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 a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

In May 2023, a jury found petitioner Donald J. Trump liable for sexually abusing respondent E. Jean Carroll and then defaming her. During the two-week trial, Ms. Carroll sought to introduce three pieces of evidence regarding other sexual assaults committed by petitioner. After careful consideration, the district court found, first, that the evidence was admissible under Federal Rule of Evidence 415, and second, that the evidence's probative value outweighed any risk of unfair prejudice under Rule 403. The Second Circuit affirmed.

Petitioner now seeks to litigate these evidentiary issues yet again. But his petition suffers from a fatal defect: It does not challenge the Second Circuit's alternative holding that petitioner failed to show that any error affected his substantial rights. Thus, this Court would have no basis for disturbing the judgment below even if it were to answer all three questions presented in petitioner's favor.

The problems don't end there. Each of the questions presented suffers from additional serious vehicle problems. And none implicates a genuine circuit split. As for the merits, the Second Circuit correctly held that the district court acted within its discretion in admitting the challenged evidence. Certiorari should be denied.

STATEMENT OF THE CASE

A. Factual background[1]

In 1996, Ms. Carroll encountered petitioner, whom she had met before, as she was leaving Bergdorf Goodman, a luxury department store in Manhattan. Pet. App. 4a; C.A. J.A. 1573-76, 1589, 1746. At petitioner's urging, Ms. Carroll followed him into the store, ostensibly to help him purchase a gift. *Id.* 1590. Eventually, they arrived at the lingerie department, which was deserted that evening. *Id.* 1590-94. Once they were alone, petitioner maneuvered Ms. Carroll into a dressing room and, following her in, "immediately shut the door" before he "shoved [her] up against the wall." Pet. App. 136a. She tried to escape, but petitioner pinned her against the wall with his shoulder and "pulled down [her] tights." *Id.* (emphasis omitted). As she testified at trial, "his fingers went into my vagina, which was extremely painful, extremely painful. It was a horrible feeling because he curved, he put his hand inside of me and curved his fingers. As

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[1] This Court's Rules require Ms. Carroll to "point out" that the entire petition is based on a "misstatement of fact." S. Ct. R. 15.2. Petitioner asserts that Ms. Carroll "falsely accuse[d]" him of a sexual assault, Pet. 2, and spends multiple pages claiming she is a liar, *id.* 2-7, as do some of his *amici*, *see* Br. for Am. First Legal Found. 6-14. But credibility determinations are the province of the jury. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Here, as the court explained, the jury "found that Mr. Trump forcibly penetrated [Ms. Carroll's] 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." Pet. App. 178a; *see id.* 172a-179a (explaining the jury's finding); *id.* 261a (special verdict form). This Court must view the evidence "in the light most favorable" to that verdict. *Patrick v. Burget*, 486 U.S. 94, 98 n.3 (1988).

I'm sitting here today, I can still feel it." *Id.* 136a-137a (emphasis omitted). Ms. Carroll was eventually able to get her knee up, push him off, and escape. *Id.* 5a.

Ms. Carroll went public with her account of petitioner's assault in 2019. Pet. App. 5a. In October 2022, petitioner posted a statement on Truth Social, "his social media outlet," alleging that Ms. Carroll's claim that he had sexually assaulted her was a "complete con job," a "Hoax," and a "Scam" designed to sell Ms. Carroll's book. *Id.* 6a-7a.

B. Procedural background

1. In 2022, Ms. Carroll brought this lawsuit against petitioner for sexual battery (a claim that was timely under New York's Adult Survivors Act, Pet. App. 8a) and defamation regarding the 2022 Truth Social post. *Id.* 9a.

a. The case proceeded to a two-week trial. The jury heard from eight fact witnesses and two expert witnesses called by Ms. Carroll. Petitioner called no witnesses and chose not to testify. C.A. J.A. 52-53.

Ms. Carroll testified for a full day on direct examination and nearly two full days on cross-examination. Several witnesses corroborated key aspects of her account. Two friends testified that she had described the assault to them soon after it happened. Pet. App. 138a-143a. And two former Bergdorf employees confirmed key details of her description of the location where the assault took place. C.A. J.A. 1539-48, 2150-62.

As relevant here, Ms. Carroll also presented three pieces of evidence regarding other sexual assaults committed by petitioner:

Jessica Leeds. Ms. Leeds testified that in the late 1970s, she was sitting next to petitioner in the first-class section of an airplane when petitioner suddenly "decided to kiss me and grope me." Pet. App. 143a; C.A. J.A. 2099-2101. She explained: "[H]e 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." Pet. App. 144a (emphasis omitted). Years later, when she encountered petitioner at a charity event, he remarked that he "remember[ed]" her "from the airplane." *Id.* 112a-113a.

Natasha Stoynoff. Ms. Stoynoff testified that petitioner attacked her while she was in Florida conducting an interview with him and his wife in 2005 at Mar-a-Lago. During a break, petitioner asked if Ms. Stoynoff would like to see a painting "in this really great room." Pet. App. 30a (quoting C.A. J.A. 2349). She testified that after she entered the room: "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.* 146a. She shoved petitioner away, but then he "came toward [her] again." *Id.* This unwanted interaction lasted a few more minutes before a butler entered the room and interrupted the struggle, allowing her to escape. *Id.* 146a-147a.

Access Hollywood *Tape.* The jury also viewed an excerpt from a video recording in which petitioner, caught on a "hot mic," can be heard describing his own

behavior, mentioned in connection with another woman whom he took shopping and then "moved on . . . like a bitch":

> 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.

Pet. App. 106a-107a (emphasis omitted).

b. The district court determined that all three pieces of evidence were admissible under Rules 415 and 413(d). Pet. App. 112a-114a, 120a.

Rule 415(a) provides that "[i]n a civil case involving a claim for relief based on a party's alleged sexual assault," a court "may admit evidence that the party committed any other sexual assault." Evidence admitted under Rule 415 "may be considered as provided in Rule[] 413," which governs criminal sexual assault cases.

