No. 19-

IN THE

# Supreme Court of the United States

MURAD RAZZAQ,

*Petitioner,*

v.

STATE OF KANSAS,

*Respondent.*

**On Petition for a Writ of Certiorari to the Supreme Court of the State of Kansas**

## PETITION FOR A WRIT OF CERTIORARI


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September 16, 2019

## QUESTION PRESENTED

Does a state violate a defendant's due process rights by admitting evidence of a prior, unrelated crime to show his propensity to commit another crime?

## PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Murad Razzaq. Respondent is the State of Kansas. No party is a corporation.

TABLE OF CONTENTS

TABLE OF CONTENTS—continued

TABLE OF CONTENTS—continued

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—continued



CONSTITUTIONS AND STATUTES



RULES

TABLE OF AUTHORITIES—continued

Page

OTHER AUTHORITIES

## PETITION FOR A WRIT OF CERTIORARI

Murad Razzaq petitions for a writ of certiorari to review the decision of the Supreme Court of the State of Kansas.

## OPINIONS BELOW

The opinion of the Supreme Court of the State of Kansas is reported at 439 P.3d 903 (Kan. 2019), and is reproduced in the appendix to this petition at Pet. App. 1a. The opinion of the Court of Appeals of the State of Kansas is reported at 383 P.3d 182 (Kan. Ct. App. 2016), and is reproduced in the appendix to this petition at Pet. App. 12a.

## JURISDICTION

The Supreme Court of the State of Kansas entered judgment on April 19, 2019. On July 1, 2019, Justice Sotomayor extended the time within which to file this petition to and including September 16, 2019. This Court has jurisdiction under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment of the U.S. Constitution provides that "nor shall any State deprive any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV, § 1.

The statutory provision involved is Kansas statute Kan. Stat. Ann. § 60-455(d), Pet. App. 26a, which states:

> Except as provided in K.S.A. 60-445, and amendments thereto, in a criminal action in which the defendant is accused of a sex offense . . ., evidence of the defendant's com-

> mission of another act or offense of sexual misconduct is admissible, and may be considered for its bearing on any matter to which it is relevant and probative.

## STATEMENT OF THE CASE

This Court previously reserved the question "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." *Estelle* v. *McGuire*, 502 U.S. 62, 75 n.5 (1991). A conflict among courts on the question has persisted. Five States have found such statutes unconstitutional while Kansas and five federal courts of appeals have upheld such rules. This case presents the question squarely.

Here the Kansas Supreme Court upheld, on both state and federal grounds, a state law that uniquely permits the admission of propensity evidence in trials for sexual misconduct offenses. The State introduced prior bad acts, though unrelated in time and scope, to prove that Mr. Razzaq had committed the sexual crime for which he was being tried.

### I. BACKGROUND OF THE CASE

#### A. Factual Background

In 2011, fourteen-year-old Bethany Davidson snuck out of her home to meet Murad Razzaq. Pet App. 109a. Upon discovering her absence, Ms. Davidson's parents searched for her, learned that she had gone to Mr. Razzaq's house, and went there. *Id.* at 109a–13a. When they arrived, they saw her through an open front door sitting in the living room with several other people, including Mr. Razzaq. *Id.* at 116a, 144a–45a. Her mother removed her from the home while her father angrily confronted Mr. Razzaq, de-

manding to know whether the two had sex. *Id.* at 145a–47a. According to her father, Mr. Razzaq admitted to having sex with his daughter. *Id.* at 147a. The police then arrested Mr. Razzaq, who was twenty-seven years old at the time. *Id.* at 147a–49a.

Ms. Davidson admitted to having sex with Mr. Razzaq during an interview with police shortly after his arrest, and this admission prompted a sexual assault examination. *Id.* at 136a, 139a–41a. Police separately transported Mr. Razzaq to a hospital so that they could collect DNA from him pursuant to a search warrant. *Id.* at 122a–23a. As a result of this brief investigation, the State charged Mr. Razzaq with one count of aggravated indecent liberties with a child under Kan. Stat. Ann. § 21-3504(a)(1). *Id.* at 187a.

