No. 25-573

In the
# Supreme Court of the United States

PRESIDENT DONALD J. TRUMP,

*Petitioner*,

v.

E. JEAN CARROLL,

*Respondent*.

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

## REPLY BRIEF FOR PETITIONER

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Statutes**



**Other Authorities**

## INTRODUCTION

It is deeply damaging to the fabric of our Republic for President Trump, in the midst of a historic presidency, to have to take his focus away from his singular and unique duties as Chief Executive to continue fighting against decades-old, false allegations and the myriad wrongs throughout this baseless case. This mistreatment of a President cannot be allowed to stand.

President Trump challenges what Judge Menashi, joined by Judge Park, rightly called three "striking departures" from the Federal Rules of Evidence allowing E. Jean Carroll to use testimony about three decades-old, unrelated, alleged incidents to obtain a $5 million judgment against him. App.202A (Menashi, J., dissenting from denial of rehearing en banc). Carroll relied on this propensity evidence, improperly admitted by a "series of indefensible evidentiary rulings," App.240A, to prop up her implausible, unsubstantiated assertions. Her response confirms that the Petition raises three important questions under the Federal Rules of Evidence about the admissibility of propensity evidence. These questions, on which the circuits are clearly divided, routinely occur in criminal and civil cases across the country and thus require resolution by this Court.

First, the Second Circuit erred in not applying Rule 403's remoteness analysis to propensity evidence that was almost a half-century old. Carroll does not try to defend the Second Circuit's erroneous reliance on legislative history to avoid such a Rule 403 remoteness analysis. The First Circuit has identified a circuit conflict on how Rule 403's analysis applies to evidence otherwise admissible under Rules 413-415. The First, Seventh, and Tenth Circuits apply the

standard analysis, while the Second, Third, Fourth, Sixth, and Eighth Circuits do not.

Second, the Second Circuit erred in not applying a categorical approach to exclude the admission of an alleged "sexual assault" under Rule 413(d) in the "bizarre way" it relied on a statute that required no sexual element. *See* App.226A. Carroll is wrong that the categorical approach applies only to statutes containing certain words.

Third, the Second Circuit erred in allowing the admission of the so-called *Access Hollywood* tape without requiring a non-propensity purpose under Rule 404(b). When Carroll's selective case quotations are read in full, it is clear that the First, Sixth, and Tenth Circuits are divided from the Second Circuit on the admissibility of such propensity evidence for *modus operandi* purposes, and the Second, Ninth, and Tenth Circuits are divided from the D.C. Circuit on the admissibility of such evidence for corroboration purposes.

Carroll tries to sidestep these serious legal errors in the admission of propensity evidence by advancing baseless procedural objections to this Court's review. President Trump has raised these three important questions under the Federal Rules at the right time in the right way. The Court should grant certiorari.

## ARGUMENT

### I. The Court Should Review the Rule 403 Propensity Evidence Question.

Signaling weakness, Carroll responds to the first question presented in the last section of her opposition. *See* Opp. at 24. Her arguments confirm this weakness.

### A. The circuits are divided on how Rule 403 applies to propensity evidence otherwise admissible under Rules 413-415.

Carroll incorrectly denies that a circuit conflict exists between the First, Seventh, and Tenth Circuits on one side, and the Second, Third, Fourth, Sixth, and Eighth Circuits on the other, by attempting to reframe the issue as *whether*, not *how*, Rule 403 applies to propensity evidence otherwise admissible under Rules 413-415. Opp. at 26-33. Carroll misleadingly cites a treatise's observations about *whether* Rule 403 applies at all to propensity evidence admissible under Rules 413-415, Opp. at 27, but she omits that same treatise's express recognition that the circuits are divided on *how* Rule 403 applies to such evidence, 2 J.B. Weinstein & M.A. Berger, Weinstein's Federal Evidence §§ 413.04, 415.04 (2025). Like the Petition, this treatise details how the Eighth Circuit's application of Rule 403—which was the same as the Second Circuit's analysis below—conflicts with the Tenth Circuit's in evaluating propensity evidence. *Id.*

Carroll cannot identify any case that disputes the circuit conflict described by the First Circuit over the admissibility of propensity evidence. *See Martinez* v. *Cui*, 608 F.3d 54, 60 (1st Cir. 2010). In fact, a Second Circuit decision on Rule 414 cited by Carroll identifies the conflict between the Seventh and Tenth Circuits on one side, and the Eighth Circuit and possibly the Fourth Circuit on the other. *United States* v. *Spoor*, 904 F.3d 141, 154 n.10 (2d Cir. 2018) (citing cases). Although the *Spoor* court criticized "a more deferential standard of review" in reviewing "evidence with the benefit of a presumption in favor of admissibility," *id.*, that is exactly what the Second Circuit panel did below, *see* App.45A-47A.

