No. _____

IN THE

Supreme Court of the United States

DAVID BERT PAYCER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Federal Rule of Evidence 414 permits the prosecution in a child-molestation case to introduce "evidence that the defendant committed any other child molestation," and defines "child molestation" as state or federal predicate crimes involving specified conduct. The question presented is:

> Whether a defendant against whom Rule 414 evidence is admitted is entitled, upon request, to an instruction directing the jury to consider that evidence only if it first unanimously finds by a preponderance that the defendant committed the predicate crime or crimes.

RELATED PROCEEDINGS

United States District Court (N.D. Okla.):

United States v. *Paycer*, Crim. No. 22-CR-00215 (Nov. 8, 2023) (entering judgment of conviction)

United States Court of Appeals (10th Cir.):

United States v. Paycer, No. 23-5120 (Sep. 16, 2025) (affirming conviction on direct appeal); (Dec. 1, 2025) (denying petition for rehearing)

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David Bert Paycer respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (App. a1–a47) is reported at 154 F.4th 1261. The ruling and instructions of the United States District Court for the Eastern District of Oklahoma (App. a57–a60) are unreported.

JURISDICTION

The court of appeals issued its opinion on September 16, 2025, and denied petitioner's petition for rehearing on December 1, 2025. App. a1, a49. This Court has jurisdiction under 28 U.S.C. § 1254(1). This petition is timely. *See* S. Ct. R. 13.

CONSTITUTIONAL PROVISION AND FEDERAL RULES OF EVIDENCE INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law * * *.

Federal Rule of Evidence 104(b) provides:

> **Rule 104. Preliminary Questions**
>
> * * *
>
> **(b) Relevance That Depends on a Fact.** When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.
>
> * * *

Federal Rule of Evidence 414 provides:

> **Rule 414. Similar Crimes in Child-Molestation Cases**
>
> **(a) Permitted Uses.** In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other child molestation. The evidence may be considered on any matter to which it is relevant.
>
> **(b) Disclosure to the Defendant.** If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses' statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.
>
> **(c) Effect on Other Rules.** This rule does not limit the admission or consideration of evidence under any other rule.

(d) Definition of "Child" and "Child Molestation." In this rule and Rule 415:

(1) "child" means a person below the age of 14; and

(2) "child molestation" means a crime under federal law or under state law (as "state" is defined in 18 U.S.C. § 513) involving:

(A) any conduct prohibited by 18 U.S.C. chapter 109A and committed with a child;

(B) any conduct prohibited by 18 U.S.C. chapter 110;

(C) contact between any part of the defendant's body—or an object—and a child's genitals or anus;

(D) contact between the defendant's genitals or anus and any part of a child's body;

(E) deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on a child; or

(F) an attempt or conspiracy to engage in conduct described in subparagraphs (A)-(E).

STATEMENT OF THE CASE

David Bert Paycer is a former butcher and truck driver from Lancaster, California. In late 2020, Mr. Paycer met Melissa Parsons on the dating website Plenty of Fish. Ms. Parsons was living in Sand Springs, Oklahoma with her three children—her son Anthony, who was 17, her older daughter Esther, who was 16, and her younger daughter SL, who was 7. Mr. Paycer and Ms. Parsons married in January of 2021, and Mr. Paycer moved in with her and her children. Eventually Ms. Parsons' teenage children moved to her sister's house, and Ms. Parsons, Mr. Paycer, and SL moved to a smaller home in Kellyville, Oklahoma. Around late May of 2021, Mr. Paycer and Ms. Parsons made a "mutual decision" to separate.

That summer, SL and Esther visited their aunt's house in Arlington, Texas. At some point, their "goth" cousin Kaiya pressed SL to tell her whether Mr. Paycer "had did anything." SL apparently initially said he did not, because she testified that Kaiya gave her "that look" that indicated "she knew I was lying," so SL told her that Mr. Paycer had touched her sexually. Esther reported the allegation to Ms. Parsons.