### B. Proceedings Below

1. Prior to trial, the State moved to admit evidence of Mr. Razzaq's prior sex crimes convictions under Kan. Stat. Ann. § 60-455(d). Pet. App. 178a–85a. Particularly, the State moved to admit two 2005 Missouri convictions, including one felony statutory sodomy and one misdemeanor child molestation in the second degree. *Id.* at 178a. The prosecution requested admission of this evidence to show Mr. Razzaq's propensity to have sex with underage girls. *Id.* at 158a, 242a. Kansas law allows "evidence of the defendant's commission of another act or offense of sexual misconduct" for "its bearing on any matter to which it is relevant and probative." Kan. Stat. Ann. § 60-455(d). Counsel for Mr. Razzaq moved to exclude this evidence, arguing that Kan. Stat. Ann. § 60-455(d) was unconstitutional and, in any event, that the prejudicial effect of the evidence outweighed any probative value. *Id.* at 160a–77a.

The trial court denied Mr. Razzaq's motion, concluding that "the elements of the Missouri crime as compared to the elements of the Kansas crime with which [Mr. Razzaq was] charged are very similar," because the Missouri statute "does involve sexual intercourse with another person who is less than 14 years old." *Id.* at 153a–54a.

Accordingly, at trial, the State offered testimony that Mr. Razzaq had been convicted in Missouri more than ten years prior of "statutory sodomy, a felony, and child molestation, a misdemeanor." *Id.* at 79a. Following this testimony, the trial court instructed the jury, along with providing limiting instructions, that the "evidence may be considered for its bearing on the defendant's disposition or propensity to commit a crime such as those charged here." *Id.* at 79a–81a.

Mr. Razzaq testified that the two did not have sex. *Id.* at 95a. Mr. Razzaq also stated that his confession of having sex with Ms. Davidson was coerced after her father verbally assaulted him. *Id.* at 98a.

A forensic scientist testified that she did not find any testable quantity of Mr. Razzaq's DNA from a swab of Ms. Davidson's genitals. *Id.* at 88a–90a. She also testified, however, that Ms. Davidson could not be excluded as a contributor to a DNA profile she found from a swab of Mr. Razzaq's genitals. *Id.* at 91a–92a.

Following this testimony and consideration of Mr. Razzaq's two prior 2005 Missouri convictions, the jury convicted Mr. Razzaq of aggravated indecent liberties with a child. *Id.* at 75a, 101a. Mr. Razzaq unsuccessfully moved for a new trial or judgment of acquittal following his conviction. *Id.* at 71a, 73a. In support of his motion, he argued insufficient evidence

and due process violations under both the United States and Kansas Constitutions. *Id.* The court denied the motions without explanation. *Id.* at 60a.

2. The trial court sentenced Mr. Razzaq to more than 14 years' (176 months') imprisonment, doubling the guidelines range under Kan. Stat. Ann. 21-6804(j)(1). *Id.* at 23a, 65a–68a.

3. On appeal, Mr. Razzaq argued that Kan. Stat. Ann. § 60-455(d) is facially unconstitutional, because it denies defendants the right to due process, the presumption of innocence, and to know the nature of crimes charged. *Id.* at 41a–55a. In support of this argument, Mr. Razzaq relied upon this Court's case law prohibiting bad acts evidence. Mr. Razzaq explained further that the prohibition traditionally disallowed "the prosecution . . . any kind of evidence of a defendant's evil character to establish probability of his guilt." *Id.* at 43a (citing *Old Chief* v. *United States*, 519 U.S. 172, 181 (1997)).

Mr. Razzaq also quoted case law assessing the constitutionality of Federal Rules of Evidence 413 and 414 at length for his attack on Kan. Stat. Ann. § 60-455(d).[1] These federal rules permit evidence of prior crimes "on any matter to which it is relevant" in certain instances. See Fed. R. Evid. 413, 414. Mr. Razzaq explained that the arguments concerning these federal rules violating due process support his contention that the Kansas law allowing prior bad acts violates due process. Such evidence, Mr. Razzaq argued, "creates a presumption of guilt that undermines the requirement that the prosecution must

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[1] Congress amended the Federal Rules of Evidence in 1994 to allow evidence of prior crimes. *See* Fed. R. Evid. 413 (prior crimes in sexual-assault cases), 414 (prior crimes in child-molestation cases).

prove guilt beyond a reasonable doubt" and it "licenses the jury to punish the defendant for past acts, eroding the presumption of innocence in criminal trials." Pet. App. 43a–44a (citing *United States* v. *Enjady*, 134 F.3d 1427, 14332 (10th Cir. 1998)).

