No. _____

In the Supreme Court of the United States

PRESIDENT DONALD J. TRUMP,

Applicant,

v.

E. JEAN CARROLL,

Respondent.

APPLICATION OF PRESIDENT DONALD J. TRUMP TO THE HONORABLE SONIA SOTOMAYOR TO EXTEND THE TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Pursuant to 28 U.S.C. § 2101(c) and Rules 13.5, 30.1, and 30.2 of the Rules of this Court, Applicant President Donald J. Trump respectfully requests a 60-day extension of time, up to and including Monday, November 10, 2025, to file his petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case. The opinion of the court of appeals (App., *infra*, 52A-128A) is reported at 124 F.4th 140. An order of the district court (App., *infra*, 129A-187A) is reported at 683 F. Supp. 3d 302.

The court of appeals entered its judgment on December 30, 2024. A petition for rehearing en banc was denied on June 13, 2025. The concurrence, dissent, and statement accompanying the denial of rehearing en banc (App., *infra*, 1A-51A) are reported at 141 F.4th 366 (Mem). Unless extended, the time within which to file a petition for a writ of certiorari would expire on September 11, 2025. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1254(1).

1. In 2019, President Donald J. Trump made statements denying false accusations brought against him in a *New York Magazine* article by E. Jean Carroll. President Trump made these statements from the White House in response to press inquiries about this matter of public interest, and the White House Press Office distributed his statements. The defamation action that Carroll filed in 2019 over President Trump's official statements is known as *Carroll I*. The Second Circuit heard oral arguments in *Carroll I* on June 24, 2025, in case number 24-644.

2. This application relates to *Carroll II*, an action that Carroll brought in 2022 against President Donald J. Trump that wrongly alleges battery and

defamation. President Trump has consistently and unequivocally denied Carroll's allegations in both cases.

3. *Carroll II* proceeded to trial before *Carroll I* as *Carroll I* was delayed because of proceedings concerning President Trump's presidential immunity defense and whether the United States could be substituted as a party for President Trump. *See Carroll* v. *Trump*, 49 F.4th 759, 761 (2d Cir. 2022) (holding that the President is an "employee of the government" for purposes of the Westfall Act, and certifying to the D.C. Court of Appeals the question of whether President Trump's statements were made within the scope of his employment as President of the United States); *Carroll* v. *Trump*, 66 F.4th 91, 94 (2d Cir. 2023) (per curiam) (remanding to the district court for further proceedings based on guidance from the D.C. Court of Appeals); *Carroll* v. *Trump*, 88 F.4th 418, 432 (2d Cir. 2023) (finding no error in the district court's denial, on grounds of undue delay and prejudice, of President Trump's request for leave to amend his answer to raise the defense of presidential immunity).

4. As a result of significant errors, Carroll obtained a $5 million award in *Carroll II*. Based on the incorrect findings in *Carroll II*, the district court wrongly applied issue preclusion in *Carroll I*, improperly preventing President Trump from contesting the merits in that action. Carroll then obtained an unjust judgment of $83.3 million in *Carroll I*.

5. President Trump intends to seek review by this Court of significant issues arising from the Second Circuit's erroneous decision in *Carroll II*. These issues involve, without limitation, disagreements among the Circuits, including divergences

in authority regarding the interplay between Federal Rules of Evidence 403 and 413-415, the application of Federal Rule of Evidence 404(b), and others.

6. Good cause exists for an extension to prepare a petition for a writ of certiorari in this case. Undersigned counsel faces a significant press of business due to many upcoming deadlines, including (i) a brief on a motion for permanent injunction due August 29, (ii) a reply brief in support of a dispositive motion due September 11, (iii) a dispositive motion argument to be held on September 15, (iv) a dispositive motion argument and evidentiary hearing on a motion for preliminary injunction to be held on September 16-17, and (v) an amicus brief in support of petitioners in a case pending before this Court due September 19.

7. The Applicant has not previously requested an extension.

Applicant respectfully requests that the time to file a petition for a writ of certiorari in this matter be extended 60 days, up to and including November 10, 2025.

August 27, 2025

Respectfully submitted,

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APPENDIX

23-793
Carroll v. Trump

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 13th day of June, two thousand twenty-five.

Present:

DEBRA ANN LIVINGSTON,
Chief Judge,
RAYMOND J. LOHIER, JR.,
MICHAEL H. PARK,
WILLIAM J. NARDINI,
STEVEN J. MENASHI,
EUNICE C. LEE,
BETH ROBINSON,
MYRNA PÉREZ,
SARAH A. L. MERRIAM,
MARIA A. KAHN,
Circuit Judges.

E. JEAN CARROLL,

Plaintiff-Appellee,

v. 23-793

DONALD J. TRUMP,

Defendant-Appellant.

For Defendant-Appellant:	D. John Sauer, James Otis Law Group, LLC, St. Louis, MO. Todd Blanche & Emile Bove, Blanche Law, New York, NY.
For Plaintiff-Appellee:	Roberta A. Kaplan (Matthew J. Craig, *on the brief*), Kaplan Martin, LLP, New York, NY. Joshua Matz & Kate Harris, *on the brief*, Hecker Fink LLP, Washington, DC.

Following disposition of this appeal on December 30, 2024, an active judge of the Court requested a poll on whether to rehear the case *en banc*. A poll having been conducted and there being no majority favoring *en banc* review, the petition for rehearing *en banc* is hereby **DENIED**.

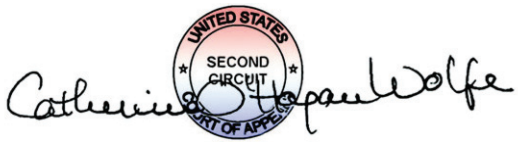
Myrna Pérez, *Circuit Judge*, joined by Eunice C. Lee, Beth Robinson, and Sarah A. L. Merriam, *Circuit Judges*, concurs by opinion in the denial of rehearing *en banc*.

Steven J. Menashi, *Circuit Judge*, joined by Michael H. Park, *Circuit Judge*, dissents by opinion from the denial of rehearing *en banc*.

Denny Chin and Susan L. Carney, *Circuit Judges*, filed a statement with respect to the denial of rehearing *en banc*.

Richard J. Sullivan, Joseph F. Bianco, and Alison J. Nathan, *Circuit Judges*, took no part in the consideration or decision of the petition.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



MYRNA PÉREZ, *Circuit Judge*, joined by EUNICE C. LEE, BETH ROBINSON, and SARAH A. L. MERRIAM, *Circuit Judges*, concurring in the denial of rehearing en banc:

Defendant-Appellant appealed a civil judgment against him for sexual assault and defamation, challenging several of the district court's evidentiary rulings. For the reasons discussed at length in its unanimous opinion, the panel, on which I sat, found no reversible abuse of discretion. *See Carroll v. Trump*, 124 F.4th 140 (2d Cir. 2024) (per curiam). The panel applied the now-axiomatic rule that, when reviewing evidentiary determinations, "an appellate court must defer to the lower court's sound judgment, so long as its decision falls within its wide discretion and is not manifestly erroneous." *United States v. Tsarnaev*, 595 U.S. 302, 323 (2022) (citation and internal quotation marks omitted).

The dissenting opinion would have us stray far from our proper role as a court of review. Without acknowledging the deferential standard we are duty-bound to apply, the dissenting opinion offers several arguments, many of which were not raised by Defendant to the panel or in his petition for rehearing.

Simply re-litigating a case is not an appropriate use of the en banc procedure. In those rare instances in which a case warrants our collective consideration, it is almost always because it involves a question of exceptional importance or a conflict between the panel's opinion and appellate precedent. Fed. R. App. P. 40(b)(2), (c). The dissenting opinion ignores this rule of restraint. It points to no exceptionally important issues, no cases that actually conflict with the panel's decision, and no persuasive justification for review of this case by the full Court.

Because there was no manifest error by the district court, and because the standard for en banc review has not been met, I concur in the denial of rehearing en banc.

MENASHI, *Circuit Judge*, joined by PARK, *Circuit Judge*, dissenting from the denial of rehearing *en banc*:

The panel opinion embraced a series of anomalous holdings to affirm the judgment of the district court. This is a defamation case involving public figures, but the district court excluded evidence of the defendant's contemporaneous state of mind, ensuring that the plaintiff easily met the actual malice standard. The panel opinion neglected to justify that exclusion. But it upheld the admission of propensity evidence on the dubious theory that evidence of prior acts of sexual assault could "prove the *actus reus*," meaning whether the defendant acted in accordance with the propensity on a later occasion. On top of its evasion of the bar on propensity evidence, the panel opinion interpreted Rule 415 to override the requirement of Rule 403 to balance the probative value of evidence against its prejudicial effect, permitting stale witness testimony about a brief encounter that allegedly occurred forty-five years earlier. And it read Rule 413(d), which authorizes the admission of evidence that the defendant committed a "crime" of "sexual assault," to allow testimony about prior acts that were neither crimes nor sexual assaults.

These holdings conflict with controlling precedents and produced a judgment that cannot be justified under the rules of evidence that apply as a matter of course in all other cases. In my view, the same rules should apply equally to all defendants.[1] The panel opinion sanctioned striking departures from those rules to justify the irregular judgment in this case, but the consequences of those holdings will not be limited to a single defendant. I would rehear the case *en banc* to "maintain uniformity of the court's decisions" and to resolve these important questions in line with

[1] *See* Judiciary Act of 1789, ch. 20, § 8, 1 Stat. 73, 76, 28 U.S.C. § 453.

longstanding principles. Fed. R. App. P. 40(b)(2)(A). I dissent from the decision of the court not to do so.

I

After E. Jean Carroll announced that she would sue him, President Trump said that the lawsuit was a "Hoax" and a "con job" that was "just like all the other Hoaxes that have been played on me for the past seven years." App'x 2858. To impose liability on Trump for defamation based on that statement, the jury needed to find that Carroll had proved, by clear and convincing evidence, that Trump had spoken with "actual malice," meaning he "made the statement knowing that it was false or acted in reckless disregard of whether or not it was true." *Carroll v. Trump*, 683 F. Supp. 3d 302, 320 (S.D.N.Y. 2023); *see also New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964).[2]

A hoax, like a con job, is an act of fabrication intended to promote some belief. At trial, Trump sought to introduce evidence and to question Carroll about facts that could lead a reasonable observer to believe that the lawsuit was fabricated to advance a

[2] In a footnote, the district court dismissed the argument that the statement was a non-actionable expression of opinion, *see Carroll v. Trump*, 650 F. Supp. 3d 213, 226 n.57 (S.D.N.Y. 2023), even though that is how denials of wrongdoing in response to high-profile lawsuits have been treated in other cases, *see, e.g.*, *Hill v. Cosby*, 665 F. App'x 169, 175-76 (3d Cir. 2016) (holding that a statement by Bill Cosby's attorney characterizing allegations as "unsubstantiated, fantastical stories" and "ridiculous" characterized the accuser as a liar but nevertheless was a non-actionable opinion); *Pecile v. Titan Cap. Grp., LLC*, 947 N.Y.S.2d 66, 67 (1st Dep't 2012) ("The statement, made to the media, that plaintiffs' suit was without merit constituted mere opinion, and was therefore nonactionable. The use of the term 'shakedown' in the statement did not convey the specificity that would suggest that the … defendants were seriously accusing plaintiffs of committing the crime of extortion.") (internal quotation marks, citation, and alteration omitted).

political agenda. Carroll had testified, for example, that she was disinclined to bring a lawsuit until a political opponent of President Trump had "crystallized" the stakes for her. App'x 1705. Despite her initial testimony that no one else was funding the lawsuit, Carroll eventually admitted that "one of the largest donors to the Democratic [P]arty"—a "vocal critic of [President Trump] and his political policies" who had "been funding groups to create a bulwark against Mr. Trump's agenda"—was financing the nonprofit that paid her legal fees. *Id.* at 1177 (internal quotation marks omitted). Carroll had "stated in the public" that she "had DNA" from the purported encounter with Trump, but in the litigation she never produced a DNA report and abandoned the effort to obtain a DNA sample. *Id.* at 468-69. She was asked on television if she "would consider bringing a rape charge" and said she would not do so because it would be "disrespectful" to victims of rape. *Id.* at 3027-28. She wrote in a published book that surveillance cameras captured Trump on the day of the incident, but she did not seek to obtain the footage to support her lawsuit. *Id.* at 1840-41. Prior to filing the lawsuit, Carroll sought out another witness, Natasha Stoynoff, and created a transcript of an interview that suggests Carroll was coaching her on what to say.[3]

This evidence makes it more likely that President Trump believed that the lawsuit had been concocted by his political opposition—and therefore that he was not speaking with actual

[3] Stoynoff denied that Trump had "grind[ed]" against her. App'x 1390-92. Carroll responded with statements such as "You shook your head and pushed back. Now think. Did he grind against you?," *id.* at 1392, and "[A]re you quite sure he didn't grind against you[?] … I think his pelvis was against you," *id.* at 1407.

malice when he called it a hoax.[4] Indeed, Trump argued to the district court that the evidence "strikes at the heart" of "whether the instant action is a 'hoax' that was commenced and/or continued to advance a political agenda." App'x 1177. And he argued to our court that the district court improperly "precluded admissible evidence and cross-examination of witnesses on core issues relating to … President Trump's truth defense on Plaintiff's defamation claim." Appellant's Br. 40; *see also* App'x 553 (asserting the defense that "Defendant did not publish with actual malice").

The district court excluded the evidence and limited cross-examination even though it never addressed this argument. Our court affirmed the judgment without addressing the relevance of the excluded evidence to the issues of actual malice or President Trump's truth defense. The panel opinion considered whether the evidence was probative of "credibility" or "bias and motive," 124 F.4th at 171,[5]

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[4] Because the purported conduct underlying the lawsuit had allegedly occurred almost thirty years earlier and "lasted just a few minutes," *Carroll v. Trump*, 124 F.4th 140, 151 (2d Cir. 2024), at the time of his statement President Trump might not have even remembered any interaction—even assuming one occurred—let alone still regarded a lawsuit based on such long-ago events as a politically motivated hoax. Normally, the statute of limitations would have prevented such a suit, but New York suspended the statute of limitations and Carroll sued "nine minutes after the [suspension] became effective." 650 F. Supp. 3d at 218.

[5] Those holdings were also questionable. The Supreme Court has said that "[p]roof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony." *United States v. Abel*, 469 U.S. 45, 52 (1984). Yet the district court restricted the defense's ability to make arguments and to ask questions about the political organization behind the lawsuit. *See* App'x 1487, 2032.

but it said nothing about how the excluded evidence "had significant probative value" with respect to "President Trump's truth defense," Appellant's Br. 43, and how the exclusion therefore undermined Trump's ability to establish that he did not speak with actual malice.

The actual malice standard famously raises "the plaintiff's burden of proof to an almost impossible level." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 771 (1985) (White, J., concurring in the judgment). In fact, "the actual malice standard has evolved from a high bar to recovery into an effective immunity from liability." *Berisha v. Lawson*, 141 S. Ct. 2424, 2428 (2021) (Thomas, J., dissenting from the denial of certiorari). Even if a speaker were to spread an obvious falsehood, a jury still cannot find actual malice unless "there is sufficient evidence" to establish "the speaker's subjective doubts about the truth of the publication." *Church of Scientology Int'l v. Behar*, 238 F.3d 168, 174 (2d Cir. 2001).[6] And evidence "may negative actual malice by showing that [the] defendant, though mistaken, had reasonable grounds for belief in the

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The panel opinion concluded that such evidence had "minimal, if any probative value." 124 F.4th at 173. But "cross-examination directed toward revealing possible biases, prejudices, or ulterior motives" is "especially 'important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be … motivated by malice, vindictiveness, intolerance, prejudice, or jealousy.'" *Fuentes v. Griffin*, 829 F.3d 233, 247-48 (2d Cir. 2016) (emphasis omitted) (quoting *Greene v. McElroy*, 360 U.S. 474, 496 (1959)).

[6] *See also Karedes v. Ackerley Grp., Inc.*, 423 F.3d 107, 114 (2d Cir. 2005) ("[A]ctual malice 'relates to whether the defendant published without believing the truth of the publication.'") (quoting Robert D. Sack, Sack on Defamation § 5.5.1.1, at 5-68 (3d ed. 2005)).

truth of the charge contained in the publication." *Crane v. N.Y. World Telegram Corp.*, 308 N.Y. 470, 476 (1955).[7]

In this case, the evidence of the political organization behind the lawsuit would have made it more difficult to conclude that President Trump subjectively "entertained serious doubts as to the truth" of his description of the lawsuit as a hoax that was part of a larger organized political effort. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). But the district court prevented the jury from seeing that evidence without explaining why it did not undercut the defense that almost always provides "immunity from liability" even when the purportedly defamatory statements are less clearly part of political debates. *Berisha*, 141 S. Ct. at 2428 (Thomas, J.). The exclusion allowed Carroll to argue in rebuttal that "Trump needs you to believe that everyone is lying because they're in this grand conspiracy to take him down" but "there is just no evidence of that." App'x 2740-41. The panel opinion did not explain why the exclusion of that evidence did not undermine President Trump's truth defense—or otherwise why this case looks so different from the typical one in which the actual

[7] *See also Sharon v. Time, Inc.*, 103 F.R.D. 86, 94 (S.D.N.Y. 1984) ("[T]he same concerns which motivated the state courts' treatment of 'common law' actual malice seem applicable to the admissibility of evidence of past acts on the question of 'constitutional' actual malice as well. TIME may well be able to argue that its knowledge of General Sharon's prior 'vicious brutality toward Arab civilians' tends to negate any inference of actual malice because its knowledge of these past instances shows that TIME personnel could reasonably have believed the truth of the information published in the article involved in this case.").

malice standard applies.[8] I would reconsider this outcome-determinative question *en banc*.

II

The exclusion of evidence relevant to actual malice becomes even more conspicuous when contrasted with the permissive approach of the panel opinion to the admission of character evidence under Rule 404(b).

The panel said that evidence of a prior bad act—the *Access Hollywood* tape—was "sufficiently similar" to "the conduct alleged by Ms. Carroll" that it was admissible "to show the existence of a pattern tending to prove the *actus reus*, and not mere propensity." 124 F.4th at 169. And the tape could "corroborate witness testimony" on the ultimate question of "whether the assault of Ms. Carroll actually occurred." *Id.* at 169-70. The panel's use of Latin terminology might obscure the import of this holding: If evidence of past conduct was introduced to prove or to corroborate the *actus reus*—that is, the

[8] The statement in support of the denial of rehearing *en banc* asserts that the issue of actual malice "was not raised" in this case because President Trump's "principal defense at trial was … that his statements about Plaintiff … were true." *Post* at 3. The appellate brief argued that the district court improperly "precluded admissible evidence and cross-examination of witnesses on core issues relating to … President Trump's truth defense on Plaintiff's defamation claim." Appellant's Br. 40. In the context of a defamation claim, a "truth defense" is precisely the argument that the defendant believed the statement was true and therefore did not speak with actual malice. But even if a "truth defense" were distinct from an "actual malice defense," the panel opinion still failed to explain why the evidence could be excluded despite its relevance to the truth defense. The panel opinion did not mention the "truth defense" at all. The evidence that tended to show that President Trump subjectively believed his description to be true also tended to show that the description was true.

ultimate question of whether he did it—that means the jury was invited to find that President Trump had committed the alleged acts because he had purportedly done something similar in the past. But "[e]vidence of any other crime, wrong, or act is *not admissible* to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Fed. R. Evid. 404(b)(1) (emphasis added).

The panel opinion erroneously sanctioned the admission of evidence of prior conduct not to prove identity or knowledge—or to corroborate any fact in dispute aside from the ultimate question of guilt or innocence—but to show that the defendant had a propensity for engaging in culpable conduct.

A

In order to admit evidence of other acts "to establish a pattern of conduct," the "extrinsic acts must share 'unusual characteristics' with the act charged or represent a 'unique scheme.'" *Berkovich v. Hicks*, 922 F.2d 1018, 1022 (2d Cir. 1991) (quoting *United States v. Benedetto*, 571 F.2d 1246, 1249 (2d Cir. 1978)). Such evidence may be admitted only when the other acts are "so nearly identical in method as to earmark them as the handiwork of the accused. Here much more is demanded than the mere repeated commission of crimes of the same class, such as repeated burglaries or thefts. The device used must be so unusual and distinctive as to be like a signature." *Benedetto*, 571 F.2d at 1249 (quoting McCormick on Evidence § 190, at 449 (2d ed. 1972)).[9] Only that way will the evidence be offered for a

[9] *See also* 1 McCormick on Evidence § 190.3 (9th ed. 2025) ("Uncharged crimes by the accused may be admissible when they are so nearly identical in method as to earmark them as the handiwork of the accused. The phrase

permissible purpose such as proving "preparation, plan," or "identity." Fed. R. Evid. 404(b)(2).

We have further explained that "other-crime evidence is only admissible for the purpose of corroboration if 'the corroboration is direct and the matter corroborated is significant,'" *United States v. Mohel*, 604 F.2d 748, 754 (2d Cir. 1979) (quoting *United States v. Williams*, 577 F.2d 188, 192 (2d Cir. 1978)), such as when a witness has testified that the defendant claimed to have "prior experience" at robbing banks, *Williams*, 577 F.2d at 192.

The danger against which these doctrines guard is that "[i]f defined broadly enough, *modus operandi* evidence can easily become nothing more than the character evidence that Rule 404(b) prohibits." *United States v. Smith*, 103 F.3d 600, 603 (7th Cir. 1996).[10] For that reason, courts "construe the *modus operandi* exception narrowly." *United States v. Griffith*, No. 89-CR-50581, 1992 WL 231087, at *4 (9th Cir. Sept. 18, 1992) (emphasis added).

In this case, there was no fact to which Carroll testified that the prior acts corroborated aside from the ultimate question of guilt. The panel opinion did not explain "how the challenged testimony corroborated any consequential testimony except insofar as it tended to show that appellant was a bad man likely to have committed the

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of which authors of detective fiction are fond, modus operandi, may be employed. Much more is demanded than the mere repeated commission of crimes of the same class, such as serial murders, robberies or rapes. The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature.") (footnotes omitted).

[10] *See also United States v. Carroll*, 207 F.3d 465, 469 (8th Cir. 2000) ("[W]here [the] alleged *modus operandi* is really just [a] garden variety criminal act any inference of identification would be based on [the] forbidden inference of propensity.") (internal quotation marks omitted).

crimes charged in the indictment—a clearly impermissible use." *United States v. O'Connor*, 580 F.2d 38, 43 (2d Cir. 1978).[11] When the panel opinion said that the evidence of prior acts could show "a pattern tending to prove the *actus reus*"—and thereby "to confirm that the alleged sexual assault actually occurred," 124 F.4th at 169-70—it meant that a jury would be more likely to conclude that President Trump committed the alleged acts after it heard that he allegedly attempted a similar assault in the past.[12] That is propensity evidence, and it is not admissible under Rule 404(b). *See* Fed. R. Evid. 404(b)(1); *Mohel*, 604 F.2d at 755.

In fact, the district court recognized that it was admitting propensity evidence. It explained that "the evidence that Mr. Trump seeks to keep from the trial jury is to the effect that Mr. Trump allegedly has abused or attempted to abuse women other than Ms. Carroll in ways that are the comparable to what he allegedly did to Ms. Carroll. In other words, Ms. Carroll offers the evidence to show that Mr. Trump has a propensity for such behavior." *Carroll v. Trump*,

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[11] *See United States v. Bailey*, 319 F.3d 514, 520 (D.C. Cir. 2003) ("To decide if Rule 404(b) evidence is admissible for corroboration, the court must determine what is being corroborated and how.").

[12] *But see United States v. Scott*, 677 F.3d 72, 81 (2d Cir. 2012) ("[T]here is no such corroboration here, except to the impermissible extent it suggests that, since Scott had been up to no good before, the detectives were right to think that he was up to no good again. … The government here has failed to show to how the recognition testimony was relevant to corroborating the detectives' other testimony."); *United States v. Brewer*, 915 F.3d 408, 415 (7th Cir. 2019) ("[A]fter a Rule 404(b) objection, the proponent of the other-act evidence must demonstrate that the evidence is relevant to a legitimate purpose through a chain of reasoning that does not rely on the forbidden inference that the person has a certain character and acted in accordance with that character on the occasion charged in the case.") (internal quotation marks omitted).

660 F. Supp. 3d 196, 199 (S.D.N.Y. 2023) (emphasis omitted). The district court said that "Mr. Trump almost certainly is correct in arguing that the quoted statements on the *Access Hollywood* tape are offered by plaintiff for only one purpose: to suggest to the jury that Defendant has a propensity for sexual assault and therefore the alleged incident with Ms. Carroll must have in fact occurred." *Id.* at 201 (internal quotation marks and alteration omitted).

Because "the Federal Rules of Evidence ordinarily preclude propensity evidence," *id.*, the district court initially decided that the propensity evidence was admissible not under Rule 404 but pursuant to Rule 415. The district court later retreated from that decision with respect to the *Access Hollywood* tape, concluding that "reliance on Rule 415 was unnecessary because the video was offered for a purpose other than to show the defendant's propensity." 683 F. Supp. 3d at 314 n.20. The district court thought that the *Access Hollywood* tape amounted to "a confession" because "one of the women he referred to in the video could have been Ms. Carroll." *Id.* For that reason, the district court "did not include the *Access Hollywood* tape in its instructions to the jury on the evidence" admitted under Rule 415. *Id.*

The panel opinion could not defend the eccentric conclusion of the district court that the tape was admissible as a confession.[13] But in place of that erroneous conclusion the panel opinion adopted a rationale for admitting the propensity evidence under Rule 404 that just as clearly conflicts with applicable precedent.

