

No. _____

**In the
Supreme Court of the United States**

PRESIDENT DONALD J. TRUMP,
Petitioner,

v.

E. JEAN CARROLL,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether Federal Rule of Evidence 415 overrides Rule 403's requirement to balance the probative value of temporally remote propensity evidence against its prejudicial effect before such evidence can be admitted?

II. Whether Federal Rule of Evidence 413(d) authorizes the admission of temporally remote propensity evidence that the defendant committed the "crime" of "sexual assault" when the alleged prior act did not constitute a crime or a sexual assault?

III. Whether Federal Rule of Evidence 404(b)(2) permits the admission of "*modus operandi*" or "corroboration" evidence of prior "bad acts" without establishing a non-propensity purpose of the evidence, such as identity, absence of mistake, or another enumerated exception in Rule 404(b)(2)?

PARTIES TO THE PROCEEDING

Petitioner President Donald J. Trump is currently serving as the 47th President of the United States. This action was initiated against him in 2022. President Trump is the defendant in the district court and defendant-appellant in the court of appeals.

Respondent E. Jean Carroll is the plaintiff in the district court and plaintiff-appellee in the court of appeals.

STATEMENT OF RELATED PROCEEDINGS

United States District Court for the Southern District of New York:

- D. Ct. Doc. 92, *Carroll v. Trump*, No. 1:22-cv-10016 (order denying President Trump's motion in limine, permitting propensity evidence) (March 20, 2023)
- D. Ct. Doc. 95, *Carroll v. Trump*, No. 1:22-cv-10016 (order granting in part and denying in part Carroll's motion in limine, permitting propensity evidence under Rules 413 and 415) (March 27, 2023)
- Jury Trial, *Carroll v. Trump*, No. 1:22-cv-10016 (April 25, 2023 through May 9, 2023)
- D. Ct. Doc. 178, *Carroll v. Trump*, No. 1:22-cv-10016 (judgment filed in favor of Carroll) (May 11, 2023)
- D. Ct. Doc. 212, *Carroll v. Trump*, No. 1:22-cv-10016 (order denying President Trump's Rule 59 motion) (July 19, 2023)

United States Court of Appeals for the Second Circuit:

- Ct. App. Doc. 171, *Carroll v. Trump*, No. 23-793 (hearing held) (September 6, 2024)
- Ct. App. Doc. 176, *Carroll v. Trump*, No. 23-793 (per curiam opinion affirming district court judgment) (December 30, 2024)
- Ct. App. Doc. 180, *Carroll v. Trump*, No. 23-793 (judgment filed) (December 30, 2024)
- Ct. App. Doc. 199, *Carroll v. Trump*, No. 23-793 (order denying President Trump's petition for rehearing en banc) (June 13, 2025)

- Ct. App. Doc. 200, *Carroll v. Trump*, No. 23-793 (opinion concurring in the denial of rehearing en banc) (June 13, 2025)
- Ct. App. Doc. 201, *Carroll v. Trump*, No. 23-793 (opinion dissenting from denial of rehearing en banc) (June 13, 2025)
- Ct. App. Doc. 202, *Carroll v. Trump*, No. 23-793 (statement opinion in support of the denial of rehearing en banc) (June 13, 2025)
- Ct. App. Doc. 204, *Carroll v. Trump*, No. 23-793 (mandate issued) (July 10, 2025)

United States Supreme Court:

- *Trump v. Carroll*, No. 25A250 (order granting President Trump's application to extend the time to file a petition for writ of certiorari) (September 4, 2025)

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
STATEMENT OF RELATED PROCEEDINGS.....	iii
TABLE OF CONTENTS	v
TABLE OF AUTHORITIES.....	ix
DECISIONS BELOW	1
STATEMENT OF JURISDICTION.....	1
STATUTORY AND RULE PROVISIONS.....	1
INTRODUCTION.....	2
STATEMENT OF THE CASE	3
1. Carroll’s Facially Implausible Allegations Against President Trump.	3
2. The District Court Erroneously Propped Up Carroll’s Implausible Allegations By Permitting Inflammatory, Inadmissible Propensity Evidence.	7
3. Carroll’s Litigation Against President Trump.....	9
4. The Second Circuit Erroneously Approves Carroll’s Reliance on Inadmissible Propensity Evidence.	11
REASONS FOR GRANTING THE PETITION	12
I. The Second Circuit Deepened an Existing Circuit Conflict by Erroneously Holding That Federal Rules of Evidence 413 and 415 Override Rule 403’s Standard Balancing Analysis for Remoteness in Admitting Propensity Evidence. 13	
A. The Circuits are divided on how to apply Rule 403 to propensity evidence otherwise admissible under Rules 413-415.	14

B. The Second Circuit abandoned the plain text of the Rules of Evidence in favor of legislative history in not applying Rule 403’s remoteness inquiry to propensity evidence.....	18
II. The Second Circuit’s Erroneous Approach to Rule 413(d) Conflicts with This Court’s Precedent and Presents an Important Question of Federal Law That This Court Should Resolve.	22
A. The Second Circuit’s erroneous approach conflicts with Rule 413(d) and this Court’s precedent.....	24
B. The Second Circuit’s erroneous approach to interpreting Rule 413(d) presents a significant question of federal law that this Court should resolve.	27
III. The Second Circuit’s Holding that Rule 404(b) Permitted Admission of the <i>Access Hollywood</i> Tape Implicates Two Independent Circuit Splits.	28
A. The Second Circuit’s decision creates a circuit conflict over whether <i>modus operandi</i> evidence is admissible without an independent non-propensity purpose.	29
B. The Second Circuit’s recognition of “corroboration” as an independent basis to admit prior acts evidence under Rule 404(b) deepens a conflict among the circuits on an important question of federal law.....	31
CONCLUSION	33
APPENDIX	
TABLE OF CONTENTS	i
Appendix A – Per Curiam Opinion of the United States Court of Appeals for the Second Circuit Affirming the District Court Judgment,	

Ct. App. Doc. 176 (December 30, 2024).....	1A
Appendix B – Memorandum and Order of the United States District Court for the Southern District of New York Denying President Trump’s Motion <i>In Limine</i> , D. Ct. Doc. 92 (March 20, 2023).....	64A
Appendix C – Memorandum and Order of the United States District Court for the Southern District of New York Granting in Part and Denying in Part Carroll’s Motion <i>In Limine</i> , D. Ct. Doc. 95 (March 27, 2023)	77A
Appendix D – Memorandum Opinion of the United States District Court for the Southern District of New York Denying President Trump’s Motion <i>In Limine</i> in <i>Carroll v. Trump</i> , No. 1:20-cv-7311 (<i>Carroll I</i>), D. Ct. Doc. 145 (March 10, 2023)	102A
Appendix E – Memorandum Opinion of the United States District Court for the Southern District of New York Denying President Trump’s Rule 59 Motion, D. Ct. Doc. 212 (July 19, 2023)	128A
Appendix F – Order of the United States Court of Appeals for the Second Circuit Denying President Trump’s Petition for Rehearing En Banc, Ct. App. Doc. 199 (June 13, 2025).....	196A
Appendix G – Opinion of Judges Pérez, Lee, Robinson, and Merriam of the United States Court of Appeals for the Second Circuit Concurring in the Denial of Rehearing En Banc, Ct. App. Doc. 200 (June 13, 2025)	199A
Appendix H – Opinion of Judges Menashi and Park of the United States Court of Appeals for the Second Circuit Dissenting from the Denial of Rehearing En Banc, Ct. App. Doc. 201 (June 13, 2025) ..	201A

Appendix I – Statement Opinion of Senior Judges Chin and Carney of the United States Court of Appeals for the Second Circuit in Support of the Denial of Rehearing En Banc, Ct. App. Doc. 202 (June 13, 2025).....	241A
Appendix J – Judgment of the United States Court of Appeals for the Second Circuit Affirming the Judgment in Favor of Plaintiff, Ct. App. Doc. 180 (December 30, 2024)	255A
Appendix K – Judgment of the United States District Court for the Southern District of New York in Favor of Plaintiff, D. Ct. Doc. 178 (May 11, 2023)	256A
Appendix L – Statutory and Rule Provisions	
18 U.S.C. § 113(e) (1976)	257A
Federal Rule of Evidence 403.....	257A
Federal Rule of Evidence 404.....	257A
Federal Rule of Evidence 413.....	259A
Federal Rule of Evidence 415.....	260A
Appendix M – Verdict Form Submitted by the Jury, D. Ct. Doc. 174 (May 9, 2023).....	261A

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Bond v. United States</i> , 572 U.S. 844 (2014).....	27
<i>Chamber of Commerce v. Whiting</i> , 563 U.S. 582 (2011).....	19
<i>Chavez v. City of Albuquerque</i> , 402 F.3d 1039 (10th Cir. 2005).....	30-31
<i>Daubert v. Merrell Dow Pharms., Inc.</i> , 509 U.S. 579 (1993).....	18, 24
<i>Delligatti v. United States</i> , 604 U.S. 423 (2025).....	26
<i>Hardt v. Reliance Standard Life Ins. Co.</i> , 560 U.S. 242 (2010).....	19
<i>Jennings v. Rodriguez</i> , 583 U.S. 281 (2018).....	21
<i>Johnson v. Elk Lake Sch. Dist.</i> , 283 F.3d 138 (3d Cir. 2002)	15
<i>Kawashima v. Holder</i> , 565 U.S. 478 (2012).....	25-26
<i>Leocal v. Ashcroft</i> , 543 U.S. 1 (2004).....	24
<i>Martinez v. Cui</i> , 608 F.3d 54 (1st Cir. 2010)	14-15, 18
<i>Munoz v. State</i> , 307 P.3d 829 (Wyo. 2013)	32
<i>Nat’l Ass’n of Mfrs. v. Dep’t of Defense</i> , 583 U.S. 109 (2018).....	20
<i>New York v. Trump</i> , No. 24-2299, 2025 WL 3096170 (2d Cir. Nov. 6, 2025)	10

<i>NLRB v. SW General, Inc.</i> , 580 U.S. 288 (2017).....	20
<i>Old Chief v. United States</i> , 519 U.S. 172 (1997).....	13, 28
<i>Pereida v. Wilkinson</i> , 592 U.S. 224 (2021).....	24
<i>Ross v. Blake</i> , 578 U.S. 632 (2016).....	18, 24
<i>Sessions v. Dimaya</i> , 584 U.S. 148 (2018).....	24
<i>Shular v. United States</i> , 589 U.S. 154 (2020).....	25
<i>United States v. Bailey</i> , 319 F.3d 514 (D.C. Cir. 2003).....	33
<i>United States v. Brimm</i> , 608 F. App'x 795 (11th Cir. 2015).....	15
<i>United States v. Delis</i> , 558 F.3d 177 (2d Cir. 2009)	22
<i>United States v. Enjady</i> , 134 F.3d 1427 (10th Cir. 1998).....	19, 21
<i>United States v. Fountain</i> , 2 F.3d 656 (6th Cir. 1993).....	30-31
<i>United States v. Gabe</i> , 237 F.3d 954 (8th Cir. 2001).....	15
<i>United States v. Guardia</i> , 135 F.3d 1326 (10th Cir. 1998).....	14, 17-18
<i>United States v. Jacques</i> , 684 F.3d 324 (2d Cir. 2012)	16
<i>United States v. Julian</i> , 427 F.3d 471 (7th Cir. 2005).....	17
<i>United States v. Kelly</i> , 510 F.3d 433 (4th Cir. 2007).....	15

<i>United States v. Knife</i> , 592 F.2d 472 (8th Cir. 1979).....	23
<i>United States v. Larson</i> , 112 F.3d 600 (2d Cir. 1997)	15
<i>United States v. LeMay</i> , 260 F.3d 1018 (9th Cir. 2001).....	15, 17, 21
<i>United States v. Lewis</i> , 796 F.3d 543 (5th Cir. 2015).....	15
<i>United States v. Lieu</i> , 963 F.3d 122 (D.C. Cir. 2020)	15
<i>United States v. Linares</i> , 367 F.3d 941 (D.C. Cir. 2004)	32
<i>United States v. Loughry</i> , 660 F.3d 965 (7th Cir. 2011).....	15
<i>United States v. Lowery</i> , 306 F.2d 133 (4th Cir. 1961).....	23
<i>United States v. Pitts</i> , 6 F.3d 1366 (9th Cir. 1993).....	31
<i>United States v. Porter</i> , 881 F.2d 878 (10th Cir. 1989).....	32
<i>United States v. Reynolds</i> , 720 F.3d 665 (8th Cir. 2013).....	17-18
<i>United States v. Rogers</i> , 587 F.3d 816 (7th Cir. 2009).....	14
<i>United States v. Seymour</i> , 468 F.3d 378 (6th Cir. 2006).....	15
<i>United States v. Stamper</i> , 106 F. App'x 833 (4th Cir. 2004).....	15
<i>United States v. Varoudakis</i> , 233 F.3d 113 (1st Cir. 2000)	16, 19
<i>United States v. Williams</i> , 985 F.2d 634 (1st Cir. 1993)	30-31

<i>United States v. Withorn</i> , 204 F.3d 790 (8th Cir. 2000).....	15
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Statutes and Rules

FED. R. EVID. 403.....	19
FED. R. EVID. 404(b)(1)	13, 28, 31
FED. R. EVID. 404(b)(2)	28-29
FED. R. EVID. 412(b)(2)	19
FED. R. EVID. 413(d)	22, 24-25
FED. R. EVID. 415(a).....	22
FED. R. EVID. 609(b)(1)	19
FED. R. EVID. 703.....	19
Pub. L. 103-272, 108 Stat. 1245 (July 5, 1994)	22
Sup. Ct. R. 10(c).....	27

Other Authorities

29 Am. Jur. 2d Evidence	29
140 Cong. Rec. 23603 (1994).....	19
Aviva Orenstein, <i>Deviance, Due Process, and the False Promise of Federal Rule of Evidence 403</i> , 90 CORNELL L. REV. 1487 (2005).....	20-21, 28
Ct. App. Doc. 140, <i>Carroll v. Trump</i> , No. 24-644 (2d Cir. Nov. 5, 2025)	10
Edward J. Imwinkelried, <i>The Meaning of Probative Value and Prejudice in Federal Rule of Evidence 403: Can Rule 403 Be Used to Resurrect the Common Law of Evidence?</i> , 41 VAND. L. REV. 879 (1988).....	16
Eileen A. Scallen, <i>Analyzing “The Politics of [Evidence] Rulemaking”</i> , 53 HASTINGS L.J. 843 (2002).....	14, 18
John McCorvey, Note, <i>Corroboration or Propensity? An Empty Distinction in the Admissibility of</i>	

<i>Similar Fact Evidence</i> , 18 STETSON L. REV. 171 (1988).....	32
Tamara Rice Lave & Aviva Orenstein, <i>Empirical Fallacies of Evidence Law: A Critical Look at the Admission of Prior Sex Crimes</i> , 81 U. CINCINNATI L. REV. 795 (2013)	20
WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1993).....	25
WRIGHT & MILLER, 22B FED. PRACTICE & PROC. (2d ed. 2025)	30
WRIGHT & MILLER, 23 FED. PRACTICE & PROC. (2d ed. 2025)	13, 25

DECISIONS BELOW

The Second Circuit's panel opinion is published at 124 F.4th 140 and reprinted in the appendix at App.1A-63A. The opinions on petition for rehearing en banc are published at 141 F.4th 366 and reprinted at App.196A-254A.

The district court's order denying President Trump's motion in limine is available at 2023 WL 3000562 and reprinted at App.64A-76A. The order granting in part and denying in part Carroll's motion in limine is available at 2023 WL 2652636 and reprinted at App.77A-101A. The order denying President Trump's Rule 59 motion is published at 683 F. Supp. 3d 302 and reprinted at App.128A-195A.

STATEMENT OF JURISDICTION

The Second Circuit entered its opinion and judgment on December 30, 2024. The court denied a timely petition for rehearing en banc on June 13, 2025, with Judges Menashi and Park dissenting. This Court extended the deadline to file this petition to November 10, 2025. The district court had jurisdiction under 28 U.S.C. § 1332(a)(1). The Second Circuit had jurisdiction under 28 U.S.C. § 1291. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND RULE PROVISIONS

18 U.S.C. § 113(e)

Fed. R. Evid. 403

Fed. R. Evid. 404

Fed. R. Evid. 413

Fed. R. Evid. 415

INTRODUCTION

In 2019, E. Jean Carroll first raised facially implausible, politically motivated allegations against President Donald J. Trump about conduct that purportedly occurred decades earlier. President Trump has clearly and consistently denied that this supposed incident ever occurred. No physical or DNA evidence corroborates Carroll's story. There were no eyewitnesses, no video evidence, and no police report or investigation. Carroll admittedly never reported the supposed incident to the police or sought video footage from the department store where it allegedly occurred, despite claiming that such footage existed. No reference to the supposed incident exists in decades of subsequent communications with her supposedly bolstering witnesses. Instead, Carroll waited more than 20 years to falsely accuse Donald Trump, who she politically opposes, until after he became the 45th President, when she could maximize political injury to him and profit for herself. Notably, Carroll's allegations are a story that precisely matches the plotline from an episode of one of admittedly her favorite TV shows, "Law & Order."

To have any chance of persuading a jury, as Judge Menashi explained in dissent from the denial of rehearing en banc, Carroll's implausible, unsubstantiated assertions had to be—and repeatedly were—propped up by a "series of indefensible evidentiary rulings," improperly admitting highly inflammatory propensity evidence against President Trump. App.240A. These "striking departures" from the Federal Rules of Evidence, App.202A, erroneously allowed testimony about multiple decades-old, unverified, and unrelated allegations to be presented to the jury. As a result, "[n]o one can have any confidence that the jury would have returned the

same verdict if the normal rules of evidence had been applied.” App.240A.

Under the law, “the same rules should apply equally to all defendants.” App.202A. That did not happen here. The Second Circuit’s decision to “embrace[] a series of anomalous holdings to affirm the judgment of the district court,” App.201A, created and deepened multiple, significant circuit conflicts over the interpretation of important Federal Rules of Evidence. First, the Second Circuit’s decision to truncate Rule 403 when admitting propensity evidence under Rules 413-415 conflicts with decisions by the First, Seventh, and Tenth Circuits, which have correctly held that district courts should apply the same Rule 403 analysis that they would apply to any other evidence. Second, the Second Circuit’s erroneous conduct-specific approach conflicts with the plain text of Rule 413(d), and this Court’s precedents, by ignoring a categorical approach and admitting evidence that was neither a crime nor a sexual assault. Third, the Second Circuit’s decision to admit *modus operandi* and corroboration evidence without requiring such evidence to be tied to an otherwise permissible non-propensity purpose conflicts with decisions by the First, Sixth, Tenth, and D.C. Circuits. Because, if left uncorrected, these errors will recur in a host of future civil and criminal cases, this Court should grant this petition.

STATEMENT OF THE CASE

1. Carroll’s Facially Implausible Allegations Against President Trump

In 2012, the TV show “Law & Order: SVU” ran an episode in which a business mogul fantasizes about raping a victim in a Bergdorf Goodman dressing room “[w]hile she was trying on lingerie.” *See* Law & Order

SVU, Season 13, Episode 11, “Theatre Tricks” (aired Jan. 11, 2012). This plotline is virtually identical to the false allegations that Carroll launched against President Trump—more than two decades after the supposed incident (with not even Carroll being able to provide an exact date)—during his first term as President. Carroll admitted that she is a “big fan of Law & Order,” but conveniently professed not to watch “Law & Order: SVU.” Ct. App. App’x A.1956. But even she called the identity between her allegations and a plotline in her favorite TV show an “amazing coincidence” and “astonishing.” Ct. App. App’x A.1957.

Carroll also acknowledged that other parts of her story are “inconceivable.” Ct. App. App’x A.1721. She agreed that it was “inconceivable” and “[c]annot be imagined” that there was supposedly not a single other person on the sixth floor of Bergdorf Goodman—a busy New York department store—at the time of the alleged incident. Ct. App. App’x A.1785. She also admitted that it was an “amazing happenstance” that the dressing room door was supposedly unlocked and open, instead of closed and locked per Bergdorf’s policy. Ct. App. App’x A.1791.

The lack of objective physical or corroborating evidence also undermines Carroll’s story. Even though Carroll falsely and publicly boasted that she possessed President Trump’s DNA, she moved at trial to exclude testimony regarding DNA evidence, and she declined the offer to test the DNA evidence, clearly suggesting that she expected the DNA evidence to contradict her story and support President Trump’s position. D. Ct. Doc. 56, at 15-16; App.91A-92A. Carroll claimed that she believed Bergdorf Goodman would have video evidence of the alleged incident, but she never took any steps to obtain or preserve that

supposed evidence. *See* Ct. App. App'x A.1840-41. Carroll never filed a police report, never sought an investigation, and never made any public accusation against Donald Trump until more than 20 years after the alleged incident when he was President. Ct. App. App'x A.1757-58.

Tellingly, through years of discovery and media interviews, Carroll could not recall the actual date and time of the alleged incident—further preventing President Trump from testing her story through objective evidence. Ct. App. App'x A.1745-49. Then, once discovery was closed, she took the stand at trial and suddenly, and inconceivably, recalled, for the first time and with dazzling specificity, that the incident supposedly occurred on a Thursday evening in the spring of 1996—a date and time that conveniently matched information that Carroll had obtained in discovery. Ct. App. App'x A.1747-49.

Carroll openly admits that she is a professional fabulist. She stated under oath that her public writings are not truthful but reflect a fictional “public person[a]” called “Ask E. Jean,” who is a figment of Carroll’s imagination and does not reflect Carroll’s own thoughts and attitudes. Ct. App. App'x A.1648. Carroll never explained why the allegations in her published *book* about President Trump came from the supposedly truthful “private” E. Jean Carroll, as opposed to the fictional, untruthful persona “Ask E. Jean,” *id.*, who supposedly authored all her other public writings. In fact, Carroll’s original versions of her book did not mention President Trump at all. Ct. App. App'x A.1751-53. President Trump was only added well after the project began, and even then, “[h]e was not permanently fixed in the book until the very end.” Ct. App. App'x A.1753.

Carroll's story also suffers from a tidal wave of bias evidence. Carroll admitted that she detests President Trump, stating that she "watched in horror" as President Trump won in 2016. Ct. App. App'x A.514. She has described President Trump as "evil" and "vile." Ct. App. App'x A.1651, 1654. Carroll's idea to sue President Trump was "crystallized" during a conversation with obsessed anti-Trump activist, George Conway. Ct. App. App'x A.1705-06. During her deposition, under oath, Carroll falsely denied that she received litigation funding from an outside source. But later, she admitted that the anti-Trump billionaire Reid Hoffman was financing her case. Ct. App. App'x A.1176-77. The district court, in error, declined to continue the trial or order an adverse inference due to the late revelation. D. Ct. Doc. 110. Hoffman has stated that he would "spend as much as [he] possibly can to avoid another Trump presidency." Ct. App. App'x A.1177. Hoffman's plan failed.

There is more. Carroll admitted that she coordinated with her two "outcry" witnesses, Carol Martin and Lisa Birnbach, before publicizing her false allegations against President Trump, by sharing the draft of the book excerpt with them in advance of publication. Ct. App. App'x A.1819. Even worse, Carroll's communications with Martin reflect a deliberate plot to slander President Trump. In an email to Carroll on November 11, 2016, Martin described President Trump's recent election victory as the "apocalypse" and expressed that "[s]omething [h]as to happen to stop the train." DX-EM, at 1; Ct. App. App'x A.2426-27. Then, on September 23, 2017—in an email that Carroll did not produce in discovery, for reasons never clearly explained—Martin wrote to Carroll, warning of President Trump's tenure, "This has to stop. As soon as we're

both well enuf [sic] to scheme, we must do our patriotic duty again...” PX-122, at 1; Ct. App. App’x A.2404-05, 2430-31. Carroll replied, “TOTALLY!!! I have something special for you when we meet.” *Id.* Martin later testified that the “something special” that would advance their “patriotic duty” in this “scheme” to “stop” President Trump, *id.*, was supposedly a stuffed squirrel, Ct. App. App’x A.2405, 2432-33—stretching credulity past the breaking point.

2. The District Court Erroneously Propped Up Carroll’s Implausible Allegations By Permitting Inflammatory, Inadmissible Propensity Evidence.

To try to buttress her implausible story, Carroll relied heavily on propensity evidence, specifically the equally implausible and biased testimony of Jessica Leeds and Natasha Stoyloff, as well as the so-called *Access Hollywood* tape. In her opening statement and closing argument, Carroll’s counsel repeatedly emphasized this improper, propensity evidence. Ct. App. App’x A.2586 (“You heard Jessica Leeds and you heard Natasha Stoyloff tell you how he used this exact same MO or playbook with them.”); *see also* Ct. App. App’x A.1445-46, 1460-62, 2585-88, 2623-25, 2628-31.

Jessica Leeds. Leeds raised facially implausible allegations against President Trump in October 2016—37 years after the alleged date, which was not identified for years, of a supposed incident involving the President—as part of a media pile-on following the pre-election release of the *Access Hollywood* tape. Leeds falsely testified that, in 1979, Donald Trump, then a successful real estate developer, supposedly sexually assaulted her—suddenly and without warning, “like out of the blue,” Ct. App. App’x

A.2101—while sitting next to her in the first-class cabin on an unspecified flight of unspecified origin. In Leeds’ telling, this aggressive, physical struggle occurred in full view of a first-class cabin filled with other passengers. At first, Leeds claimed that the assault lasted “15 minutes,” before revising that estimate in sworn testimony to “just a few seconds.” Ct. App. App’x A.2103. Leeds testified that, in full view of other passengers and flight crew, Donald Trump supposedly “tussle[d]” with her, “trying to kiss me ... trying to pull me towards him[,] ... grabbing my breasts ... like he had 40 zillion hands,” in “a tussling match between the two of us.” Ct. App. App’x A.2101-02. This alleged “tussling match” ended after Leeds supposedly stood up and stormed away, at which point Donald Trump—in full view of other passengers—was supposedly “standing up ... and lunging for [her] ... [f]rom the window seat into the aisle ... And no one said a word ... including [her].” Ct. App. App’x A.2136.

Leeds admitted that she is a politically active Democrat who has donated to Democratic Senate candidates and obtained a Hillary Clinton campaign button for her daughter. Ct. App. App’x A.2120-21. She conceded that she “hop[ed]” her story “would ... influence the election against Donald Trump.” Ct. App. App’x A.2126-27. Much like Carroll, she could not recall the origin or date of the flight, making it impossible to verify or falsify her story by checking airline records. Ct. App. App’x A.2130.

Natasha Stoyloff. Stoyloff’s allegations suffer from similar credibility problems. Stoyloff claimed that, in 2005, Donald Trump suddenly grabbed her shoulders and kissed her without her consent at Mar-a-Lago within a short distance of his then-pregnant wife and many others, during a break in her interview with both Donald and Melania Trump. Ct. App. App’x

A.2349-51. Yet, directly contradicting her later claim of being assaulted at Mar-a-Lago, shortly after the supposed incident, Stoyloff wrote a glowing profile of Donald Trump and his marriage in *People* magazine, without any suggestion of inappropriate behavior by him. PX-9, at 1-2. Stoyloff wrote that Donald Trump enjoyed “marital bliss,” that his wife was “glowing,” that he “reveled in being a twosome,” that he is “romantic, but very private,” and that Melania expected that he would be a “fantastic dad.” *Id.* Stoyloff made no public accusation against President Trump until eleven years later, in October 2016, when she suddenly joined the media feeding frenzy after the release of the *Access Hollywood* tape right before the presidential election. Like Carroll and Leeds, Stoyloff is politically hostile to President Trump, testifying that she viewed him as “terribly unfit” and that she was “happy” after the 2020 election. Ct. App. App’x A.2360.

3. Carroll’s Litigation Against President Trump.

In 2019, President Trump, through official White House channels, denied false accusations against him in a *New York Magazine* article by Carroll. App.8A. He made these statements from the White House in response to press inquiries about this matter of public interest, and the White House Press Office distributed his statements. The defamation action that Carroll filed in 2019 over President Trump’s official statements is known as *Carroll I*.

This petition relates to *Carroll II*, an action that Carroll brought in 2022 against President Trump that wrongly alleged battery under the constitutionally questionable New York Adult Survivor’s Act and defamation. App.9A. President Trump has consistently and unequivocally denied Carroll’s

allegations in both cases. *Carroll II* proceeded to trial before *Carroll I* as *Carroll I* was delayed because of proceedings concerning President Trump's presidential immunity defense and whether the United States should be substituted as a party for President Trump. See *Carroll v. Trump*, 88 F.4th 418, 432 (2d Cir. 2023); *Carroll v. Trump*, 66 F.4th 91, 94 (2d Cir. 2023); *Trump v. Carroll*, 292 A.3d 220, 224 (D.C. 2023); *Carroll v. Trump*, 49 F.4th 759, 761 (2d Cir. 2022).

As a result of the significant evidentiary errors raised in this petition, Carroll obtained a \$5 million award in *Carroll II*. App.10A-11A. Based on the incorrect findings in *Carroll II*, the district court then wrongly applied issue preclusion in *Carroll I*, improperly preventing President Trump from contesting the merits in that action. Carroll then obtained an improper and unjust judgment of \$83.3 million in *Carroll I*.

On November 5, 2025, the Second Circuit called for Carroll to respond to two petitions for rehearing en banc in *Carroll I*, raising substantial questions of presidential immunity and under the Westfall Act. See Ct. App. Doc. 140, *Carroll v. Trump*, No. 24-644 (2d Cir. Nov. 5, 2025). In a different appeal the following day, the Second Circuit vacated a district court order denying President Trump's motion for leave to file a second notice of removal in the District Attorney for New York County's prosecution over business records because, *inter alia*, "the District Court does not appear to have adequately considered whether *Trump v. United States* represented a change in controlling law that could support a finding of good cause." *New York v. Trump*, No. 24-2299, 2025 WL 3096170, at *6 (2d Cir. Nov. 6, 2025).

4. The Second Circuit Erroneously Approves Carroll's Reliance on Inadmissible Propensity Evidence.

On appeal in *Carroll II*, President Trump challenged the admission of Carroll's impermissible propensity evidence. The Second Circuit panel, however, cursorily rejected President Trump's arguments. The panel erroneously upheld admission of Leeds' testimony under Rule 415 by determining that "it was a federal crime to commit a simple assault on an airplane." App.25A. The panel also erred in upholding admission of Stoyhoff's testimony after concluding that "the sufficiency standard for admitting evidence under Rule 415 is lower than what would be required to sustain a conviction." App.37A. In addition, the panel erroneously upheld admission of the *Access Hollywood* tape by finding that it was admissible *modus operandi* and corroboration evidence. App.41A-45A. Finally, the panel improperly relied on legislative intent, as reflected in the statement of one representative, to conclude that Rule 403 did not bar admission of admission of testimony by Leeds and Stoyhoff or the *Access Hollywood* tape. App.46A.

President Trump sought rehearing en banc. The Second Circuit denied rehearing, with Judge Menashi, joined by Judge Park, dissenting. See App.201A. As Judge Menashi explained in his dissent, "[t]he panel embraced a series of anomalous holdings to affirm the judgment of the district court." App.201A. The panel opinion upheld the testimony of Leeds and Stoyhoff by "relying on statements in the congressional record to alter the effect of the rules—[which] represents a departure from how the rules are normally applied." App.217A. "[T]here is every reason to believe that testimony in this case would

have failed the standard Rule 403 analysis if either the district court or the appellate panel had been willing to apply it.” App.221A. In affirming the district court’s admission of testimony by Leeds and Stoyloff under Rule 415, “the panel opinion allowed conduct which does not meet [the] standard to qualify as an attempted sexual assault.” App.226A. And by affirming admission of the *Access Hollywood* tape, the panel opinion “erroneously sanctioned the admission of evidence of prior conduct not to prove identity or knowledge—or to corroborate any fact in dispute aside from the ultimate question of guilt or innocence—but to show that the defendant had a propensity for engaging in culpable conduct.” App.209A.

In dissent, Judge Menashi further explained, “These holdings conflict with controlling precedents and produced a judgment that cannot be justified under the rules of evidence that apply as a matter of course in all other cases.” App.202A. “The result was a jury verdict based on impermissible character evidence and few reliable facts.” App.240A. “No one can have any confidence that the jury would have returned the same verdict if the normal rules of evidence had been applied.” *Id.*

REASONS FOR GRANTING THE PETITION

Carroll’s trial rested fundamentally on improper propensity evidence that courts ordinarily disavow. To greenlight the admission of such troubling evidence, the Second Circuit created and deepened significant circuit splits in a decision that conflicts with both the text of the Federal Rules of Evidence and this Court’s decisions. This Court should grant the petition to ensure uniformity among the Circuits and proper application of evidentiary rules that, if misapplied, will result in the erroneous introduction of outcome-determinative and highly prejudicial

propensity evidence in both criminal and civil cases, as occurred here.

I. The Second Circuit Deepened an Existing Circuit Conflict by Erroneously Holding That Federal Rules of Evidence 413 and 415 Override Rule 403’s Standard Balancing Analysis for Remoteness in Admitting Propensity Evidence.

As this Court has explained, the American legal tradition has long rejected reliance on “propensity evidence,” which is evidence “generalizing a defendant’s earlier bad act into bad character and taking that as raising the odds that he did the later bad act now charged.” *Old Chief v. United States*, 519 U.S. 172, 180 (1997). Reliance on propensity evidence undermines the principle that “a trial should be about whether defendant committed the crime charged, not what sort of person the defendant is.” WRIGHT & MILLER, 23 FED. PRACTICE & PROC. § 5382 (2d ed. 2025). Federal Rule of Evidence 404(b) implements the general bar against propensity evidence. *See* FED. R. EVID. 404(b)(1). Congress altered this general prohibition in 1994 by enacting Federal Rules of Evidence 413-415 to permit relevant evidence of sexual assault crimes that involve specifically enumerated conduct.

By their terms, Rules 413-415 do not make this propensity evidence automatically admissible. “Even though Congress has made the propensity inference permissible, it has not said that evidence falling within Rule 413 is *per se* non-prejudicial. To the contrary, a jury might use such evidence, for example, to convict a defendant because it is appalled by a prior crime the defendant committed rather than persuaded that he committed the crime charged. Or a jury, uncertain of guilt, may convict a defendant

because they think the defendant is a bad person generally deserving of punishment.” *United States v. Rogers*, 587 F.3d 816, 822-23 (7th Cir. 2009) (internal citation omitted).

The circuit courts have taken divergent approaches in determining how to apply Rule 403 to propensity evidence. *See Martinez v. Cui*, 608 F.3d 54, 60 (1st Cir. 2010) (describing varying approaches taken by different Circuits); Eileen A. Scallen, *Analyzing “The Politics of [Evidence] Rulemaking”*, 53 HASTINGS L.J. 843, 881 (2002) (recognizing “a palpable difference” in approaches taken by different circuits on the interplay between Rule 403 and Rules 413-415). This deepening circuit conflict creates significant unfairness and undermines the integrity of the justice system. Some Circuits—including the Second Circuit below—have endorsed a truncated Rule 403 analysis in evaluating the admission of propensity evidence otherwise admissible under Rules 413-415, by rejecting the text of those Rules in favor of the most dubious forms of legislative history.

A. The Circuits are divided on how to apply Rule 403 to propensity evidence otherwise admissible under Rules 413-415.

In applying Rule 403 to propensity evidence admissible under Rules 413-415, the Circuits have taken divergent approaches. The First, Seventh, and Tenth Circuits have correctly held that district courts should apply the same Rule 403 analysis that they would apply to any other evidence. *See, e.g., United States v. Guardia*, 135 F.3d 1326, 1331 (10th Cir. 1998) (“When balancing Rule 413 evidence under 403, then, the district court should not alter its *normal process* of weighing the probative value of the evidence against the danger of unfair prejudice.”) (emphasis added); *Martinez*, 608 F.3d at 60 (finding “*no reason*

to adopt special rules constraining district courts' usual exercise of discretion under Rule 403 when considering evidence under Rule 415") (emphasis added); *United States v. Loughry*, 660 F.3d 965, 969 (7th Cir. 2011) (rejecting the notion "that Rule 403 applies in a 'relaxed form' to admissibility determinations under Rule 414"). The D.C. and Fifth Circuits have not acknowledged the circuit conflict on this issue, but they have applied the standard Rule 403 analysis to Rule 413-415 evidence. See, e.g., *United States v. Lieu*, 963 F.3d 122, 128 (D.C. Cir. 2020); *United States v. Lewis*, 796 F.3d 543, 548 (5th Cir. 2015).

By contrast, as the First Circuit has recognized, the Second, Third, Fourth, Sixth, and Eighth Circuits "seemingly have instructed district courts to apply Rule 403 less stringently, at least in some cases." *Martinez*, 608 F.3d at 60 (citing *Johnson v. Elk Lake Sch. Dist.*, 283 F.3d 138, 156 (3d Cir. 2002); *United States v. Seymour*, 468 F.3d 378, 385 (6th Cir. 2006); *United States v. Gabe*, 237 F.3d 954, 959-60 (8th Cir. 2001); *United States v. Larson*, 112 F.3d 600, 604 (2d Cir. 1997)); see also *United States v. Withorn*, 204 F.3d 790, 794 (8th Cir. 2000); *United States v. Stamper*, 106 F. App'x 833, 835 (4th Cir. 2004). The Eleventh Circuit has recognized, but not resolved, the "argument that the Rule 413 evidence should be evaluated under a different type of Rule 403 balance that weighs in favor of admission." *United States v. Brimm*, 608 F. App'x 795, 799 n.6 (11th Cir. 2015). And the Ninth Circuit has created a new set of mandatory Rule 403 considerations applicable only to Rule 413-415 evidence. See *United States v. LeMay*, 260 F.3d 1018, 1027-28 (9th Cir. 2001); see also *United States v. Kelly*, 510 F.3d 433, 437 n.3 (4th Cir. 2007) ("There is a circuit split on whether a district court

must address these or other specific factors and make findings.”).

This wide circuit conflict has resulted in significant differences across the country in how propensity evidence is handled, including in this implausible case against President Trump. In evaluating “prior bad acts evidence,” the Rule 403 analysis would focus heavily on “the remoteness in time of the other act.” *United States v. Varoudakis*, 233 F.3d 113, 119 (1st Cir. 2000) (cleaned up); *see also* App.215A-217A. This commonsense approach reflects that “[t]he remoteness in time lowers the probative value of the evidence.” Edward J. Imwinkelried, *The Meaning of Probative Value and Prejudice in Federal Rule of Evidence 403: Can Rule 403 Be Used to Resurrect the Common Law of Evidence?*, 41 VAND. L. REV. 879, 885 (1988). Remoteness in time “reduces the reliability of testimony as to the events’ occurrences” and—because people change over time—also reduces their predictive value as to how a person might act in a given situation. *United States v. Jacques*, 684 F.3d 324, 327 (2d Cir. 2012).

The propensity evidence against President Trump was based on allegations about incidents that supposedly occurred 44 years and 18 years, respectively, before Carroll’s claims were tried in 2023. Ct. App. App’x A.2101. In addition, these alleged incidents were separated by many years from Carroll’s facially inconceivable encounter, which supposedly happened in 1996 (a date that Carroll conveniently could not recall for many years). Ct. App. App’x A.2349-51. Thus, as Judge Menashi observed in dissent, had the Second Circuit applied the proper and standard Rule 403 analysis, “it either would have excluded the testimony or it would have issued a decision at the outer boundary of when

remote testimony has been put before a jury.” App.223A.

But the Second Circuit erred in concluding that the standard remoteness inquiry does not apply to Rule 413-415 propensity evidence. App.45A-47A; *see also* App.215A-217A. The Second Circuit began by finding that “evidence admitted under Rule 415 is presumptively probative in a sexual assault case such as this.” App.45A. The court then found that the evidence was “sufficiently similar in material respects to be probative.” App.46A. Finally, the Second Circuit dismissed remoteness concerns by applying “Rules 413-415 in a manner that effectuates Congress’ intent.” *Id.* The Eighth Circuit has similarly dismissed the remoteness inquiry as “irrelevant” in the context of Rule 413-415 propensity evidence. *See United States v. Reynolds*, 720 F.3d 665, 671 (8th Cir. 2013).

In stark contrast, other circuits have expressly identified remoteness in time as a key component of the Rule 403 analysis before admitting Rule 413-415 propensity evidence. *See, e.g., Guardia*, 135 F.3d at 1331 (directing consideration of “the closeness in time of the prior acts to the charged acts”); *United States v. Julian*, 427 F.3d 471, 487 (7th Cir. 2005) (explaining that “the date of the prior offense remains a factor for a court to consider”); *see also LeMay*, 260 F.3d at 1028 (requiring consideration of “the closeness in time of the prior acts to the acts charged”). This Court should grant certiorari to resolve this important conflict among the circuits on a recurring and important question of federal law.

B. The Second Circuit abandoned the plain text of the Rules of Evidence in favor of legislative history in not applying Rule 403's remoteness inquiry to propensity evidence.

In rejecting the standard Rule 403 remoteness inquiry in evaluating propensity evidence otherwise admissible under Rules 413-415, the Second Circuit relied entirely on a single sentence from a floor statement by Representative Susan Molinari, one of the proponents of the legislation enacting Rules 413-415. *See* App.46A; *see also Reynolds*, 720 F.3d at 671. The Second Circuit erred in ignoring the text of Rules 413-415.

This Court “interpret[s] the legislatively enacted Federal Rules of Evidence as [it] would any statute.” *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 587 (1993). All statutory interpretation “begins with the text.” *Ross v. Blake*, 578 U.S. 632, 638 (2016). The Second Circuit’s failure to apply the text of Rules 413-415 directly conflicts with how other Circuits have applied Rule 403 in evaluating propensity evidence otherwise admissible under Rules 413-415. As the First Circuit emphasized, “[n]othing in the text of Rules 413-415 suggests these rules somehow change Rule 403.” *Martinez*, 608 F.3d at 61. Similarly, the Tenth Circuit has recognized that Rule 413 “contains no language that supports an especially lenient application of Rule 403.” *Guardia*, 135 F.3d at 1331. “If Congress truly intended a special balancing rule for evidence offered under Rules 413-415, it could have said so. . . . But Congress did nothing in Rules 413-415 to alter the normal application and interpretation of Rule 403.” Scallen, *Analyzing “The Politics of [Evidence] Rulemaking”*, 53 HASTINGS L.J. at 881.

The absence of any language eliminating standard Rule 403 remoteness balancing in applying Rules 413-415 cannot be squared with the express modification of Rule 403 in other Rules of Evidence. *See* FED. R. EVID. 412(b)(2), 609(b)(1), 703. These provisions confirm “that Congress knows how to” modify the Rule 403 analysis when it intends to do so. *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 252 (2010). But Congress did not include any language eliminating Rule 403 balancing in Rules 413-415. As the Tenth Circuit held, “the adoption of [Rules 413-415] without any exclusion of or amendment to Rule 403 makes Rule 403 applicable, as it is to others of the rules of evidence.” *United States v. Enjady*, 134 F.3d 1427, 1431 (10th Cir. 1998). Thus, the same Rule 403 analysis applies to evidence admitted under Rules 413-415 as would apply to any other “relevant evidence,” FED. R. EVID. 403, including the remoteness inquiry that would apply to any other prior bad acts evidence, *see Varoudakis*, 233 F.3d at 119.

Instead of grounding its analysis in the text of Rules 413-415, the Second Circuit erred in invoking a stray sentence from the floor statement of a single Member of Congress. App.46A (“One of the original sponsors of the legislation proposing Rules 413-415 explained that ‘evidence of other sex offenses by the defendant is often probative and properly admitted, *notwithstanding very substantial lapses of time in relation to the charged offense or offenses.*’” (citing 140 Cong. Rec. 23603 (1994) (remarks of Rep. Molinari) (emphasis added)). As this Court has held, “Congress’s authoritative statement is the statutory text, not the legislative history.” *Chamber of Commerce v. Whiting*, 563 U.S. 582, 599 (2011) (quotation omitted). Even worse, the Second Circuit relied on a floor statement from a single

representative, which “rank[s] among the least illuminating forms of legislative history.” *NLRB v. SW General, Inc.*, 580 U.S. 288, 307 (2017). Not only that, Representative Molinari’s floor statement conflicts with a floor statement by Senator Bob Dole, another proponent of the legislation that enacted Rules 413-415. In particular, Senator Dole emphasized that—under the legislation adding Rules 413-415—“any prior act over ten years old would not be generally admissible under the Rules.” Tamara Rice Lave & Aviva Orenstein, *Empirical Fallacies of Evidence Law: A Critical Look at the Admission of Prior Sex Crimes*, 81 U. CINCINNATI L. REV. 795, 834 (2013) (citing 139 Cong. Rec. S15073 (Nov. 4, 1993) (remarks of Sen. Dole) (“If it had not happened for 10 years, it probably would not have any value.”)).

The “murky waters of the Congressional Record” on the enactment of Rules 413-415 provide an especially poor tool for interpreting the Rules of Evidence. See *Nat’l Ass’n of Mfrs. v. Dep’t of Defense*, 583 U.S. 109, 132 n.9 (2018). Notably, the legislative history surrounding Rules 413-415 is “truly troubling both in its content and origin” because it includes “a surreal sameness” in statements that “mimick[] the actual language and arguments” of a law review article. Aviva Orenstein, *Deviance, Due Process, and the False Promise of Federal Rule of Evidence 403*, 90 CORNELL L. REV. 1487, 1558 (2005); see also *id.* (identifying another floor statement by Representative Molinari that attempted to designate a law professor’s speech to a law school association as “an authoritative part of the legislative history” as “the height of chutzpah surrounding the engineering of this legislative history”). Simply put, the floor statement on which the Second Circuit relied has no

interpretive value at all, let alone provides a basis to overrule the text of the Rules of Evidence.

The doctrine of constitutional avoidance further undermines the Second Circuit’s erroneous interpretation of Rules 413-415. In rejecting the argument that Rules 413-415 violate the Due Process Clause, the Ninth and Tenth Circuits have explained that rigorous enforcement of Rule 403 should prevent Rules 413-415 from undermining the right to a fair trial. *See, e.g., LeMay*, 260 F.3d at 1026; *Enjady*, 134 F.3d at 1431; *see also* Aviva Orenstein, *Deviance, Due Process, and the False Promise of Federal Rule of Evidence 403*, 90 CORNELL L. REV. 1487, 1518 (2005) (“Rule 403 thus emerges as a crucial factor in the new rules’ application—a guarantor of their constitutionality.”). But weakening the Rule 403 analysis—as the Second Circuit has done—would in turn weaken the basis for upholding Rules 413-415 against due process challenges. *See, e.g., Enjady*, 134 F.3d at 1430 (“We agree that Rule 413 raises a serious constitutional due process issue.”). The doctrine of constitutional avoidance thus requires rejection of the Second Circuit’s flawed approach to interpretation of Rules 413-415. *See Jennings v. Rodriguez*, 583 U.S. 281, 296 (2018).

The Second Circuit’s reliance on legislative history violates the plain text of Rules 413-415. This Court should grant certiorari to resolve the deepening split among the Circuits and to clarify that standard Rule 403 analysis applies to an evaluation of whether evidence can be admitted under Rules 413-415.

II. The Second Circuit’s Erroneous Approach to Rule 413(d) Conflicts with This Court’s Precedent and Presents an Important Question of Federal Law That This Court Should Resolve.

In civil cases alleging a sexual assault, Federal Rule of Evidence 415 authorizes the admission of “evidence that the party committed any other sexual assault,” including for propensity purposes, as provided in Rule 413. FED. R. EVID. 415(a). To satisfy the definition of “sexual assault,” an act must meet two requirements located in Rule 413(d): (1) the act must constitute a crime under state or federal law; *and* (2) that crime must “involv[e]” at least one of the categories of conduct enumerated in Subsections (d)(1)-(5). *See* FED. R. EVID. 413(d). President Trump was never investigated, let alone charged, with any alleged crime relating to conduct claimed by Carroll, Leeds, or Stoyanoff.

The district court erroneously concluded that the acts that Leeds falsely alleged, which President Trump has consistently maintained did not occur, constituted a “sexual assault” because the conduct purportedly violated 49 U.S.C. § 46506, which applies certain criminal laws to acts on aircraft. App.113A. But § 46506 was not enacted *until 1994*—approximately 15 years *after* the alleged event occurred. *See* Pub. L. 103-272, 108 Stat. 1245 (July 5, 1994).

Rather than defending the district court’s manifestly erroneous holding, the Second Circuit instead created the alternative theory—never briefed by the parties in any court—that President Trump’s alleged conduct would have somehow violated 18 U.S.C. § 113(e), which at the relevant time prohibited “simple assault.” App.25A-26A. That simple assault

statute incorporated the common-law definition of assault, which required no sexual element. *United States v. Delis*, 558 F.3d 177, 180 (2d Cir. 2009). Unsurprisingly, then, simple assault encompassed a wide range of conduct that does not constitute sexual assault, such as forcibly removing a person from his car, *United States v. Lowery*, 306 F.2d 133, 134 (4th Cir. 1961), and waving a gun threateningly in a person’s face, *United States v. Knife*, 592 F.2d 472, 482 n.12 (8th Cir. 1979). These crimes are not within the ambit of Rule 415, and interpreting Rule 415 in a manner that would include them would destroy the rule.

In his petition for rehearing en banc, President Trump explained that the Second Circuit’s newly-minted theory also conflicted with Rule 413(d). President Trump stated that, in applying the definition of “sexual assault,” courts must employ a categorical approach that looks to the elements of the crime allegedly committed by the defendant, not the specific alleged conduct by which the defendant committed that crime. Because § 113(e) could be violated in numerous ways that do not involve the categories of sexual misconduct enumerated in Subparagraphs (d)(1)-(5), an alleged violation of § 113(e) could not constitute a “sexual assault” as required under Rule 413(d). However, the Second Circuit refused rehearing, with two members of the panel insisting that it is a defendant’s specific conduct—not the crime the defendant allegedly committed—that must satisfy the criteria of Subparagraphs (d)(1)-(5) of Rule 413(d). *See* App.245A-248A.

The Second Circuit’s erroneous approach conflicts with the text of Rule 413(d) and this Court’s precedent. That erroneous decision presents an

important question of federal law that warrants this Court's review.

A. The Second Circuit's erroneous approach conflicts with Rule 413(d) and this Court's precedent.

The Court “interpret[s] the legislatively enacted Federal Rules of Evidence as [it] would any statute.” *Daubert*, 509 U.S. at 587. All statutory interpretation begins with the text enacted by Congress. *Ross*, 578 U.S. at 638. Three aspects of the text of Rule 413(d) mandate a categorical approach to “sexual assault” rather than the Second Circuit’s approach reverse-engineered for this case.

First, the definition of “sexual assault” turns on whether “a crime” satisfies the criteria in Subparagraphs (d)(1)-(5). *See* FED. R. EVID. 413(d). The Court has previously determined that comparably phrased statutory provisions mandate a categorical approach, because those provisions direct a court’s attention to the offense committed rather than the defendant’s specific means of committing that offense. *See Leocal v. Ashcroft*, 543 U.S. 1, 7 (2004) (“[T]he statute directs our focus to the ‘offense’ of conviction. This language requires us to look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to petitioner’s crime.” (internal citations omitted)); *see also Sessions v. Dimaya*, 584 U.S. 148, 164-65 (2018) (“Simple references to a ‘conviction,’ ‘felony,’ or ‘offense,’ we have stated, are read naturally to denote the crime as *generally* committed.” (cleaned up)).

As this Court has explained, “[t]he categorical approach is required” when statutory provisions “don’t task courts with examining whether an individual’s *actions* meet a federal standard like

‘moral turpitude,’ but only whether the individual ‘has been convicted of an *offense*’ that does so.” *Pereida v. Wilkinson*, 592 U.S. 224, 233 (2021) (cleaned up). Here, the text of Rule 413(d) requires courts to assess whether “a crime under federal law or under state law” meets a federal standard: the criteria in Rule 413(d)(1)-(5). *See* FED. R. EVID. 413(d). The Rule’s text does not inquire into whether an individual’s actions meet those criteria. Thus, the plain text of Rule 413(d) mandates a categorical approach. *See Pereida*, 592 U.S. at 233; *Leocal*, 543 U.S. at 7.

Second, Rule 413(d) defines “sexual assault” to mean a crime “involving” certain categories of conduct. FED. R. EVID. 413(d). In this context, the statutory term “involving” confirms that Rule 413(d) requires a categorical approach. The ordinary meaning of “involve” is “to require as a necessary accompaniment: entail, imply.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1191 (1993); *cf. Shular v. United States*, 589 U.S. 154, 162 (2020) (“The parties agree that ‘involve’ means ‘necessarily require.’”). Thus, a crime “involves” the categories of sexual misconduct enumerated in Subparagraphs (d)(1)-(5) only if the crime necessarily entails those categories of misconduct. *See id.* By looking to the elements of the crime rather than the case-specific means of commission, the categorical approach ensures that the crime necessarily entails the criteria set out in Rule 413(d)(1)-(5). *See* WRIGHT & MILLER, 23 FED. PRACTICE & PROC. § 5384 (2d ed. 2025) (discussing Rule 413(d)) (“[W]e think ‘involving’ must mean as an element of the crime, not merely as a circumstance of its commission.”).

That conclusion mirrors this Court’s approach in *Kawashima v. Holder*, 565 U.S. 478 (2012). In *Kawashima*, the Court interpreted 8 U.S.C.

§ 1101(a)(43)(M)(i), which (in the immigration context) defines “aggravated felony” to include “an offense that . . . involves fraud or deceit.” “To determine whether [particular] offenses ‘involve fraud or deceit’ within the meaning of [the statutory definition], [the Court] employ[s] a categorical approach by looking to the statute defining the crime of conviction, rather than to the specific facts underlying the crime.” *Id.* at 483. Under this approach, the statutory definition includes only “offenses with elements that necessarily entail fraudulent or deceitful conduct.” *Id.* at 484. The relevant statutory language and structure of Rule 413(d) tracks that of the definition considered in *Kawashima*. Thus, when determining whether a crime “involv[es]” the categories of conduct in Subparagraphs (d)(1)-(5), courts must apply a categorical approach that “look[s] to the statute defining the crime,” not “the specific facts underlying the crime.” *Id.* at 483.