Rule 413, in turn, allows evidence of "any other sexual assault" to be admitted and "considered on any matter to which it is relevant." Rule 413(d) defines "sexual assault" as a crime under federal or state law "involving" a range of nonconsensual sexual "conduct," including "contact, without consent, between any part of the defendant's body" and "another person's genitals" or "an attempt" to "engage in [such] conduct." Fed. R. Evid. 413(d)(1)-(2), (5).

Taken together, these rules permit the introduction of "evidence of a defendant's prior conduct for the purpose of demonstrating a defendant's propensity to commit" the conduct at issue

in the current proceeding as well as for other purposes. *United States v. Guardia*, 135 F.3d 1326, 1329 (10th Cir. 1998).[2]

The district court determined that a "reasonable jury" could find that petitioner's behavior fit within Rule 413's definition of sexual assault. Pet. App. 109a-120a.

c. Evidence that is admissible under Rules 413 and 415 remains subject to exclusion under Rule 403, which authorizes courts "to exclude relevant evidence" that is otherwise admissible "if its probative value is substantially outweighed by a danger of . . . unfair prejudice."

Here, the district court rejected petitioner's Rule 403 argument. Pet. App. 121a-123a. It recognized that the evidence involved episodes that were "separated in time." *Id.* 123a. But it concluded that under "all the circumstances," petitioner had "not demonstrated persuasive reason to believe that there is any risk of 'unfair prejudice.'" *Id.* The court saw no "risks that would substantially outweigh the probative value of the evidence of Mss. Leeds and Stoynoff." *Id.*[3]

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[2] As petitioner acknowledges, Congress "altered" the general prohibition on propensity evidence "by enacting Federal Rules of Evidence 413-415." Pet. 13. Rules 413, 414 (which parallels Rule 413 for acts of "child molestation"), and 415 thereby "supersed[e]," Rule 404(b)'s general restriction on using other acts to "prove the character of a person in order to show action in conformity therewith." *Guardia*, 135 F.3d at 1328-29 (quoting Fed. R. Evid. 404(b)).

[3] Before the district court, petitioner discussed Rule 403 only with respect to the Leeds and Stoynoff testimony. *See* Mem. in Support of Motion in Limine 9-12, Doc. No. 131 in 1:20-cv-07311-

d. Ms. Carroll accordingly presented this evidence to the jury. Once the district court has permitted the introduction of evidence, Fed. R. Evid. 104, subsequent "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions" in a case like this. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *see, e.g.*, *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150-51 (2000). After hearing all the evidence, the jury reached a unanimous conclusion: Ms. Carroll was telling the truth. It found petitioner liable for sexually assaulting Ms. Carroll and then defaming her by suggesting that she had fabricated the assault for purposes of personal gain. Pet. App. 261a-264a. It awarded her $5 million in compensatory and punitive damages. *Id.* 3a.

2. Petitioner appealed on a number of grounds, including the admission of the Leeds and Stoynoff testimonies and the *Access Hollywood* tape. As relevant here, the Second Circuit affirmed the district court's judgment for two independent reasons.

a. The court reviewed the "district court's evidentiary rulings for abuse of discretion." Pet. App. 18a; *see Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 141 (1997). It held that the district court had acted within its discretion in admitting the challenged evidence under Rules 413 and 415. First, a reasonable jury could find that petitioner's conduct toward Ms. Leeds—grabbing her and putting his hand up her skirt without consent—"constituted an 'attempt'" under under Rule 413(d)(5) "to engage in the conduct

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LAK. He did not mention the rule in his discussion of the *Access Hollywood* tape. *See id.* 14-15.

described in Rule 413(d)(2)." Pet. App. 24a; *see id.* 23a-29a. Second, a reasonable jury could likewise conclude that petitioner "intended to bring his body into contact with Ms. Stoynoff's genitals and that he took substantial steps toward doing so." *Id.* 32a. Third, a reasonable jury could find that petitioner "admitted in the *Access Hollywood* tape that he in fact has had contact with women's genitalia in the past without their consent." *Id.* 39a-40a. Since all three pieces of evidence related to crimes involving sexual assault, they were admissible.

The court of appeals also identified an alternative basis for the admissibility of the *Access Hollywood* tape: Rule 404(b), which provides a general rule governing evidence of other crimes, wrongs, or acts. Pet. App. 41a-45a. The court explained that the tape "described conduct that was sufficiently similar in material respects to the conduct alleged by Ms. Carroll (and Ms. Leeds and Ms. Stoynoff) to show the existence of a pattern tending to prove the actus reus, and not mere propensity." *Id.* 44a.[4]

The court of appeals then held that the district court did not abuse its discretion in rejecting petitioner's argument that this evidence should have been excluded under Rule 403 because petitioner's prior sexual assaults were too remote in time or otherwise unfairly prejudicial. Pet. App. 45a-47a.

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[4] The court of appeals was "not fully persuaded" by a "second basis" the district court had given for admitting the tape—that it "captured a confession." Pet. App. 40a. But the court reiterated that the district court's "first rationale"—that the tape was admissible under Rules 413 and 415—"provided a proper basis for the district court's exercise of its broad discretion." *Id.*

b. The Second Circuit held in the alternative that even assuming the district court had erred in admitting any of this evidence, any such error would have been harmless "taking the record as a whole and considering the strength of Ms. Carroll's case." Pet. App. 62a-63a. Specifically, the Second Circuit concluded that no "claimed error or combination of errors in the district court's evidentiary rulings affected Mr. Trump's substantial rights." *Id.* 63a.

3. The Second Circuit denied petitioner's request for rehearing en banc. Pet. App. 197a. Judge Pérez, joined by Judges Lee, Robinson, and Merriam, concurred. *Id.* 199a-200a. Judge Menashi, joined by Judge Park, dissented. *Id.* 201a-240a. Judge Chin and Judge Carney filed a statement in support of the denial of rehearing en banc responding to Judge Menashi's dissent. *Id.* 241a-254a.

REASONS FOR DENYING THE WRIT

I. The petition does not contest the Second Circuit's alternative holding that petitioner failed to show prejudicial error.

This Court routinely declines to grant certiorari when the questions presented are irrelevant to the outcome below. *See* Stephen M. Shapiro et al., Supreme Court Practice § 4.4(f) (11th ed. 2019). Such is the case here.

