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 U.S. Court of Appeals for the Second Circuit

BRIEF OF AMICUS CURIAE ARTICLE III PROJECT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF AMICUS CURIAE[1]

The Article III Project ("A3P") is a nonprofit organization focused on advocating for constitutionalist judicial reform and fighting against the politicization and weaponization of the justice system. Since it was founded in 2019, A3P has been a leader in defending the separation of powers and the Constitution while at the same time opposing lawfare and efforts to undermine the prerogatives of the Executive Branch.

Amicus curiae has an interest in this case because it represents a clear weaponization of the judicial system against the President of the United States and is an affront to the rule of law. Amicus curiae files this brief to identify and explain the double standard the Second Circuit applied to Mr. Trump and how the politicization of the judicial process represents an affront to foundational principles of due process.

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[1] No party's counsel authored this brief in whole or in part, and no person or entity other than amici curiae, their counsel, or their members made a monetary contribution intended to fund the brief's preparation or submission. Amicus provided timely written notice of this brief.

SUMMARY OF THE ARGUMENT

The Second Circuit's decision below runs roughshod over the Federal Rules of Evidence and is filled with results-oriented reasoning calculated to permit the admission of evidence against President Trump. The Second Circuit panel justified the troubled district court rulings by ignoring its own precedent and mischaracterizing the evidence before it. The en banc court denied review—over a spirited dissent from Judge Menashi. That split decision's holding jeopardizes the constitutional validity of Federal Rules of Evidence 413, 414, and 415 and cries out for correction.

The district court's evidentiary rulings were outlandish. For instance, the court held that the Access Hollywood tape was admissible because it could be seen as a "confession" from the President to his alleged rape of Ms. Carroll, *Carroll v. Trump*, 683 F. Supp. 3d 302, 326 (S.D.N.Y. 2023), *aff'd*, 124 F.4th 140 (2d Cir. 2024) —it was no such thing—and wrote that it did not see "any risk" of unfair prejudice from live eyewitness testimony concerning events 45 years before the trial. *Carroll v. Trump*, 660 F. Supp. 3d 196, 208 (S.D.N.Y. 2023). The risk of prejudice was palpable.

Facing these errors and others, the Second Circuit drafted an opinion that justified every decision made by the district court. To reach this result, the panel had to depart from prior Second Circuit precedent regarding the meaning of Rules 403 and 404, create a fictional description of the Access Hollywood tape, and expand Rule 404(b) to the breaking point. Along the way, it violated the President's Due Process rights by removing one of the key constitutional checks on Rules 413–415, allowing them to be used to admit bad

acts evidence with no check on their prejudicial effect. These errors, alone or combined, undermine the fundamental constitutional fairness of the trial.

The Court should grant certiorari both to address the issues identified in the Petition and to correct the errors committed by the panel of the Second Circuit in its poorly reasoned attempt to permit the admission of highly prejudicial evidence against the President of the United States. No defendant, let alone the President of the United States, should be subject to such a deeply flawed trial result.

ARGUMENT

I. The Second Circuit created a novel exception to Rule 403 by seriously misconstruing legislative history and judicial precedent.

In order to bless the admission of two key pieces of eye-witness testimony against the President, the panel constructed a strawman position, improperly used legislative history to bypass clear text, and mischaracterized every piece of relevant evidence. Compounding these errors, the panel created a novel exception to Rule 403 that raises serious Due Process concerns.

At trial, the district court permitted testimony from two women, Jessica Leeds and Natasha Stoynoff, who testified from memory regarding prior alleged incidents of sexual misconduct by Mr. Trump. Each woman testified regarding an incident that allegedly occurred decades before the trial. Stoynoff described an alleged encounter at Mar-a-Lago in 2005, 18 years before her testimony. Even more attenuated, Leeds testified to a claimed encounter on an airplane in 1978 or 1979 (she couldn't remember which), either 44 or 45 years before her testimony.