Soon a social media-powered wave of allegations against Mr. Paycer began to take shape. The daughter of SL's father somehow got access to Mr. Paycer's Facebook contacts, and began reaching out to them. Accusers piled on, posting allegations that Mr. Paycer had sexually touched them as well. Ms. Parsons forwarded the Facebook posts to an FBI agent, who used them to guide his investigation.

The investigation culminated in Mr. Paycer being charged with knowingly causing and attempting to cause SL to engage in "sexual acts," in violation of 18 U.S.C. §§ 1151, 1152, and 2241(c). (A second count was dismissed for lack of evidence.) Mr. Paycer pleaded not guilty and invoked his right to a jury trial.

Before trial, the government noticed its intent to offer evidence pursuant to Federal Rules of Evidence 414 and 404(b). Rule 414 allows evidence that a defendant accused of "child molestation" committed "any other act of child molestation" to be admitted and considered "on any matter to which it is relevant." Fed. R. Evid. 414(a). The rule defines "child molestation" as "a crime under federal law or under state law" involving specified types of sexual conduct with children.

Fed. R. Evid. 414(d). The evidence in question consisted of the allegations of three additional young women—IW, CM, and KM—that Mr. Paycer had molested them in a manner similar to SL's allegations, when they were close in age to SL. The district court overruled Mr. Paycer's objection to the admission of this evidence, finding that the testimony was admissible under Rule 414 because it would enable the jury to reasonably find by a preponderance that he committed aggravated sexual abuse of a minor, in violation of 18 U.S.C. § 2241(c), against CM and KM, and that he committed abusive sexual contact of a minor, in violation of 18 U.S.C. § 2244(a)(5), against IW.

Mr. Paycer subsequently requested three instructions modeled on the Eighth Circuit's pattern jury instruction for Rule 414 evidence. App. a50–a56. These instructions would have directed the jury to consider this evidence only if it unanimously found it "more likely true than not true" that Mr. Paycer committed the "uncharged offense[s]" that the district court had identified as the predicates for the admission of this evidence. The instructions would have directed the jury to "disregard" this evidence if it found that these offenses had not been proved by a preponderance. The district court refused to give these instructions, reasoning that this Court "simply has not adopted that approach." App. a57.

The government's star witnesses at Mr. Paycer's trial, apart from SL, were the Rule 414 witnesses—IW, CM, and KM.

IW was the daughter of a woman Mr. Paycer had dated four years earlier. She testified that when she was 7, Mr. Paycer spent a night at her house in

Sullivan, Missouri. She said she fell asleep on the mattress that she, her mother, and Mr. Paycer shared in the living room, and that during the night she awoke to feel him touching her "where I go pee" underneath her clothes. She acknowledged that she hadn't made this allegation to anyone until a few months before trial. She explained that someone had called her mother, saying that Mr. Paycer was "doing it to a lot of other kids," and that her mother asked her whether Mr. Paycer "did anything" to her. Initially she told her mother "no," but when her mother "kind of like knew that I was lying" and asked her again, she made the allegation.

CM and KM were sisters who the FBI learned about from a Facebook post. Their mother was a woman Mr. Paycer had dated eight or nine years earlier.

CM testified that nine years earlier, when she was 7 and at Mr. Paycer's house, he had inserted his fingers in her vagina and moved them in and out, and had placed her hand on his penis. She acknowledged her own checkered history, which included running away at the age of 12, stealing cars at 13 or 14, abusing meth starting when she was 14, and getting kicked out of a home for exploited girls by breaking glass and cutting a staff member.

KM testified that eight years earlier, when she was 6 and staying at Mr. Paycer's house, she awoke one morning to feel what she believed was Mr. Paycer touching the spot where she went pee and making a circular motion. She testified that she heard a voice she believed was Mr. Paycer's saying, "Don't tell anybody." She said this happened two times, close together. She acknowledged that she had

not made this allegation to anyone other than her sister CM until after she read posts about Mr. Paycer on social media.