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[13] *See* 124 F.4th at 167 ("We are not fully persuaded by the district court's second basis for admitting the recording—that the tape captured a 'confession.'") (quoting 683 F. Supp. 3d at 326).

B

Even on its own terms, the argument of the panel opinion does not make sense. The *Access Hollywood* tape does not describe the purported pattern that the panel opinion identified. According to the panel, the tape reflected a pattern of conduct in which President Trump "engaged in an ordinary conversation with a woman he barely knew, then abruptly lunged at her in a semi-public place and proceeded to kiss and forcefully touch her without her consent." 124 F.4th at 169.

In the tape, Trump recounts an interaction with Nancy O'Dell, a co-host of *Access Hollywood*, with whom he went furniture shopping when she was visiting Palm Beach. At some unspecified time and place after the shopping excursion, he "moved on her" but "couldn't get there." App'x 2883. Then later in the tape he states that "I'm automatically attracted to beautiful" women and will "start kissing them" because "when you're a star they let you do it." *Id.*

There is no indication in the tape that this was a woman he barely knew, that he was engaged in "ordinary conversation" before he "abruptly lunged at her," that he "lunged" at her at all, that he did so in a "semi-public place," or that he forcefully touched her without her consent. On this last point, the panel opinion at least acknowledged that the tape specifies that "they let you do it" but the panel concluded that the jury could still determine that some conduct was nonconsensual. *See* 124 F.4th at 167-68. The panel opinion did not explain how the *Access Hollywood* tape reflects the other features of the purported pattern.

Even if the tape had reflected the purported pattern—of conversing in a semi-public place and then making an unwanted advance—it still would qualify as propensity evidence. Our

"inclusionary approach" to Rule 404(b) "does not invite the government 'to offer, carte blanche, any prior act of the defendant in the same category of crime.'" *United States v. McCallum*, 584 F.3d 471, 475 (2d Cir. 2009) (quoting *United States v. Garcia*, 291 F.3d 127, 137 (2d Cir. 2002)). Evidence of prior acts "is admissible" to "prove other like crimes by the accused" only when those crimes are "so nearly identical in method as to earmark them as the handiwork of the accused." *Benedetto*, 571 F.2d at 1249. We demand "much more … than the mere repeated commission of crimes of the same class, such as repeated burglaries or thefts," and require that the conduct "be so unusual and distinctive as to be like a signature." *Id.*

The *Access Hollywood* tape does not describe the defendant making an unwanted advance with a new acquaintance in a semi-public place. But even if it did, that conduct would not be "so unusual and distinctive as to be like a signature." *Id.* And even if that indistinctive conduct amounted to a *modus operandi*, it still would qualify as propensity evidence because it was not offered for a permissible purpose such as proving "preparation, plan," or "identity." Fed. R. Evid. 404(b)(2). As in other cases in which we have held the admission of prior acts evidence to be impermissible, "identity had not been placed in issue here." *O'Connor*, 580 F.2d at 42. The trial focused on whether an assault had occurred; if it had, there was no question about the identity of the assailant.[14]

If the panel opinion remains a precedent of our court, a future plaintiff or the government will be able to introduce evidence of prior

[14] *See Benedetto*, 571 F.2d at 1249 ("Defendant did not claim that he took the money from the four companies named in the indictment innocently or mistakenly. He claimed that he did not take the money at all. Knowledge and intent, while technically at issue, were not really in dispute.").

conduct in which a defendant went on a mundane outing and sometime thereafter made a sexual advance. If that generic description of misconduct is "so unusual and distinctive," *Benedetto*, 571 F.2d at 1249, that it may be introduced "to prove the *actus reus*, and not mere propensity," *Carroll*, 124 F.4th at 169, then the panel opinion will have dramatic effects with respect to a range of alleged conduct. Such a low bar for the distinctiveness of prior conduct under Rule 404(b) effectively eliminates the prohibition on propensity evidence. I would rehear the case to reaffirm the precedents that establish the prohibition.

III

Our court has decided that Rules 413-15 create "an exception to the general 'ban against propensity evidence.'" *United States v. Schaffer*, 851 F.3d 166, 177 (2d Cir. 2017) (quoting *United States v. Enjady*, 134 F.3d 1427, 1432 (10th Cir. 1998)). We have done so based largely on legislative history that purportedly shows that, "[i]n passing Rule 413, Congress considered 'knowledge that the defendant has committed rapes on other occasions to be critical in assessing the relative plausibility of sexual assault claims and accurately deciding cases that would otherwise become unresolvable swearing matches.'" *Id.* at 178 (quoting *Enjady*, 134 F.3d at 1431 (quoting in turn 140 Cong. Rec. S12990-01, S12990 (daily ed. Sept. 20, 1994) (statement of Sen. Robert Dole))). It is a questionable method of interpretation to employ legislative history to override the express requirements of the rules, but at least we have identified a possible textual basis for the same conclusion.[15]

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[15] *See Schaffer*, 851 F.3d at 177-78 ("Unlike Federal Rule of Evidence 404(b), which allows prior bad act evidence to be used for purposes *other than* to

The panel opinion, however, extended the reliance on legislative history to exempt Rules 413-15 even from the normal requirements of Rule 403. We have said that "[b]oth Rule 609 and Rule 403 … oblige the trial court to assess the probative value of every prior conviction offered in evidence and the remoteness of a conviction, whatever its age, is always pertinent to this assessment." *United States v. Jacques*, 684 F.3d 324, 327 (2d Cir. 2012) (quoting *United States v. Figueroa*, 618 F.2d 934, 942 (2d Cir. 1980)). As a result, when testimony concerns events that are remote in time, that "remoteness reduces the reliability of testimony as to the events' occurrences." *Id.*

We have specifically held that Rule 403 applies to "evidence offered under Rule 414," which "does not mandate the admission of the evidence or eliminate the need for the court to conduct the analysis required under Rule 403." *United States v. Larson*, 112 F.3d 600, 605 (2d Cir. 1997). In this case—which involved witness testimony about events that purportedly occurred in 1978 and 2005—one would expect Rule 403 to require the standard evaluation of the probative value of the evidence in light of its remoteness.

But the panel opinion held that it did not. The panel announced that it would "apply Rules 413-415 in a manner that effectuates Congress's intent," and it followed the district court in recounting that "[o]ne of the original sponsors of the legislation proposing Rules 413-415 explained that 'evidence of other sex offenses by the defendant is often probative and properly admitted, *notwithstanding very substantial lapses of time in relation to the charged offense or offenses*.'"

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show a defendant's propensity to commit a particular crime, Rule 413 permits the jury to consider the evidence 'on any matter to which it is relevant.' In other words, a prosecutor may use evidence of prior sexual assaults precisely to show that a defendant has a pattern or propensity for committing sexual assault.").

124 F.4th at 170 (emphasis in original) (quoting 140 Cong. Rec. 23603 (1994) (remarks of Rep. Molinari)). Based on "this express intent" of an individual legislator, the panel opinion concluded that "the time lapse between the alleged acts does not negate the probative value of the evidence of those acts to the degree that would be required to find an abuse of discretion in admitting them for the jury's consideration." *Id.*

A

This approach—of relying on statements in the congressional record to alter the effect of the rules—represents a departure from how the rules are normally applied. The Supreme Court has told us that "[t]here is no need to consult extratextual sources when the meaning of a statute's terms is clear" and that "extratextual sources" may not "overcome those terms." *McGirt v. Oklahoma*, 591 U.S. 894, 916 (2020). As in statutory interpretation, "[w]e give the Federal Rules of Civil Procedure [and of Evidence] their plain meaning, and generally with them as with a statute, when we find the terms unambiguous, judicial inquiry is complete." *Pavelic & LeFlore v. Marvel Ent. Grp.*, 493 U.S. 120, 123 (1989) (internal quotation marks, alterations, and citation omitted).[16] In applying the plain meaning of the rules, we cannot override the text with expressions of legislative intent. "Like a judicial opinion and like a statute, the promulgated Rule says what it says, regardless of the intent of its drafters." *Tome v. United States*, 513 U.S. 150, 168 (1995) (Scalia, J., concurring in part and concurring in the judgment). "The text of a rule thus proposed and

[16] *See also Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc.*, 498 U.S. 533, 540-41 (1991) ("As with a statute, our inquiry is complete if we find the text of the Rule to be clear and unambiguous."); *In re Chalasani*, 92 F.3d 1300, 1312 (2d Cir. 1996) ("[W]e must also accord the rules their plain meaning.").

reviewed limits judicial inventiveness," *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997), because "[w]e have no power to rewrite the Rules by judicial interpretations," *Harris v. Nelson*, 394 U.S. 286, 298 (1969).

We and other courts have emphasized that the Rule 403 analysis is especially important—and, if anything, should be *more* rigorous—when evidence is offered pursuant to Rules 413-15. "[T]he protections provided in Rule 403, which we … explicitly hold apply to evidence being offered pursuant to Rule 413, effectively mitigate the danger of unfair prejudice resulting from the admission of propensity evidence in sexual-assault cases" because "[w]here in a particular instance the admission of evidence of prior sexual assaults would create 'undue prejudice' and threaten due process, district courts can and should, by operation of Rule 403, exclude that evidence and ensure the defendant's right to a fair trial." *Schaffer*, 851 F.3d at 180. "Because of the inherent strength of the evidence that is covered by Fed. R. Evid. 415, when putting this type of evidence through the Fed. R. Evid. 403 microscope, a court should pay 'careful attention to both the significant probative value and the strong prejudicial qualities' of that evidence." *Doe ex rel. Rudy-Glanzer v. Glanzer*, 232 F.3d 1258, 1268-69 (9th Cir. 2000) (quoting *United States v. Guardia*, 135 F.3d 1326, 1330 (10th Cir. 1998)).

Appellate courts have emphasized that "a court must perform the *same* 403 analysis that it does in any other context … 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 (emphasis added).

The panel opinion, by contrast, held that the Rule 403 analysis must be *different* and *weaker* when evidence is offered pursuant to

Rules 413-15. In fact, the panel opinion did not conduct the remoteness analysis that Rule 403 requires at all. The panel considered only whether "the time lapse *between the alleged acts*" could "negate the probative value of the evidence of those acts." 124 F.4th at 170 (emphasis added).[17] But President Trump argued that Rule 403 required the exclusion of testimony based on the remoteness in time between the underlying incident and the testimony describing the incident.[18] That is the whole point of the remoteness analysis under Rule 403: Because memories fade and evidence is lost, prior acts may be "too remote in time to have any probative value"; even if testimony about those events "would be admissible under Rule 414," the "probative value is substantially outweighed by the resulting danger of unfair prejudice to [the defendant] in having to defend allegations so remote in time." *Larson*, 112 F.3d at 602 (describing the reasoning of the district court in excluding testimony that "would have described acts that occurred 'more than 21 years ago'").

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[17] The statement suggests that the "full context" of the panel opinion would show that it "properly analyzed … the lapse in time between the alleged acts and the testimony." *Post* at 9 n.8. It does not. The panel opinion quoted legislative history addressing the probative value of "evidence of other sex offenses by the defendant … *notwithstanding very substantial lapses of time in relation to the charged offense or offenses*." 124 F.4th at 170 (emphasis in original). It concluded that "the time lapse *between the alleged acts* does not negate the probative value of the evidence of those acts" and cited three cases in support of that proposition. *Id.* (emphasis added). None of those cases sanctioned the admission of testimony from forty-five years before trial. One held it was appropriate to exclude testimony that "would have described acts that occurred more than 21 years ago." *Larson*, 112 F.3d at 602 (internal quotation marks omitted).

[18] *See* Appellant's Br. 37 ("The remoteness of the alleged events that Leeds and Stoynoff described undercut the relevance and reliability of this evidence.") (internal quotation marks omitted).

In this case, the district court admitted testimony about events that occurred as much as forty-five years before the testimony was delivered at trial—over objections that those events were too remote under Rule 403. The panel opinion did not even address that argument, compounding its error of creating a novel exception to Rule 403.

B

In fact, there is every reason to believe that testimony in this case would have failed the standard Rule 403 analysis if either the district court or the appellate panel had been willing to apply it. Jessica Leeds testified that, approximately forty-five years earlier, she sat next to President Trump on an airplane, and he "grabbed [her] with his hands, tried to kiss [her], grabbed [her] breasts, and pulled [her] towards him." App'x 2131. She said that the entire encounter lasted "just a few seconds." *Id.* at 2103. The district court did not address Trump's argument that the Leeds testimony was inadmissible under Rule 403 because it was "subject to memory distortion" given that "the alleged events occurred so long ago." *Id.* at 80. Instead, the district court invoked the legislative history behind Rule 415 to conclude that the normal "limitations of Rule 403" do not apply to evidence admitted pursuant to Rule 415. 660 F. Supp. 3d at 208; *see also id*. at 208 n.30 (citing 140 Cong. Rec. at S12990 (statement of Sen. Robert Dole)). Rule 403, according to the district court, "must be applied with due regard for Congress's deliberate failure to impose temporal limits." *Id.* at 208.

When courts apply the normal rules of evidence, Rule 403 excludes testimony that has "become 'too attenuated' to be relevant or too remote to render the witness's memory reliable." *United States v. Curley*, 639 F.3d 50, 59 (2d Cir. 2011) (quoting *Larson*, 112 F.3d at

605). Leeds could not remember the year in which the airplane encounter occurred. She said it was "I think 1979 or '8." App'x 2098. When asked if she could identify a more precise date so that President Trump might be able to check his travel records, she said that she "really can't" because "[i]t's too far" in the past. *Id.* at 2130. She could not even remember the city in which she boarded the airplane. *See id.* at 2098.

We have never held that Rule 403 permits witness testimony based on an incomplete memory of a brief interaction that occurred forty-five years earlier. We have suggested that a district court properly *excluded* testimony—which was otherwise admissible under Rule 414—that "would have described acts that occurred more than 21 years ago" and therefore concerned events "too remote in time to have any probative value" and that would create a "danger of unfair prejudice to [a defendant] in having to defend allegations so remote in time." *Larson*, 112 F.3d at 602 (internal quotation marks omitted). In that case, Rule 403 required the exclusion of the testimony because the remoteness of the underlying events meant that the risk of unfair prejudice outweighed the probative value. *Id.* At the same time, we said that a district court could permissibly allow testimony that "covered events 16-20 years prior to trial" based on "strong indicators of the reliability of the witness's memory," such as "the traumatic nature of the events and their repetition over a span of four years." *Larson*, 112 F.3d at 605.

In this case, there were no strong indicators that the witness's memory was reliable. The events were not repeated over the course of four years but allegedly occurred within a few seconds on a flight coming from somewhere the witness could not remember in a year the witness could not remember but that was over four decades earlier. The lack of a full memory of the events created prejudice

because Trump could not introduce evidence of his whereabouts at that time or challenge the characterization of his conduct in the half-remembered encounter.

We have upheld the exclusion under Rule 403 of testimony about conduct "alleged to have occurred almost, or over, twenty-five years ago" because "[s]uch remoteness reduces the reliability of testimony as to the events' occurrences" and "the danger of unreliability is somewhat enhanced by the lack of a relatively contemporaneous adjudication." *Jacques*, 684 F.3d at 327. In this case, the remoteness was much greater and there was no contemporaneous adjudication.

If the district court had conducted the analysis that Rule 403 requires, it either would have excluded the testimony or it would have issued a decision at the outer boundary of when remote testimony has been put before a jury. *Cf. Doe v. Lima*, No. 15-CV-2953, 2020 WL 728813, at *6 (S.D.N.Y. Feb. 13, 2020) (excluding evidence of "robbery offenses" that "occurred more than 30 years ago" because "none of the prior offenses satisfies Rule 403"). But the district court did not even conduct that analysis, and our court has now excused the district courts in our circuit from applying the analysis that Rule 403 normally requires to evidence admitted under Rules 413-15. The panel opinion conflicts with our precedent holding, "like the Eighth, Ninth, and Tenth Circuits before us, that the protections provided in Rule 403 … apply to evidence being offered pursuant to Rule 413" and must be enforced to "mitigate the danger of unfair prejudice resulting from the admission of propensity evidence in sexual-assault cases." *Schaffer*, 851 F.3d at 180.

This is an important protection. "Exclusion of proof of other acts that are too remote in time caters principally to the dual concerns

for relevance and reliability." *Larson*, 112 F.3d at 605. Rule 403 requires an evaluation to address "these concerns" that "must be made on a case-by-case basis to determine whether the significance of the prior acts has become too attenuated and whether the memories of the witnesses has likely become too frail." *Id.* I would rehear this case *en banc* to restore our precedent holding that Rule 403 requires this evaluation and to remand to the district court to conduct it.

IV

The panel opinion treated Rules 413-15 anomalously in another way. The district court recognized that "[i]n order to be admissible under Rule 415, evidence of a sexual assault of a person other than the plaintiff must also have been a federal or state crime." 660 F. Supp. 3d at 203 n.12. Rule 413(d) defines "sexual assault" for the purposes of Rules 413 and 415 as a "crime under federal law or under state law … involving" (1) "any conduct prohibited by 18 U.S.C. chapter 109A," (2) "contact, without consent, between any part of the defendant's body—or an object—and another person's genitals or anus," (3) "contact, without consent, between the defendant's genitals or anus and any part of another person's body," (4) "deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person," or (5) "an attempt or conspiracy to engage in" the enumerated conduct. Fed. R. Evid. 413(d).

The plain language of Rule 413(d) provides that a crime of sexual assault must involve the violation of a statute that criminalizes conduct constitutive of sexual assault. "When choosing among interpretations of a statutory definition, the 'ordinary meaning' of the 'defined term' is an important contextual clue." *Delligatti v. United States*, 145 S. Ct. 797, 808 (2025) (quoting *Bond v. United States*, 572 U.S. 844, 861 (2014)). In Rule 413(d), the defined term is "sexual assault,"

so we must "prefer interpretations" of the definition that "encompass prototypical '[sexual assaults]' over those that do not." *Id.* If the definition "is to have a reasonable relationship to the term it defines, it must encompass cases where the offender" engages in conduct that violates a federal or state law criminalizing (1) the sexual misconduct enumerated in Rule 413(d)(1)-(4), or (2) the attempts or conspiracies to violate such laws that Rule 413(d)(5) identifies. The words "attempt" and "conspiracy," moreover, are terms of art referring to legal standards. For that reason, the terms have an established legal meaning.[19]

The panel opinion, however, held that the federal or state law "crime" of "sexual assault" need not "involv[e]" sexual assault at all. The panel said that the testimony concerning the airplane encounter was admissible under Rule 415 because "[i]n 1978 and 1979, just as it is now, it was a federal crime to commit a simple assault on an airplane. And on this record a jury could have reasonably found that Mr. Trump committed a simple assault." 124 F.4th at 160 (citing 18 U.S.C. § 113(e) (1976)). The panel opinion concluded that "a simple assault on an airplane" qualified as a sexual assault under Rule 413(d) because a jury could conclude that the alleged simple assault—which did not involve the touching of another's sexual organs—in fact involved an *attempt* to engage in a sexual touching. 124 F.4th at 160. In this way, the attempted sexual assault on which the panel relied to

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[19] *See* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 73 (2012) ("Sometimes context indicates that a technical meaning applies. … And when the law is the subject, ordinary legal meaning is to be expected, which often differs from common meaning."); *see also Hall v. Hall*, 584 U.S. 59, 73 (2018) ("[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.") (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947)).

satisfy Rule 413(d) was a completed simple assault. The panel opinion did not require a showing that the "attempt" under Rule 413(d)(5) qualified as a "crime under federal law or under state law" that criminalizes the attempted sexual assault.

Thus, even if a defendant did not commit an attempted sexual assault under any federal or state law, the panel opinion would still conclude that the defendant committed a "sexual assault" under Rule 413(d) based on speculation that he might have wanted to reach for other body parts while committing a simple assault.

That is a bizarre way to apply the definition of "sexual assault" in Rule 413(d). It means that a crime that does not prototypically involve the enumerated conduct nevertheless qualifies as a sexual assault. And even though Rule 413(d)(5) identifies the legal standard of attempt, the panel opinion allowed conduct which does not meet that standard to qualify as an attempted sexual assault.

A

Under no reasonable understanding of the definition of "sexual assault" in Rule 413(d) would committing a simple assault under § 113(e) qualify as a sexual assault. The conduct that § 113(e) proscribed did not involve the enumerated conduct defining a sexual assault crime in Rule 413(d). The district court did not rely on this "simple assault" theory,[20] and the panel opinion provided no explanation for introducing its counterintuitive conclusion that a simple assault on an airplane qualifies as a "crime" of "sexual assault" under the Federal Rules of Evidence.

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[20] *See* 124 F.4th at 161 n.13 ("The district court did not base its decision to admit the Leeds testimony on these specific statutes.").

Neither the panel opinion nor the underlying trial that it approved can be reconciled with the plain language of the federal rules. The district court admitted the Stoynoff testimony and the Leeds testimony pursuant to Rule 415. The district court did not rely on Rule 415 to admit the *Access Hollywood* tape, but the panel opinion held that it could have. Yet none of this evidence plausibly qualifies as "evidence that the party committed any other sexual assault" under the rule. Fed. R. Evid. 415(a).

The panel opinion and the district court admitted evidence that—those courts speculated—might have been an "attempt" to engage in the sort of conduct Rule 413(d) describes. But Rule 415 does not allow the admission of evidence of a freestanding "attempt" to engage in such conduct. The evidence must show that the party "committed" a "crime under federal law or under state law … involving" an "attempt or conspiracy to engage in conduct described in subparagraphs (1)-(4)." Fed. R. Evid. 415(a), 413(d). In other words, the evidence must show an attempt that is itself the commission of a crime.[21] Neither the panel opinion nor the district court required the evidence to show the commission of a crime involving attempted sexual assault.

The statement suggests that other circuits "have rejected precisely the argument that the dissent advances." *Post* at 4. But the

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[21] The statement insists that an "attempt" under Rule 413(d)(5) does not itself need to be a crime. *Post* at 6. But that ignores the language of Rule 413(d) providing that the enumerated conduct in all five subsections, including an attempt, must be a "crime under federal law or under state law." As the statement itself explains, "[t]o qualify as a sexual assault under Rule 413(d)," the prior conduct "must be (i) 'a crime under federal law or under state law' that (ii) involves any conduct matching at least one of five listed descriptions." *Id.* at 4 n.3 (citing Fed. R. Evid. 413(d), 413(d)(1)-(5)).

cases it cites all address prior charged crimes that prototypically—and did—involve criminal sexual assault.[22] Here, the panel opinion did not require that the prior uncharged conduct shown to the jury involve a criminal sexual assault. The statement invokes a familiar objection to the "categorical approach" to classifying criminal conduct according to enumerated elements—an approach on which this dissent does not rely. That approach sometimes leads to the counterintuitive result that a crime which prototypically involves the use of force will not be considered a "crime of violence" based on the possibility that its elements could be met without the use of force. *See*

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[22] *See United States v. Ahmed*, 119 F.4th 564, 567-68 (8th Cir. 2024) (holding, when the defendant was indicted for kidnapping two women for "sexual gratification," that for Rule 413 "to apply, Ahmed need not have been charged with any particular offense. What matters is whether the offense he was charged with involved conduct that Rule 413(d) deems to be sexual assault. Ahmed's kidnapping offenses did involve that kind of conduct."); *United States v. Foley*, 740 F.3d 1079, 1086-87 (7th Cir. 2014) ("Foley was charged with child pornography production, distribution, and possession under 18 U.S.C. chapter 110, as well as transporting a minor across state lines to engage in a sex act under 18 U.S.C. § 2423(a) …. [T]he government explained that Foley's child pornography crimes that were charged under 18 U.S.C. chapter 110 involved his molestation of Minor Male A on several occasions. For purposes of its Rule 413 analysis, the district court found that although Foley was charged under 18 U.S.C. chapter 110, his crimes involved conduct that was also prohibited under 18 U.S.C. chapter 109A, so his crimes would satisfy the first definition of 'sexual assault' under Rule 413(d)(1)."); *United States v. Batton*, 602 F.3d 1191, 1197 (10th Cir. 2010) ("Batton is charged with knowingly transporting J.D. across state lines with the intent of engaging in illicit sexual activity. The illicit sexual activities involv[ed] genital contact …. Moreover, the charged sexual activity also meets Rule 413's internal definition of sexual assault."); *United States v. Blazek*, 431 F.3d 1104, 1108 (8th Cir. 2005) ("At trial … the government introduced evidence of his 1997 conviction for Abusive Sexual Contact with a Minor in violation of 18 U.S.C. § 2244(a)(1).").

post at 5-6; *United States v. Scott*, 990 F.3d 94, 126 (2d Cir. 2021) (Park, J., concurring). The problem here, however, is that the approach of the panel opinion generates counterintuitive results in the opposite direction: crimes that neither prototypically nor actually involved criminal sexual assault still qualify as admissible evidence of sexual assault.

B

The district court admitted the Stoynoff testimony based on its conclusion that the testimony qualified as evidence of a sexual assault under Rule 415. The district court provided two reasons for that conclusion. In its view, the Stoynoff testimony described conduct that a reasonable jury could find was (1) a crime under Florida law, and (2) an attempt to engage in the sexual conduct that Rule 413(d)(2) describes. *See* 660 F. Supp. 3d at 205-07. Neither conclusion is defensible.