The Kansas Court of Appeals affirmed. *Id.* at 12a–21a. The Court of Appeals relied upon *State* v. *Boysaw*, 372 P.3d 1261 (Kan. Ct. App. 2016), holding Kan. Stat. Ann. § 60-455(d) constitutional because of the "longstanding tradition" of Kansas courts permitting "prior acts of the same character" as well the rules of evidence that preclude irrelevant and prejudicial evidence. *Boysaw*, 372 P.3d at 1265, 1271.

4. Mr. Razzaq successfully sought discretionary review in the Kansas Supreme Court. But that court also affirmed on the basis of its reasoning in the parallel *Boysaw* case, stating: "As we explain in *Boysaw* . . . the historical development of prior-crimes evidence in Kansas leads us to conclude that K.S.A. 2018 Supp. 60-455(d) satisfies the due process requirements of the federal Constitution." Pet. App. 8a.

In *State* v. *Boysaw*, the defendant pointed to due process decisions from the Iowa and Missouri supreme courts to support his claim that the admission of propensity evidence under Kan. Stat. Ann. § 60-455(d) is unconstitutional. 439 P.3d 909, 916 (Kan. 2019). The *Boysaw* court, though, found the other states' cases unpersuasive and Mr. Boysaw's reliance upon them misplaced, because of Kansas's "long history of allowing propensity evidence in these kinds of cases" involving sexual misconduct. *Id.* at 915.

This longstanding tradition dates back to 1904 when the Kansas Supreme Court found it "permissible to show prior acts of the same character" "in prosecutions for a single act forming a part of a course of

illicit commerce between the sexes." *State* v. *Borchert*, 74 P. 1108 (1904). *Boysaw* dubbed this the "lustful disposition" exception to the general prohibition of admitting evidence of unrelated crimes. "[W]hen a defendant is on trial for a sexual offense similar offenses may be introduced for the purpose of showing the lustful disposition or nature of the defendant." *Boysaw*, 372 P.3d at 1267 (citing *State* v. *Whiting*, 252 P.2d 884 (Kan. 1953)).

*Boysaw* also relied on cases upholding Federal Rules of Evidence 413 and 414 against due process challenges. *Boysaw*, 372 P.3d at 1268–69. At the time *Boysaw* was decided, four federal circuit courts had held that Rules 413 and 414 do not violate an accused's due process rights.[2] Those courts found that, while the Rules present serious constitutional concerns, any due process violations are ameliorated by the safeguards of Rule 403, which allows a court to "exclude evidence if its probative value is substantially outweighed" by "unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403. Likewise, "Kansas has a statutory safeguard similar to Federal Rule 403." *Boysaw*, 372 P.3d at 1269. Therefore, the "history of the use of propensity evidence in Kansas, coupled with the procedural safeguard of weighing the probative against the prejudicial effect of the evidence," led the court to "conclude that K.S.A. 2018 Supp. 60-455(d) . . . does not violate federal constitutional protections." *Boysaw*, 439 P.3d at 916.

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[2] *United States* v. *Julian,* 427 F.3d 471, 486–87 (7th Cir. 2005); *United States* v. *LeMay,* 260 F.3d 1018, 1026–27 (9th Cir. 2001); *United States* v. *Mound,* 149 F.3d 799, 800–01 (8th Cir. 1998); *United States* v. *Enjady,* 134 F.3d 1427, 1431 (10th Cir. 1998).

## REASONS FOR GRANTING THE PETITION

### I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER STATE SUPREME COURTS

The Kansas Supreme Court's decision in this case conflicts with the decisions of at least five state high courts, along with substantial scholarly opinions. These authorities recognize that propensity-evidence laws violate the constitutional safeguards of due process, because such evidence is highly prejudicial and leaves fact finders ill-disposed to condemn the accused for who he is, not for the specific acts for which he is being tried.

