No. 25-573

In the Supreme Court of the United States

DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES,
Petitioner,

v.

E. JEAN CARROLL,
Respondent.

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

BRIEF FOR AMERICA FIRST LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

America First Legal Foundation is a nonprofit organization dedicated to promoting the rule of law in the United States by ensuring due process and equal protection for every American citizen and encouraging understanding of the law and individual rights guaranteed under the laws of the United States. AFL has a substantial interest in this case. Ensuring judicial adherence to federal law and the Constitution's mandates is a core institutional interest at the heart of its mission.*

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* *Amicus* provided timely notice of this brief. No counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to it.

SUMMARY OF THE ARGUMENT

In this extraordinary case, President Donald Trump was held liable for calling a decades-delayed lawsuit a hoax—even though the jury unanimously agreed that plaintiff E. Jean Carroll failed to prove even by a preponderance of the evidence her central claim of rape. Just as extraordinary were the procedural departures that inexorably led to the jury's verdict of liability. On issue after issue, the district court's evidentiary decisions let Carroll skirt well-established legal rules to bring in unreliable evidence—while freeing her from explaining the many inconsistencies in her story. Taken together, these rulings leave little doubt that President Trump was treated differently from other litigants—and was improperly deprived of the law's procedural protections. The result was an incomprehensible verdict that likely rested more on hostility toward President Trump than the merits of Carroll's claims.

Though the differential treatment given President Trump alone warrants this Court's review, the decisions below also implicate an important conflict about how Rule 403 applies to propensity evidence under Rule 415. For centuries, Anglo-American legal systems have excluded propensity evidence. While Rule 415 relaxes Rule 404's general ban on propensity evidence for certain claims of sexual assault, it expressly preserves consideration under "other" rules—including Rule 403. Yet, departing from other courts, the courts below held that the staleness of Rule 415 evidence was insignificant under Rule 403. But that staleness makes propensity evidence especially unreliable and prejudicial. And the propensity

evidence offered here was especially stale and unreliable, as it involved—like Carroll's claim itself—alleged incidents occurring decades ago for which there was no physical evidence or corroboration. To preserve the evenhandedness and integrity of federal judicial proceedings, the Court should grant certiorari and reverse.

REASONS FOR GRANTING THE WRIT

I. The decisions below failed to apply legal principles neutrally.

A "basic principle of justice" is "that like cases should be decided alike." *Martin* v. *Franklin Cap. Corp.*, 546 U.S. 132, 139 (2005). "[L]imiting discretion according to legal standards helps promote" that principle. *Ibid.* "Without governing standards," "judicial 'whim' or predilection" may lead to "freewheeling inquiries [that] often deprive litigants of" the right to be treated the same way as other litigants. *Kirtsaeng* v. *John Wiley & Sons, Inc.*, 579 U.S. 197, 203–04 (2016).

The Federal Rules of Evidence play a critical role in treating like litigants alike. Their goal is that "every proceeding" be "administer[ed] . . . fairly," "to the end of ascertaining the truth and securing a just determination." Fed. R. Evid. 102; see *United States* v. *Augenblick*, 393 U.S. 348, 352 (1969) ("Rules of evidence are designed in the interest of fair trials."). Procedural rules like the rules of evidence "spell[] much of the difference between rule by law and rule by whim or caprice." *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U.S. 123, 179 (1951) (Douglas, J., concurring).

Here, it is hard to imagine that the proceedings below would have transpired the same way had the defendant not been named Donald J. Trump. Those proceedings were rife with procedural irregularities and suspect evidentiary rulings, all with the effect of bolstering Carroll's stale claim and depriving President Trump of meritorious defenses. Thus, as Judge Menashi put it, "[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." Pet. 240a (dissenting from denial of rehearing en banc). Every aspect of this case suggests a biding hostility to the defendant.