The President raised the obvious objection: eye-witness testimony (against a now-public figure) regarding events decades prior is more prejudicial than probative under Rule 403 of the Federal Rules of Evidence. Leeds's and Stoynoff's testimony was important: the district court acknowledged as much. *See Carroll*, 660 F. Supp. 3d at 207 ("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."). Despite this, the district court concluded that it did not believe there was "any risk" of unfair prejudice from the testimony. *See Carroll*, 660 F. Supp. 3d at 208. No risk? This holding doesn't pass the laugh test.

Nonetheless, the Second Circuit affirmed, holding that the lapse of time was not relevant to the Rule 403 analysis because "Congress intentionally did not restrict the timeframe within which the other sexual act must have occurred to be admissible under Rules 413–415." *Carroll v. Trump*, 124 F.4th 140, 170 (2d Cir. 2024).

This is functionally a holding that evidence offered under Rules 413–415 is not subject to attacks based on its remoteness from the trial. That is not the law anywhere. The panel hid behind abuse of discretion, but that standard did no real work in its analysis. What's more, if the remoteness of Leeds's testimony does not affect its probative value, remoteness can never affect evidence's probative value. Leeds's testimony concerned events *45 years prior*, and she could not even remember the year in which the incident occurred or the airport from which the flight departed. (Pet. App. 26A, 221A). It is difficult to imagine testimony more riddled with remoteness and reliability concerns. Yet the panel admitted it with no analysis of any reliability concerns related to remoteness.

A. The panel's Rule 403 analysis fails on its own terms.

In its haste to admit evidence prejudicial to the President, the Second Circuit constructed a dubious argument. The internal flaws in the opinion alone are fatal to its analysis. The panel analyzed the wrong

Rule 403 concern, ignored Second Circuit rules on applying legislative history, and relied on authorities that plainly contradict its conclusion.

First, the Second Circuit and the district court both avoided confronting the President's actual argument, choosing instead to address a strawman objection. Both courts addressed the question of whether "the time lapse between the alleged acts" reduced the probative value of Leeds's and Stoynoff's testimony. *Carroll*, 124 F.4th at 170. But this characterization dodges the real issue.

The crux of the issue is the reliability of the witnesses' memories, not the mere age of the alleged incidents. The panel treated the testimonies as if they were contemporaneous accounts of events from 45 years ago, which misses the point entirely. This error persists through the panel's entire analysis.

Even the legislative history it quotes concerns "lapses of time in relation to the charged offense," 140 Cong. Rec. 23603 (1994) (remarks of Rep. Molinari), and two of the three cases it cites concern contemporaneous written accounts of past events, *see United States v. O'Connor*, 650 F.3d 839, 853 (2d Cir. 2011); *United States v. Davis*, 624 F.3d 508, 511 (2d Cir. 2010).

Second, in addition to analyzing a strawman, the Second Circuit ignored its own precedent regarding the appropriate use of legislative history. Facing text with no ambiguity, the panel invoked a floor speech from a single legislator to override the text's meaning and justify its own holding.

Second Circuit precedent allows the use of legislative history only where "the statute is susceptible to

divergent understandings" or there is some "textual ambiguity." *United States v. Gayle*, 342 F.3d 89, 94 (2d Cir. 2003), *as amended* (Jan. 7, 2004). Such a rule is in keeping with this Court's precedent, which prohibits the use of legislative history where "the meaning of a statute's terms is clear." *McGirt v. Oklahoma,* 591 U.S. 894, 916 (2020); *see LeFlore v. Marvel Ent. Grp.*, 493 U.S. 120, 123 (1989) ("[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."); *Azar v. Allina Health Servs.*, 587 U.S. 566, 579 (2019) ("[E]ven those of us who believe that clear legislative history can 'illuminate ambiguous text' won't allow 'ambiguous legislative history to muddy clear statutory language.'").