1. In *State* v. *Cox*, the Iowa Supreme Court held that admission of prior bad acts solely to show a general propensity to commit a crime violated the defendant's due process rights in a case much like Mr. Razzaq's. 781 N.W.2d 757 (Iowa 2010). There, the State charged Cox with sexual abuse for allegedly inappropriately touching his cousin. The Iowa Code allowed for the admission of "evidence of the defendant's commission of another sexual abuse . . . for its bearing on any matter for which the evidence is relevant." Iowa Code Ann. § 701.11. At trial, the State introduced prior bad acts unrelated to the indictment to establish "a pattern of abuse." *Cox*, 781 N.W.2d at 759. The State argued that "the prior acts of sexual abuse should be admitted . . . because of 'common threads' in the testimony." *Id*. The State also argued that "the evidence showed the 'defendant's [*modus operandi*]'" and "a pattern of behavior." *Id*. The trial court admitted the evidence.

Reversing, the Iowa Supreme Court relied upon this Court's opinion in *Boyd* v. *United States*, 142 U.S. 450 (1892) and held that the historical rationale

for propensity evidence violated "fundamental conceptions of fairness." *Cox*, 781 N.W.2d at 768. The court also found that there is "no rationale for treating prior sexual offenses differently than all other offenses." *Id.* at 767.[3]

Like Iowa, Delaware has also determined that a "sexual gratification exception" is unconstitutional. *Getz* v. *State*, 538 A.2d 726, 733–34 (Del. 1988). The Supreme Court of Delaware rejected the suggestion that, unlike other character traits, "a defendant's propensity for satisfying sexual needs is so unique that it is relevant to his guilt." *Id.* at 734. In holding the exception unconstitutional, the court noted that it was "no more inclined to endorse" the "defendant's propensity for satisfying sexual needs" as "relevant to his guilt" than it was "to consider previous crimes of theft as demonstrating a larcenous disposition and thus admissible to show proof of intent to commit theft on a given occasion." *Id.*

Similarly, in *State* v. *Ellison*, the Missouri Supreme Court held unconstitutional the State's "lustful disposition" exception. 239 S.W.3d 603, 607 (2007) (en banc). The Missouri statute allowed "evidence [of] . . . other charged or uncharged crimes of a sexual nature . . . for the purpose of showing . . . propensity." Mo. Ann. Stat. § 566.025. The court found that "legal and logical relevance will *never* provide a basis for the admission of prior criminal acts evidence for the purpose of demonstrating a defendant's propensity." *Ellison*, 239 S.W.3d at 607. Because "the defendant has the right to be tried only on the offense charged," and

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[3] The Iowa Supreme Court conflicts with its own federal court of appeals, the Eighth Circuit, which has held that the federal propensity evidence rule does not violate due process. *Mound*, 149 F.3d at 800–01.

not based upon a "perception that a person who has acted criminally once will do so again," a person's propensity is inherently irrelevant to the case. *Id.* at 605–06 (internal quotations marks omitted). According to the court, "[t]here are no exceptions to this rule." *Id.* at 606.[4] See also *State* v. *Winter*, 648 A.2d 624, 626–27 (Vt. 1994) ("[W]e have not carved out a special propensity rule for [sexual] crimes as an exception to Rule 404(b)); *Commonwealth* v. *Green*, 434 A.2d 137, 139 (Pa. Super. Ct. 1981) (per curiam) ("[S]exual and nonsexual crimes must now be treated alike in deciding whether evidence of prior criminal conduct should be admitted."); see also *Commonwealth* v. *Young*, 989 A.2d 920, 924 (Pa. Super. Ct. 2010) (noting that "evidence is admissible only when the prior act involves *the same victim*") (emphasis added)).

2. Kansas and other states considering the question "look to United State Supreme Court interpretations" of "due process . . . for guidance." *Blue* v. *McBride*, 850 P.2d 852, 914 (Kan. 1993). Accordingly, when the Kansas Supreme Court decided *Razzaq* and

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[4] In response to this decision, Missouri voters passed a constitutional amendment in 2014, amending the rights of criminal defendants to codify an exclusion for those accused of sexual offenses. Mo. Const. art. 1, § 18(c). After reviewing the history of admitting propensity evidence in sexual offense cases and accompanying rules of evidence that safeguard against admission of highly prejudicial evidence, the Missouri Supreme Court found the amendment constitutional because of a "strong presumption in favor of . . . validity." *State* v. *Williams*, 548 S.W.3d 275, 280 (Mo. 2018) (en banc), *cert. denied*, 139 S. Ct. 606 (2018). That *Williams* abrogated *Ellison* is of no moment to *Razzaq*, because the Missouri voters codified the propensity evidence in the State's constitution.