Before addressing the questionable evidentiary rulings, it is necessary to consider the extraordinary reopening of the statute of limitations that allowed this case to proceed in the first place. The claim here against President Trump is based on events about three decades ago—the plaintiff could not pinpoint a day or even a year (more on that later)—so it would normally have been barred by New York's one-year statute of limitations. See *Sharon B.* v. *Reverend S.*, 244 A.D.2d 878, 879, 665 N.Y.S.2d 139 (1997). But "[i]n the midst" of Carroll's litigation against President Trump, "New York in May 2022 enacted the [Adult Survivors Act] which, in relevant part, created a one-year revival period, starting November 24, 2022, during which adult survivors of sexual assault could sue their abusers despite the expiration of the previously applicable statutes of limitation." *Carroll* v. *Trump*, 650 F. Supp. 3d 213, 218 (S.D.N.Y. 2023).

The bill's sponsor focused on President Trump, emphasizing that "Carroll has traveled to Albany to

lobby for the ASA's passage and has previously said she would use the ASA to sue Trump."[1] And sure enough, "a bare nine minutes after the ASA became effective on Thanksgiving morning," Carroll sued President Trump. *Carroll*, 650 F. Supp. 3d at 218.

The district court was unconcerned by this gerrymandered statutory extension. See *id.* at 225. But "[s]tatutes of limitations are not simply technicalities." *Bd. of Regents of Univ. of State of N.Y.* v. *Tomanio*, 446 U.S. 478, 487 (1980). "[T]hey have long been respected as fundamental to a well-ordered judicial system." *Ibid.* That is because "[t]he process of discovery and trial which results in the finding of ultimate facts for or against the plaintiff by the judge or jury is obviously more reliable if the witness or testimony in question is relatively fresh." *Ibid.* Thus, limitations periods "require plaintiffs to pursue diligent prosecution of known claims." *CTS Corp.* v. *Waldburger*, 573 U.S. 1, 8 (2014) (cleaned up). "Statutes of limitations promote justice by preventing surprises through plaintiffs' revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Ibid.* (cleaned up).

The proceedings below prove how problematic it is to reopen a statute of limitations over two decades

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[1] *Assemblymember Linda B. Rosenthal's Statement on New York State Assembly's Announcement that it will Pass the Adult Survivors Act Before the End of the 2022 Session* (May 19, 2022), https://perma.cc/TD63-ZXLF. This apparent targeting of President Trump suggests that the law may implicate the constitutional prohibition on bills of attainder. See U.S. Const. art. I, § 10, cl. 1; *United States* v. *Brown*, 381 U.S. 437, 462 (1965).

later. The district court said that this was "a 'he said, she said' case," "turn[ing] on an alleged event more than two decades ago." Pet. 121a. The court said that "[t]here will be no physical evidence supporting either side at trial." *Ibid.*

Yet Carroll had proclaimed that she *did* have physical evidence, particularly DNA evidence. She insisted that the dress she had worn was her trump card because it supposedly had the President's DNA on it: "I have the dress. Trump is basically in deep s***." Ct. App. App'x A-603. She made the point repeatedly:[2]

[2] Twitter (Jan. 30, 2020), https://perma.cc/BPU5-DBL8.

"Ms. Carroll testified at her deposition . . . 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? . . .
>
> 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."

Pet. 91a (cleaned up).

This DNA claim turned out to be a dud. "There was no evidence of any sperm cells." *Carroll* v. *Trump*, 2023 WL 2006312, at *3 (S.D.N.Y. Feb. 15, 2023). And Carroll seemed to give up on any effort to tie the dress to President Trump at all. She "had plenty of opportunities in both of the two related cases to move to compel Mr. Trump to submit a DNA sample," and the district court explained that "[h]ad [she] done so, [she] almost certainly would have gotten it." *Id.* at *2. "But Ms. Carroll's counsel never moved to compel Mr. Trump to submit a DNA sample." *Ibid.* And when President Trump offered to voluntarily submit a DNA sample, in exchange for a portion of the DNA report that Carroll had withheld from disclosure, Carroll refused. She refused even though the appendix "simply contain[ed] the electropherograms that were

generated in reaching the report's conclusions." *Id.* at *8. She said this exchange was "untimely"—notwithstanding her failure to timely turn over the appendix—and might "delay the trial"—though she waited *decades* to sue. *Id.* at *6.