The panel opinion below openly used "ambiguous legislative history to muddy clear statutory language." *Allina Health Servs.*, 587 U.S. at 579. There is no text in Rules 413, 414 or 415 that immunizes eyewitness testimony from reliability attacks under Rule 403. There is certainly nothing to show, as the panel suggests, an "express intent" of Congress to permit eyewitness recollections of events 45 years prior, *Carroll*, 124 F.4th at 170, as if Congress's express intent could ever be found in a floor speech by an individual legislator. This is a paradigmatic inappropriate use for legislative history and one contrary to the Second Circuit's own rules.

Third, the legislative history cited by the panel does not even support its conclusion. The panel relied on legislative history to conclude that, when Congress passed Rules 413, 414, and 415, it intended to exempt from Rule 403 arguments like the one made by the

President. *See Carroll*, 124 F.4th at 170. To reach this conclusion, the panel relied on a single quote from the bill's House sponsor, Representative Molinari. Representative Molinari stated on the House floor 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). This, the panel concluded, means that Rules 413, 414, and 415 are functionally exempt from Rule 403 remoteness analysis.

Representative Molinari expressly rejected the panel's reasoning in the same floor speech it cited. She specifically addressed Rule 403 in her speech and stated that, aside from the changes to the character evidence prohibition, "the general standards of the rules of evidence will continue to apply, including the restrictions on hearsay evidence and 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, H8991. Representative Molinari went on to say that "[t]he 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." *Id.*

The Representative's speech is so clear on this point that other courts have cited it to conclude—directly contrary to the panel here—that Rule 413–415 evidence is fully subject to Rule 403 analysis. *See, e.g.*, *United States v. Julian*, 427 F.3d 471, 487 (7th Cir. 2005); *United States v. Sumner*, 119 F.3d 658, 662 (8th Cir. 1997); *United States v. Enjady*, 134 F.3d 1427,

1431 (10th Cir. 1998), *opinion clarified,* 1998 WL 133994 (10th Cir. Mar. 25, 1998).

The story is the same with the panel opinion's asserted judicial support. The Second Circuit cited three cases to support its Rule 403 holding, *United States v. O'Connor*, 650 F.3d 839 (2d Cir. 2011, *United States v. Davis*, 624 F.3d 508 (2d Cir. 2010), and *United States v. Larson*, 112 F.3d 600, 603 (2d Cir. 1997). The first two, *O'Connor* and *Davis*, do not concern eyewitness testimony at all. *O'Connor* addresses contemporaneous written testimony and noted that "the present case does not involve the usual concerns as to memory or reliability." 650 F.3d at 853. *Davis* discusses a prior conviction that similarly carried no reliability concerns. Even then, the court noted that admission of a 19-year-old conviction "carries a high risk of prejudice." 624 F.3d at 512.

The one case that actually considered eyewitness testimony is *Larson*, and that case excluded all testimony concerning events that occurred more than 20 years before the trial because they were "too remote in time to have any probative value in this case." 112 F.3d at 602. Thus, the only case cited by the panel involving an eyewitness excluded testimony twenty years fresher than Stoynoff's.

There is no justification for the panel's Rule 403 analysis. It attacks a strawman objection while leaving the President's real objections unaddressed, improperly deploys legislative history, and relies on sources that directly contradict it. The analysis makes sense only as a results-oriented decision to justify admission of Leeds's and Stoynoff's testimony. Worse, all of this was in service of a result that raises serious legal and constitutional concerns.

B. The panel's conclusion contradicts existing precedent.

Not only is the panel opinion internally flawed, it's result is contrary to Second Circuit precedent and decisions from sister circuits. In order to justify the district court's decision, the Second Circuit panel had to sub silentio overrule its own decisions on Rule 403 and create a rule that sits contrary to that followed by other courts.

Before it considered the President's case, the Second Circuit had repeatedly held that Rule 403 requires district courts to consider the lapse in time between an event and testimony regarding that event. Before *Carroll*, to be clear, the court had issued multiple contrary opinions specifically holding that Rules 413, 414, and 415 do not change how the Rule 403 analysis is performed.