*Boysaw* it relied upon those federal court decisions upholding the constitutionality of propensity-evidence statutes. Those federal cases all reviewed the constitutionality of Federal Rules of Evidence 413 and 414, which are the federal equivalents to Kan. Stat. Ann. 60–455(d) and other state propensity evidence laws. Consider the two side-by-side:

| Kan. Stat. Ann. § 60-455(d) | Fed. R. Evid. 413(a) |
|---|---|
| "[I]n a criminal action in which the defendant is accused of a sex offense … evidence of the defendant's commission of another act or offense of sexual misconduct is admissible, and may be considered for its bearing on any matter to which it is relevant and probative." | "In a criminal case in which a defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other sexual assault. The evidence may be considered on any matter to which it is relevant." |

The most oft-cited case, including by the Kansas Supreme Court in *Boysaw*, on the Due Process question presented here is *United States* v. *Enjady*, 134 F.3d 1427, 1431 (10th Cir. 1998). There, the defendant appealed a conviction on one count of aggravated sexual abuse in violation of federal law, arguing that the prosecution's use of evidence from another case two years prior unfairly prejudiced the jury. The trial court admitted the propensity evidence under Federal Rule of Evidence 413 and the Tenth Circuit affirmed.

Although the court "agree[d] that Rule 413 raises a serious constitutional due process issue," it found the rule constitutional because Federal Rule of Evidence 403 safeguards against irrelevant or prejudicial evidence. Rule 403 states that a court may "exclude relevant evidence if its probative value is substantially outweighed by . . . unfair prejudice" or other factors effecting the trial's fairness. *Enjady* explained further that Rule 403 "overrode concerns" about "fundamental fairness" in rules allowing propensity evidence. "Considering the safeguards of Rule 403" the *Enjady* court "conclud[ed] that Rule 413 is not unconstitutional on its face as a violation of the Due Process Clause." 134 F.3d at 1433. Other circuits followed. See *United States* v. *Castillo*, 140 F.3d 874, 883 (10th Cir. 1998); *United States* v. *Mound*, 149 F.3d 799, 800–01 (8th Cir. 1998); *United States* v. *LeMay*, 260 F.3d 1018, 102 (9th Cir. 2001) ("We therefore conclude that as long as the protections of Rule 403 remain in place so that district judges retain the authority to exclude potentially devastating evidence, Rule 414 is constitutional.").

The Iowa Supreme Court, however, citing many of these decisions, took a different view: "Under the federal courts' rulings," the court stated, "a trial judge must balance the probative value of general propensity evidence against the prejudicial effect." *Cox*, 781 N.W.2d at 768–69. But "that which makes the evidence more probative—the similar of the prior act to the charged act—also makes it more prejudicial." *Id*. at 769. As such, "where a prior bad act is 'similar to the incident in question, it would be extremely difficult for juror to put out of their minds knowledge" a previous assault against the victim and "'not allow this information to consciously or subcon-

sciously influence their decision.'" *Id.* (internal quotation marks omitted).

## II. PROPENSITY EVIDENCE VIOLATES DUE PROCESS

The rationale upholding the use of propensity evidence—supposed safeguards in rules of evidence to prevent prejudice—cannot withstand scrutiny or square with this Court's historical practice forbidding the "[s]tate [to] show the defendant's prior trouble with the law." *Michelson* v. *United States*, 335 U.S. 469, 475–76 (1948).

1. But the supposed safeguards that balance prejudice against relevancy can never protect due process rights, because each measure of propensity evidence that would tip the scales toward relevance and admission is always met with an equal measure of prejudice. The "balancing test" called for by Federal Rule of Evidence 403 and its state equivalents simply does not function in this context. And the test is inapt for the additional reason that well-meaning judges, who naturally defer to the legislative branch, would not take lightly the fact that the legislature has expressly called for the admission of just such evidence. Accordingly, the typical probative/prejudice test is skewed for this reason as well. Yet as this Court has observed, "[a]lthough . . . 'propensity evidence' is relevant, the risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment—creates a prejudicial effect that outweighs ordinary relevance." *Old Chief* v. *United States*, 519 U.S. 172, 180–81 (1997).