Stoynoff testified that President Trump put "his hands on my shoulders and he pushe[d] me against the wall and start[ed] kissing me, holding me against the wall" in a room at Mar-a-Lago. App'x 2350. The district court decided that the testimony described an attempt to violate the Florida sexual battery statute. *See* 660 F. Supp. 3d at 205 n.19 (citing Fla. Stat. § 794.011(5)(b)).[23] But Stoynoff never mentioned an attempt to touch her genitals. The district court nevertheless concluded that the alleged conduct could qualify as an

[23] *See also* 660 F. Supp. 3d at 205 ("Florida law defines 'sexual battery' as 'oral, anal, or female genital penetration by, or union with, the sexual organ of another or the anal or female genital penetration of another by any other object.'") (quoting Fla. Stat. § 794.011(1)(j)).

attempted sexual battery under Florida law.[24] But the Florida courts disagree. In *Rogers v. State*, the Florida Supreme Court reversed a conviction for attempted sexual battery in which an armed defendant grabbed the victim's breast and ordered her to remove her clothes. The Florida Supreme Court explained that "these acts do not rise to the level of an overt act toward the commission of a sexual battery." 660 So. 2d 237, 241 (Fla. 1995). The Florida courts have warned that evidence of "improper touching," even on "multiple occasions," does not establish an attempted sexual battery. *Ellis v. State*, 754 So. 2d 887, 887 (Fla. 5th D.C.A. 2000). If such conduct were sufficient to establish attempt, "every case of improper touching can be prosecuted as an attempted sexual battery." *Id.* at 888.

Even the case on which the district court relied for the attempt standard under Florida law explains that "[t]he act referred to is 'an overt act' and 'must reach far enough toward accomplishing the desired result to amount to commencement of the consummation of the crime.'" *Lockley*, 632 F.3d at 1244 n.6 (citation omitted) (quoting *Morehead v. State*, 556 So. 2d 523, 524 (Fla. 5th D.C.A. 1990)). Under that standard—rather than the truncated version that appears in the district court opinion—the conduct Stoynoff described does not amount to an attempted sexual battery.

The district court decided in the alternative that the Stoynoff testimony described a violation of the Florida general battery statute because "Mr. Trump's alleged kissing and groping of Ms. Stoynoff"

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[24] *See* 660 F. Supp. 3d at 205 ("[A]ttempt under Florida law requires the defendant to commit 'any act toward the commission of such [crime], but fails in the perpetration or is intercepted or prevented in the execution thereof.'") (quoting *United States v. Lockley*, 632 F.3d 1238, 1245 n.6 (11th Cir. 2011) (quoting in turn Fla. Stat. § 777.04(1))).

amounted to touching her "against her will." 660 F. Supp. 3d at 205.[25] And Trump might have acted to commit that battery "for the purpose of committing a state crime involving contact, without consent, between any part of Mr. Trump's body and Ms. Stoynoff's genitals." 660 F. Supp. 3d at 205 (internal quotation marks and alterations omitted). But a violation of the general battery statute is not plausibly "a crime under federal law or under state law" of "sexual assault." Fed. R. Evid. 413(d). And despite the requirement of Rules 415 and 413(d) that evidence of an "attempt" must show the commission of a "crime under federal law or under state law"—in other words, an attempted sexual assault crime—the district court endorsed the theory that a completed general battery might also serve as a freestanding "attempt" to engage in the type of conduct that Rule 413(d) describes.[26]

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[25] *See* 660 F. Supp. 3d at 205 ("It is a crime under Florida law 'actually and intentionally to touch or strike another person against the will of the other.'") (alterations omitted) (quoting Fla. Stat. § 784.03(1)(a)).

[26] To satisfy that questionable theory, the district court engaged in further questionable reasoning. The district court noted Stoynoff's pre-trial statement that Trump was "lying when he denied 'groping' her without her consent—in other words, that he 'groped' her." 660 F. Supp. 3d at 205. But the district court acknowledged that "Rule 413(d) is not that broad" as to allow evidence of any "groping" because the rule requires contact "only with particular parts of the anatomy." *Id.* at 206. The district court nevertheless concluded that a jury could consider evidence of *other prior acts* to supplement Stoynoff's testimony: "the *Access Hollywood* tape and the testimony of Ms. Leeds are additional evidence that a jury would be entitled to consider in deciding whether to infer that the ultimate goal of Mr. Trump's alleged actions with Ms. Stoynoff was to bring his hands or other parts of his anatomy into contact with Ms. Stoynoff's most private [parts]." *Id.* Thus, even under the district court's tendentious interpretation of Rule 415, the Stoynoff testimony still did not qualify as "evidence that

The panel opinion upheld the admission of the Stoynoff testimony based on the district court's theory that the testimony described "a crime under Florida law" and a separate, freestanding "attempt, under Rule 413(d)(5), to engage in conduct described in Rule 413(d)(2)." 124 F.4th at 163. It bears reiterating that Rule 413(d) does not allow the admission of evidence that a court speculates could be an attempt to engage in the conduct the rule describes. The evidence must show an attempt that is itself the commission of a crime. Nevertheless, the panel opinion indulged in speculation—unmoored from the elements of *any* crime—about whether a jury could have found "that Mr. Trump intended to bring his body into contact with Ms. Stoynoff's genitals and that he took substantial steps toward doing so." 124 F.4th at 163.

In addition to that theory, the panel opinion held that the Stoynoff testimony could also have been admitted as an attempt to violate 18 U.S.C. § 2244(b)—that is, "to 'knowingly engage in sexual contact with another person without that other person's permission.'"

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the party committed any other sexual assault," Fed. R. Evid. 415, without supplementing it with additional evidence of prior acts. That approach to Rule 415 was doubly erroneous: Before Rule 415 allows the district court to place evidence of a prior sexual assault before the jury, the district court must determine whether a hypothetical reasonable jury could conclude that the evidence shows the commission of a crime of sexual assault. In conducting that gate-keeping analysis, the district court may not assume—in a circular fashion—that the hypothetical jury has seen all the other evidence before the actual jury. In effect, the district court determined that the jury could rely on evidence of the charged conduct to infer that evidence of prior conduct could be admitted as evidence to prove the charged conduct.

124 F.4th at 164 (alteration omitted) (quoting 18 U.S.C. § 2244(b)).[27] But that theory does not make sense either.

At trial, Stoynoff retreated from her pre-trial statement about having been "groped." *See* App'x 2348-53. She instead testified that Trump put "his hands on my shoulders." *Id.* at 2350. Section 2244(b) refers to contact involving another person's "genitalia, anus, groin, breast, inner thigh, or buttocks." 18 U.S.C. § 2246(3). It does not mention shoulders. And we know from the federal case law that touching the shoulders and kissing does not amount to a "substantial step" toward unwanted sexual contact. "Generally, courts have held that mere solicitation and fully clothed but sexually suggestive acts are insufficient to constitute attempted 'sexual acts.'" *United States v. Blue Bird*, 372 F.3d 989, 993 (8th Cir. 2004). The Eighth Circuit has even held that there was no attempted sexual contact when the defendant "held [the victim's] hand, rubbed her stomach, pushed her t-shirt up to just below her breasts, kissed her, and said, 'Let's do it.'" *Id.* at 992. Acts that were still more suggestive have been held not to qualify.[28]

The panel opinion in this case, however, held that a jury could reasonably conclude that a defendant committed the crime of attempted abusive sexual contact under § 2244 when he touched a

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[27] *See also* 124 F.4th at 164 (noting that federal law defines "sexual contact" as "the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person") (quoting 18 U.S.C. § 2246(3)).

[28] *See, e.g.*, *United States v. Hayward*, 359 F.3d 631, 640 (3d Cir. 2004) ("The ambiguous and equivocal act of pushing a victim's head toward one's clothed penis does not meet any definition of a 'sexual act' as defined in 18 U.S.C. § 2246(2) and does not constitute a substantial step toward achieving 'contact between the mouth and the penis' under 18 U.S.C. § 2246(2)(B).").

woman's shoulders, kissed her against a wall, and—after desisting—made a suggestive remark. *See* 124 F.4th at 163-64. That decision is an outlier among reported federal cases.

Even the same district judge who presided over the trial in this case has previously recognized that testimony about such conduct does not qualify as admissible evidence of sexual assault under Rule 415. In another case involving alleged sexual misconduct, *Rapp v. Fowler*, the plaintiff sought to introduce testimony that the defendant had, on a prior occasion, sat next to a 16-year-old and put his hand "on my leg … about two inches above my knee." No. 20-CV-9586, 2022 WL 5243030, at *2 (S.D.N.Y. Oct. 6, 2022) (Kaplan, J.). The district court explained:

> The incident, assuming it occurred, is not said to have involved any "touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks." It therefore was not a "sexual contact" within the meaning of Section 2246(3). It thus was not a "sexual contact" for purposes of chapter 109A and not proscribed by virtue of Section 2244. The [proposed] testimony accordingly is not evidence of an "other sexual assault" within the meaning of Rule 415(a), regardless of any question of intent. *It is not admissible under Rule 415(a).*

Id. (emphasis added). In that case, the district court did not indulge in speculation that the actions might be "suggestive of a plan" eventually to reach the genitals—or even the inner thigh. 660 F. Supp. 3d at 206. And the district court did not consider whether the conduct might qualify as a general battery that, in conjunction

with such a plan, could satisfy Rule 415.[29] Those novel theories have been applied only in this outlier case.

C

The district court determined that the Leeds testimony described a sexual assault because the account "reasonably could be regarded as describing unconsented-to sexual contact by Mr. Trump and also as an attempt by Mr. Trump to bring at least his hands, and perhaps other parts of his body, into contact with Ms. Leeds' genitalia, in each case in violation of federal law." 660 F. Supp. 3d at 203. According to the district court, the conduct "therefore satisfies at least Rule 413(d)(2) and 413(d)(5) and thus Rule 415." *Id.* at 203-04. The district court said that the purported conduct on the airplane would violate 49 U.S.C. § 46506, which prohibits "sexual contact" on an airplane. *See id.* at 203 n.12.

The panel opinion did not even cite 49 U.S.C. § 46506. It instead decided that the conduct on the airplane was (1) a simple assault under 18 U.S.C. § 113(e), and (2) "an 'attempt' under Rule 413(d)(5) to engage in the conduct described in Rule 413(d)(2)." 124 F.4th at 160. But the district court had not even mentioned 18 U.S.C. § 113(e).

The courts could not agree on a rationale for admitting the testimony because none are convincing. A non-sexual-assault offense does not qualify as a "crime" of "sexual assault" under Rule 413(d). Nor does Rule 415 allow the introduction of evidence of an attempt "to engage in the conduct described in Rule 413(d)(2)" that is not the

[29] *See Rapp*, 2022 WL 5243030, at *1 n.4 ("Plaintiff's assumption that any crime characterized as sexual assault by state law qualifies is mistaken. In order to constitute 'sexual assault' for purposes of Rule 413(d), the conduct at issue must satisfy one of the five enumerated categories under that rule and, in addition, constitute a crime under either federal or state law.").

commission of "a crime under federal law or under state law." The new doctrine of the panel opinion that an "attempt" under Rule 413(d)(5) does not need to be a *criminal* attempt deprives the defendant of the ability to argue that the conduct would not qualify as an attempt under the relevant "federal law or … state law." The panel opinion dispensed with the requirement under Rule 415 to identify such a law.

D

The district court did not admit the *Access Hollywood* tape pursuant to Rule 415 but the panel opinion proceeded as if it had. "[W]e conclude," the panel opinion explained, "that the district court did not abuse its discretion in admitting the recording pursuant to Rules 413(d)(2), 413(d)(5), and 415." 124 F.4th at 167. But the district court actually determined that "reliance on Rule 415 was unnecessary because the video was offered for a purpose other than to show the defendant's propensity to commit sexual assault." 683 F. Supp. 3d at 313 n.20. As a result, the district court "did not include the *Access Hollywood* tape in its instructions to the jury on the evidence of Mr. Trump's alleged sexual assaults of other women" that it admitted pursuant to Rule 415. *Id.* The district court instructed the jury that it should apply the definition of sexual assault in Rule 413(d) only when "determining whether Mr. Trump sexually assaulted or attempted to sexual[ly] assault Ms. Leeds or Ms. Stoynoff." App'x 2803. It said that "the definition of 'sexual assault' that I have just given you applies only to your determination of whether to consider the evidence concerning alleged assaults or attempted assaults on those other

women. It has no application to anything else in these instructions." *Id.* at 2804.[30]

That difference in treatment means that the holding of the panel opinion that the tape was admissible under Rule 404(b) makes a difference. If the admissibility of the tape depended only on Rule 415, a court would need to decide whether the erroneous jury instruction mattered to the verdict. And a court would also need to identify the "crime" of "sexual assault" that the *Access Hollywood* tape described. In its preliminary ruling, the district court said only that "a jury reasonably could find … that Mr. Trump 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. … Accordingly, the tape satisfies Rule 415 by virtue of Rule 413(d)(2) and (d)(5)." 660 F. Supp. 3d at 203. The panel opinion said only that "the district court did not abuse its discretion in admitting the recording pursuant to Rules 413(d)(2), 413(d)(5), and 415." 124 F.4th at 167. No court identified "a crime under federal law or under state law," even under the loose interpretation of that requirement the courts applied to the other evidence.

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[30] The statement insists that the district court still relied on Rule 415 to admit the *Access Hollywood* tape. *See post* at 7 n.7. It does so in reliance on an order the district court issued in a different but related case eight months after the notice of appeal was filed in this case. In that order, the district court said that it admitted the tape "under Rule 415," citing its pretrial ruling, and "alternatively … under Rule 404(b)," citing the post-trial ruling in which it concluded that reliance on Rule 415 was unnecessary. *Carroll v. Trump*, No. 20-CV-7311, 2024 WL 97359, at *9 (S.D.N.Y. Jan. 9, 2024). Whatever the district court later claimed about admissibility, it instructed the jury that the standards for considering evidence admitted under Rule 415 did not apply to the tape. *See* App'x 2801-04.

As noted above, the tape describes an unspecified but unsuccessful advance toward Nancy O'Dell following a furniture-shopping excursion. And it includes the general statement about being "automatically attracted to beautiful" women and "kissing them" because "when you're a star they let you" engage in such conduct, including the touching of genitals. App'x 2883. It is difficult to evaluate whether the tape provides evidence of a crime of sexual assault under federal or state law because neither the district court nor the panel opinion identified such a law.

Still, the account of the interaction with O'Dell does not include any details of sexual conduct—let alone conduct that would constitute the commission of a crime of sexual assault under federal or state law. *See Jacques*, 684 F.3d at 327 (upholding the exclusion of evidence of prior alleged acts of sexual assault when there was "murkiness … with regard to whether, or how much, coercion was involved"). And even if the general statement—about what women might allow celebrities to do—could be interpreted to describe unwanted sexual conduct, it does not describe a particular act constituting a crime. Courts do not normally treat a statement describing conduct in general—such as "generic references to violence"—as probative of criminal conduct unless the statement has "a close relationship to a specific criminal act." *United States v. Jordan*, 714 F. Supp. 3d 158, 166-67 (E.D.N.Y. 2024). In other words, the speaker must reference "specific facts that might relate to his participation" in physical conduct that could be charged as a crime. *Id.* at 165. It is even more important to adhere to that principle when applying an evidentiary rule that requires the admitted evidence to

show that the defendant "committed" a "crime." Fed. R. Evid. 415(a), 413(d).[31]

* * *

The trial in this case consisted of a series of indefensible evidentiary rulings. The panel opinion sidestepped the law of defamation, diminished the bar on propensity evidence, weakened Rule 403's limitation on prejudicial evidence, and expanded extratextually the propensity evidence that can be admitted under Rules 413-15. Following the panel opinion, a district court may admit testimony against a criminal defendant to show a propensity for sexual assault based on alleged non-criminal acts that occurred more than four decades earlier with little consideration of prejudice under Rule 403.

The result was a jury verdict based on impermissible character evidence and few reliable facts. No one can have any confidence that the jury would have returned the same verdict if the normal rules of evidence had been applied. Because I would apply the same rules in every case regardless of the identity of the defendant, I dissent from the denial of rehearing *en banc*.

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[31] *See* Edward J. Imwinkelried, 1 Uncharged Misconduct Evidence § 2:17 (2024) (explaining that, unlike "the common law and Rule 404(b)," Rules 413-15 require that, "to qualify for admission, the act must amount to a criminal offense").

CHIN and CARNEY, *Senior Circuit Judges*, in support of the denial of rehearing en banc:

As members of the three-judge panel that decided the case, we fully endorse the concurrence filed by our third panel member, Judge Pérez, in the Court's denial of the petition for rehearing en banc.[1] The panel decision was correct, *see Carroll v. Trump*, 124 F.4th 140 (2d Cir. 2024), and the criteria for en banc rehearing have not been met. Fed. R. App. P. 40(b)(2).

The dissent takes issue with the panel's review of the district court's decisions to admit or exclude certain pieces of evidence over the course of a trial—decisions on which courts of appeals must "afford broad discretion to a district court." *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 384 (2008) (Thomas, *J.*).[2] On such review, the panel found no abuse of discretion, much less any manifest error, in the challenged district court rulings. *See United States v. Tsarnaev*, 595 U.S. 302, 323 (2022). And even assuming error in any of the district court's rulings, to warrant retrial Defendant also had to show that "it is likely that in some material respect the factfinder's judgment was swayed" by any error. *Warren v. Pataki*, 823 F.3d 125, 138 (2d Cir. 2016). For the reasons set forth in detail in our opinion, the panel concluded that Defendant failed to meet that standard as well. *See Carroll*, 124 F.4th at 178. The dissent demonstrates no error in this judgment and certainly none that warrants the Court's convening en banc.

Rehearing en banc is "not favored" and is permitted only in limited circumstances: if the panel decision conflicts with specific precedent of this Circuit,

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[1] As senior judges, Judges Chin and Carney have no vote on whether to rehear a case en banc. *See* 28 U.S.C. 46(c); Fed. R. App. P. 40(c). Pursuant to this Court's protocols, however, senior judges who were members of the panel deciding the case that is subject to the en banc petition may file a statement expressing their views where, as here, an active judge has filed a dissent from the denial of a petition for rehearing en banc.

[2] Unless otherwise noted, in text quoted from caselaw and the parties' briefing, this statement omits all alterations, citations, footnotes, and internal quotation marks.

another Circuit, or the Supreme Court, or if "the proceeding involves one or more questions of exceptional importance." Fed. R. App. P. 40(c), (b)(2)(A)–(D). None of these criteria is met here. The dissent fails to cite contrary binding authority or any prior decisions that, upon review, actually conflict with the panel's decision; it fails to acknowledge the deferential standard of review that binds us; and it fails to identify any single question of exceptional importance that requires en banc consideration.

Rehearing en banc is also correctly denied because arguments advanced now by the dissent were not raised or developed by Defendant, either in his initial appeal or even in his petition for rehearing. "Our adversary system is designed around the premise that the parties [represented by competent counsel] know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief." *Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia, *J.*, concurring in part and concurring in judgment).

We write separately to respond in more detail to several arguments raised now by the dissent, which a majority of the active judges of this Court correctly concluded did not warrant en banc review.

I. "Actual Malice"

The dissent faults the panel for not addressing the issue of "actual malice" and the exclusion of certain evidence that, in its view, might be related to that issue. Menashi, *J.*, dissenting from denial of reh'g en banc ("Dissent") at 4. Our colleague argues that, to prevail as a public-figure defamation plaintiff, Plaintiff had to prove that Defendant made the challenged defamatory statement with "actual malice," Dissent at 4–5, that is, "with knowledge that it was false or with reckless disregard of whether it was false or not," *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964). The dissent contends that the panel erred by not addressing the relevance of certain excluded evidence to the issue of actual malice. Dissent at 4.

The panel did not address any "actual malice" argument for good reason: it was not raised by Defendant on appeal or in his petition for rehearing en banc. And that Defendant did not raise the argument is not surprising. His principal defense at trial was that the alleged assault simply did not happen: that his statements about Plaintiff (that she was, for example, carrying out a "con job," App'x at 2858) were true. An "actual malice" defense—that a *false* statement was uttered without actual malice—was thus orthogonal to his basic position.

In any event, the panel carefully reviewed the categories of excluded evidence that Defendant claimed bore on the issues of "credibility, bias, motive, and [his] truth defense." Appellant's Br. at 40. We explained, "We accord great deference to a district court 'in determining whether evidence is admissible, and in controlling the mode and order of its presentation to promote the effective ascertainment of the truth.'" *Carroll*, 124 F.4th at 175 (quoting *SR Int'l Bus. Ins. Co. v. World Trade Ctr. Props., LLC*, 467 F.3d 107, 119 (2d Cir. 2006)). Having conducted that deferential review, the panel identified no abuse of discretion in the district court's rulings. We refer the reader to the panel opinion for the relevant details and discussion. *See id.* at 171–78.

II. The Admission of Evidence

The panel held that the district court did not abuse its discretion in admitting a recording of a 2005 conversation involving Defendant known as the *Access Hollywood* tape (the "Tape"); the testimony of Jessica Leeds about an incident on an airline flight (the "Leeds testimony"); and the testimony of Natasha Stoynoff about an incident at Mar-a-Lago (the "Stoynoff testimony"). *See Carroll*, 124 F.4th at 159–71. All three types of evidence were admissible under Rules 413(d) and 415, we concluded, as evidence that a "party committed any other sexual assault." Fed. R. Evid. 415(a). As discussed in our opinion, Rules 413–415 reflect Congress's considered judgment to permit the admission of propensity evidence in certain sexual assault cases. *See Carroll*, 124 F.4th at

154–55 & n.5; *see also United States v. Schaffer*, 851 F.3d 166, 181 (2d Cir. 2017) ("The wisdom of an evidentiary rule permitting the use of propensity evidence in prosecutions for sexual assault is not the concern of the courts. . . . Deliberating the merits and demerits of Rule 413 is a matter for Congress alone."). The dissent raises three main challenges to our holdings under Rules 413, 415, and 404(b). None is persuasive.

First, the dissent advances a novel interpretation of a "crime under federal law or under state law" for the purposes of Rule 413(d),[3] asserting that this term means "a crime of *sexual assault*," that is, it "must involve the violation of a statute that criminalizes conduct constitutive of sexual assault." Dissent at 22 (emphasis added).[4] But the dissent does not cite any decision of this Court or any other Circuit to have limited the reference to "crime" in Rule 413(d) in this way. And meanwhile, several of our sister circuits have rejected precisely the argument that the dissent advances. *See, e.g.*, *United States v. Ahmed*, 119 F.4th 564, 568 (8th Cir. 2024) ("[F]or [Rule 413] to apply, [a party] need not have been charged with any particular offense. What matters is whether the offense he was charged with involved conduct that Rule 413(d) deems to be sexual assault."); *United States v. Foley*, 740 F.3d 1079, 1086–87 (7th Cir. 2014) (rejecting argument that "Rule 413 did not apply because [defendant] was not charged with

[3] To qualify as a sexual assault under Rule 413(d), the prior act must meet two independent criteria: it must be (i) "a crime under federal law or under state law" that (ii) involves any conduct matching at least one of five listed descriptions. Fed. R. Evid. 413(d), 413(d)(1)–(d)(5).

[4] The dissent attempts in this argument, it seems, to supplement a contention raised by Defendant for the first time in his appellate reply brief: that the Leeds testimony was inadmissible under Rules 413–415 on the ground that the conduct Leeds testified to allegedly took place on a domestic airline flight in 1978 or 1979, when it was purportedly not "a crime under federal law or under state law" to engage in the alleged conduct while on an airplane. *See* Appellant's Reply Br. at 7–9. The panel explained that "[i]n 1978 and 1979, just as it is now, it was a federal crime to commit a simple assault on an airplane." *Carroll*, 124 F.4th at 160 (discussing 18 U.S.C. § 113(e) (1976)).

'sexual assault,'" where defendant "was charged with child pornography production, distribution, and possession," as well as "transporting a minor across state lines to engage in a sex act," explaining that "Rule 413 uses statutory definitions to designate the covered conduct, but the focus is on the conduct itself rather than how the charges have been drafted"); *United States v. Batton*, 602 F.3d 1191, 1197 (10th Cir. 2010) (rejecting argument that Rules 413–415 do not apply on the ground that, regardless of whether the elements of the charged *crime* include "conduct contemplated by Rule 413," the charged *conduct* meets "Rule 413's internal definition of sexual assault"); *United States v. Blazek*, 431 F.3d 1104, 1108–09 (8th Cir. 2005) (rejecting argument that Rules 413–415 do "not apply because [defendant] was not charged with an 'offense of sexual assault'" where the "instant offense involve[d] conduct" described in Rule 413(d)).

So, for support, the dissent turns to the Supreme Court's very recent decision in *Delligatti v. United States*, 145 S. Ct. 797, 808 (2025), which interprets the elements clause of 18 U.S.C. § 924(c)(3) under the "categorical approach." Our colleague disclaims reliance on the categorical approach, Dissent at 26, yet he points to language in *Delligatti* to suggest that, using the categorical approach, the term "crime" in Rule 413(d) must refer *only* to crimes that "encompass prototypical sexual assaults." Dissent at 22–23.[5]

The categorical approach, however, is a particular method of statutory interpretation that has been crafted "for sentencing and immigration purposes," *United States v. Maxwell*, 118 F.4th 256, 265 n.22 (2d Cir. 2024)—not for reading rules of evidence. And even in the sentencing or immigration context, the Supreme Court has declined to apply the categorical approach where, as here, the text "calls for circumstance-specific application." *Nijhawan v. Holder*, 557 U.S. 29, 38 (2009). As this Court has held, statutes that require an agency or reviewing court to assess the

[5] Defendant made the same substantive argument in his petition for rehearing, describing it there as an application of the "categorical approach." Pet. for Reh'g at 9–12.