As explained in the Petition, the First, Seventh, and Tenth Circuits apply the standard Rule 403 analysis to propensity evidence admissible under Rules 413-415, Pet. at 14-15, in which "[t]he temporal remoteness alone diminishes the probative value of the proffered evidence." *United States* v. *Bauldwin*, 627 F. Supp. 3d 1242, 1254 (D.N.M. 2022) (excluding evidence of incident occurring 15 years earlier). In conflict with these decisions, the Second Circuit in this case, as well as the Third, Fourth, Sixth, and Eighth Circuits apply a truncated Rule 403 analysis that strongly favors admissibility, *id.* at 15-16, which unlawfully prejudices outcomes. The Second Circuit below allowed evidence that was two decades older than evidence in any case cited by Carroll. *See* Opp. at 30-31. Thus, the Second Circuit's truncated approach to the temporal remoteness of this propensity evidence was dispositive in causing the erroneous ruling in this case.

### B. The Second Circuit did not apply the normal rules for remoteness.

Carroll incorrectly claims that "the Second Circuit has already applied the rule petitioner seeks." Opp. at 24. Not so. The Second Circuit in this case "held that the Rule 403 analysis must be *different* and *weaker* when evidence is offered pursuant to Rules 413-15." App.219A (Menashi, J., dissenting from denial of rehearing en banc) (emphasis in original). Unlike typical Rule 403 analysis, Opp. at 25, the Second Circuit below erroneously presumed probative value, App.45A, which it did not reduce by the decades-old remoteness in time of the alleged incidents, App.46A-47A.

The Second Circuit's application of a weaker version of Rule 403 for remote evidence conflicts with the Seventh and Tenth Circuits. *See United States* v.

*Julian*, 427 F.3d 471, 487 (7th Cir. 2005); *United States* v. *Guardia*, 135 F.3d 1326, 1331 (10th Cir. 1998). Though the propensity evidence was based on alleged incidents that purportedly occurred 44 years and 18 years before the trial below, the Second Circuit wrongly rejected President Trump's remoteness argument because, relying on legislative history, "Congress intentionally did not restrict the timeframe within which the other sexual act must have occurred to be admissible." App.46A. By removing any consideration of remoteness from the Rule 403 analysis, App.46A-47A, the Second Circuit created "a novel exception to Rule 403." App.220A (Menashi, J., dissenting from denial of rehearing en banc).

Carroll does not defend the Second Circuit's improper, exclusive reliance on legislative history in support of its holding that remoteness need not be considered under Rule 403 for other sexual act evidence. Opp. at 25. What Carroll misdescribes as merely a "brief reference to the legislative history," *id.*, was the Second Circuit's main rationale: "we apply Rules 413-415 in a manner that effectuates Congress's intent." App.46A. The Second Circuit then quoted a single legislative sponsor to justify its erroneous conclusion about Congress's "express intent" not to consider remoteness when evaluating other sexual act evidence under Rule 403. *Id.* Carroll ignores the caselaw rejecting the Second Circuit's misuse of legislative history. *See* Pet. 18-21. Her silence speaks volumes.

## II. The Court Should Review the Rule 413(d) Categorical Approach Question.

### A. Rule 413(d)'s text supports a categorical approach to "sexual assault" evidence.

Besides mislabeling the authority as "meritless," Opp. at 15, Carroll has no answer to the text of Rule 413(d) and the ordinary meanings of "involving" or "sexual assault" in Rule 413(d), which support a categorical approach to the admissibility of propensity "sexual assault" evidence that would render it inadmissible here. *See* Pet. at 24-27. Carroll instead tries to reimagine this Court's precedent as imposing a magic-words requirement limiting the categorical approach to statutes that use the terms "conviction" and "elements." *See* Opp. at 15-16. That is wrong. This Court has applied the categorical approach when the relevant statutory text contained neither word. *See, e.g.*, *United States* v. *Davis*, 588 U.S. 445, 455 (2019) (interpreting "nearly identical language" in 18 U.S.C. § 16(b) and 18 U.S.C. § 924(c)(3)(B) that focused on the "offense"). Thus, it is not relevant that "conviction" and "elements" are found in Rule 609(a). *See* Opp. at 17.