It is axiomatic that the introduction of prior bad acts into trial has the "natural and inevitable tendency" to "give excessive weight to the vicious record of

crime" rather than "the present charge" when "justifying a condemnation, irrespective of the accused's guilt of the present charge." 1A John Henry Wigmore, *Wigmore on Evidence: Evidence in Trials at Common Law* § 58.2 (4th ed. 2019). Thus, this Court has found that such evidence "is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record . . . ." *Michelson*, 335 U.S. at 475–76; see also *Spencer* v. *Texas*, 385 U.S. 554, 569–70 (1967) (Warren, C.J., dissenting) (discussing how propensity evidence is fundamentally at odds with the policies underlying due process because it "needlessly prejudices the accused"); Aviva Orenstein, *Deviance, Due Process, and the False Promise of Federal Rule of Evidence 403*, 90 Cornell L. Rev. 1487, 1517 (2005) ("[I]t is beyond the capacity of even the most open-minded juror to hear propensity evidence without being overly influenced by it.").

Additionally, such evidence impairs a fair trial because § 60-455(d) and its equivalents overly burden the accused with defending himself. Under these propensity rules, prosecutors are not limited to convictions and may introduce evidence of prior "misconduct," thereby forcing the accused to continuously mount defenses against the prior misconduct as well. Countering the prosecutor's damning evidence seriatim impresses upon the jurors the notion that the accused is a "wretch[]" who is undeserving of certain prescribed trial protections. *Boyd* v. *United States*, 142 U.S. 450, 458 (1892).

Some courts have even cited concerns that allegations of prior sexual misconduct, precisely because of their titillating quality, might require more diligence in protecting due process rights. The Supreme Court

of Iowa, for example, quoted a leading treatise on evidence law observing that "certain unnatural sex crimes are in themselves so unusual and distinctive that any previous such acts by the accused with anyone are strongly probative of like acts . . . but the danger of prejudice is likewise enhanced." *State* v. *Spaulding*, 313 N.W.2d 878, 881 (Iowa 1981) (Allbee, J. dissenting) (quoting McCormick's Handbook of the Law of Evidence, § 190 at 449–50 (2d ed., E. Cleary 1972).

Scholars concur. See, *e.g.*, 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, 23–34 (1996) (criticizing propensity evidence because it "so over-persuades jurors that they will lose their impartiality and pre-judge the accused as one with a bad general character" and statistically rejecting the notion that "sexual offenders have higher rates of recidivism than other types of offenders"); Margaret C. Livnah, *Branding the Sexual Predator: Constitutional Ramifications of Federal Rules of Evidence 413 through 415*, 44 Clev. St. L. Rev. 169, 181 (1996) ("The risk of a due process violation is increased by the potential that a jury will be prejudiced by explicit reference to prior bad sexual acts."); James Joseph Duane, *The New Federal Rules of Evidence on Prior Acts of Accused Sex Offenders: A Poorly Drafted Version of a Very Bad Idea*, 157 F.R.D. 95, 126 (1994) (Propensity evidence in the federal rules "carr[ies] a number of serious and potentially constitutional dangers, including a virtual certainty of increasing the risk of convicting an innocent man . . . .").

2. The fact that evidence of prior bad acts is so prejudicial is not the only reason it violates due process. "Historical practice" also proves the point as it

includes "four hundred years of history against the use of propensity evidence." 1 Barbara E. Bergman et al., *Wharton's Criminal Evidence* § 4:42 (15th ed. 2018); see also *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 430 (1994) ("As this Court has stated from its first due process cases, traditional practice provides a touchstone for constitutional analysis.").

In *Hampden's Trial*, for example, Justice Withins of the King's Bench excluded evidence of prior forgeries committed by the accused who was on trial for forgery. See Natali, *supra*, at 14 (citing 9 Cob. St. Tr. 1053 (K.B. 1685)). Similarly, in 1692, the Lord Chief Justice Holt excluded propensity evidence in a murder prosecution in *Harrison's Trial*. *Id.* at 14–15 (citing 12 How. St. Tr. 834 (Old Bailey 1692)). Upon the evidence's proffer, Justice Holt remarked: "Hold, what are you doing now? Are you going to arraign his whole life? Away, away, that ought not to be; that is nothing to the matter." *Id.*