An obvious conclusion that could be drawn is that Carroll knew all along that the dress—her centerpiece evidence—did not have President Trump's DNA on it. The district court said that conclusion was "factually impossible for a simple reason: Mr. Trump never provided a DNA sample for the purpose of comparing it to the DNA on her dress. No one knows whether his DNA is on the dress." *Id.* at *8. But Carroll could have known, if the incident never happened—that is the whole point. Her promise that she preserved a dress from three decades ago because it had President Trump's DNA on it, followed by proof that the dress had *no* sperm and her own refusal to ask for DNA confirmation, is highly probative of the veracity of her belated allegations.

Yet the jury never heard any of this, because the district court excluded all discussion of DNA on Carroll's motion. The district court acknowledged that "the fact that [Carroll's] statement [about the dress] may have been inaccurate has at least some relevance." Pet. 94a n.46. But the court said it would be "unfairly prejudicial" for the jury to even "infer[]" "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." Pet. 94a. That is hardly an unreasonable inference, given the facts here, and it is far from an *unfair* one, given Carroll's repeated public statements and later court retreats.

Yet the district court relied on its "factual impossibility" illogic addressed above and excluded *all* evidence about DNA. Pet. 94a–96a & n.47.

The district court never grappled with the fact that the DNA evidence not only undermined Carroll's assault claim, but also bolstered President Trump's defamation defenses. In a public-figure defamation case, the plaintiff "must prove that the defamatory [statement] was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *St. Amant* v. *Thompson*, 390 U.S. 727, 728 (1968). Carroll's shifting DNA stories suggest that President Trump was *not* "speaking with actual malice when he called [Carroll's lawsuit] a hoax"—but the district court "never addressed this argument." Pet. 204a–05a (Menashi, J.).

What about other evidence? According to Carroll's book, surveillance cameras should have captured key moments of her alleged encounter with Donald Trump at Bergdorf Goodman. Ct. App. App'x A-1841. Carroll testified that she and Donald Trump "would have been filmed on the ground floor," and that cameras "could have also captured [them] going up the escalator" and "filmed [them] walking into the lingerie department." *Ibid.* Despite identifying this potentially dispositive evidence in her book, and confirming it at trial, Carroll did not even try to obtain the footage. See *ibid.*

Carroll also "never called the police." Ct. App. App'x A-1757. In her book, she recognized that this was an "odd fact" that she needed to "clear up." Ct. App. App'x A-1829. When President Trump's counsel

tried to ask what she meant by that statement, the district court largely precluded further questions. See Ct. App. App'x A-1830. But Carroll did confirm that, until publishing her book in 2019, she "hadn't publicly disclosed this purported attack for 23 or 24 years." Ct. App. App'x A-1749. Carroll said she "was never going to talk about it." *Ibid.*

In a TV interview, Carroll said she would not seek to press rape charges because it would have been "disrespectful to women being raped by the border and around the world"—and the district court refused to allow questioning about that excuse. Ct. App. App'x A-3027–28. She decided to sue President Trump only after "a conversation with George Conway," a lawyer who "does not like Donald Trump," "crystallized" the issue for her. Ct. App. App'x A-1705–06. She has described President Trump as "evil" and "vile"—but enjoyed watching *The Apprentice* television show starring Donald Trump. Ct. App. App'x A-1649, 1651, 1654.

Carroll also testified that no one else was paying her legal fees. Ct. App. App'x A-1175. But on the eve of trial, Carroll suddenly "recollected" that her multi-year litigation was being funded by Reid Hoffman, "one of the largest donors to the Democratic party" and "a vocal critic of [President Trump] and his political policies." Ct. App. App'x A-1176–77. Hoffman was "on record stating that he would 'spend as much as [he] possibly can' to avoid another Trump presidency." Ct. App. App'x A-1177. The district court, however, precluded "the whole subject of litigation funding." Ct. App. App'x A-1659.