In a civil case, "the party that 'seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted.'" *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (quoting *Palmer v. Hoffman*, 318 U.S. 109, 116 (1943)); *see* 28 U.S.C. § 2111 (requiring that in considering a "writ of certiorari in any case," the Court

must disregard any errors "which do not affect the substantial rights of the parties").

Here, the Second Circuit squarely held that petitioner had failed to carry his burden as to "any claimed error or combination of errors." Pet. App. 63a. After considering the record as a whole, the Second Circuit concluded that, even "assuming arguendo that the district court erred in some of these evidentiary rulings," those errors did not affect petitioner's "substantial rights." *Id.* 62a-63a. That alternative holding independently supports the judgment below.

That should be the end of this case. The petition does not challenge—indeed, does not mention—the Second Circuit's holding that were there any error here, it did not prejudice petitioner. Nor is a challenge to that holding "fairly included" within any of petitioner's questions presented. Sup. Ct. R. 14.1(a). Those questions focus exclusively on the lower courts' purportedly erroneous application of the relevant evidentiary rules, not on whether the asserted errors were prejudicial. *See* Pet. i. Even if that latter question is in some sense "'related' to the question presented in the petition for certiorari," it "is not 'fairly included therein,'" *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 31-32 (1993) (per curiam) (citation omitted).

The Second Circuit's judgment would stand even if this Court were to agree with petitioner on any or all of the questions his petition does present. And because any ruling from this Court would not affect the Second Circuit's judgment, the Court should deny review.

II. Even setting aside the Second Circuit's unchallenged harmless-error holding, the questions presented do not warrant review.

Even beyond the fatal threshold defect described in Part I, none of the questions presented in the petition warrants review. The petition asserts that Jessica Leeds's testimony was not admissible under Rule 413; that the *Access Hollywood* tape was not admissible under Rule 404; and that even if the other-acts evidence were admissible, it should have been excluded under Rule 403. The petition begins with Rule 403, but the more logical order is to start with the admissibility of the challenged evidence and then turn to whether it should nonetheless have been excluded under Rule 403.

A. The Rule 413(d) question does not warrant review.

Petitioner's second question presented asks whether Rule 413(d) permits the introduction of evidence of sexual assault "when the alleged prior act did not constitute a crime or a sexual assault[.]" Pet. i. With respect to this question, petitioner challenges only the admission of Jessica Leeds's testimony. *Id.* 22-23. He offers no argument challenging the lower courts' conclusion that Natasha Stoynoff's testimony and the *Access Hollywood* tape satisfied Rule 413(d).

With respect to Ms. Leeds's testimony, petitioner asserts that courts should apply a "categorical approach" to determine admissibility under Rule 413. Pet. 24-27. Under that approach, evidence of a past sexual assault would be admissible only if the conduct happened to violate a statute whose elements are

wholly encompassed within the definition of sexual assault provided in Rule 413(d).

That argument is not fairly included within petitioner's own question presented and was forfeited below. In addition, it has never been adopted by any court and contradicts Rule 413(d)'s plain text.

1. The Rule 413(d) question suffers from three fatal vehicle defects.

a. This case does not present the question framed in the petition. The petition asks whether prior-act evidence under Rule 413(d) can be admitted if it "d[oes] not constitute a crime or a sexual assault." Pet. i. The answer to that question is clearly "No." And no one has ever argued otherwise. Every court, including the Second Circuit here, requires that to be admissible under Rule 413, the proposed evidence must describe conduct that *both* constituted a crime under federal or state law *and* involved a "sexual assault" as defined in Rule 413(d). *See* Pet. App. 24a-25a.

Here, the Second Circuit held that Ms. Leeds's testimony satisfies both of these conditions—that the conduct about which she testified (a) was a crime (specifically, simple assault in violation of 18 U.S.C. § 113(e)), Pet. App. 25a, and (b) was a "sexual assault" under Rule 413(d), *id.* 27a. Petitioner challenges neither of these determinations. Thus, this case presents no question of allowing testimony regarding past conduct that does not constitute "a crime or a sexual assault." Pet. i.

b. What's more, petitioner's chosen question does not encompass the "categorical approach" argument he makes in the body of the petition, *see* Pet. 24. Under a categorical approach, the statute making the other-

acts evidence a crime (1) must contain the elements that Rule 413(d) uses to define "sexual assault" and (2) cannot be committed in a fashion that does not involve a sexual assault as defined in that Rule. But as this Court has explained, "the fact that [petitioner] discussed this issue in the text of [his] petition for certiorari does not bring it before [this Court]. Rule 14.1(a) requires that a subsidiary question be fairly included in the *question presented*." *Wood v. Allen*, 558 U.S. 290, 304 (2010) (citation omitted). And petitioner's question presented makes no mention of the categorical approach.

c. On top of that, petitioner forfeited his categorical-approach argument by failing to raise it in the district court or in his panel-stage briefing. As a result, the panel never considered this point. Rather, as petitioner concedes, he waited until his petition for rehearing en banc even to suggest that a categorical approach should apply. *See* Pet. 23. This Court generally "decline[s] to review claims raised for the first time on rehearing in the court below." *Wills v. Texas*, 511 U.S. 1097, 1097 (1994) (O'Connor, J., concurring in the denial of certiorari). It should follow that practice here.[5]

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[5] In an apparent attempt to excuse his forfeiture, petitioner asserts that the panel adopted a theory "never briefed by the parties" in holding that his assault of Ms. Leeds violated 18 U.S.C. § 113(e). Pet. 22. But petitioner never denied that Ms. Leeds's testimony described a crime until his reply brief. Petr. C.A. Reply Br. 1-5, 7-9. Ms. Carroll responded to this untimely argument at her earliest opportunity, first explaining at oral argument that the testimony described a crime under § 113(e) and subsequently expanding upon this position in a Rule 28(j) letter. Oral Arg. at 9:20-10:06; Resp. C.A. Letter, BL-109 (Sept. 6, 2024).

2. Courts uniformly reject imposing a "categorical approach" on Rules 413-415.

Petitioner does not even try to claim that there is disagreement among the courts of appeals over whether to use a "categorical approach" to decide the admissibility of evidence under Rules 413 and 415.