Third, the ordinary meaning of the phrase “sexual assault” supports a categorical approach. “When choosing among interpretations of a statutory definition, the ordinary meaning of the defined term is an important contextual clue.” *Delligatti v. United States*, 604 U.S. 423, 435 (2025) (quotation omitted). In *Delligatti*, for example, when interpreting the defined term “crime of violence,” the Court expressed a “prefer[ence for] interpretations of the [statutory definition] that encompass prototypical ‘crimes of violence’ over those that do not.” *Id.*

Similar analysis is important here to correctly interpret “sexual assault.” Thus, courts must follow an interpretation that encompasses prototypical sexual assaults. *See id.* A categorical inquiry accomplishes this objective: if the definition includes

only those crimes whose elements require the categories of conduct in Subparagraphs (d)(1)-(5), then the defined term “sexual assault” will largely align with the ordinary meaning of that term. By contrast, the Second Circuit’s newly-minted approach would almost entirely unmoor the definition of “sexual assault” from the term’s well-established ordinary meaning. As Judge Menashi explained in dissent, under the Second Circuit’s approach, “crimes that neither prototypically nor actually involved criminal sexual assault still qualify as admissible evidence of sexual assault.” App.229A. This “would not be a realistic assessment of congressional intent.” *Bond v. United States*, 572 U.S. 844, 862 (2014) (cleaned up) (relying on ordinary meaning to interpret statutory definition).

Rule 413(d)’s text requires courts to apply a categorical approach when applying the definition of “sexual assault.” But the Second Circuit “held that the federal or state law ‘crime’ of ‘sexual assault’ need not ‘involv[e]’ sexual assault at all.” App.225A. By defining “sexual assault” in this “bizarre way,” as the dissent explained, App.226A, the panel affirmed admission of testimony by Leeds and Stoyloff that “were neither crimes nor sexual assaults,” App.202A. The Second Circuit’s erroneous approach, made up to justify an affirmance in this high-profile case against President Trump, directly conflicts with Rule 413(d)’s text.

B. The Second Circuit’s erroneous approach to interpreting Rule 413(d) presents a significant question of federal law that this Court should resolve.

This Court should review the Second Circuit’s erroneous interpretation of Rule 413(d). *See* Sup. Ct. R. 10(c). The decision below involves an important

question of federal law: it implicates a threshold question for highly charged propensity evidence that, at least in principle, will apply every time evidence is sought to be admitted under Rule 413, and to most evidence sought to be admitted under Rule 415. See Orenstein, *Deviance, Due Process, and the False Promise of Federal Rule of Evidence 403*, 90 CORNELL L. REV. at 1506-08. It is essential, then, that the courts faithfully enforce the limitations that Congress built into the text of Rule 413(d).

Moreover, the Second Circuit's erroneous approach conflicts with decisions of this Court. This Court has repeatedly concluded that statutes arising in various contexts demand a categorical inquiry, not a fact-specific inquiry. As explained above, the Second Circuit's decision directly conflicts with the Court's precedents. The Court should grant certiorari to resolve the important federal questions presented by this case.

III. The Second Circuit's Holding that Rule 404(b) Permitted Admission of the Access Hollywood Tape Implicates Two Independent Circuit Splits.

Federal Rule of Evidence 404(b) implements the American legal system's deeply entrenched aversion to propensity evidence. See *Old Chief*, 519 U.S. at 180-81. The Rule provides that "[e]vidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." FED. R. EVID. 404(b)(1). At the same time, Rule 404(b) does permit a party to introduce prior bad acts evidence for a non-propensity purpose, "such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." FED. R. EVID. 404(b)(2).

Here, the Second Circuit erroneously held that the *Access Hollywood* tape was properly admitted under Rule 404(b). App.41A-43A. The Second Circuit did not cite any of the non-propensity purposes identified in Rule 404(b). *Id.* Instead, the Second Circuit claimed that the tape was admissible to show a “*modus operandi*” and to “corroborate” testimony by Carroll and her witnesses. *Id.* By allowing the admission of *modus operandi* and corroboration evidence—without requiring such evidence to be tied to an otherwise permissible non-propensity purpose—the Second Circuit’s decision conflicts with the First, Sixth, Tenth, and D.C. Circuits on important questions of federal law.

A. The Second Circuit’s decision creates a circuit conflict over whether *modus operandi* evidence is admissible without an independent non-propensity purpose.

Proving a defendant’s “*modus operandi*” is not among the non-propensity purposes recognized in Rule 404(b)’s text. *See* FED. R. EVID. 404(b)(2). However, courts have recognized that a *modus operandi* can offer one way to accomplish the purposes identified in the text of Rule 404(b). Most often, *modus operandi* evidence is used to establish “identity,” one of the Rule’s enumerated purposes. *See* 29 Am. Jur. 2d Evidence § 447. This use of *modus operandi* evidence rests on the apparent inference “that since the defendant acted in a similar and unusual or distinctive manner previously, therefore it is more likely that the defendant (rather than someone else) did the act on the occasion of the charged crime.” *Id.* In other cases, *modus operandi* evidence can be used to prove “lack of accident,” another non-propensity purpose expressly recognized by Rule 404(b). FED. R. EVID. 404(b)(2). For example,

if a defendant charged with arson claims to have started a fire at his workplace by accident, evidence that he had “accidentally” started numerous other fires in the same way at prior places of employment would bear on whether the most recent fire was actually a mistake. This use of *modus operandi* evidence rests on the intuition: “how likely will a person make the same mistake twice or suffer the consequences of the same fortuity twice?” WRIGHT & MILLER, 22B FED. PRACTICE & PROC. § 5255 (2d ed. 2025). Thus, *modus operandi* evidence can serve permissible, non-propensity purposes.

The First, Sixth, and Tenth Circuits have ruled that Rule 404(b) permits the admission of *modus operandi* evidence only where the evidence is used to accomplish a valid, non-propensity purpose relevant to an issue actually in dispute. See *Chavez v. City of Albuquerque*, 402 F.3d 1039, 1046 (10th Cir. 2005) (excluding *modus operandi* evidence, explaining that “proof of a ‘modus operandi’ is only relevant when there is an issue regarding the defendant’s identity,” and noting that there was no claim of accident or mistake); *United States v. Fountain*, 2 F.3d 656, 668 (6th Cir. 1993) (holding that *modus operandi* testimony was inadmissible, because identity was not in dispute); *United States v. Williams*, 985 F.2d 634, 637 (1st Cir. 1993) (holding that *modus operandi* evidence was inadmissible, because “identity is not disputed in this case”).

This case did not involve any questions of identity, intent, absence of mistake, or lack of accident. President Trump has continuously and steadfastly denied that the incident alleged by Carroll ever occurred. Thus, purported *modus operandi* evidence did not serve any permissible non-propensity purpose in this case. The only reason that Carroll sought to

admit the *Access Hollywood* tape was to argue that, if President Trump had allegedly engaged in bad acts on other occasions, it is more likely that he engaged in the bad acts alleged by Carroll. *See, e.g.*, Ct. App. App'x A.2586 (“[O]n the *Access Hollywood* tape, he told you what he automatically does when he sees women he finds attractive.”). The purpose was solely, and improperly, prejudicial. This is quintessential propensity evidence, which the plain text of Rule 404(b) prohibits. FED. R. EVID. 404(b)(1). By improperly allowing the admission of *modus operandi* evidence without requiring that evidence be tied to a permissible non-propensity purpose, the Second Circuit’s decision conflicts with decisions of the First, Sixth, and Tenth Circuits. *See Williams*, 985 F.2d at 637; *Fountain*, 2 F.3d at 668; *Chavez*, 402 F.3d at 1046. The Court should grant certiorari and correct the Second Circuit’s error, which created a circuit conflict.

B. The Second Circuit’s recognition of “corroboration” as an independent basis to admit prior acts evidence under Rule 404(b) deepens a conflict among the circuits on an important question of federal law.

The Second Circuit also cited a second purported basis for admitting the *Access Hollywood* tape under Rule 404(b): “corroboration.” Specifically, the Second Circuit ruled that “the tape was ‘directly corroborative’ of the testimony of Ms. Carroll, Ms. Leeds, and Ms. Stoyneff as to the pattern of behavior each allegedly experienced.” App.44A. This fallback justification deepens yet another circuit conflict warranting this Court’s review.

The Second, Ninth, and Tenth Circuits have all recognized “corroboration” as a permissible purpose

for admitting prior-acts evidence under Rule 404(b). See App.44A; *United States v. Pitts*, 6 F.3d 1366, 1370-71 (9th Cir. 1993); *United States v. Porter*, 881 F.2d 878, 886 n.8 (10th Cir. 1989). By contrast, the D.C. Circuit has held that “[c]orroboation . . . does not provide a separate basis for admitting evidence [under Rule 404(b)].” *United States v. Linares*, 367 F.3d 941, 949 (D.C. Cir. 2004). Instead, to be admitted under Rule 404(b), the D.C. Circuit requires that the allegedly corroborative “prior-acts evidence must corroborate other evidence by proving a proper element, such as intent or identity.” *Id.* Thus, the Second Circuit’s decision here deepens the conflict among the Circuits on an important question of federal law.

The Second, Ninth, and Tenth Circuits’ approach is manifestly erroneous. Notably, those courts provide no meaningful analysis to show how their “corroboation” theory serves a genuine non-propensity purpose. That is because “making a distinction between ‘propensity’ evidence and evidence that simply corroborates the victim’s testimony is not meaningful.” *Munoz v. State*, 307 P.3d 829, 833 n.3 (Wyo. 2013). This corroboroation theory amounts to

a game of semantics. There is no difference, in effect, between admitting evidence to show a pattern of criminality and admitting evidence to corroborate the victim’s testimony. The evidence was relevant to corroborate the victim’s testimony because it established a pattern of criminality.

John McCorvey, Note, *Corroboation or Propensity? An Empty Distinction in the Admissibility of Similar*

Fact Evidence, 18 STETSON L. REV. 171, 188 (1988). “If similar past acts were corroborative *only* because they showed the defendant’s character and the likelihood of ‘action in conformity therewith,’ plainly the rule would call for exclusion.” *United States v. Bailey*, 319 F.3d 514, 520 (D.C. Cir. 2003).

The Second Circuit’s decision here directly conflicts with the D.C. Circuit’s holding. The Second Circuit did not link the alleged corroboration to an otherwise proper purpose, but instead wrongly held that corroboration *itself* was a proper purpose. App.44A. This Court should grant certiorari to resolve the conflict among the Circuits over whether corroboration constitutes a permissible standalone purpose to admit prior-acts evidence under Rule 404(b) and determine that it does not constitute such a permissible purpose.

CONCLUSION

President Trump respectfully requests that the Court grant his petition for writ of certiorari.

November 10, 2025	Respectfully submitted,
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APPENDIX

TABLE OF CONTENTS

Appendix A – Per Curiam Opinion of the United States Court of Appeals for the Second Circuit Affirming the District Court Judgment, Ct. App. Doc. 176 (December 30, 2024).....	1A
Appendix B – Memorandum and Order of the United States District Court for the Southern District of New York Denying President Trump’s Motion <i>In Limine</i> , D. Ct. Doc. 92 (March 20, 2023).....	64A
Appendix C – Memorandum and Order of the United States District Court for the Southern District of New York Granting in Part and Denying in Part Carroll’s Motion <i>In Limine</i> , D. Ct. Doc. 95 (March 27, 2023)	77A
Appendix D – Memorandum Opinion of the United States District Court for the Southern District of New York Denying President Trump’s Motion <i>In Limine</i> in <i>Carroll v. Trump</i> , No. 1:20-cv-7311 (<i>Carroll I</i>), D. Ct. Doc. 145 (March 10, 2023)	102A
Appendix E – Memorandum Opinion of the United States District Court for the Southern District of New York Denying President Trump’s Rule 59 Motion, D. Ct. Doc. 212 (July 19, 2023)	128A
Appendix F – Order of the United States Court of Appeals for the Second Circuit Denying President Trump’s Petition for Rehearing En Banc, Ct. App. Doc. 199 (June 13, 2025).....	196A
Appendix G – Opinion of Judges Pérez, Lee, Robinson, and Merriam of the United States Court of Appeals for the Second Circuit Concurring in the Denial of Rehearing En Banc, Ct. App. Doc. 200 (June 13, 2025)	199A

Appendix H – Opinion of Judges Menashi and Park of the United States Court of Appeals for the Second Circuit Dissenting from the Denial of Rehearing En Banc, Ct. App. Doc. 201 (June 13, 2025) ..	201A
Appendix I – Statement Opinion of Senior Judges Chin and Carney of the United States Court of Appeals for the Second Circuit in Support of the Denial of Rehearing En Banc, Ct. App. Doc. 202 (June 13, 2025).....	241A
Appendix J – Judgment of the United States Court of Appeals for the Second Circuit Affirming the Judgment in Favor of Plaintiff, Ct. App. Doc. 180 (December 30, 2024)	255A
Appendix K – Judgment of the United States District Court for the Southern District of New York in Favor of Plaintiff, D. Ct. Doc. 178 (May 11, 2023)	256A
Appendix L – Statutory and Rule Provisions	
18 U.S.C. § 113(e) (1976)	257A
Federal Rule of Evidence 403.....	257A
Federal Rule of Evidence 404.....	257A
Federal Rule of Evidence 413.....	259A
Federal Rule of Evidence 415.....	260A
Appendix M – Verdict Form Submitted by the Jury, D. Ct. Doc. 174 (May 9, 2023).....	261A

1A

APPENDIX A

23-793-cv

E. Jean Carroll v. Donald J. Trump

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

August Term 2024
(Argued: September 6, 2024
Decided: December 30, 2024)
Docket No. 23-793-cv

E. JEAN CARROLL,

Plaintiff-Appellee,

v.

DONALD J. TRUMP,

Defendant-Appellant,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Before: CHIN, CARNEY, and PÉREZ, *Circuit Judges*

In this case, after a nine-day trial, a jury found that plaintiff-appellee E. Jean Carroll was sexually abused by defendant-appellant Donald J. Trump at the Bergdorf Goodman department store in Manhattan in 1996. The jury also found that Mr. Trump defamed her in statements he made in 2022. The jury awarded Ms. Carroll a total of \$5 million in compensatory and punitive damages.

Mr. Trump now appeals, contending that the district court (Lewis A. Kaplan, *Judge*) erred in several of its evidentiary rulings. These include its decisions to admit the testimony of two women who alleged that Mr. Trump sexually assaulted them in the past and to admit a recording of part of a 2005 conversation in which Mr. Trump described to another man how he kissed and grabbed women without first obtaining their consent. Mr. Trump contends that these and other asserted errors entitle him to a new trial.

On review for abuse of discretion, we conclude that Mr. Trump has not demonstrated that the district court erred in any of the challenged rulings. Further, he has not carried his burden to show that any claimed error or combination of claimed errors affected his substantial rights as required to warrant a new trial.

AFFIRMED.

ROBERTA A. KAPLAN (Matthew J. Craig, *on the brief*), Kaplan Martin LLP, New York, NY, and Joshua Matz and Kate Harris, *on the brief*, Hecker Fink LLP, Washington, DC, *for Plaintiff-Appellee*.

D. JOHN SAUER, James Otis Law Group, LLC, St. Louis, MO, and Todd Blanche and Emil Bove, Blanche Law, New York, NY, *on the brief, for Defendant-Appellant*.

PER CURIAM:

In this case, after a nine-day trial, a jury found that plaintiff-appellee E. Jean Carroll was sexually abused by defendant-appellant Donald J. Trump at

the Bergdorf Goodman department store in Manhattan in 1996. The jury also found that Mr. Trump defamed her in statements he made in 2022. The jury awarded Ms. Carroll a total of \$5 million in compensatory and punitive damages.

Mr. Trump now appeals, contending that the district court (Lewis A. Kaplan, *Judge*) erred in several of its evidentiary rulings. These include its decisions to admit the testimony of two women who alleged that Mr. Trump sexually assaulted them in the past and to admit a recording of part of a 2005 conversation in which Mr. Trump described to another man how he kissed and grabbed women without first obtaining their consent. Mr. Trump contends that these and other asserted errors entitle him to a new trial.

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Accordingly, and for the reasons set forth more fully below, we AFFIRM the judgment of the district court.

BACKGROUND

On appeal from a jury verdict, the court of appeals is bound to “construe all evidence, draw all inferences, and make all credibility determinations in favor of the party [who] prevailed before the jury.” *Jia Sheng v. M&T Bank Corp.*, 848 F.3d 78, 81 (2d Cir. 2017) (quoting *DiBella v. Hopkins*, 403 F.3d 102, 110 (2d Cir. 2005)). Here, that party is Ms. Carroll. We

describe the narrative heard by the jury accordingly. Mr. Trump did not testify at trial but has denied the allegations that he engaged in any sexual misconduct with Ms. Carroll and that he defamed her.

I. The Evidence Presented at Trial

We summarize the evidence presented to the jury regarding the charged 1996 assault and 2022 defamation of Ms. Carroll.

A. The Bergdorf Goodman Assault

In 1996, Ms. Carroll encountered Mr. Trump at the Bergdorf Goodman department store in Manhattan. At the time, Ms. Carroll was an advice columnist for Elle Magazine and hosted a daily advice talk show called "Ask E. Jean." App'x at 1570-73. Mr. Trump recognized Ms. Carroll and asked her to stay and help him pick a gift for a girl. Describing this as a "funny New York scene" and a "wonderful prospect" for a "born advice columnist" to give advice to Mr. Trump on buying a gift, Ms. Carroll said yes. *Id.* at 1590.

After Ms. Carroll suggested that Mr. Trump purchase a handbag or a hat, Mr. Trump proposed that they go to the lingerie department instead. Ms. Carroll and Mr. Trump went to the lingerie department on the sixth floor. Mr. Trump selected a piece of lingerie and insisted that Ms. Carroll try it on. Ms. Carroll jokingly responded, "You put it on. It's your color." *Id.* at 1595. After some playful banter, Mr. Trump took Ms. Carroll's arm and motioned for her to go to the dressing room with him. Because Mr. Trump was being "very light" and "pleasant" and "funny," *id.* at 1595, Ms. Carroll walked with Mr. Trump into the open dressing room, which she described as "sort of an open area," *id.* at 1596. But as soon as she entered, Mr. Trump "immediately shut the door" and "shoved

[her] against the wall . . . so hard [that] [her] head banged." *Id.*

Ms. Carroll pushed Mr. Trump back, but "he thrust [her] back against the wall again," causing her to "bang[] [her] head again." *Id.* at 1597. With his shoulder and the whole weight of his body against her, Mr. Trump held her against the wall, kissed her, pulled down her tights, and stuck his fingers into her vagina -- until Ms. Carroll managed to get a knee up and push him back off of her.¹ She immediately "exited the room" and left the store "as quickly as [she] could." *Id.* at 1601. The encounter lasted just a few minutes.

Within a day, Ms. Carroll told two friends, Lisa Birnbach and Carol Martin, about the sexual assault. She did not report the incident to the police, however, or share it publicly for over two decades. While conducting interviews for a book that she was writing in 2017, the accounts of assaults perpetrated by Harvey Weinstein came to light and received nationwide attention. As a consequence of the many women who came forward to report their experiences of sexual assault, Ms. Carroll finally decided to share more broadly what Mr. Trump had done to her in 1996.

B. The Defamation

In June 2019, *New York* magazine published an excerpt from Ms. Carroll's then-forthcoming book, in which Ms. Carroll wrote that Mr. Trump raped her at the Bergdorf Goodman store in 1996. Mr. Trump

¹ Ms. Carroll also testified that Mr. Trump inserted his penis into her vagina; the jury, however, found that she did not prove this part of her claim by a preponderance of the evidence.

denied the allegations and made a series of public statements in which he claimed that Ms. Carroll lied about the sexual assault. Mr. Trump made these statements in 2019 while he was still President of the United States.²

About three years later, on October 12, 2022, after he had left office and after Ms. Carroll announced her intentions to sue him for rape and sexual assault, Mr. Trump posted a statement on Truth Social, his social media outlet, under the heading "Statement by Donald J. Trump, 45th President of the United States of America." *Id.* at 2858. The statement read, in part:

This "Ms. Bergdorf Goodman case" is a complete con job, and our legal system in this Country, but especially in New York State (just

² Mr. Trump issued a public statement on June 21, 2019. It read in part:

I've never met this person in my life. She is trying to sell a new book – that should indicate her motivation. It should be sold in the fiction section. Shame on those who make up false stories of assault to try to get publicity for themselves, or sell a book, or carry out a political agenda -- like Julie Swetnick who falsely accused Justice Brett Kavanaugh. It's just as bad for people to believe it, particularly when there is zero evidence. Worse still for a dying publication to try to prop itself up by peddling fake news -- it's an epidemic. . . . It is a disgrace and people should pay dearly for such false accusations.

App'x at 2839. Then-President Trump publicly denied the allegations two more times -- once to a reporter at the White House, and again in an interview with *The Hill*. In his interview with *The Hill*, he stated: "I'll say it with great respect: Number one, she's not my type. Number two, it never happened. It never happened, OK?" App'x at 2854. The statements Mr. Trump made while still President are the subject of the second trial, which is discussed *infra*.

look at Peekaboo James), is a broken disgrace. You have to fight for years, and spend a fortune, in order to get your reputation back from liars, cheaters, and hacks. . . . I don't know this woman, have no idea who she is, other than it seems she got a picture of me many years ago, with her husband, shaking my hand on a reception line at a celebrity charity event. She completely made up a story that I met her at the doors of this crowded New York City Department Store and, within minutes, "swooned" her. It is a Hoax and a lie, just like all the other Hoaxes that have been played on me for the past seven years. And, while I am not supposed to say it, I will. This woman is not my type! She has no idea what day, what week, what month, what year, or what decade this so-called "event" supposedly took place. The reason she doesn't know is because it never happened, and she doesn't want to get caught up with details or facts that can be proven wrong. If you watch Anderson Cooper's interview with her, where she was promoting a really crummy book, you will see that it is a complete Scam. . . . In the meantime, and for the record, E. Jean Carroll is not telling the truth, is a woman who I had nothing to do with, didn't know, and would have no interest in knowing her if I ever had the chance.

Id. at 2858.

II. *The Proceedings Below*

A. *Carroll I*

In 2019, Ms. Carroll sued Mr. Trump in New York state court, seeking to recover damages for

defamation. The case was removed to the U.S. District Court for the Southern District of New York in September 2020. *Carroll v. Trump*, No. 20-cv-07311 (LAK) (S.D.N.Y. filed Sept. 8, 2020) ("*Carroll I*"). In *Carroll I*, Ms. Carroll asserted defamation claims against Mr. Trump based on the statements he made in June 2019, after Ms. Carroll published her account of the alleged rape, when he was still President of the United States. *Carroll I* did not include any damages claim for the alleged rape or sexual assault itself.

Carroll I was delayed due to proceedings concerning Mr. Trump's presidential immunity defense and whether the United States could be substituted as a party for Mr. Trump. *See Carroll v. Trump*, 49 F.4th 759, 761 (2d Cir. 2022) (holding that the President is an "employee of the government" for purposes of the Westfall Act, and certifying to the D.C. Court of Appeals the question of whether Mr. Trump's statements were made within the scope of his employment as President of the United States); *Carroll v. Trump*, 66 F.4th 91, 94 (2d Cir. 2023) (per curiam) (remanding to the district court for further proceedings based on guidance from the D.C. Court of Appeals); *Carroll v. Trump*, 88 F.4th 418, 432 (2d Cir. 2023) (finding no error in the district court's denial, on grounds of undue delay and prejudice, of Mr. Trump's request for leave to amend his answer to raise the defense of presidential immunity).

While *Carroll I* was pending, the State of New York passed the Adult Survivors Act (the "ASA"). N.Y. C.P.L.R. § 214-j (McKinney 2022). The ASA provided adult victims of sexual abuse with a new one-year window in which to sue their abusers, even if an otherwise applicable statute of limitations had previously expired. *Id.* In August 2022, Ms. Carroll

advised the district court that she intended to sue Mr. Trump for damages for the alleged rape once the ASA's filing window opened, on November 24, 2022. Letter from Roberta A. Kaplan to Hon. Lewis A. Kaplan, *Carroll I*, Dkt. No. 89 at 3 (filed Sept. 20, 2022).

B. *Carroll II*

On November 24, 2022, three years after she initiated *Carroll I*, and minutes after the ASA's authorization to file new claims became effective, Ms. Carroll filed a second action against Mr. Trump -- the case now before us on appeal. *Carroll v. Trump*, No. 22-cv-10016 (LAK) (S.D.N.Y. filed Nov. 24, 2022) ("*Carroll II*"). Unlike the first action, which was based solely on Mr. Trump's statements made while he was still in office, *Carroll II* sought damages for the alleged rape itself as well as for the purportedly defamatory statements made by Mr. Trump on October 12, 2022, after he left office.

In *Carroll II*, the district court ruled on a number of evidentiary issues in a series of written opinions issued before trial. Relevant to the instant appeal, the district court ruled that two witnesses, Jessica Leeds and Natasha Stoynoff, would be permitted to testify about other incidents of alleged sexual misconduct by Mr. Trump, and that the *Access Hollywood* tape -- a recording of a 2005 conversation involving Mr. Trump -- was admissible. *Carroll v. Trump*, 660 F. Supp. 3d 196, 202-08 (S.D.N.Y. 2023) (ruling on other acts evidence in *Carroll I*); *see also Carroll v. Trump*, No. 22-cv-10016 (LAK), 2023 WL 3000562, at *1 & n.4 (S.D.N.Y. Mar. 20, 2023) (incorporating *Carroll v. Trump*, 660 F. Supp. 3d 196 (S.D.N.Y. 2023)); *Carroll v. Trump*, No. 22-cv-10016 (LAK), 2023 WL 2652636, at *8 (S.D.N.Y. Mar. 27, 2023) (making additional

evidentiary rulings). The district court also precluded any reference to DNA evidence or Ms. Carroll's choice of counsel. *Carroll*, 2023 WL 2652636, at *5-8.

Trial in *Carroll II* commenced on April 25, 2023, and concluded on May 8, 2023. Ms. Carroll testified for nearly three days -- almost two full days of which consisted of cross-examination. Ms. Carroll called two "outcry witnesses" -- Lisa Birnbach and Carol Martin -- who each testified that Ms. Carroll told them about the attack by Mr. Trump shortly after it occurred. Ms. Carroll also called Ms. Leeds and Ms. Stoyhoff, who testified as set forth below, as well as two witnesses who were employed at Bergdorf Goodman at the time of the assault. The latter testified as to the layout of the store and presence or absence of surveillance cameras and personnel. The jury also watched the *Access Hollywood* tape twice. Ms. Carroll also called a clinical psychologist and a professor of marketing. Mr. Trump did not testify in person, and did not attend the trial. The jury did, however, watch portions of Mr. Trump's videotaped October 2022 deposition testimony.

On May 9, 2023, the nine-person jury unanimously found that Mr. Trump had "sexually abused" Ms. Carroll in 1996.³ Jury Verdict Form, *Carroll II*, Dkt. 174. *See also Carroll v. Trump*, 683 F. Supp. 3d 302, 307 (S.D.N.Y. 2023) ("[T]he jury implicitly found that Mr. Trump deliberately and forcibly penetrated Ms. Carroll's vagina with his fingers."). The jury found that Ms. Carroll was injured as a result of Mr. Trump's conduct and awarded her \$2 million in

³ *See supra* n.1. The jury also found that Ms. Carroll had not shown that Mr. Trump "raped" her. Jury Verdict Form, *Carroll II*, Dkt. 174.

compensatory damages and \$20,000 in punitive damages. The jury also found that Mr. Trump defamed Ms. Carroll and awarded her \$2.7 million in compensatory damages and \$280,000 in punitive damages. Accordingly, the jury awarded Ms. Carroll a total of \$5 million. Judgment was entered on May 11, 2023. Mr. Trump filed a notice of appeal the same day.

Mr. Trump thereafter moved for a new trial. In a fifty-nine-page memorandum opinion filed July 19, 2023, the district court denied the motion. *Carroll*, 683 F. Supp. 3d at 334. Mr. Trump filed an amended notice of appeal the same day.⁴

DISCUSSION

I. Applicable Law

On appeal, Mr. Trump focuses on evidentiary rulings that he argues were erroneous. We begin our review by summarizing the law with respect to (a) the admissibility under the Federal Rules of Evidence of evidence of other sexual assaults; (b) the proper application of Rule 404(b) of the Federal Rules of Evidence; and (c) the standard of review on appeal from a district court's evidentiary rulings.

A. Evidence of Other Sexual Assaults

Rule 415 of the Federal Rules of Evidence provides that "[i]n a civil case involving a claim for relief based on a party's alleged sexual assault . . . the court may admit evidence that the party committed any other

⁴ *Carroll I* was not tried until January 16, 2024, that is, after the trial of *Carroll II* was completed. *Carroll I* (January 16, 2024 Minute Entry). In *Carroll I*, the jury found Mr. Trump liable for earlier instances of defamation and awarded Ms. Carroll \$83 million in compensatory and punitive damages. Judgment, *Carroll I*, Dkt. 285 (Feb. 8, 2024).

sexual assault." Fed. R. Evid. 415(a). "The evidence may be considered as provided in Rules 413 and 414." *Id.*

In turn, Rule 413 defines "sexual assault" as a "crime under federal law or under state law" involving:

- (1) any conduct prohibited by 18 U.S.C. chapter 109A;
- (2) contact, without consent, between any part of the defendant's body -- or an object -- and another person's genitals or anus;
- (3) contact, without consent, between the defendant's genitals or anus and any part of another person's body;
- (4) deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person; or
- (5) an attempt or conspiracy to engage in conduct described in subparagraphs (1)-(4).

Fed. R. Evid. 413(d).

Rules 413 and 415, together with Rule 414, are congressionally-enacted exceptions to the "general ban against propensity evidence." *United States v. Schaffer*, 851 F.3d 166, 177 (2d Cir. 2017) (internal quotation marks omitted). Thus, "[u]nlike Federal Rule of Evidence 404(b), which allows prior bad act evidence to be used for purposes *other than* to show a defendant's propensity to commit a particular crime," *id.* at 177 (emphasis in original), Rules 413 and 415 permit a jury to consider evidence of a different sexual assault "precisely to show that a defendant has a *pattern or propensity for committing sexual assault*," *id.* at 178 (emphasis added). *See also id.* at 177-78

("Rule 413 permits the jury to consider the evidence 'on any matter to which it is relevant.'" (quoting Fed. R. Evid. 413(a))).

Congress "considered knowledge that the defendant has committed [sexual assault] on other occasions to be critical in assessing the relative plausibility of sexual assault claims and accurately deciding cases that would otherwise become unresolvable swearing matches." *Id.* at 178 (alterations adopted) (internal quotation marks omitted). "[T]he practical effect of Rule 413 [and Rules 414 and 415] is to create a presumption that evidence of prior sexual assaults is relevant and probative" in cases based on sexual assault. *Id.* at 180.⁵

Rule 403's protections apply to evidence being offered under Rule 415. *Id.* Accordingly, if the trial court finds that the other act evidence is admissible under Rules 413 and 415, it may still exclude the evidence if it finds that the probative value of the propensity evidence is "substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or

⁵ Some have questioned whether allowing propensity evidence in sexual assault cases "could diminish significantly the protections that have safeguarded persons accused in criminal cases and parties in civil cases against undue prejudice." *Schaffer*, 851 F.3d at 180 & n.79 (quoting *Report of Judicial Conference on Admission of Character Evidence in Certain Sexual Misconduct Cases*, 159 F.R.D. 51, 53 (1995)). "[But t]he wisdom of an evidentiary rule permitting the use of propensity evidence in prosecutions for sexual assault is not 'the concern of the courts.'" *Id.* at 181. Absent some constitutional infirmity, "[d]eliberating the merits and demerits of Rule 413 is a matter for Congress alone." *Id.* (footnote omitted) (holding that Rule 413 does not violate due process).

needlessly presenting cumulative evidence." Fed. R. Evid. 403.

Rules 413 and 415 are silent as to the standard that courts should apply in determining whether to admit evidence of past sexual assaults. Both parties accept the district court's legal conclusion that the standard articulated by the Supreme Court in *Huddleston v. United States*, 485 U.S. 681 (1988), to determine the admissibility of Rule 404(b) evidence is also the appropriate standard for admitting evidence under Rules 413-415. *Huddleston* teaches that "the trial court neither weighs credibility nor makes a finding that the [party seeking admission] has proved the conditional fact by a preponderance of the evidence." *Id.* at 690. Rather, the "court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact -- whether the defendant committed the prior act -- by a preponderance of the evidence." *Johnson v. Elk Lake Sch. Dist.*, 283 F.3d 138, 152 (3d Cir. 2002) (alteration adopted) (quoting *Huddleston*, 485 U.S. at 690).

We have not had occasion to decide this question. Most of our sister circuits, including the Third, Fourth, Sixth, Eighth, Ninth, and Tenth, have employed the *Huddleston* standard as the standard for admitting evidence under Rules 413, 414, or 415. See *Johnson*, 283 F.3d at 154-55; *United States v. Fitzgerald*, 80 F. App'x 857, 863 (4th Cir. 2003); *United States v. Hruby*, 19 F.4th 963, 966-67 (6th Cir. 2021); *United States v. Oldrock*, 867 F.3d 934, 938 (8th Cir. 2017); *United States v. Norris*, 428 F.3d 907, 913-14 (9th Cir. 2005); *United States v. Enjady*, 134 F.3d 1427, 1433 (10th Cir. 1998).

We agree with our sister circuits and join them in holding that the *Huddleston* standard for admitting evidence applies to Rule 415. We reach this conclusion based on relevant textual similarities between Rule 404(b) and Rules 413-415 and their respective legislative histories. Rule 404(b) and Rules 413-415 all permit the introduction of evidence of other bad acts, including uncharged conduct.⁶ Moreover, the text of Rules 413-415, like the text of Rule 404(b), "contains no intimation . . . that any preliminary showing is necessary before . . . evidence may be introduced for a proper purpose." *Huddleston*, 485 U.S. at 687-88 (holding that no preliminary finding is required under Rule 404(b)). The legislative history behind Rules 413-415, like that behind Rule 404(b), also weighs against requiring a preliminary preponderance finding by the court that the other sexual assault occurred. *See id.* at 688-89.⁷ Accordingly, in determining whether to

⁶ *See* 140 Cong. Rec. 23,603 (1994) (statement of Rep. Molinari) ("The practical effect of the new rules is to put evidence of *uncharged offenses* in sexual assault and child molestation cases on the same footing as other types of relevant evidence that are not subject to a special exclusionary rule.") (emphasis added).

⁷ As the Third Circuit explained in *Johnson*:

The principal sponsors of Rules 413-15, Representative Susan Molinari and Senator Robert Dole, declared . . . that an address delivered to the Evidence section of the Association of American Law Schools by David J. Karp -- . . . the drafter of Rules 413-15 -- was to serve as an "authoritative" part of the Rules' legislative history. 140 Cong. Rec. 23,602 (1994) (statement of Rep. Molinari); 140 Cong. Rec. 24,799 (1994) (statement of Sen. Dole). In the referenced speech, Mr. Karp stated clearly that "the standard of proof with respect to uncharged offenses under the new rules would be governed by the Supreme Court's decision in *Huddleston v. United States*." [David J. Karp,] *Evidence of*

admit other sexual act evidence, the trial court need not itself find by a preponderance of the evidence that the other assault occurred. Instead, the court must "ask whether a jury could reasonably make such a finding." *Johnson*, 283 F.3d at 152 (internal quotation marks omitted).

In sum, in addition to other requirements not relevant here, the district court may admit evidence of other sexual assaults under Rule 415 when: (1) the civil case before it involves a claim for relief based on a party's alleged sexual assault; (2) the court determines that a jury could reasonably find by a preponderance of the evidence that the party committed the other sexual assault (as defined by Rule 413); and (3) applying Rule 403, the court further determines that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.

B. Rule 404(b)

While Rules 413 and 415 permit propensity evidence in sexual assault cases, the usual rule is that propensity evidence is not allowed. Rule 404(b) of the Federal Rules of Evidence governs the admissibility of other act evidence -- that is, "any . . . crime, wrong, or act" other than those charged. Fed. R. Evid. 404(b)(1). Evidence of other acts is not admissible if offered "to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." *Id.* Such evidence may be admissible, however, if offered "for another purpose." *Id.* 404(b)(2). Acceptable purposes include, but are not

Propensity [and Probability in Sex Offense Cases and Other Cases], 70 Chi.-Kent L. Rev. [15, 19 (1994)].

Johnson, 283 F.3d at 153-54.

limited to, showing "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." *Id.*; *see also* 1 McCormick, Evidence § 190.1 (8th ed. 2020) (recognizing that evidence of other acts "may be used in numerous ways, and those enumerated [in Rule 404(b)] are neither mutually exclusive nor collectively exhaustive"). Other acceptable purposes include providing direct corroboration of other testimony, *see United States v. Everett*, 825 F.2d 658, 660-61 (2d Cir. 1987), and showing the existence of a pattern, or "*modus operandi*," which may be relevant "to prove that the actor possessed the required mental state (*mens rea*), or to prove the charged act occurred (*actus reus*)." David P. Leonard, *New Wigmore: A Treatise on Evidence: Evidence of Other Misconduct and Similar Events* § 13.3 (2d ed. 2020).

This Court has long taken an "inclusionary" approach to Rule 404(b), under which other act evidence is admissible unless it is introduced for the sole purpose of showing a defendant's bad character, subject to the relevance and prejudice considerations set out in Rules 402 and 403. *United States v. Pascarella*, 84 F.3d 61, 69 (2d Cir. 1996); *Ismail v. Cohen*, 899 F.2d 183, 188 (2d Cir. 1990); *see also United States v. Robinson*, 702 F.3d 22, 37 (2d Cir. 2012) (evidence of uncharged criminal conduct that "is inextricably intertwined with the evidence regarding the charged offense, or . . . necessary to complete the story of the crime on trial," is not typically excluded under Rule 404(b) (citation omitted)).

"To determine whether a district court properly admitted other act evidence, the reviewing court considers whether (1) it was offered for a proper purpose; (2) it was relevant to a material issue in

dispute; (3) its probative value is substantially outweighed by its prejudicial effect; and (4) the trial court gave an appropriate limiting instruction to the jury if so requested by the defendant." *United States v. LaFlam*, 369 F.3d 153, 156 (2d Cir. 2004).

C. Review of Evidentiary Rulings

We review a district court's evidentiary rulings for "abuse of discretion." *Schaffer*, 851 F.3d at 177. Abuse of discretion is a term of art that "merely signifies that a district court based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence, or rendered a decision that cannot be located within the range of permissible decisions." *Vill. of Freeport v. Barrella*, 814 F.3d 594, 611 (2d Cir. 2016) (internal quotation marks omitted). A district court's legal interpretation of the Federal Rules of Evidence is reviewed *de novo*. See *United States v. Samet*, 466 F.3d 251, 254 (2d Cir. 2006). We accord "great deference" to a district court, however, in ruling "as to the relevancy and unfair prejudice of proffered evidence, mindful that it sees the witnesses, the parties, the jurors, and the attorneys, and is thus in a superior position to evaluate the likely impact of the evidence." *United States v. Paulino*, 445 F.3d 211, 217 (2d Cir. 2006) (internal quotation marks omitted).

We "will disturb an evidentiary ruling only where the decision to admit or exclude evidence was manifestly erroneous." *United States v. Litvak*, 889 F.3d 56, 67 (2d Cir. 2018) (internal quotation marks omitted). "To find such abuse [of discretion], we must conclude that the trial judge's evidentiary rulings were arbitrary and irrational." *Paulino*, 445 F.3d at 217 (internal quotation marks omitted).

Moreover, even if an evidentiary ruling is manifestly erroneous, we will affirm and not require a retrial if we conclude that the error was harmless. *Cameron v. City of New York*, 598 F.3d 50, 61 (2d Cir. 2010); *see also United States v. Siddiqui*, 699 F.3d 690, 702 (2d Cir. 2012). "[A]n erroneous evidentiary ruling warrants a new trial only when 'a substantial right of a party is affected,' as when 'a jury's judgment would be swayed in a material fashion by the error.'" *Lore v. City of Syracuse*, 670 F.3d 127, 155 (2d Cir. 2012) (quoting *Arlio v. Lively*, 474 F.3d 46, 51 (2d Cir. 2007)). Thus, "[a]n error is harmless if we can conclude with fair assurance that the evidence did not substantially influence the jury." *Cameron*, 598 F.3d at 61 (internal quotation marks omitted). "In civil cases, the burden falls on the appellant to show that the error was not harmless and that 'it is likely that in some material respect the factfinder's judgment was swayed by the error.'" *Warren v. Pataki*, 823 F.3d 125, 138 (2d Cir. 2016) (quoting *Tesser v. Bd. of Educ. of City Sch. Dist.*, 370 F.3d 314, 319 (2d Cir. 2004)); *see also Tesser*, 370 F.3d at 319 ("An erroneous evidentiary ruling that does not affect a party's 'substantial right' is . . . harmless.").

Evidentiary objections not raised in the district court are reviewed for plain error only. *Cruz v. Jordan*, 357 F.3d 269, 271 (2d Cir. 2004). Under that standard, "there must be (1) error, (2) that is plain, and (3) that affects substantial rights." *United States v. Gomez*, 705 F.3d 68, 75 (2d Cir. 2013) (alteration adopted) (internal quotation marks omitted). "If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings."

Id. (alteration adopted) (internal quotation marks omitted); *accord Yukos Capital S.A.R.L. v. Feldman*, 977 F.3d 216, 237 (2d Cir. 2020).

II. Application

Mr. Trump's challenges to the district court's evidentiary rulings fall into two categories -- evidence that he contends was erroneously admitted on the one hand, and evidence that he asserts was erroneously precluded on the other. We address each category of evidence and then turn to the question of whether Mr. Trump has carried his burden to show error of such impact that a new trial is warranted.

A. Admitted Evidence

We first address Mr. Trump's argument that the defamation claim is not "based on" an alleged sexual assault and that therefore Rule 415 does not apply. We then consider the admissibility of the testimony of Jessica Leeds and Natasha Stoyanoff, and the admissibility of the *Access Hollywood* tape.

1. The Basis of the Claims

At the outset, on *de novo* review of this legal question, we reject Mr. Trump's assertion that the district court erred in admitting the other acts evidence because, he contends, Ms. Carroll's defamation claim was not "'based on' sexual assault." Appellant's Br. at 20-21. Mr. Trump's argument misconstrues Rule 415's text and ignores its plain meaning. Again, Rule 415(a) permits evidence of other sexual assaults to be introduced in "civil *case[s]* involving a *claim* for relief *based on* a party's alleged sexual assault." Fed. R. Evid. 415(a) (emphasis added). It is beyond dispute that Ms. Carroll's first claim – for recovery of damages arising from Mr. Trump's alleged rape of her in 1996 – is "based on" a

sexual assault. *Id.* Mr. Trump does not argue otherwise on appeal. Thus, *Carroll II* is a civil case that involves a claim for relief based on a party's alleged sexual assault.

Instead, Mr. Trump argues that the jury should not have been permitted to consider evidence admitted pursuant to Rule 415(a) when considering Ms. Carroll's second claim, for recovery of damages arising from the alleged defamation. But he does not identify any case law holding that Rule 415 evidence is admissible *only* to prove sexual assault claims. Indeed, the text of the rule contains no such limitation.

Because Mr. Trump acknowledges that Ms. Carroll's sexual assault claim was "based on" a sexual assault, we understand his argument really to be that the evidence was not admissible to prove the defamation claim. In other words, Mr. Trump is arguing that the district court should have given the jury a limiting instruction, advising that it could consider the other sexual assault evidence only with respect to the sexual assault claim and not with respect to the defamation claim.

But Mr. Trump failed to raise this contention below.⁸ Therefore, we review the absence of a limiting instruction for plain error only. We discern no plain error here. The other act evidence was relevant to Ms. Carroll's defamation claim -- she had to show that she *was* sexually assaulted by Mr. Trump to prove that his

⁸ In her brief on appeal, Ms. Carroll notes that Mr. Trump failed to raise this argument in his briefings below, despite having ample opportunity to do so. Mr. Trump does not challenge this assertion, or make any further mention of his "based on" argument, in his reply brief.

assertion that she was engaging in a "[h]oax," App'x at 2858, was false and therefore defamatory.⁹ Hence, the evidence was relevant under Rule 401 because it was offered to prove a sexual assault, and it had a tendency to prove that Mr. Trump did sexually assault Ms. Carroll. *See* Fed. R. Evid. 401 ("Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action."). Moreover, as discussed, Mr. Trump does not cite any authority for the proposition that Rule 415 evidence is admissible only to prove a sexual assault claim, even where, as here, the evidence might otherwise be relevant. *See United States v. Whab*, 355 F.3d 155, 158 (2d Cir. 2004) (observing that it is "exceedingly rare" to find plain error "in the absence of binding precedent").

For these reasons, we conclude that the district court did not err, much less plainly err, in permitting the jury to consider this evidence with respect to Ms. Carroll's defamation claim.

2. The Admissibility of the Evidence of Other Sexual Assaults

We next turn to whether the district court abused its discretion in admitting the other sexual assaults evidence -- the testimony of Jessica Leeds and Natasha Stoyloff and the *Access Hollywood* recording -- and we conclude that it did not.

⁹ "Under New York law a defamation plaintiff must establish five elements: (1) a written defamatory statement of and concerning the plaintiff, (2) publication to a third party, (3) fault, (4) falsity of the defamatory statement, and (5) special damages or per se actionability." *Palin v. New York Times Co.*, 940 F.3d 804, 809 (2d Cir. 2019).

a. *The Leeds Testimony*

Jessica Leeds testified that she was on an airplane flying to New York in 1978 or 1979 when a flight attendant came down the aisle to ask if she "would like to come up to first class." App'x at 2098-99. Welcoming the invitation, Ms. Leeds went up to first class where she sat down next to a man sitting at the window who introduced himself as Donald Trump. The two chatted. After their meal was served and cleared, however, Mr. Trump suddenly "decided to kiss [her] and grope [her]." *Id.* at 2101. Ms. Leeds testified at trial:

[I]t was like a tussle. He was -- his hands and -
- he was trying to kiss me, he was trying to pull me towards him. He was grabbing my breasts, he was -- it's like he had 40 zillion hands, and it was a tussling match between the two of us. And it was when he started putting his hand up my skirt that that kind of gave me a jolt of strength, and I managed to wiggle out of the seat and I went storming back to my seat in the coach.

Id. at 2101-02.

On cross-examination, Ms. Leeds further explained:

Q: OK. And then according to you he, at one point, put his hand on your knee?

A: He started putting his hand up my skirt.

Q: OK, on your leg and up your skirt?

A: Correct.

Id. at 2132. And on re-direct, she explained why she got so upset:

A: [M]en . . . would frequently pat you on the shoulder and grab you or something like that and you just -- it is not that serious and you don't -- you don't -- *but when somebody starts to put their hand up your skirt, you know they're serious and this is not good.*

Id. at 2147 (emphasis added).

Mr. Trump argues that Rule 415 does not apply to Ms. Leeds's testimony. He contends that: (1) even if the jury were to credit Ms. Leeds's testimony, she did not describe conduct that constituted a crime at the time the conduct occurred, as Mr. Trump asserts is required under Rule 413(d); (2) no jury could reasonably find that Mr. Trump attempted to bring his body into contact with Ms. Leeds's genitals, as required for admission under Rule 413(d)(2) and (d)(5); and (3) the conduct described by Ms. Leeds could not have been "prohibited" by 18 U.S.C. chapter 109A, as required for admission under Rule 413(d)(1), because (he argues) it did not occur within the requisite federal jurisdiction.

We conclude that the Leeds testimony was properly admitted. First, Mr. Trump's alleged conduct toward Ms. Leeds was a federal crime at the time it occurred. Second, the Leeds testimony was admissible on the ground that Ms. Leeds testified to an "attempt" under Rule 413(d)(5) to engage in the conduct described in Rule 413(d)(2). Fed. R. Evid. 413. And because we conclude that the Leeds testimony was admissible under Rule 413(d)(2) and (d)(5), we do not

reach Mr. Trump's Rule 413(d)(1) jurisdiction-based argument here.¹⁰

We begin with the requirement that the other act be a crime under federal or state law. Mr. Trump argues that the alleged act had to constitute a crime at the time it was committed to satisfy Rule 413(d). We need not decide the issue here because the alleged act clearly was a crime at the time. In 1978 and 1979, just as it is now, it was a federal crime to commit a simple assault on an airplane. And on this record a jury could have reasonably found that Mr. Trump committed a simple assault against Ms. Leeds.

In 1978 and 1979, the law provided, in relevant part:

Whoever, while aboard an aircraft within the special aircraft jurisdiction of the United States, commits an act which, if committed within the special maritime and territorial jurisdiction of the United States, as defined in section 7 of title 18, would be in violation of section 113 . . . of such title 18 shall be punished as provided therein.

49 U.S.C. § 1472(k)(1) (1976). Section 1472(k)(1) thus included as an offense within the "special aircraft jurisdiction of the United States" the conduct proscribed by 18 U.S.C. § 113(e) (1976) -- a simple assault. In 1978 and 1979, the "special aircraft jurisdiction" extended to any aircraft "within the United States" "while that aircraft is in flight." 49

¹⁰ We do reach the argument, however, in our discussion below of the Stoyanoff testimony.

U.S.C. § 1301(34) (1976); *see also* 49 U.S.C. § 1301(38) (Supp. III 1980).¹¹

Ms. Leeds testified that the departure and arrival destinations of the flight in this case were both within the United States,¹² and that Mr. Trump's alleged conduct toward her occurred after the plane had departed, that is, while the plane was "in flight." Moreover, a jury could reasonably find by a preponderance of the evidence that Mr. Trump committed a simple assault by grabbing Ms. Leeds's breasts, kissing her, and pulling her toward him, all without her consent. *See United States v. Delis*, 558 F.3d 177, 184 (2d Cir. 2009) (concluding that simple assault, as governed by section 113 of Title 18, encompassed a "completed common-law battery," which included "offensive touching," and did not require a "specific intent to injure").¹³

¹¹ The statute provided that an aircraft is "in flight . . . from the moment when all external doors are closed following embarkation until the moment when one such door is opened for disembarkation." 49 U.S.C. § 1301(34) (1976); *see also* 49 U.S.C. § 1301(38) (Supp. III 1980).

¹² Mr. Trump argues that because Ms. Leeds could not recall her embarkation point, the proof of jurisdiction is insufficient. But Ms. Leeds definitively recalled that the plane departed from one of only two possible locations -- either "Atlanta" or "Dallas" -- and had its final destination at LaGuardia Airport in New York. App'x at 2098, 2130. The alleged conduct therefore took place "within the United States" and thus within the "special aircraft jurisdiction of the United States" under either version of Ms. Leeds's testimony. *See* 49 U.S.C. § 1301(34) (1976); *see also* 49 U.S.C. § 1301(38) (Supp. III 1980).

¹³ The district court did not base its decision to admit the Leeds testimony on these specific statutes, *Carroll*, 660 F. Supp. 3d at 203-04, in part because Mr. Trump did not make these

Likewise, we find no error in the trial court's conclusion that a jury could reasonably find by a preponderance of the evidence that Mr. Trump's actions as described by Ms. Leeds qualified as an attempt under (d)(5) to engage in the conduct described in (d)(2). The term "attempt" is not defined in the text of Rule 413. Because Rule 413 deals specifically with "similar crimes in sexual-assault cases," we look to the meaning of the word "attempt" as it is used in federal criminal statutes. *Cf. United States v. Hansen*, 599 U.S. 762, 774-75 (2023) ("[W]hen a criminal-law term is used in a criminal-law statute, that -- in and of itself -- is a good clue that it takes its criminal-law meaning."). In that context, it means having "the intent to commit the crime and engag[ing] in conduct amounting to a substantial step towards the commission of the crime." *United States v. Pugh*, 945 F.3d 9, 20 (2d Cir. 2019) (internal quotation marks omitted). "A substantial step 'is conduct planned to culminate in the commission of the substantive crime being attempted.'" *Id.* (quoting *United States v. Farhane*, 634 F.3d 127, 147 (2d Cir. 2011)).

Attempt may be found "even where significant steps necessary to carry out the substantive crime are not completed." *Id.* (internal quotation marks omitted). "Because the substantial step need not be the 'last act necessary' before commission of the crime, 'the finder of fact may give weight to that which has already been done as well as that which remains to be

arguments below. But "[w]e are free to affirm on any ground that finds support in the record, even if it was not the ground upon which the trial court relied." *Beijing Neu Cloud Oriental Sys. Tech. Co. v. Int'l Bus. Machines Corp.*, 110 F.4th 106, 113 (2d Cir. 2024) (citation omitted).

accomplished before commission of the substantive crime." *Id.* (quoting *United States v. Manley*, 632 F.2d 978, 987 (2d Cir. 1980)). The behavior "need not be incompatible with innocence, yet it must be necessary to the consummation of the crime" *Manley*, 632 F.2d at 987-88. The behavior must also "be of such a nature that a reasonable observer, viewing it in context[,] could conclude beyond a reasonable doubt" - - or in the case of other acts evidence admitted under Rule 415, by a preponderance of the evidence -- "that it was undertaken in accordance with a design to violate the statute." *Id.* at 988.

Ms. Leeds testified that Mr. Trump grabbed her breasts, and tried to kiss her and pull her toward him as she resisted. She also testified unequivocally that Mr. Trump put his hand up her skirt. On the basis of this testimony, a jury could have reasonably found by a preponderance of the evidence that Mr. Trump knowingly took a substantial step toward bringing part of his body – his hand -- into contact with Ms. Leeds's genitals without her consent.¹⁴

¹⁴ Mr. Trump argues that Ms. Leeds's testimony was insufficient, as a factual matter, to support an attempt theory. The cases he cites, however, involve readily distinguishable conduct. In *Rapp v. Fowler*, for example, the witness had testified that the defendant put his hand on his knee and left it there for about 30 to 45 seconds. No. 20-cv-09586 (LAK), 2022 WL 5243030, at *2 (S.D.N.Y. Oct. 6, 2022). By contrast, Ms. Leeds testified that Mr. Trump put his hand up her skirt, wholly rejecting defense counsel's characterization that Mr. Trump had merely placed his hand on her knee. Similarly, in *United States v. Blue Bird*, 372 F.3d 989, 993 (8th Cir. 2004), no attempt was found where defendant had touched and kissed the victim but "desisted and withdrew when she said that she was not interested." *Accord United States v. Hayward*, 359 F.3d 631, 640 (3d Cir. 2004) (finding act of pushing a victim's head toward one's

Other evidence in the case further supports the district court's decision to admit Ms. Leeds's testimony. As discussed below, the jury could reasonably infer from Ms. Stoyloff's testimony and the *Access Hollywood* tape that Mr. Trump engaged in similar conduct with other women -- a pattern of abrupt, nonconsensual, and physical advances on women he barely knew.¹⁵ And, as discussed above, the standard for admitting testimony under Rule 415 -- whether a jury could reasonably find by a preponderance of the evidence that a person committed the attempted assault -- is distinct from and less stringent than the standard for convicting a person criminally of assault or attempted assault, which would have required the jury to make this finding beyond a reasonable doubt.