Turning to Carroll's book, *What Do We Need Men For?: A Modest Proposal*, published in 2019 as she made allegations against President Trump for the first time, Carroll claimed to be compiling a "dead serious" book listing the 21 "most hideous men" of her life. Ct. App. App'x A-1751. One man was a mechanic who put her car "wheel on the wrong way," while another was "some man who wouldn't let [her] park in an empty parking lot." Ct. App. App'x A-1752. Despite this apparent low bar of hideousness, she "didn't decide to include Donald Trump on that list until [she was] already four or five weeks into writing the book," and "[h]e was not permanently fixed in the book until the very end." Ct. App. App'x A-1752–53. She thought that "including the story about Donald Trump in [the] book while he was still president would help sell the book." Ct. App. App'x A-1753.

Carroll conceded that she "first mentioned the story about Donald Trump in Bergdorf Goodman" as she was "trying to sell [her] book and get money for [her] book." Ct. App. App'x A-1759. And she confirmed that this story "was the single most important part of [her] prepublication" "publicity." Ct. App. App'x A-1763. She aggressively pushed her PR agents to get her "more press" because her book had been "an absolute dud." Ct. App. App'x A-1943–44. She conceded that mentioning Donald Trump meant "people would be interested." Ct. App. App'x A-1667.

Her plan worked. An expert report analyzing her public profile found that before June 2019, articles about Carroll were practically nonexistent. Ct. App. App'x A-856. After she published her accusation and President Trump responded, her visibility "r[ose]

tremendously." *Ibid.* She admitted, "I like attention. There is no question, I like attention." Ct. App. App'x A-1708. One of her alleged confidants texted her daughter to say that Carroll was "acting a little scary," "turning this whole never-ending transaction into a lifestyle," and "loving the adulation." Ct. App. App'x A-2452.

Carroll's testimony below was less than reliable. Carroll—who was around 52 years old at the time of the alleged incident, and 79 at trial—could not provide basic details about the incident, which limited President Trump's ability to defend against her belated claim. At first, she could not identify the date—or even the year—of the alleged incident. See Ct. App. App'x A-1746–47. The two confidants whom she claimed to have told immediately after the incident fared no better—they "couldn't give [her] a specific date of the alleged incident, either" and "couldn't even tell [her] the year, whether it was 1995 or 1996." Ct. App. App'x A-3253.

Once discovery closed, Carroll suddenly testified more precisely: "It's always been in the back of my mind that it was a Thursday, but I never said it because I wasn't 100 percent positive." Ct. App. App'x A-1585. This was after she had "spoken publicly about it," "written publicly about [it]," and "been deposed about it." Ct. App. App'x A-1586. Yet "never before" had she "said it was Thursday." *Ibid.* Carroll believed it was a Thursday night because "that's the only night of the week that Bergdorf stayed open past 6 p.m."—a fact she learned in discovery from a former store manager. Ct. App. App'x A-1451; see Ct. App. App'x A-1586, A-2153.

In similar fashion, Carroll narrowed down the year of the incident. "[G]oing by what [she] was wearing"—"a wool dress, tights, high heels, but no coat"—she deduced that it "wasn't too cold out" but still cold, which "pinned it to" fall 1995 or spring 1996. Ct. App. App'x A-1582–83. To narrow the timeline further, to the spring of 1996, she relied on her friend Lisa Birnbach's published magazine article about Donald Trump from February 1996, claiming that Birnbach "never would have gone down to Mar-a-Lago to cover Trump if she knew what Donald Trump had done to me in Bergdorf's." Ct. App. App'x A-1584–85.