"conduct" of an individual rather than a "conviction" call for circumstance-specific inquiries. *Alvarez v. Garland*, 33 F.4th 626, 643 (2d Cir. 2022). Here, Rule 413(d) defines "sexual assault" in relation to "*conduct* described in subparagraphs (1)–(4)" and "an attempt or conspiracy to engage in [that] *conduct*." Fed. R. Evid. 413(d)(5) (emphasis added). The categorical approach and the Supreme Court's reasoning in *Delligatti* have no bearing on this appeal.[6]

Second, and in a similar vein, the dissent argues that the word "attempt" as used in Rule 413(d)(5) must "qualif[y] as a 'crime under federal law or under state law' that criminalizes . . . *attempted sexual assault*." Dissent at 24 (emphasis added); *see id*. at 29. That reading, too, is untenable.

Rule 413(d)(5) provides that the definition of "sexual assault" may be met if—in addition to satisfying the requirement of describing "a crime under federal law or under state law"—the evidence also demonstrates "an attempt or conspiracy to engage in conduct described in subparagraphs (1)–(4)." Fed. R. Evid. 413(d)(5). Rule 413(d)(5) thus expressly provides that, as used there, the word "attempt" refers to an attempt "to engage in conduct described in subparagraphs (1)–(4)"—statutory text that the dissent's interpretation overlooks. Fed. R. Evid. 413(d)(5).

The dissent further claims that, to qualify as "sexual assault" under Rule 413(d)(5), the evidence must show "attempts or conspiracies to violate *such laws* that Rule 413(d)(5) identifies." Dissent at 23 (emphasis added). But Rule 413(d)(5) does not

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[6] The dissent applies its strained reading of Rule 413(d) to argue also that the Stoynoff testimony and the Tape were inadmissible on the ground that neither was evidence of "a crime under federal law or under state law," which in the dissent's view means "a crime of sexual assault." Dissent at 27–33, 35–37. Yet neither Defendant's brief on appeal nor his petition for rehearing advances any argument that these two pieces of evidence were not evidence of a "crime." *See Carroll*, 124 F.4th at 163 (explaining that the district court's determination that the Stoynoff testimony described "a crime under Florida law [is] a proposition that Mr. Trump does not challenge").

identify any "laws"—it speaks only to "conduct." The dissent points to no authority for its contrary reading.

Third, the dissent takes issue with the panel's alternative ruling that the Tape was admissible as non-propensity evidence of an "other act" under Rule 404(b). We found that it was within the district court's discretion to admit the Tape under Rules 413–415 and, in the alternative, under Rule 404(b).[7] Our colleague argues that the "other act" evidence here was bare propensity evidence under a different name. The panel's Rule 404(b) ruling, however, is consistent with our Circuit's longstanding "inclusionary approach" to the admission of evidence under Rule 404(b). *United States v. Pascarella*, 84 F.3d 61, 69 (2d Cir. 1996). As the panel opinion explains, the Tape was relevant here *not* to show that Defendant had a "bad character," but for other purposes, *inter alia*, to show a pattern of conduct that tends to rebut Defendant's fabrication defense and to corroborate witness testimony. *Carroll*, 124 F.4th at 157, 168–70. Moreover, even if the admission of the Tape was error under either Rules 413–415 or Rule 404(b), the dissent fails to set out any argument that the error necessarily swayed the jury as to a material fact, *see Warren*, 823 F.3d at 138, or that Defendant has borne the burden of showing

[7] The dissent contends that "[t]he district court did not admit the *Access Hollywood* tape pursuant to Rule 415 but the panel opinion proceeded as if it had." Dissent at 34; *see id*. at 25. As the panel described, the district court decided on a motion in limine that the Tape was admissible under Rules 413–415. *Carroll v. Trump*, 660 F. Supp. 3d 196, 203 (S.D.N.Y. 2023). In a post-trial ruling, the district court noted its view that the Tape was also admissible under Rule 404(b), explaining that reliance on Rules 413–415 alone was "unnecessary." *Carroll v. Trump*, 683 F. Supp. 3d 302, 313 n.20 (S.D.N.Y. 2023). The district court was later explicit that "[t]he video was admitted in *Carroll II* at least under Rule 415." *Carroll v. Trump*, No. 20-CV-7311 (LAK), 2024 WL 97359, at *9 (S.D.N.Y. Jan. 9, 2024); *see id*. at *10 (rejecting Defendant's argument in *Carroll I* that the Tape was "not admissible under Rule 415" for the reasons articulated "in the Court's prior rulings" (citing *Carroll*, 660 F. Supp. 3d at 200–03)). The dissent also suggests that the panel was incorrect in not addressing any potential error arising from the district court's omission of the "*Access Hollywood* tape in its instructions to the jury on the evidence of Mr. Trump's alleged sexual assaults of other women." Dissent at 34. In the district court, however, Defendant did not "object[] to [the Tape's] exclusion from that portion of the charge." *Carroll*, 683 F. Supp. 3d at 313 n.20. Nor did Defendant raise any such objection on appeal or in his petition for rehearing.

reversible error. We refer the reader to the panel opinion for the details of that analysis. *See Carroll*, 124 F.4th at 156–57, 168–70.

In sum, the panel applied Rules 413–415 and Rule 404(b) as written and consistent with Circuit precedent. Moreover, the dissent fails to set out any argument that, even if the admission of any of this evidence was an abuse of discretion, Defendant has borne the burden of showing that the error warranted reversal and retrial.

III. Rule 403 Balancing

Finally, contrary to the dissent's account, Dissent at 15, the panel emphasized that Rule 403 applies with its usual force to evidence otherwise admissible under Rules 413–415. *See Carroll*, 124 F.4th at 155 ("Rule 403's protections apply to evidence being offered under Rule 415" and, therefore, "if the trial court finds that the other act evidence is admissible under Rules 413 and 415, it may still exclude the evidence if it finds that the probative value of the propensity evidence is 'substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.'"); *id*. at 156 ("[T]he district court may admit evidence of other sexual assaults under Rule 415 when . . . applying Rule 403, the court further determines that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.").

On appeal, Defendant challenged the district court's Rule 403 balancing of its rulings admitting the testimony of Leeds and Stoynoff under Rules 413–415. Each woman testified to incidents that allegedly occurred many years before their respective trial testimony and years apart from the incident that Carroll alleged. Defendant contended on this basis that Rule 403 required the exclusion of both women's testimony. *See* Appellant's Br. at 36–37. And once again on abuse of discretion review, the panel decided that the elapsed time did "not negate the probative value of the evidence of those acts to the degree that would be required to find an abuse of

discretion in admitting them for the jury's consideration." *Carroll*, 124 F.4th at 170.[8]

In so deciding—and contrary to the dissent's suggestion—the panel did not rely on legislative history to "override" or "alter the effect" of any Rule. Dissent at 1, 16. No part of the text of Rules 413–415 excludes evidence of an otherwise qualifying event because of the date of its alleged occurrence. The panel applied the Rules and assessed the district court's application of them consistent with the "great deference" that we owe to a district court's decision "as to the relevancy and unfair prejudice of proffered evidence, mindful that it sees the witnesses, the parties, the jurors, and the attorneys, and is thus in a superior position to evaluate the likely impact of the evidence." *United States v. Paulino*, 445 F.3d 211, 217 (2d Cir. 2006).

In our decision, and contrary to the dissent's claim, we cited a statement made by Rep. Molinari, the sponsor of the original bill proposing Rules 413–415, only as additional support for our understanding of the evidentiary rules and our decision on this issue. *Carroll*, 124 F.4th at 165 & n.17. Our Court in *United States v. Larson*, 112 F.3d 600 (2d Cir. 1997), an opinion on which our dissenting colleague relies in charging error in our Rule 403 analysis, cited the same statement by Rep. Molinari to support its review of the district court's Rule 403 balancing. *See* 112 F.3d at 605 ("The legislative history of Rule 414 reveals that Congress meant its temporal scope to be broad . . . .").

The dissent further asserts that the panel decision "conflicts with our precedent" in *United States v. Schaffer*, 851 F.3d 166, 180 (2d Cir. 2017), in which we held that Rule 403 applies to evidence offered under Rule 413. Dissent at 21. But not only did the panel

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[8] The dissent incorrectly asserts that the panel "did not conduct the remoteness analysis that Rule 403 requires at all." Dissent at 18. Quoting a few select words of the panel decision, the dissent contends that the panel considered only "the time lapse between the alleged acts." *Id.* (quoting *Carroll*, 124 F.4th at 170). Reading these words in their full context makes clear, however, that the panel properly analyzed whether the lapse in time between the alleged acts and the testimony about those acts "negate[d] the probative value of the evidence of those acts to the degree that would be required to find an abuse of discretion in admitting them for the jury's consideration." *Carroll*, 124 F.4th at 170.

repeatedly reaffirm *Schaffer*'s holding, *Schaffer*'s analysis itself also mirrors that of the panel's here: the *Schaffer* Court assessed the district court's Rule 403 balancing analysis while "bearing in mind the 'great deference' accorded to district courts in resolving evidentiary questions" and upheld the district court's admission of evidence under Rule 413, as we did, here. 851 F.3d at 184 (quoting *United States v. Quinones*, 511 F.3d 289, 310 (2d Cir. 2007)).

En banc review is hardly necessary to emphasize that Rule 403 applies with its usual force to evidence that is otherwise admissible under Rules 413–415. The panel applied Rule 403 explicitly and reasonably and took no contrary position. *Carroll*, 124 F.4th at 170–71. The dissent may disagree with the result of our abuse of discretion review of the district court's Rule 403 balancing. But any such disagreement hardly warrants en banc review. *See Tharpe v. Sellers*, 583 U.S. 33, 46–47 (2018) (Thomas, *J.*, dissenting) ("[E]ven if we might have made a different call, abuse-of-discretion review means we cannot 'substitute [our] judgment for that of the district court.'").

IV. Conclusion

The rulings of the panel and the challenges raised by the dissent do not present the kind of broad concerns about the law of the Circuit that warrant convening en banc. The dissent's "actual malice" argument was not addressed by the panel because it was not raised by Defendant on appeal. The dissent's arguments concerning the admissibility of evidence under Federal Rules of Evidence 413–415 were not raised by Defendant on appeal, and the dissent's strained reading of Rule 413 lacks merit. The dissent's Rule 404(b) argument fails to engage with the panel's reasoning, explain why any purported error necessarily swayed the jury as to a material fact, *see Warren*, 823 F.3d at 138, or show that Defendant has borne the burden of showing reversible error. Finally, contrary to the dissent's account, the panel reaffirmed the applicability of Rule 403 to evidence otherwise admissible under Rules 413–415. Even on his own terms, our

dissenting colleague fails to explain why any purported error warrants a retrial or full court review. As Judge Pérez reminds us, we do not convene en banc to relitigate a case.

The Court appropriately denied the petition for rehearing en banc.

23-793-cv
E. Jean Carroll v. Donald J. Trump

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2024

(Argued: September 6, 2024 Decided: December 30, 2024)

Docket No. 23-793-cv

E. JEAN CARROLL,

Plaintiff-Appellee,

v.

DONALD J. TRUMP,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Before: CHIN, CARNEY, and PÉREZ, *Circuit Judges*.

In this case, after a nine-day trial, a jury found that plaintiff-appellee E. Jean Carroll was sexually abused by defendant-appellant Donald J. Trump at

the Bergdorf Goodman department store in Manhattan in 1996. The jury also found that Mr. Trump defamed her in statements he made in 2022. The jury awarded Ms. Carroll a total of $5 million in compensatory and punitive damages.

Mr. Trump now appeals, contending that the district court (Lewis A. Kaplan, *Judge*) erred in several of its evidentiary rulings. These include its decisions to admit the testimony of two women who alleged that Mr. Trump sexually assaulted them in the past and to admit a recording of part of a 2005 conversation in which Mr. Trump described to another man how he kissed and grabbed women without first obtaining their consent. Mr. Trump contends that these and other asserted errors entitle him to a new trial.

On review for abuse of discretion, we conclude that Mr. Trump has not demonstrated that the district court erred in any of the challenged rulings. Further, he has not carried his burden to show that any claimed error or combination of claimed errors affected his substantial rights as required to warrant a new trial.

AFFIRMED.

ROBERTA A. KAPLAN (Matthew J. Craig, *on the brief*), Kaplan Martin LLP, New York, NY, and Joshua Matz and Kate Harris, *on the brief*, Hecker Fink LLP, Washington, DC, *for Plaintiff-Appellee.*

D. JOHN SAUER, James Otis Law Group, LLC, St. Louis, MO, and Todd Blanche and Emil Bove, Blanche Law, New York, NY, *on the brief, for Defendant-Appellant.*

PER CURIAM:

In this case, after a nine-day trial, a jury found that plaintiff-appellee E. Jean Carroll was sexually abused by defendant-appellant Donald J. Trump at the Bergdorf Goodman department store in Manhattan in 1996. The jury also found that Mr. Trump defamed her in statements he made in 2022. The jury awarded Ms. Carroll a total of $5 million in compensatory and punitive damages.

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grabbed women without first obtaining their consent. Mr. Trump contends that these and other asserted errors entitle him to a new trial.

On review for abuse of discretion, we conclude that Mr. Trump has not demonstrated that the district court erred in any of the challenged rulings. Further, he has not carried his burden to show that any claimed error or combination of claimed errors affected his substantial rights as required to warrant a new trial.

Accordingly, and for the reasons set forth more fully below, we AFFIRM the judgment of the district court.

BACKGROUND

On appeal from a jury verdict, the court of appeals is bound to "construe all evidence, draw all inferences, and make all credibility determinations in favor of the party [who] prevailed before the jury." *Jia Sheng v. M&TBank Corp.*, 848 F.3d 78, 81 (2d Cir. 2017) (quoting *DiBella v. Hopkins*, 403 F.3d 102, 110 (2d Cir. 2005)). Here, that party is Ms. Carroll. We describe the narrative heard by the jury accordingly. Mr. Trump did not testify at trial but has denied the allegations that he engaged in any sexual misconduct with Ms. Carroll and that he defamed her.

I. *The Evidence Presented at Trial*

We summarize the evidence presented to the jury regarding the charged 1996 assault and 2022 defamation of Ms. Carroll.

A. *The Bergdorf Goodman Assault*

In 1996, Ms. Carroll encountered Mr. Trump at the Bergdorf Goodman department store in Manhattan. At the time, Ms. Carroll was an advice columnist for Elle Magazine and hosted a daily advice talk show called "Ask E. Jean." App'x at 1570-73. Mr. Trump recognized Ms. Carroll and asked her to stay and help him pick a gift for a girl. Describing this as a "funny New York scene" and a "wonderful prospect" for a "born advice columnist" to give advice to Mr. Trump on buying a gift, Ms. Carroll said yes. *Id.* at 1590.

After Ms. Carroll suggested that Mr. Trump purchase a handbag or a hat, Mr. Trump proposed that they go to the lingerie department instead. Ms. Carroll and Mr. Trump went to the lingerie department on the sixth floor. Mr. Trump selected a piece of lingerie and insisted that Ms. Carroll try it on. Ms. Carroll jokingly responded, "You put it on. It's your color." *Id.* at 1595. After some playful banter, Mr. Trump took Ms. Carroll's arm and motioned for her to go to the dressing room with him. Because Mr. Trump was being "very light"

and "pleasant" and "funny," *id.* at 1595, Ms. Carroll walked with Mr. Trump into the open dressing room, which she described as "sort of an open area," *id.* at 1596. But as soon as she entered, Mr. Trump "immediately shut the door" and "shoved [her] against the wall . . . so hard [that] [her] head banged." *Id.*

Ms. Carroll pushed Mr. Trump back, but "he thrust [her] back against the wall again," causing her to "bang[] [her] head again." *Id.* at 1597. With his shoulder and the whole weight of his body against her, Mr. Trump held her against the wall, kissed her, 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.[1] She immediately "exited the room" and left the store "as quickly as [she] could." *Id.* at 1601. The encounter lasted just a few minutes.

Within a day, Ms. Carroll told two friends, Lisa Birnbach and Carol Martin, about the sexual assault. She did not report the incident to the police, however, or share it publicly for over two decades. While conducting interviews for a book that she was writing in 2017, the accounts of assaults perpetrated by Harvey Weinstein came to light and received nationwide attention. As a

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[1] Ms. Carroll also testified that Mr. Trump inserted his penis into her vagina; the jury, however, found that she did not prove this part of her claim by a preponderance of the evidence.

consequence of the many women who came forward to report their experiences of sexual assault, Ms. Carroll finally decided to share more broadly what Mr. Trump had done to her in 1996.

B. ***The Defamation***

In June 2019, *New York* magazine published an excerpt from Ms. Carroll's then-forthcoming book, in which Ms. Carroll wrote that Mr. Trump raped her at the Bergdorf Goodman store in 1996. Mr. Trump denied the allegations and made a series of public statements in which he claimed that Ms. Carroll lied about the sexual assault. Mr. Trump made these statements in 2019 while he was still President of the United States.[2]

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[2] Mr. Trump issued a public statement on June 21, 2019. It read in part:

> I've never met this person in my life. She is trying to sell a new book -- that should indicate her motivation. It should be sold in the fiction section. Shame on those who make up false stories of assault to try to get publicity for themselves, or sell a book, or carry out a political agenda -- like Julie Swetnick who falsely accused Justice Brett Kavanaugh. It's just as bad for people to believe it, particularly when there is zero evidence. Worse still for a dying publication to try to prop itself up by peddling fake news -- it's an epidemic. . . . It is a disgrace and people should pay dearly for such false accusations.

App'x at 2839. Then-President Trump publicly denied the allegations two more times -- once to a reporter at the White House, and again in an interview with *The Hill*. In his interview with *The Hill*, he stated: "I'll say it with great respect: Number one, she's not my type. Number two, it never happened. It never

About three years later, on October 12, 2022, after he had left office and after Ms. Carroll announced her intentions to sue him for rape and sexual assault, Mr. Trump posted a statement on Truth Social, his social media outlet, under the heading "Statement by Donald J. Trump, 45th President of the United States of America." *Id.* at 2858. The statement read, in part:

> This "Ms. Bergdorf Goodman case" is a complete con job, and our legal system in this Country, but especially in New York State (just look at Peekaboo James), is a broken disgrace. You have to fight for years, and spend a fortune, in order to get your reputation back from liars, cheaters, and hacks. . . . I don't know this woman, have no idea who she is, other than it seems she got a picture of me many years ago, with her husband, shaking my hand on a reception line at a celebrity charity event. She completely made up a story that I met her at the doors of this crowded New York City Department Store and, within minutes, "swooned" her. It is a Hoax and a lie, just like all the other Hoaxes that have been played on me for the past seven years. And, while I am not supposed to say it, I will. This woman is not my type! She has no idea what day, what week, what month, what year, or what decade this so-called "event" supposedly took place. The reason she doesn't know is because it never happened, and she doesn't want to get caught up with details or facts that can be proven wrong. If you watch Anderson Cooper's interview with her, where she was promoting a really crummy book, you will see that it is a complete Scam. . . . In the meantime, and for the record, E. Jean Carroll is not telling the truth, is a woman who I had nothing to do with, didn't know, and would have no interest in knowing her if I ever had the chance.

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happened, OK?" App'x at 2854. The statements Mr. Trump made while still President are the subject of the second trial, which is discussed *infra*.

Id. at 2858.

II. *The Proceedings Below*

A. *Carroll I*

In 2019, Ms. Carroll sued Mr. Trump in New York state court, seeking to recover damages for defamation. The case was removed to the U.S. District Court for the Southern District of New York in September 2020. *Carroll v. Trump*, No. 20-cv-07311 (LAK) (S.D.N.Y. filed Sept. 8, 2020) ("*Carroll I*"). In *Carroll I*, Ms. Carroll asserted defamation claims against Mr. Trump based on the statements he made in June 2019, after Ms. Carroll published her account of the alleged rape, when he was still President of the United States. *Carroll I* did not include any damages claim for the alleged rape or sexual assault itself.

Carroll I was delayed due to proceedings concerning Mr. Trump's presidential immunity defense and whether the United States could be substituted as a party for Mr. Trump. *See Carroll v. Trump*, 49 F.4th 759, 761 (2d Cir. 2022) (holding that the President is an "employee of the government" for purposes of the Westfall Act, and certifying to the D.C. Court of Appeals the question of whether Mr. Trump's statements were made within the scope of his employment as President of the United States); *Carroll v. Trump*, 66 F.4th 91, 94

(2d Cir. 2023) (per curiam) (remanding to the district court for further proceedings based on guidance from the D.C. Court of Appeals); *Carroll v. Trump*, 88 F.4th 418, 432 (2d Cir. 2023) (finding no error in the district court's denial, on grounds of undue delay and prejudice, of Mr. Trump's request for leave to amend his answer to raise the defense of presidential immunity).

While *Carroll I* was pending, the State of New York passed the Adult Survivors Act (the "ASA"). N.Y. C.P.L.R. § 214-j (McKinney 2022). The ASA provided adult victims of sexual abuse with a new one-year window in which to sue their abusers, even if an otherwise applicable statute of limitations had previously expired. *Id.* In August 2022, Ms. Carroll advised the district court that she intended to sue Mr. Trump for damages for the alleged rape once the ASA's filing window opened, on November 24, 2022. Letter from Roberta A. Kaplan to Hon. Lewis A. Kaplan, *Carroll I*, Dkt. No. 89 at 3 (filed Sept. 20, 2022).

B. *Carroll II*

On November 24, 2022, three years after she initiated *Carroll I*, and minutes after the ASA's authorization to file new claims became effective, Ms. Carroll filed a second action against Mr. Trump -- the case now before us on appeal. *Carroll v. Trump*, No. 22-cv-10016 (LAK) (S.D.N.Y. filed Nov. 24, 2022)

("*Carroll II*"). Unlike the first action, which was based solely on Mr. Trump's statements made while he was still in office, *Carroll II* sought damages for the alleged rape itself as well as for the purportedly defamatory statements made by Mr. Trump on October 12, 2022, after he left office.

In *Carroll II*, the district court ruled on a number of evidentiary issues in a series of written opinions issued before trial. Relevant to the instant appeal, the district court ruled that two witnesses, Jessica Leeds and Natasha Stoynoff, would be permitted to testify about other incidents of alleged sexual misconduct by Mr. Trump, and that the *Access Hollywood* tape -- a recording of a 2005 conversation involving Mr. Trump -- was admissible. *Carroll v. Trump*, 660 F. Supp. 3d 196, 202-08 (S.D.N.Y. 2023) (ruling on other acts evidence in *Carroll I*); *see also Carroll v. Trump*, No. 22-cv-10016 (LAK), 2023 WL 3000562, at *1 & n.4 (S.D.N.Y. Mar. 20, 2023) (incorporating *Carroll v. Trump*, 660 F. Supp. 3d 196 (S.D.N.Y. 2023)); *Carroll v. Trump*, No. 22-cv-10016 (LAK), 2023 WL 2652636, at *8 (S.D.N.Y. Mar. 27, 2023) (making additional evidentiary rulings). The district court also precluded any reference to DNA evidence or Ms. Carroll's choice of counsel. *Carroll*, 2023 WL 2652636, at *5-8.

Trial in *Carroll II* commenced on April 25, 2023, and concluded on May 8, 2023. Ms. Carroll testified for nearly three days -- almost two full days of which consisted of cross-examination. Ms. Carroll called two "outcry witnesses" -- Lisa Birnbach and Carol Martin -- who each testified that Ms. Carroll told them about the attack by Mr. Trump shortly after it occurred. Ms. Carroll also called Ms. Leeds and Ms. Stoynoff, who testified as set forth below, as well as two witnesses who were employed at Bergdorf Goodman at the time of the assault. The latter testified as to the layout of the store and presence or absence of surveillance cameras and personnel. The jury also watched the *Access Hollywood* tape twice. Ms. Carroll also called a clinical psychologist and a professor of marketing. Mr. Trump did not testify in person, and did not attend the trial. The jury did, however, watch portions of Mr. Trump's videotaped October 2022 deposition testimony.

On May 9, 2023, the nine-person jury unanimously found that Mr. Trump had "sexually abused" Ms. Carroll in 1996.[3] Jury Verdict Form, *Carroll II*, Dkt. 174. *See also Carroll v. Trump*, 683 F. Supp. 3d 302, 307 (S.D.N.Y. 2023)

[3] *See supra* n.1. The jury also found that Ms. Carroll had not shown that Mr. Trump "raped" her. Jury Verdict Form, *Carroll II*, Dkt. 174.

("[T]he jury implicitly found that Mr. Trump deliberately and forcibly penetrated Ms. Carroll's vagina with his fingers."). The jury found that Ms. Carroll was injured as a result of Mr. Trump's conduct and awarded her $2 million in compensatory damages and $20,000 in punitive damages. The jury also found that Mr. Trump defamed Ms. Carroll and awarded her $2.7 million in compensatory damages and $280,000 in punitive damages. Accordingly, the jury awarded Ms. Carroll a total of $5 million. Judgment was entered on May 11, 2023. Mr. Trump filed a notice of appeal the same day.

Mr. Trump thereafter moved for a new trial. In a fifty-nine-page memorandum opinion filed July 19, 2023, the district court denied the motion. *Carroll*, 683 F. Supp. 3d at 334. Mr. Trump filed an amended notice of appeal the same day.[4]

[4] *Carroll I* was not tried until January 16, 2024, that is, after the trial of *Carroll II* was completed. *Carroll I* (January 16, 2024 Minute Entry). In *Carroll I*, the jury found Mr. Trump liable for earlier instances of defamation and awarded Ms. Carroll $83 million in compensatory and punitive damages. Judgment, *Carroll I*, Dkt. 285 (Feb. 8, 2024).

DISCUSSION

I. *Applicable Law*

On appeal, Mr. Trump focuses on evidentiary rulings that he argues were erroneous. We begin our review by summarizing the law with respect to (a) the admissibility under the Federal Rules of Evidence of evidence of other sexual assaults; (b) the proper application of Rule 404(b) of the Federal Rules of Evidence; and (c) the standard of review on appeal from a district court's evidentiary rulings.