Quite the contrary: In every context where courts of appeals have been asked to adopt a categorical approach to Rules 413-415, they have refused to do so.

Only one court of appeals has even addressed whether a categorical approach should apply to other acts evidence. And it rejected that argument in the context of Rule 414, the analytically indistinguishable counterpart to Rule 413 that governs child molestation cases. *United States v. Tucker*, 154 F.4th 616, 618-20 (8th Cir. 2025). As Judge Stras explained in his opinion for the court, the categorical approach should apply only when a provision "speak[s] in terms of convict[ions]"; by contrast, "when propensity is the purpose," and a court is "dealing with the admissibility of evidence," then "conduct is what matters." *Id.* at 619-20 (cleaned up).

Moreover, every court of appeals that has been asked to apply a "categorical approach" when assessing whether a defendant is "is accused of sexual assault" under Rule 413 or "child molestation" under Rule 414 has rejected that argument. *See, e.g.*, *United States v. Foley*, 740 F.3d 1079, 1086-87 (7th Cir. 2014); *Tucker*, 154 F.4th at 618-20; *United States v. Ahmed*, 119 F.4th 564, 567-68 (8th Cir. 2024), *cert. denied*, 145 S. Ct. 1940 (2025); *United States v. Clay*, 148 F.4th 1181, 1187-88 (10th Cir. 2025); *United States v. Brooks*, 723 F. Appx. 671, 680-81 (11th Cir. 2018). At the Government's urging, they have all held that

because the focus of the Federal Rules of Evidence "is on the conduct itself rather than how the charges have been drafted," Rules 413 and 414 demand a conduct-focused inquiry. *Foley*, 740 F.3d at 1087; *accord Brooks*, 723 F. Appx. at 680-81; *Clay*, 148 F.4th at 1196; *Ahmed*, 119 F.4th at 567-68. Only last Term, this Court denied certiorari in *Ahmed v. United States*, 145 S. Ct. 1940 (2025) on this very issue. It should decline petitioner's invitation as well.

3. Petitioner's argument for the categorical approach is meritless.

This Court has limited the categorical approach to cases involving a handful of sentencing and immigration statutes that reflect the following considerations: (1) the text of the statute demands it; (2) a conduct-based approach would raise serious Sixth Amendment concerns; or (3) in the context of immigration cases, there is a longstanding tradition of using it. None of those considerations exists here.

a. Start with the text of Rules 413 and 415. This Court has limited the categorical approach to statutes that direct courts "to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions." *Taylor v. United States*, 495 U.S. 575, 600 (1990). By contrast, this Court has rejected the categorical approach where Congress uses "statutory language requiring courts to ask whether the defendant's actual conduct," rather than the "offense of conviction[,] meets certain criteria." *Pereida v. Wilkinson*, 592 U.S. 224, 234 n.2 (2021).

Rules 413 and 415 are of the latter type. They speak of conduct, not of conviction. Petitioner concedes

as much: "Rule 413(d) defines 'sexual assault' to mean a crime 'involving' certain categories of *conduct*." Pet. 25 (emphasis added) (quoting Fed. R. Evid. 413(d)). And, unlike statutes to which the categorical approach applies, Rule 413 "makes no mention of 'elements.'" *Clay*, 148 F.4th at 1196. Likewise, in civil cases, Rule 415 addresses the admissibility of evidence that a party has "*committed*," rather than has been convicted of, another sexual assault, thereby also directing courts to assess conduct, not elements. Fed. R. Evid. 415(a) (emphasis added); *cf. Taylor*, 495 U.S. at 600.

Petitioner is just wrong to claim that this Court has applied the categorical approach to "comparably phrased statutory provisions." Pet. 24 (citing *Leocal v. Ashcroft*, 543 U.S. 1, 7 (2004), and *Sessions v. Dimaya*, 584 U.S. 148, 164-65 (2018)). Those cases involved 18 U.S.C. § 16, which is *not* comparably phrased to Rules 413-415. Section 16(a) defines a "crime of violence" as "an offense that has *as an element*" the use of force, *id.* § 16(a) (emphasis added), or a felony offense "that *by its nature* involves a substantial risk that physical force" may be used, *id.* § 16(b) (emphasis added). Interpreting this language, this Court has held that "[i]n determining whether [a] conviction falls within the ambit of § 16," the court must "look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to petitioner's crime." *Leocal*, 543 U.S. at 7; *see also Dimaya*, 584 U.S. at 164-65. By contrast, Rules 413-415 make no reference to elements or convictions and provide their own definition of the "conduct" that can be admitted.

The overall structure of the rules of evidence confirms that Rules 413 and 415 are conduct-based.

Elsewhere, the Rules *do* use the language of "conviction" and "elements" to limit admissibility. *See, e.g.*, Fed. R. Evid. 609(a) (prescribing that "evidence of a criminal conviction" must be admitted "if the court can readily determine that establishing the elements of the crime required proving . . . a dishonest act"). If Congress had meant to restrict Rule 413 in this way, "it presumably would have said so," *Descamps v. United States*, 570 U.S. 254, 267 (2013). Thus, petitioner's proposal—an approach that asks courts to examine convictions and not conduct—asks this Court to blind itself to the plain text of Rules 413 and 415.

b. Nor does a conduct-based approach to admitting evidence under Rule 413 and 415 implicate any of the constitutional concerns that require use of the categorical approach. This Court has applied the categorical approach where a conduct-specific approach would otherwise require judges to "mak[e] findings of fact that properly belong to juries," in violation of the Sixth Amendment. *Descamps*, 570 U.S at 267 (articulating these concerns in the sentencing context); *cf. Mellouli v. Lynch*, 575 U.S. 798, 805-06 (2015) (discussing fairness implications of the categorical approach in the immigration context). Here, there is no such risk. Once the preliminary admissibility decision is made, evidence offered under Rules 413 and 415 *will* go to a jury if the right to a jury trial applies and either party has requested one. That jury will then make credibility determinations and draw inferences from the facts.

c. As already pointed out, there is no tradition of applying the categorical approach in the context of Rule 413(d)—not in this Court nor in any other. And there is no reason to extend the categorical approach

to a completely new area of law. Even with respect to sentencing and immigration, members of this Court have criticized some applications of the categorical approach as "the veritable *ne plus ultra*" of "pointless formalism." *Mathis v. United States*, 579 U.S. 500, 543 (2016) (Alito, J., dissenting).