In sum, the district court did not abuse its discretion in admitting the Leeds testimony at trial.

clothed genitals was ambiguous and not a substantial step toward contact between the mouth and genitals). Here, the jury could have reasonably found that Mr. Trump placed his hand underneath Ms. Leeds's clothing and did not withdraw it voluntarily.

¹⁵ "[P]ieces of evidence must be viewed not in isolation but in conjunction." *United States v. Carson*, 702 F.2d 351, 362 (2d Cir. 1983). Indeed, we have often observed that "bits and pieces" of evidence, taken together, can create a fuller picture -- such as a "mosaic" of intentional discrimination. *Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 86 (2d Cir. 2015); *see also Palin v. New York Times Co.*, 113 F.4th 245, 272 (2d Cir. 2024) ("When conducting this examination [under Rule 104(b)], 'the trial court must consider all evidence presented to the jury' because '[i]ndividual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it.'" (quoting *Huddleston*, 485 U.S. at 690-91)).

b. *The Stoyhoff Testimony*

Natasha Stoyhoff testified that, in December 2005, when she was a reporter for *People* magazine, she was on assignment at Mar-a-Lago, Mr. Trump's residence in Florida. She was there to do a story about the first anniversary of Mr. Trump's marriage to Melania Trump and the arrival of their son, Barron. Ms. Stoyhoff was at Mar-a-Lago for most of the day, conducting interviews of Mr. Trump and his wife between photoshoots. During a break between interviews, Mr. Trump told her that he would like to show her a painting that he had in "this really great room" in the house. App'x at 2349. Mr. Trump then led her to a room in a different part of his residence. Once they arrived at the room, as Ms. Stoyhoff described at trial:

I went in first and I'm looking around, I'm thinking, wow, really nice room, wonder what he wants to show me, and he -- I hear the door shut behind me. And by the time I turn around, he has his hands on my shoulders and he pushes me against the wall and starts kissing me, holding me against the wall.

Id. at 2350. Ms. Stoyhoff "tried to push him away," but Mr. Trump came toward her again and she "tried to shove him again." *Id.* at 2350-51. Mr. Trump "was kissing [her]" and "he was against [her] and just holding [her] shoulders back." *Id.* at 2351. The encounter ended when Mr. Trump's butler came into the room. Immediately afterward (Ms. Stoyhoff testified), Mr. Trump told her:

Oh, you know we are going to have an affair, don't you? You know, don't forget what -- don't forget what Marla said, best sex she ever had.

We are going to go for steak, we are going to go to Peter Luger's. We're going to have an affair.

Id. at 2352.

Mr. Trump challenges the district court's admission of Ms. Stoenoff's testimony. The district court based its decision to admit the Stoenoff testimony on its finding that it described (1) a crime under Florida law, a proposition that Mr. Trump does not challenge, and (2) an attempt, under Rule 413(d)(5), to engage in conduct described in Rule 413(d)(2).

The trial court did not abuse its discretion when it admitted, pursuant to Rule 413(d)(2) and (5), the evidence of Mr. Trump's alleged actions toward Ms. Stoenoff at Mar-a-Lago in 2005. It found that those actions – inviting Ms. Stoenoff to an unoccupied room, closing the door behind her, and immediately engaging in nonconsensual kissing despite Ms. Stoenoff's resistance -- suggested a premeditated plan to "take advantage of [the] privacy and to do so without regard to Ms. Stoenoff's wishes." *Carroll*, 660 F. Supp. 3d at 206. We agree and further conclude that the jury could have reasonably found that Mr. Trump took a "substantial step" toward the completion of this premeditated plan when he allegedly closed the door, forcefully held Ms. Stoenoff against the wall while kissing her, and repeatedly came toward her despite being pushed back twice. Mr. Trump's comments to Ms. Stoenoff immediately after the encounter -- including "you know we are going to have an affair" and suggesting they would have the "best sex" -- also shed light on the intent behind his actions. App'x at 2352. That the alleged assault showed no signs of terminating until a third party interrupted it also supports the conclusion that a jury

could have reasonably found that Mr. Trump intended to bring his body into contact with Ms. Stoyhoff's genitals and that he took substantial steps toward doing so.

In addition, the evidence could have been admitted as an attempt under Rule 413(d)(5) to engage in the type of conduct under (d)(1): "any conduct prohibited by 18 U.S.C. chapter 109A." Fed. R. Evid. 413(d)(1). Conduct proscribed by chapter 109A includes to "knowingly engage[] in sexual contact with another person without that other person's permission." 18 U.S.C. § 2244(b). The chapter defines "sexual contact" as:

the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

Id. § 2246(3). A jury could have reasonably found, upon consideration of the circumstances discussed above, that the actions alleged constituted an attempt to knowingly engage in conduct that falls within that definition of making "sexual contact," and to do so without Ms. Stoyhoff's permission.

Mr. Trump argues (as he did with respect to the Leeds testimony) that, to be admissible under Rule 413(d)(1), the evidence must meet the jurisdictional requirement of 18 U.S.C. chapter 109A: he contends, in other words, that the conduct must have occurred within the "special maritime and territorial jurisdiction of the United States" or certain custodial facilities to qualify as "conduct prohibited by" chapter

109A.¹⁶ Mr. Trump argues that an act that does not meet the jurisdictional requirement of chapter 109A cannot be "prohibited" by chapter 109A. Appellant's Reply Br. at 2-3. We are not persuaded that Rule 413(d)(1) is so constrained.

Mr. Trump's reading is wholly inconsistent with the rationale advanced in Congress in adopting Rules 413-415, which centered on the *nature* of the other conduct, not the specific location in which the conduct occurred. As the text and structure of Rule 413 make clear, Congress did not intend for Rule 413(d)(1) to apply only to conduct occurring within the "special maritime and territorial jurisdiction of the United States" -- that is, among other places, the high seas, on federally controlled land, or in certain custodial facilities. *See* 18 U.S.C. § 7 (defining "special maritime and territorial jurisdiction of the United States"). Rules 413 and 415 permit the admission of evidence that the defendant "committed any other sexual assault," and Rule 413(d) defines "sexual assault" to include "a crime under federal law or under state law . . . involving" any one of five categories of conduct. Clearly, in Rule 413(d)(1), Congress was referring to the nature or types of conduct covered in chapter 109A -- such as aggravated sexual abuse, sexual abuse, sexual abuse of a minor, and abusive sexual contact, 18 U.S.C. §§ 2241, 2242, 2243, 2244 -- without limiting the applicability of Rule 413(d)(1) to the conduct

¹⁶ Chapter 109A is entitled "Sexual Abuse" and includes, *inter alia*, sections 2241 through 2244, each of which criminalizes conduct "in the special maritime and territorial jurisdiction of the United States or in a Federal prison" or certain other custodial facilities. 18 U.S.C. §§ 2241, 2242, 2243, 2244.

occurring on the high seas, on federally-controlled lands, and in certain custodial facilities.

Several of our sister circuits read the statute as we do, stressing the nature of the conduct and disregarding any jurisdictional element. *See, e.g., United States v. Batton*, 602 F.3d 1191, 1196-98 (10th Cir. 2010) (holding defendant's prior sexual assault of a boy "falls squarely under Rule 413's definition of sexual assault" because it involved conduct that was "clearly proscribe[d]" by chapter 109A, without regard to whether it occurred within the special maritime and territorial jurisdiction of the United States or a custodial facility); *Blind-Doan v. Sanders*, 291 F.3d 1079, 1082 (9th Cir. 2002) ("We understand Rule 413 to mean acts proscribed by [chapter 109A], whether or not the acts are committed by federal personnel in federal prisons"); *United States v. Blazek*, 431 F.3d 1104, 1109 (8th Cir. 2005) ("Rule 413 does not require that the defendant be charged with a chapter 109A offense, only that the instant offense involve conduct proscribed by chapter 109A."). We fail to see any bearing that the jurisdiction of the offense would have on the probative value of the proffered evidence of sexual assault.

The legislative history of the rules also supports our conclusion. For example, the Congressional Record explains that the definition of sexual assault under Rule 413(d) is intended to "cover[] federal and state offenses involving *the types of conduct* prohibited by [chapter 109A]." 137 Cong. Rec. 6031 (1991) (emphasis added).¹⁷ And Congress left no doubt that

¹⁷ Rules 413-415 were introduced in materially identical form as part of the proposed, but not enacted, Comprehensive Violent Crime Control Act of 1991. *See* 137 Cong. Rec. 6003-04. When the

it adopted Rules 413-415 to allow courts to admit evidence that a "defendant has the motivation or disposition to commit sexual assaults." *Id.* The above legislative history confirms that Rule 413(d)(1) hinges on the "type of conduct" alleged, not where the conduct occurred. *See also United States v. Sturm*, 673 F.3d 1274, 1283 (10th Cir. 2012) (analyzing legislative history and holding that Rule 414's incorporation of conduct prohibited in a federal statute does not incorporate that statute's interstate-commerce element because "the interstate character of a defendant's prior crimes has no bearing on the evidence's probative value"); *United States v. Shaw*, No. 22-CR-00105-BLF-1, 2023 WL 2815360, at *7 (N.D. Cal. Apr. 5, 2023) (analyzing legislative history of Rules 413-415 and holding that "the Court should look at the type of conduct at issue, as opposed to its location"); Advisory Note, *Report of the Judicial Conference on the Admission of Character Evidence in Certain Sexual Misconduct Cases*, 159 F.R.D. 51, 57 (Feb. 9, 1995) (proposing amendments to Rules 413-415, including to clarify "with no change in meaning" that "[e]vidence offered [of another sexual assault] must relate to a form of conduct proscribed by . . . chapter 109A . . . of title 18, United States Code, regardless of whether the actor was subject to federal jurisdiction").

Rules were re-introduced and passed as part of the Violent Crime Control and Law Enforcement Act of 1994, the section-by-section analysis of the Rules that accompanied the 1991 legislation, 137 Cong. Rec. 6030-34, was described by the Rules' original co-sponsors as a key part of the Rules' legislative history that "deserve[s] particular attention." 140 Cong. Rec. 24,799 (statement of Sen. Dole); *see also* 140 Cong. Rec. 23,602 (statement of Rep. Molinari).

In an analogous context, in *Torres v. Lynch*, the Supreme Court held that a New York state arson law was an "aggravated felony" under the Immigration and Nationality Act because it was an offense "described in" a federal arson statute, even though it lacked the federal statute's jurisdictional hook. 578 U.S. 452, 460, 473 (2016). The Court reasoned that state legislatures are "not limited to Congress's enumerated powers" and therefore would have "no reason to tie their substantive offenses to those grants of authority." *Id.* at 458; *see also id.* at 457 (explaining that most federal criminal statutes include "substantive elements," which "primarily define[] the behavior that the statute calls a 'violation' of federal law," and a "jurisdictional element," which "ties the substantive offense . . . to one of Congress's constitutional powers"). Rules 413-415 do not contain a "jurisdictional hook," and the drafters of the rules would not have been concerned with the lack of police power or any jurisdictional requirement because the Federal Rules of Evidence, unlike the federal criminal code, do not authorize federal punishment.

Accordingly, we give Rule 413 a common-sense reading that is consistent with the structure and purpose of Rules 413-415. We conclude that Rule 413(d)(1) applies to *conduct* that fits within chapter 109A -- such as aggravated sexual abuse, sexual abuse, sexual abuse of a minor, or abusive sexual contact -- without regard to whether chapter 109A's jurisdictional element is met. Therefore, the Stoyneff testimony was admissible under Rule 413(d)(5) as evidence of an attempt to engage in the type of conduct covered by Rule 413(d)(1).

Our holding that Ms. Stoyneff's testimony was properly admitted is further supported by Ms. Leeds's

testimony and the *Access Hollywood* tape and the fact that the sufficiency standard for admitting the evidence under Rule 415 is lower than what would be required to sustain a conviction. Accordingly, the district court did not abuse its discretion in admitting the Stoyhoff testimony.¹⁸

c. *The Access Hollywood Tape*

Mr. Trump's final challenge to the district court's admission of other act evidence centers on a 2005 recording of a conversation among Mr. Trump, Billy Bush, and others as they arrived for the filming of a

¹⁸ In allowing Ms. Stoyhoff to testify, the district court also relied on Ms. Stoyhoff's deposition, where she stated that Mr. Trump groped her without her consent. *See* App'x at 146 ("I consider that he lied about kissing and groping me without consent."). While Ms. Stoyhoff did not ultimately use the word "grobe" at trial, the district court did not abuse its discretion in relying on the deposition testimony in deciding to admit the evidence. As the district court reasoned in denying Mr. Trump's motion *in limine* to exclude Ms. Stoyhoff's testimony, "the circumstances of the alleged encounter are relevant," including that Mr. Trump invited Ms. Stoyhoff "to an unoccupied room and closed the door behind her," and then "he immediately, and without her consent, began kissing Ms. Stoyhoff and pressed on as she resisted his advances" -- actions the court found to be "suggestive of a plan, formed before Mr. Trump invited Ms. Stoyhoff to the unoccupied room and closed the door behind her, to take advantage of that privacy and to do so without regard to Ms. Stoyhoff's wishes." *Carroll*, 660 F. Supp. 3d at 206. The court noted that the *Access Hollywood* tape and Ms. Leeds's testimony "are additional evidence that a jury would be entitled to consider in deciding whether to infer that the ultimate goal of Mr. Trump's alleged actions" was to attempt to sexually assault Ms. Stoyhoff. *Id.* We further conclude, based on the above discussion, that Ms. Carroll elicited sufficient evidence for the jury to reasonably find by a preponderance of the evidence that Mr. Trump attempted to sexually assault Ms. Stoyhoff.

television show. This recording, known as the *Access Hollywood* tape, aired nationally during the 2016 presidential election. The tape, just under two minutes long, was played twice for the jury. In the recording, Mr. Trump states that he "moved on" a woman named Nancy "like a bitch" and "did try and fuck her." App'x at 2883. As he described the encounter:

I moved on her actually. You know she was down on Palm Beach. I moved on her, and I failed. I'll admit it. I did try and fuck her. She was married. . . . I moved on her very heavily in fact I took her out furniture shopping. She wanted to get some furniture. I said I'll show you where they have some nice furniture. I moved on her like a bitch, but I couldn't get there. And she was married. Then all-of-a-sudden I see her, she's now got the big phony tits and everything. She's totally changed her look.

Id. He also stated, "You know I'm automatically attracted to beautiful -- I just start kissing them. It's like a magnet. Just kiss. I don't even wait. And when you're a star, they let you do it. You can do anything. . . . Grab them by the pussy. You can do anything." *Id.*

During his October 2022 deposition, Mr. Trump was questioned about his statements in the tape. A portion of that testimony was played to the jury:

Q. And you say -- and again, this has become very famous -- in this video, 'I just start kissing them. It's like a magnet. Just kiss. I don't even wait. And when you're a star, they let you do it. You can do anything, grab them by the pussy.

You can do anything.' That's what you said; correct?

A. Well, historically, that's true with stars.

Q. True with stars that they can grab women by the pussy?

A. Well, that's what -- if you look over the last million years, I guess that's been largely true. Not always, but largely true. Unfortunately or fortunately.

Q. And you consider yourself to be a star?

A. I think you can say that, yeah.

Id. at 2973.

The district court concluded that the recording was admissible as evidence of a prior sexual assault because it satisfied the requirements of Rule 413(d)(2) as well as (d)(5). Thus, the district court ruled that a "jury reasonably could find, even from the *Access Hollywood* tape alone, that Mr. Trump admitted in the *Access Hollywood* tape that he in fact has had contact with women's genitalia in the past without their consent, or that he has attempted to do so." *Carroll*, 660 F. Supp. 3d at 203. In its post-trial decision denying Mr. Trump's motion for a new trial, however, the district court concluded that at trial "it became clear that reliance on Rule 415 was unnecessary because the video was offered for a purpose other than to show the defendant's propensity to commit sexual assault." *Carroll*, 683 F. Supp. 3d at 302, 313 n.20. Instead, the court concluded, the recording "could have been regarded by the jury as a sort of personal confession as to his behavior." *Id.* at 326.

The district court concluded that the recording was relevant because it "has the tendency to make [the]

fact [of whether [Mr. Trump] sexually assaulted Ms. Carroll] more or less probable than it would be without the evidence because one of the women he referred to in the video could have been Ms. Carroll." *Id.* at 313 n.20 (internal quotation marks omitted).

We are not fully persuaded by the district court's second basis for admitting the recording -- that the tape captured a "confession." *Id.* at 326. But the first rationale adopted by the district court -- that the recording was evidence of one or more prior sexual assaults and therefore admissible under Rules 413 and 415 -- provided a proper basis for the district court's exercise of its broad discretion. As discussed above, we may reverse the district court's ruling only if we find it to have been "arbitrary and irrational." *Restivo v. Hessemann*, 846 F.3d 547, 573 (2d Cir. 2017) (quoting *United States v. Coppola*, 671 F.3d 220, 244 (2d Cir. 2012)).

Applying this highly deferential standard of review, we conclude that the district court did not abuse its discretion in admitting the recording pursuant to Rules 413(d)(2), 413(d)(5), and 415. In the recording, Mr. Trump says, "I just start kissing them," "I don't even wait," and "You can do anything. . . . Grab them by the pussy." App'x at 2883. The jury could have reasonably concluded from those statements that, in the past, Mr. Trump had kissed women without their consent and then proceeded to touch their genitalia. While it is true, as Mr. Trump argues, that he also said, "[T]hey let you do it," the district court correctly observed that "[i]t simply is not the Court's function in ruling on the admissibility of this evidence to decide what Mr. Trump meant or how to interpret his statements." *Carroll*, 660 F. Supp. 3d at 203. Rather, the court's duty was simply to decide

whether a jury could reasonably find by a preponderance of the evidence that Mr. Trump committed an act of sexual assault (as defined under Rule 413). If it could so find, the court had the discretion to admit the evidence.

We also conclude that the *Access Hollywood* tape was admissible pursuant to Rule 404(b) as evidence of a pattern, or *modus operandi*, that was relevant to prove that the alleged sexual assault actually occurred (the *actus reus*).¹⁹ See Leonard, *supra*, § 13.1 (recognizing that evidence of *modus operandi* may be admissible for a variety of non-propensity purposes, including "to demonstrate that the act at issue actually was committed").

The existence of a pattern, or a "recurring *modus operandi*," can be proven by evidence of "characteristics . . . sufficiently idiosyncratic to permit a fair inference of a pattern's existence." *United States v. Sliker*, 751 F.2d 477, 487 (2d Cir. 1984); see also *Ismail v. Cohen*, 706 F. Supp. 243, 253 (S.D.N.Y. 1989) (admitting evidence under Rule 404(b) to show a "pattern of misconduct" involving defendant "applying handcuffs too tightly, falsely claiming injury from the citizen to cover up his own inappropriate use of physical force, and filing false charges for the same purpose"), *aff'd*, 899 F.2d 183, 188-89 (2d Cir. 1990) (no error in admitting other act evidence under Rule

¹⁹ To the extent that the district court's post-trial "confession" rationale for admitting the *Access Hollywood* tape -- that the tape "could have been regarded by the jury as a sort of personal confession as to his behavior," *Carroll*, 683 F. Supp. 3d at 326 -- is consistent with our above explanation that the tape was admissible under Rule 404(b) as evidence of a pattern of conduct, we identify no error.

404(b) for "pattern" purposes); *United States v. Carlton*, 534 F.3d 97, 101-02 (2d Cir. 2008) (holding that evidence of similarities between defendant's three prior bank robberies and the charged bank robbery -- "such as location, the takeover style of the robberies, or use of a getaway car" -- established "the existence of a pattern"). The similarities between the past acts and current allegations "need not be complete." *Sliker*, 751 F.2d at 487. It is enough for admissibility purposes that the acts be sufficiently similar as to "earmark them as the handiwork of the accused." *Id.* (quoting 1 McCormick, Evidence § 190, at 559 (3d ed. 1984)).

Courts have routinely admitted evidence of a pattern or *modus operandi* in sexual assault cases where, as here, the defendant is alleged to have engaged in a distinctive pattern of conduct related to non-consensual sexual contact. *See, e.g., Roe v. Howard*, 917 F.3d 229, 245-46 (4th Cir. 2019) (no error in the admission of evidence of a pattern of prior sexual abuse under Rule 404(b) where the prior victim's testimony mirrored the plaintiff's allegations); *Montanez v. City of Syracuse*, No. 16-cv-00550, 2019 WL 4328872, at *4-7 (N.D.N.Y. Sept. 12, 2019) (admitting evidence of a prior sexual assault under Rule 404(b) as relevant to show, *inter alia*, a pattern because the previous victim and the plaintiff both alleged that the defendant, a law enforcement officer, "exposed himself to them while on duty, responding to calls at their residences, and intimidated them into performing oral sex"); Leonard, *supra*, § 13.3 (explaining that evidence of *modus operandi* may be relevant and admissible under Rule 404(b) in "[s]exual assault and child molestation

cases" where the "crimes are committed in the presence of fewer people and leave fewer traces").

Evidence of a pattern may also be relevant for the non-propensity purpose of corroborating witness testimony. *United States v. Everett*, 825 F.2d 658, 660-61 (2d Cir. 1987) ("Under Rule 404(b) evidence of 'other crimes' has been consistently held admissible to corroborate crucial prosecution testimony" so long as "corroboration is direct and the matter corroborated is significant.") (internal quotation marks omitted); *United States v. Williams*, 577 F.2d 188, 192 (2d Cir. 1978) (noting that evidence of other acts may be admissible under Rule 404(b) "even if the trial court finds that such evidence is relevant only for corroboration purposes, provided that the corroboration is direct and the matter corroborated is significant"); *see also United States v. Cadet*, 664 F.3d 27, 32 (2d Cir. 2011) (listing "corroboration of witnesses" as one of the acceptable "non-propensity purposes" for admitting other act evidence under Rule 404(b)); *United States v. Oskowitz*, 294 F. Supp. 2d 379, 382 (E.D.N.Y. 2003) ("[C]orroboration is also an acceptable purpose to admit prior act evidence.").²⁰ Its

²⁰ In the related context of Rules 413-415, courts have also upheld the admissibility of evidence that is challenged as unfairly prejudicial where such evidence shows a pattern of behavior that corroborates witness testimony. *See United States v. Gaudet*, 933 F.3d 11, 18 (1st Cir. 2019) ("[The witness's] testimony was probative because it helped to establish the credibility of [the victim's] testimony" and "because the near identical account of abuse that she offered helped to corroborate [the victim's] allegations by illustrating that [the witness] had leveled nearly identical allegations against [the defendant] previously."); *United States v. Joubert*, 778 F.3d 247, 254-55 (1st Cir. 2015) ("[B]ecause [the defendant's] defense was that he did not commit the crimes against [the child victim], evidence

use in this fashion must be assessed as well under Rule 403, of course, for unfair prejudice, but in a proper case the district court may admit it.

We conclude that the Access Hollywood tape described conduct that was sufficiently similar in material respects to the conduct alleged by Ms. Carroll (and Ms. Leeds and Ms. Stoyoff) to show the existence of a pattern tending to prove the *actus reus*, and not mere propensity. Mr. Trump's statements in the tape, together with the testimony of Ms. Leeds and Ms. Stoyoff (detailed above), establish a repeated, idiosyncratic pattern of conduct consistent with what Ms. Carroll alleged.²¹ In each of the three encounters, Mr. Trump engaged in an ordinary conversation with a woman he barely knew, then abruptly lunged at her in a semi-public place and proceeded to kiss and forcefully touch her without her consent. The acts are sufficiently similar to show a pattern or "recurring *modus operandi*." *Sliker*, 751 F.2d at 487. Moreover, the tape was "directly corroborative" of the testimony of Ms. Carroll, Ms. Leeds, and Ms. Stoyoff as to the pattern of behavior each allegedly experienced, and "the matter corroborated" was one of the most "significant" in the case -- whether the assault of Ms.

bearing on [the child's] veracity was probative to determining whether [the defendant] indeed produced and possessed the illicit recording. The uncharged child molestation testimony was probative of [the child's] veracity because it corroborated aspects of [the child's] testimony, particularly the nature of the abuse and [the defendant's] *modus operandi* in approaching his victims.").

²¹ *Cf. United States v. Mohel*, 604 F.2d 748, 751 n.6 (2d Cir. 1979) ("The fact that the [other act] evidence is in the form of statements by the defendant himself does not change the applicable analysis.").

Carroll actually occurred. *Everett*, 825 F.2d at 660-61 (noting that other act evidence admissible for corroborative purposes must involve corroboration that is "direct and the matter corroborated [must be] significant" (internal quotation marks omitted)). Therefore, the evidence of other conduct was relevant to show a pattern tending to directly corroborate witness testimony and to confirm that the alleged sexual assault actually occurred.²² The *Access Hollywood* tape was therefore properly admitted.

d. Rule 403

Mr. Trump's final argument with respect to the other acts evidence rests on Rule 403. He contends that the district court abused its discretion in admitting the evidence because the risk of unfair prejudice substantially outweighed the evidence's probative value, which he characterizes as "extremely limited." Appellant's Br. at 35.

We find no abuse of discretion in the district court's assessment of the other acts evidence under Rule 403. The testimony of Ms. Leeds and Ms. Stoyneff and Mr. Trump's statements on the *Access Hollywood* tape were highly probative, and their probative value was not substantially outweighed by any unfair prejudice.

First, evidence admitted under Rule 415 is presumptively probative in a sexual assault case such as this, which centers on the parties' respective credibility. *See Schaffer*, 851 F.3d at 178 ("In passing

²² As our discussion makes clear, while *modus operandi* evidence is often relevant to identify the unknown perpetrator of a crime, "[it] is not in fact synonymous with 'identity.'" Leonard, *supra*, § 13.1. It can be -- and in this case it is -- relevant for other non-propensity purposes as well.

Rule 413, Congress considered '[k]nowledge that the defendant has committed rapes on other occasions [to be] critical in assessing the relative plausibility of [sexual assault] claims and accurately deciding cases that would otherwise become unresolvable swearing matches.'" (alterations in original) (quoting *United States v. Enjady*, 134 F.3d 1427, 1431 (10th Cir. 1998))).

Second, for the reasons we discussed above with regard to the admissibility of the *Access Hollywood* tape under Rule 404(b), the conduct described by the other act evidence is sufficiently similar in material respects to be probative. True, Mr. Trump's alleged assault of Ms. Leeds occurred on an airplane, and thus differed from the assaults described by Ms. Carroll and Ms. Stoyloff, but Ms. Leeds's testimony was not so dissimilar as to substantially outweigh its strong probative value.

Mr. Trump argues that the amount of time since the alleged acts, particularly with respect to Ms. Leeds's testimony, reduces their probative value. But we apply Rules 413-415 in a manner that effectuates Congress's intent. *See, e.g., Schaffer*, 851 F.3d at 178. As the district court observed, Congress intentionally did not restrict the timeframe within which the other sexual act must have occurred to be admissible under Rules 413-415. *Carroll*, 660 F. Supp. 3d at 208. One of the original sponsors of the legislation proposing Rules 413-415 explained that "evidence of other sex offenses by the defendant is often probative and properly admitted, *notwithstanding very substantial lapses of time in relation to the charged offense or offenses*." 140 Cong. Rec. 23603 (1994) (remarks of Rep. Molinari) (emphasis added). In consideration of this express intent, we conclude that the time lapse

between the alleged acts does not negate the probative value of the evidence of those acts to the degree that would be required to find an abuse of discretion in admitting them for the jury's consideration. *Accord*, e.g., *United States v. O'Connor*, 650 F.3d 839, 853-54 (2d Cir. 2011) (no abuse of discretion in admission of evidence of sexual acts that occurred 30 years earlier); *United States v. Davis*, 624 F.3d 508, 511-12 (2d Cir. 2010) (evidence of molestation conviction 19 years earlier was properly admitted); *United States v. Larson*, 112 F.3d 600, 604-05 (2d Cir. 1997) (evidence of sexual acts occurring up to 20 years earlier was properly admitted).

Finally, we also find that the other act evidence was not unfairly prejudicial, as the incidents in question were "no more sensational or disturbing" than the acts that Ms. Carroll alleged Mr. Trump to have committed against her. *United States v. Curley*, 639 F.3d 50, 59 (2d Cir. 2011) (internal quotation marks omitted).²³

²³ On appeal, Mr. Trump also offered brief challenges to the district court's admission of certain other evidence, including: (1) excerpts from two 2016 campaign videos in which Mr. Trump denied the allegations made by Ms. Leeds and Ms. Stoyanoff; (2) additional testimony from Ms. Leeds, including, for example, regarding her reaction to statements made by Mr. Trump during the campaign; (3) additional testimony from Ms. Stoyanoff, including, for example, her testimony regarding her belief that Mr. Trump engaged in this conduct with many women; and (4) evidence of certain other comments made by Mr. Trump. We discern no abuse of discretion in these rulings. Mr. Trump did not object to much of this additional evidence at trial, and he was able to use some of the same testimony as impeachment material on cross-examination. Even assuming error in any of these rulings, Mr. Trump failed to carry his burden to show that his "substantial rights" were affected. *Tesser*, 370 F.3d at 319.

B. *Excluded Evidence*

Mr. Trump's second category of challenges to the judgment below is based on the district court's decision to exclude, rather than admit, certain evidence. Specifically, Mr. Trump argues that the district court unreasonably restricted his defense by precluding (1) evidence that some of Ms. Carroll's legal fees were being paid for by one of Mr. Trump's political opponents and (2) portions of a transcript made by Ms. Carroll of a 2020 interview between Ms. Carroll and Ms. Stoyloff that, Mr. Trump argues, suggests that Ms. Carroll coached Ms. Stoyloff on her testimony. Mr. Trump also asserts that the district court erred in preventing him from cross-examining Ms. Carroll on three matters: her out-of-court claim that she possessed Mr. Trump's DNA; her decision not to file a police report; and her failure to seek surveillance video footage from Bergdorf Goodman. We address each challenge in turn.

1. *Litigation Funding*

The district court did not abuse its discretion in excluding evidence related to litigation funding. Mr. Trump contends that this evidence was "proof that a billionaire critic of President Trump had paid [Ms. Carroll's] legal fees, and that [Ms. Carroll] lied about the funding during her deposition." Appellant's Br. at 41. Mr. Trump thus sought to offer this evidence to attack Ms. Carroll's credibility, and also as evidence of bias and motive.

a. *Ms. Carroll's Credibility*

"Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness." Fed.

R. Evid. 608(b). But the court "may, on cross-examination, allow [specific instances] to be inquired into if they are probative of [a witness's] character for truthfulness or untruthfulness." *Id.*

At Ms. Carroll's October 2022 deposition, when *Carroll I* (but not this case) was pending, in response to a question asking whether she was "presently paying [her] counsel's fees," Ms. Carroll responded that hers was "a contingency case" and said that no one else was paying her legal fees. App'x at 1188. On April 10, 2023, however, Ms. Carroll's counsel disclosed to Mr. Trump's attorneys Ms. Carroll's refreshed recollection "that at some point her counsel secured additional funding from a nonprofit organization to offset certain expenses and legal fees." *Id.* at 1191. In response, the district court permitted defense counsel limited discovery into the litigation funding, and Ms. Carroll's knowledge of it, while reserving judgment on the relevancy of evidence relating to the issue.

The facts established during the ensuing discovery confirmed that Ms. Carroll's case was taken on a contingency fee basis, and that, in September 2020, Ms. Carroll's counsel received outside funding from a nonprofit to help offset costs. There was no evidence to suggest that Ms. Carroll was personally involved in securing the funding, interacted with the funder, received an invoice showing the arrangement before or after her counsel received the outside funding, or had discussed the arrangement with anyone between learning of it in September 2020 and being deposed in October 2022.

Upon consideration of this evidence, the district court granted Ms. Carroll's motion to preclude

evidence and argument about the litigation funding in the case. The district court concluded:

In general, litigation funding is not relevant. Here I allowed very limited discovery against what seemed to me a remote but plausible argument that maybe something to do with litigation funding arguably was relevant to the credibility of one or two answers by this witness in her deposition. I gave the defense an additional deposition of the plaintiff, and I gave the defense limited document discovery.

On the basis of all that, I have concluded that there is virtually nothing there as to credibility. And even if there were, the unfair prejudicial effect of going into the subject would very substantially outweigh any probative value whatsoever.

App'x at 1659. We perceive no abuse of discretion here.

First, district courts regularly exclude evidence of litigation financing under Rule 401, finding it "irrelevant to credibility" and that it "does not assist the factfinder in determining whether or not the witness is telling the truth." *Benitez v. Lopez*, No. 17-cv-3827, 2019 WL 1578167, at *1 (E.D.N.Y. Mar. 14, 2019); *see also id.* at *2 (reviewing cases and noting that "[n]o case" of which the court was aware supports the claimed proposition that "litigation financing documents are generally probative of a plaintiff's credibility"); *In re Valsartan N-Nitrosodimethylamine (NDMA) Contamination Prods. Liab. Litig.*, 405 F. Supp. 3d 612, 615 (D.N.J. 2019) (collecting cases); *cf. Kaplan v. S.A.C. Cap. Advisors, L.P.*, No. 12-cv-9350, 2015 WL 5730101, at *5 (S.D.N.Y. Sept. 10, 2015) (in class action context, denying defendants' request for

production of documents relating to plaintiffs' litigation funding on ground that defendants failed to "show that the requested documents are relevant to any party's claim or defense").

Second, the district court did not abuse its discretion in precluding cross-examination on this point because, as the district court found, Ms. Carroll's prior statement on the litigation funding was not sufficiently probative of her credibility. Ms. Carroll plausibly represented that she had forgotten about the limited outside funding counsel obtained in September 2020 when this question was first posed to her in 2022, and the additional discovery did not indicate otherwise. Rather, it showed that Ms. Carroll simply was not involved in the matter of who was or was not funding her litigation costs. Ms. Carroll testified that, after her counsel informed her in September 2020 that they had received some outside funding, she did not speak with her counsel about this topic again until the spring of 2023 and did not even know the funder's political position or why they were partially funding her lawsuit. Therefore, by the time of her deposition in October 2022, Ms. Carroll had not spoken with her counsel about the matter of outside funding for over two years. It was not an abuse of the district court's discretion to conclude that the available litigation-funding evidence would have little probative value compared to its potential for unfair prejudice.

b. *Bias and Motive*

For similar reasons, we conclude that extrinsic evidence of the litigation funding had minimal, if any,

probative value on the issue of Ms. Carroll's bias and motive.²⁴

Extrinsic evidence may be introduced to prove a witness's bias. *United States v. Harvey*, 547 F.2d 720, 722 (2d Cir. 1976) ("[B]ias of a witness is not a collateral issue and extrinsic evidence is admissible to prove that a witness has a motive to testify falsely."). The admissibility of evidence for this purpose depends on whether it is "sufficiently probative of [the witness's asserted bias] to warrant its admission into evidence." *United States v. Abel*, 469 U.S. 45, 49 (1984).

To the extent Mr. Trump argues that the acceptance of outside funding goes toward Ms. Carroll's motive in lodging these allegations at Mr. Trump, the discovery also confirmed that Ms. Carroll publicly accused Mr. Trump of sexual assault over a year before the outside litigation funding was secured. Moreover, whether the outside funder was politically opposed to Mr. Trump was of little probative value because Ms. Carroll herself frankly admitted her political opposition to Mr. Trump, and her key witnesses testified to their opposition as well. *See, e.g.*, App'x at 1653 (Ms. Carroll acknowledging she is "a registered Democrat"); *id.* at 2120, 2123 (Ms. Leeds acknowledging she is a Democrat and "passionate about politics"); *id.* at 2054 (Ms. Birnbach acknowledging she is a Democrat and donated to

²⁴ "Bias is a term used . . . to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party. Bias may be induced by a witness'[s] like, dislike, or fear of a party, or by the witness'[s] self-interest." *United States v. Abel*, 469 U.S. 45, 52 (1984).

Hillary Clinton); *id.* at 2411 (Ms. Martin acknowledging she is a Democrat and donated to Clinton). On multiple occasions, defense counsel was able to bring out the political opposition and distaste for Mr. Trump held by Ms. Carroll and her witnesses. *See United States v. James*, 609 F.2d 36, 47-48 (2d Cir. 1979) (finding reversal not warranted where defendant was given full opportunity to explore witness's apparent bias).²⁵

In light of the minimal probative value of the evidence, we conclude that the district court did not abuse its discretion in excluding it under Rule 403.

2. *The Stoyhoff Transcript*

During trial, Mr. Trump moved to admit a redacted version of a transcript made by Ms. Carroll

²⁵ Mr. Trump separately argues that the district court also "improperly restricted questioning and argument regarding [an attorney, George] Conway." Appellant's Br. At 43. Ms. Carroll testified at trial that about one month after she publicly accused Mr. Trump of sexually assaulting her, she attended a party where she met a lawyer named George Conway. Mr. Conway encouraged Ms. Carroll to seriously consider filing a lawsuit against Mr. Trump. The district court sustained an objection to portions of Mr. Trump's opening statement that concerned Mr. Conway on the ground that counsel was impermissibly arguing to the jury that Mr. Conway had recommended Ms. Carroll's counsel. Even if Mr. Conway's conversation with Ms. Carroll was somehow probative of bias, we find no error in the district court's ruling. Argument related to Ms. Carroll's choice of counsel had been ruled inadmissible pursuant to Ms. Carroll's unopposed motion *in limine*. *Carroll v. Trump*, No. 22-cv-10016 (LAK), 2023 WL 2652636, at *8 (S.D.N.Y. Mar. 27, 2023). Further, contrary to Mr. Trump's representation on appeal, defense counsel was permitted to meaningfully cross-examine Ms. Carroll about Mr. Conway. Ms. Carroll acknowledged that Mr. Conway had encouraged her to file the lawsuit, and defense counsel was able to argue these facts to the jury during summation.

of a conversation between Ms. Carroll and Ms. Stoyneff to show Ms. Carroll's alleged "effort to influence Ms. Stoyneff's testimony." App'x at 1900. The court devoted over thirty minutes of a sidebar conversation to "trying to figure out what it is [defense counsel was] trying to put in[to evidence]." App'x at 1907; *see also id.* at 1912.²⁶ The district court called defense counsel's rendition of his proposed presentation to the jury of the redacted transcript "tremendously confusing," *id.* at 1903, and commented that defense counsel did not have the slides of the redacted transcript "figured out" or "put together," *id.* at 1907. At the end of this lengthy conversation, the district court denied the motion to receive the proposed document into evidence, finding that Ms. Stoyneff's statements in the transcript constituted hearsay, and that the proposed document's use at trial would be confusing and unnecessarily time-consuming. The court requested that defense counsel determine how to elicit the information "[i]n a way that will not be confusing and take three times as much time." *Id.* at 1913.

The solution that the court accepted, and that Mr. Trump now challenges as insufficient, was to exclude the redacted transcript from presentation on direct examination but to permit defense counsel to cross-examine Ms. Carroll about the interview and to use the transcript to refresh and impeach, if necessary. On cross-examination, defense counsel did in fact confront Ms. Carroll with language from the transcript, reading portions of it into the record.

²⁶ The "transcript" document included much extraneous material. *See* App'x at 1371-415.

Defense counsel did not seek to question Ms. Stoyhoff about the transcript.

Mr. Trump argues that the district court's decision to preclude the redacted Stoyhoff transcript itself was erroneous: he submits that Ms. Carroll's statements, as they were embodied in the redacted transcript, were admissible for their truth as a party admission under Federal Rule of Evidence 801(d)(2)(A). Mr. Trump also argues that the transcript itself was admissible as extrinsic evidence of motive and bias.

We agree with Mr. Trump that, contrary to Ms. Carroll's argument, the Stoyhoff transcript did not contain inadmissible hearsay: Ms. Carroll's statements were party admissions under Rule 801(d)(2)(A), and Ms. Stoyhoff's responses were being offered to place Ms. Carroll's statements into context and were not being offered for their truth. *See United States v. Song*, 436 F.3d 137, 139 (2d Cir. 2006) (finding that it was error to exclude testimony not offered for the truth of the matters asserted, "but rather[] to demonstrate the motivation behind [a party's] actions"); *United States v. Ebens*, 800 F.2d 1422, 1430-32 (6th Cir. 1986) (holding that trial court erred in not admitting recording of witnesses being prepared, where tapes were not offered for truth of statements contained therein, but to show, *inter alia*, that witnesses were being coached), *abrogated in other respects by Huddleston v. United States*, 485 U.S. 681 (1988). The transcript was also arguably relevant as extrinsic evidence of Ms. Carroll's bias. *See James*, 609 F.2d at 46; *Harvey*, 547 F.2d at 722.

But the district court did not err in refusing to admit the proposed redacted version of the transcript into evidence. We accord great deference to a district court "in determining whether evidence is admissible,

and in controlling the mode and order of its presentation to promote the effective ascertainment of the truth." *SR Int'l Bus. Ins. Co. v. World Trade Ctr. Props., LLC*, 467 F.3d 107, 119 (2d Cir. 2006) (internal quotation marks omitted). As discussed above, a district court does not abuse its discretion in making an evidentiary ruling unless "the ruling was arbitrary and irrational." *Restivo*, 846 F.3d at 573 (quoting *Coppola*, 671 F.3d at 244). The district court's decision to exclude the Stoyhoff transcript as prepared by counsel was far from arbitrary or irrational.

The district court's sidebar discussion with counsel illuminates that defense counsel sought to use the transcript in ways that risked confusion, undue delay, and wasted time on cumulative evidence -- considerations that the district court was permitted to weigh, pursuant to Federal Rule of Evidence 403, when deciding whether to admit or exclude the evidence. Defense counsel provided no explanation as to how the transcript itself would have added anything of significance, and the transcript's admission would have been largely cumulative of the excerpts that were read verbatim into the record. See *Old Chief v. United States*, 519 U.S. 172, 184-85 (1997) ("[W]hen Rule 403 confers discretion by providing that evidence 'may' be excluded, the discretionary judgment may be informed not only by assessing an evidentiary item's twin tendencies, but by placing the result of that assessment alongside similar assessments of evidentiary alternatives."). A trial judge has discretion to exclude cumulative proof of bias, including documentary evidence, when the witness admits to the "incidents from which any alleged bias . . . arose." *United States v. Weiss*, 930 F.2d 185, 199 (2d Cir. 1991). Here, the district court

permitted defense counsel to cross-examine Ms. Carroll using language drawn verbatim from the transcript, and Ms. Carroll admitted to all the relevant information. Moreover, the district court correctly instructed the jury to consider Ms. Stoyhoff's statements not for their truth, but for "the fact that they were said to Ms. Carroll because they shed light on what Ms. Carroll did and why she did it." App'x at 1920. Accordingly, we conclude that the district court acted well within its discretion in excluding the Stoyhoff transcript.

3. DNA Evidence

Mr. Trump next argues that the district court erred when it "precluded cross-examination of [Ms. Carroll] regarding her false, public claim that she possessed President Trump's DNA" on the dress she was wearing the day of the 1996 assault. Appellant's Br. at 48. In a written opinion issued pretrial, the district court concluded that although Ms. Carroll's statements regarding DNA evidence were arguably relevant to Ms. Carroll's credibility, their probative value was significantly outweighed by the reasons for preclusion enumerated in Rule 403, including "unfair prejudice, confusing the issues, misleading the jury, undue delay, [and] wasting time." *Carroll v. Trump*, No. 22-cv-10016 (LAK), 2023 WL 2652636, at *7 (S.D.N.Y. Mar. 27, 2023). We see no abuse of discretion here.

In a series of tweets on her public Twitter page in 2020 and 2021, Ms. Carroll claimed that she still had the dress she was wearing when Mr. Trump assaulted her, and she believed the dress had Mr. Trump's DNA

on it.²⁷ She had had a DNA test performed on the dress, and the test showed, she said, that the dress had male DNA on it. *See* App'x at 599-601. At the outset of *Carroll I*, Ms. Carroll had requested a DNA sample from Mr. Trump for testing, seeking to confirm her belief that it was his DNA, but Mr. Trump had refused to provide a sample for over three years and did not offer to provide a sample until the eve of trial in *Carroll II*. *See generally Carroll v. Trump*, No. 22-cv-10016 (LAK), 2023 WL 2006312, at *3-6 (S.D.N.Y. Feb. 15, 2023). The district court did not abuse its discretion in precluding cross-examination of Ms. Carroll on this subject.

First, the district court determined that the probative value of this line of questioning was low, as there was no credible evidence that Ms. Carroll lied about believing that Mr. Trump's DNA was on the dress. She was simply never able to confirm or negate the basis for her belief because she was never able to obtain a sample of Mr. Trump's DNA to compare to the DNA on the dress.

²⁷ @ejeancarroll, Twitter (June 2, 2021, 12:10 PM), <https://twitter.com/ejeancarroll/status/1400122740720480262> [<https://perma.cc/W845-73S2>] ("Didn't last as long as DNA on a dress."); @ejeancarroll, Twitter (Feb. 25, 2021, 12:49 PM), <https://twitter.com/ejeancarroll/status/1364995845439901700> [<https://perma.cc/MCQ7-ZTHD>] ("Cyrus Vance, the Manhattan District Attorney, has Trump's taxes. Fani Willis, the Georgia Prosecutor, has Trump's phone call. Mary Trump has her grandfather's will. And I have the dress. Trump is basically in deep shit."); @ejeancarroll, Twitter (May 1, 2020, 3:16 PM), <https://twitter.com/ejeancarroll/status/1256301599426785280> [<https://perma.cc/PAR7-HPYM>] ("I am STILL waiting for Trump to provide his DNA sample to be tested against the dress I wore when he attacked me.").

Second, the district court also recognized that cross-examination of Ms. Carroll on this basis would have opened the door to questions about why she never conducted a DNA test with Mr. Trump's sample, whether she had tried to get a DNA sample from Mr. Trump, and why she was unable to do so. Cross-examination in this area also could have required expert testimony on DNA testing. The parties indicated to the district court that if DNA became an issue, they would seek to reopen discovery, adduce expert testimony, and engage in a new round of motions *in limine* related to this topic.

We conclude that the district court did not abuse its discretion in determining that allowing further inquiry into this area created a substantial danger of unfair prejudice, confusion, and unnecessary delay. That danger substantially outweighed any possible probative value, especially considering that the pretrial discovery period had closed by the time Mr. Trump offered to provide a DNA sample, and both parties had had ample time to develop DNA as an issue, yet both had failed to do so. Permitting cross-examination on this issue would have created a "trial within a trial" about why Ms. Carroll did not have Mr. Trump's DNA sample. *See, e.g., Ricketts v. City of Hartford*, 74 F.3d 1397, 1414 (2d Cir. 1996) (no abuse of discretion "in determining that a trial within a trial . . . would have been more confusing than helpfully probative"); *United States v. Aboumoussallem*, 726 F.2d 906, 912-13 (2d Cir. 1984) (upholding exclusion of evidence under Rule 403 where confusion and delay caused by trial within a trial would substantially outweigh the evidence's probative value).

4. Failure to File Police Report

Mr. Trump also contends that the district court erred in precluding the following question to Ms. Carroll: "How would you bringing criminal charges be disrespectful to some people at the border?" App'x at 1840. The district court stated: "Correct me if I'm wrong, counsel, but I believe in the State of New York private individuals can't bring criminal charges," and explained, "We have been up and down the mountain on the question of whether she went to the police, so let's move on." *Id.*

Mr. Trump argues that he should have been permitted to pursue this line of questioning to explore further her decision not to use formal options for reporting her allegations. Mr. Trump also argues that the district court's response improperly suggested that Ms. Carroll was powerless to file a report.

The district court did not abuse its discretion in limiting this line of questioning or in making these brief comments. Mr. Trump's arguments on this point rely on a mischaracterization of the record. The district court permitted extensive questioning on cross-examination of Ms. Carroll regarding her decision not to go to the police, and the court allowed the introduction of extrinsic evidence on this very point. By the time Mr. Trump's counsel reached this question, Ms. Carroll had already responded to at least ten questions regarding her decision not to file a police report. The federal rules instruct the district court to "exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to . . . make those procedures effective for determining the truth [and] avoid wasting time." Fed. R. Evid. 611(a). The district court was well within its discretion to bar further cumulative questioning.

5. *Bergdorf Goodman Security Footage*

Finally, the district court did not abuse its discretion when it denied Mr. Trump's counsel the opportunity to ask Ms. Carroll whether she went back to Bergdorf Goodman the "next day to . . . ask for the video camera footage." App'x at 1842.

It is well established in our circuit that "a question (which assumes a fact) may become improper on cross-examination, because it may by implication put into the mouth of an unwilling witness, a statement which he never intended to make, and thus incorrectly attribute to him testimony which is not his." *United States v. DeFillipo*, 590 F.2d 1228, 1239-40 (2d Cir. 1979) (quoting 3 Wigmore, Evidence § 780, at 171 (Chadbourn ed., rev. 1970)).

Right before this question was asked and objected to, Ms. Carroll had testified that she had "never . . . been able to verify if there were cameras in the dressing room or in the lingerie department." App'x at 1841. And not one of the witnesses who testified about the location of cameras within the store at the time in question had stated that there were cameras in either of these locations. The former store manager at Bergdorf Goodman, Cheryl Beall, testified that she thought that, at the time, there were cameras at the main entrances and exits and "in fine jewelry" but not around the escalators or in the lingerie department. *Id.* at 1557-58. Likewise, the former Senior Vice President of Administration at Bergdorf Goodman, Robert Salerno, testified that he thought there were only a few cameras in the store in the mid-1990's -- at the employee entrance, at the loading dock, and maybe in furs, and in fine jewelry. Thus, by the time this question was asked, defense counsel had elicited no proof that video cameras were installed in the

specific locations of the store where the incident occurred. Accordingly, the district court correctly determined that defense counsel's question to Ms. Carroll assumed a fact not in evidence. Moreover, notwithstanding the absence of evidence of cameras in the locations in question, Mr. Trump's counsel still emphasized this point during his closing argument. *Id.* at 2681 ("[S]he even told you she never even went back to think about looking for surveillance video at Bergdorf Goodman which would have proven her case. She didn't think about it because it never happened.").

C. No New Trial Is Warranted

Finally, Mr. Trump asserts that he is entitled to a new trial, arguing that the cumulative effect of the claimed errors affected his substantial rights. "[A]n erroneous evidentiary ruling warrants a new trial only when 'a substantial right of a party is affected,' as when 'a jury's judgment would be swayed in a material fashion by the error.'" *Lore*, 670 F.3d at 155 (quoting *Arlino*, 474 F.3d at 51). "We measure prejudice by assessing error in light of the record as a whole." *Phillips v. Bowen*, 278 F.3d 103, 111 (2d Cir. 2002) (citation omitted). And, even assuming evidentiary error, we will not grant a new trial if we find that the error was "harmless." *Cameron*, 598 F.3d at 61. We will deem an evidentiary error harmless if we conclude that the proof at issue was "unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." *Yates v. Evatt*, 500 U.S. 391, 403 (1991).

As we have discussed, the district court did not abuse its discretion in making any of the challenged evidentiary rulings. The jury made its assessment of the facts and claims on a properly developed record. Even assuming *arguendo* that the district court erred

in some of these evidentiary rulings -- a proposition that we have rejected -- taking the record as a whole and considering the strength of Ms. Carroll's case, we are not persuaded that any claimed error or combination of errors in the district court's evidentiary rulings affected Mr. Trump's substantial rights. *Lore*, 670 F.3d at 155.

CONCLUSION

For the reasons set forth above, the judgment of the district court is AFFIRMED.

64A

APPENDIX B

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

No. 22-cv-10016 (LAK)
March 20, 2023

E. JEAN CARROLL,
Plaintiff,

v.

DONALD J. TRUMP,
Defendant.

**MEMORANDUM AND ORDER ON
DEFENDANT’S *IN LIMINE* MOTION**

LEWIS A. KAPLAN, *District Judge.*

Donald J. Trump is accused in this case (“*Carroll II*”) and a second very closely related case (“*Carroll I*”) of having raped E. Jean Carroll in the mid 1990s.¹ In

¹ The Court assumes familiarity with its decisions in both actions. Doc. No. 20-cv-7311 (*Carroll I*), Dkt 32, *Carroll v. Trump*, 498 F. Supp. 3d 422 (S.D.N.Y. 2020), *rev’d in part, vacated in part*, 49 F.4th 759 (2d Cir. 2022); *Carroll I*, Dkt 73, *Carroll v. Trump*, 590 F. Supp. 3d 575 (S.D.N.Y. 2022); *Carroll I*, Dkt 96, *Carroll v. Trump*, No. 20-cv-7311 (LAK), 2022 WL 6897075 (S.D.N.Y. Oct. 12, 2022); *Carroll I*, Dkt 145, *Carroll v. Trump*, No. 20-cv-7311 (LAK), 2023 WL 2441795 (S.D.N.Y. Mar. 10, 2023); Dkt 56, *Carroll v. Trump*, No. 22-CV-10016 (LAK), 2023 WL 2006312 (S.D.N.Y. Feb. 15, 2023); Dkt 38, *Carroll v.*

both cases, plaintiff E. Jean Carroll claims Mr. Trump defamed her in public statements in response to Ms. Carroll's rape accusation against him. In this action, Ms. Carroll seeks also to recover damages and other relief for the alleged rape pursuant to a newly-enacted New York law, the Adult Survivors Act, which created a "window" within which adult survivors could sue their assaulters without regard to the otherwise applicable statute of limitations.

The matter now is before the Court on Mr. Trump's *in limine* motion to exclude from evidence and/or preclude at the trial of this case:

- (1) evidence relating to Mr. Trump's alleged interactions with Ms. Natasha Stoyanoff and Jessica Leeds;
- (2) short excerpts of videos of remarks by Mr. Trump during the 2016 presidential campaign;
- (3) evidence relating to the so-called *Access Hollywood* tape, including the tape itself; and
- (4) the testimony of two of Ms. Carroll's proposed witnesses, Ms. Cheryl Lee Beall and Mr. Robert Salerno.²

Mr. Trump moved also to exclude (1) through (3) in *Carroll I*. This Court denied Mr. Trump's motion as to

Trump, No. 22-cv-10016 (LAK), 2023 WL 185507 (S.D.N.Y. Jan. 13, 2023).