A. *Evidence of Other Sexual Assaults*

Rule 415 of the Federal Rules of Evidence provides that "[i]n a civil case involving a claim for relief based on a party's alleged sexual assault . . . the court may admit evidence that the party committed any other sexual assault." Fed. R. Evid. 415(a). "The evidence may be considered as provided in Rules 413 and 414." *Id.*

In turn, Rule 413 defines "sexual assault" as a "crime under federal law or under state law" involving:

> (1) any conduct prohibited by 18 U.S.C. chapter 109A;

> (2) contact, without consent, between any part of the defendant's body -- or an object -- and another person's genitals or anus;
>
> (3) contact, without consent, between the defendant's genitals or anus and any part of another person's body;
>
> (4) deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person; or
>
> (5) an attempt or conspiracy to engage in conduct described in subparagraphs (1)-(4).

Fed. R. Evid. 413(d).

Rules 413 and 415, together with Rule 414, are congressionally-enacted exceptions to the "general ban against propensity evidence." *United States v. Schaffer*, 851 F.3d 166, 177 (2d Cir. 2017) (internal quotation marks omitted). Thus, "[u]nlike Federal Rule of Evidence 404(b), which allows prior bad act evidence to be used for purposes *other than* to show a defendant's propensity to commit a particular crime," *id*. at 177 (emphasis in original), Rules 413 and 415 permit a jury to consider evidence of a different sexual assault "precisely to show that a defendant has a *pattern or propensity for committing sexual assault*," *id*. at 178 (emphasis added). *See also id*. at 177-78 ("Rule 413 permits the jury to consider the evidence 'on any matter to which it is relevant.'" (quoting Fed. R. Evid. 413(a))).

Congress "considered knowledge that the defendant has committed [sexual assault] on other occasions to be critical in assessing the relative plausibility of sexual assault claims and accurately deciding cases that would otherwise become unresolvable swearing matches." *Id.* at 178 (alterations adopted) (internal quotation marks omitted). "[T]he practical effect of Rule 413 [and Rules 414 and 415] is to create a presumption that evidence of prior sexual assaults is relevant and probative" in cases based on sexual assault. *Id.* at 180.[5]

Rule 403's protections apply to evidence being offered under Rule 415. *Id.* Accordingly, if the trial court finds that the other act evidence is admissible under Rules 413 and 415, it may still exclude the evidence if it finds that the probative value of the propensity evidence is "substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury,

[5] Some have questioned whether allowing propensity evidence in sexual assault cases "could diminish significantly the protections that have safeguarded persons accused in criminal cases and parties in civil cases against undue prejudice." *Schaffer*, 851 F.3d at 180 & n.79 (quoting *Report of Judicial Conference on Admission of Character Evidence in Certain Sexual Misconduct Cases*, 159 F.R.D. 51, 53 (1995)). "[But t]he wisdom of an evidentiary rule permitting the use of propensity evidence in prosecutions for sexual assault is not 'the concern of the courts.'" *Id.* at 181. Absent some constitutional infirmity, "[d]eliberating the merits and demerits of Rule 413 is a matter for Congress alone." *Id.* (footnote omitted) (holding that Rule 413 does not violate due process).

undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403.

Rules 413 and 415 are silent as to the standard that courts should apply in determining whether to admit evidence of past sexual assaults. Both parties accept the district court's legal conclusion that the standard articulated by the Supreme Court in *Huddleston v. United States*, 485 U.S. 681 (1988), to determine the admissibility of Rule 404(b) evidence is also the appropriate standard for admitting evidence under Rules 413-415. *Huddleston* teaches that "the trial court neither weighs credibility nor makes a finding that the [party seeking admission] has proved the conditional fact by a preponderance of the evidence." *Id*. at 690. Rather, the "court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact -- whether the defendant committed the prior act -- by a preponderance of the evidence." *Johnson v. Elk Lake Sch. Dist.*, 283 F.3d 138, 152 (3d Cir. 2002) (alteration adopted) (quoting *Huddleston*, 485 U.S. at 690).

We have not had occasion to decide this question. Most of our sister circuits, including the Third, Fourth, Sixth, Eighth, Ninth, and Tenth, have employed the *Huddleston* standard as the standard for admitting evidence under

Rules 413, 414, or 415. *See Johnson*, 283 F.3d at 154-55; *United States v. Fitzgerald*, 80 F. App'x 857, 863 (4th Cir. 2003); *United States v. Hruby*, 19 F.4th 963, 966-67 (6th Cir. 2021); *United States v. Oldrock*, 867 F.3d 934, 938 (8th Cir. 2017); *United States v. Norris*, 428 F.3d 907, 913-14 (9th Cir. 2005); *United States v. Enjady*, 134 F.3d 1427, 1433 (10th Cir. 1998).

We agree with our sister circuits and join them in holding that the *Huddleston* standard for admitting evidence applies to Rule 415. We reach this conclusion based on relevant textual similarities between Rule 404(b) and Rules 413-415 and their respective legislative histories. Rule 404(b) and Rules 413-415 all permit the introduction of evidence of other bad acts, including uncharged conduct.[6] Moreover, the text of Rules 413-415, like the text of Rule 404(b), "contains no intimation . . . that any preliminary showing is necessary before . . . evidence may be introduced for a proper purpose." *Huddleston*, 485 U.S. at 687-88 (holding that no preliminary finding is required under Rule 404(b)). The legislative history behind Rules 413-415, like that behind Rule 404(b), also weighs

[6] *See* 140 Cong. Rec. 23,603 (1994) (statement of Rep. Molinari) ("The practical effect of the new rules is to put evidence of *uncharged offenses* in sexual assault and child molestation cases on the same footing as other types of relevant evidence that are not subject to a special exclusionary rule.") (emphasis added).

against requiring a preliminary preponderance finding by the court that the other sexual assault occurred. *See id.* at 688-89.[7] Accordingly, in determining whether to admit other sexual act evidence, the trial court need not itself find by a preponderance of the evidence that the other assault occurred. Instead, the court must "ask whether a jury could reasonably make such a finding." *Johnson*, 283 F.3d at 152 (internal quotation marks omitted).

In sum, in addition to other requirements not relevant here, the district court may admit evidence of other sexual assaults under Rule 415 when: (1) the civil case before it involves a claim for relief based on a party's alleged sexual assault; (2) the court determines that a jury could reasonably find by a

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[7] As the Third Circuit explained in *Johnson*:

> The principal sponsors of Rules 413-15, Representative Susan Molinari and Senator Robert Dole, declared . . . that an address delivered to the Evidence section of the Association of American Law Schools by David J. Karp -- . . . the drafter of Rules 413-15 -- was to serve as an "authoritative" part of the Rules' legislative history. 140 Cong. Rec. 23,602 (1994) (statement of Rep. Molinari); 140 Cong. Rec. 24,799 (1994) (statement of Sen. Dole). In the referenced speech, Mr. Karp stated clearly that "the standard of proof with respect to uncharged offenses under the new rules would be governed by the Supreme Court's decision in *Huddleston v. United States*." [David J. Karp,] *Evidence of Propensity [and Probability in Sex Offense Cases and Other Cases]*, 70 Chi.-Kent L. Rev. [15, 19 (1994)].

Johnson, 283 F.3d at 153-54.

preponderance of the evidence that the party committed the other sexual assault (as defined by Rule 413); and (3) applying Rule 403, the court further determines that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.

B. ***Rule 404(b)***

While Rules 413 and 415 permit propensity evidence in sexual assault cases, the usual rule is that propensity evidence is not allowed. Rule 404(b) of the Federal Rules of Evidence governs the admissibility of other act evidence -- that is, "any . . . crime, wrong, or act" other than those charged. Fed. R. Evid. 404(b)(1). Evidence of other acts is not admissible if offered "to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." *Id.* Such evidence may be admissible, however, if offered "for another purpose." *Id.* 404(b)(2). Acceptable purposes include, but are not limited to, showing "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." *Id.*; *see also* 1 McCormick, Evidence § 190.1 (8th ed. 2020) (recognizing that evidence of other acts "may be used in numerous ways, and those enumerated [in Rule 404(b)] are neither mutually exclusive nor collectively exhaustive").

Other acceptable purposes include providing direct corroboration of other testimony, *see United States v. Everett*, 825 F.2d 658, 660-61 (2d Cir. 1987), and showing the existence of a pattern, or "*modus operandi*," which may be relevant "to prove that the actor possessed the required mental state (*mens rea*), or to prove the charged act occurred (*actus reus*)." David P. Leonard, *New Wigmore: A Treatise on Evidence: Evidence of Other Misconduct and Similar Events* § 13.3 (2d ed. 2020).

This Court has long taken an "inclusionary" approach to Rule 404(b), under which other act evidence is admissible unless it is introduced for the sole purpose of showing a defendant's bad character, subject to the relevance and prejudice considerations set out in Rules 402 and 403. *United States v. Pascarella*, 84 F.3d 61, 69 (2d Cir. 1996); *Ismail v. Cohen*, 899 F.2d 183, 188 (2d Cir. 1990); *see also United States v. Robinson*, 702 F.3d 22, 37 (2d Cir. 2012) (evidence of uncharged criminal conduct that "is inextricably intertwined with the evidence regarding the charged offense, or . . . necessary to complete the story of the crime on trial," is not typically excluded under Rule 404(b) (citation omitted)).

"To determine whether a district court properly admitted other act evidence, the reviewing court considers whether (1) it was offered for a proper purpose; (2) it was relevant to a material issue in dispute; (3) its probative value

is substantially outweighed by its prejudicial effect; and (4) the trial court gave an appropriate limiting instruction to the jury if so requested by the defendant." *United States v. LaFlam*, 369 F.3d 153, 156 (2d Cir. 2004).

C. *Review of Evidentiary Rulings*

We review a district court's evidentiary rulings for "abuse of discretion." *Schaffer*, 851 F.3d at 177. Abuse of discretion is a term of art that "merely signifies that a district court based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence, or rendered a decision that cannot be located within the range of permissible decisions." *Vill. of Freeport v. Barrella*, 814 F.3d 594, 611 (2d Cir. 2016) (internal quotation marks omitted). A district court's legal interpretation of the Federal Rules of Evidence is reviewed *de novo*. *See United States v. Samet*, 466 F.3d 251, 254 (2d Cir. 2006). We accord "great deference" to a district court, however, in ruling "as to the relevancy and unfair prejudice of proffered evidence, mindful that it sees the witnesses, the parties, the jurors, and the attorneys, and is thus in a superior position to evaluate the likely impact of the evidence." *United States v. Paulino*, 445 F.3d 211, 217 (2d Cir. 2006) (internal quotation marks omitted).

We "will disturb an evidentiary ruling only where the decision to admit or exclude evidence was manifestly erroneous." *United States v. Litvak*, 889 F.3d 56, 67 (2d Cir. 2018) (internal quotation marks omitted). "To find such abuse [of discretion], we must conclude that the trial judge's evidentiary rulings were arbitrary and irrational." *Paulino*, 445 F.3d at 217 (internal quotation marks omitted).

Moreover, even if an evidentiary ruling is manifestly erroneous, we will affirm and not require a retrial if we conclude that the error was harmless. *Cameron v. City of New York*, 598 F.3d 50, 61 (2d Cir. 2010); *see also United States v. Siddiqui*, 699 F.3d 690, 702 (2d Cir. 2012). "[A]n erroneous evidentiary ruling warrants a new trial only when 'a substantial right of a party is affected,' as when 'a jury's judgment would be swayed in a material fashion by the error.'" *Lore v. City of Syracuse*, 670 F.3d 127, 155 (2d Cir. 2012) (quoting *Arlio v. Lively*, 474 F.3d 46, 51 (2d Cir. 2007)). Thus, "[a]n error is harmless if we can conclude with fair assurance that the evidence did not substantially influence the jury." *Cameron*, 598 F.3d at 61 (internal quotation marks omitted). "In civil cases, the burden falls on the appellant to show that the error was not harmless and that 'it is likely that in some material respect the factfinder's judgment was swayed by the error.'"

Warren v. Pataki, 823 F.3d 125, 138 (2d Cir. 2016) (quoting *Tesser v. Bd. of Educ. of City Sch. Dist.*, 370 F.3d 314, 319 (2d Cir. 2004)); *see also Tesser*, 370 F.3d at 319 ("An erroneous evidentiary ruling that does not affect a party's 'substantial right' is . . . harmless.").

Evidentiary objections not raised in the district court are reviewed for plain error only. *Cruz v. Jordan*, 357 F.3d 269, 271 (2d Cir. 2004). Under that standard, "there must be (1) error, (2) that is plain, and (3) that affects substantial rights." *United States v. Gomez*, 705 F.3d 68, 75 (2d Cir. 2013) (alteration adopted) (internal quotation marks omitted). "If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* (alteration adopted) (internal quotation marks omitted); *accord Yukos Capital S.A.R.L. v. Feldman*, 977 F.3d 216, 237 (2d Cir. 2020).

II. *Application*

Mr. Trump's challenges to the district court's evidentiary rulings fall into two categories -- evidence that he contends was erroneously admitted on the one hand, and evidence that he asserts was erroneously precluded on the other. We address each category of evidence and then turn to the question of whether

Mr. Trump has carried his burden to show error of such impact that a new trial is warranted.

A. ***Admitted Evidence***

We first address Mr. Trump's argument that the defamation claim is not "based on" an alleged sexual assault and that therefore Rule 415 does not apply. We then consider the admissibility of the testimony of Jessica Leeds and Natasha Stoynoff, and the admissibility of the *Access Hollywood* tape.

1. ***The Basis of the Claims***

At the outset, on *de novo* review of this legal question, we reject Mr. Trump's assertion that the district court erred in admitting the other acts evidence because, he contends, Ms. Carroll's defamation claim was not "'based on' sexual assault." Appellant's Br. at 20-21. Mr. Trump's argument misconstrues Rule 415's text and ignores its plain meaning. Again, Rule 415(a) permits evidence of other sexual assaults to be introduced in "civil *case[s]* involving a *claim* for relief *based on* a party's alleged sexual assault." Fed. R. Evid. 415(a) (emphasis added). It is beyond dispute that Ms. Carroll's first claim -- for recovery of damages arising from Mr. Trump's alleged rape of her in 1996 -- is "based on" a sexual assault. *Id.* Mr. Trump does not argue otherwise on appeal.

Thus, *Carroll II* is a civil case that involves a claim for relief based on a party's alleged sexual assault.

Instead, Mr. Trump argues that the jury should not have been permitted to consider evidence admitted pursuant to Rule 415(a) when considering Ms. Carroll's second claim, for recovery of damages arising from the alleged defamation. But he does not identify any case law holding that Rule 415 evidence is admissible *only* to prove sexual assault claims. Indeed, the text of the rule contains no such limitation.

Because Mr. Trump acknowledges that Ms. Carroll's sexual assault claim was "based on" a sexual assault, we understand his argument really to be that the evidence was not admissible to prove the defamation claim. In other words, Mr. Trump is arguing that the district court should have given the jury a limiting instruction, advising that it could consider the other sexual assault evidence only with respect to the sexual assault claim and not with respect to the defamation claim.

But Mr. Trump failed to raise this contention below.[8] Therefore, we review the absence of a limiting instruction for plain error only. We discern no plain error here. The other act evidence was relevant to Ms. Carroll's defamation claim -- she had to show that she *was* sexually assaulted by Mr. Trump to prove that his assertion that she was engaging in a "[h]oax," App'x at 2858, was false and therefore defamatory.[9] Hence, the evidence was relevant under Rule 401 because it was offered to prove a sexual assault, and it had a tendency to prove that Mr. Trump did sexually assault Ms. Carroll. *See* Fed. R. Evid. 401 ("Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action."). Moreover, as discussed, Mr. Trump does not cite any authority for the proposition that Rule 415 evidence is admissible only to prove a sexual assault claim, even where, as here, the evidence might otherwise be relevant. *See*

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[8] In her brief on appeal, Ms. Carroll notes that Mr. Trump failed to raise this argument in his briefings below, despite having ample opportunity to do so. Mr. Trump does not challenge this assertion, or make any further mention of his "based on" argument, in his reply brief.

[9] "Under New York law a defamation plaintiff must establish five elements: (1) a written defamatory statement of and concerning the plaintiff, (2) publication to a third party, (3) fault, (4) falsity of the defamatory statement, and (5) special damages or per se actionability." *Palin v. New York Times Co.*, 940 F.3d 804, 809 (2d Cir. 2019).

United States v. Whab, 355 F.3d 155, 158 (2d Cir. 2004) (observing that it is "exceedingly rare" to find plain error "in the absence of binding precedent").

For these reasons, we conclude that the district court did not err, much less plainly err, in permitting the jury to consider this evidence with respect to Ms. Carroll's defamation claim.

2. *The Admissibility of the Evidence of Other Sexual Assaults*

We next turn to whether the district court abused its discretion in admitting the other sexual assaults evidence -- the testimony of Jessica Leeds and Natasha Stoynoff and the *Access Hollywood* recording -- and we conclude that it did not.

a. *The Leeds Testimony*

Jessica Leeds testified that she was on an airplane flying to New York in 1978 or 1979 when a flight attendant came down the aisle to ask if she "would like to come up to first class." App'x at 2098-99. Welcoming the invitation, Ms. Leeds went up to first class where she sat down next to a man sitting at the window who introduced himself as Donald Trump. The two chatted. After their meal was served and cleared, however, Mr. Trump suddenly "decided to kiss [her] and grope [her]." *Id.* at 2101. Ms. Leeds testified at trial:

> [I]t was like a tussle. He was -- his hands and -- he 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 and I went storming back to my seat in the coach.

Id. at 2101-02.

On cross-examination, Ms. Leeds further explained:

> Q: OK. And then according to you he, at one point, put his hand on your knee?
>
> A: He started putting his hand up my skirt.
>
> Q: OK, on your leg and up your skirt?
>
> A: Correct.

Id. at 2132. And on re-direct, she explained why she got so upset:

> A: [M]en . . . would frequently pat you on the shoulder and grab you or something like that and you just -- it is not that serious and you don't -- you don't -- *but when somebody starts to put their hand up your skirt, you know they're serious and this is not good*.

Id. at 2147 (emphasis added).

Mr. Trump argues that Rule 415 does not apply to Ms. Leeds's testimony. He contends that: (1) even if the jury were to credit Ms. Leeds's testimony, she did not describe conduct that constituted a crime at the time the

conduct occurred, as Mr. Trump asserts is required under Rule 413(d); (2) no jury could reasonably find that Mr. Trump attempted to bring his body into contact with Ms. Leeds's genitals, as required for admission under Rule 413(d)(2) and (d)(5); and (3) the conduct described by Ms. Leeds could not have been "prohibited" by 18 U.S.C. chapter 109A, as required for admission under Rule 413(d)(1), because (he argues) it did not occur within the requisite federal jurisdiction.

We conclude that the Leeds testimony was properly admitted. First, Mr. Trump's alleged conduct toward Ms. Leeds was a federal crime at the time it occurred. Second, the Leeds testimony was admissible on the ground that Ms. Leeds testified to an "attempt" under Rule 413(d)(5) to engage in the conduct described in Rule 413(d)(2). Fed. R. Evid. 413. And because we conclude that the Leeds testimony was admissible under Rule 413(d)(2) and (d)(5), we do not reach Mr. Trump's Rule 413(d)(1) jurisdiction-based argument here.[10]

We begin with the requirement that the other act be a crime under federal or state law. Mr. Trump argues that the alleged act had to constitute a

[10] We do reach the argument, however, in our discussion below of the Stoynoff testimony.

crime at the time it was committed to satisfy Rule 413(d). We need not decide the issue here because the alleged act clearly was a crime at the time. In 1978 and 1979, just as it is now, it was a federal crime to commit a simple assault on an airplane. And on this record a jury could have reasonably found that Mr. Trump committed a simple assault against Ms. Leeds.

In 1978 and 1979, the law provided, in relevant part:

> Whoever, while aboard an aircraft within the special aircraft jurisdiction of the United States, commits an act which, if committed within the special maritime and territorial jurisdiction of the United States, as defined in section 7 of title 18, would be in violation of section 113 . . . of such title 18 shall be punished as provided therein.

49 U.S.C. § 1472(k)(1) (1976). Section 1472(k)(1) thus included as an offense within the "special aircraft jurisdiction of the United States" the conduct proscribed by 18 U.S.C. § 113(e) (1976) -- a simple assault. In 1978 and 1979, the "special aircraft jurisdiction" extended to any aircraft "within the United States" "while that aircraft is in flight." 49 U.S.C. § 1301(34) (1976); *see also* 49 U.S.C. § 1301(38) (Supp. III 1980).[11]

[11] The statute provided that an aircraft is "in flight . . . from the moment when all external doors are closed following embarkation until the moment when one such door is opened for disembarkation." 49 U.S.C. § 1301(34) (1976); *see also* 49 U.S.C. § 1301(38) (Supp. III 1980).

Ms. Leeds testified that the departure and arrival destinations of the flight in this case were both within the United States,[12] and that Mr. Trump's alleged conduct toward her occurred after the plane had departed, that is, while the plane was "in flight." Moreover, a jury could reasonably find by a preponderance of the evidence that Mr. Trump committed a simple assault by grabbing Ms. Leeds's breasts, kissing her, and pulling her toward him, all without her consent. *See United States v. Delis*, 558 F.3d 177, 184 (2d Cir. 2009) (concluding that simple assault, as governed by section 113 of Title 18, encompassed a "completed common-law battery," which included "offensive touching," and did not require a "specific intent to injure").[13]

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[12] Mr. Trump argues that because Ms. Leeds could not recall her embarkation point, the proof of jurisdiction is insufficient. But Ms. Leeds definitively recalled that the plane departed from one of only two possible locations -- either "Atlanta" or "Dallas" -- and had its final destination at LaGuardia Airport in New York. App'x at 2098, 2130. The alleged conduct therefore took place "within the United States" and thus within the "special aircraft jurisdiction of the United States" under either version of Ms. Leeds's testimony. *See* 49 U.S.C. § 1301(34) (1976); *see also* 49 U.S.C. § 1301(38) (Supp. III 1980).

[13] The district court did not base its decision to admit the Leeds testimony on these specific statutes, *Carroll*, 660 F. Supp. 3d at 203-04, in part because Mr. Trump did not make these arguments below. But "[w]e are free to affirm on any ground that finds support in the record, even if it was not the ground upon which the trial court relied." *Beijing Neu Cloud Oriental Sys. Tech. Co. v. Int'l Bus. Machines Corp.*, 110 F.4th 106, 113 (2d Cir. 2024) (citation omitted).

Likewise, we find no error in the trial court's conclusion that a jury could reasonably find by a preponderance of the evidence that Mr. Trump's actions as described by Ms. Leeds qualified as an attempt under (d)(5) to engage in the conduct described in (d)(2). The term "attempt" is not defined in the text of Rule 413. Because Rule 413 deals specifically with "similar crimes in sexual-assault cases," we look to the meaning of the word "attempt" as it is used in federal criminal statutes. *Cf. United States v. Hansen*, 599 U.S. 762, 774-75 (2023) ("[W]hen a criminal-law term is used in a criminal-law statute, that -- in and of itself -- is a good clue that it takes its criminal-law meaning."). In that context, it means having "the intent to commit the crime and engag[ing] in conduct amounting to a substantial step towards the commission of the crime." *United States v. Pugh*, 945 F.3d 9, 20 (2d Cir. 2019) (internal quotation marks omitted). "A substantial step 'is conduct planned to culminate in the commission of the substantive crime being attempted.'" *Id.* (quoting *United States v. Farhane*, 634 F.3d 127, 147 (2d Cir. 2011)).

Attempt may be found "even where significant steps necessary to carry out the substantive crime are not completed." *Id.* (internal quotation marks omitted). "Because the substantial step need not be the 'last act necessary' before

commission of the crime, 'the finder of fact may give weight to that which has already been done as well as that which remains to be accomplished before commission of the substantive crime.'" *Id.* (quoting *United States v. Manley*, 632 F.2d 978, 987 (2d Cir. 1980)). The behavior "need not be incompatible with innocence, yet it must be necessary to the consummation of the crime . . . ." *Manley*, 632 F.2d at 987-88. The behavior must also "be of such a nature that a reasonable observer, viewing it in context[,] could conclude beyond a reasonable doubt" -- or in the case of other acts evidence admitted under Rule 415, by a preponderance of the evidence -- "that it was undertaken in accordance with a design to violate the statute." *Id.* at 988.

Ms. Leeds testified that Mr. Trump grabbed her breasts, and tried to kiss her and pull her toward him as she resisted. She also testified unequivocally that Mr. Trump put his hand up her skirt. On the basis of this testimony, a jury could have reasonably found by a preponderance of the evidence that Mr. Trump knowingly took a substantial step toward bringing part of his body -- his hand -- into contact with Ms. Leeds's genitals without her consent.[14]

[14] Mr. Trump argues that Ms. Leeds's testimony was insufficient, as a factual matter, to support an attempt theory. The cases he cites, however, involve readily

Other evidence in the case further supports the district court's decision to admit Ms. Leeds's testimony. As discussed below, the jury could reasonably infer from Ms. Stoynoff's testimony and the *Access Hollywood* tape that Mr. Trump engaged in similar conduct with other women -- a pattern of abrupt, nonconsensual, and physical advances on women he barely knew.[15] And, as discussed above, the standard for admitting testimony under Rule 415 -- whether a jury could reasonably find by a preponderance of the evidence that a

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distinguishable conduct. In *Rapp v. Fowler*, for example, the witness had testified that the defendant put his hand on his knee and left it there for about 30 to 45 seconds. No. 20-cv-09586 (LAK), 2022 WL 5243030, at *2 (S.D.N.Y. Oct. 6, 2022). By contrast, Ms. Leeds testified that Mr. Trump put his hand up her skirt, wholly rejecting defense counsel's characterization that Mr. Trump had merely placed his hand on her knee. Similarly, in *United States v. Blue Bird*, 372 F.3d 989, 993 (8th Cir. 2004), no attempt was found where defendant had touched and kissed the victim but "desisted and withdrew when she said that she was not interested." *Accord United States v. Hayward*, 359 F.3d 631, 640 (3d Cir. 2004) (finding act of pushing a victim's head toward one's *clothed* genitals was ambiguous and not a substantial step toward contact between the mouth and genitals). Here, the jury could have reasonably found that Mr. Trump placed his hand underneath Ms. Leeds's clothing and did not withdraw it voluntarily.