B. The Rule 404(b) question does not warrant review.

Petitioner's third question presented challenges "the Second Circuit's holding that Rule 404(b) permitted admission of the *Access Hollywood* tape." Pet. 28 (cleaned up). But the district court initially admitted the tape under Rule 415, and the Second Circuit affirmed the lower court's ruling on that ground. Pet. App. 39a-40a. Petitioner does not ask this Court to review that holding, which independently supports the admission of the tape. As a result, petitioner asks the Court to answer a question that cannot affect the outcome of this case for an additional reason beyond the harmless-error problem discussed in Part I.

Even beyond that defect, review is unwarranted. All circuits agree that Rule 404(b) requires a non-propensity purpose. Here, the Second Circuit was correct that the tape was admissible under Rule 404(b) as evidence to rebut petitioner's fabrication defense.

1. The answer to the Rule 404(b) question does not matter to the outcome of this case.

The Second Circuit affirmed the district court's decision to admit the *Access Hollywood* tape under Rule 415—an independent and sufficient ground wholly distinct from any admissibility question under

Rule 404(b). Ruling on a motion *in limine*, the district court decided that the tape was admissible under Rule 415 because a "jury reasonably could find" that petitioner "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." Pet. App. 111a-112a. The Second Circuit affirmed, emphasizing that in the tape petitioner states that "I don't even wait," nor ask for consent, before "automatically . . . kissing" women and "grab[bing]" their genitalia, *id.* 38a—conduct that squarely constitutes "sexual assault" under Rule 413(d)(2). Thus, the Second Circuit held that the district court was within "its broad discretion" in admitting this evidence under that rule. *Id.* 40a.

Petitioner does not challenge—or even acknowledge—this holding. So, even if petitioner were correct that the *Access Hollywood* tape served solely a propensity purpose—and he is not—it would make no difference to the outcome here. The *Access Hollywood* tape was properly admitted under Rule 415, which, as petitioner concedes, allows propensity evidence in sexual assault cases, Pet. 13. And as already explained, this Court does not grant review when the question presented is irrelevant to the outcome below. *See supra* at 9-10.[6]

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[6] In dissenting from the denial of rehearing en banc, Judge Menashi suggested that, because the tape was not included in the district court's instructions regarding petitioner's other sexual assaults, the panel's holding that the tape was admissible under Rule 415 does not independently support this aspect of its decision. Pet. App. 237a-238a. But petitioner forfeited any argument on this ground four times over: (1) He did not "object to

2. The Second Circuit's Rule 404(b) analysis does not conflict with that of any other court and is correct.

Even apart from its fatal vehicle problem, this question is not worthy of review: The Second Circuit "establish[ed] a non-propensity purpose," Pet. i, for the *Access Hollywood* tape under Rule 404(b)(2). The tape was introduced "*not* to show that [petitioner] had a 'bad character,'" but rather, as two of the judges on the panel explained, "to show a pattern of conduct that tends to rebut [petitioner's] fabrication defense." Pet. App. 250a.

Petitioner is thus wrong that the Second Circuit's Rule 404(b)(2) analysis implicates a circuit split on "the admission of '*modus operandi*' or 'corroboration' evidence," Pet. i.

a. After affirming the admissibility of the *Access Hollywood* tape under Rule 415, the Second Circuit held in the alternative that the tape was admissible to show that "the alleged sexual assault [on Ms. Carroll] actually occurred." Pet. App. 41a. On the tape, petitioner describes a "distinctive pattern" of "nonconsensual sexual contact." *Id.* 42a. The Second Circuit found petitioner's description relevant to rebut his argument that Carroll's testimony describing how the assault here occurred was "implausible," *see, e.g.*, Pet. 2, 3, 7, 16. In other words, the tape had a non-propensity purpose because it reinforced the

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the Tape's exclusion" from the portion of the charge addressing other sexual assaults. *Id.* 249a n.7 (brackets omitted) (quoting *id.* 148a n.20). (2) "Nor did [he] raise any such objection on appeal" or (3) "in his petition for rehearing." *Id.* And (4) petitioner has not raised this issue in his petition to this Court.

plausibility of Ms. Carroll's account of the unusual way petitioner attacked her. *See* Pet. App. 38a, 40a-41a.

First, Ms. Carroll testified that her encounter with petitioner began when he asked her to go shopping with him "for a friend," Pet. App. 139a, but then led her into a dressing room, closed the door, and "shoved [her] against the wall . . . so hard [that her] head banged," *id.* 4a-5a (alteration in original). In the *Access Hollywood* tape, petitioner admitted to this same tactic: He invited Nancy O'Dell to go shopping and then "moved on her like a bitch." *Id.* 38a.

Second, Ms. Carroll testified that petitioner then kissed her without her consent. Pet. App. 5a. In the *Access Hollywood* tape, petitioner admits that when he sees a woman he finds attractive, "I just start kissing them. It's like a magnet. Just kiss. I don't even wait." *Id.* 38a.

Third, Ms. Carroll testified that petitioner "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." Pet. App. 5a. Petitioner, in his own words, acknowledges on the tape that when he sees a woman to whom he is attracted, he "grab[s] them by the pussy." *Id.* 38a.

Accordingly, the Second Circuit correctly upheld the district court's admission of the *Access Hollywood* tape under Rule 404(b) because it directly rebutted petitioner's defense that Ms. Carroll had fabricated an "implausible" story. Petitioner's description of engaging in this sort of behavior shows that such behavior does occur, thereby reinforcing the plausibility of Ms. Carroll's account. *See also* Pet. App. 17a (quoting David P. Leonard, New Wigmore: A

Treatise on Evidence: Evidence of Other Misconduct and Similar Events § 13.3 (2d ed. 2020)).[7]

b. This case bears no relation to petitioner's purported disagreement on whether courts may admit Rule 404(b) evidence "without establishing a non-propensity purpose," Pet. i. Here, the Second Circuit squarely held that the *Access Hollywood* tape served such a purpose. So its decision is completely in accord with the approach of every other circuit.

