there is literally nothing for any relevancy test, state or federal, to exclude.

Since *Cox*, another state supreme court has followed the federal courts, which have uniformly decided that propensity evidence for its own sake is admissible so long as Rule 403 exists. *State v. Boysaw*, 439 P.3d 909, 919 (Kan. 2019) (finding balancing test a due process protection). Meanwhile, legal scholars, like the federal judges who opposed the elimination of the propensity rule, continue to consider the innovation to be an unwarranted if not unconstitutional deviation from well-settled and long-standing rules of evidence. *See*, *e.g.*, Aviva Orenstein, *Deviance, Due Process, and the False Promise of Federal Rule of Evidence 403*, 90 Cornell L. Rev. 1487 (2005); Major Francis P. King, *Rules of Evidence 413 and 414: Where Do We Go from Here?*, 2000 Army Law. 4 (2000); Michael S. Ellis, *The Politics Behind Federal Rules of Evidence 413, 414, and 415*, 38 Santa Clara L. Rev. 961 (1998); Jason L. McCandless, Note, *Prior Bad Acts and Two Bad Rules: The*

Fundamental Unfairness of Federal Rules of Evidence 413 and 414, 5 Wm. & Mary Bill Rts. J. 689 (1997); Katherine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 Harv. L. Rev. 563 (1997); Margaret C. Livnah, *Branding the Sexual Predator: Constitutional Ramifications of Federal Rules of Evidence 413 Through 415*, 44 Clev. St. L. Rev. 169 (1996); Louis M. Natali, Jr. & R. Stephen Stigall, "*Are You Going to Arraign His Whole Life?": How Sexual Propensity Evidence Violates the Due Process Clause*, 28 Loy. U. Chi. L. J. 1 (1996); Mark A. Sheft, *Federal Rule of Evidence 413: A Dangerous New Frontier*, 33 Am. Crim. L. Rev. 57 (1995); *Judicial Conference of the U.S., Report of the Judicial Conference on Admission of Character Evidence in Certain Sexual Misconduct Cases* (1994), *reprinted*, 56 Crim. L. Rep. 2139 (1995); Myrna S. Raeder, *American Bar Association Criminal Justice Section Report to the House of Delegates* (reporting the basis for the American Bar Association's opposition to Rules 413-415), *reprinted*, 22 Fordham Urb. L. J. 343 (1995). This issue is ripe for this Court's resolution not only for States like Texas and Iowa, but the federal courts of appeals as well.

IV. The Texas statute violates the Due Process Clause.

The Texas statute violates the Due Process Clause in various straightforward ways. It removes the gravity that tethers the State's burden of proving the allegations in the indictment. Reasonable doubt about the charged offense evaporates with the introduction of

extraneous offenses. Juries are free to decide that because the defendant is likely guilty of one, some, many or all of the extraneous offenses, he must be guilty of the offense for which he is on trial. Whatever jurors might think of the allegations, they may nonetheless convict the defendant based entirely upon uncharged misconduct under a propensity rationale. Indeed, they are directed to do so through jury instructions following this statute.

Under this statute, there is very little process due in cases where the State has evidence of uncharged propensity evidence. Sufficient character proof that the accused is a sex offender is enough to convict on the allegations in the indictment. There can be no clearer statute, or less defensible one, that begs this Court's attention to definitely address the interplay between the introduction of prejudicial evidence in criminal cases and the right to a fair trial under the Due Process Clause.

A defendant has the "substantial right to be tried only on charges presented in an indictment[,]" a right so "basic" that its deprivation remains "far too serious to be treated as nothing more than a variance and then dismissed as harmless error." *Stirone v. United States*, 361 U.S. 212, 217 (1960) (reversing conviction because the jury may have based its verdict on acts not charged in the indictment). One of the purposes of this right "is to limit [a defendant's] jeopardy to offenses charged" in the indictment. *Stirone v. United States*, 361 U.S. at 217-218 (reversing because "it cannot be said with certainty" that the defendant "was convicted *solely* on the

charge made in the indictment[.]" *Id*. (emphasis added). Under this Texas statute, this fundamental right is replaced with trials based on a prosecution's notice of its intent to present allegations in addition to those in the indictment, effectively amending the indictment with uncharged misconduct. *Id*. ("Although the trial court did not permit a formal amendment of the indictment, the effect of what it did was the same."). Trial by notice thereby supplants this fundamental feature of American trials.

"Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of *every fact necessary to constitute the crime with which he is charged*." *In re Winship*, 397 U.S. 358, 364 (1970) (emphasis added). A charged fact can be proven entirely on uncharged facts. Facts that only indirectly permit guilty verdicts can, under statutes like the Texas provision, welcome conviction without reservation, a form of adjudication alien to the Due Process Clause.

This Court's enforcement of the Due Process Clause recognizes how the government's burden of proof is inextricably intertwined with its own allegations. *E.g.*, *Stirone, supra*. *Winship*'s holding will continue to be undermined should this Court permit this statutory innovation into a well-established rule of evidence to persist. Under this statute, uncharged misconduct may out-shine those all-important factual allegations in the indictment, unconstitutionally

blending allegations which are charged by indictment with those allegations charged by notice, and basing convictions on the defendant's propensity for criminality and his character as a sex offender.

This Court seemed fairly self-assured in its well-established Due Process holding: "General bad character, much less bad reputation, has not yet become a criminal offense in our scheme." *Michelson v. United States*, 335 U.S. at 489. Without this Court's intervention, it effectively has now become a staple of sex offense prosecutions. Congress cut deep into the judicial sphere when it decided to ignore the inhabitants of the Judicial Branch, specifically, the judges and legal scholars of evidence who opposed this unnecessary and unwanted departure from the way of handling prejudicial evidence that had satisfied courts for generations. Congress' unfortunate foray into this rule of evidence is now copied by an increasing number of State legislatures, and its prevailing rationale for constitutionality is now followed by a growing number of State courts.

It is no longer a question whether this Court should weigh in, but when. This particular State statute is unambiguous in its intent. Its explicit application cannot avoid the scrutiny of the Due Process Clause. It more than merely undermines familiar rules for the admission of character conformity evidence recognized in every state and every federal court, rules that are well-settled, workable and uncontroversial. Instead it affirmatively negates the basic structure of criminal trials at their most fundamental level.

More specifically, this Texas appellate decision directly conflicts with every holding of this Court's jurisprudence regarding the Due Process Clause. The congressional action rejected centuries of experience with the admission of such evidence. Its language has mutated to the States, justified by erroneous federal appellate analysis. There will be no better time for this Court's intervention regarding an evidentiary rule so vital to the due process of criminal trials in State courts than this petition.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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