Except where preceded by “*Carroll I*”, “Dkt” references are to the docket in this case.

² Dkt 69.

Mr. Trump moved also to exclude evidence of emotional and psychological harm at the trial of this case, but subsequently withdrew that request. Dkt 89 at 8.

(1) and (3) and deferred ruling on (2) until trial.³ The evidentiary rulings made in *Carroll I* as to (1) through (3) are entirely applicable here. There is no reason, and Mr. Trump has made no persuasive argument, for me to rule differently.⁴

Mr. Trump's only remaining claim – which he did not raise in *Carroll I* – is that Ms. Beall and Mr. Salerno should be precluded from testifying at trial. These witnesses formerly were employed at Bergdorf Goodman, the New York department store where Ms. Carroll alleges Mr. Trump sexually assaulted her. Mr. Trump argues that they should be excluded pursuant to Federal Rule of Civil Procedure 37(c)(1) because they are “ ‘surprise’ witnesses” who were not timely

³ *Carroll*, 2023 WL 2441795 at *8-9.

⁴ Mr. Trump in this motion adds to his *Carroll I* position the argument that Ms. Stoyneff's testimony is not admissible because in *Rapp v. Fowler*, No. 20-cv-9586 (LAK), 2022 WL 5243030 (S.D.N.Y. Oct. 6, 2022), this Court determined that a witness's proposed testimony that the defendant's “hand was on [the witness's] leg ... about two inches above [his] knee” was not evidence of an “other sexual assault” under Rule 415 “regardless of any question of intent.” *Rapp*, 2022 WL 5243030 at *2; Dkt 89 (Def. Reply Mem.) at 9. Mr. Trump's equation of the two cases fails for two reasons. First, the evidence and circumstances of Mr. Trump's alleged encounter with Ms. Stoyneff – including her testimony that he “groped” her – are materially different from the proposed testimony in *Rapp*. Second, in *Rapp*, the Court determined that the testimony was not evidence of an other sexual assault under the definitions in 18 U.S.C. chapter 109A. That analysis was unnecessary with respect to Ms. Stoyneff because the Court determined that a jury reasonably could conclude that Mr. Trump's alleged conduct toward Ms. Stoyneff was an other sexual assault within the meaning of Rules 415 and 413 and would constitute a crime under Florida law. *See Carroll I*, Dkt 145 at 13-15; *Carroll*, 2023 WL 2441795 at *5-6.

disclosed.⁵ His claim fails as to both proposed witnesses.

Ms. Beall

Ms. Beall was an employee at Bergdorf Goodman at the time Mr. Trump allegedly raped Ms. Carroll in the store. She is expected to give “testimony regarding the Bergdorf Goodman store in the relevant time period, including the store's operations and layout, as well as Mr. Trump's presence at the store.”⁶ Ms. Beall first was disclosed to Mr. Trump on October 14, 2022 in Ms. Carroll's Rule 26(a) disclosures in *Carroll I*. She again was disclosed to Mr. Trump in *Carroll II* before the January 9, 2023 deadline set in *Carroll II* by this Court.

Mr. Trump seeks to preclude Ms. Beall from testifying pursuant to Rule 37(c)(1). Rule 37(c)(1) provides that:

“If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.”⁷

“The party seeking Rule 37 sanctions bears the burden of showing that the opposing party failed to

⁵ Dkt 70 (Def. Mem. of Law) at 2.

⁶ Dkt 77 (Pl. Mem. of Law) at 3.

⁷ Fed. R. Civ. P. 37(c)(1).

timely disclose information.”⁸ So the logical starting point is Ms. Carroll's obligations under Rules 26(a) and (e).

Rule 26(a)(1)(A) in relevant part provides that “a party must, without awaiting a discovery request, provide to the other parties: (i) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment.”⁹ The timing of the required disclosure is fixed by Rule 26(a)(1)(C), which in relevant part states that “[a] party must make the initial disclosures at or within 14 days after the parties' Rule 26(f) conference unless a different time is set by stipulation or court order.”¹⁰ In this case, the Court fixed the deadline for Rule 26(a) disclosures in *Carroll II* as January 9, 2023.¹¹ It is undisputed that Ms.

⁸ *A.V.E.L.A., Inc. v. Est. of Monroe*, No. 12-cv-4828 (KPF)(JCF), 2014 WL 715540, at *4 (S.D.N.Y. Feb. 24, 2014), *adhered to on reconsideration*, No. 12-cv-4828(KPF)(JCF), 2014 WL 1408488 (S.D.N.Y. Apr. 11, 2014); *see also In re Sept. 11th Liab. Ins. Coverage Cases*, 243 F.R.D. 114, 125 (S.D.N.Y. 2007) (“The moving party bears the burden of showing that its adversary failed timely to disclose information required by Rule 26.”).

⁹ Fed. R. Civ. P. 26(a)(1)(A).

¹⁰ Fed. R. Civ. P. 26(a)(1)(C).

¹¹ Dkt 19 ¶ 7.

Carroll disclosed Ms. Beall in her Rule 26(a) disclosures on that date.¹²

Mr. Trump nevertheless contends, in a somewhat convoluted argument, that the January 9 disclosure was untimely. The contention is that “the operative deadlines [in this case, *Carroll II*] are those set forth in *Carroll I*.”¹³ Mr. Trump points to the fact that Ms. Carroll disclosed Ms. Beall in *Carroll I* in her second supplemental disclosures pursuant to Rule 26(e) merely five days before the close of discovery in that case, which Mr. Trump argues was “untimely and long delayed.”¹⁴ “[D]iscovery in *Carroll II* [(the argument continues)] [was] ‘limited to’ ‘damages ... allegedly suffered by plaintiff as a result of the alleged sexual assault as distinguished from the defamation alleged in *Carroll I*, and the October 12, 2022 statement’ ” that is the subject of the alleged defamation at issue in this case, *Carroll II*.¹⁵ Therefore, he contends, Ms. Carroll's January 9 disclosure in this case of Ms. Beall was untimely. But Mr. Trump's argument entirely ignores how the limitation of discovery in *Carroll II* came about and ignores the actual extent of the limitation.

¹² Dkt 78 (Crowley Decl.) ¶ 7, Dkt 78-1 (Ex. 1) at 4; *see also* Dkt 89 (Def. Reply Mem.) at 1-2.

¹³ Dkt 70 (Def. Mem. of Law) at 3.

¹⁴ *Id.*

Rule 26(e) requires a party to “supplement or correct its disclosure [under Rule 26(a)] ... in a timely manner if the party learns that in some material respect the disclosure ... is incomplete or incorrect.” Fed. R. Civ. P. 26(e).

¹⁵ *Id.* (quoting Dkt 19 (Pretrial and Scheduling Order)).

The scheduling orders in *Carroll I* imposed deadlines for the completion of depositions and of all discovery of October 19 and November 16, 2022, respectively.¹⁶ Both dates preceded the filing of this action, *Carroll II*, on November 24, 2022. From the outset of *this* case, it thus appeared that all discovery concerning the core issue in this case – whether Mr. Trump sexually assaulted Ms. Carroll – had been completed in *Carroll I* because that issue is common to *Carroll II* and discovery in *Carroll I* had been concluded. The Court therefore set a scheduling conference and directed the parties to submit a discovery plan for *Carroll II* containing “[a] detailed statement of what specific discovery that was not conducted in *Carroll I* is needed for the prosecution or defense of this case and the basis for the contention that it is needed.”¹⁷ The parties' written submission diverged as to the scope of additional discovery need for *Carroll II*.

Ms. Carroll took the position that discovery should be limited to the new issues first raised in *Carroll II* – essentially to damages attributable to the alleged sexual assault as well as the circumstances of and damages attributable to the new defamation claim.¹⁸ She contended that “[a]ny further discovery into whether Defendant sexually assaulted Plaintiff, the defamatory statements at issue in *Carroll I*, or the damages caused by those statements, should not be

¹⁶ *Carroll I*, Dkts 76, 77; *Carroll I*, Dkt 100 (reiterating discovery deadlines).

¹⁷ Dkt 10.

¹⁸ Dkt 16 at 3-4.

permitted since those topics were fully explored in both fact and expert discovery.”¹⁹

Mr. Trump agreed with Ms. Carroll's position as to discovery concerning new issues raised by *Carroll II*, but contended that he should be permitted to take “further discovery into the purported facts of the alleged incident.”²⁰ His written submission, however, did not specify any additional discovery he sought with respect to the occurrence of the alleged sexual assault as opposed to the damages claimed as a result.²¹ And while the Court pressed Mr. Trump's counsel at the conference in an effort to determine what if any additional discovery was sought concerning the alleged sexual assault itself, his counsel identified none.²² Accordingly, the pretrial

¹⁹ *Id.* at 3.

²⁰ *Id.* at 4-5.

²¹ *Id.*, *id.* at 5 n.3 (“Specifically, Defendant's additional discovery efforts shall include, but not be limited to, (1) written discovery regarding the newly-raised issues; (2) conducting an Independent Medical Examination of Plaintiff in accordance with Federal Rule 35, as Plaintiff has plainly put her physical and/or mental condition ‘in controversy’ in this action. *See* FRCP 35; (3) the report of Defendant's own forensic expert; (4) a report from Defendant's original damages expert, who will offer expert testimony demonstrating that Plaintiff was not damaged by Defendant's October 12, 2022 statement; and (5) conducting additional depositions of Plaintiff and potential additional non-party witnesses *with respect to the new issues raised in Carroll II.*”) (second emphasis added). No mention was made of any additional non-party witnesses with respect to the occurrence of the alleged sexual assault.

²² Dkt 24 (Tr., Dec. 21, 2022) at 4:24-9:20.

and scheduling order issued on December 21, 2022 provided in relevant part:

“2. * * * On the basis of the parties' written and oral submissions, the Court has concluded that the only such issues [(i.e., new issues raised by *Carroll II*)] are damages, including emotional or psychological damages, allegedly suffered by plaintiff as a result of the alleged sexual assault as distinguished from the defamation alleged in *Carroll I*, and the defendant's October 12, 2022 statement. *Unless otherwise ordered*, discovery will be limited to those subjects.”²³

In these circumstances, Mr. Trump's argument is without merit. First of all, even if he first had learned of Ms. Beall as a prospective witness on January 9, 2023, the date of Ms. Carroll's Rule 26(a) disclosure in this case, he could have sought an order under paragraph 2 of the pretrial and scheduling order permitting him to take her deposition. But he did not do so. Instead, he waited and then, on February 23, 2023, moved to preclude her from testifying.

Even more striking, Mr. Trump learned of Ms. Beall as a prospective witness months before January 9, 2023. The fact that Ms. Beall was a potential witness on the subjects of the Bergdorf store and of Mr. Trump's presence there concededly has been known to Mr. Trump's counsel at least since October 14, 2022.²⁴ They elected not to take her deposition in

²³ Dkt 19 (emphasis added).

²⁴ This was revealed to him on that date by the service of Ms. Carroll's supplemental disclosures in *Carroll I*, as mentioned above. Dkt 71 (Habba Decl.) ¶ 6, Dkt 71-3 (Ex. C) at 2-4. *Accord*, Dkt 78 (Crowley Decl.) ¶¶ 3-4.

Carroll I, which they almost certainly could have done.²⁵ And when asked in *Carroll II* what if any additional discovery they wished to take in this action, they never even mentioned Ms. Beall despite a court order requiring “[a] detailed statement of what specific discovery that was not conducted in *Carroll I* is needed for the prosecution or defense of this case and the basis for the contention that it is needed.”²⁶ Moreover, in making the present argument based on the limitation of discovery in *Carroll II*, they fail to mention that the pretrial and scheduling order permitted them to seek leave to take her deposition notwithstanding the limitation. But they did not do so.

In sum, the Rule 26(a) disclosure of Ms. Beall in *Carroll II* was timely. Even if it were not, Mr. Trump would not have been prejudiced.

²⁵ Mr. Trump claims that the October 14 disclosure of Ms. Beall in *Carroll I* came only five days before the fact discovery cutoff in that case, which he argues “provided [him] with little to no opportunity to subpoena her deposition within the relevant discovery time frame.” Dkt 70 at 2-3, Dkt 89 at 3. Although his first claim is accurate literally, the conclusion he drew from it is not. For one thing, he could have sought Ms. Beall's deposition short notice. Moreover, while fact depositions were to have been completed by October 19, 2022, the overall discovery deadline was November 16, 2022, and expert depositions were permitted to continue during the intervening period. *Carroll I*, Dkts 76, 77. Had Mr. Trump applied to take Ms. Beall's deposition after October 19 on the basis that he first had learned of her existence on October 14, his application almost certainly would have been granted. In any case, responsibility for Mr. Trump's failure to take Ms. Beall's deposition in *Carroll I* lies with Mr. Trump.

²⁶ Dkt 10.

Mr. Salerno

Mr. Salerno, who also was an employee at Bergdorf Goodman, is expected to testify on similar subjects as Ms. Beall. As with Ms. Beall, Ms. Carroll timely disclosed Mr. Salerno in her Rule 26(a) initial disclosures in *Carroll II* on January 9, 2023, the deadline set by the Court.²⁷

Mr. Trump nevertheless argues that Mr. Salerno should be precluded from testifying because (1) he was disclosed after the close of fact discovery in *Carroll I*, and (2) his proposed testimony falls outside of the scope of discovery permitted in *Carroll II*.²⁸

The first argument clearly is without merit because the issue here is whether Ms. Carroll failed to discharge her disclosure obligations in this case, not *Carroll I*. As already stated, the disclosure in this case was timely made on January 9, 2023.

Mr. Trump's second argument is essentially a reprise of part of his argument with respect to Ms. Beall – a deposition of Mr. Salerno would not have been within the limited the scope of discovery set out in the pretrial and scheduling order and he therefore

²⁷ Dkt 78 (Crowley Decl.) ¶¶ 6-7, Dkt 78-1 (Ex. 1) at 2-4. That disclosure, moreover, was made approximately two weeks after Ms. Carroll's counsel's initial telephone call with Mr. Salerno and only three days after her counsel learned that he was willing to testify. *Id.*

She disclosed Mr. Salerno as a potential witness in *Carroll I* in her third supplemental disclosures pursuant to Rule 26(e) on January 6, 2023. That disclosure was timely in that case under Rule 26(e) because of the aforementioned speed with which it was made.

²⁸ Dkt 70 at 3-4.

could not have deposed Mr. Salerno. But that order, as discussed above, did not absolutely prohibit a deposition of Mr. Salerno (or, for that matter, any other) witness with respect to the alleged sexual assault. It limited the scope of discovery to the new issues raised by *Carroll II* “*unless otherwise ordered.*”²⁹ But at no point after Mr. Trump learned of Mr. Salerno as a potential witness did Mr. Trump seek relief from this Court prior to moving *in limine* to preclude Mr. Salerno from testifying at trial.³⁰ As evidenced by Mr. Trump's discovery-related requests in this action after that order, he has not been reticent in seeking leave to amend this Court's discovery schedule in matters purportedly important to him.³¹ Yet he made no such attempt with respect to Mr. Salerno. Any prejudice Mr. Trump claims he would suffer therefore would be a product of his own failure to seek a deposition of Mr. Salerno since early January, when Ms. Carroll timely made her Rule 26(a) disclosure in this case.

²⁹ Dkt 19 at 2 (emphasis added).

³⁰ According to Ms. Carroll's counsel, the only actions Mr. Trump appears to have taken with respect to Ms. Beall and Mr. Salerno were on February 17, 2023, when “two men visited [Ms.] Beall at her home, indicating that they were there to investigate on [Mr.] Trump's behalf, and ... [Mr.] Salerno receive[d] a telephone call from someone purporting to investigate the case around the same time.” Dkt 77 at 4, n.1. Mr. Trump's counsel did not address these alleged interactions in their briefs.

³¹ *E.g.*, Dkt 48 (Mr. Trump's motion to adjourn deadline with respect to Mr. Trump's psychiatric expert); Dkt 51 (Mr. Trump's motion to compel production of an appendix to a DNA report obtained by Ms. Carroll in January 2020).

Conclusion

Mr. Trump's *in limine* motion (Dkt 69) is denied in all respects. This ruling is without prejudice to Mr. Trump renewing his objection to the campaign speech excerpts in the event they are offered at trial. Unless otherwise ordered, those excerpts shall not be mentioned in opening statements.

SO ORDERED.

Dated: March 20, 2023

/s/ Lewis A. Kaplan

Lewis A. Kaplan

United States District Judge

77A

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 22-cv-10016 (LAK)
March 27, 2023

E. JEAN CARROLL,
Plaintiff,

v.

DONALD J. TRUMP,
Defendant.

MEMORANDUM AND ORDER ON
PLAINTIFF'S *IN LIMINE* MOTION

LEWIS A. KAPLAN, *District Judge.*

Plaintiff moves *in limine* for an order (1) adopting the evidentiary rulings recently made in *Carroll v. Trump*, 20-cv-7311 (LAK) ("*Carroll I*"), (2) precluding the testimony of Mr. Trump's purported rebuttal expert, Robert J. Fisher, and (3) ruling on two contested and a number of uncontested requests made in *Carroll I* and incorporated by reference in this case. The motion is granted in part and denied in part.

Carroll I Evidentiary Rulings

The analysis of the evidentiary issues resolved in *Carroll I*¹ is entirely applicable here with one minor exception. The exception is the issue of whether *Carroll I* is based on an alleged sexual assault because *Carroll I* asserts only a defamation claim. But this case, unlike *Carroll I*, contains a claim for what, if it occurred, undeniably was a sexual assault. Hence, the “based on” analysis in the *Carroll I* decision² has no bearing here. Accordingly, all of the evidentiary rulings previously made in *Carroll I* apply here.

Mr. Fisher

The Proposed Testimony

Ms. Carroll intends to call as an expert witness Professor Ashlee Humphreys, Ph.D. Dr. Humphreys intends to testify principally on the extent of the dissemination of Mr. Trump's allegedly defamatory statement of October 12, 2022, the damage, if any, of Mr. Trump's statement to Ms. Carroll's reputation and “person brand,”³ and the means and costs of repairing that damage.⁴ Mr. Trump seeks to call Robert J. Fisher as an expert witness, purportedly to

¹ *Carroll I*, Dkt 145; *Carroll v. Trump*, No. 20-cv-7311 (LAK), 2023 WL 2441795 (S.D.N.Y. Mar. 10, 2023).

Except where preceded by “*Carroll I*,” “Dkt” references are to the docket in this case.

² *Carroll I*, Dkt 145 at 6-7; *Carroll*, 2023 WL 2441795 at *2-3.

³ According to Dr. Humphreys, “[p]erson brands are well-known people who also possess a set of brand meanings and associations that have value.” Dkt 74-3 (Humphreys Rep.) at 4.

⁴ Dkt 74-3 (Humphreys Rep.) at 2-5 and *passim*.

rebut Dr. Humphreys's conclusions. Ms. Carroll seeks the exclusion of Mr. Fisher's testimony on the grounds that (1) it would not be proper rebuttal testimony, (2) defendant has failed to establish that Mr. Fisher's methods in arriving at his opinions are reliable and, in any case, (3) each portion of his proposed testimony is inadmissible for other reasons.⁵

Is Mr. Fisher a Rebuttal Expert?

The dispute regarding whether Mr. Fisher would be a proper witness to rebut Dr. Humphreys's opinions, or something else instead, is significant because there are procedural differences between principal and rebuttal experts. These are spelled out in Ms. Carroll's motion papers, not disputed by Mr. Trump, and need not be discussed here in detail.⁶ Ms.

⁵ Ms. Carroll moved *in limine* also to exclude Mr. Fisher's testimony in *Carroll I*, where he was hired by Mr. Trump also purportedly to rebut Dr. Humphreys's conclusions with respect to the harm, if any, to Ms. Carroll's reputation caused by Mr. Trump's June 2019 statements. Although the two sets of reports – like the two cases – are closely related, this case concerns only Mr. Fisher's and Dr. Humphreys's reports and testimony submitted in *Carroll II* with respect to Mr. Trump's October 12, 2022 statement.

⁶ Dkt 73 (Pl. Mem.) at 4-7.

It suffices to say here that (1) a party is not obligated to identify a rebuttal expert and to disclose information concerning that witness and the proposed testimony until closer to trial compared to when it is obliged to disclose such information regarding experts called on its case-in-chief, and (2) the party against whom a rebuttal witness is called has less opportunity to respond to a rebuttal witness than it would have had if the witness were called on the calling party's case-in-chief. Fed. R. Civ. P. 26(a)(2)(D) (providing that a party must disclose expert testimony “(i) at least 90 days before the date set for trial or for the case to be ready for trial; or (ii) if the evidence is intended

Carroll's point is essentially that Mr. Fisher's deposition testimony and his report make very clear that he was not hired to rebut Dr. Humphreys's proposed testimony and did not view that as his assignment. Moreover, the vast bulk of Mr. Fisher's report, Ms. Carroll's argument goes, has nothing to do with Dr. Humphreys's opinions.

There is a great deal of merit to Ms. Carroll's argument. Indeed, Mr. Fisher testified at his deposition, to cite but one example, as follows:

“Q. Are there any parts of Professor Humphreys’ *Carroll II* report that you sought to rebut in connection with your *Carroll II* report?

“A. No, not at all. But I did – I do have a section in this report ... that does discuss Ms. Carroll's expert, but most of that is information derived from the first report, is basically on her views and opinions. I did put one paragraph into this report. The only thing I picked out of that report in skimming it was a statistic that she had related to the number of people that might be influenced by Mr. Trump's comments. And

solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure”); *Ebbert v. Nassau Cnty.*, No. 05-cv-5445 (FB) (AKT), 2008 WL 4443238, at *14 (E.D.N.Y. Sept. 26, 2008) (“The Court finds that [p]laintiff is prejudiced by the very fact that [her expert] did not have an opportunity to respond to the new material contained in [defendant's expert's] [r]ebuttal [r]eport and [d]efendants took no steps to cure this prejudice.”).

that's near the end of the report. You know, I just made a reference[.]”⁷

Federal Rule of Civil Procedure 26 defines rebuttal expert testimony as testimony “intended solely to contradict or rebut evidence on the same subject matter identified [in the expert testimony offered] by another party.”⁸ “[T]he [rebuttal] expert's testimony should be to ‘explain, repel, counteract or disprove evidence’ presented by the expert to whom he or she is responding.”⁹

Mr. Fisher addresses Dr. Humphreys's findings and conclusions in the last few pages of his report.¹⁰ He (1) opines that Dr. Humphreys is not qualified to testify as to reputation damage or repair, (2) evaluates and critiques Dr. Humphreys's proposal for reputational repair, specifically her emphasis on social media, (3) comments on Dr. Humphreys's

⁷ Dkt 74-1 (Fisher Dep.) at 52:9-25.

⁸ Fed. R. Civ. P. 26(a)(2)(D)(ii).

⁹ *Faulkner v. Arista Recs. LLC*, 46 F. Supp. 3d 365, 386 (S.D.N.Y. 2014) (quoting *Marmo v. Tyson Fresh Meats, Inc.*, 457 F.3d 748, 759 (8th Cir. 2006)).

¹⁰ Dkt 87-4 (Fisher Rep.) at 22-24.

The testimony Mr. Fisher offers in rebuttal responds to findings and conclusions common to Dr. Humphreys's reports in both cases. Although the citations to certain statements in his report are to Dr. Humphreys's report in *Carroll I*, the same statements — with one exception — appear also in Dr. Humphreys's report in *Carroll II*. As a result, Mr. Fisher's admissions in his deposition that he did not seek to rebut Dr. Humphreys's report in this case is not dispositive of whether any of his proposed testimony properly constitutes rebuttal testimony.

finding that only approximately 21.42 percent of those people exposed to Mr. Trump's October 12, 2022 statement, the alleged defamation in *Carroll II*, would have been receptive to it, and (4) concludes that Ms. Carroll “benefitted from this public dispute in terms of increased positive exposure for her as a professional and positive enhancement of her personal character and reputation.”¹¹ With the exception of Mr. Fisher's views of Dr. Humphreys's qualifications, which are not proper subjects of expert testimony at all,¹² these aspects of Mr. Fisher's proposed testimony would be proper rebuttal to the extent that they rest on reliable methodology.¹³

That said, the rest of Mr. Fisher's report is not rebuttal of Dr. Humphreys. It contains a mixture of legal opinions – including his views as to the elements of defamation and whether the alleged false statements are defamatory under New York law,¹⁴ that his proposed testimony satisfies Federal Rule of Evidence 702¹⁵ and that one of the allegedly

¹¹ *Id.*

¹² *Capri Sun GmbH v. Am. Beverage Corp.*, 595 F. Supp. 3d 83, 142 (S.D.N.Y. 2022), *motion to certify appeal denied*, No. 19-cv-1422(PAE)(VF), 2022 WL 3137131 (S.D.N.Y. Aug. 5, 2022) (“[A]t trial, [defendant's expert] may not opine on the qualification of another expert to testify on a particular subject.... That ... is a judicial function....”).

¹³ As the issue of Mr. Fisher's qualifications have not been raised on this motion, I do not now address that question.

¹⁴ Dkt 87-4 (Fisher Rep.) at 14, 24.

¹⁵ *Id.* at 13.

defamatory statements “was clearly an opinion”¹⁶ – as well as arguments about the evidence (including that there is no evidence that Mr. Trump knew the falsity of his statements¹⁷ or that “[Mr. Trump and Ms. Carroll] met at [Bergdorf]”¹⁸), and sundry other things. None of these is a proper subject of expert testimony either on a party's case-in-chief or in rebuttal. Hence, I turn to the small part of the proposed testimony that in substance is arguably proper rebuttal testimony to determine whether it is inadmissible on other grounds.

Standard for Reliability of Expert Testimony

Trial courts are required to ensure that any expert testimony that is admitted is relevant and reliable.¹⁹ Under Federal Rule of Evidence 702, expert testimony is admissible if:

“(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

“(b) the testimony is based on sufficient facts or data;

¹⁶ *Id.* at 16.

¹⁷ *Id.* at 14-16.

¹⁸ *Id.* at 16.

¹⁹ *Scott v. Chipotle Mexican Grill, Inc.*, 315 F.R.D. 33, 42 (S.D.N.Y. 2016) (“Trial courts serve as gatekeepers for expert evidence and are responsible for ‘ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand.’”) (quoting *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993)).

“(c) the testimony is the product of reliable principles and methods; and

“(d) the expert has reliably applied the principles and methods to the facts of the case.”²⁰

“When evaluating the reliability of an expert's testimony, the court must ‘undertake a rigorous examination of the facts on which the expert relies, the method by which the expert draws an opinion from those facts, and how the expert applies the facts and methods to the case at hand.’”²¹ A district court “must focus on the ‘principles and methodology’ employed by the expert, not on the conclusions reached.”²² Where the expert's testimony does not rely on scientific methods, “the court may permit testimony ‘where a proposed expert witness bases her testimony on practical experience rather than scientific analysis.’”²³ Courts have excluded rebuttal testimony where the rebuttal expert “failed to employ a reliable methodology or illustrate how [the expert's] experience informed [his or her] analysis”²⁴ or where

²⁰ Fed. R. Evid. 702.

²¹ *Scott*, 315 F.R.D. at 43 (quoting *Amorgianos v. National R.R. Passenger Corp.*, 303 F.3d 256, 267 (2d Cir. 2002)).

²² *In re Rezulin Prod. Liab. Litig.*, 309 F. Supp. 2d 531, 540 (S.D.N.Y. 2004) (quoting *Daubert*, 509 U.S. at 595).

²³ *Scott*, 315 F.R.D. at 43 (quoting *Davis v. Carroll*, 937 F.Supp.2d 390, 412 (S.D.N.Y. 2013)).

²⁴ *Scott*, 315 F.R.D. at 44 (citing *Cospelich v. Hurst Boiler & Welding Co., Inc.*, 08-cv-46(LG)(JMR), 2009 WL 8599064, at *2 (S.D. Miss. July 7, 2009)).

the rebuttal expert “was unable to articulate a specific process or methodology by which [the expert] reached [his or her] conclusions.”²⁵

Reliability of Mr. Fisher's Proposed Rebuttal Testimony

Mr. Fisher's conclusion that Ms. Carroll “benefitted from this public dispute in terms of increased positive exposure for her as a professional and positive enhancement of her personal character and reputation,”²⁶ if received in evidence, would contradict Dr. Humphreys's conclusion that Mr. Trump's October 12 statement “caused short- and long-term harm to Ms. Carroll's person brand” and that her “reputational value has been diminished due to [Mr. Trump's] [s]tatement.”²⁷ His purported explanation of this conclusion discusses Ms. Carroll's preexisting “positive public profile,” certain public perceptions of Mr. Trump and his “perceived public reputation for inappropriate sexual contact with women,” the Me Too movement, and Ms. Carroll's public exposure and her “[p]ositive [m]edia [e]xposure” following her public rape accusation against Mr. Trump.”²⁸ And while Mr. Fisher is entitled to his personal opinion, the question here is whether that personal opinion reflects the application of a reliable methodology, as it must be in order for

²⁵ *Id.* (citing *Rondor Music Int'l Inc. v. TVT Records LLC*, 05-cv-2909(JTL), 2006 WL 5105272, at *3 (C.D. Cal. Aug. 21, 2006)).

²⁶ Dkt 87-4 (Fisher Rep.) at 24.

²⁷ Dkt 74-3 (Humphreys Rep.) at 5.

²⁸ Dkt 87-4 (Fisher Rep.) at 18-21.

him to be permitted to express that opinion to the jury. And Mr. Fisher has made clear that it does not.

Mr. Fisher states in his report that “the methodology [he] used in this case is consistent with that which is standard operating procedure that public relations and communications professionals as well as expert witnesses use when addressing issues and situations for clients like those in this case....”²⁹ This methodology purportedly includes, *inter alia*, “[a]pplying the principles of negative communications to this case as appropriate” and “follow[ing] peer accepted procedures in both the public relations and expert witness professions as to how to analyze and assess situations which negatively impact reputations as well as devise strategies, plans and actions to restore them.”³⁰ Nowhere, however, does he explain what the “peer accepted procedures” or “principles of negative communications” are, let alone how his application of those procedures and principles led him to his conclusion. He states also that his “input in this report [is] based on the information [he] obtained and reviewed in this case,” which consists of (1) litigation documents in *Carroll I* and *Carroll II*, (2) a total of *six* media articles about Ms. Carroll and/or these cases, and (3) whatever he saw in his “[i]nternet [r]esearch,” on which he testified he spent “at most an hour” and apparently simply “Googled” Ms. Carroll.³¹ In short, there is no reliable basis for Mr. Fisher's conclusion. Indeed, when asked during his deposition how he

²⁹ *Id.* at 12.

³⁰ *Id.* at 13.

³¹ *Id.*; Dkt 74-1 (Fisher Dep.) at 47:1, 148:10-11.

reached his conclusion that Ms. Carroll experienced a “net benefit” from her dispute with Mr. Trump, he testified:

“A. * * * I think that factoring in common sense and logic, a lot of positive things would have come out from his, for lack of a better word, tirade against her based on her comments that he raped her.

“Q. Is there any data that supports that conclusion?

“A. Not data, no. There are no data. It's just -- you know, it's just basic in my assessment based on my background and expertise and experience in the field of communications particularly as it relates to * * *”³²

He further explained:

“Q. So besides that sort of personal experience you had [], did you -- is there any data to quantify the media coverage that Ms. Carroll received after Mr. Trump's defamation as compared to before?

“A. Well, I think, yes. I think if you're just doing an analysis or Google or something like that, you can see that there weren't hardly any articles on her prior to the Trump incident, for lack of a better word, and now -- exponentially her visibility has risen tremendously. I mean, the bottom line -- I just used myself as an example because I had never heard of her before I started reading articles about Trump being accused of rape and whatever. And most

³² Dkt 74-1 (Fisher Dep.) at 130:14-25.

of those articles, and I did analysis in this report which is in the next section, by the way, on 20 here is that the

* * *

“A. [Question omitted from record filed with the Court] ... No. From looking online and looking at the first ten pages of her Google presence, it was clear that there was a tremendous increase in articles about her or exposure than there was prior to that.

“Q. By looking -- by your reference to looking at the first ten pages of Google, you just mean the nature of the search results that you would see if you put in E. Jean Carroll's name in Google?

“A. Yeah, in other words, you know, each page has 10 to 12 things on it and you go through pages 2, 3, 4, 5. You know, I saw other references to Ms. Carroll but not nearly the weight of the exposure she received after she came forward to accuse Mr. Trump of rape.”³³

Mr. Fisher's blanket invocation of his experience in the communications field to justify his conclusion does not suffice. Instead, an “expert must ‘show how his or her experience ... led to his conclusion,’ ”³⁴ which Mr. Fisher has not. His observation that he saw more Google search results mentioning Ms. Carroll after she publicly accused Mr. Trump of rape and his

³³ *Id.* at 195:7-25, 197:1-17.

³⁴ *In re Methyl Tertiary Butyl Ether (“MTBE”) Prod. Liab. Litig.*, No. 1:00-1898, 2008 WL 1971538, at *6 (S.D.N.Y. May 7, 2008) (quoting *SR Int’l Bus. Ins. Co., Ltd. v. World Trade Ctr. Props., LLC*, 467 F.3d 307, 132 (2d Cir. 2006)).

discussion in his report of four news articles with positive comments on Ms. Carroll after her public accusation, in the perhaps one hour he spent on his Googling, also do not make his methodology reliable.³⁵ The number of Google hits in a brief search, without any investigation of the nature of those results or the full extent of the relevant universe of results, says nothing about whether Ms. Carroll has had more positive compared to negative or neutral media coverage after her public accusation against Mr. Trump. Four news articles with positive comments, or even the six news articles in total cited in his report, are insufficient to support a conclusion that Ms. Carroll has experienced a “net benefit” from her dispute with Mr. Trump. The other elements of his analysis fare no better. The gist of his reasoning – essentially that more people think favorably of Ms. Carroll than they do of Mr. Trump, and therefore she has benefitted more than she has suffered from Mr. Trump's remarks – lacks the kind of foundation in facts, evidence, and/or experience that is demanded of expert witnesses. It is also unresponsive to the key issue on which he purportedly would be called – whether and to what extent Ms. Carroll was harmed by Mr. Trump's allegedly defamatory statement.

Mr. Fisher's other rebuttal testimony similarly is unreliable. Mr. Fisher does not explain how his experience informs his criticisms of Dr. Humphreys's proposal for reputation repair. Nor does he rely on any specific facts, data, or evidence. Indeed, his entire analysis of Dr. Humphreys's proposal for reputation repair contains no citation other than to Dr.

³⁵ Dkt 87-4 (Fisher Rep.) at 20-21 (discussion of four news articles).

Humphreys's report.³⁶ As a result, it is unclear how he reached his conclusions that “[t]he most successful type of communications program features dissemination of information through multiple communications channels giving each sufficient budget to effectively ensure all bases are covered in terms of reaching the target audiences,” the “relatively small size of the audience that can be impacted or influenced by [Dr. Humphreys's proposal],” that “there is no need for a massive online and social media campaign ... when the mass media would give coverage for free....,” or that, if Ms. Carroll wins, “the positive outcome of the litigation would significantly repair her reputation and a program would only be needed to build on that news and lessen the need for such a major program.”³⁷ Although one could hypothesize that his opinions were informed by his experience in the communications and reputation management fields, how exactly that experience leads to those opinions remains unknown and would be nothing more than speculation. Moreover, almost all of Mr. Fisher's “analysis” with respect to Dr. Humphreys's proposal consists of potential discrepancies or shortcomings in Dr. Humphreys's background and report that can be observed readily by jurors and/or brought out in cross examination without benefitting from any aid by an expert.³⁸ The same is true of Mr. Fisher's comment – which he characterizes as a “reference” in his deposition – that

³⁶ *Id.* at 21-24.

³⁷ *Id.* at 23-24.

³⁸ *Id.* at 21-24 (purporting to point out inconsistencies or “admissions” by Dr. Humphreys in her report).

Dr. Humphreys is “reporting that less than one in four people might possibly have given any credence to [Mr. Trump's] alleged false statements.”³⁹ His opinions as to Dr. Humphreys's report and proposal therefore must be excluded.

Contested Issues First Raised in Carroll I But Not Yet Ruled Upon

Reference to Ms. Carroll's Public Statements Concerning DNA Evidence

Ms. Carroll testified at her deposition in *Carroll I* as follows:

“Q. * * * [Y]ou stated in the public that you had DNA from the former president; is that correct?

“A. Yes.

“Q. Why did you say that?

“A. Because we sent the dress to be examined and then we got back a report. Robbie published it.

“Q. What did that report say that you recall? And don't divulge anything that's privileged, please, so conversations between you and your attorney I don't want to know.

“Q. It is so far above my head. The reports about DNA are so detailed and so much scientific rigor is required to understand even the opening paragraph, I can't really -- I can't say.”⁴⁰

³⁹ *Id.* at 24.

⁴⁰ *Carroll I*, Dkt 137 (Habba Decl.), *Carroll I*, Dkt 137-5 (Ex. E) at 217:23-218:16.

Ms. Carroll seeks to preclude any testimony or commentary regarding DNA evidence.⁴¹ Mr. Trump responds that “Defendant is entitled to cross-examine Plaintiff with respect to the fact that she publicly, and falsely, proclaimed that she was in possession of Defendant's DNA,”⁴² Cross-examination on that point, he argues, would be relevant to Ms. Carroll's credibility and Mr. Trump's contention that she fabricated her defamation claim to garner publicity.⁴³ But the probative value of such examination – if it would have any at all – would be extremely modest, and it would be outweighed substantially by the likelihood of unfair prejudice coupled with the risk of confusion of the issues and a waste of time that would be caused by permitting it. This is apparent when one considers both the deposition testimony and the whole story of DNA in this case.

⁴¹ *Carroll I*, Dkt 134 (Pl. Mem.) at 27-30; *see also Carroll II*, Dkt 86 at 3.

⁴² *Carroll I*, Dkt 136 (Def. Mem.) at 19; *see also* Dkt 75 (Def. Mem.) at 1 (incorporating by reference his arguments in opposition to Ms. Carroll's motion *in limine* in *Carroll I*).

Mr. Trump argues that Ms. Carroll made “numerous public assertions that she *obtained* Defendant's DNA.” *Carroll I*, Dkt 136 at 20-21 (emphasis added). None of Ms. Carroll's posts on social media that he cited, however, refer to her having “obtained” his DNA. Instead, as she did also in her deposition testimony, her posts all refer to his DNA being on her dress. Indeed, in one of the posts, she wrote that she is “STILL waiting for Trump to provide his DNA sample to be tested against the dress.” E. Jean Carroll, Twitter, May 1, 2020, *available at* <https://twitter.com/ejeancarroll/status/1256301599426785280>.

⁴³ *Carroll I*, Dkt 136 at 20.

Of course, if Ms. Carroll simply and knowingly had made a false claim that Mr. Trump's DNA is on the dress, that would be a fit subject for cross examination. But the record in fact suggests something else. There is evidence before the Court that there is male DNA on the dress in question but that the identity of the source could not be established.⁴⁴ It might be Mr. Trump's DNA; it might be someone else's. The lab could not reach such a conclusion at least in part because Mr. Trump refused to allow the taking of a sample of his DNA for comparison despite a request that had been outstanding for years.⁴⁵ As a result, neither party intends to adduce any scientific evidence concerning the recovery of male DNA from the dress or the laboratory analysis that was done. And several things follow from these facts.

First, the premise of Mr. Trump's argument is incorrect, as Ms. Carroll's statement has not been proven either true or false. She might have been right.

⁴⁴ *Carroll v. Trump*, Index No. 160694/2019 (N.Y. Sup. Ct.), Dkt 56, Ex. A (DNA test report attached to Ms. Carroll's notice in which she sought Mr. Trump's DNA) at 22-24.

⁴⁵ This is detailed in another opinion in this case. Dkt 56; *Carroll v. Trump*, No. 22-CV-10016 (LAK), 2023 WL 2006312 (S.D.N.Y. Feb. 15, 2023).

About ten weeks before this case is set to be tried, Mr. Trump proposed a “deal” in which he offered to provide a DNA sample but only on the condition that this Court require Ms. Carroll first to turn over to him a previously undisclosed appendix to the DNA test report. The Court denied Mr. Trump's application in part because “Mr. Trump [gave] the Court no reason to believe that pursuing that course would be likely to yield any admissible evidence, let alone a guarantee that anything important would come of it.” Dkt 56 at 4; *Carroll*, 2023 WL 2006312 at *2.

She might have been wrong. Or it might be impossible to determine whether she was right or wrong. In any case, the failure of Mr. Trump to allow a DNA sample prevented the laboratory from even trying to determine whether the male DNA found on Ms. Carroll's dress is his.

Second, as indicated, there will be no scientific DNA evidence at this trial. Cross-examination of Ms. Carroll about her statement, while potentially relevant to her credibility,⁴⁶ in these circumstances would be susceptible to an inference (and the risk of an argument by Mr. Trump) that would be unfairly prejudicial – namely, that the reason that Ms. Carroll did not adduce scientific DNA evidence at the trial is that Mr. Trump's DNA is not on the dress and, perhaps, that this proves her sexual assault allegation false.⁴⁷ The unfairly prejudicial nature of such an

⁴⁶ There are a number of possible reasons Ms. Carroll made public statements implying that Mr. Trump's DNA was on her dress. She may have leapt to an incorrect conclusion about the meager laboratory findings that do exist. She may have understood the laboratory conclusion but exaggerated based upon the fact that she allegedly knew that Mr. Trump had been in contact with the dress, and believed that once she obtained his DNA to test against the dress, there would be a match. Or perhaps she knowingly lied. There may be other explanations. But whatever the reason, the fact that the statement may have been inaccurate has at least some relevance.

⁴⁷ Indeed, Mr. Trump in his motion to compel production of an appendix to a DNA report obtained by Ms. Carroll in January 2020 “surmise[d] that the answer to [why Ms. Carroll did not produce previously the appendix] is that she knows [Mr. Trump's] DNA is not on the dress because the alleged sexual assault never occurred.” Dkt 51 at 3. The Court explained that his surmise “of course is factually impossible for a simple reason: Mr. Trump never provided a DNA sample for the purpose of

inference, let alone the possible argument, is apparent – there is no such evidence, at least in part due to Mr. Trump's failure to allow the DNA sample.

Third, that unfair prejudice to Ms. Carroll could be avoided by placing before the jury the facts concerning Mr. Trump's failure to allow collection of his own DNA. But to do so would require (1) scientific evidence concerning the testing of the dress stains as well as the fact that the DNA on the dress could not be tied to or eliminate Mr. Trump as its source without Mr. Trump's DNA, and (2) evidence of Mr. Trump's refusal to provide it. It would require evidence also as to why the presence or absence of Mr. Trump's DNA on the dress would go only to whether Mr. Trump was in Ms. Carroll's presence or touched her, but would not in either case be dispositive of her sexual assault claim.⁴⁸ Thus, any questioning of Ms. Carroll about the statement upon which Mr. Trump relies would lead to consumption of a good deal of trial time, would be distracting and needlessly confusing for the jury, and ultimately would not contribute materially to a fair result in this case.

Rule 403 of the Federal Rules of Evidence permits a court to “exclude relevant evidence if its probative value is substantially outweighed by a danger of ... unfair prejudice, confusing the issues, misleading the jury, undue delay, [or] wasting time....”⁴⁹ In these

comparing it to the DNA on her dress. No one knows whether his DNA is on the dress.” Dkt 56 at 20, *Carroll*, 2023 WL 2006312 at *8.

⁴⁸ The laboratory findings did not find semen on the dress. Dkt 56 at 7; *Carroll*, 2023 WL 2006312, at *3.

⁴⁹ Fed. R. Evid. 403.

circumstances, the Court finds that pursuit of such cross-examination or argument touches heavily upon each of the quoted bases for exclusion. Those considerations substantially outweigh whatever probative value might be obtained by going down that path. Accordingly, the Court excludes any evidence or argument by either party concerning DNA.

Preclusion of Five of Mr. Trump's Proposed Witnesses

Mr. Trump lists in the joint pretrial order five witnesses he may call at trial – namely, David Haskell, Elizabeth Dyssegaard, Erin Hobday, Laurie Abraham, and Sarah Lazin – whom Ms. Carroll seeks to preclude from testifying. She seeks to exclude them on the grounds that Mr. Trump was obliged under Rule 26(a) and (e) to have disclosed them and that he might call them as witnesses far earlier in the case and that his delay was prejudicial because it prevented Ms. Carroll from taking their depositions.

Ms. Carroll herself disclosed four of the five witnesses – all except Ms. Hobday – in response to Mr. Trump's interrogatory in June 2022 in *Carroll I*, which asked her to “[i]dentify all [p]ersons who have any knowledge or information about any of the allegations in the [c]omplaint, and ... the subject matter of the knowledge that each [p]erson possesses.”⁵⁰ Ms. Carroll discussed Ms. Hobday during her deposition on October 14, 2022.⁵¹ Mr. Trump accordingly argues that he was not obliged to disclose them under Rule 26 because “they were

⁵⁰ *Carroll I*, Dkt 137-6 at 5.

⁵¹ *Carroll I*, Dkt 137-5 (Ex. E, Carroll Dep.) at 178:12-25, 188:25-189:19.

known to—in fact, disclosed by—Plaintiff” and even if he was, his violation was harmless because they already were known to Ms. Carroll.⁵² Ms. Carroll contends that her knowledge of these witnesses is immaterial because Mr. Trump was obliged to inform her that he intended to call these witnesses at trial.⁵³ There is case law in favor of both positions.⁵⁴

The fundamental purpose of Rule 37(c)(1) – which permits courts to preclude testimony if a party fails to

⁵² *Carroll I*, Dkt 136 (Def. Mem.) at 21.

⁵³ Dkt 86 (Pl. Reply Mem.) at 2.

⁵⁴ *E.g.*, *Marvel Worldwide, Inc. v. Kirby*, 777 F. Supp. 2d 720, 727 (S.D.N.Y. 2011), *aff'd in part, vacated in part sub nom.*, 726 F.3d 119 (2d Cir. 2013) (“Because [plaintiff] became aware of [witnesses] at ... depositions, the [defendants] did not have a duty to supplement their Rule 26 initial disclosures.”); *Howard Univ. v. Borders*, No. 20-cv-04716 (LJL), 2022 WL 3568477, at *2 (S.D.N.Y. Aug. 17, 2022) (concluding that the plaintiff was not obligated to supplement its initial disclosures and that even if it was, the violation would be harmless, where “[d]efendants were well aware of [witness's] identity and her role from the beginning of the litigation and that it was possible that [plaintiff] might choose to use her as a witness.”). *But see, e.g.*, *Pal v. New York Univ.*, No. 06-cv-5892 (PAC)(FM), 2008 WL 2627614, at *4 (S.D.N.Y. June 30, 2008) (“[Plaintiff's] knowledge of the existence of a witness does not satisfy the Rule 26(a)(1)(A) disclosure obligation; that obligation is fulfilled only if [defendant] informed [plaintiff] that it might call the witness in support of its claims or defenses.”); *Lebada v. New York City Dep't of Educ.*, No. 14-cv-758 (LAK) (GWG), 2016 WL 626059, at *5 (S.D.N.Y. Feb. 8, 2016), *objections overruled*, No. 14-cv-0758 (LAK), 2016 WL 8453417 (S.D.N.Y. May 16, 2016) (“[T]he mere discussion of an individual in documents or deposition testimony is insufficient to create a duty on defendants to assume that such an individual is a witness that plaintiffs ‘may use to support [their] claims’ under Rule 26(a)(1)(A)(i).”).

satisfy its disclosure obligations under Rule 26 – is “to prevent the practice of ‘sandbagging’ an opposing party with new evidence.”⁵⁵ With this principle in mind, the Court agrees with Mr. Trump that he was not obliged to disclose under Rule 26 the four witnesses whom Ms. Carroll disclosed in her June 2022 interrogatory responses as persons knowledgeable of the allegations in the complaint, or, if he was, his violation would be harmless. Each of the four witnesses, as identified by Ms. Carroll, were individuals who she informed about Mr. Trump's alleged assault prior to the publication of the article with an excerpt with Ms. Carroll's account of the alleged rape from her then-forthcoming book in *New York* magazine.⁵⁶ Each was involved in some way with Ms. Carroll's book and/or the *New York* magazine article, both of which are relevant to issues in this case. These witnesses (as well as the fifth witness, Ms. Hobday) received notices of subpoenas by Mr. Trump, although it is not clear which, if any, was served.⁵⁷ In these circumstances, there was sufficient notice—albeit just barely—to Ms. Carroll that there was a possibility they would be called as witnesses by Mr. Trump and sufficient time for Ms. Carroll to have deposed them. Mr. Trump's failure to disclose them does not equate to him “sandbagging” Ms. Carroll.

A different conclusion is appropriate with respect to Ms. Hobday. Unlike the other four witnesses,

⁵⁵ *Haas v. Delaware & Hudson Ry. Co.*, 282 F. App'x 84, 86 (2d Cir. 2008) (internal quotation marks in original) (quoting *Ebewo v. Martinez*, 309 F.Supp.2d 600, 607 (S.D.N.Y. 2004)).

⁵⁶ *Carroll I*, Dkt 137-6 at 5.

⁵⁷ Dkt 86 (Pl. Reply Mem.) at 3, 3 n.3.

neither Ms. Carroll nor Mr. Trump disclosed Ms. Hobday as a person with relevant knowledge. Ms. Hobday was mentioned only in Ms. Carroll's deposition in October 2022, during which Ms. Carroll identified her as the managing editor of *Elle* magazine who advised Ms. Carroll that her contract with the magazine was being terminated.⁵⁸ Nothing about the context in which Ms. Hobday was mentioned, nor her actual role as discussed in the excerpts of Ms. Carroll's deposition that were provided, demonstrate that Ms. Carroll should have expected she might be called as a witness by Mr. Trump. He therefore was obligated to disclose Ms. Hobday in his Rule 26 disclosures. His failure to do so prejudiced Ms. Carroll by preventing her from deposing her or even knowing that she perhaps should depose her. The circumstances with respect to Ms. Hobday justify the drastic but occasionally warranted sanction of precluding her from testifying at trial.

Uncontested Issues First Raised in Carroll I But Not Yet Ruled Upon

Ms. Carroll has incorporated in her motion in *Carroll II* several requests for *in limine* relief on which the Court has not yet ruled but that Mr. Trump has not opposed. Accordingly, those requests are granted.

Conclusion

Plaintiff's motion *in limine* (Dkt 72) is granted to the extent that:

⁵⁸ *Carroll I*, Dkt 137-5 (Ex. E, Carroll Dep.) at 178:12-25.

- (1) plaintiff's prior consistent statements to Mss. Birnbach and Martin about defendant's alleged sexual assault are admissible;
- (2) the testimony of Mss. Stoyhoff and Leeds regarding their experiences involving the defendant come within Federal Rules of Evidence 413 and 415 and will not be excluded under Rule 403;
- (3) defendant is precluded from giving or eliciting testimony concerning information allegedly known to persons whom he has not disclosed under Rules 26(a) and (e);
- (4) both parties are precluded from any testimony, argument, commentary or reference concerning DNA evidence;
- (5) defendant is precluded from cross-examination or eliciting evidence regarding Stephanie Grisham's prior misdemeanor convictions, her unrelated pending lawsuit, and her use of a prescription medication;
- (6) defendant is precluded from commenting upon or eliciting any evidence regarding plaintiff's choice of counsel or her counsel's activities outside the litigation between plaintiff and defendant;
- (7) Mr. Fisher is precluded from testifying at trial as a rebuttal expert witness; and
- (8) defendant is precluded from calling Ms. Hobday to testify at trial.

Plaintiff's motion *in limine* (Dkt 72) is denied to the extent that defendant is not precluded from calling Mss. Dyssegaard, Abraham, Lazin, and Mr. Haskell at trial.

SO ORDERED.

101A

Dated: March 27, 2023

/s/ Lewis A. Kaplan

Lewis A. Kaplan

United States District Judge

102A

APPENDIX D

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

No. 20-cv-7311 (LAK)
March 10, 2023

E. JEAN CARROLL,
Plaintiff,

v.

DONALD J. TRUMP,
Defendant.

MEMORANDUM OPINION

Appearances:

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LEWIS A. KAPLAN, *District Judge.*

Donald J. Trump is accused in this and a second very closely related civil case of having raped E. Jean Carroll in the mid 1990s. Ms. Carroll claims, in this action, that Mr. Trump defamed her in 2019 in a series of public responses to the first public appearance of her accusation.¹ Her claim in the second case is for damages for the alleged rape as well as for a different allegedly defamatory statement.

The matter now is before the Court on Mr. Trump's motion to exclude from evidence at the trial of this case an excerpt from the so-called *Access Hollywood* tape that was broadcast nationwide repeatedly during the 2016 presidential campaign, the testimony of two witnesses – Mss. Leeds and Stoenoff – who previously have claimed that Mr. Trump sexually assaulted them, and extremely short excerpts of videos of campaign remarks by Mr. Trump. He seeks also to exclude any evidence regarding emotional harm that Ms. Carroll may have suffered as a result of the underlying incident.

Before proceeding to the analysis, it is appropriate to set out the legal framework that applies at this stage of the case to the bulk of the motion and the

¹ The Court assumes familiarity with its decisions in both actions. See Dkt 32, *Carroll v. Trump*, 498 F. Supp. 3d 422 (S.D.N.Y. 2020), *rev'd in part, vacated in part*, 49 F.4th 759 (2d Cir. 2022); Dkt 73, *Carroll v. Trump*, 590 F. Supp. 3d 575 (S.D.N.Y. 2022); Dkt 96, *Carroll v. Trump*, No. 20-CV-7311 (LAK), 635 F.Supp.3d 229 (S.D.N.Y. Oct. 12, 2022); Doc. No. 22-cv-10016 (*Carroll II*), Dkt 38, *Carroll v. Trump*, No. 22-cv-10016 (LAK), 650 F.Supp.3d 213 (S.D.N.Y. Jan. 13, 2023); *Carroll II*, Dkt 56, *Carroll v. Trump*, No. 22-CV-10016 (LAK), — F.R.D. —, 2023 WL 2006312 (S.D.N.Y. Feb. 15, 2023). Unless otherwise indicated, Dkt references are to the docket in 20-cv-7311 (*Carroll I*).