To bolster her late-breaking allegations, Carroll recruited two others who suddenly recalled decades-old incidents supposedly involving President Trump. One, Natasha Stoynoff, was "sought out" by Carroll, who "created a transcript of an interview that suggests Carroll was coaching her on what to say." Pet. 204a (Menashi, J.); see Ct. App. App'x A-1407 ("I think his pelvis was against you."). Stoynoff waited some 11 years—during which she wrote a favorable profile of President Trump—to accuse President Trump of trying to kiss her without permission while surrounded by others. Pet. 8–9. She "retreated from her pre-trial statement about having been 'groped.'" Pet. 233a (Menashi, J.). The district court admitted this belated testimony despite its scant resemblance to Carroll's claims. Stoynoff—who views President Trump as "terribly unfit," Ct. App. App'x A-2360—has not filed any claims herself against President Trump.

Likewise, the court admitted uncorroborated testimony from Jessica Leeds, who "testified that, approximately forty-five years earlier"—like Carroll,

she could not recall the precise year—"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.'" Pet. 221a (Menashi, J.); see Ct. App. App'x A-2098. She could not "remember whether [the flight] was from Dallas or from Atlanta." *Ibid.* She initially claimed that the assault lasted "15 minutes" before revising that estimate to "just a few seconds." Ct. App. App'x A-2103. She did not "tell anyone about supposedly being assaulted by Donald Trump for almost 40 years." Ct. App. App'x A-2123. Leeds, like Carroll and Stoynoff, is a political opponent of President Trump. Ct. App. App'x A-2126–27. Yet the court admitted her vastly stale testimony—along with Stoynoff's—shoring up Carroll's own claim.

Finally consider the jury's verdict. Both in her book and in her testimony, Carroll asserted that President Trump had "inserted his penis" into her. Pet. 135a–37a. The first "liability question[] for Ms. Carroll's sexual battery claim w[as] whether Ms. Carroll proved by a preponderance of the evidence that (1) 'Mr. Trump raped Ms. Carroll?'" Pet. 158a. Applying New York law, "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." Pet. 160a (emphasis omitted). And the jury unanimously answered Question 1 "no." Ct. App. App'x A-3095.

As Professor Dershowitz has explained, "[i]n so finding, the jury apparently disbelieved at least part of the plaintiff's testimony": "[s]he was very specific

about being raped, not merely sexually abused."[3] Yet even as the jury unanimously found that Carroll had not proved rape even by a preponderance of the evidence, it seemed to accept Carroll's claim of "an encounter with Trump"—even though the essential feature of that claim was rape.[4] This "strange verdict" is even harder to understand given the simultaneous "finding that he did not rape her" and the "finding that he maliciously defamed her by essentially saying that he did not rape her."[5] It is unclear how the jury could have found President Trump's statement false and defamatory—and made with actual malice—when the jury *agreed* with him that Carroll had "made up" the rape claim. Pet. 7a. Even Carroll took the verdict as a repudiation of her rape claim, per the following exchange just after the verdict:

> Reporter: Sure. And I want you to, but I just wonder, E. Jean, what went through your head when you heard that [the jury found that Trump did not rape you]?
>
> Ms. Carroll: Well, I just immediately say in my own head, *oh, yes, he did—oh, yes, he did*.

Carroll v. *Trump*, 685 F. Supp. 3d 267, 272 (S.D.N.Y. 2023) (cleaned up). But according to the jury, that did not happen.

All this is why Professor Dershowitz wrote that "if the appellant in this case had a name other than Donald Trump, there is a good likelihood that the

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[3] Alan Dershowitz, *The Trump-Carroll Verdict is a Rorschach Test*, Spectator (May 9, 2023), https://perma.cc/GX9Q-C25A.
[4] *Ibid.*
[5] *Ibid.*

entire verdict might be reversed."[6] Because Donald Trump is entitled to the same protections and procedures as any other defendant, and the proceedings below did not provide those same protections and procedures, the Court should grant certiorari.

II. The decisions below wrongly modified Rule 403's analysis for Rule 415 evidence.

As noted, the main way Carroll tried to bolster her late-breaking claim was via testimony of two others, who offered similarly delayed, spectacular claims. Normally, this type of propensity evidence would be barred by Rule 404(b), which 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." Rule 415 relaxes that prohibition for sexual assault claims. But, as all agree, Rule 403 still requires a court to "exclude relevant evidence"—including other claims of sexual assault—"if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."