[15] "[P]ieces of evidence must be viewed not in isolation but in conjunction." *United States v. Carson*, 702 F.2d 351, 362 (2d Cir. 1983). Indeed, we have often observed that "bits and pieces" of evidence, taken together, can create a fuller picture -- such as a "mosaic" of intentional discrimination. *Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 86 (2d Cir. 2015); *see also Palin v. New York Times Co.*, 113 F.4th 245, 272 (2d Cir. 2024) ("When conducting this examination [under Rule 104(b)], 'the trial court must consider all evidence presented to the jury' because '[i]ndividual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it.'" (quoting *Huddleston*, 485 U.S. at 690-91)).

person committed the attempted assault -- is distinct from and less stringent than the standard for convicting a person criminally of assault or attempted assault, which would have required the jury to make this finding beyond a reasonable doubt.

In sum, the district court did not abuse its discretion in admitting the Leeds testimony at trial.

b. ***The Stoynoff Testimony***

Natasha Stoynoff testified that, in December 2005, when she was a reporter for *People* magazine, she was on assignment at Mar-a-Lago, Mr. Trump's residence in Florida. She was there to do a story about the first anniversary of Mr. Trump's marriage to Melania Trump and the arrival of their son, Barron. Ms. Stoynoff was at Mar-a-Lago for most of the day, conducting interviews of Mr. Trump and his wife between photoshoots. During a break between interviews, Mr. Trump told her that he would like to show her a painting that he had in "this really great room" in the house. App'x at 2349. Mr. Trump then led her to a room in a different part of his residence. Once they arrived at the room, as Ms. Stoynoff described at trial:

> I went in first and I'm looking around, I'm thinking, wow, really nice room, wonder what he wants to show me, and he -- 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. at 2350. Ms. Stoynoff "tried to push him away," but Mr. Trump came toward her again and she "tried to shove him again." *Id.* at 2350-51. Mr. Trump "was kissing [her]" and "he was against [her] and just holding [her] shoulders back." *Id.* at 2351. The encounter ended when Mr. Trump's butler came into the room. Immediately afterward (Ms. Stoynoff testified), Mr. Trump told her:

> Oh, you know we are going to have an affair, don't you? You know, don't forget what -- don't forget what Marla said, best sex she ever had. We are going to go for steak, we are going to go to Peter Luger's. We're going to have an affair.

Id. at 2352.

Mr. Trump challenges the district court's admission of Ms. Stoynoff's testimony. The district court based its decision to admit the Stoynoff testimony on its finding that it described (1) a crime under Florida law, a proposition that Mr. Trump does not challenge, and (2) an attempt, under Rule 413(d)(5), to engage in conduct described in Rule 413(d)(2).

The trial court did not abuse its discretion when it admitted, pursuant to Rule 413(d)(2) and (5), the evidence of Mr. Trump's alleged actions toward Ms. Stoynoff at Mar-a-Lago in 2005. It found that those actions -- inviting Ms. Stoynoff to an unoccupied room, closing the door behind her, and immediately engaging in nonconsensual kissing despite Ms. Stoynoff's resistance -- suggested a premeditated plan to "take advantage of [the] privacy and to do so without regard to Ms. Stoynoff's wishes." *Carroll*, 660 F. Supp. 3d at 206. We agree and further conclude that the jury could have reasonably found that Mr. Trump took a "substantial step" toward the completion of this premeditated plan when he allegedly closed the door, forcefully held Ms. Stoynoff against the wall while kissing her, and repeatedly came toward her despite being pushed back twice. Mr. Trump's comments to Ms. Stoynoff immediately after the encounter -- including "you know we are going to have an affair" and suggesting they would have the "best sex" -- also shed light on the intent behind his actions. App'x at 2352. That the alleged assault showed no signs of terminating until a third party interrupted it also supports the conclusion that a jury could have reasonably found that Mr. Trump intended to bring his body into contact with Ms. Stoynoff's genitals and that he took substantial steps toward doing so.

In addition, the evidence could have been admitted as an attempt under Rule 413(d)(5) to engage in the type of conduct under (d)(1): "any conduct prohibited by 18 U.S.C. chapter 109A." Fed. R. Evid. 413(d)(1). Conduct proscribed by chapter 109A includes to "knowingly engage[] in sexual contact with another person without that other person's permission." 18 U.S.C. § 2244(b). The chapter defines "sexual contact" as:

> the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

Id. § 2246(3). A jury could have reasonably found, upon consideration of the circumstances discussed above, that the actions alleged constituted an attempt to knowingly engage in conduct that falls within that definition of making "sexual contact," and to do so without Ms. Stoynoff's permission.

Mr. Trump argues (as he did with respect to the Leeds testimony) that, to be admissible under Rule 413(d)(1), the evidence must meet the jurisdictional requirement of 18 U.S.C. chapter 109A: he contends, in other words, that the conduct must have occurred within the "special maritime and territorial jurisdiction of the United States" or certain custodial facilities to qualify

as "conduct prohibited by" chapter 109A.[16] Mr. Trump argues that an act that does not meet the jurisdictional requirement of chapter 109A cannot be "prohibited" by chapter 109A. Appellant's Reply Br. at 2-3. We are not persuaded that Rule 413(d)(1) is so constrained.

Mr. Trump's reading is wholly inconsistent with the rationale advanced in Congress in adopting Rules 413-415, which centered on the *nature* of the other conduct, not the specific location in which the conduct occurred. As the text and structure of Rule 413 make clear, Congress did not intend for Rule 413(d)(1) to apply only to conduct occurring within the "special maritime and territorial jurisdiction of the United States" -- that is, among other places, the high seas, on federally controlled land, or in certain custodial facilities. *See* 18 U.S.C. § 7 (defining "special maritime and territorial jurisdiction of the United States"). Rules 413 and 415 permit the admission of evidence that the defendant "committed any other sexual assault," and Rule 413(d) defines "sexual assault" to include "a crime under federal law or under state law . . . involving" any one of

[16] Chapter 109A is entitled "Sexual Abuse" and includes, *inter alia*, sections 2241 through 2244, each of which criminalizes conduct "in the special maritime and territorial jurisdiction of the United States or in a Federal prison" or certain other custodial facilities. 18 U.S.C. §§ 2241, 2242, 2243, 2244.

five categories of conduct. Clearly, in Rule 413(d)(1), Congress was referring to the nature or types of conduct covered in chapter 109A -- such as aggravated sexual abuse, sexual abuse, sexual abuse of a minor, and abusive sexual contact, 18 U.S.C. §§ 2241, 2242, 2243, 2244 -- without limiting the applicability of Rule 413(d)(1) to the conduct occurring on the high seas, on federally-controlled lands, and in certain custodial facilities.

Several of our sister circuits read the statute as we do, stressing the nature of the conduct and disregarding any jurisdictional element. *See, e.g.*, *United States v. Batton*, 602 F.3d 1191, 1196-98 (10th Cir. 2010) (holding defendant's prior sexual assault of a boy "falls squarely under Rule 413's definition of sexual assault" because it involved conduct that was "clearly proscribe[d]" by chapter 109A, without regard to whether it occurred within the special maritime and territorial jurisdiction of the United States or a custodial facility); *Blind-Doan v. Sanders*, 291 F.3d 1079, 1082 (9th Cir. 2002) ("We understand Rule 413 to mean acts proscribed by [chapter 109A], whether or not the acts are committed by federal personnel in federal prisons . . . ."); *United States v. Blazek*, 431 F.3d 1104, 1109 (8th Cir. 2005) ("Rule 413 does not require that the defendant be charged with a chapter 109A offense, only that the instant

offense involve conduct proscribed by chapter 109A."). We fail to see any bearing that the jurisdiction of the offense would have on the probative value of the proffered evidence of sexual assault.

The legislative history of the rules also supports our conclusion. For example, the Congressional Record explains that the definition of sexual assault under Rule 413(d) is intended to "cover[] federal and state offenses involving *the types of conduct* prohibited by [chapter 109A]." 137 Cong. Rec. 6031 (1991) (emphasis added).[17] And Congress left no doubt that it adopted Rules 413-415 to allow courts to admit evidence that a "defendant has the motivation or disposition to commit sexual assaults." *Id*. The above legislative history confirms that Rule 413(d)(1) hinges on the "type of conduct" alleged, not where the conduct occurred. *See also United States v. Sturm*, 673 F.3d 1274, 1283 (10th Cir. 2012) (analyzing legislative history and holding that Rule 414's incorporation

[17] Rules 413-415 were introduced in materially identical form as part of the proposed, but not enacted, Comprehensive Violent Crime Control Act of 1991. *See* 137 Cong. Rec. 6003-04. When the Rules were re-introduced and passed as part of the Violent Crime Control and Law Enforcement Act of 1994, the section-by-section analysis of the Rules that accompanied the 1991 legislation, 137 Cong. Rec. 6030-34, was described by the Rules' original co-sponsors as a key part of the Rules' legislative history that "deserve[s] particular attention." 140 Cong. Rec. 24,799 (statement of Sen. Dole); *see also* 140 Cong. Rec. 23,602 (statement of Rep. Molinari).

of conduct prohibited in a federal statute does not incorporate that statute's interstate-commerce element because "the interstate character of a defendant's prior crimes has no bearing on the evidence's probative value"); *United States v. Shaw*, No. 22-CR-00105-BLF-1, 2023 WL 2815360, at *7 (N.D. Cal. Apr. 5, 2023) (analyzing legislative history of Rules 413-415 and holding that "the Court should look at the type of conduct at issue, as opposed to its location"); Advisory Note, *Report of the Judicial Conference on the Admission of Character Evidence in Certain Sexual Misconduct Cases*, 159 F.R.D. 51, 57 (Feb. 9, 1995) (proposing amendments to Rules 413-415, including to clarify "with no change in meaning" that "[e]vidence offered [of another sexual assault] must relate to a form of conduct proscribed by . . . chapter 109A . . . of title 18, United States Code, regardless of whether the actor was subject to federal jurisdiction").

In an analogous context, in *Torres v. Lynch*, the Supreme Court held that a New York state arson law was an "aggravated felony" under the Immigration and Nationality Act because it was an offense "described in" a federal arson statute, even though it lacked the federal statute's jurisdictional hook. 578 U.S. 452, 460, 473 (2016). The Court reasoned that state legislatures are "not limited to Congress's enumerated powers" and therefore would have "no

reason to tie their substantive offenses to those grants of authority." *Id.* at 458; *see also id*. at 457 (explaining that most federal criminal statutes include "substantive elements," which "primarily define[] the behavior that the statute calls a 'violation' of federal law," and a "jurisdictional element," which "ties the substantive offense . . . to one of Congress's constitutional powers"). Rules 413-415 do not contain a "jurisdictional hook," and the drafters of the rules would not have been concerned with the lack of police power or any jurisdictional requirement because the Federal Rules of Evidence, unlike the federal criminal code, do not authorize federal punishment.

Accordingly, we give Rule 413 a common-sense reading that is consistent with the structure and purpose of Rules 413-415. We conclude that Rule 413(d)(1) applies to *conduct* that fits within chapter 109A -- such as aggravated sexual abuse, sexual abuse, sexual abuse of a minor, or abusive sexual contact -- without regard to whether chapter 109A's jurisdictional element is met. Therefore, the Stoynoff testimony was admissible under Rule 413(d)(5) as evidence of an attempt to engage in the type of conduct covered by Rule 413(d)(1).

Our holding that Ms. Stoynoff's testimony was properly admitted is further supported by Ms. Leeds's testimony and the *Access Hollywood* tape and the fact that the sufficiency standard for admitting the evidence under Rule 415 is lower than what would be required to sustain a conviction. Accordingly, the district court did not abuse its discretion in admitting the Stoynoff testimony.[18]

c. *The* Access Hollywood *Tape*

Mr. Trump's final challenge to the district court's admission of other act evidence centers on a 2005 recording of a conversation among Mr. Trump,

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[18] In allowing Ms. Stoynoff to testify, the district court also relied on Ms. Stoynoff's deposition, where she stated that Mr. Trump groped her without her consent. *See* App'x at 146 ("I consider that he lied about kissing and groping me without consent."). While Ms. Stoynoff did not ultimately use the word "grope" at trial, the district court did not abuse its discretion in relying on the deposition testimony in deciding to admit the evidence. As the district court reasoned in denying Mr. Trump's motion *in limine* to exclude Ms. Stoynoff's testimony, "the circumstances of the alleged encounter are relevant," including that Mr. Trump invited Ms. Stoynoff "to an unoccupied room and closed the door behind her," and then "he immediately, and without her consent, began kissing Ms. Stoynoff and pressed on as she resisted his advances" -- actions the court found to be "suggestive of a plan, formed before Mr. Trump invited Ms. Stoynoff to the unoccupied room and closed the door behind her, to take advantage of that privacy and to do so without regard to Ms. Stoynoff's wishes." *Carroll*, 660 F. Supp. 3d at 206. The court noted that the *Access Hollywood* tape and Ms. Leeds's testimony "are additional evidence that a jury would be entitled to consider in deciding whether to infer that the ultimate goal of Mr. Trump's alleged actions" was to attempt to sexually assault Ms. Stoynoff. *Id*. We further conclude, based on the above discussion, that Ms. Carroll elicited sufficient evidence for the jury to reasonably find by a preponderance of the evidence that Mr. Trump attempted to sexually assault Ms. Stoynoff.

Billy Bush, and others as they arrived for the filming of a television show. This recording, known as the *Access Hollywood* tape, aired nationally during the 2016 presidential election. The tape, just under two minutes long, was played twice for the jury. In the recording, Mr. Trump states that he "moved on" a woman named Nancy "like a bitch" and "did try and fuck her." App'x at 2883. As he described the encounter:

> I moved on her actually. You know she was down on Palm Beach. I moved on her, and I failed. I'll admit it. I did try and fuck her. She was married. . . . I moved on her very heavily in fact I took her out furniture shopping. She wanted to get some furniture. I said I'll show you where they have some nice furniture. I moved on her like a bitch, but I couldn't get there. And she was married. Then all-of-a-sudden I see her, she's now got the big phony tits and everything. She's totally changed her look.

Id. He also stated, "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." *Id*.

During his October 2022 deposition, Mr. Trump was questioned about his statements in the tape. A portion of that testimony was played to the jury:

> Q. And you say -- and again, this has become very famous -- in this video, '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.' That's what you said; correct?
>
> A. Well, historically, that's true with stars.
>
> Q. True with stars that they can grab women by the pussy?
>
> A. Well, that's what -- if you look over the last million years, I guess that's been largely true. Not always, but largely true. Unfortunately or fortunately.
>
> Q. And you consider yourself to be a star?
>
> A. I think you can say that, yeah.

Id. at 2973.

The district court concluded that the recording was admissible as evidence of a prior sexual assault because it satisfied the requirements of Rule 413(d)(2) as well as (d)(5). Thus, the district court ruled that a "jury reasonably could find, even from the *Access Hollywood* tape alone, that Mr. Trump 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." *Carroll*, 660 F. Supp. 3d at 203. In its post-trial decision denying Mr. Trump's motion for a new trial, however, the district court concluded that at trial "it

became clear that reliance on Rule 415 was unnecessary because the video was offered for a purpose other than to show the defendant's propensity to commit sexual assault." *Carroll*, 683 F. Supp. 3d at 302, 313 n.20. Instead, the court concluded, the recording "could have been regarded by the jury as a sort of personal confession as to his behavior." *Id.* at 326.

The district court concluded that the recording was relevant because it "has the tendency to make [the] fact [of whether [Mr. Trump] sexually assaulted Ms. Carroll] more or less probable than it would be without the evidence because one of the women he referred to in the video could have been Ms. Carroll." *Id.* at 313 n.20 (internal quotation marks omitted).

We are not fully persuaded by the district court's second basis for admitting the recording -- that the tape captured a "confession." *Id.* at 326. But the first rationale adopted by the district court -- that the recording was evidence of one or more prior sexual assaults and therefore admissible under Rules 413 and 415 -- provided a proper basis for the district court's exercise of its broad discretion. As discussed above, we may reverse the district court's ruling only if we find it to have been "arbitrary and irrational." *Restivo v. Hessemann*, 846 F.3d

547, 573 (2d Cir. 2017) (quoting *United States v. Coppola*, 671 F.3d 220, 244 (2d Cir. 2012)).

Applying this highly deferential standard of review, we conclude that the district court did not abuse its discretion in admitting the recording pursuant to Rules 413(d)(2), 413(d)(5), and 415. In the recording, Mr. Trump says, "I just start kissing them," "I don't even wait," and "You can do anything. . . . Grab them by the pussy." App'x at 2883. The jury could have reasonably concluded from those statements that, in the past, Mr. Trump had kissed women without their consent and then proceeded to touch their genitalia. While it is true, as Mr. Trump argues, that he also said, "[T]hey let you do it," the district court correctly observed that "[i]t simply is not the Court's function in ruling on the admissibility of this evidence to decide what Mr. Trump meant or how to interpret his statements." *Carroll*, 660 F. Supp. 3d at 203. Rather, the court's duty was simply to decide whether a jury could reasonably find by a preponderance of the evidence that Mr. Trump committed an act of sexual assault (as defined under Rule 413). If it could so find, the court had the discretion to admit the evidence.

We also conclude that the *Access Hollywood* tape was admissible pursuant to Rule 404(b) as evidence of a pattern, or *modus operandi*, that was relevant to prove that the alleged sexual assault actually occurred (the *actus reus*).[19] *See* Leonard, *supra*, § 13.1 (recognizing that evidence of *modus operandi* may be admissible for a variety of non-propensity purposes, including "to demonstrate that the act at issue actually was committed").

The existence of a pattern, or a "recurring *modus operandi*," can be proven by evidence of "characteristics . . . sufficiently idiosyncratic to permit a fair inference of a pattern's existence." *United States v. Sliker*, 751 F.2d 477, 487 (2d Cir. 1984); *see also Ismail v. Cohen*, 706 F. Supp. 243, 253 (S.D.N.Y. 1989) (admitting evidence under Rule 404(b) to show a "pattern of misconduct" involving defendant "applying handcuffs too tightly, falsely claiming injury from the citizen to cover up his own inappropriate use of physical force, and filing false charges for the same purpose"), *aff'd*, 899 F.2d 183, 188-89 (2d Cir. 1990) (no error

[19] To the extent that the district court's post-trial "confession" rationale for admitting the *Access Hollywood* tape -- that the tape "could have been regarded by the jury as a sort of personal confession as to his behavior," *Carroll*, 683 F. Supp. 3d at 326 -- is consistent with our above explanation that the tape was admissible under Rule 404(b) as evidence of a pattern of conduct, we identify no error.

in admitting other act evidence under Rule 404(b) for "pattern" purposes); *United States v. Carlton*, 534 F.3d 97, 101-02 (2d Cir. 2008) (holding that evidence of similarities between defendant's three prior bank robberies and the charged bank robbery -- "such as location, the takeover style of the robberies, or use of a getaway car" -- established "the existence of a pattern"). The similarities between the past acts and current allegations "need not be complete." *Sliker*, 751 F.2d at 487. It is enough for admissibility purposes that the acts be sufficiently similar as to "earmark them as the handiwork of the accused." *Id*. (quoting 1 McCormick, Evidence § 190, at 559 (3d ed. 1984)).

Courts have routinely admitted evidence of a pattern or *modus operandi* in sexual assault cases where, as here, the defendant is alleged to have engaged in a distinctive pattern of conduct related to non-consensual sexual contact. *See, e.g.*, *Roe v. Howard*, 917 F.3d 229, 245-46 (4th Cir. 2019) (no error in the admission of evidence of a pattern of prior sexual abuse under Rule 404(b) where the prior victim's testimony mirrored the plaintiff's allegations); *Montanez v. City of Syracuse*, No. 16-cv-00550, 2019 WL 4328872, at *4-7 (N.D.N.Y. Sept. 12, 2019) (admitting evidence of a prior sexual assault under Rule 404(b) as relevant to show, *inter alia*, a pattern because the previous victim and the plaintiff both

alleged that the defendant, a law enforcement officer, "exposed himself to them while on duty, responding to calls at their residences, and intimidated them into performing oral sex"); Leonard, *supra*, § 13.3 (explaining that evidence of *modus operandi* may be relevant and admissible under Rule 404(b) in "[s]exual assault and child molestation cases" where the "crimes are committed in the presence of fewer people and leave fewer traces").

Evidence of a pattern may also be relevant for the non-propensity purpose of corroborating witness testimony. *United States v. Everett*, 825 F.2d 658, 660-61 (2d Cir. 1987) ("Under Rule 404(b) evidence of 'other crimes' has been consistently held admissible to corroborate crucial prosecution testimony" so long as "corroboration is direct and the matter corroborated is significant.") (internal quotation marks omitted); *United States v. Williams*, 577 F.2d 188, 192 (2d Cir. 1978) (noting that evidence of other acts may be admissible under Rule 404(b) "even if the trial court finds that such evidence is relevant only for corroboration purposes, provided that the corroboration is direct and the matter corroborated is significant"); *see also United States v. Cadet*, 664 F.3d 27, 32 (2d Cir. 2011) (listing "corroboration of witnesses" as one of the acceptable "non-propensity purposes" for admitting other act evidence under Rule 404(b)); *United*

States v. Oskowitz, 294 F. Supp. 2d 379, 382 (E.D.N.Y. 2003) ("[C]orroboration is also an acceptable purpose to admit prior act evidence.").[20] Its use in this fashion must be assessed as well under Rule 403, of course, for unfair prejudice, but in a proper case the district court may admit it.

We conclude that the *Access Hollywood* 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. Mr. Trump's statements in the tape, together with the testimony of Ms. Leeds and Ms. Stoynoff (detailed above), establish a repeated, idiosyncratic pattern of conduct consistent with what Ms.

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[20] In the related context of Rules 413-415, courts have also upheld the admissibility of evidence that is challenged as unfairly prejudicial where such evidence shows a pattern of behavior that corroborates witness testimony. *See United States v. Gaudet*, 933 F.3d 11, 18 (1st Cir. 2019) ("[The witness's] testimony was probative because it helped to establish the credibility of [the victim's] testimony" and "because the near identical account of abuse that she offered helped to corroborate [the victim's] allegations by illustrating that [the witness] had leveled nearly identical allegations against [the defendant] previously."); *United States v. Joubert*, 778 F.3d 247, 254-55 (1st Cir. 2015) ("[B]ecause [the defendant's] defense was that he did not commit the crimes against [the child victim], evidence bearing on [the child's] veracity was probative to determining whether [the defendant] indeed produced and possessed the illicit recording. The uncharged child molestation testimony was probative of [the child]'s veracity because it corroborated aspects of [the child]'s testimony, particularly the nature of the abuse and [the defendant's] modus operandi in approaching his victims.").

Carroll alleged.[21] In each of the three encounters, Mr. Trump engaged in an ordinary conversation with a woman he barely knew, then abruptly lunged at her in a semi-public place and proceeded to kiss and forcefully touch her without her consent. The acts are sufficiently similar to show a pattern or "recurring *modus operandi*." *Sliker*, 751 F.2d at 487. Moreover, the tape was "directly corroborative" of the testimony of Ms. Carroll, Ms. Leeds, and Ms. Stoynoff as to the pattern of behavior each allegedly experienced, and "the matter corroborated" was one of the most "significant" in the case -- whether the assault of Ms. Carroll actually occurred. *Everett*, 825 F.2d at 660-61 (noting that other act evidence admissible for corroborative purposes must involve corroboration that is "direct and the matter corroborated [must be] significant" (internal quotation marks omitted)). Therefore, the evidence of other conduct was relevant to show a pattern tending to directly corroborate witness testimony and to confirm that

[21] *Cf. United States v. Mohel*, 604 F.2d 748, 751 n.6 (2d Cir. 1979) ("The fact that the [other act] evidence is in the form of statements by the defendant himself does not change the applicable analysis.").

the alleged sexual assault actually occurred.[22] The *Access Hollywood* tape was therefore properly admitted.

d. *Rule 403*

Mr. Trump's final argument with respect to the other acts evidence rests on Rule 403. He contends that the district court abused its discretion in admitting the evidence because the risk of unfair prejudice substantially outweighed the evidence's probative value, which he characterizes as "extremely limited." Appellant's Br. at 35.

We find no abuse of discretion in the district court's assessment of the other acts evidence under Rule 403. The testimony of Ms. Leeds and Ms. Stoynoff and Mr. Trump's statements on the *Access Hollywood* tape were highly probative, and their probative value was not substantially outweighed by any unfair prejudice.

First, evidence admitted under Rule 415 is presumptively probative in a sexual assault case such as this, which centers on the parties' respective

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[22] As our discussion makes clear, while *modus operandi* evidence is often relevant to identify the unknown perpetrator of a crime, "[it] is not in fact synonymous with 'identity.'" Leonard, *supra*, § 13.1. It can be -- and in this case it is -- relevant for other non-propensity purposes as well.

credibility. *See Schaffer*, 851 F.3d at 178 ("In passing Rule 413, Congress considered '[k]nowledge that the defendant has committed rapes on other occasions [to be] critical in assessing the relative plausibility of [sexual assault] claims and accurately deciding cases that would otherwise become unresolvable swearing matches.'" (alterations in original) (quoting *United States v. Enjady*, 134 F.3d 1427, 1431 (10th Cir. 1998))).