In 1980, before Rules 413, 414, and 415 were passed, the Second Circuit instructed district courts that remoteness of evidence "is always pertinent" to the Rule 403 assessment. *United States v. Figueroa*, 618 F.2d 934, 942 (2d Cir. 1980). The Second Circuit continued issuing that instruction, *see United States v. Jacques*, 684 F.3d 324, 327 (2d Cir. 2012), and district courts continued applying it, *see, e.g.*, *United States v. Ozsusamlar*, 428 F. Supp. 2d 161, 171 (S.D.N.Y. 2006), well after Rules 413–415 were enacted.

In addition to this general principle, the Second Circuit has specifically held that Rule 403 requires a court to determine whether a Rule 413–415 witness's memory may be unreliable. In *United States v. Larson*, 112 F.3d 600, which is cited by the panel opinion

elsewhere, the court considered how Rule 403 interacted with the then-new rules and issued a decision directly contrary to its decision here.

In *Larson*, the Second Circuit explained that a district court must evaluate the reliability of eyewitness testimony under Rule 403, even where that evidence falls within the ambit of Rules 413–415. That is the correct rule. The court began its analysis by explaining that, "[w]e view Rule 403 analysis in connection with evidence offered under Rule 414 to be consistent with Congress's intent as reflected in the legislative history quoted above." 112 F.3d at 604–05. It then went on to explain that "[t]he evaluation of the proffered evidence in light of these concerns must be made on a case-by-case basis to determine whether … the memories of the witnesses has likely become too frail." *Id.* at 605.

The district court did not perform this mandatory evaluation; it did not consider the reliability of the witnesses' memories at all or give any weight to the remoteness of the testimony. And the Second Circuit affirmed this decision, silently modifying the rule of *Larson*.

The Second Circuit's remoteness loophole is not only contrary to its own decisions, it runs contrary to the conclusion reached by other circuits. When those circuits have considered the interaction of Rule 403 with Rules 413–415 they have concluded that Rule 403 applies with full force. *See Johnson v. Elk Lake Sch. Dist.*, 283 F.3d 138, 155 (3d Cir. 2002); *Julian*, 427 F.3d at 487; *United States v. Med. Horn*, 447 F.3d 620, 623 (8th Cir. 2006); *United States v. LeMay*, 260 F.3d 1018, 1026 (9th Cir. 2001); *United States v.*

Guardia, 135 F.3d 1326, 1331 (10th Cir. 1998). The Second Circuit split with all this authority.

C. The panel's decision implicates the President's Due Process rights.

More concerning, the Second Circuit's ruling raises serious Due Process concerns by removing an important safeguard from Rules 413–415. Since their passage, Rules 413–415 have been subject to repeated Due Process challenges as defendants alleged that admission of propensity evidence violates the Fifth Amendment. *See, e.g.*, *Enjady*, 134 F.3d at 1432; *United States v. Harvel*, 115 F.4th 714, 736 (6th Cir. 2024), *cert. denied*, 145 S. Ct. 1439 (2025); *United States v. Rodriguez*, 581 F.3d 775, 795 (8th Cir. 2009); *LeMay*, 260 F.3d at 1026. The Second Circuit itself confronted such a challenge in *United States v. Schaffer*, 851 F.3d 166, 177 (2d Cir. 2017).

All of these courts, ironically including the Second Circuit, have held that Rules 413–415 do not violate the Due Process clause *because they are subject to Rule 403*. As the Second Circuit said in 2017:

> we agree with every other court of appeals that has addressed this issue and hold that, *in light of the safeguards provided by Rule 403*, Rule 413 on its face does not violate the Due Process Clause.

Schaffer, 851 F.3d at 177 (emphasis added). At least one court, the Tenth Circuit, has affirmatively stated that it believes Rules 413–415 would be *unconstitutional* if exempted from Rule 403. *See Enjady*, 134 F.3d at 1433 ("without the safeguards embodied in Rule 403 we would hold [Rule 413] unconstitutional.").