As to *modus operandi* evidence, the circuits all agree that such evidence is admissible for non-propensity purposes. Indeed, as petitioner concedes, the First, Sixth, and Tenth Circuits—the circuits he claims are in conflict with the Second—"have ruled that 404(b) permits the admission of *modus operandi* evidence" where it serves "a valid, non-propensity purpose." Pet. 30. Where petitioner goes wrong is in saying that in these circuits *modus operandi* evidence "is *only* relevant when there is an issue regarding the defendant's identity," *id.* (emphasis added) (quoting *Chavez v. City of Albuquerque*, 402 F.3d 1039, 1046 (10th Cir. 2005)). More recently, the Tenth Circuit has "affirmed the principle that when a defendant denies an element of the crime," that "evidence of prior acts is admissible to rebut the denial." *United States v. Isabella*, 918 F.3d 816, 841 (10th Cir. 2019). That is precisely why the *Access Hollywood* tape was admissible here—to rebut petitioner's denial of an element of the crime: the actus reus. And petitioner

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[7] Petitioner does not point to a single case holding that Rule 404(b)(2) bars a party from using other-acts evidence to rebut a fabrication argument. *See* Pet. 28-33. The cases he cites are inapposite because they address other-acts evidence being used exclusively to show character.

points to no case from the First or Sixth Circuits decided in the past thirty years that restricts *modus operandi* evidence to cases where the sole question is the identity of the defendant.

Nor is there disagreement among the courts of appeals over whether other-acts evidence may be introduced where it serves a corroborative purpose. Arguing to the contrary, petitioner identifies only the D.C. Circuit on the other side of his alleged split. In reality, that court held only that other-acts evidence is inadmissible under a corroboration theory where it serves solely to corroborate the defendant's "character." *United States v. Bailey*, 319 F.3d 514, 520 (D.C. Cir. 2003); *see United States v. Linares*, 367 F.3d 941, 949 (D.C. Cir. 2004). However, in the very case that the petition cites, the D.C. Circuit recognized that other-acts evidence "might corroborate" a material fact beyond the defendant's propensity "and therefore be admissible under 404(b)." *Bailey*, 319 F.3d at 520.

The Second Circuit's Rule 404(b) analysis is consistent with these circuits. The court correctly held that the *Access Hollywood* tape served a non-propensity purpose—rebutting petitioner's fabrication defense by proving that "the charged act occurred." Pet. App. 17a (citation omitted). And the tape did so—consistent with the rule in other circuits—by corroborating material facts in respondent's testimony.[8]

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[8] Petitioner contends that the Second Circuit's opinion "deepens" a split between the D.C. Circuit and the Ninth and Tenth Circuits on the corroboration issue. Pet. 31-32. But petitioner has already received the benefit of the D.C. Circuit's rule, so this case is a bad vehicle to resolve that split—if it even exists.

C. The Rule 403 question does not warrant review.

Petitioner's first question presented asks "[w]hether Federal Rule of Evidence 415 overrides Rule 403's requirement to balance the probative value" of evidence against the risk of unfair prejudice. Pet. i. In addition to arguing that the Second Circuit does not apply Rule 403 balancing in Rule 415 cases, petitioner contends that the Second Circuit failed to consider the "remoteness in time" of the other-acts evidence at issue here. Pet. 17. As with the petition's other two questions, the answer to the question presented would not affect the outcome here because the Second Circuit did apply Rule 403. And it did consider remoteness in time as part of that inquiry.

Nor is there any conflict among the circuits on this question. No court has held that Rules 413 and 415 override Rule 403, and no court ignores temporal remoteness when applying Rule 403 to evidence admitted under these rules.

And on the merits, the Second Circuit was correct. The district court did not abuse its discretion when it admitted the three pieces of other-acts evidence. This Court should not disturb that decision.

1. The answer to the Rule 403 question does not matter to the outcome of this case.

This case is a poor vehicle for addressing the interplay between Rule 415 and Rule 403 because the Second Circuit has already applied the rule petitioner seeks.

a. Petitioner argues that the Second Circuit should have followed the First, Seventh, and Tenth Circuits by holding "that district courts should apply

the same Rule 403 analysis that they would apply to any other evidence." Pet. 14.

It did. The court expressly held that "Rule 403's protections apply to evidence being offered under Rule 415," Pet. App. 13a, and that "the district court may admit evidence of other sexual assaults under Rule 415" only if, after "applying Rule 403, the court further determines that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice," *id.* 16a. Thus, the court has already applied "the same Rule 403 analysis that they would apply to any other evidence," Pet. 14.[9]

Nor, contrary to petitioner's lengthy disquisition on methodology, Pet. 18-21, did the Second Circuit "rel[y] entirely on a single sentence from a floor statement" to apply Rule 403 in the context of Rules 413-415, *id.* 18. The court's brief reference to the legislative history came only after its extensive discussion of the text, structure, and purpose of Rules 413-415 and prior precedent. *See* Pet. App. 22a-45a (addressing admissibility under Rules 413 and 415); *id.* 45a-47a (addressing the Rule 403 question).

b. Petitioner also asserts that the Second Circuit should have incorporated remoteness in time as a "component of the Rule 403 analysis." Pet. 17.

It did. After determining that the other acts were admissible "sexual assault[s]" under Rule 415, the court turned to Rule 403 and "conclude[d] that the

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[9] There is nothing distinctive about how the Second Circuit applies Rule 403 in cases involving Rule 415. It drew its standard here from a case that did not involve Rule 415. Pet. App. 17a-18a (quoting *United States v. LaFlam*, 369 F.3d 153, 156 (2d Cir. 2004)).

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." Pet. App. 46a-47a. The Second Circuit has already given petitioner what he now seeks from this Court: a rule that incorporates "the closeness in time of the prior acts to the charged acts" as one factor to be considered under Rule 403, *see* Pet. 17 (quoting *United States v. Guardia*, 135 F.3d 1326, 1331 (10th Cir. 1998)).

At most, then, petitioner is arguing that there was a "misapplication of a properly stated rule of law"—a ground this Court's Rule 10 disparages as a basis for granting review. And review is especially unwarranted where, as here, the court of appeals has already determined that even if the district court's Rule 403 analysis were flawed in some way, petitioner nonetheless failed to show that his substantial rights were affected. *See supra* at 9-10.