Court's limited role in ruling on Mr. Trump's principal evidentiary objections.

The Framework and the Court's Limited Role

Most of the evidence that Mr. Trump seeks to keep from the trial jury is to the effect that Mr. Trump allegedly has abused or attempted to abuse women *other than Ms. Carroll* in ways that are the comparable to what he allegedly did to Ms. Carroll. In other words, Ms. Carroll offers the evidence to show that Mr. Trump has a propensity for such behavior.

Mr. Trump correctly points out that the Federal Rules of Evidence ordinarily preclude propensity evidence. In 1994, however, Congress enacted Rule 415, which created an important exception to that principle. In a civil case “based on a party's alleged sexual assault,” as that term is defined in the rules, “evidence that the [defendant] committed any other sexual assault” may be admitted in such cases.² So the

² The exception created in Rule 415 applies also in civil child molestation cases. Fed. R. Evid. 414. There is a comparable exception for criminal cases. Fed. R. Evid. 413.

The purpose of these amendments to the Federal Rules of Evidence was to make it easier to convict and hold civilly liable alleged perpetrators of such assaults. See 140 Cong. Rec. S12990-01, S12990 (1994) (statement of Sen. Robert Dole) (“The reform effected by these rules is critical to the protection of the public from rapists and child molesters, and is justified by the distinctive characteristics of the cases to which it applies.... In child molestation cases, for example, a history of similar acts tends to be exceptionally probative because it shows an unusual disposition of the defendant—a sexual or sado-sexual interest in children—that simply does not exist in ordinary people.... Similarly, sexual assault cases, where adults are the victims, often turn on difficult credibility determinations.... The practical effect of the new rules is to put evidence of uncharged offenses in sexual assault and child molestation cases on the same footing

initial questions presented by Mr. Trump's motion are (a) whether this is a case “based on [an] alleged sexual assault,” (b) whether the evidence Mr. Trump seeks to exclude is evidence of “other sexual assault[s],” and, even if both are so, (c) whether Rule 403 warrants exclusion of that evidence.

Moreover, it is relevant to emphasize that the Court's role with respect to evidence of prior sexual assaults in a case like this is limited. The Court does not itself decide what Mr. Trump meant in making his various statements. It does not decide whether Mr. Trump or Mss. Leeds and Stoyoff are more credible. All of that is for the trial jury. The Court's role is to determine whether the evidence regarding these alleged prior incidents and Mr. Trump's statements would permit a jury reasonably to find that Mr. Trump has a history of sexual assaults that could be

as other types of relevant evidence that are not subject to a special exclusionary rule.”); *United States v. Schaffer*, 851 F.3d 166, 181 n.81 (2d Cir. 2017) (“[David J. Karp's article] explain[s] that one of the primary arguments in favor of Rule 413 was that ‘the past conduct’ of ‘[a] person with a history of rape or child molestation ... provides evidence that he has the combination of aggressive and sexual impulses that motivates the commission of such crimes, that he lacks effective inhibitions against acting on these impulses, and that the risks involved do not deter him. A charge of rape or child molestation has greater plausibility against a person with such a background.’ ”) (quoting David J. Karp, *Evidence of Propensity and Probability in Sex Offense Cases and Other Cases*, 70 Chi.–Kent L. Rev. 15, 20 (1994)); *id.* (noting that “Sen. Robert Dole, principal sponsor of Rule 413, referr[ed] to David Karp's work as ‘provid[ing] a detailed account of the views of the legislative sponsors and the administration concerning the proposed reform, and should also be considered an authoritative part of its legislative history’ ”) (quoting 140 Cong. Rec. at S12990).

probative of whether he committed the alleged attack on Ms. Carroll.

The Access Hollywood Tape

Mr. Trump first seeks to exclude from evidence an excerpt from (a) the so-called *Access Hollywood* tape, an excerpt that records an exchange among Mr. Trump and others as the group arrived for the shooting of a television episode, as well as (b) a brief taped excerpt from a question to and response by Mr. Trump during a 2016 presidential debate regarding his statements on the *Access Hollywood* tape. He contends that his statements on the *Access Hollywood* video could be taken to support the allegation that he committed the alleged sexual attack on Ms. Carroll and therefore should not be heard by the jury.

The audio of the excerpt offered by Ms. Carroll reads as follows:

Unknown: “She used to be great. She's still very beautiful.”

Trump: “You know and I moved on her actually. You know she was down on Palm Beach. *I moved on her and I failed. I'll admit it. I did try and fuck her. She was married.*”

Unknown: “That's huge news.”

Trump: “No, no, Nancy. No this was [(inaudible)]. And I moved on her very heavily in fact I took her out furniture shopping. She wanted to get some furniture. I said I'll show you where they have some nice furniture. I took her out furniture [sic]. *I moved on her like a bitch*, but I couldn't get there, and she was married. Then all of a sudden I see her, she's

now got the big phony tits and everything. She's totally changed her look."

Bush: "Sheesh, your girl's hot as shit. In the purple."

Multiple voices: "Whoa! Yes! Whoa!"

Bush: "Yes! The Donald has scored. Whoa, my man!"

[Crosstalk]

Trump: "Look at you. You are a pussy."

[Crosstalk]

Trump: "Maybe it's a different one."

Bush: "It better not be the publicist. No, it's her. It's"

Trump: "*Yeah that's her. With the gold. I better use some Tic Tacs just in case I start kissing her. You know I'm automatically attracted to beautiful – I just start kissing them. It's like a magnet. Just kiss. I don't even wait. And when you're a star they let you do it. You can do anything.*"

Bush: "*Whatever you want.*"

Trump: "*Grab them by the pussy. You can do anything.*"

...

Ms. Carroll's Case is "Based On" An Alleged Sexual Assault

As previously stated, Mr. Trump almost certainly is correct in arguing that the quoted statements on the *Access Hollywood* tape are offered by plaintiff for "only one purpose: to suggest to the jury that Defendant has a propensity for sexual assault and therefore the alleged incident [with Ms. Carroll] must have in fact

occurred.”³ He is correct also that the Federal Rules of Evidence ordinarily preclude propensity evidence. As noted above, however, Rule 415 provides that “evidence that the [defendant] committed any other sexual assault” may be admitted in “a civil case involving a claim for relief based on a party's alleged sexual assault,” as that term is defined in Rule 413(d).⁴

Mr. Trump nevertheless claims that this is not a case “*based on* a party's alleged sexual assault” because Ms. Carroll's claim in this case – as distinguished from *Carroll II*, which asserts both battery and defamation claims – is exclusively for defamation, not rape or some other form of sexual assault. He contends that there are two schools of legal thought as to the meaning of “based on” as used in Rule 415 and that the narrower and, in his submission, better view – referred to as the “categorical approach” – is that a case is “based on” a sexual assault only if proof of the sexual assault is an element of the claim for relief. Proof of defamation, he says, does not require proof of a sexual assault. But there is no need in this case to debate the preferable interpretation of the phrase “based on” as used in Rule 415. For whatever the theoretical merits of the categorical approach as applied in other cases, this particular case is “based on” an alleged sexual assault under either approach for a very simple reason: proof of sexual assault is an essential element of Ms. Carroll's defamation claim given the nature of the alleged defamation.

³ Def. Mem. (Dkt 131) at 15.

⁴ Fed. R. Evid. 415(a).

The core of the alleged defamation in this case, although it is broader, is that Mr. Trump's statements in words and in substance included the assertions that Ms. Carroll lied in claiming that Mr. Trump raped her, that her accusation is a “hoax.” Thus, in order to prevail on her libel claim, Ms. Carroll must prove that Mr. Trump sexually assaulted her.⁵ Unless she proves that sexually assault, she cannot establish that Mr. Trump's charge that her story was a lie and a hoax was false. In consequence, this indeed is a case “based on” a sexual assault even under the categorical approach. In any event, as Judge Furman recently explained in a thoughtful opinion, the alternative view of the meaning of “based on” – a view under which a case is “based on” a sexual assault if a sexual assault is a premise of a plaintiff's claim – is preferable to the categorical approach,⁶ an analysis with which I agree. And under that test there is no serious question that Ms. Carroll's claim is “based on” an alleged sexual assault.

The Access Hollywood Tape Satisfies Rule 415

The next question is whether the *Access Hollywood* tape contains evidence of one or more other “sexual

⁵ *Palin v. New York Times Co.*, 940 F.3d 804, 809 (2d Cir. 2019) (“Under New York law a defamation plaintiff must establish five elements: (1) a written defamatory statement of and concerning the plaintiff, (2) publication to a third party, (3) fault, (4) *falsity of the defamatory statement*, and (5) special damages or *per se* actionability.”) (emphasis added) (citation omitted). For Ms. Carroll to establish the “falsity of [Mr. Trump's allegedly] defamatory statement,” she must prove that Mr. Trump sexually assaulted her.

⁶ *Boyce v. Weber*, 19-CV-3825, 2021 WL 2821154, at *8 (S.D.N.Y. July 7, 2021).

assaults” by Mr. Trump. This requires further consideration of the definition of “sexual assault” in Rule 413(d).

Rule 413(d) defines “sexual assault” as “a crime under federal law or under state law ... involving” any of five categories of conduct, the relevant portions of at least two of which have a bearing here:

- “contact, without consent, between any part of the defendant's body — or an object — and another person's genitals or anus” - Rule 413(d)(2).
- “an attempt ... to engage in conduct described in subparagraph[]”(2) - Rule 413(d)(5).

The first italicized portion of the *Access Hollywood* tape excerpt evidences Mr. Trump stating that he “moved on” a woman named Nancy⁷ “like a bitch,” that he “tried to fuck her.” The second italicized portion evidences Mr. Trump said that he just starts kissing beautiful women, he does not first obtain consent, that the women just let one do it when one is a “star,” and that a “star” can “grab” beautiful women by their genitals or do anything the “star” wants. Moreover, he testified in his deposition:

“Q And you consider yourself to be a star?

A I think you can say that, yeah.”⁸

The Court acknowledges that Mr. Trump has claimed that his statements were “locker room talk” – presumably meaning that they were not true – and that he has denied that he has behaved in the manner

⁷ Possibly Nancy O'Dell, then a television personality.

⁸ Trump Dep. (Dkt 135-3) at 174:20-21.

described by his statements. Although he has not so argued, some of the statements perhaps may be susceptible of varying interpretations – including in some respects interpretations that may be inconsistent with sexual misconduct by Mr. Trump. Possibly, for example, he may claim that he was speaking of what other “stars” have done, not his own conduct. But that is not what is required to justify exclusion for failure to satisfy Rule 415.

While Rules 413 and 415 do not articulate the standard for the admission of evidence of sexual assaults, those courts that have addressed the question have held that “a trial court considering evidence offered under Rule 415 must decide under Rule 104(b) *whether a reasonable jury could find* by a preponderance of the evidence that the past act was an ‘offense of sexual assault’ under Rule 413(d)’s definition and that it was committed by the defendant.”⁹ It simply is not the Court’s function in ruling on the admissibility of this evidence to decide what Mr. Trump meant or how to interpret his statements.

In this case, a jury reasonably could find, even from the *Access Hollywood* tape alone, that Mr.

⁹ *E.g.*, *Johnson v. Elk Lake School District*, 283 F.3d 138, 154-55 (3d Cir. 2002) (emphasis added). *Accord*, *United States v. Keen*, No. 4:21-CR-00052, 2023 WL 2226796, at *3 (M.D. Pa. Feb. 24, 2023); *A.R. v. Pohlmann*, Civ. No. 16-17865, 2019 WL 468528, at *1 (E.D. La. Feb. 6, 2019); *McMahon v. Valenzuela*, Case No. 2:14-cv-02085-CAS(AGRx), 2015 WL 7573620, at *4 (C.D. Cal. Nov. 25, 2015); *United States v. Levinson*, No. 10-80166-CR, 2011 WL 1102841, at *3 (S.D. Fla. Jan. 31, 2011) (in the context of Rule 414, whether the defendant committed a prior child molestation offense); Christopher Mueller and Laird Kirkpatrick, *Federal Evidence* § 4:84, at 346-37 (3d ed. 2007).

Trump admitted in the *Access Hollywood* tape that he in fact has had contact with women's genitalia in the past without their consent, or that he has attempted to do so. And that conclusion is supported by the other evidence discussed below. Accordingly, the tape satisfies Rule 415 by virtue of Rule 413(d)(2) and (d)(5).

The Two Alleged "Other Victim" Witnesses

Jessica Leeds

Ms. Leeds testified at her deposition that she was seated beside Mr. Trump on a flight from Texas to New York in 1979. After they finished eating the served airline meal, Mr. Trump assaulted her:

"[H]e was with his hands grabbing me, trying to kiss me, grabbing my breasts, pulling me towards him, pulling himself on me. It was kind of a struggle going on. * * * That went on for what seemed like a terribly long time, but it probably was just a few seconds.

"It was when he started putting his hand up my skirt that I realized that nobody was going to save me but me, and I was on the aisle, I managed to wheel my way out of the chair, and grabbed my purse, and I went back to my seat in the back."¹⁰

Some time later, Ms. Leeds testified, she was at prominent retail store in New York for an event at which guests were seated at tables. Ms. Leeds was working at a table distributing "chits" (table assignments) to those attending. Mr. Trump and his wife came up to the table. Ms. Leeds handed him his

¹⁰ Leeds Dep. (Dkt 135-5) at 19:3-18.

“chit” whereupon “he looked at [her] and[, according to Ms. Leeds,] he said, ‘I remember you. You’re the cunt from the airplane.’”¹¹

Mr. Trump has claimed that Ms. Leeds is a liar and that no such event over occurred. And he will be entitled to make that argument to the jury. But that is not now the issue. Even considered alone, Ms. Leeds’ account, if credited by the jury, reasonably could be regarded as describing unconsented-to sexual contact by Mr. Trump and also as an attempt by Mr. Trump to bring at least his hands, and perhaps other parts of his body, into contact with Ms. Leeds’ genitalia, in each case in violation of federal law.¹² It

¹¹ *Id.* at 22.

¹² In order to be admissible under Rule 415, evidence of a sexual assault of a person other than the plaintiff must also have been a federal or state crime. That requirement is satisfied here.

49 U.S.C. §§ 46506 and 46501(2) make it a crime to commit an act on an “aircraft in the United States” that would violate any provision of chapter 109A of title 18 of the United States Code if the act had been committed in the special maritime and territorial jurisdiction of the United States.

18 U.S.C. 2246(3), which is part of chapter 109A, defines “sexual contact” in relevant part as “the intentional touching, either directly or through the clothing, of the genitalia, ... groin, breast, [or] inner thigh ... of any person with an intent to ... arouse or gratify the sexual desire of any person.” Mr. Trump’s alleged non-consensual grabbing of Ms. Leeds’ breasts and putting his hand up her skirt, if it occurred, therefore would have been forced “sexual contact” or, at least, an attempt to make such contact, under chapter 109A.

That takes us to 18 U.S.C. § 2244(a)(1), which makes it unlawful knowingly to cause another person to engage in a “sexual contact” by force, or to attempt to do so, in the special maritime and territorial jurisdiction of the United States if so to do would violate section 2241(a) or (b) had the “sexual contact”

therefore satisfies at least Rule 413(d)(2) and 413(d)(5) and thus Rule 415.

Natasha Stoyoff

Ms. Stoyoff, then a writer for *People* magazine, traveled to Mar-a-Lago, Mr. Trump's residence in Florida, to interview him and his wife, Melania. Mr. Trump offered to show Ms. Stoyoff a painting that he said was hanging in a certain room, and took her there. As she began looking around, she heard him close the door behind her. Then, she testified:

“I turn around and he's right here (indicating), and he grabs my shoulders and pushes me against this wall and starts kissing me.

Q Did he say anything before?

A Not that I recall.

Q And what was going through your mind when Donald Trump did this?

A Complete shock. Thank you. Complete shock because it was very fast and I was taken – taken by surprise.

Q And do you recall how you reacted?

A I do recall pushing him back twice. I recall trying to say something, but not really being able to. I was so flustered.

been a “sexual act.” 18 U.S.C. § 2241(a)(1) makes it a crime knowingly to engage in a “sexual act” with another within the special maritime jurisdiction of the United States. 2241(a).

Accordingly, the alleged assault on Ms. Leeds while on an “aircraft in the United States,” attempted or completed, if it occurred, thus would have been a federal crime under 49 U.S.C. § 46506 and 46501(2).

Q And when you pushed him back the first time do you recall how Donald Trump reacted?

A Yes. He just came toward me again.

Q And what about after the second time?

A He started coming toward me again, but then someone came into the room.

Q Do you recall who came into the room?

A Yes. It was the butler.

* * *

Q And did you see the butler have any reaction to what Mr. Trump was doing?

A Yes, I did.

Q And how would you describe that?

A Well, all I know is that when I looked at his face, to me he had the look on his face like thank God I got in here, like he's done this before, like he knew that he saw a shut door and he had to get in there. That's my perception of his ..."¹³

Later in the deposition, she further testified:

Q [earlier portion of question not in record] there a particular piece of the video you're referring to?

A Lying about never groping or kissing women without their consent and how he had the utmost respect for women.

Q You consider what he did to you lying and groping women without their consent?

¹³ Stoyhoff Dep. (Dkt 135-4) at 21:5-22:25.

A I consider that he lied about kissing and groping me without consent.”¹⁴

Ms. Stoyhoff’s deposition presents a different factual situation than Ms. Leeds’. Nevertheless, the legal analysis is similar.

Rule 413(d)(5) defines as “sexual assault” for purposes of Rule 415 an attempt to engage in conduct described in Rule 413(d)(2), among other provisions. Rule 413(d) requires also that any such attempt to constitute a crime under federal or state law. There are at least two ways that Mr. Trump’s conduct as described by Ms. Stoyhoff, if it occurred, would have been a crime under the law of Florida, where the incident allegedly took place.

First, under Florida law, “[t]o establish an attempt to commit a specific intent crime, the State must prove a specific intent to commit that crime and an overt act toward the commission of the crime.”¹⁵ It is a crime under Florida law “[a]ctually and intentionally [to] touch[] or strike[] another person against the will of the other.”¹⁶ This clearly covers Mr. Trump’s alleged kissing and groping of Ms. Stoyhoff, as Mr. Trump tacitly concedes.¹⁷ Rule 415 therefore is satisfied if (1) Mr. Trump’s conduct included an “overt act” toward the commission of a state crime (2) taken for the purpose of committing a state crime “involving”

¹⁴ *Id.* at 38:2-10.

¹⁵ *Neal v. State*, 854 So. 2d 666, 670 (Fla. Dist. Ct. App. 2003).

¹⁶ Fla. Stat. § 784.03(1)(a)1.

¹⁷ *See, e.g., Stockett v. Tolin*, 791 F. Supp. 1536, 1555-56 (S.D. Fla. 1992) (groping and kissing).

“contact, without consent, between any part of [Mr. Trump]’s body ... and [Ms. Stoyhoff]’s genitals or anus
”¹⁸

Second, in the alternative, Florida law makes it a crime for “[a] person 18 years of age or older [to] commit[] sexual battery upon a person 18 years of age or older, without that person’s consent, and in the process does not use physical force and violence likely to cause serious personal injury”¹⁹ Florida law defines “sexual battery” as “oral, anal, or female genital penetration by, or union with, the sexual organ of another or the anal or female genital penetration of another by any other object,”²⁰ and that definition “makes no mention of intent at all.”²¹ For a crime that does not have an intent requirement, “[a]ttempt under Florida law requires the defendant to commit ‘any act toward the commission of such [crime], but fails in the perpetration or is intercepted or prevented in the execution thereof.’ ”²² As a result, Rule 415 also is satisfied if Mr. Trump’s conduct included “an[] act toward the commission” of a state crime “involving” “contact, without consent, between

¹⁸ Fed. R. Evid. 413(d)(2).

¹⁹ Fla. Stat. § 794.011(5)(b).

²⁰ Fla. Stat. § 794.011(1)(j).

²¹ *United States v. Bemis*, No. 8:19-CR-458-T-33AAS, 2020 WL 1046827, at *3 (M.D. Fla. Mar. 4, 2020).

²² *United States v. Lockley*, 632 F.3d 1238, 1245 n.6 (11th Cir. 2011) (quoting Fla. Stat. § 777.04(1)) (alteration in original).

any part of [Mr. Trump]’s body ... and [Ms. Stoyhoff]’s genitals or anus”²³

Ms. Stoyhoff described Mr. Trump kissing her without her consent and against her will. That alone would not satisfy any part of Rule 413(d). But Ms. Stoyhoff, however, testified also that Mr. Trump was lying when he denied “groping” her without her consent – in other words, that he “groped” her.

The word “grope” in the context of human contact means “[t]o touch or fondle (a person or part of the body) clumsily or forcefully for one’s sexual gratification, (in later use) esp. without consent.”²⁴ And while “groping” anyone without consent is sexual misconduct, and colloquially might be referred to as sexual assault, Rule 413(d) is not that broad. It defines “sexual assault” as unwanted contact, or attempted unwanted contact, only with particular parts of the anatomy. The portion of Ms. Stoyhoff’s deposition now before the Court does not specify what part of her anatomy she claims that Mr. Trump groped or attempted to grope. And if Ms. Stoyhoff’s account of the parts of her body that Mr. Trump allegedly touched were the only relevant evidence, it

²³ Fed. R. Evid. 413(d)(2).

²⁴ “Grope.” OXFORD ENGLISH DICTIONARY (available at <https://www.oed.com/view/Entry/81745?rskey=awTI5e&result=3&isAdvanced=false#eid>) (last visited Feb. 28, 2023); *see also* “Grope.” MERRIAM-WEBSTER’S UNABRIDGED DICTIONARY (available at <https://unabridged.merriam-webster.com/unabridged/grope>) (“to pass the hands over (the person of another) for the sake of sexual pleasure”) (last visited Feb. 28, 2023).

would be debatable whether that conduct alone would satisfy Rules 413(d) and 415.²⁵ But it is not alone.

As an initial matter, the circumstances of the alleged encounter are relevant. Mr. Trump, she says, invited Ms. Stoyneff – who was at Mar-a-Lago to interview Mr. Trump and his wife – to an unoccupied room and closed the door behind her, actions indicative of a desire for privacy. She went on to say that he immediately, and without her consent, began kissing Ms. Stoyneff and pressed on as she resisted his advances. These actions are suggestive of a plan, formed before Mr. Trump invited Ms. Stoyneff to the unoccupied room and closed the door behind her, to take advantage of that privacy and to do so without regard to Ms. Stoyneff's wishes. Moreover, the *Access Hollywood* tape and the testimony of Ms. Leeds are additional evidence that a jury would be entitled to consider in deciding whether to infer that the ultimate goal of Mr. Trump's alleged actions with Ms. Stoyneff

²⁵ In any case, the Court may not assume for purposes of Mr. Trump's motion that the plaintiff could not lay a better foundation for admissibility of Ms. Stoyneff's account by adducing evidence concerning the particular parts of Ms. Stoyneff's anatomy Mr. Trump groped or attempted to grope. Mr. Trump therefore would not have satisfied his burden, on the *in limine* motion, to establish that “the evidence is clearly inadmissible on all potential grounds.” *Jean-Laurent v. Hennessy*, 840 F. Supp.2d 529, 536 (E.D.N.Y. 2011) (internal quotation marks and citation omitted). It is worth noting that Mr. Trump concedes that this is the applicable standard. Def. Mem. (Dkt 131) at 1 (citing *Highland Capital Mgmt. v. Schneider*, 379 F. Supp. 2d 461, 471 (S.D.N.Y. 2005)) (“Evidence should be excluded on a motion *in limine* only when the evidence is clearly inadmissible on all potential grounds.”) (citation omitted).

was to bring his hands or other parts of his anatomy into contact with Ms. Stoyhoff's most private parts.

To be sure, the Court does not now draw any such inference. And Mr. Trump has denied publicly any such occurrence ever happened. He of course will be entitled to do so before the jury. And the jury could credit Mr. Trump's testimony in preference to Ms. Stoyhoff's. But that is for another day. The Court's only function at this stage is to decide whether the evidence of record is sufficient for a jury reasonably to conclude that Mr. Trump at least attempted to have contact with Ms. Stoyhoff that, if it had occurred, would have met the requirements of Rule 413(d). That standard has been satisfied.

Rule 403

Mr. Trump contends that the testimony of Mss. Leeds and Stoyhoff, even if otherwise admissible under Rules 415 and 413(d), should be excluded under Rule 403. He argues that the circumstances of the alleged assaults on these two women are “vastly different” from those on Ms. Carroll, that the events allegedly involving these women were not close in time to the alleged incident with Ms. Carroll, that each was the only alleged assault on the alleged victim, and that the testimony of Mss. Leeds and Stoyhoff is unnecessary because it “is relevant only to the extent Plaintiff lacks sufficient evidence to independently establish the merit of her claims.”²⁶

Rule 403, upon which Mr. Trump relies, provides:

“The court may exclude relevant evidence if its probative value is substantially outweighed by

²⁶ Def. Mem. (Dkt 131) at 9-11.

a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”²⁷

And Mr. Trump correctly points out that courts considering Rule 403 objections to relevant evidence consider a number of factors, including

“(1) the similarity of the prior acts to the acts charged, (2) the closeness in time of the prior acts to the acts charged, (3) the frequency of the prior acts, (4) the presence or lack of intervening circumstances, and (5) the necessity of the evidence beyond the testimonies already offered at trial.”²⁸

But, as the text of the rule itself makes clear, the probative value of the evidence that the movant seeks to exclude weighs heavily in the equation. And that is the appropriate starting point here.

This is, in the vernacular, is a “he said, she said” case, and it is one that turns on an alleged event more than two decades ago. There will be no physical evidence supporting either side at trial. Mr. Trump repeatedly has denounced Ms. Carroll as a liar and the perpetrator of a hoax, and he has done so on national television and with the benefit of his status in the public and political spheres. Ms. Carroll's case, absent these witnesses, likely will depend upon her personal credibility in the courtroom, the credibility of two witnesses whom she allegedly told of the alleged rape contemporaneously, and the jury's assessment of

²⁷ Fed. R. Evid. 403.

²⁸ *United States v. Spoor*, 904 F.3d 141, 153-55 (2d Cir. 2018).

Mr. Trump's personal credibility. Mr. Trump's alleged sexual assaults on Mss. Leeds and/or Stoyhoff, if the jury is permitted to hear their testimony and believes it, is likely to weigh heavily in the jury's determination. In consequence, their testimony, if received, could prove quite important. Indeed, that surely is why Mr. Trump seeks to exclude it. So it is in that context that the usual Rule 403 factors warrant attention.

Mr. Trump's attempt to minimize the similarity between his alleged actions with respect to Ms. Leeds and Ms. Stoyhoff, on the one hand, and Ms. Carroll on the other is not very persuasive. The alleged acts are far more similar than different in the important aspects. In each case, the alleged victim claims that Mr. Trump suddenly attacked her sexually. In the cases of Ms. Carroll and Ms. Stoyhoff, he allegedly did so in a location after closing a door behind him, which gave him privacy. In all three cases, he allegedly did so without consent. So it is only Ms. Leeds' case that differs in an important particular -- the fact that the alleged assault occurred on an airplane in circumstances in which, despite the fact that both she and Mr. Trump were in bulkhead seats, afforded little privacy.

Mr. Trump effectively concedes that there were no intervening circumstances here that weigh in his favor.²⁹ Nor is the fact that Mr. Trump did not allegedly assault either Ms. Leeds or Ms. Stoyhoff more than once each of any significance. There is no reason to suppose that he encountered either of them

²⁹ Def. Mem. (Dkt 131) at 11.

with sufficient frequency for repeated assaults on either to have been within realm of possibility.

His best argument is that these three alleged incidents were widely separated in time: Ms. Leeds in 1979, Ms. Carroll in the mid-1990s, and Ms. Stoyhoff in 2005. And that weighs in his favor. On the other hand, Rule 415, unlike other provisions of the Rules of Evidence, contains no temporal limits on the admissibility of evidence of other sexual assaults in a sexual assault case. The legislative history makes clear that this was no accident.³⁰ So, while the limitations of Rule 403 certainly apply with respect to sexual assault evidence in cases like this, they perhaps must be applied with due regard for Congress's deliberate failure to impose temporal limits.

In all the circumstances, Mr. Trump has not demonstrated persuasive reason to believe that there is any risk of “unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence,” let alone any risks that would substantially outweigh the probative value of the evidence of Mss. Leeds and Stoyhoff.

The Campaign Excerpts

Ms. Carroll seeks to offer in evidence seven excerpts from statements by Mr. Trump during the 2016 presidential campaign. The excerpts vary in

³⁰ 140 Cong. Rec. at S12990 (statement of Sen. Robert Dole) (“No time limit is imposed on the uncharged offenses for which evidence may be admitted; as a practical matter, evidence of other sex offenses by the defendant is often probative and properly admitted, notwithstanding substantial lapses of time in relation to the charged offense or offenses.”).

length and average 47 seconds each. And all of them share similar characteristics – assertions by Mr. Trump that women who have accused him of sexual assaults were lying and, in several of the cases, words or implications that the women's looks are not appealing to Mr. Trump. In short, he spoke of these other women essentially in the same terms as he allegedly defamed Ms. Carroll. Mr. Trump seeks to exclude them as irrelevant and under Rule 403.

These excerpts do not allege sexual assault, so Rules 413 and 415 are irrelevant. And, except under Evidence Rules 413 through 415, “[e]vidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.”³¹ But Rule 404(b) provides that “[t]his evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.”³² And that is where Ms. Carroll hangs her hat. She argues that these excerpts are appropriate

“to establish Trump's *modus operandi* of categorically denying accusations and his intent and knowledge when making those statements. Indeed, this *modus operandi* is plain to see. When a woman accuses Trump, he unconditionally denies the allegations, accuses the woman of fabricating her story, and declares that she was too ugly for him to have sexually assaulted in the first place. [citations

³¹ Fed. R. Evid. 404(b)(1).

³² Fed. R. Evid. 404(b)(2).

omitted] This is the exact pattern Trump followed when he first responded to Carroll's accusations in June 2019 ...”³³

She goes on to contend that this evidence is “highly relevant” because, “[g]iven the similarities between how Trump responded to all three women, the pattern makes it more likely that Trump lied when he denied assaulting Carroll.”³⁴

The problem with Ms. Carroll's argument, even assuming sufficient similarities, is that these speech excerpts would not tend to make it more likely that Mr. Trump lied when he denied assaulting Ms. Carroll *unless* perhaps the evidence establishes that he lied when he denied assaulting each of the other women to whom he responded. The jury might or might not so find with respect to Ms. Leeds and Ms. Stoyloff, who are the obvious subjects of some of the excerpts. But it is not now clear that Ms. Leeds and Ms. Stoyloff were the only subjects of these remarks. Nor is it clear that the jury could make similar findings with respect to any others.³⁵

In the circumstances, the Court will defer any ruling on the admissibility of these excerpts until trial.

³³ Pl. Mem. (Dkt 138) at 14.

³⁴ *Id.* at 15.

³⁵ Ms. Carroll's fallback position – *i.e.*, that the excerpts are “evidence of Trump's knowledge regarding the falsity of his statements about Carroll, and his intent to lie and act with malice when making those statements”, *id.* -- amounts to the same argument.

Emotional Harm

This action is exclusively for defamation allegedly committed in 2019. Ms. Carroll here seeks damages solely for that defamation. In *Carroll II*, in contrast, the alleged rape itself as well as for a different allegedly defamatory statement allegedly made in October 2022. Mr. Trump seeks to preclude in this case, the case limited to alleged defamation, “any evidence of purported emotional harm related to the alleged incident,” referring to the sexual assault.³⁶ On this point, the parties are speaking past each other.

“To the extent that Trump seeks only to preclude Carroll from claiming as *compensatory damages*, the emotional and psychological harm that the sexual assault caused her, Carroll does not disagree.”³⁷ Compensatory damages for the sexual assault are available, if at all, only in *Carroll II*, which is brought under New York's Adult Survivors Act. But evidence of emotional and psychological harm allegedly caused by the alleged sexual assault may be relevant in this action, as it may go to why Ms. Carroll did not report or speak out about the alleged sexual assault earlier than she did and perhaps for other reasons. Mr. Trump does not suggest any reason that such evidence should be excluded.

Conclusions

For the foregoing reasons, Mr. Trump's *in limine* motion (Dkt 130) is denied in all other respects. This ruling is without prejudice to renewing his objection to the campaign speech excerpts in the event they are

³⁶ Dkt 131 at 10.

³⁷ Pl. Mem. (Dkt 138) at 17 (emphasis in original).

127A

offering at trial. Unless otherwise ordered, those excerpts shall not be mentioned in opening statements.

SO ORDERED.

Dated: March 10, 2023

/s/ *Lewis A. Kaplan*

Lewis A. Kaplan

United States District Judge

128A

APPENDIX E

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

No. 22-cv-10016 (LAK)
July 19, 2023

E. JEAN CARROLL,
Plaintiff,

v.

DONALD J. TRUMP,
Defendant.

**MEMORANDUM OPINION DENYING
DEFENDANT'S RULE 59 MOTION**

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LEWIS A. KAPLAN, *District Judge.*

In 2019, E. Jean Carroll first publicly claimed that businessman Donald J. Trump, as he then was, sexually assaulted (“raped”) her in the mid-1990s. Mr. Trump responded almost immediately by charging that Ms. Carroll’s claim was entirely false, that no such thing ever had happened, and that Ms. Carroll falsely accused Mr. Trump for ulterior and improper purposes. He repeated that contention in 2022 and yet again more recently. Ms. Carroll consequently sued Mr. Trump twice.

Ms. Carroll’s first lawsuit (“*Carroll I*”), commenced in 2019, alleges that Mr. Trump’s 2019 statements were defamatory. While that case was delayed for years for reasons that need not be recapitulated here, it now is scheduled for trial in January 2024.

This, the second case (“*Carroll II*”), also contains a defamation claim, albeit one based on Mr. Trump’s comparable 2022 statement. But *Carroll II* made an additional claim – one for damages for the sexual assault. That claim could not have been made in 2019 because the statute of limitations almost doubtless would have expired long before. But the claim was made possible in 2022 by the enactment that year of New York’s Adult Survivors Act (the “ASA”), which temporarily revived the ability of persons who were sexually assaulted as adults to sue their alleged assaulters despite the fact that an earlier statute of limitations had run out.

This case, *Carroll II*, was tried in April and May 2023. Ms. Carroll contended that Mr. Trump had assaulted her in a dressing room at a New York department store where, among other things, he forcibly penetrated her vagina with his fingers and his penis. She testified in person for most of three days and was cross-examined intensively. Her sexual assault claim was corroborated by two “outcry” witnesses in whom Ms. Carroll had confided shortly after the attack, and was supported by six other fact witnesses. Mr. Trump's defense – based exclusively on an attempt to discredit Ms. Carroll and her other witnesses – in substance was that no assault ever had occurred, that he did not even know Ms. Carroll, and that her accusations were a “Hoax.” Mr. Trump, however, did not testify in person or even attend the trial despite ample opportunity to do so.

The jury's unanimous verdict in *Carroll II* was almost entirely in favor of Ms. Carroll. The only point on which Ms. Carroll did not prevail was whether she had proved that Mr. Trump had “raped” her within the narrow, technical meaning of a particular section of the New York Penal Law – a section that provides that the label “rape” as used in criminal prosecutions in New York applies only to vaginal penetration by a penis. Forcible, unconsented-to penetration of the vagina or of other bodily orifices by fingers, other body parts, or other articles or materials is not called “rape” under the New York Penal Law. It instead is labeled “sexual abuse.”¹

¹ “Sexual abuse” involving sexual contact by forcible compulsion (sexual abuse in the first degree) nevertheless is a felony punishable by a term of imprisonment and requiring sex offender registration. N.Y. Penal Law §§ 70.02(1)(c) (sexual

As is shown in the following notes, the definition of rape in the New York Penal Law is far narrower than the meaning of “rape” in common modern parlance, its definition in some dictionaries,² in some federal and

abuse in the first degree is a Class D violent felony), 3(c) (“For a class D felony, the term must be at least two years and must not exceed seven years”); N.Y. Correct. Law §§ 168-a(3)(a)(i) (defining “[s]exually violent offense” to include a conviction of sexual abuse in the first degree), 7(b) (defining “[s]exually violent offender” as “a sex offender who has been convicted of a sexually violent offense defined in subdivision three of this section”).

² One dictionary, for example, defines rape as “unlawful sexual intercourse *or any other sexual penetration* of the vagina, anus, or mouth of another person, with or without force, *by a sex organ, other body part, or foreign object*, without the consent of the person subjected to such penetration.” “[R]ape,” Dictionary.com, <https://www.dictionary.com/browse/rape> (last accessed July 14, 2023) (emphasis added). The most recent edition of Black’s Law Dictionary defines rape in part as “[u]nlawful sexual activity (esp. intercourse) with a person (usu[ally] a female) without consent and usu[ally] by force or threat of injury” and it defines “intercourse” in the sexual sense as “[p]hysical sexual contact, esp. involving the penetration of the vagina by the penis.” Black’s Law Dictionary 966, 1511 (11th ed. 2019).

state criminal statutes,³ and elsewhere.⁴ The finding that Ms. Carroll failed to prove that she was “raped”

³ *E.g.*, 10 U.S.C. § 920(g)(1)(C) (Uniform Code of Military Justice) (defining “sexual act” for purposes of rape and sexual assault as, *inter alia*, “the penetration, however slight, of the vulva or penis or anus of another *by any part of the body or any object*, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person”) (emphasis added); Wayne R. LaFave, Subst. Crim. L., § 17.2(a) & n. 43 (3d ed.) (“In recent years, revision of rape laws have often brought about coverage of a broader range of conduct than is encompassed within the common law term ‘carnal knowledge.’... As for the acts covered, the new statutes ‘fall into three categories: those that continue the narrow notion that rape should punish only genital copulation; those that agree with the Model Code that rape laws should be expanded to include anal and oral copulation; and *those that go beyond the Model Code to include digital or mechanical penetration* as well as genital, anal, and oral sex.”) (emphasis added) (citing state statutes).

In fact, “rape” as defined in the relevant part of the New York Penal Law – forcible, unconsented-to penetration of the vagina by a penis – constitutes “sexual assault” under the Code of Criminal Justice of the State of New Jersey. N.J. Stat. Ann. §§ 2C:14-2c.(1) (“[a]n actor is guilty of sexual assault if the actor commits an act of sexual penetration with another person” and does so “using coercion or without the victim’s affirmative and freely-given permission”) and 2C:14-1c (“‘Sexual penetration’ means vaginal intercourse, cunnilingus, fellatio or anal intercourse between persons or insertion of the hand, finger or object into the anus or vagina either by the actor or upon the actor’s instruction.”). New Jersey, like some other states, does not statutorily define any crime as “rape.” As indicated by the foregoing, New Jersey’s penal code – unlike New York’s – treats digital and other modes of penetration in the same manner as penile penetration.

⁴ The American Psychological Association, for example, defines rape as “the nonconsensual oral, anal, or vaginal penetration of an individual by another person *with a part of the body or an object*, using force or threats of bodily harm or taking advantage

within the meaning of the New York Penal Law does not mean that she failed to prove that Mr. Trump “raped” her as many people commonly understand the word “rape.” Indeed, as the evidence at trial recounted below makes clear, the jury found that Mr. Trump in fact did exactly that.

So why does this matter? It matters because Mr. Trump now contends that the jury's \$2 million compensatory damages award for Ms. Carroll's sexual assault claim was excessive because the jury concluded that he had not “raped” Ms. Carroll.⁵ Its verdict, he says, could have been based upon no more than “groping of [Ms. Carroll's] breasts through clothing or similar conduct, which is a far cry from rape.”⁶ And while Mr. Trump is right that a \$2 million

of the individual's inability to give or deny consent. U.S. laws defining rape vary by state, but the crime of rape is no longer limited to ... vaginal penetration” APA Dictionary of Psychology, “Rape,” American Psychological Association, <https://dictionary.apa.org/rape> (last accessed July 14, 2023) (emphasis added).

The United States Attorney General announced in January 2012 a new definition of rape for the purpose of the Federal Bureau of Investigation's Uniform Crime Report Summary Reporting System by, among other changes, “recogniz[ing] that rape with an object can be as traumatic as penile/vaginal rape.” U.S. Department of Justice, *An Updated Definition of Rape*, Jan. 6, 2012, <https://www.justice.gov/archives/opa/blog/updated-definition-rape> (new definition of “rape” as “[t]he penetration, no matter how slight, of the vagina or anus *with any body part or object*, or oral penetration by a sex organ of another person, without the consent of the victim”) (emphasis added).

⁵ The jury awarded Ms. Carroll \$20,000 in punitive damages, in addition to the \$2 million in compensatory damages.

⁶ Dkt 205 (Def. Mem.) at 1.

award for such groping alone could well be regarded as excessive, that undermines rather than supports his argument. His argument is entirely unpersuasive.

This jury did not award Ms. Carroll more than \$2 million for groping her breasts through her clothing, wrongful as that might have been. There was no evidence at all of such behavior. Instead, the proof convincingly established, and the jury implicitly found, that Mr. Trump deliberately and forcibly penetrated Ms. Carroll's vagina with his fingers, causing immediate pain and long lasting emotional and psychological harm. Mr. Trump's argument therefore ignores the bulk of the evidence at trial, misinterprets the jury's verdict, and mistakenly focuses on the New York Penal Law definition of "rape" to the exclusion of the meaning of that word as it often is used in everyday life and of the evidence of what actually occurred between Ms. Carroll and Mr. Trump.

There is no basis for disturbing the jury's sexual assault damages. And Mr. Trump's arguments with respect to the defamation damages are no stronger.

Facts

The Evidence at Trial

Ms. Carroll's case in chief constituted all of the evidence at trial. Mr. Trump neither testified nor called any witnesses. Apart from portions of his deposition that came in on Ms. Carroll's case, there was no defense evidence at all. The defense consisted entirely of (1) an attempt to discredit Ms. Carroll's proof on cross-examination, and (2) Mr. Trump's testimony during his deposition that Ms. Carroll's account of the alleged events at the department store was a hoax.

*Sexual Battery**Liability*

The principal evidence as to Mr. Trump's liability for the sexual assault was the testimony of Ms. Carroll, of the two “outcry” witnesses and of two other women who claimed to have been sexually assaulted by Mr. Trump, the so-called *Access Hollywood* video, and Mr. Trump's remarkable comments about that video during his deposition.

Ms. Carroll

In her first public accusation of sexual assault – “rape” – against Mr. Trump, which was published in June 2019 as an excerpt of her then-forthcoming book, Ms. Carroll described the assault in relevant part as follows:

“The moment the dressing-room door [(at Bergdorf Goodman, a department store in New York)] is closed, he lunges at me, pushes me against the wall, hitting my head quite badly, and puts his mouth against my lips. I am so shocked I shove him back and start laughing again. He seizes both my arms and pushes me up against the wall a second time, and, as I become aware of how large he is, he holds me against the wall with his shoulder and jams his hand under my coat dress and pulls down my tights.... The next moment, still wearing correct business attire, shirt, tie, suit jacket, overcoat, he opens the overcoat, *unzips his pants, and, forcing his fingers around my private area, thrusts his penis halfway — or completely, I'm*

not certain — inside me. It turns into a colossal struggle.⁷

At trial, Ms. Carroll testified:

- “He [(Mr. Trump)] immediately shut the [(dressing room)] door and shoved me up against the wall and shoved me so hard my head banged.”
- “I pushed him back, and he thrust me back against the wall again, banging my head again.”
- “He put his shoulder against me and hold [*sic*] me against the wall.”
- “I remember him being -- he was very large, and his whole weight came against my chest and held me up there, and he leaned down and pulled down my tights.”
- “I was pushing him back.... I pushed him back. This arm was pinned down. This arm had my purse. Trying to get him back.”
- “His head was beside mine breathing. First, he put his mouth against me.”
- “[I was] [s]tamping and trying to wiggle out from under him. *But he had pulled down my tights and his hand went -- his fingers went into my vagina, which was extremely painful, extremely painful. It was a horrible feeling*

⁷ E. Jean Carroll, *Hideous Men: Donald Trump assaulted me in a Bergdorf Goodman dressing room 23 years ago. But he's not alone on the list of awful men in my life*, The Cut, New York Magazine, Jun. 21, 2019, <https://www.thecut.com/2019/06/donald-trump-assault-e-jean-carroll-other-hideous-men.html> (emphasis added).

because he curved, he put his hand inside of me and curved his finger. As I'm sitting here today, I can still feel it."

- "Then he inserted his penis."
- "He was against me, his whole shoulder -- I couldn't see anything. I couldn't see anything that was happening. *But I could certainly feel it. I could certainly feel that pain in the finger jamming up.*"⁸

After a day and a half of direct testimony, Ms. Carroll was subjected to a lengthy cross examination during which she testified:

"Q. It's your story that at some point you felt his penis inside of you?

A. Yes.

Q. But before that, *it's your sworn testimony that you felt his fingers, what you *309 said was rummaging around your vagina?*

A. *It's an unforgettable feeling.*

Q. Now, when you say rummaging around your vagina, that's different than inserting a finger inside your vagina.

A. *At first he rummaged around and then he put his finger inside me.*

Q. In your book you wrote that he was forcing his fingers around my private area and then thrust his penis halfway completely, I'm not certain, inside me. Is that accurate?

⁸ Dkt 187 (Trial Tr.) at 177:22-181:23 (emphasis added).

A. Yes.”⁹

The Outcry Witnesses

Ms. Carroll confided in two of her friends, Lisa Birnbach and Carol Martin (the “outcry” witnesses), about the attack shortly after it occurred. Almost immediately after Ms. Carroll escaped from Mr. Trump and exited the store, she called Ms. Birnbach. Ms. Carroll testified that during that call:

“A. I said, you are not going to believe what just happened. I just needed to tell her. I said I met Donald Trump in Bergdorf’s. We went lingerie shopping and I was so dumb I walked in a dressing room and he pulled down my tights.”

...

Q. What else did you say?

A. Well, she asked me, she said, after she heard he had pulled down my tights, she asked me, did he insert his penis? I said yes. And then Lisa said the words: Probably why I called her. She said he raped you. He raped you, E. Jean. You should go to the police. I said: No way. Then she said: I will go with you.”¹⁰

The next day, or the day after that, Ms. Carroll told Ms. Martin about the attack. Ms. Carroll testified:

“I said [(to Ms. Martin)]: Carol, you are not going to believe it. I had a run-in with Donald Trump at Bergdorf’s. She said -- she saw my face. She said: We can’t talk here. We were back

⁹ Dkt 189 (Trial Tr.) at 406:5-18 (emphasis added).

¹⁰ Dkt 187 (Trial Tr.) at 186:4-19.

behind the studio. She said: Let's talk tonight at my house.

...

I took her through step by step what happened. And Carol is a very unjudgmental, open-hearted friend. But she was -- she gave me the exact -- her concern was very different than Lisa's. Carol's concern was, do not go to the police.”¹¹

Both Ms. Birnbach and Ms. Martin testified about their conversations with Ms. Carroll. Ms. Birnbach testified in relevant part:

“Q. What was the first thing that Ms. Carroll said when you picked up the phone?

A. She said, Lisa, you are not going to believe what happened to me.

...

Q. What did she say after she said, Lisa, you are not going to believe what just happened?

A. E. Jean said that she had, after work that day, she had gone to Bergdorf's to look around, and she was on her way out -- and I believe it was a revolving door -- and she said on the other side of the glass from her going in, as she was going out, Donald Trump said to her, *Hey, you're the advice lady*. And she said, *You're the real estate guy*. And he said, *You're so good at advice, you are so smart, why don't you help me pick out a present for a friend?* So she thought she would, it sounded like a funny thing, this guy, who is famous. And she went back in the

¹¹ *Id.* at 190:5-20.

store and tried to, in my -- in my memory tried to show him things[.] ... They went upstairs, eventually finding themselves in the lingerie department, and there was no one behind the counter but there was a little bodysuit --

...

Q. What did she say happened after they got to the lingerie department?

A. He said, *Why don't you try this on?* And she, continuing sort of the jokey banter that they had, she said, *Why don't you try it on?* And then the next thing that happened is they were both in the dressing room and he slammed her against the wall. And then, as she was trying to move, he -- he slammed his whole arm, pinned her against the wall with his arm and shoulders, and with his free hand pulled down her tights. And E. Jean said to me many times, *He pulled down my tights. He pulled down my tights.* Almost like she couldn't believe it. She was still processing what had just happened to her. It had just happened to her. *He pulled down my tights.* And then he penetrated her.

Q. Did she say how he penetrated her?

A. Yes. She said with his penis.

Q. What did you say after Ms. Carroll described this to you?

A. As soon as she said that ... and I said, I whispered, *E. Jean, he raped you....*”¹²

Two days later, Ms. Martin testified in pertinent part:

¹² Dkt 193 (Trial Tr.) at 688:5-690:9 (emphases in original).

“Q. And what did she say -- again, taking this piece by piece, what did she say what happened?

A. She introduced it by saying, *You won't believe what happened to me the other night*. As I recall. And I didn't know what to expect and so, I just turned to her and she said, *Trump attacked me*.

...

Q. Now, Ms. Carroll says to you that *Trump attacked me*. Do you recall what you said next, if anything?

A. Yeah. I was completely floored. I didn't quite know what was coming next. She is leaning in to me, and I'm saying, *What are you talking about?* But the next thing that came to my mind was if she was OK and that's what I asked her. So I said, *Are you OK?* Because she seemed -- her affect was, I would say, anxious and excitable, but she could be that way sometimes but that part was different in her affect. But what she was saying didn't make any sense at first.

Q. And when you asked her was she OK, did she respond?

A. She said -- she probably said I don't know. She kept telling me what happened, *that he attacked me*. I think she said 'pinned me' is what she said and I still didn't know what that meant.

Q. So, to the best of your recollection -- I understand it would be crazy if you could remember every word, but what did she tell you

that day about what had happened to her at Bergdorf Goodman?

A. Basically, she backtracked. I kept asking her to backtrack. It wasn't a linear conversation, as you would expect, because it was news, it was I didn't know what I am hearing here, and she was clearly agitated, anxious. And she said she was at Bergdorf's the night before -- probably two nights, if I recall -- and that she ran into Mr. Trump going in one of the revolving doors. And she said that they started up a conversation. My sense is that she engaged him, or vice versa, because that's not uncommon for E. Jean. He recognized her, she recognized him.

...

Q. And what else did she tell you about what happened once they were inside Bergdorf Goodman?

A. So, she related that they sort of started kibbitzing or talking back and forth, it was apparently friendly, and she said that he was looking for a gift. And so, she engaged him that way suggesting certain things. I don't remember all of the things. But this must have gone on for a few minutes and then, somehow, they started up the stairs -- escalator, she said.

Q. And did she tell you what happened after they got off the escalator?

A. Yeah. And again, this was disjointed because I would stop and ask her, *What do you mean? What do you mean?* And she was explaining as she's going that once they reached a level -- and I don't know Bergdorf's that well, but once they

reached a level where there was -- there were dressing rooms, and she said at that point that he attacked her. Those were the words that I remember but I still said, *What do you mean? You look OK. You look --* and she had been at work so I couldn't put it together. And she didn't use the word 'rape,' that I recall. I have said that before. But she said it was a frenzy. She said, *I was fighting. I was fighting.* She kept saying that.”¹³

Other Alleged Survivors

The jury heard also from two other women who allegedly were sexually assaulted by Mr. Trump: Jessica Leeds and Natasha Stoyloff.¹⁴ Ms. Leeds claims she was seated beside Mr. Trump on a flight to New York in 1978 or 1979 when he allegedly assaulted her. She testified:

“A. Well, what happened was they served a meal, and it was a very nice meal, as Braniff was -- was -- reputation to do, and it was cleared and we were sitting there when all of a sudden Trump decided to kiss me and grope me.

Q. What led to that? Was there conversation?

¹³ Dkt 197 (Trial Tr.) at 1028:22-1032:6 (emphases in original).

¹⁴ The testimony of Mss. Leeds and Stoyloff was received pursuant to Federal Rule of Evidence 415, which provides that “evidence that the [defendant] committed any other sexual assault” may be admitted in “a civil case involving a claim for relief based on a party's alleged sexual assault.” Fed. R. Evid. 415(a). The Court's analysis is contained in a prior decision and need not be repeated here. *Carroll v. Trump*, No. 20-CV-7311 (LAK), 660 F.Supp.3d 196 (S.D.N.Y. Mar. 10, 2023).

A. There was no conversation. It was like out of the blue.

...

Q. What did you -- so describe, if you would, what he did exactly.

A. Well, it was like a tussle. He was -- his hands and -- he was trying to kiss me, he was trying to pull me towards him. He was grabbing my breasts, he was -- it's like he had 40 zillion hands, and it was a tussling match between the two of us. And *it was when he started putting his hand up my skirt* that that kind of gave me a jolt of strength, and I managed to wiggle out of the seat and I went storming back to my seat in the coach.”¹⁵

On cross examination, she testified also:

“Q. And it is your story that after you were done eating, the flight attendant cleared your tray tables and this man suddenly attacked you?

A. Correct.

Q. It is your story this man grabbed you with his hands, tried to kiss you, grabbed your breasts, and pulled you towards him?

A. Correct.

Q. And pulled himself onto you?

A. It's not -- no, not onto me but he was leaning-in to me, pushing me against the back of the seat.

Q. OK. And then according to you he, at one point, put his hand on your knee?

¹⁵ Dkt 193 (Trial Tr.) at 741:13-742:6 (emphasis added).

A. *He started putting his hand up my skirt.*

Q. *OK, on your leg and up your skirt?*

A. *Correct.*”¹⁶

Ms. Leeds confirmed that “if the man had just stuck with the upper part of [her] body, [she] might not have gotten that upset” and that “it is only when he eventually started putting his hands up [her] skirt that [she] said I don't need this[.]”¹⁷ On re-direct she explained:

“Q. Why did you find it less upsetting when he had his hands above your skirt than when they went into your skirt, when his hand went into your skirt?

A. That's sort of the demarcations -- I mean, people -- men -- would frequently pat you on the shoulder and grab you or something like that and you just -- it is not serious and you don't -- you don't -- *but when somebody starts to put their hand up your skirt, you know they're serious and this is not good.*”¹⁸

Ms. Stoyhoff, then a reporter for a magazine, encountered Mr. Trump in 2005 at Mar-a-Lago, his residence in Florida, on an assignment to interview him and his wife, Melania. Ms. Stoyhoff testified:

“Q. So where did you go with Mr. Trump after he said, I want to show you this room?