SL testified on the second day of trial. She claimed that on multiple occasions Mr. Paycer had touched her "pee spot" under her clothes with his hand at the Sand Springs and Kellyville homes. She also said that Mr. Paycer had touched her pee spot with a vibrating "thingy" at the Kellyville home.

In its closing argument, the government described the testimony of IW, CM, and KM as the "[f]irst, second, and third" reasons the jury should believe SL's allegations. The district court instructed the jury that it had "heard evidence" that Mr. Paycer "may have committed other offenses of child sexual abuse," and that it could "consider this evidence for its bearing on any matter to which it is relevant." Later that afternoon, the jury returned its guilty verdict. Although Mr. Paycer had no Criminal History points, the United States Sentencing Guidelines recommended a sentence of life imprisonment, which the district court imposed.

On appeal to the Tenth Circuit, Mr. Paycer challenged (*inter alia*) the district court's refusal to give his proffered instruction regarding the Rule 414 testimony of IW, CM, and KM. He argued that the instruction was necessary to ensure that the jury would consider this evidence only if it was relevant and proper under Rule 414. But while it acknowledged that Mr. Paycer's arguments were "not without weight" (App. a37), the court of appeals affirmed the district court's refusal to give the instruction. *Id*. a36–a47. The court reasoned that the instruction Mr. Paycer sought was not required by precedent or by the text of Federal Rule of Evidence 104(b), and

would likely create "significant complexity." App. a37. The court rejected Mr. Paycer's other challenges, and affirmed his conviction and sentence. Mr. Paycer filed a timely petition for rehearing, which the court of appeals denied. App. a49.

REASONS FOR GRANTING THE PETITION

The court of appeals opinion errs with respect to a question of exceptional importance, and is in tension with its own and this Court's precedent.

In *Huddleston v. United States*, 485 U.S. 681 (1988), this Court held that "similar act evidence" under Federal Rule of Evidence 404(b) "is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor." *Huddleston*, 485 U.S. at 689. The Court further noted that, pursuant to Federal Rule of Evidence 104(b), "[w]hen the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist." Fed. R. Evid. 104(b); *Huddleston*, 485 U.S. at 690. And while the trial court is only required to find, as a predicate for *admitting* the evidence, that a jury could reasonably find by a preponderance that the defendant committed the other acts, Fed. R. Evid. 104(b), the jury must actually *make* the finding. If it does not, it may end up basing its verdict on evidence the essential relevance of which has never been established.

Pursuant to *Huddleston* and Rule 104(b), therefore, the jury must be instructed to consider "other acts" evidence only if it finds, unanimously and by a preponderance, that the defendant committed the "other acts." See *United States v. Beechum*, 582 F.2d 898, 913 (5th Cir. 1978) (noting that extrinsic offense under Rule 404(b) is relevant "assuming the jury finds the defendant to have committed

it") (cited in *Huddleston*, 485 U.S. at 689); 1 Edward J. Imwinkelried, *Uncharged Misconduct Evidence* § 2:6 (West, Westlaw through December 2025 Update) ("On a proper request by the opponent, the judge instructs the jury that they must finally decide whether the fact exists.") (citing Cal. Evid. Code § 403(c)); Cal. Evid. Code § 403(c) (if court admits evidence relevance of which depends on "preliminary fact," the court "[m]ay, and on request shall, instruct the jury to determine whether the preliminary fact exists and to disregard the proffered evidence unless the jury finds that the preliminary fact does exist") (cited in Fed. R. Evid. 104(b) advisory committee's note to 1972 proposed rule); Model Crim. Jury Instr. 8th Cir. 2.08A (2025); CALCRIM 1191A (West, Westlaw through April 2025 Update). The court of appeals' refusal to give Mr. Paycer's proffered instructions conflicts with the important principles established in *Huddleston*.