2. *There is no circuit split on the relationship between Rule 403 and Rule 415.*

Petitioner claims a split between the First, Seventh, and Tenth Circuits, on the one hand, and the Second, Third, Fourth, Sixth, and Eighth Circuits, on the other, over whether Rule 403 applies with equal force to evidence admissible under Rules 413 and 415. Pet. 14-15. That is wrong.

a. To support this contention, the petition relies on the First Circuit's identification of a conflict in *Martinez v. Cui*, 608 F.3d 54 (1st Cir. 2010). Pet. 14-15. *Martinez*, in turn, relied upon Weinstein's Federal Evidence to describe perceived differences in how

courts performed the Rule 403 balancing test. *See* 608 F.3d at 60 (citing 2 J.B. Weinstein & M.A. Berger, Weinstein's Federal Evidence § 415.04, at 415-13 to 16 (J.M. McLaughlin ed., 2d ed. 2010) ("Weinstein's Federal Evidence")).

But that was in 2010. Today, the Weinstein treatise says something quite different: It says only that "[t]here was *initially* some debate on how Rule 413 would be construed in conjunction with Rule 403." 2 Weinstein's Federal Evidence § 413.04 (2025) (emphasis added); *see also id.* § 415.04 (making the same comment about Rule 415).

As that change suggests, whatever conflict may have existed fifteen years ago has dissipated. Petitioner points to no case more recent than *Martinez* that perceives his asserted disagreement. Any dust kicked up in the wake of the 1994 enactment of Rules 413-415 has since settled. Indeed, this Court has already denied certiorari in a Rule 415 case where the petitioner asserted "conflicting Circuit Court opinions" on whether Rule 415 alters "the traditional balancing test under FRE 403." Pet. i, *Bernard v. E. Stroudsburg Univ.*, 583 U.S. 1118 (2018) (No. 17-860); *see id.* at 25-28 (relying on *Martinez* to summarize the alleged conflict). There is no reason for a different result here.

b. Opinions on both sides of petitioner's purported split affirm this consensus.

Start with the Tenth Circuit's decision in *Guardia*, the touchstone of what petitioner calls the "correct[]" approach. Pet. 14. There, the Tenth Circuit held that "a court must perform the same 403 analysis that it does in any other context, but 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. The court emphasized that this weighing "will depend on innumerable considerations, including the similarity of the prior acts to the acts charged, the closeness in time of the prior acts to the charged acts, the frequency of the prior acts, the presence or lack of intervening events, and the need for evidence beyond the testimony of the defendant and alleged victim." *Id.* at 1331 (citations omitted).

The Seventh Circuit took a similar position in *United States v. Hawpetoss*, 478 F.3d 820 (7th Cir. 2007). There, the court declared that the "factors articulated" by the Ninth Circuit in *United States v. LeMay*, 260 F.3d 1018, 1028 (9th Cir. 2001)—which had their "roots in the particular considerations employed by the Tenth Circuit in *United States v. Guardia*"—established "a helpful guide for a district court." 478 F.3d at 825-26.

Now turn to the courts in what petitioner claims to be the opposing camp—the Second, Third, Fourth, Sixth, and Eighth Circuits. Pet. 15. They too have adopted the *Guardia-LeMay-Hawpetoss* framework.

The Second Circuit in *United States v. Spoor*, 904 F.3d 141 (2d Cir. 2018), relied expressly on *Guardia* and *LeMay* to describe the framework for conducting Rule 403 balancing in Rule 414 cases. *Id.* at 154-55 (citation omitted).

Likewise, the Third, Fourth, Sixth, and Eighth Circuits have relied on the *Guardia-LeMay-Hawpetoss* framework in holding that the normal Rule 403 analysis applies in the Rules 413-415 context. *See, e.g.*, *Johnson v. Elk Lake Sch. Dist.*, 283 F.3d 138, 156 (3d Cir. 2002) (quoting *Guardia*); *United States v. Kelly*,

510 F.3d 433 (4th Cir. 2007) (citing *Hawpetoss* and *LeMay*); *United States v. Seymour*, 468 F.3d 378, 386 (6th Cir. 2006) (citing *Guardia* and *LeMay*); *United States v. Gabe*, 237 F.3d 954, 959 (8th Cir. 2001) (citing *Guardia*).

In short, there's no conflict. While the circuits don't always use identical language, the nearly complete overlap of factors in their opinions shows that every circuit applies Rule 403 to evidence admitted under Rules 413-415 the same way it applies in any other context. And this Court is "not particularly interested in ironing out minor linguistic discrepancies among the lower courts because those discrepancies are not outcome determinative." Stephen G. Breyer, *Reflections on the Role of Appellate Courts*, 8 J. App. Prac. & Process 91, 96 (2006).

3. There is no conflict among the circuits on the need to consider temporal proximity under Rule 403.

Petitioner is equally mistaken as to the existence of a conflict on whether a district court should consider "remoteness in time as a key component of the Rule 403 analysis." Pet. 17.

a. Petitioner insists that the First, Seventh, and Tenth Circuits require courts to "focus heavily on" remoteness in time in deciding whether Rule 403 requires excluding otherwise admissible evidence. Pet. 16. But they do no such thing. Rather, those three courts simply consider temporal proximity alongside an array of other factors.

The First Circuit, for example, holds that in deciding whether evidence otherwise admissible under Rule 404(b) should be excluded under Rule 403,

courts should consider both "the remoteness in time of the other act and the degree of resemblance to the crime charged." *United States v. Martínez-Mercado*, 919 F.3d 91, 101 (1st Cir. 2019) (citations omitted). It does not prioritize one of those factors over the other.

Applying that approach, the First Circuit has upheld the admission of evidence in cases involving temporal gaps like the ones at issue here. *See, e.g.*, *United States v. Majeroni*, 784 F.3d 72, 76 (1st Cir. 2015) (no abuse of discretion in admitting similar prior conduct that "occurred over ten years before the charged conduct"); *United States v. Joubert*, 778 F.3d 247, 254-55 (1st Cir. 2015) (eighteen to twenty years); *United States v. Jones*, 748 F.3d 64, 68-71 (1st Cir. 2014) (eighteen years).