The Treason Act of 1695, which was designed to dispense with the inquisitorial proceedings of the Star Chamber, included a provision that prohibited the prosecution from proving any alleged crimes of the defendant that were not listed in the indictment. Thomas J. Reed, *Trial by Propensity: Admission of Other Criminal Acts Evidenced in Federal Criminal Trials*, 50 U. Cin. L. Rev. 713, 716–17 (1981). "By the end of the eighteenth century, the Treason Act of 1695 and the legal commentaries had generated a general rule excluding evidence of other crimes and accusations not listed in the indictment." *Id.* at 717 (citing William Hawkins, *In A Treatise of the Pleas of the Crown* (1721)).

Pre-Revolutionary war colonial courts adopted this proscription against using propensity evidence as well. In *Rex* v. *Doaks*, the accused had been indicted

for keeping a bawdy house. See Natali, *supra,* at 15 (citing Quincy's Mass. Repts 90 (Mass. Super. Ct. 1763)). The prosecution sought to introduce the accused's prior acts of lasciviousness. The highest court in Massachusetts, however, held that propensity evidence was inadmissible. *Id*. The rule against propensity evidence thus informed the Framers' understanding of a just criminal process. See Reed, *supra*, at 721 ("Some of the provisions of the Treason Act of [1695] thus became matters of fundamental law of the separating colonies, and eventually appeared in the Bill of Rights to the Federal Constitution.").

The proscription has been a constant of evidence law ever since. As New York's high court observed in reiterating the "general rule . . . against receiving evidence of another offence": "A person cannot be convicted of one offense upon proof that he committed another, however persuasive in a moral point of view such evidence may be." *Coleman* v. *People*, 55 N.Y. 81, 90 (1873). "It would lead to convictions, upon the particular charge made, by proof of other acts in no way connected with it, and to uniting evidence of several offenses to produce conviction for a single one." *Id*. Justice Cardozo also explained that "[i]f a murderous propensity may be provoked against a defendant as one of the tokens of his guilt, a rule of criminal evidence, long believed to be of fundamental importance for the protection of the innocent, must be first declared away." *People* v. *Zackowitz*, 172 N.E. 466, 468 (N.Y. 1930).

This Court has reaffirmed the propensity ban time and again. In addition to *Boyd*, the Court held in *Bird* v. *United States* that the "prosecuting officer is not . . . allowed to give evidence of facts tending to prove a similar, but distinct offense, for the purpose of raising an inference or presumption that the ac-

cused committed the particular act with which he is charged." 180 U.S. 356, 360 (1901). And in *Brinegar* v. *United States*, this Court concluded that in a prosecution for illegal importation of liquor, testimony of a government agent that he had arrested the defendant several months earlier for illegal transportation of liquor was inadmissible. 338 U.S. 160 (1949). *Brinegar* declared: "Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard." *Id.* at 174.

Justice Jackson has also described how the law has handled this risk: "The [s]tate may not show defendant's prior trouble with the law . . . even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them . . . ." *Michelson*, 335 U.S. at 475–76.

## III. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT AND THIS CASE IS AN IDEAL VEHICLE

The question presented in this case is exceptionally important because the submission of prior bad acts evidence undermines the integrity of criminal trials and challenges the "fundamental fairness" of due process. *Medina* v. *California*, 505 U.S. 437, 448 (1992). Propensity evidence focuses the criminal trial not on the allegations at hand but on the character of the person being tried. This is a recurring issue that will not go away. As common sense and related statistics

would indicate, sexual misconduct cases are unfortunately very frequent.[5]

The facts of this case cleanly present the issue for resolution. The question was squarely decided by the Kansas Supreme Court and was dispositive in Mr. Razzaq's case. But for Kansas's propensity-evidence rule, Mr. Razzaq would have been tried not for who he is but for what he allegedly had done.

Had Mr. Razzaq been tried in Iowa or Missouri, under the exact same facts and allegations, the trial would have been much different and there is a reasonable probability that he may not have been found guilty.

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[5] Federal Bureau of Investigation, Crime Data Explorer, *Crime Rates in Kansas,* 2007–2017 (Sept. 12, 2019), https://crime-data-explorer.fr.cloud.gov/explorer/state/kansas/crime.

## CONCLUSION

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

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