¹⁶ *Id.* at 771:19-772:8 (emphasis added).

¹⁷ *Id.* at 774:24-775:2, 775:13-16.

¹⁸ *Id.* at 787:6-14 (emphasis added).

A. So we -- I followed him, and we went in through these back doors and down a hall, as I recall it, and turned right into a room.

Q. Who was with you at that point?

A. As I recall, just he and I.

Q. So what happened next?

A. So we -- we walked into a room, and I'm looking in this room, and I went in first and I'm looking around, I'm thinking, wow, really nice room, wonder what he wants to show me, and he -- I hear the door shut behind me. And by the time I turn around, he has his hands on my shoulders and he pushes me against the wall and starts kissing me, holding me against the wall.

Q. Was anyone else in the room at this time?

A. Nobody else.

Q. What did you -- how did you react?

A. I started -- I tried to push him away.

Q. Had you -- had anything been said up until that point when you walked into the room? Did he say anything or did you say anything?

A. No, not that I recall.

...

Q. So what -- I think you said you tried to shove him away. What happened?

A. He came toward me again, and I tried to shove him again.

Q. What was he doing sort of -- what was he doing with, let's say, the rest of his face or body?

A. Well, he was kissing me and, you know, he was against me and just holding my shoulders back.

Q. Did you -- what, if anything, did you say while this was happening?

A. I didn't say words. I couldn't. I tried. I mean, I was just flustered and sort of shocked and I -- no words came out of me. I tried, though. I remember just sort of mumbling.

...

Q. How long -- do you recall how long that went on for?

A. A few minutes.

Q. How did it end?

A. A butler came into the room.

...

Q. How did Mr. Trump react when the butler came in?

A. He stopped doing what he was doing.

Q. Were you able to perceive whether the butler saw what had been happening?

A. I don't know if he saw, but to my mind, I gave him a kind of a 'get me out of here' look, and I felt like he understood.

Q. So what happened, what happened next?

A. The butler led us back to the couch area, and Melania was on her way, and Trump said a few things to me.

Q. What did he say to you?

A. *He said, Oh, you know we are going to have an affair, don't you? You know, don't forget*

what -- don't forget what Marla said, best sex she ever had. We are going to go for steak, we are going to go to Peter Luger's. We're going to have an affair.

...

Q.... Before the butler came into the room, *did Mr. Trump do anything to you that suggested he was going to stop on his own?*

A. No.”¹⁹

The Access Hollywood Tape

The so-called *Access Hollywood* tape, a recorded exchange among Mr. Trump and others as they arrived for the shooting of a television episode that was broadcast nationwide repeatedly during the 2016 presidential campaign, was played twice for the jury.²⁰ In that video, Mr. Trump stated that he

¹⁹ Dkt 195 (Trial Tr.) at 989:24-996:7 (emphasis added).

²⁰ Like the testimony of Mss. Leeds and Stoyneoff, the Court initially determined that the *Access Hollywood* tape was admissible on the ground that a jury reasonably could find it was evidence that Mr. Trump “committed any other sexual assault” pursuant to Rule 415. *Carroll*, 660 F.Supp.3d at 201–04. At trial, however, it became clear that reliance on Rule 415 was unnecessary because the video was offered for a purpose other than to show the defendant's propensity to commit sexual assault. Instead, it was offered – as Ms. Carroll's counsel argued in rebuttal summation – as “a confession.” Dkt 199 (Trial Tr.) at 1403:24. Given that Mr. Trump states in the video that he “just start[s] kissing” women without “even wait[ing]” and that a “star” (such as himself) could “grab [women] by the pussy,” it “has the tendency to make [the] fact [of whether he sexually assaulted Ms. Carroll] more or less probable than it would be without the evidence” because one of the women he referred to in the video could have been Ms. Carroll. Fed. R. Evid. 401. *See also*, e.g., *United States v. Cordero*, 205 F.3d 1325 (2d Cir. 2000)

previously had “moved on [a woman] like a bitch, but [he] couldn't get there.” He said also in the following exchange:

Trump: “Maybe it's a different one.”

Billy Bush: “It better not be the publicist. No, it's, it's her.”

Trump: “Yeah that's her. With the gold. I better use some Tic Tacs just in case I start kissing her. You know I'm automatically attracted to beautiful -- I just start kissing them. It's like a magnet. Just kiss. I don't even wait. *And when you're a star they let you do it. You can do anything.*”

Bush: “Whatever you want.”

Trump: “*Grab them by the pussy. You can do anything.*”

In the following excerpt of his deposition, which was played for the jury, Mr. Trump testified that:

“Q. And you say -- and again, this has become very famous -- in this video, ‘I just start kissing them. It's like a magnet. Just kiss. I don't even

(unpublished opinion) (“Proof of similar acts may be admitted so long as such evidence is offered ‘for any purpose other than to show a defendant's criminal propensity.’ ”) (citation omitted); *Woolfolk v. Baldofsky*, No. 19-CV-3815(WFK) (ST), 2022 WL 2600132, at *2 (E.D.N.Y. July 8, 2022) (“Evidence of prior crimes, wrongs, or acts, however, may be admissible if offered ‘for any purpose other than to show a defendant's criminal propensity, as long as the evidence is relevant and satisfies the probative-prejudice balancing test of Rule 403.’ ”) (citation omitted). Accordingly, the Court did not include the *Access Hollywood* tape in its instructions to the jury on the evidence of Mr. Trump's alleged sexual assaults of other women, and neither party objected to its exclusion from that portion of the charge.

wait. And when you're a star, they let you do it. You can do anything, grab them by the pussy. You can do anything. That's what you said; correct?"

A. Well, historically, that's true with stars.

Q. True with stars that they can grab women by the pussy?

A. Well, that's what -- if you look over the last million years, I guess that's been largely true. Not always, but largely true. Unfortunately or fortunately.

Q. And you consider yourself to be a star?

A. I think you can say that, yeah.

Q. And -- now, you said before, a couple of minutes ago, that this was just locker room talk?

A. It's locker room talk.

Q. And so does that mean that you didn't really mean it?

*A. No. It's locker room talk. I don't know. It's just the way people talk."*²¹

Damages for Sexual Assault (Battery) Claim

The damages evidence at trial consisted primarily of Ms. Carroll's own testimony as well as the testimony of Dr. Leslie Lebowitz, a clinical psychologist with expertise in trauma and in sexual trauma who evaluated Ms. Carroll for this case. Dr. Lebowitz testified in detail on the psychological harm

²¹ Dkt 138-1 (Def. Dep. Designations) at 174:5-175:4 (emphasis added).

of the assault by Mr. Trump on Ms. Carroll. She explained that:

“There were three dominant ways that I felt that she [(Ms. Carroll)] had been harmed. She has suffered from painful, intrusive memories for many years; she endured a diminishment in how she thought and felt about herself; and, perhaps most prominently, she manifests very notable avoidance symptoms which have curtailed her romantic and intimate life and caused profound loss.”²²

Dr. Lebowitz testified also that, although Ms. Carroll did not meet the full criteria to have been diagnosed with post-traumatic stress disorder (“PTSD”), Ms. Carroll exhibited symptoms in at least some of the four categories that are necessary for a diagnosis of PTSD, including “avoidance symptoms, ... alterations in her thoughts and feelings about herself, and ... intrusions.”²³ She explained that Ms. Carroll blamed herself for the assault and that the assault “made her feel like she was worth less than she had been before” and “[s]he felt degraded and diminished.”²⁴ As an example of an intrusive memory, which Dr. Lebowitz defined as “when some part of the traumatic experience, either what it felt like or it felt like in your body or in your emotions, just pierces your consciousness and lands in the middle of your experience and essentially hijacks your attention,” Dr. Lebowitz testified that at one point during her

²² Dkt 193 (Trial Tr.) at 829:22-830:2.

²³ Dkt 195 (Trial Tr.) at 853:13-15.

²⁴ *Id.* at 876:2-4.

interview with Ms. Carroll, she “began to squirm in her seat because she was actually reexperiencing Mr. Trump's fingers inside of her, what she alleges to be Mr. Trump's fingers inside of her.”²⁵ She explained also Ms. Carroll's comment that she felt she had died and somehow still was alive as a manifestation of “what it feels like psychologically” because “what rape does is it so violates that sense of humanity and independence and selfhood than people feel psychologically that they are being killed. They feel at risk. They feel like their personhood is being murdered”²⁶ Dr. Lebowitz summarized the psychological impact of Mr. Trump's assault on Ms. Carroll as follows:

“Because she was frightened and rendered helpless in a way that had never happened to her before and because she blamed herself and because the meaning of that event and the feelings associated with it were simply too big for her to cope with in her usual ways, *it became a stuck point in her life*, something that she had to walk around in her day-to-day basis; and, in doing that, in working so hard to stay away from those feelings of helplessness and vulnerability, she gave up one of the great sources of joy and connection in her life, which was the opportunity to be intimate with a man, and that was a huge loss for her.”²⁷

²⁵ *Id.* at 861:8-19.

²⁶ *Id.* at 864:19-865:12.

²⁷ *Id.* at 888:10-20 (emphasis added).

*Defamation**Liability*

Most of the evidence of Mr. Trump's liability for the defamation claim based on his 2022 statement was coextensive with the evidence of his liability for the sexual assault. The crux of Mr. Trump's 2022 statement was that Ms. Carroll lied about him sexually assaulting her and that her entire accusation was a “Hoax” concocted to increase sales of her then-forthcoming book. To prove that Mr. Trump defamed her, Ms. Carroll needed to prove that his statement was false (i.e., not substantially true), that he knew the statement was false when he made it or acted in reckless disregard of whether or not it was true (actual malice), and that the statement tended to disparage Ms. Carroll in the way of her profession or expose her to hatred or contempt in the minds of a substantial number of people in the community.

The evidence that Mr. Trump sexually assaulted Ms. Carroll proved also the falsity of his statement, which contended that Ms. Carroll's entire account – not any particular sexual act – was a fabrication. With respect to its defamatory import, in addition to showing the jury examples of Internet hate messages Ms. Carroll received from people she did not know, Ms. Carroll testified:

“Q. How, if at all, do you believe this statement affected your reputation?

A. I really thought I was gaining back a bit of ground. I thought, it's starting to go and I felt, you know, happy that, you know, I was back on my feet, had garnered some readers, and feeling pretty good, and then, boom, he knocks me back down again.

...

Q. What, if any, I'll call it sort of public response did you experience after Mr. Trump made his October 2022 statement?

A. It was not very nice.

Q. What do you recall?

A. Just a wave of slime. It was very seedy comments, very denigrating. Almost an endless stream of people repeating what Donald Trump says, I was a liar and I was in it for the money, can't wait for the payoff, working for the democrats, over and over. But the main thing was way too ugly. It is very hard to get up in the morning and face the fact that you're receiving these messages you are just too ugly to go on living, practically.”²⁸

Ms. Carroll further testified that in comparison to the “tweets or messages [she] received after Mr. Trump made his first remarks in June of 2019,” the messages that came after October 2022 “were equally, equally disparaging and hurtful, but these particularly hurt because I thought I had made it through and here they are again.”²⁹

In excerpts of Mr. Trump's deposition that were played for the jury, Mr. Trump confirmed that he wrote the statement “all myself”³⁰ and testified that:

“I still don't know this woman. I think she's a wack job. I have no idea. I don't know anything

²⁸ Dkt 189 (Trial Tr.) at 322:6-324:5.

²⁹ *Id.* at 329:2-7.

³⁰ Dkt 138-1 (Def. Dep. Designations) at 134:13.

about this woman other than what I read in stories and what I hear. I know nothing about her.”³¹

Damages for Defamation Claim

The damages evidence consisted primarily of Ms. Carroll's testimony as to the harm she suffered, which is described above, plus the testimony of Professor Ashlee Humphreys with respect to a “reputation repair program” to correct the harm to Ms. Carroll's reputation caused by Mr. Trump's statement.

“... [T]he nature of the work [(for Professor Humphreys)] was to look at a statement that was posted on social media and to understand the spread of that statement, how many people saw it, how broadly did it spread, then to look at the impact that statement might have had on Ms. Carroll's reputation, if any, and finally to estimate, well, how much would it cost to repair that reputation.”³²

Professor Humphreys testified about her process and various calculations. She used an “impression model” to determine approximately how many people saw Mr. Trump's 2022 statement. She determined that across various forms of media, including on the Internet, social media, print media, and television, “the final estimate ... was between 13.7 million and 18 million impressions,” which she explained likely “was an undercount.”³³ She stated that “after June 2019 ... of

³¹ *Id.* at 137:14-17.

³² Dkt 197 (Trial Tr.) at 1114:2-8.

³³ *Id.* at 1127:24-25, 1128:16-19.

course there was a lot more volume of statements about her [(Ms. Carroll)] and they contained pretty negative associations including that she was a liar, the perpetrator of a scam, a hoax. Things like that.”³⁴ With respect to Ms. Carroll's reputation before and after the 2022 statement, she testified:

“So, what I noticed is that those meetings [*sic*] existed after June 2019, but the frequency of the posting with those associations had started to decline. However, after the statement on October 12th, the frequency of the negative associations, the volume of them again escalated.”³⁵

Professor Humphreys accordingly “concluded that there was a relationship” between Mr. Trump's 2022 statement and Ms. Carroll's reputation “given the timing and the fact that they [(posts with negative associations)] were in kind of direct response to his [(Mr. Trump's)] statement, as well as the particular language, words like ‘liar’ etc.”³⁶ She looked at approximately how many people likely believed Mr. Trump's statement, and determined that “between 3.7 million and 5.6 million people saw Mr. Trump's statement and likely believed it.”³⁷ Finally, she explained that to repair Ms. Carroll's reputation, there would need to be “a campaign to put out positive message” about her (a “reputational repair campaign”

³⁴ *Id.* at 1130:9-12.

³⁵ *Id.* at 1130:18-22.

³⁶ *Id.* at 1130:25-1131:3.

³⁷ *Id.* at 1134:16-19.

or “reputation repair program”).³⁸ In total, Professor Humphreys calculated that the cost of such a campaign to repair Ms. Carroll's reputation on the low end would be \$368,000 and on the high end would be \$2.7 million.³⁹

The Structure of the Verdict

Both parties submitted proposed “special verdict” forms to distribute to the jury. Pursuant to Federal Rule of Civil Procedure 49, which governs jury verdict forms and questions, “[t]he court may require a jury to return only a special verdict in the form of a special written finding on each issue of fact.”⁴⁰ A special verdict stands in contrast to a general verdict form, which typically asks jurors to answer only the ultimate questions of liability and the damages amounts, if any.

The Court here used a special verdict form that was substantially similar to the parties’ proposed forms, consisting of factual questions going to liability and damages, organized by the two claims. Neither party raised any objection to the Court's verdict form nor demanded that any specific questions other than those on the special verdict form be submitted to the jury. In accordance with Rule 49, the Court “g[a]ve the instructions and explanations necessary to enable the jury to make its findings on each submitted issue” contained in the verdict form.⁴¹ Accordingly, the

³⁸ *Id.* at 1136:10-13.

³⁹ *Id.* at 1142:11-20.

⁴⁰ Fed. R. Civ. P. 49(a)(1).

⁴¹ Fed. R. Civ. P. 49(a)(2).

meaning of the jury's answers to each question on the verdict form depends upon the instructions given as to what it had to conclude in order to answer the questions.

Sexual Battery Instructions

The liability questions for Ms. Carroll's sexual battery claim were whether Ms. Carroll proved by a preponderance of the evidence that (1) “Mr. Trump raped Ms. Carroll?”, (2) “Mr. Trump sexually abused Ms. Carroll?”, (3) “Mr. Trump forcibly touched Ms. Carroll?”.⁴² These three theories of liability (rape, sexual abuse, and forcible touching) were the same three proposed by both parties. As the Court instructed the jury:

“Ms. Carroll claims that Mr. Trump is liable to her for battery on three different and alternative bases, each of which corresponds to a criminal law definition of a different sex crime. Mr. Trump denies that he is liable to her for battery on any of these three different and alternative bases.... Accordingly, the first set of questions in the verdict form has to do with whether or not Ms. Carroll has established that Mr. Trump's conduct, if any, came within any of those criminal law definitions.”⁴³

The Court then instructed the jury on the definitions of the three different sex crimes.

On the first question – whether Ms. Carroll proved that Mr. Trump “raped” her – the Court instructed the

⁴² Dkt 174 (Verdict) at 1.

⁴³ Dkt 201 (Trial Tr.) at 1416:1-9.

jury in accordance with the New York Penal Law's definition of rape:⁴⁴

“In order to establish that Mr. Trump raped her, Ms. Carroll must prove each of two elements by a preponderance of the evidence.

The first element is that Mr. Trump engaged in *sexual intercourse* with her.

The second element is that Mr. Trump did so without Ms. Carroll's consent by the use of forcible compulsion....

‘Sexual intercourse’ means any penetration, however slight, *of the penis* into the vaginal opening. In other words, *any penetration of the penis* into the vaginal opening, regardless of the distance of penetration, constitutes an act of sexual intercourse. Sexual intercourse does not necessarily require erection *of the penis*, emission, or an orgasm.

...

I also used the phrase ‘forcible compulsion,’ and what that means is intentionally to compel by the use of physical force.

...

If you find that Ms. Carroll has proved by a preponderance of the evidence both of those two elements, you will answer Question 1 ‘yes.’ If you answer Question 1 ‘yes,’ I instruct you that Mr. Trump thus committed battery against Ms.

⁴⁴ It was necessary to obtain findings under the New York Penal Law definitions because the timeliness of the battery claim under the Adult Survivors Act depended on such findings. N.Y. CPLR § 214-j.

Carroll. There would be no need to consider whether he committed battery on either of the other two alternative bases.... If you find that Ms. Carroll has not proven either of the two elements of rape by a preponderance of the evidence, you must answer ‘no’ to Question 1 and go on to Question 2, which deals with the second of the three alternative bases for the battery claim.”⁴⁵

Thus, the instructions required the jury to answer Question 1 “No” unless it found that Ms. Carroll had proved that Mr. Trump penetrated her vagina *with his penis*. Penetration by any other body part did not suffice.

With respect to the second question, whether Ms. Carroll proved that Mr. Trump “sexually abused” her within the meaning of the New York Penal Law, the Court instructed the jury:

“The second theory of battery corresponds to something called sexual abuse. Sexual abuse has two elements. In order to establish that Mr. Trump sexually abused her, Ms. Carroll must prove each of two elements by a preponderance of the evidence.

The first element is that Mr. Trump subjected Ms. Carroll to sexual contact.

The second element is that he did so without Ms. Carroll's consent by the use of forcible compulsion.

... Sexual contact for this purpose means *any touching of the sexual or other intimate parts of*

⁴⁵ Dkt 201 (Trial Tr.) at 1416:18-1418:2 (emphasis added).

a person for the purpose of gratifying the sexual desire of either person. It includes the touching of the actor by the victim, as well as the touching of the victim by the actor, and the touching may be either directly or through clothing.

... For this purpose, a *'sexual part'* is an organ of human reproduction. So far as intimate part is concerned, the law does not specifically define which parts of the body are intimate. Intimacy, moreover, is a function of behavior and not just anatomy. Therefore, if any touching occurred, the manner and circumstances of the touching may inform your determination whether Mr. Trump touched any of Ms. Carroll's intimate parts. You should apply your common sense to determine whether, under general societal norms and considering all the circumstances, any area or areas that Mr. Trump touched, if he touched any, were sufficiently personal or private that it would not have been touched in the absence of a close relationship between the parties.

...

If you find that Ms. Carroll has proved by a preponderance of the evidence both of the two elements that I just referred to, the two elements of sexual abuse, then you will answer 'yes' to Question 2. If you answer yes to Question 2, I instruct you that Mr. Trump thus committed battery against Ms. Carroll. There would be no need to consider whether he committed battery on the third alternative test.... If you find that Ms. Kaplan [*sic*] has not proven either of the two elements of sexual

abuse by a preponderance of the evidence, you must answer ‘no’ to Question 2 and proceed to Question 3, which deals with the third of the three alternative bases for the battery claim.”⁴⁶

Thus, if the jury found that Mr. Trump penetrated Ms. Carroll's vagina with his fingers, it was obliged to answer Question 2 “Yes” assuming the other element was satisfied.

Questions 4 and 5 dealt with compensatory and punitive damages, respectively, for Ms. Carroll's battery claim. Question 4 asked whether Ms. Carroll proved that she was injured as a result of Mr. Trump's conduct, and if so, to insert a dollar amount that would fairly and adequately compensate her for that injury or those injuries. The Court instructed the jury:

“My instructions to you on the law of damages should not be taken by you as a hint that you should find for the plaintiff. That is for you to decide by answering the questions I have put to you based on the evidence presented. But if you answer ‘yes’ to any of Question 1, Question 2, or Question 3, you will have determined that Ms. Carroll has prevailed on her claim of battery. In that event, it will be your task to determine from the evidence a dollar amount, if any, that would justly and adequately compensate Ms. Carroll for any physical injury, pain and suffering, and mental anguish, as well as emotional distress, fear, personal humiliation, and indignation that she has suffered, or will suffer in the future, as a result of Mr. Trump's

⁴⁶ *Id.* at 1418:3-1420:8 (emphasis added).

alleged rape, sexual abuse, or forcible touching as the case may be.

You may award damages only for those injuries that you find Ms. Carroll has proved by a preponderance of the evidence. Compensatory damages may not be based on speculation or sympathy. They must be based on the evidence presented at trial and only on that evidence.

Now, if you answer 'yes' to Question 4 ... she [(Ms. Carroll)] would be entitled to a dollar amount to compensate her adequately and fairly for any physical injury, pain and suffering, mental anguish, emotional distress, and the other things I just mentioned a moment ago, that she suffered by virtue of Mr. Trump's alleged battery, in other words, his alleged rape, sexual abuse, or forcible touching, as the case may be. Damages may be awarded based on a plaintiff's subjective testimony of pain, but the plaintiff's proof must satisfactorily establish that the injury is more than minimal.”⁴⁷

⁴⁷ *Id.* at 1422:17-1423:25.

Question 5 on punitive damages asked whether Ms. Carroll proved by a preponderance of the evidence that Mr. Trump's conduct was willfully or wantonly negligent, reckless, or done with a conscious disregard of the rights of Ms. Carroll, or was so reckless as to amount to such disregard. If so, it asked how much Mr. Trump should pay to Ms. Carroll in punitive damages. Given that Mr. Trump does not dispute the jury's \$20,000 award in punitive damages for Ms. Carroll's battery claim, the Court's instructions on this question need not be reproduced here.

Defamation Instructions

The factual questions for the defamation liability issue were (1) whether Ms. Carroll proved by a preponderance of the evidence that Mr. Trump's statement was defamatory and (2) whether Ms. Carroll proved by clear and convincing evidence his statement was (a) false and (b) made with actual malice. As relevant to Mr. Trump's arguments in this motion, the Court instructed the jury that:

“Question 7, as you see on the verdict form, asks whether Ms. Carroll has proved by something called clear and convincing evidence that Mr. Trump's statement was false.... A statement is false if it is not substantially true. You will determine from the evidence presented what the truth was and then compare that with Mr. Trump's October 12 statement, taking that statement according to its ordinary meaning, the ordinary meaning of its words.

As you probably already have guessed, *whether Mr. Trump's statement is false or true depends largely or entirely on whether you find that Mr. Trump raped or sexually abused or forcibly touched or otherwise sexually attacked Ms. Carroll.*

...

Question 8, in substance, asks you to determine whether Ms. Carroll has proved by clear and convincing evidence that Mr. Trump made the statement with what the law calls actual malice. Actual malice for this purpose ... means that Mr. Trump made the statement knowing that it was false or acted in reckless disregard of whether or not it was true. Reckless

disregard means that when he made the October 12 statement, he had serious doubts as to the truth of the statement or made the statement with a high degree of awareness that it was probably false. So Question 8 asks you to decide whether Ms. Carroll proved by clear and convincing evidence that Mr. Trump, when he made his October 12 statement, knew that it was false, had serious doubts as to its truth, or had a high degree of awareness that the statement probably was false.”⁴⁸

The question on compensatory damages was broken down into several parts. First, it asked whether Ms. Carroll proved by a preponderance of the evidence that Ms. Carroll was injured as a result of Mr. Trump's publication of the October 12, 2022 statement. If so, it asked that the jury (1) insert a dollar amount for any damages other than the reputation repair program, and (2) insert a dollar amount for any damages for the reputation repair program only. The Court instructed the jury that:

“In the event Mr. Trump is liable for defamation, you will award an amount that, in the exercise of your good judgment and common sense, you decide is fair and just compensation for the injury to the plaintiff's reputation and the humiliation and mental anguish in her public and private life which you decide was caused by the defendant's statement. In fixing that amount, if you fix one, you should consider the plaintiff's standing in the community, the nature of Mr. Trump's statement made about

⁴⁸ *Id.* at 1430:17-1432:3 (emphasis added).

Ms. Carroll, the extent to which the statement was circulated, the tendency of the statement to injure a person such as Ms. Carroll, and all of the other facts and circumstances in the case. These damages can't be proved with mathematical certainty. Fair compensation may vary, ranging from one dollar, if you decide that there was no injury, to a substantial sum if you decide that there was substantial injury.

Now, in this case, Question 9, I have divided the damages determination into two parts The first part of Question 9, right at the top, the yes/no question asks you to decide whether Ms. Carroll has proved by a preponderance of the evidence that she was injured in any of the respects I just described.... If the answer is 'yes,' you first will fill in the amount you award for all defamation damages, excluding the reputation repair program. You will leave that out if you put in a figure in the first blank. That was of course the testimony of Professor Humphreys. Second, you will fill in the amount, if any, that you award for the reputation repair program only.”⁴⁹

The last question on the form, on punitive damages for the defamation claim, asked whether in making the 2022 statement, Mr. Trump acted maliciously, out of hatred, ill will, spite or wanton, reckless, or willful disregard of the rights of another. If so, it asked how much, if any, Mr. Trump should pay to Ms. Carroll in punitive damages. The Court instructed the jury:

⁴⁹ *Id.* at 1432:25-1434:7.

“In addition to the claim for punitive damages for the defamation, Ms. Carroll asks also that you award punitive damages for the defamation. Similar to my earlier instructions to you regarding punitive damages on the battery claim, punitive damages in relation to a libel claim – the defamation claim – may be awarded to punish a defendant who has acted maliciously and to discourage others from doing the same. Now, this is where that difference between ‘actual malice,’ which I already talked about, and ‘malice’ or ‘maliciously’ comes into play.... A statement is made with malice or it's made maliciously for the purpose of Question 10 if it's made with deliberate intent to injure or made out of hatred or ill will or spite or made with willful or wanton or reckless disregard of another's rights.

If you answer ‘yes’ to the first part of Question 10 – in other words, if you find that Mr. Trump acted with malice, as I have just defined that term for you, in making the October 12 statement about Ms. Carroll – you will write down an amount, if any, that you find Mr. Trump should pay to Ms. Carroll in punitive damages for the defamation. If you answer ‘no’ to that first part of Question 10 – that is, you find that Mr. Trump's statement was not made maliciously – you may not award punitive damages....

In arriving at your decision as to the amount of punitive damages, you should consider here with respect to the defamation punitive damage claim:

The nature and reprehensibility of what Mr. Trump did if he defamed her; that would include the character of the wrongdoing and Mr. Trump's awareness of what harm the conduct caused or was likely to cause. In considering the amount of punitive damages to award, you should weigh that factor heavily;

You should consider the actual and potential harm created by Mr. Trump's conduct; and

You should consider Mr. Trump's financial condition and the impact of your award of punitive damages, if any, on Mr. Trump.”⁵⁰

This concluded the Court's substantive instructions on the law, as relevant to Mr. Trump's motion.

The Jury's Decision

In accordance with the Court's instructions, which the jury is presumed to have followed,⁵¹ the jury made the following explicit findings based on its answers to the verdict form. On the sexual battery claim, the jury found that:

- Mr. Trump *sexually abused* Ms. Carroll.
- Mr. Trump *injured her* in doing so.
- “Mr. Trump's conduct was *willfully or wantonly negligent, reckless, or done with a conscious disregard of the rights of Ms. Carroll*, or was so reckless as to amount to such disregard”.⁵²

⁵⁰ *Id.* at 1434:17-1436:10.

⁵¹ *E.g., United States v. Salameh*, 152 F.3d 88, 116 (2d Cir. 1998).

⁵² Dkt 174 (Verdict) at 2 (emphasis added).

- Ms. Carroll was entitled to compensatory and punitive damages on the sexual battery claim of *\$2.02 million* (\$2 million in compensatory damages and \$20,000 in punitive damages).

On the defamation claim, it found that:

- Mr. Trump's October 12, 2022 statement was *defamatory and false* (i.e., “not substantially true”).
- Mr. Trump made that statement “with actual malice” – that is, that when he made the statement, Mr. Trump “*knew that it was false*”, “*had serious doubts as to its truth*”, or “*had a high degree of awareness that the statement probably was false.*”⁵³
- “Ms. Carroll was *injured* as a result of Mr. Trump's publication of the October 12, 2022 statement.”⁵⁴
- “Mr. Trump *acted maliciously, out of hatred, ill will, spite or wanton, reckless, or willful disregard* of the rights of another.”⁵⁵
- Ms. Carroll was entitled to *\$2.98 million* in compensatory and punitive damages on the defamation claim relating to the October 12, 2022 statement (\$1.7 million in compensatory damages for the “reputation repair program” only, \$1 million in compensatory damages for damages other than the reputation repair program, and \$280,000 in punitive damages).

⁵³ Dkt 201 (Trial Tr.) at 1432:1-3 (emphasis added).

⁵⁴ Dkt 174 (Verdict) at 3 (emphasis added).

⁵⁵ *Id.* (emphasis added).

Discussion

Mr. Trump's motion is addressed only to the jury's damages awards, specifically its compensatory damages award for Ms. Carroll's sexual battery claim, and its compensatory and punitive damages awards for the defamation claim. He does not challenge the Court's instructions or the jury's liability verdict. All of his arguments are unpersuasive.

The Legal Standard

A “trial judge enjoys ‘discretion to grant a new trial if the verdict appears to [the judge] to be against the weight of the evidence,’ and ... ‘[t]his discretion includes overturning verdicts for excessiveness and ordering a new trial without qualification, or conditioned on the verdict winner's refusal to agree to a reduction (remittitur).’ ”⁵⁶ “In considering motions for a new trial and/or remittitur, ‘[t]he role of the district court is to determine whether the jury's verdict is within the confines set by state law, and to determine, by reference to federal standards developed under Rule 59, whether a new trial or remittitur should be ordered.’ ”⁵⁷

“Ordinarily, a court should not grant a new trial ‘unless it is convinced that the jury has reached a seriously erroneous result or ... the verdict is a miscarriage of justice.’ ... Nevertheless, the standard for granting a new trial under Rule 59 is less stringent

⁵⁶ *Lore v. City of Syracuse*, 670 F.3d 127, 176–77 (2d Cir. 2012) (alterations in original) (quoting *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 433, 116 S.Ct. 2211, 135 L.Ed.2d 659 (1996)).

⁵⁷ *Stampf v. Long Island R. Co.*, 761 F.3d 192, 204 (2d Cir. 2014) (quoting *Gasperini*, 518 U.S. at 435, 116 S.Ct. 2211).

than the standard under Rule 50.”⁵⁸ Specifically, unlike the standard on a Rule 50 motion, on a Rule 59 motion: “(1) a new trial ... may be granted even if there is substantial evidence supporting the jury's verdict, and (2) a trial judge is free to weigh the evidence himself, and need not view it in the light most favorable to the verdict winner.”⁵⁹ “A court considering a Rule 59 motion for a new trial must bear in mind, however, that the court should only grant such a motion when the jury's verdict is egregious. Accordingly, a court should rarely disturb a jury's evaluation of a witness's credibility.”⁶⁰

With respect to determining whether the jury's damages awards come within the confines of state law, “[u]nder New York law, a court ‘shall determine

⁵⁸ *Mono v. Peter Pan Bus Lines, Inc.*, 13 F. Supp. 2d 471, 475 (S.D.N.Y. 1998) (quoting *Smith v. Lightning Bolt Productions, Inc.*, 861 F.2d 363, 370 (2d Cir.1988)).

In *Mono*, the Court identified “an unresolved *Erie* issue – whether the state or federal standard of review applies in a motion for a new trial in a diversity action. New York law does not distinguish between a motion for a new trial and a motion for a judgment notwithstanding the verdict.... Thus, if state law applies to defendants’ Rule 59 motion, the standard of review would be whether the jury could have reached its verdict on ‘any fair interpretation of the evidence.’ ” *Id.* at 475, n.2 (citations omitted). However, as in *Mono*, “[b]ecause the evidence presented at trial [in *Carroll II*] satisfies both the federal and state standards, I need not determine which jurisdiction's law controls [Mr. Trump's] motion for a new trial.” *Id.*

⁵⁹ *Iverson v. Surber*, No. 13-CV-633 (RA), 2018 WL 6523176, at *1 (S.D.N.Y. Nov. 13, 2018), *aff'd*, 800 F. App'x 50 (2d Cir. 2020) (citation omitted).

⁶⁰ *Id.* (quoting *DLC Mgmt. Corp. v. Town of Hyde Park*, 163 F.3d 124, 134 (2d Cir. 1998)).

that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation.’ ”⁶¹ “To determine whether a jury award is excessive within the meaning of [New York Civil Practice Law and Rules] § 5501(c), New York courts compare it with awards in similar cases.”⁶² The relevant standard “is not whether an award deviates *at all* from past awards – it is whether an award deviates *materially* from *reasonable compensation*.”⁶³

Compensatory Damages - Sexual Battery Claim

Mr. Trump Digitally and Forcibly Penetrated Ms. Carroll's Vagina

Mr. Trump argues that the Court should grant a new trial or remittitur with respect to the jury's award of compensatory damages for Ms. Carroll's sexual battery claim chiefly on the ground that “the [j]ury found that [Ms. Carroll] was not raped but was sexually abused by [Mr. Trump] during the 1995/96 Bergdorf Goodman incident.”⁶⁴ According to Mr. Trump, “[s]uch abuse could have included groping of Plaintiff's breasts through clothing or similar conduct, which is a far cry from rape. Therefore, an award of \$2 million for such conduct, which admittedly did not cause any diagnosed mental injury to Plaintiff, is

⁶¹ *Stampf*, 761 F.3d at 204 (quoting N.Y. CPLR § 5501(c)).

⁶² *Id.*

⁶³ *Okraynets v. Metro. Transp. Auth.*, 555 F. Supp. 2d 420, 439 (S.D.N.Y. 2008) (emphasis in original).

⁶⁴ Dkt 205 (Def. Mem.) at 1.

grossly excessive under the applicable case law.”⁶⁵ Mr. Trump's argument is incorrect at every step.

First, the definition of “rape” in the New York Penal Law – which the jury was obliged to apply in responding to Question 1 on the verdict form – requires forcible penetration of the victim's vagina *by the accused's penis*.⁶⁶ Accordingly, the jury's negative answer to Question 1 means *only* that the jury was unpersuaded that Mr. Trump's penis penetrated Ms.

⁶⁵ *Id.*

⁶⁶ The New York Penal Law states that “[a] person is guilty of rape in the first degree when he or she engages in sexual intercourse with another person ... 1. By forcible compulsion” N.Y. Penal Law § 130.35. It provides also that “ ‘[s]exual intercourse’ has its ordinary meaning and occurs upon any penetration, however slight.” *Id.* § 130.00. New York courts have interpreted “sexual intercourse” as involving *penile* penetration. *E.g.*, *People v. Berardicurti*, 167 A.D.2d 840, 841, 561 N.Y.S.2d 949 (4th Dept. 1990) (“The trial court properly instructed the jury that, to constitute sexual intercourse, penetration ‘need not be deep’ and that ‘[a]ny penetration of the penis into the vaginal opening, regardless of the distance or amount of penetration’ constitutes sexual intercourse.”) (citation omitted); *People v. Peet*, 101 A.D.2d 656, 656, 475 N.Y.S.2d 898 (3d Dept. 1984), *aff'd*, 64 N.Y.2d 914, 488 N.Y.S.2d 379, 477 N.E.2d 620 (1985) (“[T]he use of one's finger has already been sufficiently proscribed by section 130.65 of the Penal Law [(sexual abuse in the first degree)]”); *Williams v. McCoy*, 7 F. Supp. 2d 214, 220-21 (E.D.N.Y. 1998) (rejecting petitioner's argument that “the trial judge erred in instructing the jury on the elements of rape because he neglected to explain that rape requires penile – as opposed to digital – penetration” because “[a] jury of competent adults surely understood the ‘ordinary meaning’ of ‘sexual intercourse’ to require penile penetration”). This Court accordingly instructed the jury that sexual intercourse required penile penetration of the vagina, and neither party objected to that definition.

Carroll's vagina. It does not mean that he did not forcibly insert his fingers into her – that he “raped” her in the broader sense of that word which, as discussed above, includes any penetration by any part of an accused's body (including a finger or fingers) or any other object.⁶⁷

Second, Mr. Trump's argument ignores the fact that the verdict in this case was a special verdict governed by Rule 49 of the Federal Rules of Civil Procedure. The form of the verdict, including the fact that it did not ask the jury to decide exactly what conduct Mr. Trump committed in the event it found for Ms. Carroll as to sexual abuse – was approved by

⁶⁷ It is not entirely surprising that the jury did not find penile penetration but, as discussed below, implicitly found digital penetration. Ms. Carroll testified about the specific physical memory and excruciating pain of the digital penetration at great length and in greater detail than the penile penetration. She acknowledged that she could not see exactly what Mr. Trump inserted but testified on the basis of what she felt. Dkt 187 (Trial Tr.) at 181:20-23 (“I couldn't see anything. I couldn't see anything that was happening. But I could certainly feel it. *I could certainly feel that pain in the finger jamming up.*”) (emphasis added). Moreover, the jury might have been influenced by defense counsel's ardent summation in which he virtually begged the jury not to answer the “rape” question against Mr. Trump. Dkt 199 (Trial Tr.) at 1370:5-10 (“To condemn someone as a rapist is a decision you would have to live with for the rest of your lives. Don't let her throw that burden on you. Don't let her throw her burden on you to have to carry forever. You know this didn't happen, that Donald Trump raped E. Jean Carroll in a Bergdorf Goodman changing room. You know it didn't happen.”).

Mr. Trump as well as by Ms. Carroll.⁶⁸ In these circumstances,

“A party waives the right to a jury trial on any issue of fact raised by the pleadings or evidence but not submitted to the jury unless, before the jury retires, the party demands its submission to the jury. *If the party does not demand submission, the court may make a finding on the issue. If the court makes no finding, it is considered to have made a finding consistent with its judgment on the special verdict.*”⁶⁹

Neither party made any such demand here. So the jury (or the Court) is deemed to have made a finding in accord with the judgment on the special verdict unless the Court makes a contrary finding.⁷⁰ In other

⁶⁸ Dkt 199 (Trial Tr.) at 1208:12-21 (Both Ms. Carroll's counsel and Mr. Trump's counsel stating that they have no objection to the verdict form).

⁶⁹ Fed. R. Civ. P. 49(a)(3).

⁷⁰ *Roberts v. Karimi*, 251 F.3d 404, 407 (2d Cir. 2001) (“When a jury is specially instructed, and ‘an issue [is] omitted’ without objection, it ‘shall be deemed’ that a finding was made ‘in accord with the judgment on the special verdict,’ *unless* the court makes a finding to the contrary.”) (alterations and emphasis in original) (citation omitted); *Marbelite Co. v. National Sign & Signal Co.*, 2 Fed. App'x 118, 120 (2d Cir. 2001) (“If the court fails to make a finding on the issue, it will be deemed to have made a finding that is harmonious with the judgment entered on the special verdict.”); *Getty Petroleum Corp. v. Island Transp. Corp.*, 878 F.2d 650, 655-56 (2d Cir. 1989) (in special verdict case, affirming on basis of implicit jury finding or, in the alternative, on basis of implicit finding in statement of the trial court).

As the jury's response to Question 2 was an implicit finding that Mr. Trump forcibly digitally penetrated Ms. Carroll's

words, the jury is deemed to have found that the specific conduct in which Mr. Trump actually engaged was such that the damages award was justified provided the evidence permitted such a finding.⁷¹ And for reasons discussed in greater detail below, the evidence of the attack generally coupled with forcible digital penetration of Ms. Carroll justified the damages awarded regardless of the jury's finding adverse to Ms. Carroll on the New York Penal Law rape question.

Ms. Carroll testified that the sexual assault – the “rape” – of which she accused Mr. Trump involved especially painful, forced digital penetration, which as recounted above she described graphically and emphatically to the jury. The testimony of the outcry witnesses, Mss. Birnbach and Martin, corroborated

vagina, no explicit independent finding by the Court is necessary. Nevertheless, the Court alternatively finds that he did so.

⁷¹ As the Second Circuit has put it:

“A district court has a duty to reconcile the jury's answers on a special verdict form with any reasonable theory consistent with the evidence, and to attempt to harmonize the answers if possible under a fair reading of those answers.... The court must search for a reasonable way to read the verdicts as expressing a coherent view of the case, ... and if there is any way to view a case that makes the jury's answers to the special verdict form consistent with one another, the court must resolve the answers that way even if the interpretation is strained.... The district court should refer to the entire case and not just the answers themselves.” *McGuire v. Russell Miller, Inc.*, 1 F.3d 1306, 1311 (2d Cir. 1993) (citations omitted).

Thus, the Court is obliged to construe the jury's answer to Question 2 with reference to the entire case and in a manner that renders it consistent with the \$2 million award for sexual assault.

the essence of Ms. Carroll's account of a violent, traumatic sexual assault. Ms. Leeds's testimony that Mr. Trump attacked her, culminating in putting his hand on her leg and up her skirt, suggests that Mr. Trump has a propensity for attempting forcibly to get his hands on and into women's sexual organs. Mr. Trump's own words from the *Access Hollywood* tape and from his deposition – that (a) stars “[u]nfortunately or fortunately” “c[ould] do anything” they wished to do to women, including “grab[bing] them by the pussy” and (b) he considers himself to be a “star” – could have been regarded by the jury as a sort of personal confession as to his behavior. Thus, there was ample, arguably overwhelming evidence, that Mr. Trump forcibly digitally penetrated Ms. Carroll, thus fully supporting the jury's sexual abuse finding.

Mr. Trump's attempt to minimize the sexual abuse finding as perhaps resting on nothing more than groping of Ms. Carroll's breasts through her clothing is frivolous. There was no evidence whatever that Mr. Trump groped Ms. Carroll's breasts, through her clothing or otherwise. The only evidence of bodily contact between Mr. Trump and Ms. Carroll other than the digital and alleged penile penetration was Ms. Carroll's testimony that Mr. Trump (a) “shoved” and “thrust” her against the wall, (b) “put his shoulder against [her] and h[eld] [her] against the wall,” (c) “his whole weight came against [her] chest and held [her] up there,” (d) he “pulled down [her] tights,” (e) her “arm was pinned down” while she pushed him back, and (f) “he put his mouth against [hers].” The jury was instructed that one of the essential elements of sexual abuse under the New York Penal Law is “sexual contact,” defined as “touching of the sexual or

intimate parts.” None of these actions, other than putting his mouth against hers and perhaps pulling down her tights, was sexual contact.⁷² The jury's finding of sexual abuse therefore necessarily implies that it found that Mr. Trump forcibly penetrated her vagina. And since the jury's answer to Question 1 demonstrates that it was unconvinced that there was penile penetration, the only remaining conclusion is that it found that Mr. Trump forcibly penetrated her vagina with his fingers – in other words, that he “raped” her in the sense of that term broader than the New York Penal Law definition. And this conclusion is fully supported by Ms. Carroll's repeated and clear testimony on the digital penetration (more than the penile penetration), Dr. Lebowitz specifically mentioning Ms. Carroll squirming in response to an intrusive memory of Mr. Trump's fingers in her

⁷² Mr. Trump does not argue that the jury's sexual abuse finding was based on Ms. Carroll's testimony that he put his mouth against hers (or any of the other actions listed above). Even assuming this non-consensual kiss was “touching of [a] sexual or intimate part[],” there is no basis to assume that the jury found Mr. Trump sexually abused her based on that contact but not on digital penetration. Ms. Carroll testified that “it was a shocking thing for him to suddenly put his mouth against [hers],” Dkt 187 (Trial Tr.) at 179:22-23, and that she thinks she “laughed pretty consistently after the kiss to absolutely throw cold water on anything he thought was about to happen,” Dkt 189 (Trial Tr.) at 405:22-24. She did not testify as to any physical pain and lasting trauma of the non-consensual kiss, or of any other bodily contact between her and Mr. Trump, as she did repeatedly of the digital penetration. A determination that this jury found Mr. Trump sexually abused Ms. Carroll solely on the basis of a non-consensual kiss would require ignoring all this testimony and accepting a far less malign, albeit still wrongful, version of events that is contradicted by the overwhelming weight of the evidence.

vagina, and the evidence at trial taken as a whole. It also is bolstered by the amount of the jury's verdict.

The Jury's \$2 Million Damages Award Is Not Excessive

The trial evidence of the harm to Ms. Carroll as a result of being assaulted and digitally raped supports the jury's \$2 million award as reasonable compensation for her pain and suffering. Ms. Carroll testified in detail with respect to the physical, emotional, and psychological injury she suffered after the incident with Mr. Trump. She expressed that in “the seconds, the minutes following [the assault] ... my overwhelming thought was I had died and was somehow still alive.”⁷³ She testified that when she called Ms. Birnbach immediately after the assault, “I had not processed it. I had not processed what was going on. I felt the hand jammed, and I felt the back of my head hurting.”⁷⁴ The night of the assault, she testified “[m]y head hurt, my vagina felt pain”⁷⁵ In relation to the specific act of being digitally raped, Ms. Carroll testified that it was “extremely painful,” “a horrible feeling,” “unforgettable,” and that the day after the assault she “felt [her] vagina still hurt from his fingers.”⁷⁶ She testified also about not being able to maintain a romantic relationship or have sex for the past two decades since the “very violent” incident with Mr. Trump and about experiencing “visions” or

⁷³ Dkt 191 (Trial Tr.) at 635:23-636:1.

⁷⁴ Dkt 187 (Trial Tr.) at 185:15-17.

⁷⁵ *Id.* at 188:18.

⁷⁶ *Id.* at 180:24-25; Dkt 189 (Trial Tr.) at 406:10, 432:7-8.

“sudden intrusions” which she has “had ... ever since the attack” and that “would absolutely take over [her] brain.”⁷⁷ These visions included her “feel[ing] Donald Trump again on top of [her] ... [she] thought for a minute [she] was going to die because [she] couldn't breathe” and while going about her day “in would slide just a picture of him going like this into the dressing room or hitting [her] head or feeling his fingers jammed up inside of [her].”⁷⁸ Ms. Carroll's testimony and Dr. Lebowitz's testimony, which is summarized above, of the long-lasting emotional and psychological trauma that Ms. Carroll experienced as a result of the incident with Mr. Trump demonstrate that the jury's \$2 million award was motivated not by sympathy, but by competent evidence of harm to Ms. Carroll.

In view of the jury's implicit finding that Mr. Trump digitally raped Ms. Carroll, Mr. Trump's argument and references to examples of damages awards “in the ‘low six-figure range’ ” where a plaintiff's “intimate parts were groped by a defendant” plainly are irrelevant.⁷⁹ Many of the cases Mr. Trump

⁷⁷ Dkt 187 (Trial Tr.) at 225:3, 225:19-226:7.

⁷⁸ *Id.* at 226:14-21.

⁷⁹ Dkt 205 (Def. Mem.) at 14-16.

Mr. Trump's argument that Ms. Carroll's “alleged damages are identical to plaintiffs in other cases asserting ... a [loss of consortium claim], namely that Plaintiff argued to the Jury that she should be compensated for living a life since early 1996 without companionship,” also is unavailing. Dkt 211 (Def. Reply Mem.) at 1; *see also* Dkt 205 (Def. Mem.) at 13. His theory ignores all of the other types of harm to Ms. Carroll that were discussed in her and Dr. Lebowitz's testimony, and in any case mistakenly conflates the loss of companionship in the context of a loss of consortium claim with the inability to form a romantic

cites are distinguishable also for the reasons identified by Ms. Carroll.⁸⁰ To be sure, there are New York cases in which plaintiffs who were sexually assaulted and/or raped were awarded lower damages than was Ms. Carroll.⁸¹ There also, however, are cases with facts and injuries comparable to those here in which plaintiffs were awarded similar or higher compensatory damages.⁸² “Although a review of

connection and have sex as a result of trauma arising from sexual assault.

⁸⁰ Dkt 207 (Pl. Opp. Mem.) at 15-16 (“In some [of Mr. Trump's ‘comparator’] cases, the plaintiff was awarded the exact amount of compensatory damages that the plaintiff herself had requested, often as part of a damages inquest conducted by a magistrate judge during default judgment proceedings.... As a result, those cases obviously have little to nothing to say about the damages that a jury might have awarded on a full evidentiary record developed at trial, as occurred here. Other cases cited by Trump involved evidentiary issues not present in this case.... And not one of the cases Trump cites involved evidence of injury covering a 25-year-plus period. That distinguishes Carroll's case from all of the cases on which Trump relies, and it was entirely reasonable for the jury to account for the harm that Carroll has experienced ever since the assault in 1996 in determining compensatory damages.”) (citations omitted).

⁸¹ See Dkt 205 (Def. Mem.) at 15-16 (citing cases).

⁸² E.g., *Ortiz v. New York City Hous. Auth.*, 22 F. Supp. 2d 15, 39 (E.D.N.Y. 1998), *aff'd*, 198 F.3d 234 (2d Cir. 1999) (jury's \$3 million compensatory damages award for plaintiff who was raped at gunpoint, diagnosed with PTSD, and suffered “dramatic[] change[s]” to the quality of her life did not deviate materially from reasonable compensation) (citing cases).

Ms. Carroll cites to three cases, one of which is *Ortiz*, in which the plaintiffs were awarded more than Ms. Carroll was. *Breest v. Haggis*, No. 161137/2017, 2023 WL 374404 (N.Y. Sup. Ct., N.Y. Cty. Jan. 24, 2023) (\$7.5 million); *Egan v. Gordon*, No. 904231-

comparable cases is appropriate,” the Court “need not average the high and low awards; [it may] focus instead on whether the verdict lies within the reasonable range.”⁸³ It accordingly suffices for present purposes that the jury's award of \$2 million falls within a reasonable range of the amounts awarded to plaintiffs in comparable sexual assault and rape cases.

In these circumstances, and based on all of the evidence presented at trial, the jury's compensatory damages award to Ms. Carroll for her sexual battery claim did not deviate materially from reasonable compensation so as to make it excessive under New York law.

Compensatory Damages - Defamation Claim

Mr. Trump argues that “the general compensatory damages for the defamation claim should be no more than \$100,000, and no more than \$368,000 (the low estimate provided by Professor Humphreys) for the reputation repair campaign.”⁸⁴ He contends that the jury's awards should be reduced to these amounts

20 (N.Y. Sup. Ct., Albany Cty., Nov. 10, 2022) (\$13.8 million). Mr. Trump correctly observes certain differences between those cases and this one, including in the details of the rapes and in the fact that the plaintiffs in those cases were diagnosed with PTSD whereas Ms. Carroll was not. Those differences, however, do not render these cases of no value in determining the appropriate range of reasonable compensation. Indeed, the greater severity of the harm in those cases might explain why the awards were greater than the amount awarded to Ms. Carroll, while still demonstrating that \$2 million is not outside the bounds in circumstances such as these.

⁸³ *Restivo v. Hessemann*, 846 F.3d 547, 587 (2d Cir. 2017).

⁸⁴ Dkt 205 (Def. Mem.) at 18.

because “the jury awards in this case for these categories of damages were speculative and based upon alleged harms caused by the June 2019 statements.”⁸⁵ He makes eleven specific arguments, at least seven of which are based on challenges to the testimony of Professor Humphreys, Ms. Carroll's defamation damages expert. None ultimately is persuasive.

Professor Humphreys's Testimony

Mr. Trump makes the following challenges to Professor Humphreys's testimony:

1. “Professor Humphreys testified about the purported harm arising from the June 2019 Statements and even compared Plaintiff's reputation before the June 2019 Statements and after the October 12, 2022 Statement, but did not do a comparison between her reputational harm before and after the October 12, 2022 Statement.... Therefore, Professor Humphreys must have included the alleged harm from the June 2019 Statements as part of her damages analysis.”
2. “Professor Humphreys testified that she could not narrow her estimate as to how many times the October 12, 2022 Statement was viewed on Truth Social [(Mr. Trump's social media platform)] and Twitter to anything more specific than somewhere ‘between 1.5 million and 5.7 million times,’ which is an error rate of 74%.... Such an analysis is thus pure speculation.”

⁸⁵ *Id.*

3. “Professor Humphreys testified that the people who read and believed the October 12, 2022 Statement were ‘republicans [who] typically believe Mr. Trump.’ ... Consequently, Professor Humphreys did not take into consideration the fact that Trump's supporters likely would never have supported or believed Plaintiff regardless of the October 12, 2022 Statement, and that Plaintiff's reputation with such supporters would not have changed due to such statement.”
4. “Professor Humphreys testified that in order to repair Plaintiff's reputation with such Trump supporters, Plaintiff would have to pay for the cost of a reputation repair campaign, which is ‘a campaign to put out positive messages about’ Plaintiff.... However, Professor Humphreys did not explain how existing Trump supporters would have changed their minds about Plaintiff from merely seeing positive messages about Plaintiff. Professor Humphreys also testified that she has never done a reputation repair campaign before, and thus, her opinion on this issue should be given little weight.”
5. “Professor Humphreys testified that (a) the June 2019 Statements already existed as of the October 12, 2022 Statement, and that readers of the June 2019 Statements likely would not have changed their minds about the rape allegation after reading the October 12, 2022 Statement ... and (b) she does not know if the people who believed the October 12, 2022 Statement had already made up their minds about Plaintiff's rape allegation from reading the June 2019 Statements.... Therefore,

Professor Humphreys's testimony about changing the minds of Trump supporters (the target of the reputation repair campaign) is pure speculation. Additionally, her testimony only supports the argument that the October 2022 Statement did not cause Plaintiff any harm in addition to any harm that was caused by the June 2019 Statements, because people already had made up their minds as to the veracity of Plaintiffs accusations as of the June 2019 Statements.”