The Seventh Circuit, as already discussed, anticipates "that district courts [will] consider 'innumerable' factors" and refuses to "cabin artificially the discretion of the district courts through the imposition of a relatively rigid multi-factor test." *Hawpetoss*, 478 F.3d at 825 (quoting *Guardia*, 135 F.3d at 1331); *see supra* 28. Thus, the date of the prior assault constitutes but "*a* factor for a court to consider in weighing the possibility that the risk of unfair prejudice to the defendant posed by evidence of his prior offense might counsel against admission pursuant to Rule of Evidence 403." *United States v. Julian*, 427 F.3d 471, 487 (7th Cir. 2005) (emphasis added). In *Julian*, the court upheld the admission of evidence of a sexual assault that "occurred 12 years prior to the events underlying the charges." *Id.* at 485.

The same is true of the Tenth Circuit, which, as already described, recognizes that the admissibility of prior sexual assaults may "depend on innumerable

considerations," of which "the closeness in time of the prior acts to the charged acts" is only one. *Guardia*, 135 F.3d at 1331.

b. Petitioner is wrong to claim that the Eighth and Second Circuits take a different approach. His argument rests on a fundamental misunderstanding of evidence law: He conflates the question of admissibility under Rules 413-415 with the analytically distinct question whether admissible evidence should be excluded under Rule 403. Disentangling these two questions shows that, contrary to petitioner's assertion, the Eighth and Second Circuits consider remoteness in time as part of the Rule 403 analysis.

United States v. Reynolds, 720 F.3d 665 (8th Cir. 2013), the case cited by petitioner to establish the supposed conflict, Pet. 17, illustrates his error. There, the Eighth Circuit stated that "when Congress enacted Rule 414, it expressly rejected imposing any time limit on the *admission* of prior sex offense evidence" under that rule. *Id*. at 671 (emphasis added). As a natural consequence, remoteness is "irrelevant" for purposes of the initial admissibility determination. *See id.*

But, like other circuits, the Eighth Circuit *does* consider temporal remoteness. It does so, as the other circuits do, under Rule 403 to determine whether admissible evidence should nevertheless be excluded.

In *United States v. Luger*, 837 F.3d 870 (8th Cir. 2016), for example, the Eighth Circuit recognized that the fact that the two prior assaults "had occurred more than 25 years" earlier "diminish[ed] the probative value of their testimony and potentially increase[ed] its prejudicial effect." *Id.* at 874. Nevertheless, it

upheld the introduction of the evidence at issue. *Id.* That being said, courts within the Eighth Circuit do exclude such evidence when the standard Rule 403 balancing test leads them to conclude that the risk of unfair prejudice outweighs the probative value. *See, e.g.*, *United States v. Reed*, 2018 WL 940620, at *3 (D. Minn. Feb. 16, 2018).

As for the Second Circuit, both the district court and the court of appeals considered temporal proximity here. The district court forthrightly recognized that the lapse of time was a factor that "weighs in [petitioner's] favor" in the Rule 403 analysis. Pet. App. 123a. But it held that other factors weighed sufficiently in Ms. Carroll's favor to warrant admitting this probative evidence. *Id.* 120a-123a. On appeal, 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." *Id.* 46a-47a.[10]

The circuits petitioner does not discuss confirm this consensus. In *United States v. Lieu*, 963 F.3d 122 (D.C. Cir. 2020), Judge Katsas's opinion for the court upheld the admission of other-acts evidence from six to eight years before the charged conduct and more than a decade before trial. *Id.* at 124, 129. In reaching this conclusion, he pointed to a case from the Sixth Circuit upholding admission of "acts from 24 years before trial," *id.* at 129 (citing *United States v.*

[10] Indeed, even Judge Menashi, who otherwise dissented vigorously from the denial of rehearing en banc, conceded that the district court's ruling did not exceed the "outer boundary of when remote testimony has been put before a jury." Pet. App. 223a.

Underwood, 859 F.3d 386, 393 (6th Cir. 2017)), and a case from the Ninth Circuit upholding the admission of acts from eleven years before trial, *id.* (citing *LeMay*, 260 F.3d at 1029).

In short, there is no disagreement among the courts of appeals as to the legal rule. Any difference in whether evidence was admitted in a particular case simply reflects the district courts' exercise of judgment and discretion in factbound contexts.[11]

4. The Second Circuit correctly affirmed the admission of the evidence at issue here.

On appeal, a district court's evidentiary rulings are reviewed for abuse of discretion. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 141 (1997). Under that standard, the Second Circuit was required to ask whether the district court "appl[ied] the correct legal standard and offer[ed] substantial justification for its conclusion." *BLOM Bank SAL v. Honickman*, 605 U.S. 204, 216 (2025) (cleaned up). The Second Circuit correctly held that the district court met this standard.

First, the district court plainly articulated the correct legal standard. It recognized that in "considering Rule 403 objections to relevant evidence," it was required to "consider a number of factors, including '(1) the similarity of the prior acts to the acts

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[11] As a last-ditch effort, petitioner posits "constitutional avoidance" as a reason to favor an especially restrictive remoteness-focused interpretation. Pet. 21. However, there is widespread consensus that Rules 413-415 are constitutional precisely because they are subject to Rule 403. *See, e.g.*, *United States v. Schaffer*, 851 F.3d 166, 180-81 (2d Cir. 2017) (surveying the Eighth, Ninth, and Tenth Circuits); *see also United States v. Enjady*, 134 F.3d 1427, 1433 (10th Cir. 1998).

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.'" Pet. App. 121a (emphasis added) (quoting *Spoor*, 904 F.3d at 153-55).

Second, the district court discussed at length why it considered the challenged evidence to be probative and why it considered the probative value to outweigh the risk of unfair prejudice even given the lapse in time. Pet. App. 121a-123a. It thereby offered a substantial justification for its decision to admit the evidence.

The phrase "abuse of discretion" appears nowhere in the petition. Thus, the petition never challenges the Second Circuit's analysis under the governing standard of review. This is reason enough to deny certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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