Though the Second Circuit rightly acknowledged that "Rule 403's protections apply to evidence being offered under Rule 415," Pet. 13a, the courts below went astray by using a more lenient Rule 403 inquiry for Rule 415 evidence. The district court said that President Trump's "best argument" was "that these three alleged incidents were widely separated in time:

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[6] *Ibid.*

Ms. Leeds in 1979, Ms. Carroll in the mid-1990s, and Ms. Stoynoff in 2005." Pet. 123a. Likewise, members of the Second Circuit majority agreed that Leeds and Stoynoff "testified to incidents that allegedly occurred many years before their respective trial testimony and years apart from the incident that Carroll alleged." Pet. 251a (Chin and Carney, JJ., in support of the denial of rehearing en banc).

Ordinarily, such stale evidence—including testimony about events forty-five years before trial—would tend to be much more prejudicial than probative. At the outset, propensity evidence is suspect because "it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." *Michelson* v. *United States*, 335 U.S. 469, 476 (1948). "[I]ts disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice." *Ibid.*

Propensity evidence that is *stale* is especially problematic. "[L]ength of time necessarily obscures all human evidence," *Prevost* v. *Gratz*, 19 U.S. 481, 498 (1821), so claims of long-ago misconduct raise significant risks of error—including by making it difficult for the defending party to rebut newfound claims. Time generally thus "operates by way of presumption, in favour of innocence." *Ibid.* For instance, as explained above, statutes of limitations "protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise."

United States v. *Kubrick*, 444 U.S. 111, 117 (1979) (cleaned up). Admitting as propensity evidence stale claims that would be long barred by the statute of limitations likewise threatens the judicial search for truth.

But both the district court and the Second Circuit swept away the staleness of this propensity evidence. The district court reasoned that Rule 415 "contains no temporal limits on the admissibility of evidence of other sexual assaults in a sexual assault case," and "[t]he legislative history makes clear that this was no accident." Pet. 123a. Thus, the court said that Rule 403's limitations "perhaps must be applied with due regard for Congress's deliberate failure to impose temporal limits." *Ibid.*

Though members of the panel majority later disclaimed the use of similar reasoning, Pet. 252a–53a, the decision below belies any suggestion that the Second Circuit applied an ordinary Rule 403 analysis. The panel decision echoed the district court nearly verbatim. First, citing the district court, it repeated that court's observation that "Congress intentionally did not restrict the timeframe within which the other sexual act must have occurred to be admissible under Rules 413-415." Pet. 46a.

Then, the Second Circuit quoted the same legislative history statement cited by the district court, in which a sponsor "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.'" *Ibid.* (emphasis omitted) (quoting 140 Cong. Rec. 23603 (1994) (Rep. Molinari)). Thus,

"[*i*]*n consideration of this express intent*," the Second Circuit "conclude[d] 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." Pet. 46a–47a (emphasis added).

This reasoning can only be understood as modifying Rule 403's ordinary application to reduce the prejudicial effect—and increase the probative value—of stale evidence. Other courts have squarely rejected applying "an especially lenient application of Rule 403" to evidence that could otherwise be admissible under Rules 413–15. *United States* v. *Guardia*, 135 F.3d 1326, 1331 (CA10 1998); see also *Martinez* v. *Cui*, 608 F.3d 54, 61 (CA1 2010) ("Nothing in the text of Rules 413–415 suggests these rules somehow change Rule 403."). This Court's resolution of this important conflict is especially important because the Second Circuit's approach is highly dubious.