The residual clause in § 16(b) is instructive because, like Rule 413(d), it describes what the crime "involves" that triggers its application. *See* 18 U.S.C. § 16(b). Where the statutory text asks whether a crime meets a particular standard, this Court applies a categorical approach. *See Pereida* v. *Wilkinson*, 592 U.S. 224, 233 (2021). The Second Circuit's contrary interpretation "means that a crime that does not prototypically involve the enumerated conduct nevertheless qualifies as a sexual assault." App.226A (Menashi, J., dissenting from denial of rehearing en banc). That "is a bizarre way to apply the definition of 'sexual assault' in Rule 413(d)." *Id.*

Carroll's remaining textual arguments are also wrong. She trumpets that "Rule 415 addresses the admissibility of evidence that a party has '*committed*.'" Opp. at 16 (emphasis in original). But the term "commit" further confirms that the text of the Rules focuses the Court's attention on *the crime* allegedly committed, rather than the case-specific means of commission. *See* Black's Law Dictionary (12th ed. 2024) (defining "commit" to mean "To perpetrate (*a crime*)" (emphasis added)). This term cuts *against* Carroll's interpretation.

### B. This Petition properly presents an important federal question under Rule 413(d).

The question presented provided notice to Carroll and the Court that Rule 413(d) mandates a categorical inquiry, and that the Second Circuit's failure to conduct such an inquiry is an important federal question that conflicts with relevant decisions of this Court. *See Yee* v. *City of Escondido*, 503 U.S. 519, 535-36 (1992). Given her extensive response regarding a categorical approach, *see* Opp. at 14-18, Carroll cannot argue that she "lack[ed] any opportunity in advance of litigation on the merits to argue that such questions are not worthy of review." *Yee*, 503 U.S. at 536. The question presented "fairly encompasses an inquiry into" the categorical approach. *Daimler AG* v. *Bauman*, 571 U.S. 117, 136 n.16 (2014). Carroll relies on a case that is inapposite because it involved two different issues within the same question presented, *see* Opp. at 13 (citing *Wood* v. *Allen*, 558 U.S. 290, 304 (2010).

Carroll also wrongly claims forfeiture, which did not occur. Carroll does not deny that the Second Circuit implicated the application of the categorical approach under Rule 413(d) to the introduction of

propensity evidence of a purported "sexual assault" for the first time in this case when it created its alternative "simple assault" theory under a statute that the district court never considered. *See* Opp. at 13 n.5. President Trump could not forfeit an argument by "wait[ing] too long to raise the point," *Kontrick* v. *Ryan*, 540 U.S. 443, 456 (2004), when he "could not have raised the argument before then," *Sanders* v. *Melvin*, 25 F.4th 475, 486 (7th Cir. 2022). Thus, President Trump has properly and timely raised whether Rule 413(d) requires a categorical approach to the introduction of evidence of a "sexual assault," which it does.

## III. The Court Should Review the Rule 404(b) Propensity Evidence Question.

### A. The First, Sixth, and Tenth Circuits are divided from the Second Circuit on the introduction of *modus operandi* evidence.

Carroll wrongly claims that the *Access Hollywood* tape "had a non-propensity purpose because it reinforced the plausibility of Ms. Carroll's account." Opp. at 20-21. That is, by definition, a propensity purpose. Carroll's response confirms that this tape was textbook propensity evidence because it purportedly showed the President's propensity to act in the way that Carroll alleged. *See id.* at 21-22.

Carroll does not deny that the Second Circuit admitted this *modus operandi* evidence without relying on a non-propensity purpose listed in Rule 404(b). She thus cannot wave away the conflict between the decision below and the contrary holdings of the First, Sixth, and Tenth Circuits. *See id.* at 22. The fact remains: those circuits permit *modus operandi* evidence only if it serves a non-propensity

purpose, while the Second Circuit below permitted such evidence for a propensity purpose.

Carroll is wrong that the Tenth Circuit ruled otherwise. *See* Opp. at 22 (citing *United States* v. *Isabella*, 918 F.3d 816 (10th Cir. 2019)). Carroll's selective quotation omits the Tenth Circuit's specific reference to non-propensity purposes under Rule 404(b). *See Isabella*, 918 F.3d at 841 ("she denied intent and knowledge of the mailing scheme"). Because the *Isabella* defendant "challenged the Government's proof of his specific intent"—a non-propensity purpose—he "opened the door" to the evidence. *Id.* *Isabella* thus confirms the circuit conflict identified here.

### B. The Second, Ninth, and Tenth Circuits are divided from the D.C. Circuit on the admissibility of corroboration evidence.

Carroll does not dispute that the Second, Ninth, and Tenth Circuits have recognized "corroboration" as a permissible purpose for admitting prior-acts evidence under Rule 404(b). *See* Opp. at 23. But Carroll ignores the D.C. Circuit's contrary holding that "[c]orroboration … does not provide a separate basis for admitting evidence [under Rule 404(b)]." *United States* v. *Linares*, 367 F.3d 941, 949 (D.C. Cir. 2004).