6. “Professor Humphreys's cost estimate for such a campaign was equally based upon pure conjecture in that she estimated that it would cost anywhere from \$368,000 to \$2.7 million ..., which is an error rate of 86 percent. This is especially troublesome since Professor Humphreys testified that she has never done a reputation repair campaign before.”
7. “Professor Humphreys also testified that she did not analyze any of Plaintiffs numerous media appearances where Plaintiff enhanced her reputation with regard to her allegations against Defendant.... In fact, Plaintiff conceded that she received a vast amount of positive support from the public after making her accusation against Defendant.... Even though Professor Humphreys admitted that Plaintiff received positive support from the public after the rape allegation, she did not factor such support into her analysis of the harm allegedly caused by the October 12, 2022 Statement....

Accordingly, her analysis of reputational harm is pure speculation.”⁸⁶

Ms. Carroll points out that Mr. Trump's arguments concerning Professor Humphreys “get at the core of Professor Humphreys's reliability as an expert, something Trump could have challenged under Federal Rule of Evidence 702 [(which governs the admissibility of expert testimony)] or raised on cross-examination.”⁸⁷ His failure to do so, she contends, waived his present complaints. Mr. Trump counters, however, that his challenges are timely because they go to the weight, not the admissibility, of Professor Humphreys's testimony and because he preserved the issues by raising them on cross examination at trial.⁸⁸ Thus, there is a threshold question with respect to whether Mr. Trump waived those arguments in relation to Professor Humphreys's testimony by failing to raise them previously, as a

⁸⁶ Dkt 205 (Def. Reply Mem.) at 19-21.

⁸⁷ Dkt 207 (Pl. Opp. Mem.) at 19.

⁸⁸ Dkt 205 (Def. Reply Mem.) at 3. *See Disability Advocs., Inc. v. Paterson*, No. 03-CV-3209 (NGG) (MDG), 2009 WL 1312112, at *7 (E.D.N.Y. May 8, 2009) (“Thus, while Defendants are free to conduct vigorous cross-examine of Plaintiff's experts at trial and may argue in their post-trial briefing that the court should accord the opinions of those experts little or no weight, they may not renew their challenge to the admissibility of those opinions.”); *Celebrity Cruises Inc. v. Essef Corp.*, 478 F. Supp. 2d 440, 446 (S.D.N.Y. 2007) (“[E]ven where a post-trial challenge to the admissibility of expert evidence is barred, a trial court remains free to grant a new trial if it weighs the prevailing party's scientific proof and finds it wanting.”).

Rule 59 motion generally is not a proper vehicle to raise new arguments or legal theories.⁸⁹

On reflection, the Court concludes that Mr. Trump's arguments listed above go primarily to the weight, rather than the admissibility, of Professor Humphreys's testimony. "Generally, arguments that the assumptions relied on by an expert are unfounded go to the weight rather than the admissibility of the evidence."⁹⁰ Most of Mr. Trump's arguments concern certain assumptions Professor Humphreys made or did not make in forming her expert opinion (e.g., whether she included the alleged harm from the 2019

⁸⁹ *MJAC Consulting, Inc. v. Barrett*, No. 04-cv-6078 (WHP), 2006 WL 2051129, at *3 (S.D.N.Y. July 24, 2006) (citing cases).

⁹⁰ *Silivanch v. Celebrity Cruises, Inc.*, 171 F. Supp. 2d 241, 270 (S.D.N.Y. 2001). *See also AU New Haven, LLC v. YKK Corp.*, No. 15-CV-3411 (GHW) (SN), 2019 WL 1254763, at *3 (S.D.N.Y. Mar. 19, 2019), *objections overruled*, No. 1:15-CV-3411(GHW), 2019 WL 2992016 (S.D.N.Y. July 8, 2019) ("Any contentions that the expert's 'assumptions are unfounded go to the weight, not the admissibility, of the testimony.' ") (citation omitted); *In re: Gen. Motors LLC Ignition Switch Litig.*, No. 14-MD-2543 (JMF), 2015 WL 9480448, at *1 (S.D.N.Y. Dec. 29, 2015) (" 'Although expert testimony should be excluded if it is speculative or conjectural, or if it is based on assumptions that are so unrealistic and contradictory as to suggest bad faith, or to be in essence an apples and oranges comparison, other contentions that the assumptions are unfounded go to the weight, not the admissibility, of the testimony.' ") (citation omitted); *Colombo v. CMI Corp.*, 26 F. Supp. 2d 574, 576 (W.D.N.Y. 1998) ("Although a district court 'may ... inquire into the reliability and foundation of any expert opinion to determine admissibility,' *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 422 (5th Cir.1987), '[a]s a general rule, questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility and should be left for the jury's consideration.' *Id.*") (ellipsis and alteration in original).

statements in her analysis, whether and how she considered Mr. Trump's supporters who viewed his 2022 statement, and whether she took into account Ms. Carroll's media appearances). The Court therefore considers Mr. Trump's challenges to Professor Humphreys's testimony as having been timely raised.⁹¹ Nevertheless, Mr. Trump's arguments are unavailing on the merits.

His contention that Professor Humphreys “did not do a comparison between [Ms. Carroll's] reputational harm before and after the October 12, 2022 Statement” and she therefore “must have included the alleged harm from the June 2019 Statements as part of her damages analysis” is contradicted by the record. Professor Humphreys testified that in her analysis,

⁹¹ Mr. Trump's two “error” rate arguments arguably go more to the admissibility of Professor Humphreys's testimony and therefore would be waived. *E.g.*, *AU New Haven, LLC*, 2019 WL 1254763, at *23 (stating that a high error rate “would be a valid basis to exclude an expert with scientific knowledge under *Daubert*”). But there is a vast difference between an error rate, on the one hand, and an expert opining that a quantity falls within a certain range, on the other. For example, an appraiser who values a piece of real state as falling in the range of \$12 million to \$14 million has not made an “error”; the expert is merely giving an opinion that a willing buyer and a willing seller would conclude a sale within that range. In any event, Mr. Trump's arguments that there were high error rates in Professor Humphreys's calculations fail to demonstrate that the jury's compensatory damages award was erroneous or against the weight of the evidence. Indeed, it is plausible that the jury took the so-called error rates, along with any other purported weaknesses in Professor Humphreys's testimony, into account in awarding damages well below the high end of Professor Humphreys's estimated range. Dkt 197 (Trial Tr.) at 1142:14-16 (“[O]n the low, low end it would be [\$368,000], and on the high end it would be 2.7 million.”).

although she “noticed ... that those meetings [(public statements of negative associations with Ms. Carroll)] existed after June 2019, ... the frequency of the posting with those associations had started to decline. However, after the statement on October 12th, the frequency of the negative associations, the volume of them again escalated.”⁹² She testified also that she “only looked at the reputational harm from the October 12[, 2022] statement” and that the cost she estimated to repair Ms. Carroll's reputation following Mr. Trump's 2019 statements – the subject of *Carroll I* – was “higher” than the cost she estimated to repair Ms. Carroll's reputation following the 2022 statement.⁹³ Moreover, to remove any doubt, the Court specifically instructed the jury that “the question of whether there was any adverse effect by virtue of the 2019 statements and, if there was, how much adverse effect is not at issue in this case. It is not for you to determine.”⁹⁴ There accordingly is no basis to assume that the jury award for the 2022 statement improperly included damages for the 2019 statements.

Mr. Trump's remaining challenges to Professor Humphreys's testimony similarly fail to support his argument for a new trial on or a reduction in the damages. Professor Humphreys's testimony was not “pure speculation” because she “did not analyze any of Plaintiffs numerous media appearances where Plaintiff enhanced her reputation with regard to her

⁹² Dkt 197 (Trial Tr.) at 1130:18-22.

⁹³ *Id.* at 1158:12-23.

⁹⁴ *Id.* at 1158:3-6.

allegations against Defendant.” Professor Humphreys testified that “in terms of reputation,” the “positive responses or comments [do not] offset negative responses.”⁹⁵ She explained: “if you imagine, like, at the place where you work, if 20 percent of your colleagues think that you stole money where you work, let's say you have a hundred colleagues and 20 of them think that you stole money, that still has an impact on your work life and your day-to-day reputation, and so I think that 20 percent is still important.”⁹⁶

Nor are his arguments that Professor Humphreys “did not take into consideration the fact that Trump's supporters [who read and believed the 2022 statement] likely would never have supported or believed Plaintiff regardless of the [2022 statement]” and “did not explain how existing Trump supporters [or people who had made up their minds already based on the 2019 statements] would have changed their minds about Plaintiff” through her proposed reputation repair program grounds to minimize the weight of her testimony. Mr. Trump's counsel cross examined Professor Humphreys on these points. Professor Humphreys explained that in her view, it is “very likely that [the 2022 statement] was seen by some new people.”⁹⁷

The jury considered all of Professor Humphreys's testimony, including the purported flaws Mr. Trump's counsel attempted to draw out on cross examination

⁹⁵ *Id.* at 1135:9-11.

⁹⁶ *Id.* at 1135:11-17.

⁹⁷ *Id.* at 1135:10-11.

and in summation, and determined that her testimony still was worthy of sufficient weight to reach the \$1.7 million it awarded for the reputation repair program. None of Mr. Trump's challenges to that testimony, considered separately or collectively, supports a determination that the jury's compensatory damages award was seriously erroneous, egregious, or against the weight of the evidence.

Mr. Trump's Other Arguments and Awards in Comparable Defamation Cases

Mr. Trump's other objections to the jury's compensatory damages award for Ms. Carroll's defamation claim are without merit. He contends that the jury's award was excessive because:

“[T]he overall essence of Plaintiff's defamation claim was that Defendant allegedly defamed Plaintiff when he denied her rape allegation.... [T]he Jury found that Defendant did not rape Plaintiff, and thus, the portions of the defamation claim based upon an alleged rape failed. Accordingly, all that was left of Plaintiff's defamation claim was that Defendant defamed Plaintiff by stating that ‘he has no idea who Carroll was[,]’ ... which is far less damaging to Plaintiff's reputation than accusing Plaintiff of lying about the alleged rape.”⁹⁸

His argument is grounded entirely on false premises.

The crux of Ms. Carroll's defamation claim was that Mr. Trump defamed her by stating that she lied

⁹⁸ Dkt 205 (Def. Mem.) at 18-19.

about him sexually assaulting her in order to increase sales of her new book or for other inappropriate purposes. Her claim, as noted above, never was limited to the specific definition of “rape” in the New York Penal Law, which requires penile penetration. Nor was any specific “portion[] of the defamation claim based upon an alleged rape.” Mr. Trump did not deny specifically “raping” Ms. Carroll or specifically penetrating her with his penis as opposed to with another body part in his 2022 statement. He instead accused her of lying about the incident as a whole, of “completely ma[king] up a story” that was a “Hoax and a lie.”⁹⁹ There is thus no factual or legal support for Mr. Trump's made-up version of Ms. Carroll's defamation claim.¹⁰⁰

⁹⁹ Dkt 1 (Compl.) at 18, ¶ 92.

¹⁰⁰ Mr. Trump's remaining arguments similarly lack merit. His contention that the jury “clearly must have [awarded compensatory damages for the June 2019 statements]” because Ms. Carroll “did not even attempt the separate the harm caused by the June 2019 Statements and the October 12, 2022 Statement” in her testimony fails for the same reasons discussed above with respect to his “double recovery” argument based on Professor Humphreys's testimony. Dkt 205 (Def. Mem.) at 19. It also is inaccurate because, as noted above, Ms. Carroll in fact did compare the post-2022 messages she received to the post-2019 messages and stated that the post-2022 messages were “equally disparaging and hurtful, but these particularly hurt because [she] thought [she] had made it through and there they are again.” Dkt 189 (Trial Tr.) at 329:5-7. Moreover, even if Ms. Carroll had not clearly separated the harm from the 2019 statements from the 2022 statement, it would not demonstrate that the jury's award was against the weight of the evidence. The same is true for Mr. Trump's argument that in summation, Ms. Carroll's counsel stated “public statements” as opposed to the singular 2022 “statement.” Dkt 205 (Def. Mem.) at 19. As noted above, the Court's instruction to the jury to ignore any harm

Mr. Trump argues also that the jury's damages award deviates materially from the compensatory damages awards in other defamation cases in New York. Similar to the review of damages awards in sexual assault and rape cases, there certainly are cases – including those cited by Mr. Trump – in which plaintiffs in defamation cases in New York received compensatory damages awards considerably lower than the amount awarded to Ms. Carroll.¹⁰¹ The facts of those cases, however, were materially different from the facts and evidence in this case. In many of those cases, the defamatory statements were published in far less public forums (*e.g.*, a “local newspaper”),¹⁰² and none involved the scale of attention and influence commanded when the defendant in this case chooses to speak publicly. The cases Mr. Trump cites “do not compare in the slightest to being defamed by one of the loudest voices in the world, in a statement read by millions and millions of people, which described you as a liar, labeled your account of a forcible sexual assault a ‘hoax,’ and accused you of making up a horrific accusation to sell a ‘really crummy book.’ ”¹⁰³ And, as Ms. Carroll cites,

arising from the 2019 statements overrides Mr. Trump's concern in this respect. Finally, his argument that Ms. Carroll testified she made more money after leaving *Elle* magazine and therefore suffered no financial harm from the 2022 statement is irrelevant. Ms. Carroll did not argue that she was owed compensatory damages for financial harm resulting from the 2022 statement.

¹⁰¹ Dkt 205 (Def. Mem.) at 16-17.

¹⁰² *Strader v. Ashley*, 61 A.D.3d 1244, 1247, 877 N.Y.S.2d 747 (N.Y. App. Div. 3d Dep't 2009).

¹⁰³ Dkt 207 (Pl. Opp. Mem.) at 24.

there are cases in New York in which defamation plaintiffs have been awarded compensatory damages higher than the amount awarded to Ms. Carroll, demonstrating that the jury's award here is not excessive and falls within the range of reasonable compensation.¹⁰⁴

Mr. Trump accordingly has failed to meet his burden of demonstrating that a new trial or remittitur is warranted on the jury's compensatory damages award for Ms. Carroll's defamation claim.

Punitive Damages - Defamation Claim

Lastly, Mr. Trump argues that the jury's \$280,000 punitive damages award for Ms. Carroll's defamation claim violated due process principles. He principally argues that the punitive damages award for Ms. Carroll's defamation claim should be no more than \$5,000 because his conduct with regard to the 2022 statement is “barely reprehensible, if at all, because he was defending himself against a false accusation of rape.”¹⁰⁵ “The Supreme Court [has] outlined three ‘guideposts’ to facilitate its review of state court punitive damage awards: (1) the degree of reprehensibility of the defendant's conduct, (2) the ratio of punitive damages to the actual harm inflicted, and (3) ‘the difference between this remedy and the civil penalties authorized or imposed in comparable cases.’”¹⁰⁶ Mr. Trump's argument plainly is foreclosed by the analysis set forth above and by the Court's

¹⁰⁴ *Id.* at 23-25.

¹⁰⁵ Dkt 205 (Def. Mem.) at 23.

¹⁰⁶ *Stampf*, 761 F.3d at 209 (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996)).

determination that the jury implicitly found Mr. Trump did in fact digitally rape Ms. Carroll.

Moreover, the evidence presented at trial and the jury's findings that Mr. Trump made the 2022 statement knowing that it was false (or with reckless disregard of its truth or falsity) and with deliberate intent to injure or out of hatred, ill will, or spite or with willful, wanton or reckless disregard of another's rights firmly establish the high reprehensibility of Mr. Trump's defamatory statement. In these circumstances, the jury's \$280,000 punitive damages award was not excessive and did not violate due process.

I have considered Mr. Trump's other arguments and found them all unpersuasive.

Conclusion

The jury in this case did not reach “a seriously erroneous result.” Its verdict is not “a miscarriage of justice.” Mr. Trump's motion for a new trial on damages or a remittitur (Dkt 204) is denied.

SO ORDERED.

Dated: July 19, 2023

/s/ Lewis A. Kaplan

Lewis A. Kaplan

United States District Judge

196A

APPENDIX F

23-793

Carroll v. Trump

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 13th day of June, two thousand twenty-five.

Present:

DEBRA ANN LIVINGSTON,
Chief Judge,
RAYMOND J. LOHIER, JR.,
MICHAEL H. PARK,
WILLIAM J. NARDINI,
STEVEN J. MENASHI,
EUNICE C. LEE,
BETH ROBINSON,
MYRNA PÉREZ,
SARAH A. L. MERRIAM,
MARIA A. KAHN,
Circuit Judges.

E. JEAN CARROLL,

Plaintiff-Appellee,

v.

23-793

DONALD J. TRUMP,

Defendant-Appellant.

For Defendant-Appellant: D. John Sauer, James
Otis Law Group, LLC,
St. Louis, MO.
Todd Blanche & Emil
Bove, Blanche Law,
New York, NY.

For Plaintiff-Appellee: Roberta A. Kaplan
(Matthew J. Craig, *on
the brief*), Kaplan
Martin, LLP, New York,
NY.
Joshua Matz & Kate
Harris, *on the brief*,
Hecker Fink LLP,
Washington, DC.

Following disposition of this appeal on December 30, 2024, an active judge of the Court requested a poll on whether to rehear the case *en banc*. A poll having been conducted and there being no majority favoring *en banc* review, the petition for rehearing *en banc* is hereby **DENIED**.

Myrna Pérez, *Circuit Judge*, joined by Eunice C. Lee, Beth Robinson, and Sarah A. L. Merriam, *Circuit Judges*, concurs by opinion in the denial of rehearing *en banc*.

Steven J. Menashi, *Circuit Judge*, joined by Michael H. Park, *Circuit Judge*, dissents by opinion from the denial of rehearing *en banc*.

Denny Chin and Susan L. Carney, *Circuit Judges*, filed a statement with respect to the denial of rehearing *en banc*.

198A

Richard J. Sullivan, Joseph F. Bianco, and Alison J. Nathan, *Circuit Judges*, took no part in the consideration or decision of the petition.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

/s/ Catherine O'Hagan Wolfe

199A

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 23-793
June 13, 2025

E. JEAN CARROLL,
Plaintiff-Appellee,

v.

DONALD J. TRUMP,
Defendant-Appellant.

MYRNA PÉREZ, *Circuit Judge*, joined by EUNICE C. LEE, BETH ROBINSON, and SARAH A. L. MERRIAM, *Circuit Judges*, concurring in the denial of rehearing en banc:

Defendant-Appellant appealed a civil judgment against him for sexual assault and defamation, challenging several of the district court’s evidentiary rulings. For the reasons discussed at length in its unanimous opinion, the panel, on which I sat, found no reversible abuse of discretion. *See Carroll v. Trump*, 124 F.4th 140 (2d Cir. 2024) (per curiam). The panel applied the now-axiomatic rule that, when reviewing evidentiary determinations, “an appellate court must defer to the lower court’s sound judgment, so long as its decision falls within its wide discretion and is not manifestly erroneous.” *United States v. Tsarnaev*, 595 U.S. 302, 323 (2022) (citation and internal quotation marks omitted).

The dissenting opinion would have us stray far from our proper role as a court of review. Without acknowledging the deferential standard we are duty-bound to apply, the dissenting opinion offers several arguments, many of which were not raised by Defendant to the panel or in his petition for rehearing.

Simply re-litigating a case is not an appropriate use of the en banc procedure. In those rare instances in which a case warrants our collective consideration, it is almost always because it involves a question of exceptional importance or a conflict between the panel's opinion and appellate precedent. Fed. R. App. P. 40(b)(2), (c). The dissenting opinion ignores this rule of restraint. It points to no exceptionally important issues, no cases that actually conflict with the panel's decision, and no persuasive justification for review of this case by the full Court.

Because there was no manifest error by the district court, and because the standard for en banc review has not been met, I concur in the denial of rehearing en banc.

201A

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 23-793
June 13, 2025

E. JEAN CARROLL,
Plaintiff-Appellee,

v.

DONALD J. TRUMP,
Defendant-Appellant.

MENASHI, *Circuit Judge*, joined by PARK, *Circuit Judge*, dissenting from the denial of rehearing *en banc*:

The panel opinion embraced a series of anomalous holdings to affirm the judgment of the district court. This is a defamation case involving public figures, but the district court excluded evidence of the defendant's contemporaneous state of mind, ensuring that the plaintiff easily met the actual malice standard. The panel opinion neglected to justify that exclusion. But it upheld the admission of propensity evidence on the dubious theory that evidence of prior acts of sexual assault could "prove the *actus reus*," meaning whether the defendant acted in accordance with the propensity on a later occasion. On top of its evasion of the bar on propensity evidence, the panel opinion interpreted Rule 415 to override the requirement of Rule 403 to balance the probative value of evidence against its

prejudicial effect, permitting stale witness testimony about a brief encounter that allegedly occurred forty-five years earlier. And it read Rule 413(d), which authorizes the admission of evidence that the defendant committed a “crime” of “sexual assault,” to allow testimony about prior acts that were neither crimes nor sexual assaults.

These holdings conflict with controlling precedents and produced a judgment that cannot be justified under the rules of evidence that apply as a matter of course in all other cases. In my view, the same rules should apply equally to all defendants.¹ The panel opinion sanctioned striking departures from those rules to justify the irregular judgment in this case, but the consequences of those holdings will not be limited to a single defendant. I would rehear the case *en banc* to “maintain uniformity of the court’s decisions” and to resolve these important questions in line with longstanding principles. Fed. R. App. P. 40(b)(2)(A). I dissent from the decision of the court not to do so.

I

After E. Jean Carroll announced that she would sue him, President Trump said that the lawsuit was a “Hoax” and a “con job” that was “just like all the other Hoaxes that have been played on me for the past seven years.” App’x 2858. To impose liability on Trump for defamation based on that statement, the jury needed to find that Carroll had proved, by clear and convincing evidence, that Trump had spoken with “actual malice,” meaning he “made the statement knowing that it was false or acted in reckless

¹ See Judiciary Act of 1789, ch. 20, § 8, 1 Stat. 73, 76, 28 U.S.C. § 453.

disregard of whether or not it was true.” *Carroll v. Trump*, 683 F. Supp. 3d 302, 320 (S.D.N.Y. 2023); *see also New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964).²

A hoax, like a con job, is an act of fabrication intended to promote some belief. At trial, Trump sought to introduce evidence and to question Carroll about facts that could lead a reasonable observer to believe that the lawsuit was fabricated to advance a political agenda. Carroll had testified, for example, that she was disinclined to bring a lawsuit until a political opponent of President Trump had “crystallized” the stakes for her. App’x 1705. Despite her initial testimony that no one else was funding the lawsuit, Carroll eventually admitted that “one of the largest donors to the Democratic [P]arty”—a “vocal critic of [President Trump] and his political policies” who had “been funding groups to create a bulwark against Mr. Trump’s agenda”—was financing the

² In a footnote, the district court dismissed the argument that the statement was a non-actionable expression of opinion, *see Carroll v. Trump*, 650 F. Supp. 3d 213, 226 n.57 (S.D.N.Y. 2023), even though that is how denials of wrongdoing in response to high-profile lawsuits have been treated in other cases, *see, e.g., Hill v. Cosby*, 665 F. App’x 169, 175-76 (3d Cir. 2016) (holding that a statement by Bill Cosby’s attorney characterizing allegations as “unsubstantiated, fantastical stories” and “ridiculous” characterized the accuser as a liar but nevertheless was a non-actionable opinion); *Pecile v. Titan Cap. Grp., LLC*, 947 N.Y.S.2d 66, 67 (1st Dep’t 2012) (“The statement, made to the media, that plaintiffs’ suit was without merit constituted mere opinion, and was therefore nonactionable. The use of the term ‘shakedown’ in the statement did not convey the specificity that would suggest that the ... defendants were seriously accusing plaintiffs of committing the crime of extortion.”) (internal quotation marks, citation, and alteration omitted).

nonprofit that paid her legal fees. *Id.* at 1177 (internal quotation marks omitted). Carroll had “stated in the public” that she “had DNA” from the purported encounter with Trump, but in the litigation she never produced a DNA report and abandoned the effort to obtain a DNA sample. *Id.* at 468-69. She was asked on television if she “would consider bringing a rape charge” and said she would not do so because it would be “disrespectful” to victims of rape. *Id.* at 3027-28. She wrote in a published book that surveillance cameras captured Trump on the day of the incident, but she did not seek to obtain the footage to support her lawsuit. *Id.* at 1840-41. Prior to filing the lawsuit, Carroll sought out another witness, Natasha Stoyanoff, and created a transcript of an interview that suggests Carroll was coaching her on what to say.³

This evidence makes it more likely that President Trump believed that the lawsuit had been concocted by his political opposition—and therefore that he was not speaking with actual malice when he called it a hoax.⁴ Indeed, Trump argued to the district court that

³ Stoyanoff denied that Trump had “grind[ed]” against her. App’x 1390-92. Carroll responded with statements such as “You shook your head and pushed back. Now think. Did he grind against you?,” *id.* at 1392, and “[A]re you quite sure he didn’t grind against you[?] ... I think his pelvis was against you,” *id.* at 1407.

⁴ Because the purported conduct underlying the lawsuit had allegedly occurred almost thirty years earlier and “lasted just a few minutes,” *Carroll v. Trump*, 124 F.4th 140, 151 (2d Cir. 2024), at the time of his statement President Trump might not have even remembered any interaction—even assuming one occurred—let alone still regarded a lawsuit based on such long-ago events as a politically motivated hoax. Normally, the statute of limitations would have prevented such a suit, but New York

the evidence “strikes at the heart” of “whether the instant action is a ‘hoax’ that was commenced and/or continued to advance a political agenda.” App’x 1177. And he argued to our court that the district court improperly “precluded admissible evidence and cross-examination of witnesses on core issues relating to ... President Trump’s truth defense on Plaintiff’s defamation claim.” Appellant’s Br. 40; *see also* App’x 553 (asserting the defense that “Defendant did not publish with actual malice”).

The district court excluded the evidence and limited cross-examination even though it never addressed this argument. Our court affirmed the judgment without addressing the relevance of the excluded evidence to the issues of actual malice or President Trump’s truth defense. The panel opinion considered whether the evidence was probative of “credibility” or “bias and motive,” 124 F.4th at 171,⁵

suspended the statute of limitations and Carroll sued “nine minutes after the [suspension] became effective.” 650 F. Supp. 3d at 218.

⁵ Those holdings were also questionable. The Supreme Court has said that “[p]roof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness’ testimony.” *United States v. Abel*, 469 U.S. 45, 52 (1984). Yet the district court restricted the defense’s ability to make arguments and to ask questions about the political organization behind the lawsuit. *See* App’x 1487, 2032. The panel opinion concluded that such evidence had “minimal, if any probative value.” 124 F.4th at 173. But “cross-examination directed toward revealing possible biases, prejudices, or ulterior motives” is “especially ‘important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be ... motivated by malice, vindictiveness, intolerance, prejudice, or jealousy.’”

but it said nothing about how the excluded evidence “had significant probative value” with respect to “President Trump’s truth defense,” Appellant’s Br. 43, and how the exclusion therefore undermined Trump’s ability to establish that he did not speak with actual malice.

The actual malice standard famously raises “the plaintiff’s burden of proof to an almost impossible level.” *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 771 (1985) (White, J., concurring in the judgment). In fact, “the actual malice standard has evolved from a high bar to recovery into an effective immunity from liability.” *Berisha v. Lawson*, 141 S. Ct. 2424, 2428 (2021) (Thomas, J., dissenting from the denial of certiorari). Even if a speaker were to spread an obvious falsehood, a jury still cannot find actual malice unless “there is sufficient evidence” to establish “the speaker’s subjective doubts about the truth of the publication.” *Church of Scientology Int’l v. Behar*, 238 F.3d 168, 174 (2d Cir. 2001).⁶ And evidence “may negative actual malice by showing that [the] defendant, though mistaken, had reasonable grounds for belief in the truth of the charge contained in the publication.” *Crane v. N.Y. World Telegram Corp.*, 308 N.Y. 470, 476 (1955).⁷

Fuentes v. Griffin, 829 F.3d 233, 247-48 (2d Cir. 2016) (emphasis omitted) (quoting *Greene v. McElroy*, 360 U.S. 474, 496 (1959)).

⁶ See also *Karedes v. Ackerley Grp., Inc.*, 423 F.3d 107, 114 (2d Cir. 2005) (“[A]ctual malice ‘relates to whether the defendant published without believing the truth of the publication.’”) (quoting Robert D. Sack, *Sack on Defamation* § 5.5.1.1, at 5-68 (3d ed. 2005)).

⁷ See also *Sharon v. Time, Inc.*, 103 F.R.D. 86, 94 (S.D.N.Y. 1984) (“[T]he same concerns which motivated the state courts’

In this case, the evidence of the political organization behind the lawsuit would have made it more difficult to conclude that President Trump subjectively “entertained serious doubts as to the truth” of his description of the lawsuit as a hoax that was part of a larger organized political effort. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). But the district court prevented the jury from seeing that evidence without explaining why it did not undercut the defense that almost always provides “immunity from liability” even when the purportedly defamatory statements are less clearly part of political debates. *Berisha*, 141 S. Ct. at 2428 (Thomas, J.). The exclusion allowed Carroll to argue in rebuttal that “Trump needs you to believe that everyone is lying because they’re in this grand conspiracy to take him down” but “there is just no evidence of that.” App’x 2740-41. The panel opinion did not explain why the exclusion of that evidence did not undermine President Trump’s truth defense—or otherwise why this case looks so different from the typical one in which the actual malice standard applies.⁸ I would reconsider this outcome-determinative question *en banc*.

treatment of ‘common law’ actual malice seem applicable to the admissibility of evidence of past acts on the question of ‘constitutional’ actual malice as well. TIME may well be able to argue that its knowledge of General Sharon’s prior ‘vicious brutality toward Arab civilians’ tends to negate any inference of actual malice because its knowledge of these past instances shows that TIME personnel could reasonably have believed the truth of the information published in the article involved in this case.”).

⁸ The statement in support of the denial of rehearing *en banc* asserts that the issue of actual malice “was not raised” in this case because President Trump’s “principal defense at trial was ... that his statements about Plaintiff ... were true.” *Post* at 3.

II

The exclusion of evidence relevant to actual malice becomes even more conspicuous when contrasted with the permissive approach of the panel opinion to the admission of character evidence under Rule 404(b).

The panel said that evidence of a prior bad act—the *Access Hollywood* tape—was “sufficiently similar” to “the conduct alleged by Ms. Carroll” that it was admissible “to show the existence of a pattern tending to prove the *actus reus*, and not mere propensity.” 124 F.4th at 169. And the tape could “corroborate witness testimony” on the ultimate question of “whether the assault of Ms. Carroll actually occurred.” *Id.* at 169-70. The panel’s use of Latin terminology might obscure the import of this holding: If evidence of past conduct was introduced to prove or to corroborate the *actus reus*—that is, the ultimate question of whether he did it—that means the jury was invited to find that President Trump had committed the alleged acts because he had purportedly done something similar in the past. But “[e]vidence of any other crime, wrong, or act is *not admissible* to prove a person’s character in

The appellate brief argued that the district court improperly “precluded admissible evidence and cross-examination of witnesses on core issues relating to ... President Trump’s truth defense on Plaintiff’s defamation claim.” Appellant’s Br. 40. In the context of a defamation claim, a “truth defense” is precisely the argument that the defendant believed the statement was true and therefore did not speak with actual malice. But even if a “truth defense” were distinct from an “actual malice defense,” the panel opinion still failed to explain why the evidence could be excluded despite its relevance to the truth defense. The panel opinion did not mention the “truth defense” at all. The evidence that tended to show that President Trump subjectively believed his description to be true also tended to show that the description was true.

order to show that on a particular occasion the person acted in accordance with the character.” Fed. R. Evid. 404(b)(1) (emphasis added).

The panel opinion erroneously sanctioned the admission of evidence of prior conduct not to prove identity or knowledge—or to corroborate any fact in dispute aside from the ultimate question of guilt or innocence—but to show that the defendant had a propensity for engaging in culpable conduct.

A

In order to admit evidence of other acts “to establish a pattern of conduct,” the “extrinsic acts must share ‘unusual characteristics’ with the act charged or represent a ‘unique scheme.’” *Berkovich v. Hicks*, 922 F.2d 1018, 1022 (2d Cir. 1991) (quoting *United States v. Benedetto*, 571 F.2d 1246, 1249 (2d Cir. 1978)). Such evidence may be admitted only when the other acts are “so nearly identical in method as to earmark them as the handiwork of the accused. Here much more is demanded than the mere repeated commission of crimes of the same class, such as repeated burglaries or thefts. The device used must be so unusual and distinctive as to be like a signature.” *Benedetto*, 571 F.2d at 1249 (quoting McCormick on Evidence § 190, at 449 (2d ed. 1972)).⁹ Only that way

⁹ See also 1 McCormick on Evidence § 190.3 (9th ed. 2025) (“Uncharged crimes by the accused may be admissible when they are so nearly identical in method as to earmark them as the handiwork of the accused. The phrase of which authors of detective fiction are fond, *modus operandi*, may be employed. Much more is demanded than the mere repeated commission of crimes of the same class, such as serial murders, robberies or rapes. The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature.”) (footnotes omitted).

will the evidence be offered for a permissible purpose such as proving “preparation, plan,” or “identity.” Fed. R. Evid. 404(b)(2).

We have further explained that “other-crime evidence is only admissible for the purpose of corroboration if ‘the corroboration is direct and the matter corroborated is significant,’” *United States v. Mohel*, 604 F.2d 748, 754 (2d Cir. 1979) (quoting *United States v. Williams*, 577 F.2d 188, 192 (2d Cir. 1978)), such as when a witness has testified that the defendant claimed to have “prior experience” at robbing banks, *Williams*, 577 F.2d at 192.

The danger against which these doctrines guard is that “[i]f defined broadly enough, *modus operandi* evidence can easily become nothing more than the character evidence that Rule 404(b) prohibits.” *United States v. Smith*, 103 F.3d 600, 603 (7th Cir. 1996).¹⁰ For that reason, courts “construe the *modus operandi* exception narrowly.” *United States v. Griffith*, No. 89-CR-50581, 1992 WL 231087, at *4 (9th Cir. Sept. 18, 1992) (emphasis added).

In this case, there was no fact to which Carroll testified that the prior acts corroborated aside from the ultimate question of guilt. The panel opinion did not explain “how the challenged testimony corroborated any consequential testimony except insofar as it tended to show that appellant was a bad man likely to have committed the crimes charged in the indictment—a clearly impermissible use.” *United*

¹⁰ See also *United States v. Carroll*, 207 F.3d 465, 469 (8th Cir. 2000) (“[W]here [the] alleged *modus operandi* is really just [a] garden variety criminal act any inference of identification would be based on [the] forbidden inference of propensity.”) (internal quotation marks omitted).

States v. O'Connor, 580 F.2d 38, 43 (2d Cir. 1978).¹¹ When the panel opinion said that the evidence of prior acts could show “a pattern tending to prove the *actus reus*”—and thereby “to confirm that the alleged sexual assault actually occurred,” 124 F.4th at 169-70—it meant that a jury would be more likely to conclude that President Trump committed the alleged acts after it heard that he allegedly attempted a similar assault in the past.¹² That is propensity evidence, and it is not admissible under Rule 404(b). *See* Fed. R. Evid. 404(b)(1); *Mohel*, 604 F.2d at 755.

In fact, the district court recognized that it was admitting propensity evidence. It explained that “the evidence that Mr. Trump seeks to keep from the trial jury is to the effect that Mr. Trump allegedly has abused or attempted to abuse women other than Ms. Carroll in ways that are the comparable to what he allegedly did to Ms. Carroll. In other words, Ms.

¹¹ *See United States v. Bailey*, 319 F.3d 514, 520 (D.C. Cir. 2003) (“To decide if Rule 404(b) evidence is admissible for corroboration, the court must determine what is being corroborated and how.”).

¹² *But see United States v. Scott*, 677 F.3d 72, 81 (2d Cir. 2012) (“[T]here is no such corroboration here, except to the impermissible extent it suggests that, since Scott had been up to no good before, the detectives were right to think that he was up to no good again. ... The government here has failed to show to how the recognition testimony was relevant to corroborating the detectives’ other testimony.”); *United States v. Brewer*, 915 F.3d 408, 415 (7th Cir. 2019) (“[A]fter a Rule 404(b) objection, the proponent of the other-act evidence must demonstrate that the evidence is relevant to a legitimate purpose through a chain of reasoning that does not rely on the forbidden inference that the person has a certain character and acted in accordance with that character on the occasion charged in the case.”) (internal quotation marks omitted).

Carroll offers the evidence to show that Mr. Trump has a propensity for such behavior.” *Carroll v. Trump*, 660 F. Supp. 3d 196, 199 (S.D.N.Y. 2023) (emphasis omitted). The district court said that “Mr. Trump almost certainly is correct in arguing that the quoted statements on the *Access Hollywood* tape are offered by plaintiff for only one purpose: to suggest to the jury that Defendant has a propensity for sexual assault and therefore the alleged incident with Ms. Carroll must have in fact occurred.” *Id.* at 201 (internal quotation marks and alteration omitted).

Because “the Federal Rules of Evidence ordinarily preclude propensity evidence,” *id.*, the district court initially decided that the propensity evidence was admissible not under Rule 404 but pursuant to Rule 415. The district court later retreated from that decision with respect to the *Access Hollywood* tape, concluding that “reliance on Rule 415 was unnecessary because the video was offered for a purpose other than to show the defendant’s propensity.” 683 F. Supp. 3d at 314 n.20. The district court thought that the *Access Hollywood* tape amounted to “a confession” because “one of the women he referred to in the video could have been Ms. Carroll.” *Id.* For that reason, the district court “did not include the *Access Hollywood* tape in its instructions to the jury on the evidence” admitted under Rule 415. *Id.*

The panel opinion could not defend the eccentric conclusion of the district court that the tape was admissible as a confession.¹³ But in place of that

¹³ See 124 F.4th at 167 (“We are not fully persuaded by the district court’s second basis for admitting the recording—that

erroneous conclusion the panel opinion adopted a rationale for admitting the propensity evidence under Rule 404 that just as clearly conflicts with applicable precedent.

B

Even on its own terms, the argument of the panel opinion does not make sense. The *Access Hollywood* tape does not describe the purported pattern that the panel opinion identified. According to the panel, the tape reflected a pattern of conduct in which President Trump “engaged in an ordinary conversation with a woman he barely knew, then abruptly lunged at her in a semi-public place and proceeded to kiss and forcefully touch her without her consent.” 124 F.4th at 169.

In the tape, Trump recounts an interaction with Nancy O’Dell, a co-host of *Access Hollywood*, with whom he went furniture shopping when she was visiting Palm Beach. At some unspecified time and place after the shopping excursion, he “moved on her” but “couldn’t get there.” App’x 2883. Then later in the tape he states that “I’m automatically attracted to beautiful” women and will “start kissing them” because “when you’re a star they let you do it.” *Id.*

There is no indication in the tape that this was a woman he barely knew, that he was engaged in “ordinary conversation” before he “abruptly lunged at her,” that he “lunged” at her at all, that he did so in a “semi-public place,” or that he forcefully touched her without her consent. On this last point, the panel opinion at least acknowledged that the tape specifies

the tape captured a ‘confession.’”) (quoting 683 F. Supp. 3d at 326).

that “they let you do it” but the panel concluded that the jury could still determine that some conduct was nonconsensual. *See* 124 F.4th at 167-68. The panel opinion did not explain how the *Access Hollywood* tape reflects the other features of the purported pattern.

Even if the tape had reflected the purported pattern—of conversing in a semi-public place and then making an unwanted advance—it still would qualify as propensity evidence. Our “inclusionary approach” to Rule 404(b) “does not invite the government ‘to offer, carte blanche, any prior act of the defendant in the same category of crime.’” *United States v. McCallum*, 584 F.3d 471, 475 (2d Cir. 2009) (quoting *United States v. Garcia*, 291 F.3d 127, 137 (2d Cir. 2002)). Evidence of prior acts “is admissible” to “prove other like crimes by the accused” only when those crimes are “so nearly identical in method as to earmark them as the handiwork of the accused.” *Benedetto*, 571 F.2d at 1249. We demand “much more ... than the mere repeated commission of crimes of the same class, such as repeated burglaries or thefts,” and require that the conduct “be so unusual and distinctive as to be like a signature.” *Id.*

The *Access Hollywood* tape does not describe the defendant making an unwanted advance with a new acquaintance in a semi-public place. But even if it did, that conduct would not be “so unusual and distinctive as to be like a signature.” *Id.* And even if that indistinctive conduct amounted to a *modus operandi*, it still would qualify as propensity evidence because it was not offered for a permissible purpose such as proving “preparation, plan,” or “identity.” Fed. R. Evid. 404(b)(2). As in other cases in which we have held the admission of prior acts evidence to be impermissible, “identity had not been placed in issue

here.” *O’Connor*, 580 F.2d at 42. The trial focused on whether an assault had occurred; if it had, there was no question about the identity of the assailant.¹⁴

If the panel opinion remains a precedent of our court, a future plaintiff or the government will be able to introduce evidence of prior conduct in which a defendant went on a mundane outing and sometime thereafter made a sexual advance. If that generic description of misconduct is “so unusual and distinctive,” *Benedetto*, 571 F.2d at 1249, that it may be introduced “to prove the *actus reus*, and not mere propensity,” *Carroll*, 124 F.4th at 169, then the panel opinion will have dramatic effects with respect to a range of alleged conduct. Such a low bar for the distinctiveness of prior conduct under Rule 404(b) effectively eliminates the prohibition on propensity evidence. I would rehear the case to reaffirm the precedents that establish the prohibition.

III

Our court has decided that Rules 413-15 create “an exception to the general ‘ban against propensity evidence.’” *United States v. Schaffer*, 851 F.3d 166, 177 (2d Cir. 2017) (quoting *United States v. Enjady*, 134 F.3d 1427, 1432 (10th Cir. 1998)). We have done so based largely on legislative history that purportedly shows that, “[i]n passing Rule 413, Congress considered ‘knowledge that the defendant has committed rapes on other occasions to be critical in assessing the relative plausibility of sexual assault

¹⁴ See *Benedetto*, 571 F.2d at 1249 (“Defendant did not claim that he took the money from the four companies named in the indictment innocently or mistakenly. He claimed that he did not take the money at all. Knowledge and intent, while technically at issue, were not really in dispute.”).

claims and accurately deciding cases that would otherwise become unresolvable swearing matches.” *Id.* at 178 (quoting *Enjady*, 134 F.3d at 1431 (quoting in turn 140 Cong. Rec. S12990-01, S12990 (daily ed. Sept. 20, 1994) (statement of Sen. Robert Dole))). It is a questionable method of interpretation to employ legislative history to override the express requirements of the rules, but at least we have identified a possible textual basis for the same conclusion.¹⁵

The panel opinion, however, extended the reliance on legislative history to exempt Rules 413-15 even from the normal requirements of Rule 403. We have said that “[b]oth Rule 609 and Rule 403 ... oblige the trial court to assess the probative value of every prior conviction offered in evidence and the remoteness of a conviction, whatever its age, is always pertinent to this assessment.” *United States v. Jacques*, 684 F.3d 324, 327 (2d Cir. 2012) (quoting *United States v. Figueroa*, 618 F.2d 934, 942 (2d Cir. 1980)). As a result, when testimony concerns events that are remote in time, that “remoteness reduces the reliability of testimony as to the events’ occurrences.” *Id.*

We have specifically held that Rule 403 applies to “evidence offered under Rule 414,” which “does not

¹⁵ See *Schaffer*, 851 F.3d at 177-78 (“Unlike Federal Rule of Evidence 404(b), which allows prior bad act evidence to be used for purposes *other than* to show a defendant’s propensity to commit a particular crime, Rule 413 permits the jury to consider the evidence ‘on any matter to which it is relevant.’ In other words, a prosecutor may use evidence of prior sexual assaults precisely to show that a defendant has a pattern or propensity for committing sexual assault.”).

mandate the admission of the evidence or eliminate the need for the court to conduct the analysis required under Rule 403.” *United States v. Larson*, 112 F.3d 600, 605 (2d Cir. 1997). In this case—which involved witness testimony about events that purportedly occurred in 1978 and 2005—one would expect Rule 403 to require the standard evaluation of the probative value of the evidence in light of its remoteness.

But the panel opinion held that it did not. The panel announced that it would “apply Rules 413-415 in a manner that effectuates Congress’s intent,” and it followed the district court in recounting that “[o]ne of the original sponsors of the legislation proposing Rules 413-415 explained that ‘evidence of other sex offenses by the defendant is often probative and properly admitted, *notwithstanding very substantial lapses of time in relation to the charged offense or offenses.*’” 124 F.4th at 170 (emphasis in original) (quoting 140 Cong. Rec. 23603 (1994) (remarks of Rep. Molinari)). Based on “this express intent” of an individual legislator, the panel opinion concluded that “the time lapse between the alleged acts does not negate the probative value of the evidence of those acts to the degree that would be required to find an abuse of discretion in admitting them for the jury’s consideration.” *Id.*

A

This approach—of relying on statements in the congressional record to alter the effect of the rules—represents a departure from how the rules are normally applied. The Supreme Court has told us that “[t]here is no need to consult extratextual sources when the meaning of a statute’s terms is clear” and that “extratextual sources” may not “overcome those

terms.” *McGirt v. Oklahoma*, 591 U.S. 894, 916 (2020). As in statutory interpretation, “[w]e give the Federal Rules of Civil Procedure [and of Evidence] their plain meaning, and generally with them as with a statute, when we find the terms unambiguous, judicial inquiry is complete.” *Pavelic & LeFlore v. Marvel Ent. Grp.*, 493 U.S. 120, 123 (1989) (internal quotation marks, alterations, and citation omitted).¹⁶ In applying the plain meaning of the rules, we cannot override the text with expressions of legislative intent. “Like a judicial opinion and like a statute, the promulgated Rule says what it says, regardless of the intent of its drafters.” *Tome v. United States*, 513 U.S. 150, 168 (1995) (Scalia, J., concurring in part and concurring in the judgment). “The text of a rule thus proposed and reviewed limits judicial inventiveness,” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997), because “[w]e have no power to rewrite the Rules by judicial interpretations,” *Harris v. Nelson*, 394 U.S. 286, 298 (1969).

We and other courts have emphasized that the Rule 403 analysis is especially important—and, if anything, should be *more* rigorous—when evidence is offered pursuant to Rules 413-15. “[T]he protections provided in Rule 403, which we ... explicitly hold apply to evidence being offered pursuant to Rule 413, effectively mitigate the danger of unfair prejudice resulting from the admission of propensity evidence in sexual-assault cases” because “[w]here in a particular

¹⁶ See also *Bus. Guides, Inc. v. Chromatic Commc’ns Enters., Inc.*, 498 U.S. 533, 540-41 (1991) (“As with a statute, our inquiry is complete if we find the text of the Rule to be clear and unambiguous.”); *In re Chalasani*, 92 F.3d 1300, 1312 (2d Cir. 1996) (“[W]e must also accord the rules their plain meaning.”).

instance the admission of evidence of prior sexual assaults would create ‘undue prejudice’ and threaten due process, district courts can and should, by operation of Rule 403, exclude that evidence and ensure the defendant’s right to a fair trial.” *Schaffer*, 851 F.3d at 180. “Because of the inherent strength of the evidence that is covered by Fed. R. Evid. 415, when putting this type of evidence through the Fed. R. Evid. 403 microscope, a court should pay ‘careful attention to both the significant probative value and the strong prejudicial qualities’ of that evidence.” *Doe ex rel. Rudy-Glanzer v. Glanzer*, 232 F.3d 1258, 1268-69 (9th Cir. 2000) (quoting *United States v. Guardia*, 135 F.3d 1326, 1330 (10th Cir. 1998)).

Appellate courts have emphasized that “a court must perform the *same* 403 analysis that it does in any other context ... with careful attention to both the significant probative value and the strong prejudicial qualities inherent in all evidence submitted under 413.” *Guardia*, 135 F.3d at 1330 (emphasis added).

The panel opinion, by contrast, held that the Rule 403 analysis must be *different* and *weaker* when evidence is offered pursuant to Rules 413-15. In fact, the panel opinion did not conduct the remoteness analysis that Rule 403 requires at all. The panel considered only whether “the time lapse *between the alleged acts*” could “negate the probative value of the evidence of those acts.” 124 F.4th at 170 (emphasis added).¹⁷ But President Trump argued that Rule 403

¹⁷ The statement suggests that the “full context” of the panel opinion would show that it “properly analyzed ... the lapse in time between the alleged acts and the testimony.” *Post* at 9 n.8. It does not. The panel opinion quoted legislative history addressing the probative value of “evidence of other sex offenses

required the exclusion of testimony based on the remoteness in time between the underlying incident and the testimony describing the incident.¹⁸ That is the whole point of the remoteness analysis under Rule 403: Because memories fade and evidence is lost, prior acts may be “too remote in time to have any probative value”; even if testimony about those events “would be admissible under Rule 414,” the “probative value is substantially outweighed by the resulting danger of unfair prejudice to [the defendant] in having to defend allegations so remote in time.” *Larson*, 112 F.3d at 602 (describing the reasoning of the district court in excluding testimony that “would have described acts that occurred ‘more than 21 years ago’”).

In this case, the district court admitted testimony about events that occurred as much as forty-five years before the testimony was delivered at trial—over objections that those events were too remote under Rule 403. The panel opinion did not even address that argument, compounding its error of creating a novel exception to Rule 403.

by the defendant ... *notwithstanding very substantial lapses of time in relation to the charged offense or offenses.*” 124 F.4th at 170 (emphasis in original). It concluded that “the time lapse *between the alleged acts* does not negate the probative value of the evidence of those acts” and cited three cases in support of that proposition. *Id.* (emphasis added). None of those cases sanctioned the admission of testimony from forty-five years before trial. One held it was appropriate to exclude testimony that “would have described acts that occurred more than 21 years ago.” *Larson*, 112 F.3d at 602 (internal quotation marks omitted).

¹⁸ See Appellant’s Br. 37 (“The remoteness of the alleged events that Leeds and Stoyloff described undercut the relevance and reliability of this evidence.”) (internal quotation marks omitted).

B

In fact, there is every reason to believe that testimony in this case would have failed the standard Rule 403 analysis if either the district court or the appellate panel had been willing to apply it. Jessica Leeds testified that, approximately forty-five years earlier, she sat next to President Trump on an airplane, and he “grabbed [her] with his hands, tried to kiss [her], grabbed [her] breasts, and pulled [her] towards him.” App’x 2131. She said that the entire encounter lasted “just a few seconds.” *Id.* at 2103. The district court did not address Trump’s argument that the Leeds testimony was inadmissible under Rule 403 because it was “subject to memory distortion” given that “the alleged events occurred so long ago.” *Id.* at 80. Instead, the district court invoked the legislative history behind Rule 415 to conclude that the normal “limitations of Rule 403” do not apply to evidence admitted pursuant to Rule 415. 660 F. Supp. 3d at 208; *see also id.* at 208 n.30 (citing 140 Cong. Rec. at S12990 (statement of Sen. Robert Dole)). Rule 403, according to the district court, “must be applied with due regard for Congress’s deliberate failure to impose temporal limits.” *Id.* at 208.

When courts apply the normal rules of evidence, Rule 403 excludes testimony that has “become ‘too attenuated’ to be relevant or too remote to render the witness’s memory reliable.” *United States v. Curley*, 639 F.3d 50, 59 (2d Cir. 2011) (quoting *Larson*, 112 F.3d at 605). Leeds could not remember the year in which the airplane encounter occurred. She said it was “I think 1979 or ’8.” App’x 2098. When asked if she could identify a more precise date so that President Trump might be able to check his travel records, she said that she “really can’t” because “[i]t’s

too far” in the past. *Id.* at 2130. She could not even remember the city in which she boarded the airplane. *See id.* at 2098.

We have never held that Rule 403 permits witness testimony based on an incomplete memory of a brief interaction that occurred forty-five years earlier. We have suggested that a district court properly *excluded* testimony—which was otherwise admissible under Rule 414—that “would have described acts that occurred more than 21 years ago” and therefore concerned events “too remote in time to have any probative value” and that would create a “danger of unfair prejudice to [a defendant] in having to defend allegations so remote in time.” *Larson*, 112 F.3d at 602 (internal quotation marks omitted). In that case, Rule 403 required the exclusion of the testimony because the remoteness of the underlying events meant that the risk of unfair prejudice outweighed the probative value. *Id.* At the same time, we said that a district court could permissibly allow testimony that “covered events 16-20 years prior to trial” based on “strong indicators of the reliability of the witness’s memory,” such as “the traumatic nature of the events and their repetition over a span of four years.” *Larson*, 112 F.3d at 605.

In this case, there were no strong indicators that the witness’s memory was reliable. The events were not repeated over the course of four years but allegedly occurred within a few seconds on a flight coming from somewhere the witness could not remember in a year the witness could not remember but that was over four decades earlier. The lack of a full memory of the events created prejudice because Trump could not introduce evidence of his whereabouts at that time or challenge the

characterization of his conduct in the half-remembered encounter.

We have upheld the exclusion under Rule 403 of testimony about conduct “alleged to have occurred almost, or over, twenty-five years ago” because “[s]uch remoteness reduces the reliability of testimony as to the events’ occurrences” and “the danger of unreliability is somewhat enhanced by the lack of a relatively contemporaneous adjudication.” *Jacques*, 684 F.3d at 327. In this case, the remoteness was much greater and there was no contemporaneous adjudication.

If the district court had conducted the analysis that Rule 403 requires, it either would have excluded the testimony or it would have issued a decision at the outer boundary of when remote testimony has been put before a jury. *Cf. Doe v. Lima*, No. 15-CV-2953, 2020 WL 728813, at *6 (S.D.N.Y. Feb. 13, 2020) (excluding evidence of “robbery offenses” that “occurred more than 30 years ago” because “none of the prior offenses satisfies Rule 403”). But the district court did not even conduct that analysis, and our court has now excused the district courts in our circuit from applying the analysis that Rule 403 normally requires to evidence admitted under Rules 413-15. The panel opinion conflicts with our precedent holding, “like the Eighth, Ninth, and Tenth Circuits before us, that the protections provided in Rule 403 ... apply to evidence being offered pursuant to Rule 413” and must be enforced to “mitigate the danger of unfair prejudice resulting from the admission of propensity evidence in sexual-assault cases.” *Schaffer*, 851 F.3d at 180.