A. Rule 415 does not alter Rule 403's analysis.

First, the Second Circuit misunderstood the thrust of Rules 413–15. Those rules make evidence that would otherwise be barred by Rule 404 *potentially* admissible. But they do not relax *other* rules that guard against prejudicial evidence, most significantly Rule 403. Indeed, Rule 415(c) says that it "does not limit the . . . consideration of evidence under any other rule." See *Martinez*, 608 F.3d at 61 (emphasizing that point). So even though Rules 413–15 encompass evidence about long-ago acts—relaxing the bar on admissibility of such propensity evidence regardless

of date—they do not make such evidence automatically more probative or less prejudicial for Rule 403 purposes.

This conclusion is reinforced by the fact that "courts apply Rule 403 in undiluted form to" other "exceptions to the ban on propensity evidence," including exceptions articulated by Rule 404 itself. *Guardia*, 135 F.3d at 1331. Like Rule 415, Rule 404's exceptions "reflect a legislative judgment that certain types of propensity evidence should be admitted." *Ibid.* "Courts have never found, however, that because the drafters made exceptions to the general rule of 404[], they tempered 403 as well." *Ibid.* Rule 415 should not be treated differently from these other exceptions to Rule 404.

What's more, "if Congress wanted to" change how Rule 403 applies to Rule 415 evidence, "Congress knew how to do so." *Pugin* v. *Garland*, 599 U.S. 600, 608 (2023). Several rules have their own explanation of how courts should weigh probative value and prejudicial effect for specific kinds of evidence. For instance, Rule 703 allows an expert witness to disclose otherwise inadmissible underlying facts or data "only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect." Rule 609(b)(1) allows evidence of old criminal convictions "only if" "its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect." And Rule 412(b)(2) provides that a court in a civil case "may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value

substantially outweighs the danger of harm to any victim and of unfair prejudice."

Given these indications that Congress could have changed Rule 403's application for Rule 415 evidence—but did not—the Court should not "lightly assume" that Congress "nonetheless intends to apply" a modified Rule 403 analysis. *Jama* v. *Immigr. & Customs Enf't*, 543 U.S. 335, 341 (2005).

The approach taken by the courts below is inconsistent with Rule 415's text. Courts "interpret the legislatively enacted Federal Rules of Evidence as [they] would any statute." *Daubert* v. *Merrell Dow Pharms., Inc.*, 509 U.S. 579, 587 (1993). Because the relevant text is "clear and unambiguous," judicial inquiry should be "complete." *Bus. Guides, Inc.* v. *Chromatic Commc'ns Enters., Inc.*, 498 U.S. 533, 540–41 (1991). "When balancing Rule 41[5] evidence under 403, then, the district court should not alter its normal process" of applying Rule 403. *Guardia*, 135 F.3d at 1331.

B. The Second Circuit's reliance on legislative history is misplaced.

Lacking a textual hook for a modified Rule 403 application, the district court and the Second Circuit turned to a stray remark in the legislative history from one of the sponsors. This reliance is misplaced. A "short, isolated comment" from the legislative history sheds no light on the original public meaning of the text, *United States* v. *Wells Fargo Bank*, 485 U.S. 351, 358 (1988)—even a comment from "the principal House sponsor." *Posters 'N' Things, Ltd.* v. *United States*, 511 U.S. 513, 522 (1994). It is "the provisions

of th[e] legislative commands rather than the principal concerns of our legislators by which we are governed." *Bostock* v. *Clayton Cnty.*, 590 U.S. 644, 674 (2020) (cleaned up). After all, "members of Congress may have different views about how a statutory provision should apply to particular circumstances, and there's no reason to treat the views of one member or a faction of members as representative of the majority of both houses of Congress." Amy Coney Barrett, *Listening to the Law* 220 (2025).

Plus, the House sponsor relied on by the courts below specifically said that Rule 415 would supersede only Rule 404(b), and that otherwise admission of Rule 415 evidence would be governed by "the general standards of the rules of evidence," including the "court's authority under Evidence Rule 403 to exclude evidence whose probative value is substantially outweighed by its prejudicial effect." 140 Cong. Rec. H8968-01, 8991 (Aug. 21, 1994) (Rep. Molinari). The bill's primary Senate sponsor said the same. 140 Cong. Rec. S12990 (Sept. 20, 1994) (Sen. Dole). Ambiguous legislative history cannot overcome clear text. See Barrett, *supra*, at 220 ("If the history contains statements going both ways, it's not reliable."); accord Victor J. Gold, *Federal Practice and Procedure (Wright & Miller)* § 5385 (Sept. 2025 update) (noting contradictory comments by sponsors).