The court of appeals' holding is also in tension with its own precedent. In *United States v. Platero*, 72 F.3d 806 (10th Cir. 1995), the court reviewed a conviction for aggravated sexual assault in violation of 18 U.S.C. § 2241(a). The defendant was charged with impersonating a police officer, removing a woman from a car she was riding with a male friend under the guise of arresting her, raping her, and then returning her to the car. *Platero*, 72 F.3d at 808. Before trial, the defendant filed a motion under Federal Rule of Evidence 412 seeking to introduce evidence that the victim had been in a romantic relationship with the male friend, to show that she had a motive to fabricate the rape allegation. *Id*. Rule 412 generally bars the admission of evidence of a victim's past sexual behavior in sex-

offense cases, but creates an exception for evidence the exclusion of which would violate the defendant's constitutional rights. Fed. R. Evid. 412(b)(1)(C). The district court denied the defendant's motion on the basis of the court's conclusion that no sexual relationship had existed between the victim and her male friend at the time of the assault. *Platero*, 72 F.3d at 809.

The court of appeals held that the district court erred by deciding a factual question that the jury is meant to decide. The court stressed language in the Advisory Committee Note to Rule 412 making plain that a district court cannot bar the admission of other-conduct evidence based on its belief that the conduct did not occur, because this procedure would "raise[] questions of invasion of the right to a jury trial." *Id*. at 812 (italics removed). Pursuant to *Huddleston*, the court noted, where the relevance of evidence is conditioned on a question of fact, "that question goes to the *jury* for a determination, not to the judge." *Id*. at 814.

The court accordingly remanded the case, and directed the district court to instruct the jury that "it should first determine whether there was a romantic or sexual relationship between [the victim] and [her male friend] at the time of the alleged assault; that if it finds no such relationship, it should disregard the cross-examination of [the victim] on that subject; otherwise the jury may consider that cross-examination and other evidence of the relationship between [the male friend] and [the victim] in determining [the defendant's] innocence or guilt." *Id*. at 816. This is substantially identical to the instructions Mr. Paycer requested with respect to the Rule 414 evidence here.

Thus, as Mr. Paycer argued to the court of appeals, the district court abused its discretion by refusing to give the instructions he requested. The instructions were consistent with *Huddleston* and *Platero* and, because they would have limited the purpose for which the jury could use the Rule 414 evidence, they were mandatory upon Mr. Paycer's "timely request." Fed. R. Evid. 105. In light of this error—which effectively authorized the jury to consider the highly incriminating testimony of IW, CM, and KM without making the crucial finding necessary to establish its relevance—the court of appeals should have reversed Mr. Paycer's conviction and remanded the case for a new trial. The court's reasons for refusing to do so were flawed.

One prominent theme of the court of appeals' reasoning merits emphasis: The court repeatedly referenced the notion that *unanimity* is not required in respect to the jury's Rule 414 finding. This theme is misleading. The district court did not merely fail to instruct the jury that it had to make a *unanimous* finding that Mr. Paycer had committed offenses enumerated in Rule 414; it failed to instruct the jurors that they had to make *any* such finding, in order to consider that evidence. In place of Mr. Paycer's requested instructions, which would have required the jury to make that finding unanimously and by a preponderance (App. a50–a56), the district court merely instructed the jury that it had heard evidence that Mr. Paycer "may have committed" other child sexual abuse offenses, and that it "may consider this evidence for its bearing on any matter to which it is relevant." *Id.* a60. The district court thus gave the jury—and each individual juror—license to "consider" this

evidence against Mr. Paycer without making any finding that he had committed predicate offenses specified in Rule 414.