Rule 403 is critically important to the constitutional status of Rules 413–415 because the Due Process clause does not permit the admission of unfairly prejudicial propensity evidence. Though not explicitly contained in the Due Process clause, "the general ban on propensity evidence has the requisite historical pedigree to qualify for constitutional status." *LeMay*, 260 F.3d at 1025; *see Old Chief v. United States*, 519 U.S. 172, 182 (1997) ("[t]here is … no question that propensity would be an 'improper basis' for conviction").

Historically, the ban on propensity evidence has been loosened in sex-offense cases, but the Due Process clause still requires a backstop against "potentially devastating evidence of little probative value." *LeMay*, 260 F.3d at 1026; *Spencer v. Texas*, 385 U.S. 554, 574 (1967) (Warren, C.J., dissenting in part, concurring in part) ("our decisions … suggest that evidence of prior crimes introduced for no purpose other than to show criminal disposition would violate the Due Process Clause."). Rule 403 is necessary for the constitutional application of Rules 413–415 because it "effectively mitigate[s] the danger of unfair prejudice resulting from the admission of propensity evidence in sexual-assault cases." *Schaffer*, 851 F.3d at 180.

The Second Circuit's ruling therefore raises a substantial question about the constitutionality of Rules 413–415 as applied in that Circuit. Because, while its ruling is couched in conditional language, the panel's holding here is really a categorical one. If eyewitness testimony from memory regarding events 45 years in the past is not subject to attack based on remoteness, then attacks on the reliability of eyewitness testimony are practically unavailable under Rules 413–415.

Leeds described an alleged event from more than four decades ago, could not remember the year it occurred, and could not remember the origin point of the flight on which it occurred. (Pet. App. 26A, 221A). If such testimony is immune from remoteness analysis, all Rule 413–415 testimony is functionally immune from remoteness analysis.

By exempting Rules 413–415 from remoteness analysis, the Second Circuit has created a breach in Rule 403's constitutional backstop. In the Second Circuit, it is now possible to use Rules 413–415 to admit propensity evidence that is not subject to exclusion for unfair prejudice. According to the Second, Sixth, Eighth, Ninth, and Tenth Circuits, that is a violation of the President's Due Process rights.

II. The Second Circuit created a fictional account of the Access Hollywood tape.

In order to bless the admission of the "Access Hollywood tape" against the President, the Second Circuit had to invent a description of the evidence that bears no relationship to the actual facts. The court then ruled on the admissibility of this fictional evidence.

The Second Circuit held that the district court properly admitted the Access Hollywood tape as evidence of a "pattern, or *modus operandi*, that was relevant to prove that the alleged sexual assault actually occurred (the *actus reus*)." *Carroll*, 124 F.4th at 168. Proving a modus operandi requires showing evidence of repeated idiosyncratic conduct. Specifically, the evidence must show past acts "sufficiently idiosyncratic to permit a fair inference of a pattern's existence." *United States v. Sliker*, 751 F.2d 477, 487 (2d Cir.

1984). Proving idiosyncrasy requires more than labeling something *modus operandi*.

According to the Second Circuit, the relevant "pattern" proved by the Access Hollywood tape is a pattern wherein the President "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." *Carroll*, 124 F.4th at 169. That may fit Carroll's allegations, but it does not fit the Access Hollywood tape discussion. For this "pattern" to be relevant for evidence purposes, the tape must show the President engaging in idiosyncratic conduct that fits this pattern.

The relevant sections from the tape readily disprove any similar pattern. In the tape, the President describes an encounter with a woman named Nancy who he took "furniture shopping" and who he "moved on." Pet. App. 38A. The tape does not describe any conversation or physical interaction between the President and Nancy. The tape then states, in the context of being attracted to "beautiful" people, that "I just start kissing them." *Id.*

With no real analysis, the Second Circuit held that these excerpts were relevant as evidence of a pattern in which the President "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." *Carroll*, 124 F.4th at 169. The tape, whatever one may think of it, shows nothing about ordinary conversation, barely knowing a woman, lunging, let alone lunging in a semi-public place, or a lack of consent.