C. The approach below raises constitutional doubts.

If there were any doubt about how Rules 403 and 415 interact, the constitutional problems associated with the theory adopted below would resolve that doubt in favor of Rule 403's ordinary application. See,

e.g., *Zadvydas* v. *Davis*, 533 U.S. 678, 689 (2001). Rule 415's allowance for propensity evidence otherwise barred by Rule 404 "flouts the general prohibition of evidence whose only purpose is to invite the inference that a defendant who committed a previous [bad act] is disposed toward committing [bad acts], and therefore is more likely to have committed the one at bar." 1 *McCormick on Evidence* § 190.10 (9th ed. 2025). This "general ban on evidence of criminal propensity was the universal law throughout the States long before the Federal Rules of Evidence were adopted in 1975," and it "has received judicial sanction in Anglo-American history for nearly three centuries."[7] Propensity evidence "tend[s] to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches" generally. *Boyd* v. *United States*, 142 U.S. 450, 458 (1892).

One of the factors central to "the specific dictates of due process" in a civil case is "the risk of an erroneous deprivation of [a protected] interest" "and the probable value, if any, of additional or substitute procedural safeguards." *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976). Given the deep roots of the bar on propensity evidence and the implications that bar has for a litigant's defense, Rule 415's deviation from the general rule requires constitutional guardrails.

Most courts have identified the main guardrail as Rule 403. For instance, the Ninth Circuit upheld Rule 414's similar standard because "Rule 403 adequately

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[7] James Joseph Duane, *The New Federal Rules of Evidence on Prior Acts of Accused Sex Offenders: A Poorly Drafted Version of A Very Bad Idea*, 157 F.R.D. 95, 105 (1994) (cleaned up).

safeguards the right to a fair trial." *United States* v. *LeMay*, 260 F.3d 1018, 1031 (CA9 2001). The court emphasized "that evidence of a defendant's prior sex crimes will always present the possibility of extreme prejudice, and that district courts must accordingly conduct the Rule 403 balancing inquiry in a careful, conscientious manner that allows for meaningful appellate review of their decisions." *Ibid.* As a leading treatise summarized, "[a] serious rather than perfunctory effort to balance under Rule 403 may be required to avoid questions regarding fairness that may rise to a constitutional level." Gold, *supra*, § 5387.

The importance of a genuine Rule 403 analysis for Rule 415 evidence is heightened in cases like this, involving stale claims. The district court itself underscored the significance of Leeds's and Stoynoff's testimony, given that Carroll's claim "turns on an alleged event more than two decades ago" and was supported by "no physical evidence." Pet. 121a. Thus, "Mr. Trump's alleged sexual assaults on Mss. Leeds and/or Stoynoff, if the jury is permitted to hear their testimony and believes it, is likely to weigh heavily in the jury's determination." Pet. 122a.

Yet despite the conceded importance of this testimony—and its implications for President Trump's right to a fair trial—the courts below conducted a circumscribed Rule 403 inquiry unsupported by text, history, or the Constitution. The courts erred by "forsak[ing] the traditional, discretionary gate-keeping role of Rule 403 and substitut[ing] a 'presumption of admissibility'"—a "toothless application" that is even more problematic

because "only the individual balancing provided by" Rule 403 protects Rule 415's constitutionality.[8]

CONCLUSION

For these reasons, the Court should grant certiorari.

Respectfully submitted,

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[8] Aviva Orenstein, *Propensity or Stereotype?: A Misguided Evidence Experiment in Indian Country*, 19 Cornell J.L. & Pub. Pol'y 173, 180 (2009).