The court of appeals' assertion that "[n]either *Huddleston* nor *Platero* compels the giving of unanimity instructions in the Rule 104(b) context" (App. a37) is similarly misguided. As noted above, Mr. Paycer's claim does not turn on the requirement of a "unanimity instruction"; it turns on the requirement of a *finding*—specifically, the "finding that the fact does exist" described in Rule 104(b). And this Court made plain in *Huddleston*, with respect to Rule 404(b) evidence, that the essential relevance of "other act" evidence that a Rule declares admissible only upon the demonstration of preliminary facts depends upon the satisfaction of Rule 104(b). Rule 104(b) in turn requires proof "sufficient to support a finding that the [preliminary] fact does exist"—which carries with it the requirement that the jury make that finding; otherwise, the requirement of proof sufficient to "support" the finding would be pointless and the evidence's essential relevance would never be established.

The court of appeals went on to assert that Rule 104(b) provides no "textual hook" for Mr. Paycer's requested instruction. App. a45. But Rule 104(b) expressly requires the introduction of proof "sufficient to support a finding that the [preliminary] fact does exist"—and under the court of appeals' interpretation, this "finding" would never be made. In addition, Rule 104(b)'s advisory committee note cites California Evidence Code § 403(c)—which provides that if a court admits evidence the relevance of which depends on "preliminary fact," the court "[m]ay, and

on request shall, instruct the jury to determine whether the preliminary fact exists and to disregard the proffered evidence unless the jury finds that the preliminary fact does exist." The court of appeals criticized Mr. Paycer's reliance on § 403(c) (App. a44 n.11), but failed to acknowledge the provision's approving citation in the Advisory Committee's Notes to Rule 104(b). See Fed. R. Evid. 104(b), advisory committee's note to 1972 proposed rule.

Finally, the court of appeals raised policy concerns, asserting that a holding requiring an instruction of the sort Mr. Paycer sought here with respect to Rule 414 evidence would "seriously complicate district court proceedings," because it could implicate Federal Rules of Evidence 602, 901, and 1008—which also govern the admission of "conditionally relevant evidence." App. a45–a46.

Insofar as it suggests that an important question of federal law is at stake, the court of appeals' assertion supports the grant of certiorari. S. Ct. R. 10(c). The court notably does not suggest that these practical implications affect the meaning of Rule 104(b), or the merits of Mr. Paycer's claim. And in any case, these purported implications are illusory. The Eighth Circuit has a model instruction, and California has for almost 60 years had a Code provision, that mirror the instructions Mr. Paycer requested. Model Crim. Jury Instr. 8th Cir. 2.08A; Cal. Stats. 1965, c. 299, § 2 (enacting Cal. Evid. Code § 403(c), operative Jan. 1, 1967). Yet the court of appeals did not suggest that criminal trials have been "seriously complicated" by this approach in those jurisdictions.

Moreover, the court of appeals' premise is flawed. The court posits that any instruction required with respect to Rule 414 evidence would necessarily also be required with respect to evidence admitted pursuant to Rules 602, 901, and 1008. App. a45. But unlike those rules, Rule 414: (i) involves the sort of "other act" evidence at issue in *Huddleston*; (ii) expressly conditions the admission of such evidence on the prosecution's ability to demonstrate that the defendant "committed" a specific category of crime—the sort of finding traditionally assigned to the jury, rather than the judge; and (iii) requires advance disclosure of the evidence to the defendant. Fed. R. Evid. 414(a), (b). These important distinctions may explain why the Eighth Circuit's Model Jury Instructions, which resemble Mr. Paycer's requested Rule 414 instructions with respect to the admission of "other acts" evidence under Rules 404(b), 413, and 414 (Model Crim. Jury Instr. 8th Cir. 2.08, 208A), contain no similar instructions respecting the admission of evidence pursuant to Rules 602, 901, and 1008. In short, contrary to the court of appeals' rationale, the applicability of a holding in Mr. Paycer's favor with respect to Rule 414 to those other rules would have to be examined individually—and the outcome of those examinations would be far from a foregone conclusion.

In summary, the court of appeals' opinion fails to vindicate its ruling permitting the jury to consider other-crimes evidence the fundamental relevance of which has not been established as required by Rule 104(b) and by this Court's opinion in *Huddleston*.

CONCLUSION

The petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED this 27th day of February, 2026.

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