This is an important protection. “Exclusion of proof of other acts that are too remote in time caters principally to the dual concerns for relevance and

reliability.” *Larson*, 112 F.3d at 605. Rule 403 requires an evaluation to address “these concerns” that “must be made on a case-by-case basis to determine whether the significance of the prior acts has become too attenuated and whether the memories of the witnesses has likely become too frail.” *Id.* I would rehear this case *en banc* to restore our precedent holding that Rule 403 requires this evaluation and to remand to the district court to conduct it.

IV

The panel opinion treated Rules 413-15 anomalously in another way. The district court recognized that “[i]n order to be admissible under Rule 415, evidence of a sexual assault of a person other than the plaintiff must also have been a federal or state crime.” 660 F. Supp. 3d at 203 n.12. Rule 413(d) defines “sexual assault” for the purposes of Rules 413 and 415 as a “crime under federal law or under state law ... involving” (1) “any conduct prohibited by 18 U.S.C. chapter 109A,” (2) “contact, without consent, between any part of the defendant’s body—or an object—and another person’s genitals or anus,” (3) “contact, without consent, between the defendant’s genitals or anus and any part of another person’s body,” (4) “deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person,” or (5) “an attempt or conspiracy to engage in” the enumerated conduct. Fed. R. Evid. 413(d).

The plain language of Rule 413(d) provides that a crime of sexual assault must involve the violation of a statute that criminalizes conduct constitutive of sexual assault. “When choosing among interpretations of a statutory definition, the ‘ordinary meaning’ of the ‘defined term’ is an important

contextual clue.” *Delligatti v. United States*, 145 S. Ct. 797, 808 (2025) (quoting *Bond v. United States*, 572 U.S. 844, 861 (2014)). In Rule 413(d), the defined term is “sexual assault,” so we must “prefer interpretations” of the definition that “encompass prototypical [sexual assaults] over those that do not.” *Id.* If the definition “is to have a reasonable relationship to the term it defines, it must encompass cases where the offender” engages in conduct that violates a federal or state law criminalizing (1) the sexual misconduct enumerated in Rule 413(d)(1)-(4), or (2) the attempts or conspiracies to violate such laws that Rule 413(d)(5) identifies. The words “attempt” and “conspiracy,” moreover, are terms of art referring to legal standards. For that reason, the terms have an established legal meaning.¹⁹

The panel opinion, however, held that the federal or state law “crime” of “sexual assault” need not “involv[e]” sexual assault at all. The panel said that the testimony concerning the airplane encounter was admissible under Rule 415 because “[i]n 1978 and 1979, just as it is now, it was a federal crime to commit a simple assault on an airplane. And on this record a jury could have reasonably found that Mr. Trump committed a simple assault.” 124 F.4th at 160 (citing

¹⁹ See Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 73 (2012) (“Sometimes context indicates that a technical meaning applies. ... And when the law is the subject, ordinary legal meaning is to be expected, which often differs from common meaning.”); see also *Hall v. Hall*, 584 U.S. 59, 73 (2018) (“[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.”) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947)).

18 U.S.C. § 113(e) (1976)). The panel opinion concluded that “a simple assault on an airplane” qualified as a sexual assault under Rule 413(d) because a jury could conclude that the alleged simple assault—which did not involve the touching of another’s sexual organs—in fact involved an *attempt* to engage in a sexual touching. 124 F.4th at 160. In this way, the attempted sexual assault on which the panel relied to satisfy Rule 413(d) was a completed simple assault. The panel opinion did not require a showing that the “attempt” under Rule 413(d)(5) qualified as a “crime under federal law or under state law” that criminalizes the attempted sexual assault.

Thus, even if a defendant did not commit an attempted sexual assault under any federal or state law, the panel opinion would still conclude that the defendant committed a “sexual assault” under Rule 413(d) based on speculation that he might have wanted to reach for other body parts while committing a simple assault.

That is a bizarre way to apply the definition of “sexual assault” in Rule 413(d). It means that a crime that does not prototypically involve the enumerated conduct nevertheless qualifies as a sexual assault. And even though Rule 413(d)(5) identifies the legal standard of attempt, the panel opinion allowed conduct which does not meet that standard to qualify as an attempted sexual assault.

A

Under no reasonable understanding of the definition of “sexual assault” in Rule 413(d) would committing a simple assault under § 113(e) qualify as a sexual assault. The conduct that § 113(e) proscribed did not involve the enumerated conduct defining a

sexual assault crime in Rule 413(d). The district court did not rely on this “simple assault” theory,²⁰ and the panel opinion provided no explanation for introducing its counterintuitive conclusion that a simple assault on an airplane qualifies as a “crime” of “sexual assault” under the Federal Rules of Evidence.

Neither the panel opinion nor the underlying trial that it approved can be reconciled with the plain language of the federal rules. The district court admitted the Stoyloff testimony and the Leeds testimony pursuant to Rule 415. The district court did not rely on Rule 415 to admit the *Access Hollywood* tape, but the panel opinion held that it could have. Yet none of this evidence plausibly qualifies as “evidence that the party committed any other sexual assault” under the rule. Fed. R. Evid. 415(a).

The panel opinion and the district court admitted evidence that—those courts speculated—might have been an “attempt” to engage in the sort of conduct Rule 413(d) describes. But Rule 415 does not allow the admission of evidence of a freestanding “attempt” to engage in such conduct. The evidence must show that the party “committed” a “crime under federal law or under state law ... involving” an “attempt or conspiracy to engage in conduct described in subparagraphs (1)-(4).” Fed. R. Evid. 415(a), 413(d). In other words, the evidence must show an attempt that is itself the commission of a crime.²¹ Neither the panel

²⁰ See 124 F.4th at 161 n.13 (“The district court did not base its decision to admit the Leeds testimony on these specific statutes.”).

²¹ The statement insists that an “attempt” under Rule 413(d)(5) does not itself need to be a crime. *Post* at 6. But that ignores the language of Rule 413(d) providing that the

opinion nor the district court required the evidence to show the commission of a crime involving attempted sexual assault.

The statement suggests that other circuits “have rejected precisely the argument that the dissent advances.” *Post* at 4. But the cases it cites all address prior charged crimes that prototypically—and did—involve criminal sexual assault.²² Here, the panel

enumerated conduct in all five subsections, including an attempt, must be a “crime under federal law or under state law.” As the statement itself explains, “[t]o qualify as a sexual assault under Rule 413(d),” the prior conduct “must be (i) ‘a crime under federal law or under state law’ that (ii) involves any conduct matching at least one of five listed descriptions.” *Id.* at 4 n.3 (citing Fed. R. Evid. 413(d), 413(d)(1)-(5)).

²² See *United States v. Ahmed*, 119 F.4th 564, 567-68 (8th Cir. 2024) (holding, when the defendant was indicted for kidnapping two women for “sexual gratification,” that for Rule 413 “to apply, Ahmed need not have been charged with any particular offense. What matters is whether the offense he was charged with involved conduct that Rule 413(d) deems to be sexual assault. Ahmed’s kidnapping offenses did involve that kind of conduct.”); *United States v. Foley*, 740 F.3d 1079, 1086-87 (7th Cir. 2014) (“Foley was charged with child pornography production, distribution, and possession under 18 U.S.C. chapter 110, as well as transporting a minor across state lines to engage in a sex act under 18 U.S.C. § 2423(a) [T]he government explained that Foley’s child pornography crimes that were charged under 18 U.S.C. chapter 110 involved his molestation of Minor Male A on several occasions. For purposes of its Rule 413 analysis, the district court found that although Foley was charged under 18 U.S.C. chapter 110, his crimes involved conduct that was also prohibited under 18 U.S.C. chapter 109A, so his crimes would satisfy the first definition of ‘sexual assault’ under Rule 413(d)(1).”); *United States v. Batton*, 602 F.3d 1191, 1197 (10th Cir. 2010) (“Batton is charged with knowingly transporting J.D. across state lines with the intent of engaging in illicit sexual activity. The illicit sexual activities involv[ed] genital contact Moreover, the charged sexual activity also meets Rule 413’s

opinion did not require that the prior uncharged conduct shown to the jury involve a criminal sexual assault. The statement invokes a familiar objection to the “categorical approach” to classifying criminal conduct according to enumerated elements—an approach on which this dissent does not rely. That approach sometimes leads to the counterintuitive result that a crime which prototypically involves the use of force will not be considered a “crime of violence” based on the possibility that its elements could be met without the use of force. *See post* at 5-6; *United States v. Scott*, 990 F.3d 94, 126 (2d Cir. 2021) (Park, J., concurring). The problem here, however, is that the approach of the panel opinion generates counterintuitive results in the opposite direction: crimes that neither prototypically nor actually involved criminal sexual assault still qualify as admissible evidence of sexual assault.

B

The district court admitted the Stoyneff testimony based on its conclusion that the testimony qualified as evidence of a sexual assault under Rule 415. The district court provided two reasons for that conclusion. In its view, the Stoyneff testimony described conduct that a reasonable jury could find was (1) a crime under Florida law, and (2) an attempt to engage in the sexual conduct that Rule 413(d)(2) describes. *See* 660 F. Supp. 3d at 205-07. Neither conclusion is defensible.

internal definition of sexual assault.”); *United States v. Blazek*, 431 F.3d 1104, 1108 (8th Cir. 2005) (“At trial ... the government introduced evidence of his 1997 conviction for Abusive Sexual Contact with a Minor in violation of 18 U.S.C. § 2244(a)(1).”).

Stoynoff testified that President Trump put “his hands on my shoulders and he pushe[d] me against the wall and start[ed] kissing me, holding me against the wall” in a room at Mar-a-Lago. App’x 2350. The district court decided that the testimony described an attempt to violate the Florida sexual battery statute. *See* 660 F. Supp. 3d at 205 n.19 (citing Fla. Stat. § 794.011(5)(b)).²³ But Stoynoff never mentioned an attempt to touch her genitals. The district court nevertheless concluded that the alleged conduct could qualify as an attempted sexual battery under Florida law.²⁴ But the Florida courts disagree. In *Rogers v. State*, the Florida Supreme Court reversed a conviction for attempted sexual battery in which an armed defendant grabbed the victim’s breast and ordered her to remove her clothes. The Florida Supreme Court explained that “these acts do not rise to the level of an overt act toward the commission of a sexual battery.” 660 So. 2d 237, 241 (Fla. 1995). The Florida courts have warned that evidence of “improper touching,” even on “multiple occasions,” does not establish an attempted sexual battery. *Ellis v. State*, 754 So. 2d 887, 887 (Fla. 5th D.C.A. 2000). If such conduct were sufficient to establish attempt,

²³ *See also* 660 F. Supp. 3d at 205 (“Florida law defines ‘sexual battery’ as ‘oral, anal, or female genital penetration by, or union with, the sexual organ of another or the anal or female genital penetration of another by any other object.’”) (quoting Fla. Stat. § 794.011(1)(j)).

²⁴ *See* 660 F. Supp. 3d at 205 (“[A]ttempt under Florida law requires the defendant to commit ‘any act toward the commission of such [crime], but fails in the perpetration or is intercepted or prevented in the execution thereof.’”) (quoting *United States v. Lockley*, 632 F.3d 1238, 1245 n.6 (11th Cir. 2011) (quoting in turn Fla. Stat. § 777.04(1))).

“every case of improper touching can be prosecuted as an attempted sexual battery.” *Id.* at 888.

Even the case on which the district court relied for the attempt standard under Florida law explains that “[t]he act referred to is ‘an overt act’ and ‘must reach far enough toward accomplishing the desired result to amount to commencement of the consummation of the crime.’” *Lockley*, 632 F.3d at 1244 n.6 (citation omitted) (quoting *Morehead v. State*, 556 So. 2d 523, 524 (Fla. 5th D.C.A. 1990)). Under that standard—rather than the truncated version that appears in the district court opinion—the conduct Stoyhoff described does not amount to an attempted sexual battery.

The district court decided in the alternative that the Stoyhoff testimony described a violation of the Florida general battery statute because “Mr. Trump’s alleged kissing and groping of Ms. Stoyhoff” amounted to touching her “against her will.” 660 F. Supp. 3d at 205.²⁵ And Trump might have acted to commit that battery “for the purpose of committing a state crime involving contact, without consent, between any part of Mr. Trump’s body and Ms. Stoyhoff’s genitals.” 660 F. Supp. 3d at 205 (internal quotation marks and alterations omitted). But a violation of the general battery statute is not plausibly “a crime under federal law or under state law” of “sexual assault.” Fed. R. Evid. 413(d). And despite the requirement of Rules 415 and 413(d) that evidence of an “attempt” must show the commission of a “crime under federal law or under state law”—in other words, an attempted

²⁵ See 660 F. Supp. 3d at 205 (“It is a crime under Florida law ‘actually and intentionally to touch or strike another person against the will of the other.’”) (alterations omitted) (quoting Fla. Stat. § 784.03(1)(a)).

sexual assault crime—the district court endorsed the theory that a completed general battery might also serve as a freestanding “attempt” to engage in the type of conduct that Rule 413(d) describes.²⁶

The panel opinion upheld the admission of the Stoyneff testimony based on the district court’s theory that the testimony described “a crime under Florida law” and a separate, freestanding “attempt, under

²⁶ To satisfy that questionable theory, the district court engaged in further questionable reasoning. The district court noted Stoyneff’s pre-trial statement that Trump was “lying when he denied ‘groping’ her without her consent—in other words, that he ‘groped’ her.” 660 F. Supp. 3d at 205. But the district court acknowledged that “Rule 413(d) is not that broad” as to allow evidence of any “groping” because the rule requires contact “only with particular parts of the anatomy.” *Id.* at 206. The district court nevertheless concluded that a jury could consider evidence of *other prior acts* to supplement Stoyneff’s testimony: “the *Access Hollywood* tape and the testimony of Ms. Leeds are additional evidence that a jury would be entitled to consider in deciding whether to infer that the ultimate goal of Mr. Trump’s alleged actions with Ms. Stoyneff was to bring his hands or other parts of his anatomy into contact with Ms. Stoyneff’s most private [parts].” *Id.* Thus, even under the district court’s tendentious interpretation of Rule 415, the Stoyneff testimony still did not qualify as “evidence that the party committed any other sexual assault,” Fed. R. Evid. 415, without supplementing it with additional evidence of prior acts. That approach to Rule 415 was doubly erroneous: Before Rule 415 allows the district court to place evidence of a prior sexual assault before the jury, the district court must determine whether a hypothetical reasonable jury could conclude that the evidence shows the commission of a crime of sexual assault. In conducting that gate-keeping analysis, the district court may not assume—in a circular fashion—that the hypothetical jury has seen all the other evidence before the actual jury. In effect, the district court determined that the jury could rely on evidence of the charged conduct to infer that evidence of prior conduct could be admitted as evidence to prove the charged conduct.

Rule 413(d)(5), to engage in conduct described in Rule 413(d)(2).” 124 F.4th at 163. It bears reiterating that Rule 413(d) does not allow the admission of evidence that a court speculates could be an attempt to engage in the conduct the rule describes. The evidence must show an attempt that is itself the commission of a crime. Nevertheless, the panel opinion indulged in speculation—unmoored from the elements of *any* crime—about whether a jury could have found “that Mr. Trump intended to bring his body into contact with Ms. Stoyloff’s genitals and that he took substantial steps toward doing so.” 124 F.4th at 163.

In addition to that theory, the panel opinion held that the Stoyloff testimony could also have been admitted as an attempt to violate 18 U.S.C. § 2244(b)—that is, “to ‘knowingly engage in sexual contact with another person without that other person’s permission.’” 124 F.4th at 164 (alteration omitted) (quoting 18 U.S.C. § 2244(b)).²⁷ But that theory does not make sense either.

At trial, Stoyloff retreated from her pre-trial statement about having been “groped.” See App’x 2348-53. She instead testified that Trump put “his hands on my shoulders.” *Id.* at 2350. Section 2244(b) refers to contact involving another person’s “genitalia, anus, groin, breast, inner thigh, or buttocks.” 18 U.S.C. § 2246(3). It does not mention shoulders. And we know from the federal case law that touching the

²⁷ See also 124 F.4th at 164 (noting that federal law defines “sexual contact” as “the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person”) (quoting 18 U.S.C. § 2246(3)).

shoulders and kissing does not amount to a “substantial step” toward unwanted sexual contact. “Generally, courts have held that mere solicitation and fully clothed but sexually suggestive acts are insufficient to constitute attempted ‘sexual acts.’” *United States v. Blue Bird*, 372 F.3d 989, 993 (8th Cir. 2004). The Eighth Circuit has even held that there was no attempted sexual contact when the defendant “held [the victim’s] hand, rubbed her stomach, pushed her t-shirt up to just below her breasts, kissed her, and said, ‘Let’s do it.’” *Id.* at 992. Acts that were still more suggestive have been held not to qualify.²⁸

The panel opinion in this case, however, held that a jury could reasonably conclude that a defendant committed the crime of attempted abusive sexual contact under § 2244 when he touched a woman’s shoulders, kissed her against a wall, and—after desisting—made a suggestive remark. *See* 124 F.4th at 163-64. That decision is an outlier among reported federal cases.

Even the same district judge who presided over the trial in this case has previously recognized that testimony about such conduct does not qualify as admissible evidence of sexual assault under Rule 415. In another case involving alleged sexual misconduct, *Rapp v. Fowler*, the plaintiff sought to introduce testimony that the defendant had, on a prior occasion,

²⁸ *See, e.g., United States v. Hayward*, 359 F.3d 631, 640 (3d Cir. 2004) (“The ambiguous and equivocal act of pushing a victim’s head toward one’s clothed penis does not meet any definition of a ‘sexual act’ as defined in 18 U.S.C. § 2246(2) and does not constitute a substantial step toward achieving ‘contact between the mouth and the penis’ under 18 U.S.C. § 2246(2)(B).”).

sat next to a 16-year-old and put his hand “on my leg ... about two inches above my knee.” No. 20-CV-9586, 2022 WL 5243030, at *2 (S.D.N.Y. Oct. 6, 2022) (Kaplan, J.). The district court explained:

The incident, assuming it occurred, is not said to have involved any “touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks.” It therefore was not a “sexual contact” within the meaning of Section 2246(3). It thus was not a “sexual contact” for purposes of chapter 109A and not proscribed by virtue of Section 2244. The [proposed] testimony accordingly is not evidence of an “other sexual assault” within the meaning of Rule 415(a), regardless of any question of intent. *It is not admissible under Rule 415(a).*

Id. (emphasis added). In that case, the district court did not indulge in speculation that the actions might be “suggestive of a plan” eventually to reach the genitals—or even the inner thigh. 660 F. Supp. 3d at 206. And the district court did not consider whether the conduct might qualify as a general battery that, in conjunction with such a plan, could satisfy Rule 415.²⁹ Those novel theories have been applied only in this outlier case.

²⁹ See *Rapp*, 2022 WL 5243030, at *1 n.4 (“Plaintiff’s assumption that any crime characterized as sexual assault by state law qualifies is mistaken. In order to constitute ‘sexual assault’ for purposes of Rule 413(d), the conduct at issue must satisfy one of the five enumerated categories under that rule and, in addition, constitute a crime under either federal or state law.”).

C

The district court determined that the Leeds testimony described a sexual assault because the account “reasonably could be regarded as describing unconsented-to sexual contact by Mr. Trump and also as an attempt by Mr. Trump to bring at least his hands, and perhaps other parts of his body, into contact with Ms. Leeds’ genitalia, in each case in violation of federal law.” 660 F. Supp. 3d at 203. According to the district court, the conduct “therefore satisfies at least Rule 413(d)(2) and 413(d)(5) and thus Rule 415.” *Id.* at 203-04. The district court said that the purported conduct on the airplane would violate 49 U.S.C. § 46506, which prohibits “sexual contact” on an airplane. *See id.* at 203 n.12.

The panel opinion did not even cite 49 U.S.C. § 46506. It instead decided that the conduct on the airplane was (1) a simple assault under 18 U.S.C. § 113(e), and (2) “an ‘attempt’ under Rule 413(d)(5) to engage in the conduct described in Rule 413(d)(2).” 124 F.4th at 160. But the district court had not even mentioned 18 U.S.C. § 113(e).

The courts could not agree on a rationale for admitting the testimony because none are convincing. A non-sexual-assault offense does not qualify as a “crime” of “sexual assault” under Rule 413(d). Nor does Rule 415 allow the introduction of evidence of an attempt “to engage in the conduct described in Rule 413(d)(2)” that is not the commission of “a crime under federal law or under state law.” The new doctrine of the panel opinion that an “attempt” under Rule 413(d)(5) does not need to be a *criminal* attempt deprives the defendant of the ability to argue that the conduct would not qualify as an attempt under the relevant “federal law or ... state law.” The panel

opinion dispensed with the requirement under Rule 415 to identify such a law.

D

The district court did not admit the *Access Hollywood* tape pursuant to Rule 415 but the panel opinion proceeded as if it had. “[W]e conclude,” the panel opinion explained, “that the district court did not abuse its discretion in admitting the recording pursuant to Rules 413(d)(2), 413(d)(5), and 415.” 124 F.4th at 167. But the district court actually determined that “reliance on Rule 415 was unnecessary because the video was offered for a purpose other than to show the defendant’s propensity to commit sexual assault.” 683 F. Supp. 3d at 313 n.20. As a result, the district court “did not include the *Access Hollywood* tape in its instructions to the jury on the evidence of Mr. Trump’s alleged sexual assaults of other women” that it admitted pursuant to Rule 415. *Id.* The district court instructed the jury that it should apply the definition of sexual assault in Rule 413(d) only when “determining whether Mr. Trump sexually assaulted or attempted to sexual[ly] assault Ms. Leeds or Ms. Stoyanoff.” App’x 2803. It said that “the definition of ‘sexual assault’ that I have just given you applies only to your determination of whether to consider the evidence concerning alleged assaults or attempted assaults on those other women. It has no application to anything else in these instructions.” *Id.* at 2804.³⁰

³⁰ The statement insists that the district court still relied on Rule 415 to admit the *Access Hollywood* tape. *See post* at 7 n.7. It does so in reliance on an order the district court issued in a different but related case eight months after the notice of appeal was filed in this case. In that order, the district court said that it

That difference in treatment means that the holding of the panel opinion that the tape was admissible under Rule 404(b) makes a difference. If the admissibility of the tape depended only on Rule 415, a court would need to decide whether the erroneous jury instruction mattered to the verdict. And a court would also need to identify the “crime” of “sexual assault” that the *Access Hollywood* tape described. In its preliminary ruling, the district court said only that “a jury reasonably could find ... that Mr. Trump admitted in the *Access Hollywood* tape that he in fact has had contact with women’s genitalia in the past without their consent, or that he has attempted to do so. ... Accordingly, the tape satisfies Rule 415 by virtue of Rule 413(d)(2) and (d)(5).” 660 F. Supp. 3d at 203. The panel opinion said only that “the district court did not abuse its discretion in admitting the recording pursuant to Rules 413(d)(2), 413(d)(5), and 415.” 124 F.4th at 167. No court identified “a crime under federal law or under state law,” even under the loose interpretation of that requirement the courts applied to the other evidence.

As noted above, the tape describes an unspecified but unsuccessful advance toward Nancy O’Dell following a furniture-shopping excursion. And it includes the general statement about being “automatically attracted to beautiful” women and

admitted the tape “under Rule 415,” citing its pretrial ruling, and “alternatively ... under Rule 404(b),” citing the post-trial ruling in which it concluded that reliance on Rule 415 was unnecessary. *Carroll v. Trump*, No. 20-CV-7311, 2024 WL 97359, at *9 (S.D.N.Y. Jan. 9, 2024). Whatever the district court later claimed about admissibility, it instructed the jury that the standards for considering evidence admitted under Rule 415 did not apply to the tape. *See* App’x 2801-04.

“kissing them” because “when you’re a star they let you” engage in such conduct, including the touching of genitals. App’x 2883. It is difficult to evaluate whether the tape provides evidence of a crime of sexual assault under federal or state law because neither the district court nor the panel opinion identified such a law.

Still, the account of the interaction with O’Dell does not include any details of sexual conduct—let alone conduct that would constitute the commission of a crime of sexual assault under federal or state law. *See Jacques*, 684 F.3d at 327 (upholding the exclusion of evidence of prior alleged acts of sexual assault when there was “murkiness ... with regard to whether, or how much, coercion was involved”). And even if the general statement—about what women might allow celebrities to do—could be interpreted to describe unwanted sexual conduct, it does not describe a particular act constituting a crime. Courts do not normally treat a statement describing conduct in general—such as “generic references to violence”—as probative of criminal conduct unless the statement has “a close relationship to a specific criminal act.” *United States v. Jordan*, 714 F. Supp. 3d 158, 166-67 (E.D.N.Y. 2024). In other words, the speaker must reference “specific facts that might relate to his participation” in physical conduct that could be charged as a crime. *Id.* at 165. It is even more important to adhere to that principle when applying an evidentiary rule that requires the admitted evidence to show that the defendant “committed” a “crime.” Fed. R. Evid. 415(a), 413(d).³¹

³¹ *See* Edward J. Imwinkelried, 1 Uncharged Misconduct Evidence § 2:17 (2024) (explaining that, unlike “the common law

The trial in this case consisted of a series of indefensible evidentiary rulings. The panel opinion sidestepped the law of defamation, diminished the bar on propensity evidence, weakened Rule 403's limitation on prejudicial evidence, and expanded extratextually the propensity evidence that can be admitted under Rules 413-15. Following the panel opinion, a district court may admit testimony against a criminal defendant to show a propensity for sexual assault based on alleged non-criminal acts that occurred more than four decades earlier with little consideration of prejudice under Rule 403.

The result was a jury verdict based on impermissible character evidence and few reliable facts. No one can have any confidence that the jury would have returned the same verdict if the normal rules of evidence had been applied. Because I would apply the same rules in every case regardless of the identity of the defendant, I dissent from the denial of rehearing *en banc*.

and Rule 404(b),” Rules 413-15 require that, “to qualify for admission, the act must amount to a criminal offense”).

241A

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 23-793
June 13, 2025

E. JEAN CARROLL,
Plaintiff-Appellee,

v.

DONALD J. TRUMP,
Defendant-Appellant.

CHIN and CARNEY, *Senior Circuit Judges*, in support
of the denial of rehearing en banc:

As members of the three-judge panel that decided the case, we fully endorse the concurrence filed by our third panel member, Judge Pérez, in the Court's denial of the petition for rehearing en banc.¹ The panel decision was correct, *see Carroll v. Trump*, 124 F.4th 140 (2d Cir. 2024), and the criteria for en banc rehearing have not been met. Fed. R. App. P. 40(b)(2).

¹ As senior judges, Judges Chin and Carney have no vote on whether to rehear a case en banc. *See* 28 U.S.C. 46(c); Fed. R. App. P. 40(c). Pursuant to this Court's protocols, however, senior judges who were members of the panel deciding the case that is subject to the en banc petition may file a statement expressing their views where, as here, an active judge has filed a dissent from the denial of a petition for rehearing en banc.

The dissent takes issue with the panel’s review of the district court’s decisions to admit or exclude certain pieces of evidence over the course of a trial—decisions on which courts of appeals must “afford broad discretion to a district court.” *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 384 (2008) (Thomas, *J.*).² On such review, the panel found no abuse of discretion, much less any manifest error, in the challenged district court rulings. *See United States v. Tsarnaev*, 595 U.S. 302, 323 (2022). And even assuming error in any of the district court’s rulings, to warrant retrial Defendant also had to show that “it is likely that in some material respect the factfinder’s judgment was swayed” by any error. *Warren v. Pataki*, 823 F.3d 125, 138 (2d Cir. 2016). For the reasons set forth in detail in our opinion, the panel concluded that Defendant failed to meet that standard as well. *See Carroll*, 124 F.4th at 178. The dissent demonstrates no error in this judgment and certainly none that warrants the Court’s convening en banc.

Rehearing en banc is “not favored” and is permitted only in limited circumstances: if the panel decision conflicts with specific precedent of this Circuit, another Circuit, or the Supreme Court, or if “the proceeding involves one or more questions of exceptional importance.” Fed. R. App. P. 40(c), (b)(2)(A)–(D). None of these criteria is met here. The dissent fails to cite contrary binding authority or any prior decisions that, upon review, actually conflict with the panel’s decision; it fails to acknowledge the deferential standard of review that binds us; and it

² Unless otherwise noted, in text quoted from caselaw and the parties’ briefing, this statement omits all alterations, citations, footnotes, and internal quotation marks.

fails to identify any single question of exceptional importance that requires en banc consideration.

Rehearing en banc is also correctly denied because arguments advanced now by the dissent were not raised or developed by Defendant, either in his initial appeal or even in his petition for rehearing. “Our adversary system is designed around the premise that the parties [represented by competent counsel] know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief.” *Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia, *J.*, concurring in part and concurring in judgment).

We write separately to respond in more detail to several arguments raised now by the dissent, which a majority of the active judges of this Court correctly concluded did not warrant en banc review.

I. “Actual Malice”

The dissent faults the panel for not addressing the issue of “actual malice” and the exclusion of certain evidence that, in its view, might be related to that issue. Menashi, *J.*, dissenting from denial of reh’g en banc (“Dissent”) at 4. Our colleague argues that, to prevail as a public-figure defamation plaintiff, Plaintiff had to prove that Defendant made the challenged defamatory statement with “actual malice,” Dissent at 4–5, that is, “with knowledge that it was false or with reckless disregard of whether it was false or not,” *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964). The dissent contends that the panel erred by not addressing the relevance of certain excluded evidence to the issue of actual malice. Dissent at 4.

The panel did not address any “actual malice” argument for good reason: it was not raised by Defendant on appeal or in his petition for rehearing en banc. And that Defendant did not raise the argument is not surprising. His principal defense at trial was that the alleged assault simply did not happen: that his statements about Plaintiff (that she was, for example, carrying out a “con job,” App’x at 2858) were true. An “actual malice” defense—that a *false* statement was uttered without actual malice—was thus orthogonal to his basic position.

In any event, the panel carefully reviewed the categories of excluded evidence that Defendant claimed bore on the issues of “credibility, bias, motive, and [his] truth defense.” Appellant’s Br. at 40. We explained, “We accord great deference to a district court ‘in determining whether evidence is admissible, and in controlling the mode and order of its presentation to promote the effective ascertainment of the truth.’” *Carroll*, 124 F.4th at 175 (quoting *SR Int’l Bus. Ins. Co. v. World Trade Ctr. Props., LLC*, 467 F.3d 107, 119 (2d Cir. 2006)). Having conducted that deferential review, the panel identified no abuse of discretion in the district court’s rulings. We refer the reader to the panel opinion for the relevant details and discussion. *See id.* at 171–78.

II. The Admission of Evidence

The panel held that the district court did not abuse its discretion in admitting a recording of a 2005 conversation involving Defendant known as the *Access Hollywood* tape (the “Tape”); the testimony of Jessica Leeds about an incident on an airline flight (the “Leeds testimony”); and the testimony of Natasha Stoyanoff about an incident at Mar-a-Lago (the “Stoyanoff testimony”). *See Carroll*, 124 F.4th at 159–

71. All three types of evidence were admissible under Rules 413(d) and 415, we concluded, as evidence that a “party committed any other sexual assault.” Fed. R. Evid. 415(a). As discussed in our opinion, Rules 413–415 reflect Congress’s considered judgment to permit the admission of propensity evidence in certain sexual assault cases. *See Carroll*, 124 F.4th at 154–55 & n.5; *see also United States v. Schaffer*, 851 F.3d 166, 181 (2d Cir. 2017) (“The wisdom of an evidentiary rule permitting the use of propensity evidence in prosecutions for sexual assault is not the concern of the courts. . . . Deliberating the merits and demerits of Rule 413 is a matter for Congress alone.”). The dissent raises three main challenges to our holdings under Rules 413, 415, and 404(b). None is persuasive.

First, the dissent advances a novel interpretation of a “crime under federal law or under state law” for the purposes of Rule 413(d),³ asserting that this term means “a crime of *sexual assault*,” that is, it “must involve the violation of a statute that criminalizes conduct constitutive of sexual assault.” Dissent at 22 (emphasis added).⁴ But the dissent does not cite any

³ To qualify as a sexual assault under Rule 413(d), the prior act must meet two independent criteria: it must be (i) “a crime under federal law or under state law” that (ii) involves any conduct matching at least one of five listed descriptions. Fed. R. Evid. 413(d), 413(d)(1)–(d)(5).

⁴ The dissent attempts in this argument, it seems, to supplement a contention raised by Defendant for the first time in his appellate reply brief: that the Leeds testimony was inadmissible under Rules 413–415 on the ground that the conduct Leeds testified to allegedly took place on a domestic airline flight in 1978 or 1979, when it was purportedly not “a crime under federal law or under state law” to engage in the alleged conduct while on an airplane. *See Appellant’s Reply Br.*

decision of this Court or any other Circuit to have limited the reference to “crime” in Rule 413(d) in this way. And meanwhile, several of our sister circuits have rejected precisely the argument that the dissent advances. *See, e.g., United States v. Ahmed*, 119 F.4th 564, 568 (8th Cir. 2024) (“[F]or [Rule 413] to apply, [a party] need not have been charged with any particular offense. What matters is whether the offense he was charged with involved conduct that Rule 413(d) deems to be sexual assault.”); *United States v. Foley*, 740 F.3d 1079, 1086–87 (7th Cir. 2014) (rejecting argument that “Rule 413 did not apply because [defendant] was not charged with ‘sexual assault,’” where defendant “was charged with child pornography production, distribution, and possession,” as well as “transporting a minor across state lines to engage in a sex act,” explaining that “Rule 413 uses statutory definitions to designate the covered conduct, but the focus is on the conduct itself rather than how the charges have been drafted”); *United States v. Batton*, 602 F.3d 1191, 1197 (10th Cir. 2010) (rejecting argument that Rules 413–415 do not apply on the ground that, regardless of whether the elements of the charged *crime* include “conduct contemplated by Rule 413,” the charged *conduct* meets “Rule 413’s internal definition of sexual assault”); *United States v. Blazek*, 431 F.3d 1104, 1108–09 (8th Cir. 2005) (rejecting argument that Rules 413–415 do “not apply because [defendant] was not charged with an ‘offense of sexual assault’” where the “instant offense involve[d] conduct” described in Rule 413(d)).

at 7–9. The panel explained that “[i]n 1978 and 1979, just as it is now, it was a federal crime to commit a simple assault on an airplane.” *Carroll*, 124 F.4th at 160 (discussing 18 U.S.C. § 113(e) (1976)).

So, for support, the dissent turns to the Supreme Court’s very recent decision in *Delligatti v. United States*, 145 S. Ct. 797, 808 (2025), which interprets the elements clause of 18 U.S.C. § 924(c)(3) under the “categorical approach.” Our colleague disclaims reliance on the categorical approach, Dissent at 26, yet he points to language in *Delligatti* to suggest that, using the categorical approach, the term “crime” in Rule 413(d) must refer *only* to crimes that “encompass prototypical sexual assaults.” Dissent at 22–23.⁵

The categorical approach, however, is a particular method of statutory interpretation that has been crafted “for sentencing and immigration purposes,” *United States v. Maxwell*, 118 F.4th 256, 265 n.22 (2d Cir. 2024)—not for reading rules of evidence. And even in the sentencing or immigration context, the Supreme Court has declined to apply the categorical approach where, as here, the text “calls for circumstance-specific application.” *Nijhawan v. Holder*, 557 U.S. 29, 38 (2009). As this Court has held, statutes that require an agency or reviewing court to assess the “conduct” of an individual rather than a “conviction” call for circumstance-specific inquiries. *Alvarez v. Garland*, 33 F.4th 626, 643 (2d Cir. 2022). Here, Rule 413(d) defines “sexual assault” in relation to “*conduct* described in subparagraphs (1)–(4)” and “an attempt or conspiracy to engage in [that] *conduct*.” Fed. R. Evid. 413(d)(5) (emphasis added). The categorical approach and the Supreme Court’s

⁵ Defendant made the same substantive argument in his petition for rehearing, describing it there as an application of the “categorical approach.” Pet. for Reh’g at 9–12.

reasoning in *Delligatti* have no bearing on this appeal.⁶

Second, and in a similar vein, the dissent argues that the word “attempt” as used in Rule 413(d)(5) must “qualif[y] as a ‘crime under federal law or under state law’ that criminalizes . . . *attempted sexual assault*.” Dissent at 24 (emphasis added); *see id.* at 29. That reading, too, is untenable.

Rule 413(d)(5) provides that the definition of “sexual assault” may be met if—in addition to satisfying the requirement of describing “a crime under federal law or under state law”—the evidence also demonstrates “an attempt or conspiracy to engage in conduct described in subparagraphs (1)–(4).” Fed. R. Evid. 413(d)(5). Rule 413(d)(5) thus expressly provides that, as used there, the word “attempt” refers to an attempt “to engage in conduct described in subparagraphs (1)–(4)” —statutory text that the dissent’s interpretation overlooks. Fed. R. Evid. 413(d)(5).

The dissent further claims that, to qualify as “sexual assault” under Rule 413(d)(5), the evidence must show “attempts or conspiracies to violate *such laws* that Rule 413(d)(5) identifies.” Dissent at 23

⁶ The dissent applies its strained reading of Rule 413(d) to argue also that the Stoyneff testimony and the Tape were inadmissible on the ground that neither was evidence of “a crime under federal law or under state law,” which in the dissent’s view means “a crime of sexual assault.” Dissent at 27–33, 35–37. Yet neither Defendant’s brief on appeal nor his petition for rehearing advances any argument that these two pieces of evidence were not evidence of a “crime.” *See Carroll*, 124 F.4th at 163 (explaining that the district court’s determination that the Stoyneff testimony described “a crime under Florida law [is] a proposition that Mr. Trump does not challenge”).

(emphasis added). But Rule 413(d)(5) does not identify any “laws”—it speaks only to “conduct.” The dissent points to no authority for its contrary reading.

Third, the dissent takes issue with the panel’s alternative ruling that the Tape was admissible as non-propensity evidence of an “other act” under Rule 404(b). We found that it was within the district court’s discretion to admit the Tape under Rules 413–415 and, in the alternative, under Rule 404(b).⁷ Our colleague argues that the “other act” evidence here was bare propensity evidence under a different name. The panel’s Rule 404(b) ruling, however, is consistent with our Circuit’s longstanding “inclusionary

⁷ The dissent contends that “[t]he district court did not admit the *Access Hollywood* tape pursuant to Rule 415 but the panel opinion proceeded as if it had.” Dissent at 34; *see id.* at 25. As the panel described, the district court decided on a motion in limine that the Tape was admissible under Rules 413–415. *Carroll v. Trump*, 660 F. Supp. 3d 196, 203 (S.D.N.Y. 2023). In a post-trial ruling, the district court noted its view that the Tape was also admissible under Rule 404(b), explaining that reliance on Rules 413–415 alone was “unnecessary.” *Carroll v. Trump*, 683 F. Supp. 3d 302, 313 n.20 (S.D.N.Y. 2023). The district court was later explicit that “[t]he video was admitted in *Carroll II* at least under Rule 415.” *Carroll v. Trump*, No. 20-CV-7311 (LAK), 2024 WL 97359, at *9 (S.D.N.Y. Jan. 9, 2024); *see id.* at *10 (rejecting Defendant’s argument in *Carroll I* that the Tape was “not admissible under Rule 415” for the reasons articulated “in the Court’s prior rulings” (citing *Carroll*, 660 F. Supp. 3d at 200–03)). The dissent also suggests that the panel was incorrect in not addressing any potential error arising from the district court’s omission of the “*Access Hollywood*” tape in its instructions to the jury on the evidence of Mr. Trump’s alleged sexual assaults of other women.” Dissent at 34. In the district court, however, Defendant did not “object[] to [the Tape’s] exclusion from that portion of the charge.” *Carroll*, 683 F. Supp. 3d at 313 n.20. Nor did Defendant raise any such objection on appeal or in his petition for rehearing.

approach” to the admission of evidence under Rule 404(b). *United States v. Pascarella*, 84 F.3d 61, 69 (2d Cir. 1996). As the panel opinion explains, the Tape was relevant here *not* to show that Defendant had a “bad character,” but for other purposes, *inter alia*, to show a pattern of conduct that tends to rebut Defendant’s fabrication defense and to corroborate witness testimony. *Carroll*, 124 F.4th at 157, 168–70. Moreover, even if the admission of the Tape was error under either Rules 413–415 or Rule 404(b), the dissent fails to set out any argument that the error necessarily swayed the jury as to a material fact, *see Warren*, 823 F.3d at 138, or that Defendant has borne the burden of showing reversible error. We refer the reader to the panel opinion for the details of that analysis. *See Carroll*, 124 F.4th at 156–57, 168–70.

In sum, the panel applied Rules 413–415 and Rule 404(b) as written and consistent with Circuit precedent. Moreover, the dissent fails to set out any argument that, even if the admission of any of this evidence was an abuse of discretion, Defendant has borne the burden of showing that the error warranted reversal and retrial.

III. Rule 403 Balancing

Finally, contrary to the dissent’s account, Dissent at 15, the panel emphasized that Rule 403 applies with its usual force to evidence otherwise admissible under Rules 413–415. *See Carroll*, 124 F.4th at 155 (“Rule 403’s protections apply to evidence being offered under Rule 415” and, therefore, “if the trial court finds that the other act evidence is admissible under Rules 413 and 415, it may still exclude the evidence if it finds that the probative value of the propensity evidence is ‘substantially outweighed by a danger of . . . unfair prejudice, confusing the issues,

misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”); *id.* at 156 (“[T]he district court may admit evidence of other sexual assaults under Rule 415 when . . . applying Rule 403, the court further determines that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.”).

On appeal, Defendant challenged the district court’s Rule 403 balancing of its rulings admitting the testimony of Leeds and Stoyoff under Rules 413–415. Each woman testified to incidents that allegedly occurred many years before their respective trial testimony and years apart from the incident that Carroll alleged. Defendant contended on this basis that Rule 403 required the exclusion of both women’s testimony. *See* Appellant’s Br. at 36–37. And once again on abuse of discretion review, the panel decided that the elapsed time did “not negate the probative value of the evidence of those acts to the degree that would be required to find an abuse of discretion in admitting them for the jury’s consideration.” *Carroll*, 124 F.4th at 170.⁸

⁸ The dissent incorrectly asserts that the panel “did not conduct the remoteness analysis that Rule 403 requires at all.” Dissent at 18. Quoting a few select words of the panel decision, the dissent contends that the panel considered only “the time lapse between the alleged acts.” *Id.* (quoting *Carroll*, 124 F.4th at 170). Reading these words in their full context makes clear, however, that the panel properly analyzed whether the lapse in time between the alleged acts and the testimony about those acts “negate[d] the probative value of the evidence of those acts to the degree that would be required to find an abuse of discretion in admitting them for the jury’s consideration.” *Carroll*, 124 F.4th at 170.

In so deciding—and contrary to the dissent’s suggestion—the panel did not rely on legislative history to “override” or “alter the effect” of any Rule. Dissent at 1, 16. No part of the text of Rules 413–415 excludes evidence of an otherwise qualifying event because of the date of its alleged occurrence. The panel applied the Rules and assessed the district court’s application of them consistent with the “great deference” that we owe to a district court’s decision “as to the relevancy and unfair prejudice of proffered evidence, mindful that it sees the witnesses, the parties, the jurors, and the attorneys, and is thus in a superior position to evaluate the likely impact of the evidence.” *United States v. Paulino*, 445 F.3d 211, 217 (2d Cir. 2006).

In our decision, and contrary to the dissent’s claim, we cited a statement made by Rep. Molinari, the sponsor of the original bill proposing Rules 413–415, only as additional support for our understanding of the evidentiary rules and our decision on this issue. *Carroll*, 124 F.4th at 165 & n.17. Our Court in *United States v. Larson*, 112 F.3d 600 (2d Cir. 1997), an opinion on which our dissenting colleague relies in charging error in our Rule 403 analysis, cited the same statement by Rep. Molinari to support its review of the district court’s Rule 403 balancing. *See* 112 F.3d at 605 (“The legislative history of Rule 414 reveals that Congress meant its temporal scope to be broad . . .”).

The dissent further asserts that the panel decision “conflicts with our precedent” in *United States v. Schaffer*, 851 F.3d 166, 180 (2d Cir. 2017), in which we held that Rule 403 applies to evidence offered under Rule 413. Dissent at 21. But not only did the panel repeatedly reaffirm *Schaffer*’s holding,

Schaffer's analysis itself also mirrors that of the panel's here: the *Schaffer* Court assessed the district court's Rule 403 balancing analysis while "bearing in mind the 'great deference' accorded to district courts in resolving evidentiary questions" and upheld the district court's admission of evidence under Rule 413, as we did, here. 851 F.3d at 184 (quoting *United States v. Quinones*, 511 F.3d 289, 310 (2d Cir. 2007)).

En banc review is hardly necessary to emphasize that Rule 403 applies with its usual force to evidence that is otherwise admissible under Rules 413–415. The panel applied Rule 403 explicitly and reasonably and took no contrary position. *Carroll*, 124 F.4th at 170–71. The dissent may disagree with the result of our abuse of discretion review of the district court's Rule 403 balancing. But any such disagreement hardly warrants en banc review. *See Tharpe v. Sellers*, 583 U.S. 33, 46–47 (2018) (Thomas, *J.*, dissenting) ("[E]ven if we might have made a different call, abuse-of-discretion review means we cannot 'substitute [our] judgment for that of the district court.'").

IV. Conclusion

The rulings of the panel and the challenges raised by the dissent do not present the kind of broad concerns about the law of the Circuit that warrant convening en banc. The dissent's "actual malice" argument was not addressed by the panel because it was not raised by Defendant on appeal. The dissent's arguments concerning the admissibility of evidence under Federal Rules of Evidence 413–415 were not raised by Defendant on appeal, and the dissent's strained reading of Rule 413 lacks merit. The dissent's Rule 404(b) argument fails to engage with the panel's reasoning, explain why any purported error necessarily swayed the jury as to a material fact, *see*

Warren, 823 F.3d at 138, or show that Defendant has borne the burden of showing reversible error. Finally, contrary to the dissent's account, the panel reaffirmed the applicability of Rule 403 to evidence otherwise admissible under Rules 413–415. Even on his own terms, our dissenting colleague fails to explain why any purported error warrants a retrial or full court review. As Judge Pérez reminds us, we do not convene en banc to relitigate a case.

The Court appropriately denied the petition for rehearing en banc.

255A

APPENDIX J

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 30th day of December, two thousand twenty-four.

Before: Denny Chin,
Susan L. Carney,
Myrna Pérez
Circuit Judges.

E. Jean Carroll,	JUDGMENT
<i>Plaintiff,</i>	Docket No. 23-793
v.	
Donald J. Trump,	
<i>Defendant.</i>	

The appeal in the above captioned case from a judgment of the United States District Court for the Southern District of New York was argued on the district court's record and the parties' briefs.

IT IS HEREBY ORDERED, ADJUDGED and DECREED that judgment of the district court is AFFIRMED.

For the Court:
/s/ Catherine O'Hagan Wolfe
Catherine O'Hagan Wolfe,
Clerk of Court

256A

APPENDIX K

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

No. 22-cv-10016 (LAK)
May 11, 2023

E. JEAN CARROLL,
Plaintiff,

v.

DONALD J. TRUMP,
Defendant.

JUDGMENT

It is hereby **ORDERED, ADJUDGED AND DECREED:** That after a Jury Trial before the Honorable Lewis A. Kaplan, United States District Judge, Plaintiff E. Jean Carroll has judgment against the defendant Donald J. Trump in the sum of \$2,000,000.00 for injuries; \$20,000.00 in punitive damages; \$1,000,000.00 for damages other than the reputation repair program; \$1,700,000.00 for damages for the reputation repair program; and \$280,000.00 in punitive damages; accordingly, the case is closed.

Dated: New York, New York
May 11, 2023

So Ordered:

/s/ Lewis A. Kaplan
U.S.D.J.

/s/ Ruby J. Krajick
Clerk of Court

BY: /s/ K. Mango
Deputy Clerk

APPENDIX L

STATUTORY AND RULE PROVISIONS**18 U.S.C. § 113(e) (1976): Assaults Within Maritime and Territorial Jurisdiction**

Whoever, within the special maritime and territorial jurisdiction of the United States, is guilty of an assault shall be punished as follows:

* * *

(e) Simple assault, by fine of not more than \$300 or imprisonment for not more than three months, or both.

* * *

Federal Rule of Evidence 403: Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons

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 delay, wasting time, or needlessly presenting cumulative evidence.

Federal Rule of Evidence 404: Character Evidence; Other Crimes, Wrongs, or Acts

(a) Character Evidence.

(1) *Prohibited Uses.* Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

(2) *Exceptions for a Defendant or Victim in a Criminal Case.* The following exceptions apply in a criminal case:

258A

(A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;

(B) subject to the limitations in Rule 412 , a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may:

(i) offer evidence to rebut it; and

(ii) offer evidence of the defendant's same trait; and

(C) in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

(3) *Exceptions for a Witness.* Evidence of a witness's character may be admitted under Rules 607 , 608 , and 609 .

(b) Other Crimes, Wrongs, or Acts.

(1) *Prohibited Uses.* Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) *Permitted Uses.* This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

(3) *Notice in a Criminal Case.* In a criminal case, the prosecutor must:

(A) provide reasonable notice of any such evidence that the prosecutor intends to offer at

trial, so that the defendant has a fair opportunity to meet it;

(B) articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose; and

(C) do so in writing before trial — or in any form during trial if the court, for good cause, excuses lack of pretrial notice.

Federal Rule of Evidence 413: Similar Crimes in Sexual-Assault Cases

(a) Permitted Uses. 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.

(b) Disclosure to the Defendant. If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses' statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.

(c) Effect on Other Rules. This rule does not limit the admission or consideration of evidence under any other rule.

(d) Definition of "Sexual Assault." In this rule and Rule 415, "sexual assault" means a crime under federal law or under state law (as "state" is defined in 18 U.S.C. § 513) involving:

- (1) any conduct prohibited by 18 U.S.C. chapter 109A;

- (2) contact, without consent, between any part of the defendant's body — or an object — and another person's genitals or anus;
- (3) contact, without consent, between the defendant's genitals or anus and any part of another person's body;
- (4) deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person; or
- (5) an attempt or conspiracy to engage in conduct described in subparagraphs (1)–(4).

Federal Rule of Evidence 415: Similar Acts in Civil Cases Involving Sexual Assault or Child Molestation

- (a) Permitted Uses. In a civil case involving a claim for relief based on a party's alleged sexual assault or child molestation, the court may admit evidence that the party committed any other sexual assault or child molestation. The evidence may be considered as provided in Rules 413 and 414.
- (b) Disclosure to the Opponent. If a party intends to offer this evidence, the party must disclose it to the party against whom it will be offered, including witnesses' statements or a summary of the expected testimony. The party must do so at least 15 days before trial or at a later time that the court allows for good cause.
- (c) Effect on Other Rules. This rule does not limit the admission or consideration of evidence under any other rule.

261A

APPENDIX M

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 22-cv-10016 (LAK)
May 9, 2023

E. JEAN CARROLL,
Plaintiff,

v.

DONALD J. TRUMP,
Defendant.

VERDICT FORM

Battery

Did Ms. Carroll prove, by a preponderance of the evidence, that

1. Mr. Trump raped Ms. Carroll?

YES _____ NO X

[If you answered "Yes," skip to Question 4. If you answered "No," continue to Question 2.]

2. Mr. Trump sexually abused Ms. Carroll?

YES X NO _____

[If you answered "Yes," skip to Question 4. If you answered "No," continue to Question 3.]

3. Mr. Trump forcibly touched Ms. Carroll?

YES _____ NO _____

[If you answered "Yes," continue to Question 4. If you answered "No," skip to Question 6.]

4. Ms. Carroll was injured as a result of Mr. Trump's conduct?

YES X NO

If "Yes," insert a dollar amount that would fairly and adequately compensate her for that injury or those injuries.

\$2,000,000 – (2 million)

If "No," insert \$1.

\$

[Continue to Question 5, whether you answered "Yes" or "No."]

5. Mr. Trump's conduct was willfully or wantonly negligent, reckless, or done with a conscious disregard of the rights of Ms. Carroll, or was so reckless as to amount to such disregard?

YES X NO

If "Yes," how much, if any, should Mr. Trump pay to Ms. Carroll in punitive damages?

\$20,000 – (twenty thousand)

[Continue to Question 6, whether you answered "Yes" or "No."]

Defamation

Did Ms. Carroll prove, by a preponderance of the evidence, that

6. Mr. Trump's statement was defamatory?

YES X NO

[If you answered “Yes,” continue to Question 7. If you answered “No,” stop here and return your verdict.]

Did Ms. Carroll prove, by clear and convincing evidence, that

7. Mr. Trump’s statement was false?

YES X NO

[If you answered “Yes,” continue to Question 8. If you answered “No,” stop here and return your verdict.]

8. Mr. Trump made the statement with actual malice?

YES X NO

[If you answered “Yes,” continue to Question 9. If you answered “No,” stop here and return your verdict.]

Did Ms. Carroll prove, by a preponderance of the evidence, that

9. Ms. Carroll was injured as a result of Mr. Trump’s publication of the October 12, 2022 statement?

YES X NO

If “Yes,” insert a dollar amount for any damages other than the reputation repair program.

\$1,000,000. – (1 million)

If “Yes,” insert a dollar amount for any damages for the reputation repair program only.

\$1,700,000. – (1.7 million)

If “No,” insert \$1.

\$

[Continue to Question 10, whether you answered “Yes” or “No.”]

264A

10. In making the statement, Mr. Trump acted maliciously, out of hatred, ill will, spite or wanton, reckless, or willful disregard of the rights of another?

YES X NO

If "Yes," how much, if any, should Mr. Trump pay to Ms. Carroll in punitive damages?

\$280,000. – (two hundred eighty thousand)

[Please write your juror number (not your seat number or name) in the space provided below, fill in the date, and inform the officer that you have reached a verdict.]

Dated: 5/9, 2023

Juror numbers:

<u>10</u>	<u>58</u>
<u>37</u>	<u>77</u>
<u>39</u>	<u>80</u>
<u>44</u>	<u>81</u>
<u>48</u>	<u> </u>