Second, for the reasons we discussed above with regard to the admissibility of the *Access Hollywood* tape under Rule 404(b), the conduct described by the other act evidence is sufficiently similar in material respects to be probative. True, Mr. Trump's alleged assault of Ms. Leeds occurred on an airplane, and thus differed from the assaults described by Ms. Carroll and Ms. Stoynoff, but Ms. Leeds's testimony was not so dissimilar as to substantially outweigh its strong probative value.

Mr. Trump argues that the amount of time since the alleged acts, particularly with respect to Ms. Leeds's testimony, reduces their probative value. But we apply Rules 413-415 in a manner that effectuates Congress's intent. *See, e.g.*, *Schaffer*, 851 F.3d at 178. As the district court observed, Congress intentionally did not restrict the timeframe within which the other sexual act

must have occurred to be admissible under Rules 413-415. *Carroll*, 660 F. Supp. 3d at 208. One of the original sponsors of the legislation proposing Rules 413-415 explained that "evidence of other sex offenses by the defendant is often probative and properly admitted, *notwithstanding very substantial lapses of time in relation to the charged offense or offenses*." 140 Cong. Rec. 23603 (1994) (remarks of Rep. Molinari) (emphasis added). In consideration of this express intent, we conclude that the time lapse between the alleged acts does not negate the probative value of the evidence of those acts to the degree that would be required to find an abuse of discretion in admitting them for the jury's consideration. *Accord, e.g.*, *United States v. O'Connor*, 650 F.3d 839, 853-54 (2d Cir. 2011) (no abuse of discretion in admission of evidence of sexual acts that occurred 30 years earlier); *United States v. Davis*, 624 F.3d 508, 511-12 (2d Cir. 2010) (evidence of molestation conviction 19 years earlier was properly admitted); *United States v. Larson*, 112 F.3d 600, 604-05 (2d Cir. 1997) (evidence of sexual acts occurring up to 20 years earlier was properly admitted).

Finally, we also find that the other act evidence was not unfairly prejudicial, as the incidents in question were "no more sensational or disturbing" than the acts that Ms. Carroll alleged Mr. Trump to have committed against her.

United States v. Curley, 639 F.3d 50, 59 (2d Cir. 2011) (internal quotation marks omitted).[23]

B. ***Excluded Evidence***

Mr. Trump's second category of challenges to the judgment below is based on the district court's decision to exclude, rather than admit, certain evidence. Specifically, Mr. Trump argues that the district court unreasonably restricted his defense by precluding (1) evidence that some of Ms. Carroll's legal fees were being paid for by one of Mr. Trump's political opponents and (2) portions of a transcript made by Ms. Carroll of a 2020 interview between Ms. Carroll and Ms. Stoynoff that, Mr. Trump argues, suggests that Ms. Carroll coached Ms. Stoynoff on her testimony. Mr. Trump also asserts that the district

[23] On appeal, Mr. Trump also offered brief challenges to the district court's admission of certain other evidence, including: (1) excerpts from two 2016 campaign videos in which Mr. Trump denied the allegations made by Ms. Leeds and Ms. Stoynoff; (2) additional testimony from Ms. Leeds, including, for example, regarding her reaction to statements made by Mr. Trump during the campaign; (3) additional testimony from Ms. Stoynoff, including, for example, her testimony regarding her belief that Mr. Trump engaged in this conduct with many women; and (4) evidence of certain other comments made by Mr. Trump. We discern no abuse of discretion in these rulings. Mr. Trump did not object to much of this additional evidence at trial, and he was able to use some of the same testimony as impeachment material on cross-examination. Even assuming error in any of these rulings, Mr. Trump failed to carry his burden to show that his "substantial rights" were affected. *Tesser*, 370 F.3d at 319.

court erred in preventing him from cross-examining Ms. Carroll on three matters: her out-of-court claim that she possessed Mr. Trump's DNA; her decision not to file a police report; and her failure to seek surveillance video footage from Bergdorf Goodman. We address each challenge in turn.

1. *Litigation Funding*

The district court did not abuse its discretion in excluding evidence related to litigation funding. Mr. Trump contends that this evidence was "proof that a billionaire critic of President Trump had paid [Ms. Carroll's] legal fees, and that [Ms. Carroll] lied about the funding during her deposition." Appellant's Br. at 41. Mr. Trump thus sought to offer this evidence to attack Ms. Carroll's credibility, and also as evidence of bias and motive.

a. *Ms. Carroll's Credibility*

"Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness." Fed. R. Evid. 608(b). But the court "may, on cross-examination, allow [specific instances] to be inquired into if they are probative of [a witness's] character for truthfulness or untruthfulness." *Id*.

At Ms. Carroll's October 2022 deposition, when *Carroll I* (but not this case) was pending, in response to a question asking whether she was "presently paying [her] counsel's fees," Ms. Carroll responded that hers was "a contingency case" and said that no one else was paying her legal fees. App'x at 1188. On April 10, 2023, however, Ms. Carroll's counsel disclosed to Mr. Trump's attorneys Ms. Carroll's refreshed recollection "that at some point her counsel secured additional funding from a nonprofit organization to offset certain expenses and legal fees." *Id.* at 1191. In response, the district court permitted defense counsel limited discovery into the litigation funding, and Ms. Carroll's knowledge of it, while reserving judgment on the relevancy of evidence relating to the issue.

The facts established during the ensuing discovery confirmed that Ms. Carroll's case was taken on a contingency fee basis, and that, in September 2020, Ms. Carroll's counsel received outside funding from a nonprofit to help offset costs. There was no evidence to suggest that Ms. Carroll was personally involved in securing the funding, interacted with the funder, received an invoice showing the arrangement before or after her counsel received the outside funding, or had discussed the arrangement with anyone between learning of it in September 2020 and being deposed in October 2022.

Upon consideration of this evidence, the district court granted Ms. Carroll's motion to preclude evidence and argument about the litigation funding in the case. The district court concluded:

> In general, litigation funding is not relevant. Here I allowed very limited discovery against what seemed to me a remote but plausible argument that maybe something to do with litigation funding arguably was relevant to the credibility of one or two answers by this witness in her deposition. I gave the defense an additional deposition of the plaintiff, and I gave the defense limited document discovery.
>
> On the basis of all that, I have concluded that there is virtually nothing there as to credibility. And even if there were, the unfair prejudicial effect of going into the subject would very substantially outweigh any probative value whatsoever.

App'x at 1659. We perceive no abuse of discretion here.

First, district courts regularly exclude evidence of litigation financing under Rule 401, finding it "irrelevant to credibility" and that it "does not assist the factfinder in determining whether or not the witness is telling the truth." *Benitez v. Lopez*, No. 17-cv-3827, 2019 WL 1578167, at *1 (E.D.N.Y. Mar. 14, 2019); *see also id.* at *2 (reviewing cases and noting that "[n]o case" of which the court was aware supports the claimed proposition that "litigation financing documents are generally probative of a plaintiff's credibility"); *In re Valsartan N-Nitrosodimethylamine (NDMA) Contamination Prods. Liab. Litig.*, 405 F. Supp. 3d

612, 615 (D.N.J. 2019) (collecting cases); *cf. Kaplan v. S.A.C. Cap. Advisors, L.P.*, No. 12-cv-9350, 2015 WL 5730101, at *5 (S.D.N.Y. Sept. 10, 2015) (in class action context, denying defendants' request for production of documents relating to plaintiffs' litigation funding on ground that defendants failed to "show that the requested documents are relevant to any party's claim or defense").

Second, the district court did not abuse its discretion in precluding cross-examination on this point because, as the district court found, Ms. Carroll's prior statement on the litigation funding was not sufficiently probative of her credibility. Ms. Carroll plausibly represented that she had forgotten about the limited outside funding counsel obtained in September 2020 when this question was first posed to her in 2022, and the additional discovery did not indicate otherwise. Rather, it showed that Ms. Carroll simply was not involved in the matter of who was or was not funding her litigation costs. Ms. Carroll testified that, after her counsel informed her in September 2020 that they had received some outside funding, she did not speak with her counsel about this topic again until the spring of 2023 and did not even know the funder's political position or why they were partially funding her lawsuit. Therefore, by the time of her deposition in October 2022, Ms. Carroll had not spoken with her counsel about

the matter of outside funding for over two years. It was not an abuse of the district court's discretion to conclude that the available litigation-funding evidence would have little probative value compared to its potential for unfair prejudice.

b. *Bias and Motive*

For similar reasons, we conclude that extrinsic evidence of the litigation funding had minimal, if any, probative value on the issue of Ms. Carroll's bias and motive. [24]

Extrinsic evidence may be introduced to prove a witness's bias. *United States v. Harvey*, 547 F.2d 720, 722 (2d Cir. 1976) ("[B]ias of a witness is not a collateral issue and extrinsic evidence is admissible to prove that a witness has a motive to testify falsely."). The admissibility of evidence for this purpose depends on whether it is "sufficiently probative of [the witness's asserted bias] to warrant its admission into evidence." *United States v. Abel*, 469 U.S. 45, 49 (1984).

[24] "Bias is a term used . . . to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party. Bias may be induced by a witness'[s] like, dislike, or fear of a party, or by the witness'[s] self-interest." *United States v. Abel*, 469 U.S. 45, 52 (1984).

To the extent Mr. Trump argues that the acceptance of outside funding goes toward Ms. Carroll's motive in lodging these allegations at Mr. Trump, the discovery also confirmed that Ms. Carroll publicly accused Mr. Trump of sexual assault over a year before the outside litigation funding was secured. Moreover, whether the outside funder was politically opposed to Mr. Trump was of little probative value because Ms. Carroll herself frankly admitted her political opposition to Mr. Trump, and her key witnesses testified to their opposition as well. *See, e.g.*, App'x at 1653 (Ms. Carroll acknowledging she is "a registered Democrat"); *id.* at 2120, 2123 (Ms. Leeds acknowledging she is a Democrat and "passionate about politics"); *id.* at 2054 (Ms. Birnbach acknowledging she is a Democrat and donated to Hillary Clinton); *id.* at 2411 (Ms. Martin acknowledging she is a Democrat and donated to Clinton). On multiple occasions, defense counsel was able to bring out the political opposition and distaste for Mr. Trump held by Ms. Carroll and her witnesses. *See United States v. James*, 609 F.2d 36, 47-48 (2d Cir. 1979) (finding reversal not warranted

where defendant was given full opportunity to explore witness's apparent bias).[25]

In light of the minimal probative value of the evidence, we conclude that the district court did not abuse its discretion in excluding it under Rule 403.

2. *The Stoynoff Transcript*

During trial, Mr. Trump moved to admit a redacted version of a transcript made by Ms. Carroll of a conversation between Ms. Carroll and Ms. Stoynoff to show Ms. Carroll's alleged "effort to influence Ms. Stoynoff's testimony." App'x at 1900. The court devoted over thirty minutes of a sidebar

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[25] Mr. Trump separately argues that the district court also "improperly restricted questioning and argument regarding [an attorney, George] Conway." Appellant's Br. at 43. Ms. Carroll testified at trial that about one month after she publicly accused Mr. Trump of sexually assaulting her, she attended a party where she met a lawyer named George Conway. Mr. Conway encouraged Ms. Carroll to seriously consider filing a lawsuit against Mr. Trump. The district court sustained an objection to portions of Mr. Trump's opening statement that concerned Mr. Conway on the ground that counsel was impermissibly arguing to the jury that Mr. Conway had recommended Ms. Carroll's counsel. Even if Mr. Conway's conversation with Ms. Carroll was somehow probative of bias, we find no error in the district court's ruling. Argument related to Ms. Carroll's choice of counsel had been ruled inadmissible pursuant to Ms. Carroll's unopposed motion *in limine*. *Carroll v. Trump*, No. 22-cv-10016 (LAK), 2023 WL 2652636, at *8 (S.D.N.Y. Mar. 27, 2023). Further, contrary to Mr. Trump's representation on appeal, defense counsel was permitted to meaningfully cross-examine Ms. Carroll about Mr. Conway. Ms. Carroll acknowledged that Mr. Conway had encouraged her to file the lawsuit, and defense counsel was able to argue these facts to the jury during summation.

conversation to "trying to figure out what it is [defense counsel was] trying to put in[to evidence]." App'x at 1907; *see also id.* at 1912.[26] The district court called defense counsel's rendition of his proposed presentation to the jury of the redacted transcript "tremendously confusing," *id.* at 1903, and commented that defense counsel did not have the slides of the redacted transcript "figured out" or "put together," *id.* at 1907. At the end of this lengthy conversation, the district court denied the motion to receive the proposed document into evidence, finding that Ms. Stoynoff's statements in the transcript constituted hearsay, and that the proposed document's use at trial would be confusing and unnecessarily time-consuming. The court requested that defense counsel determine how to elicit the information "[i]n a way that will not be confusing and take three times as much time." *Id.* at 1913.

The solution that the court accepted, and that Mr. Trump now challenges as insufficient, was to exclude the redacted transcript from presentation on direct examination but to permit defense counsel to cross-examine Ms. Carroll about the interview and to use the transcript to refresh and

[26] The "transcript" document included much extraneous material. *See* App'x at 1371-415.

impeach, if necessary. On cross-examination, defense counsel did in fact confront Ms. Carroll with language from the transcript, reading portions of it into the record. Defense counsel did not seek to question Ms. Stoynoff about the transcript.

Mr. Trump argues that the district court's decision to preclude the redacted Stoynoff transcript itself was erroneous: he submits that Ms. Carroll's statements, as they were embodied in the redacted transcript, were admissible for their truth as a party admission under Federal Rule of Evidence 801(d)(2)(A). Mr. Trump also argues that the transcript itself was admissible as extrinsic evidence of motive and bias.

We agree with Mr. Trump that, contrary to Ms. Carroll's argument, the Stoynoff transcript did not contain inadmissible hearsay: Ms. Carroll's statements were party admissions under Rule 801(d)(2)(A), and Ms. Stoynoff's responses were being offered to place Ms. Carroll's statements into context and were not being offered for their truth. *See United States v. Song*, 436 F.3d 137, 139 (2d Cir. 2006) (finding that it was error to exclude testimony not offered for the truth of the matters asserted, "but rather[] to demonstrate the motivation behind [a party's] actions"); *United States v. Ebens*, 800 F.2d 1422, 1430-32 (6th Cir. 1986)

(holding that trial court erred in not admitting recording of witnesses being prepared, where tapes were not offered for truth of statements contained therein, but to show, *inter alia*, that witnesses were being coached), *abrogated in other respects by Huddleston v. United States*, 485 U.S. 681 (1988). The transcript was also arguably relevant as extrinsic evidence of Ms. Carroll's bias. *See James*, 609 F.2d at 46; *Harvey*, 547 F.2d at 722.

But the district court did not err in refusing to admit the proposed redacted version of the transcript into evidence. We accord great deference to a district court "in determining whether evidence is admissible, and in controlling the mode and order of its presentation to promote the effective ascertainment of the truth." *SR Int'l Bus. Ins. Co. v. World Trade Ctr. Props., LLC*, 467 F.3d 107, 119 (2d Cir. 2006) (internal quotation marks omitted). As discussed above, a district court does not abuse its discretion in making an evidentiary ruling unless "the ruling was arbitrary and irrational." *Restivo*, 846 F.3d at 573 (quoting *Coppola*, 671 F.3d at 244). The district court's decision to exclude the Stoynoff transcript as prepared by counsel was far from arbitrary or irrational.

The district court's sidebar discussion with counsel illuminates that defense counsel sought to use the transcript in ways that risked confusion, undue

delay, and wasted time on cumulative evidence -- considerations that the district court was permitted to weigh, pursuant to Federal Rule of Evidence 403, when deciding whether to admit or exclude the evidence. Defense counsel provided no explanation as to how the transcript itself would have added anything of significance, and the transcript's admission would have been largely cumulative of the excerpts that were read verbatim into the record. *See Old Chief v. United States*, 519 U.S. 172, 184-85 (1997) ("[W]hen Rule 403 confers discretion by providing that evidence 'may' be excluded, the discretionary judgment may be informed not only by assessing an evidentiary item's twin tendencies, but by placing the result of that assessment alongside similar assessments of evidentiary alternatives."). A trial judge has discretion to exclude cumulative proof of bias, including documentary evidence, when the witness admits to the "incidents from which any alleged bias . . . arose." *United States v. Weiss*, 930 F.2d 185, 199 (2d Cir. 1991). Here, the district court permitted defense counsel to cross-examine Ms. Carroll using language drawn verbatim from the transcript, and Ms. Carroll admitted to all the relevant information. Moreover, the district court correctly instructed the jury to consider Ms. Stoynoff's statements not for their truth, but for "the fact that they were said to Ms. Carroll because they shed light on what

Ms. Carroll did and why she did it." App'x at 1920. Accordingly, we conclude that the district court acted well within its discretion in excluding the Stoynoff transcript.

3. ***DNA Evidence***

Mr. Trump next argues that the district court erred when it "precluded cross-examination of [Ms. Carroll] regarding her false, public claim that she possessed President Trump's DNA" on the dress she was wearing the day of the 1996 assault. Appellant's Br. at 48. In a written opinion issued pre-trial, the district court concluded that although Ms. Carroll's statements regarding DNA evidence were arguably relevant to Ms. Carroll's credibility, their probative value was significantly outweighed by the reasons for preclusion enumerated in Rule 403, including "unfair prejudice, confusing the issues, misleading the jury, undue delay, [and] wasting time." *Carroll v. Trump*, No. 22-cv-10016 (LAK), 2023 WL 2652636, at *7 (S.D.N.Y. Mar. 27, 2023). We see no abuse of discretion here.

In a series of tweets on her public Twitter page in 2020 and 2021, Ms. Carroll claimed that she still had the dress she was wearing when Mr. Trump

assaulted her, and she believed the dress had Mr. Trump's DNA on it.[27] She had had a DNA test performed on the dress, and the test showed, she said, that the dress had male DNA on it. *See* App'x at 599-601. At the outset of *Carroll I*, Ms. Carroll had requested a DNA sample from Mr. Trump for testing, seeking to confirm her belief that it was his DNA, but Mr. Trump had refused to provide a sample for over three years and did not offer to provide a sample until the eve of trial in *Carroll II*. *See generally Carroll v. Trump*, No. 22-cv-10016 (LAK), 2023 WL 2006312, at *3-6 (S.D.N.Y. Feb. 15, 2023). The district court did not abuse its discretion in precluding cross-examination of Ms. Carroll on this subject.

First, the district court determined that the probative value of this line of questioning was low, as there was no credible evidence that Ms. Carroll lied about believing that Mr. Trump's DNA was on the dress. She was simply

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[27] @ejeancarroll, Twitter (June 2, 2021, 12:10 PM), https://twitter.com/ejeancarroll/status/1400122740720480262 [https://perma.cc/W845-73S2] ("Didn't last as long as DNA on a dress."); @ejeancarroll, Twitter (Feb. 25, 2021, 12:49 PM), https://twitter.com/ejeancarroll/status/1364995845439901700 [https://perma.cc/MCQ7-ZTHD] ("Cyrus Vance, the Manhattan District Attorney, has Trump's taxes. Fani Willis, the Georgia Prosecutor, has Trump's phone call. Mary Trump has her grandfather's will. And I have the dress. Trump is basically in deep shit."); @ejeancarroll, Twitter (May 1, 2020, 3:16 PM), https://twitter.com/ejeancarroll/status/1256301599426785280 [https://perma.cc/PAR7-HPYM] ("I am STILL waiting for Trump to provide his DNA sample to be tested against the dress I wore when he attacked me.").

never able to confirm or negate the basis for her belief because she was never able to obtain a sample of Mr. Trump's DNA to compare to the DNA on the dress.

Second, the district court also recognized that cross-examination of Ms. Carroll on this basis would have opened the door to questions about why she never conducted a DNA test with Mr. Trump's sample, whether she had tried to get a DNA sample from Mr. Trump, and why she was unable to do so. Cross-examination in this area also could have required expert testimony on DNA testing. The parties indicated to the district court that if DNA became an issue, they would seek to reopen discovery, adduce expert testimony, and engage in a new round of motions *in limine* related to this topic.

We conclude that the district court did not abuse its discretion in determining that allowing further inquiry into this area created a substantial danger of unfair prejudice, confusion, and unnecessary delay. That danger substantially outweighed any possible probative value, especially considering that the pretrial discovery period had closed by the time Mr. Trump offered to provide a DNA sample, and both parties had had ample time to develop DNA as an issue, yet both had failed to do so. Permitting cross-examination on this issue

would have created a "trial within a trial" about why Ms. Carroll did not have Mr. Trump's DNA sample. *See, e.g.*, *Ricketts v. City of Hartford*, 74 F.3d 1397, 1414 (2d Cir. 1996) (no abuse of discretion "in determining that a trial within a trial . . . would have been more confusing than helpfully probative"); *United States v. Aboumoussallem*, 726 F.2d 906, 912-13 (2d Cir. 1984) (upholding exclusion of evidence under Rule 403 where confusion and delay caused by trial within a trial would substantially outweigh the evidence's probative value).

4. *Failure to File Police Report*

Mr. Trump also contends that the district court erred in precluding the following question to Ms. Carroll: "How would you bringing criminal charges be disrespectful to some people at the border?" App'x at 1840. The district court stated: "Correct me if I'm wrong, counsel, but I believe in the State of New York private individuals can't bring criminal charges," and explained, "We have been up and down the mountain on the question of whether she went to the police, so let's move on." *Id.*

Mr. Trump argues that he should have been permitted to pursue this line of questioning to explore further her decision not to use formal options for

reporting her allegations. Mr. Trump also argues that the district court's response improperly suggested that Ms. Carroll was powerless to file a report.

The district court did not abuse its discretion in limiting this line of questioning or in making these brief comments. Mr. Trump's arguments on this point rely on a mischaracterization of the record. The district court permitted extensive questioning on cross-examination of Ms. Carroll regarding her decision not to go to the police, and the court allowed the introduction of extrinsic evidence on this very point. By the time Mr. Trump's counsel reached this question, Ms. Carroll had already responded to at least ten questions regarding her decision not to file a police report. The federal rules instruct the district court to "exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to . . . make those procedures effective for determining the truth [and] avoid wasting time." Fed. R. Evid. 611(a). The district court was well within its discretion to bar further cumulative questioning.

5. ***Bergdorf Goodman Security Footage***

Finally, the district court did not abuse its discretion when it denied Mr. Trump's counsel the opportunity to ask Ms. Carroll whether she went back

to Bergdorf Goodman the "next day to . . . ask for the video camera footage." App'x at 1842.

It is well established in our circuit that "a question (which assumes a fact) may become improper on cross-examination, because it may by implication put into the mouth of an unwilling witness, a statement which he never intended to make, and thus incorrectly attribute to him testimony which is not his." *United States v. DeFillipo*, 590 F.2d 1228, 1239-40 (2d Cir. 1979) (quoting 3 Wigmore, Evidence § 780, at 171 (Chadbourn ed., rev. 1970)).

Right before this question was asked and objected to, Ms. Carroll had testified that she had "never . . . been able to verify if there were cameras in the dressing room or in the lingerie department." App'x at 1841. And not one of the witnesses who testified about the location of cameras within the store at the time in question had stated that there were cameras in either of these locations. The former store manager at Bergdorf Goodman, Cheryl Beall, testified that she thought that, at the time, there were cameras at the main entrances and exits and "in fine jewelry" but not around the escalators or in the lingerie department. *Id.* at 1557-58. Likewise, the former Senior Vice President of Administration at Bergdorf Goodman, Robert Salerno, testified that he thought there were only a

few cameras in the store in the mid-1990's -- at the employee entrance, at the loading dock, and maybe in furs, and in fine jewelry. Thus, by the time this question was asked, defense counsel had elicited no proof that video cameras were installed in the specific locations of the store where the incident occurred. Accordingly, the district court correctly determined that defense counsel's question to Ms. Carroll assumed a fact not in evidence. Moreover, notwithstanding the absence of evidence of cameras in the locations in question, Mr. Trump's counsel still emphasized this point during his closing argument. *Id.* at 2681 ("[S]he even told you she never even went back to think about looking for surveillance video at Bergdorf Goodman which would have proven her case. She didn't think about it because it never happened.").

C. ***No New Trial Is Warranted***

Finally, Mr. Trump asserts that he is entitled to a new trial, arguing that the cumulative effect of the claimed errors affected his substantial rights. "[A]n erroneous evidentiary ruling warrants a new trial only when 'a substantial right of a party is affected,' as when 'a jury's judgment would be swayed in a material fashion by the error.'" *Lore*, 670 F.3d at 155 (quoting *Arlio*, 474 F.3d at 51). "We measure prejudice by assessing error in light of the record

as a whole." *Phillips v. Bowen*, 278 F.3d 103, 111 (2d Cir. 2002) (citation omitted). And, even assuming evidentiary error, we will not grant a new trial if we find that the error was "harmless." *Cameron*, 598 F.3d at 61. We will deem an evidentiary error harmless if we conclude that the proof at issue was "unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." *Yates v. Evatt*, 500 U.S. 391, 403 (1991).

As we have discussed, the district court did not abuse its discretion in making any of the challenged evidentiary rulings. The jury made its assessment of the facts and claims on a properly developed record. Even assuming *arguendo* that the district court erred in some of these evidentiary rulings -- a proposition that we have rejected -- taking the record as a whole and considering the strength of Ms. Carroll's case, we are not persuaded that any claimed error or combination of errors in the district court's evidentiary rulings affected Mr. Trump's substantial rights. *Lore*, 670 F.3d at 155.