Carroll instead mischaracterizes a D.C. Circuit decision that predated *Linares*. Opp. at 23 (quoting *United States* v. *Bailey*, 319 F.3d 514, 520 (D.C. Cir. 2003)). Like *Linares*, *Bailey* held that "[c]orroboration, in and of itself, is not a separate purpose belonging in the open class of permissible purposes referred to in Rule 404(b)'s second sentence." *Bailey*, 319 F.3d at 520. "If it were," the D.C. Circuit warned, "evidence could slide past the rule against

improper character evidence." *Id.* That is exactly what happened in this case. In context, *Bailey*'s "might corroborate" language requires the evidence to show a permissible purpose under Rule 404(b) "by showing plan, purpose, intent, etc." *Id.* This is the correct rule, and the Second Circuit erred in not following it.

Here, Carroll does not claim that the *Access Hollywood* tape "show[s] plan, purpose, intent," or any other permissible purpose under Rule 404(b). Instead, her "corroboration" theory rests entirely on the claim that President Trump acted "in conformity" with the tape. The D.C. Circuit has correctly interpreted Rule 404(b) not to permit such "corroboration" evidence. *See Linares*, 367 F.3d at 949; *Bailey*, 319 F.3d at 520. The contrary Second Circuit decision below expressly endorsed such an improper approach. App.44A.

## IV. These Important Questions of Interpretation Under the Federal Rules of Evidence Are Dispositive in This Case.

To try to avoid this Court's review of these important and recurring questions under the Federal Rules of Evidence, Carroll cites the Second Circuit's single sentence on harmless error. *See* Opp. at 9-10. Recent precedent rejects this argument. *See McWilliams* v. *Dunn*, 582 U.S. 183 (2017). As an alternative holding in *McWilliams*, the Eleventh Circuit "determined that any error … was harmless." *Id.* at 212-13 (Alito, J., dissenting). The petitioner there did not separately challenge the harmless-error

conclusion,[1] and the respondent cited this alternative holding in opposing certiorari.[2] This Court granted certiorari, reversed on the merits, and instructed the Eleventh Circuit to reconsider its harmless-error conclusion. *Id.* at 200.

As further proof that a separate challenge is not necessary, the Court overlooked an alternative holding when it granted certiorari on an issue not raised by either party. *See, e.g.*, *Payne* v. *Tennessee*, 498 U.S. 1080 (1991) (Stevens, J., dissenting). Carroll cannot identify a single decision that requires a separate harmless-error challenge, particularly when the opinion below contains just one sentence of analysis. *See* Opp. at 9-10. Applying Carroll's improper rule would "work very unfair and mischievous results." *Chapman* v. *California*, 386 U.S. 18, 22 (1967).

In any event, Carroll is wrong that the Petition did not maintain that these errors in interpreting the Federal Rules prejudiced President Trump. *See* Opp. at 10. The Petition specifically argued that "[a]s a result of the significant evidentiary errors raised in this petition, Carroll obtained a $5 million award." Pet. at 10; *see also id.* at 7, 12. Indeed, as Judge Menashi explained, "[n]o one can have any confidence that the jury would have returned the same verdict if

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[1] Petition for Writ of Certiorari, *McWilliams* v. *Dunn*, No. 16-5294, at i (Questions Presented), https://www.scotusblog.com/wp-content/uploads/2017/01/16-5294-cert-petition.pdf.

[2] Brief of Respondent in Opposition to Petition for Writ of Certiorari, *McWilliams* v. *Dunn*, No. 16-5294, at 17, https://www.scotusblog.com/wp-content/uploads/2017/01/16-5294-OPP..pdf.

the normal rules of evidence had been applied." Pet. at 2-3 (citing App.240A (Menashi, J., dissenting from denial of rehearing en banc)).

The prejudice here is obvious. As a decision cited by Carroll explained, "[o]ften the circumstances of the case will make clear to the appellate judge that the ruling, if erroneous, was harmful and nothing further need be said." *Shinseki* v. *Sanders*, 556 U.S. 396, 410 (2009). The district court's reasoning confirmed the clear prejudice. When it erroneously admitted the Leeds and Stoynoff evidence, the district court correctly predicted that the evidence was "likely to weigh heavily in the jury's determination." App.122A.

Error also is not harmless when the evidence "was pressed upon the jury." *Tipton* v. *Socony Mobil Oil Co.*, 375 U.S. 34, 35 (1963) (per curiam). In both her opening and closing arguments, Carroll's counsel repeatedly invoked the propensity evidence at issue here. *See, e.g.*, Ct. App. App'x A.1446, 1460-62, 2585-87, 2623-25, 2631. Indeed, her counsel sought to bolster Carroll's lagging credibility in telling her decades-old story by expressly tying it to the propensity evidence: "Three women, one clear pattern." *Id.* A.1462. The erroneous admission of this propensity evidence—particularly in a case turning entirely on the credibility of the accuser and the accused—was far from harmless.

## CONCLUSION

The Court should grant the Petition.

January 28, 2026 Respectfully submitted,

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