The falsity of the Second Circuit's "pattern" analysis is manifest. Again, the tape contains no evidence whatsoever that the President ever engaged in conversation with any woman he barely knew or ever "lunged" at a woman. Nor does it provide any context of how well he knew any woman described or where he interacted with her. The Second Circuit's description of its contents as showing a "pattern" is almost entirely fictional.

To break it down, the panel's description of the President's "pattern" has five elements: 1) engaging in ordinary conversation; 2) with a woman he barely knew; 3) abruptly lunging at her; 4) in a semi-public place; and 5) kissing and forcefully touching without consent.

Only one of those five elements is even arguably present in the Access Hollywood tape: 1) the tape contains no mention of conversation at all; 2) the tape provides no context as to how well the President knew the women he's describing; 3) there is no mention of lunging, "abruptly" or otherwise; 4) the excerpt mentions a furniture shop, but not any conduct there; and 5) the excerpt, at most, describes nonconsensual kissing and touching, though it notes that "they let you do it."

This is not some nuanced or obscure evidentiary issue: the court baldly misrepresented the evidence against the President. In order to justify admission of evidence against President Trump, a United States Court of Appeals invented a description of that evidence with no basis in reality.

III. The Second Circuit admitted propensity evidence to prove propensity contrary to Rule 404(b).

Even putting aside the false description of the tape, the Second Circuit's Rule 404(b) analysis all but erased the restrictions of the rule. The panel's analysis baldly admits propensity evidence to prove propensity. Even if the ruling could be taken to identify a non-propensity purpose for the evidence, that purpose would be so broad as to swallow 404(b).

Federal Rule of Evidence 404(b) strictly limits the admission of evidence of prior bad acts to situations where the evidence is not used "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); *see Huddleston v. United States*, 485 U.S. 681, 685 (1988). Prohibited evidence of character to show action in conformity therewith is also known as "propensity" evidence. The restriction on admission of propensity evidence is Federal Rule of Evidence 404(a)(1).

Consistent with this broad prohibition, the Second Circuit has adopted a formal four-factor test to evaluate the admission of 404(b) evidence. *See United States v. Scott*, 677 F.3d 72, 79 (2d Cir. 2012). Shockingly, or tellingly, the panel majority declined to even cite it here. That test, which is based on this Court's decision in *Huddleston v. United States*, 485 U.S. 681, 685 (1988), requires a reviewing court to consider whether "(1) [the evidence] 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." *Scott*, 677 F.3d at 79 (quoting *United States v. LaFlam*, 369 F.3d 153, 156 (2d Cir. 2004)).

Rather than apply its own test, the Second Circuit announced that the Access Hollywood tape was admissible under Rule 404(b) because it was used to prove a "pattern, or *modus operandi*, that was relevant to prove that the alleged sexual assault actually occurred (the *actus reus*)," not to prove the President's character. *Carroll*, 124 F.4th at 168. The use of Latin doesn't make the evidence any more admissible.

The panel's pronouncement fails on the very first element of the *Huddleston* standard: "the evidence was offered for a 'proper purpose.'" *Huddleston*, 485 U.S. at 688. The Second Circuit identified two things the evidence served to prove: a *modus operandi* and the "*actus reus*." Neither is a proper purpose. If the evidence was used to prove the *actus reus*, "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." *Carroll v. Trump*, 141 F.4th 366, 371 (2d Cir. 2025) (Menashi, J., dissenting from denial of rehearing en banc). Doing something similar in the past is nothing but propensity. That is classic propensity evidence.

So, too, with the panel's use of "*modus operandi*." While evidence may be used to prove a *modus operandi*, the *modus operandi* itself must be at issue in the case or relevant to prove another fact. For example, where a perpetrator's identity is in question, a defendant's *modus operandi* is often relevant to prove that he committed the offense at issue. *See, e.g., United States v. Carlton*, 534 F.3d 97, 101 (2d Cir. 2008) ("The evidence of defendant's three prior

convictions for bank robbery was properly admitted to show identity through a common modus operandi."); *United States v. Carroll*, 207 F.3d 465, 469 (8th Cir. 2000) ("In sum, in order to admit Rule 404(b) identity evidence on the signature facts or modus operandi theory, the District Court must make a threshold determination that, based solely on the evidence comparing the past acts and the charged offense, a reasonable juror could conclude that the same person committed both crimes."). Of course, there is no question about the President's identity in this case.

Merely proving the existence of a pattern or *modus operandi* in a vacuum is not permissible under Rule 404(b) That's because "[p]attern evidence *is* propensity evidence, and it is inadmissible unless the pattern shows some meaningful specificity or other feature that suggests identity or some other fact at issue." *United States v. Miller*, 673 F.3d 688, 699 (7th Cir. 2012) (emphasis in original); *see United States v. Davis*, 547 F.3d 520, 527 (6th Cir. 2008) ("Rule 404(b) does not include "pattern of related conduct" as one of the permissible purposes for admitting evidence of prior acts. Pattern instead is a way of demonstrating one of the purposes permissible under 404(b), usually to show identity."). This case was mere pattern for the sake of pattern, not for identity or some other relevant fact.

Thus, to the extent the Access Hollywood tape was admitted to prove some combination of "*actus reus*" and "*modus operandi*," it was admitted to prove pure propensity. Neither is a proper purpose standing alone. The tape was admitted in an attempt to prove that the President is the kind of person who would

have assaulted Carroll. That is simply not allowed under the Federal Rules of Evidence.

But even if the panel was correct that demonstrating a "*modus operandi*" was a sufficient proper purpose, its analysis all but removes 404(b) as a meaningful check on propensity evidence. The use of *modus operandi* evidence relies on evidence of an "idiosyncratic" pattern of conduct. *Sliker*, 751 F.2d at 487. The idiosyncrasies must be sufficient to "earmark [the acts] as the handiwork of the accused." *Id.* For example, in *Sliker*, the case cited by the panel, the defendant defrauded separate banks using "phony bank checks issued by the same non-existent offshore bank as well as on prearrangement with an 'officer' of the bank to confirm the validity of the checks." *Id.* Or in *United States v. Danzey*, 594 F.2d 905, 911 (2d Cir. 1979), where the defendant always stole one lightly colored car and one darkly colored car the night before a bank robbery, always wore a ski mask, always vaulted the counter and emptied the teller trays into a bag, and always stationed an accomplice at the bank door. Nothing like that exists in this case.

The use of evidence to prove a *modus operandi* must be carefully managed because, "[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). The Second Circuit's analysis did just that; admitting character evidence to prove propensity.

The supposed *modus operandi* identified by the Second Circuit in this case is nothing more than a generic description that could apply to thousands of sexual assaults. According to the Second Circuit, an

instance of sexual misconduct is "earmarked as the handiwork" of the accused when it involves conversation in a semi-public place followed by nonconsensual kissing and touching. *See Carroll*, 124 F.4th at 169. That is garden variety propensity evidence that must not be admitted.

Such a description is not a *modus operandi* sufficient to admit evidence under Rule 404(b) and, if it is, the exception swallows the rule. *See, e.g.*, *Carroll*, 207 F.3d at 469 ("it is amply clear that the signature facts relied upon by the government in this case occur frequently, even in combination."); *United States v. Martinez-Mercado*, 919 F.3d 91, 103 (1st Cir. 2019) ("Given the differences, it is as if the government were pointing to the use of a ball in both a cricket match and a baseball game as proof of modus operandi for a particular player.").

The *modus operandi* identified by the Second Circuit would have allowed the admission of nearly any alleged past instance of sexual misconduct involving a woman the President did not know well. An exception that broad all but eliminates the prohibition of Rule 404, permitting the blatant use of bad acts evidence to prove propensity, precisely what Rule 404(b) prohibits. This Court should affirm the importance of Rule 404(b)'s prohibition on propensity evidence.

CONCLUSION

For the reasons stated herein and in the Petition, the Court should grant the Petition for Certiorari and reverse the ruling of the Second Circuit.

Respectfully submitted,

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