CONCLUSION

For the reasons set forth above, the judgment of the district court is AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

E. JEAN CARROLL,

Plaintiff,

-against-

22-cv-10016 (LAK)

DONALD J. TRUMP,

Defendant.

- x

MEMORANDUM OPINION DENYING DEFENDANT'S RULE 59 MOTION

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LEWIS A. KAPLAN, *District Judge.*

In 2019, E. Jean Carroll first publicly claimed that businessman Donald J. Trump, as he then was, sexually assaulted ("raped") her in the mid-1990s. Mr. Trump responded almost immediately by charging that Ms. Carroll's claim was entirely false, that no such thing ever had happened, and that Ms. Carroll falsely accused Mr. Trump for ulterior and improper purposes. He repeated that contention in 2022 and yet again more recently. Ms. Carroll consequently sued Mr. Trump twice.

Ms. Carroll's first lawsuit (*"Carroll I"*), commenced in 2019, alleges that Mr. Trump's 2019 statements were defamatory. While that case was delayed for years for reasons that need not be recapitulated here, it now is scheduled for trial in January 2024.

This, the second case (*"Carroll II"*), also contains a defamation claim, albeit one based on Mr. Trump's comparable 2022 statement. But *Carroll II* made an additional claim – one for damages for the sexual assault. That claim could not have been made in 2019 because the statute of limitations almost doubtless would have expired long before. But the claim was made possible in 2022 by the enactment that year of New York's Adult Survivors Act (the "ASA"), which temporarily revived the ability of persons who were sexually assaulted as adults to sue their alleged assaulters despite the fact that an earlier statute of limitations had run out.

This case, *Carroll II,* was tried in April and May 2023. Ms. Carroll contended that Mr. Trump had assaulted her in a dressing room at a New York department store where, among other things, he forcibly penetrated her vagina with his fingers and his penis. She testified in person for most of three days and was cross-examined intensively. Her sexual assault claim was corroborated by two "outcry" witnesses in whom Ms. Carroll had confided shortly after the attack, and was supported by six other fact witnesses. Mr. Trump's defense – based exclusively on an

attempt to discredit Ms. Carroll and her other witnesses – in substance was that no assault ever had occurred, that he did not even know Ms. Carroll, and that her accusations were a "Hoax." Mr. Trump, however, did not testify in person or even attend the trial despite ample opportunity to do so.

The jury's unanimous verdict in *Carroll II* was almost entirely in favor of Ms. Carroll. The only point on which Ms. Carroll did not prevail was whether she had proved that Mr. Trump had "raped" her within the narrow, technical meaning of a particular section of the New York Penal Law – a section that provides that the label "rape" as used in criminal prosecutions in New York applies only to vaginal penetration by a penis. Forcible, unconsented-to penetration of the vagina or of other bodily orifices by fingers, other body parts, or other articles or materials is not called "rape" under the New York Penal Law. It instead is labeled "sexual abuse."[1]

As is shown in the following notes, the definition of rape in the New York Penal Law is far narrower than the meaning of "rape" in common modern parlance, its definition in some dictionaries,[2] in some federal and state criminal statutes,[3] and elsewhere.[4] The finding that Ms.

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1 "Sexual abuse" involving sexual contact by forcible compulsion (sexual abuse in the first degree) nevertheless is a felony punishable by a term of imprisonment and requiring sex offender registration. N.Y. Penal Law §§ 70.02(1)(c) (sexual abuse in the first degree is a Class D violent felony), 3(c) ("For a class D felony, the term must be at least two years and must not exceed seven years . . .."); N.Y. Correct. Law §§ 168-a(3)(a)(i) (defining "[s]exually violent offense" to include a conviction of sexual abuse in the first degree), 7(b) (defining "[s]exually violent offender" as "a sex offender who has been convicted of a sexually violent offense defined in subdivision three of this section").

2 One dictionary, for example, defines rape as "unlawful sexual intercourse *or any other sexual penetration* of the vagina, anus, or mouth of another person, with or without force, *by a sex organ, other body part, or foreign object*, without the consent of the person subjected to such penetration." "[R]ape," Dictionary.com, https://www.dictionary.com/browse/rape (last accessed July 14, 2023) (emphasis added). The most recent edition of Black's Law Dictionary defines rape in part as "[u]nlawful sexual activity (esp. intercourse) with a person (usu[ally] a female) without consent and usu[ally] by force or threat of injury" and

Carroll failed to prove that she was "raped" within the meaning of the New York Penal Law does

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it defines "intercourse" in the sexual sense as "*[p]hysical sexual contact*, esp. involving the penetration of the vagina by the penis." Black's Law Dictionary 966, 1511 (11th ed. 2019).

[3] *E.g.,* 10 U.S.C. § 920(g)(1)(C) (Uniform Code of Military Justice) (defining "sexual act" for purposes of rape and sexual assault as, *inter alia*, "the penetration, however slight, of the vulva or penis or anus of another *by any part of the body or any object*, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person") (emphasis added); WAYNE R. LAFAVE, SUBST. CRIM. L., § 17.2(a) & n. 43 (3d ed.) ("In recent years, revision of rape laws have often brought about coverage of a broader range of conduct than is encompassed within the common law term 'carnal knowledge.'... As for the acts covered, the new statutes 'fall into three categories: those that continue the narrow notion that rape should punish only genital copulation; those that agree with the Model Code that rape laws should be expanded to include anal and oral copulation; and *those that go beyond the Model Code to include digital or mechanical penetration* as well as genital, anal, and oral sex.") (emphasis added) (citing state statutes).

In fact, "rape" as defined in the relevant part of the New York Penal Law – forcible, unconsented-to penetration of the vagina by a penis – constitutes "sexual assault" under the Code of Criminal Justice of the State of New Jersey. N.J. Stat. Ann. §§ 2C:14-2c.(1) ("[a]n actor is guilty of sexual assault if the actor commits an act of sexual penetration with another person" and does so "using coercion or without the victim's affirmative and freely-given permission") and 2C:14-1c ("'Sexual penetration' means vaginal intercourse, cunnilingus, fellatio or anal intercourse between persons or insertion of the hand, finger or object into the anus or vagina either by the actor or upon the actor's instruction."). New Jersey, like some other states, does not statutorily define any crime as "rape." As indicated by the foregoing, New Jersey's penal code – unlike New York's – treats digital and other modes of penetration in the same manner as penile penetration.

[4] The American Psychological Association, for example, defines rape as "the nonconsensual oral, anal, or vaginal penetration of an individual by another person *with a part of the body or an object*, using force or threats of bodily harm or taking advantage of the individual's inability to give or deny consent. U.S. laws defining rape vary by state, but the crime of rape is no longer limited to . . . vaginal penetration . . . ." APA Dictionary of Psychology, "Rape," AMERICAN PSYCHOLOGICAL ASSOCIATION, https://dictionary.apa.org/rape (last accessed July 14, 2023) (emphasis added).

The United States Attorney General announced in January 2012 a new definition of rape for the purpose of the Federal Bureau of Investigation's Uniform Crime Report Summary Reporting System by, among other changes, "recogniz[ing] that rape with an object can be as traumatic as penile/vaginal rape." U.S. Department of Justice, *An Updated Definition of Rape*, Jan. 6, 2012, https://www.justice.gov/archives/opa/blog/updated-definition-rape (new definition of "rape" as "[t]he penetration, no matter how slight, of the vagina or anus *with any body part or object*, or oral penetration by a sex organ of another person, without the consent of the victim") (emphasis added).

not mean that she failed to prove that Mr. Trump "raped" her as many people commonly understand the word "rape." Indeed, as the evidence at trial recounted below makes clear, the jury found that Mr. Trump in fact did exactly that.

So why does this matter? It matters because Mr. Trump now contends that the jury's $2 million compensatory damages award for Ms. Carroll's sexual assault claim was excessive because the jury concluded that he had not "raped" Ms. Carroll.[5] Its verdict, he says, could have been based upon no more than "groping of [Ms. Carroll's] breasts through clothing or similar conduct, which is a far cry from rape."[6] And while Mr. Trump is right that a $2 million award for such groping alone could well be regarded as excessive, that undermines rather than supports his argument. His argument is entirely unpersuasive.

This jury did not award Ms. Carroll more than $2 million for groping her breasts through her clothing, wrongful as that might have been. There was no evidence at all of such behavior. Instead, the proof convincingly established, and the jury implicitly found, that Mr. Trump deliberately and forcibly penetrated Ms. Carroll's vagina with his fingers, causing immediate pain and long lasting emotional and psychological harm. Mr. Trump's argument therefore ignores the bulk of the evidence at trial, misinterprets the jury's verdict, and mistakenly focuses on the New York Penal Law definition of "rape" to the exclusion of the meaning of that word as it often is used in everyday life and of the evidence of what actually occurred between Ms. Carroll and Mr. Trump.

There is no basis for disturbing the jury's sexual assault damages. And Mr. Trump's

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5 The jury awarded Ms. Carroll $20,000 in punitive damages, in addition to the $2 million in compensatory damages.

6 Dkt 205 (Def. Mem.) at 1.

arguments with respect to the defamation damages are no stronger.

Facts

The Evidence at Trial

Ms. Carroll's case in chief constituted all of the evidence at trial. Mr. Trump neither testified nor called any witnesses. Apart from portions of his deposition that came in on Ms. Carroll's case, there was no defense evidence at all. The defense consisted entirely of (1) an attempt to discredit Ms. Carroll's proof on cross-examination, and (2) Mr. Trump's testimony during his deposition that Ms. Carroll's account of the alleged events at the department store was a hoax.

Sexual Battery

Liability

The principal evidence as to Mr. Trump's liability for the sexual assault was the testimony of Ms. Carroll, of the two "outcry" witnesses and of two other women who claimed to have been sexually assaulted by Mr. Trump, the so-called *Access Hollywood* video, and Mr. Trump's remarkable comments about that video during his deposition.

Ms. Carroll

In her first public accusation of sexual assault – "rape" – against Mr. Trump, which was published in June 2019 as an excerpt of her then-forthcoming book, Ms. Carroll described the assault in relevant part as follows:

> "The moment the dressing-room door [(at Bergdorf Goodman, a department store in New York)] is closed, he lunges at me, pushes me against the wall, hitting

> my head quite badly, and puts his mouth against my lips. I am so shocked I shove him back and start laughing again. He seizes both my arms and pushes me up against the wall a second time, and, as I become aware of how large he is, he holds me against the wall with his shoulder and jams his hand under my coat dress and pulls down my tights. . . . The next moment, still wearing correct business attire, shirt, tie, suit jacket, overcoat, he opens the overcoat, *unzips his pants, and, forcing his fingers around my private area, thrusts his penis halfway — or completely, I'm not certain — inside me*. It turns into a colossal struggle.[7]

At trial, Ms. Carroll testified:

- "He [(Mr. Trump)] immediately shut the [(dressing room)] door and shoved me up against the wall and shoved me so hard my head banged."
- "I pushed him back, and he thrust me back against the wall again, banging my head again."
- "He put his shoulder against me and hold [*sic*] me against the wall."
- "I remember him being -- he was very large, and his whole weight came against my chest and held me up there, and he leaned down and pulled down my tights."
- "I was pushing him back. . . . I pushed him back. This arm was pinned down. This arm had my purse. Trying to get him back."
- "His head was beside mine breathing. First, he put his mouth against me."

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[7] E. Jean Carroll, *Hideous Men: Donald Trump assaulted me in a Bergdorf Goodman dressing room 23 years ago. But he's not alone on the list of awful men in my life*, THE CUT, NEW YORK MAGAZINE, Jun. 21, 2019, https://www.thecut.com/2019/06/donald-trump-assault-e-jean-carroll-other-hideous-men.html (emphasis added).

- "[I was] [s]tamping and trying to wiggle out from under him. *But he had pulled down my tights and his hand went -- 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 finger. As I'm sitting here today, I can still feel it.*"
- "Then he inserted his penis."
- "He was against me, his whole shoulder -- I couldn't see anything. I couldn't see anything that was happening. *But I could certainly feel it. I could certainly feel that pain in the finger jamming up.*"[8]

After a day and a half of direct testimony, Ms. Carroll was subjected to a lengthy cross examination during which she testified:

"Q. It's your story that at some point you felt his penis inside of you?

A. Yes.

Q. But before that, *it's your sworn testimony that you felt his fingers, what you said was rummaging around your vagina*?

A. *It's an unforgettable feeling.*

Q. Now, when you say rummaging around your vagina, that's different than inserting a finger inside your vagina.

A. *At first he rummaged around and then he put his finger inside me.*

Q. In your book you wrote that he was forcing his fingers around my private area and then thrust his penis halfway completely, I'm not certain, inside me. Is that accurate?

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[8] Dkt 187 (Trial Tr.) at 177:22-181:23 (emphasis added).

A. Yes."[9]

The Outcry Witnesses

Ms. Carroll confided in two of her friends, Lisa Birnbach and Carol Martin (the "outcry" witnesses), about the attack shortly after it occurred. Almost immediately after Ms. Carroll escaped from Mr. Trump and exited the store, she called Ms. Birnbach. Ms. Carroll testified that during that call:

> "A. I said, you are not going to believe what just happened. I just needed to tell her. I said I met Donald Trump in Bergdorf's. We went lingerie shopping and I was so dumb I walked in a dressing room and he pulled down my tights."
>
> . . .
>
> Q. What else did you say?
>
> A. Well, she asked me, she said, after she heard he had pulled down my tights, she asked me, did he insert his penis? I said yes. And then Lisa said the words: Probably why I called her. She said he raped you. He raped you, E. Jean. You should go to the police. I said: No way. Then she said: I will go with you."[10]

The next day, or the day after that, Ms. Carroll told Ms. Martin about the attack. Ms. Carroll testified:

> "I said [(to Ms. Martin)]: Carol, you are not going to believe it. I had a run-in with Donald Trump at Bergdorf's. She said -- she saw my face. She said: We can't talk

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[9] Dkt 189 (Trial Tr.) at 406:5-18 (emphasis added).

[10] Dkt 187 (Trial Tr.) at 186:4-19.

here. We were back behind the studio. She said: Let's talk tonight at my house.

. . .

I took her through step by step what happened. And Carol is a very unjudgmental, open-hearted friend. But she was -- she gave me the exact -- her concern was very different than Lisa's. Carol's concern was, do not go to the police."[11]

Both Ms. Birnbach and Ms. Martin testified about their conversations with Ms. Carroll. Ms. Birnbach testified in relevant part:

"Q. What was the first thing that Ms. Carroll said when you picked up the phone?

A. She said, Lisa, you are not going to believe what happened to me.

. . .

Q. What did she say after she said, Lisa, you are not going to believe what just happened?

A. E. Jean said that she had, after work that day, she had gone to Bergdorf's to look around, and she was on her way out -- and I believe it was a revolving door -- and she said on the other side of the glass from her going in, as she was going out, Donald Trump said to her, *Hey, you're the advice lady*. And she said, *You're the real estate guy*. And he said, *You're so good at advice, you are so smart, why don't you help me pick out a present for a friend*? So she thought she would, it sounded like a funny thing, this guy, who is famous. And she went back in the store and tried to, in my -- in my memory tried to show him things[.] . . . They went upstairs, eventually finding themselves in the lingerie department, and there was no one behind the

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[11] *Id.* at 190:5-20.

counter but there was a little bodysuit --

. . .

Q. What did she say happened after they got to the lingerie department?

A. He said, *Why don't you try this on?* And she, continuing sort of the jokey banter that they had, she said, *Why don't you try it on?* And then the next thing that happened is they were both in the dressing room and he slammed her against the wall. And then, as she was trying to move, he -- he slammed his whole arm, pinned her against the wall with his arm and shoulders, and with his free hand pulled down her tights. And E. Jean said to me many times, *He pulled down my tights. He pulled down my tights*. Almost like she couldn't believe it. She was still processing what had just happened to her. It had just happened to her. *He pulled down my tights*. And then he penetrated her.

Q. Did she say how he penetrated her?

A. Yes. She said with his penis.

Q. What did you say after Ms. Carroll described this to you?

A. As soon as she said that . . . and I said, I whispered, *E. Jean, he raped you*. . . . "[12]

Two days later, Ms. Martin testified in pertinent part:

"Q. And what did she say -- again, taking this piece by piece, what did she say what happened?

A. She introduced it by saying, *You won't believe what happened to me the other*

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[12] Dkt 193 (Trial Tr.) at 688:5-690:9 (emphases in original).

night. As I recall. And I didn't know what to expect and so, I just turned to her and she said, *Trump attacked me.*

. . .

Q. Now, Ms. Carroll says to you that *Trump attacked me*. Do you recall what you said next, if anything?

A. Yeah. I was completely floored. I didn't quite know what was coming next. She is leaning in to me, and I'm saying, *What are you talking about?* But the next thing that came to my mind was if she was OK and that's what I asked her. So I said, *Are you OK?* Because she seemed -- her affect was, I would say, anxious and excitable, but she could be that way sometimes but that part was different in her affect. But what she was saying didn't make any sense at first.

Q. And when you asked her was she OK, did she respond?

A. She said -- she probably said I don't know. She kept telling me what happened, *that he attacked me*. I think she said 'pinned me' is what she said and I still didn't know what that meant.

Q. So, to the best of your recollection -- I understand it would be crazy if you could remember every word, but what did she tell you that day about what had happened to her at Bergdorf Goodman?

A. Basically, she backtracked. I kept asking her to backtrack. It wasn't a linear conversation, as you would expect, because it was news, it was I didn't know what I am hearing here, and she was clearly agitated, anxious. And she said she was at Bergdorf's the night before -- probably two nights, if I recall -- and that she ran into Mr. Trump going in one of the revolving doors. And she said that they started up a

conversation. My sense is that she engaged him, or vice versa, because that's not uncommon for E. Jean. He recognized her, she recognized him.

. . .

Q. And what else did she tell you about what happened once they were inside Bergdorf Goodman?

A. So, she related that they sort of started kibbitzing or talking back and forth, it was apparently friendly, and she said that he was looking for a gift. And so, she engaged him that way suggesting certain things. I don't remember all of the things. But this must have gone on for a few minutes and then, somehow, they started up the stairs -- escalator, she said.

Q. And did she tell you what happened after they got off the escalator?

A. Yeah. And again, this was disjointed because I would stop and ask her, *What do you mean? What do you mean?* And she was explaining as she's going that once they reached a level -- and I don't know Bergdorf's that well, but once they reached a level where there was -- there were dressing rooms, and she said at that point that he attacked her. Those were the words that I remember but I still said, *What do you mean? You look OK. You look* -- and she had been at work so I couldn't put it together. And she didn't use the word 'rape,' that I recall. I have said that before. But she said it was a frenzy. She said, *I was fighting*. *I was fighting*. She kept saying that."[13]

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[13] Dkt 197 (Trial Tr.) at 1028:22-1032:6 (emphases in original).

Other Alleged Survivors

The jury heard also from two other women who allegedly were sexually assaulted by Mr. Trump: Jessica Leeds and Natasha Stoynoff.[14] Ms. Leeds claims she was seated beside Mr. Trump on a flight to New York in 1978 or 1979 when he allegedly assaulted her. She testified:

> "A. Well, what happened was they served a meal, and it was a very nice meal, as Braniff was -- was -- reputation to do, and it was cleared and we were sitting there when all of a sudden Trump decided to kiss me and grope me.
>
> Q. What led to that? Was there conversation?
>
> A. There was no conversation. It was like out of the blue.
>
> . . .
>
> Q. What did you -- so describe, if you would, what he did exactly.
>
> A. Well, it was like a tussle. He was -- his hands and -- he 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 and I went storming back to my seat in the coach."[15]

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[14] The testimony of Mss. Leeds and Stoynoff was received pursuant to Federal Rule of Evidence 415, which provides that "evidence that the [defendant] committed any other sexual assault" may be admitted in "a civil case involving a claim for relief based on a party's alleged sexual assault." Fed. R. Evid. 415(a). The Court's analysis is contained in a prior decision and need not be repeated here. *Carroll v. Trump*, No. 20-CV-7311 (LAK), 2023 WL 2441795 (S.D.N.Y. Mar. 10, 2023).

[15] Dkt 193 (Trial Tr.) at 741:13-742:6 (emphasis added).

On cross examination, she testified also:

> "Q. And it is your story that after you were done eating, the flight attendant cleared your tray tables and this man suddenly attacked you?
>
> A. Correct.
>
> Q. It is your story this man grabbed you with his hands, tried to kiss you, grabbed your breasts, and pulled you towards him?
>
> A. Correct.
>
> Q. And pulled himself onto you?
>
> A. It's not -- no, not onto me but he was leaning-in to me, pushing me against the back of the seat.
>
> Q. OK. And then according to you he, at one point, put his hand on your knee?
>
> A. *He started putting his hand up my skirt*.
>
> Q. *OK, on your leg and up your skirt?*
>
> A. *Correct.*"[16]

Ms. Leeds confirmed that "if the man had just stuck with the upper part of [her] body, [she] might not have gotten that upset" and that "it is only when he eventually started putting his hands up [her] skirt that [she] said I don't need this[.]"[17] On re-direct she explained:

> "Q. Why did you find it less upsetting when he had his hands above your skirt than when they went into your skirt, when his hand went into your skirt?
>
> A. That's sort of the demarcations -- I mean, people -- men -- would frequently pat

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16 *Id.* at 771:19-772:8 (emphasis added).

17 *Id.* at 774:24-775:2, 775:13-16.

you on the shoulder and grab you or something like that and you just -- it is not serious and you don't -- you don't -- *but when somebody starts to put their hand up your skirt, you know they're serious and this is not good*."[18]

Ms. Stoynoff, then a reporter for a magazine, encountered Mr. Trump in 2005 at Mar-a-Lago, his residence in Florida, on an assignment to interview him and his wife, Melania. Ms. Stoynoff testified:

"Q. So where did you go with Mr. Trump after he said, I want to show you this room?

A. So we -- I followed him, and we went in through these back doors and down a hall, as I recall it, and turned right into a room.

Q. Who was with you at that point?

A. As I recall, just he and I.

Q. So what happened next?

A. So we -- we walked into a room, and I'm looking in this room, and I went in first and I'm looking around, I'm thinking, wow, really nice room, wonder what he wants to show me, and he -- 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.

Q. Was anyone else in the room at this time?

A. Nobody else.

Q. What did you -- how did you react?

A. I started -- I tried to push him away.

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[18] *Id.* at 787:6-14 (emphasis added).

Q. Had you -- had anything been said up until that point when you walked into the room? Did he say anything or did you say anything?

A. No, not that I recall.

. . .

Q. So what -- I think you said you tried to shove him away. What happened?

A. He came toward me again, and I tried to shove him again.

Q. What was he doing sort of -- what was he doing with, let's say, the rest of his face or body?

A. Well, he was kissing me and, you know, he was against me and just holding my shoulders back.

Q. Did you -- what, if anything, did you say while this was happening?

A. I didn't say words. I couldn't. I tried. I mean, I was just flustered and sort of shocked and I -- no words came out of me. I tried, though. I remember just sort of mumbling.

. . .

Q. How long -- do you recall how long that went on for?

A. A few minutes.

Q. How did it end?

A. A butler came into the room.

. . .

Q. How did Mr. Trump react when the butler came in?

A. He stopped doing what he was doing.

Q. Were you able to perceive whether the butler saw what had been happening?

A. I don't know if he saw, but to my mind, I gave him a kind of a 'get me out of here' look, and I felt like he understood.

Q. So what happened, what happened next?

A. The butler led us back to the couch area, and Melania was on her way, and Trump said a few things to me.

Q. What did he say to you?

A. *He said, Oh, you know we are going to have an affair, don't you? You know, don't forget what -- don't forget what Marla said, best sex she ever had. We are going to go for steak, we are going to go to Peter Luger's. We're going to have an affair.*

. . .

Q. . . . Before the butler came into the room, *did Mr. Trump do anything to you that suggested he was going to stop on his own*?

A. *No*."[19]

The Access Hollywood Tape

The so-called *Access Hollywood* tape, a recorded exchange among Mr. Trump and others as they arrived for the shooting of a television episode that was broadcast nationwide repeatedly during the 2016 presidential campaign, was played twice for the jury.[20] In that video, Mr.

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19 Dkt 195 (Trial Tr.) at 989:24-996:7 (emphasis added).

20 Like the testimony of Mss. Leeds and Stoynoff, the Court initially determined that the *Access Hollywood* tape was admissible on the ground that a jury reasonably could find it was evidence that Mr. Trump "committed any other sexual assault" pursuant to Rule 415. *Carroll*, 2023 WL 2441795 at *3-4. At trial, however, it became clear that reliance on Rule 415 was unnecessary because the video was offered for a purpose other than to show the

Trump stated that he previously had "moved on [a woman] like a bitch, but [he] couldn't get there." He said also in the following exchange:

> Trump: "Maybe it's a different one."
>
> Billy Bush: "It better not be the publicist. No, it's, it's her."
>
> Trump: "Yeah that's her. With the gold. I better use some Tic Tacs just in case I start kissing her. 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.*"
>
> Bush: "Whatever you want."
>
> Trump: "*Grab them by the pussy. You can do anything.*"

In the following excerpt of his deposition, which was played for the jury, Mr. Trump testified that:

> "*Q. And you say -- and again, this has become very famous -- in this video, '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*

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defendant's propensity to commit sexual assault. Instead, it was offered – as Ms. Carroll's counsel argued in rebuttal summation – as "a confession." Dkt 199 (Trial Tr.) at 1403:24. Given that Mr. Trump states in the video that he "just start[s] kissing" women without "even wait[ing]" and that a "star" (such as himself) could "grab [women] by the pussy," it "has the tendency to make [the] fact [of whether he sexually assaulted Ms. Carroll] more or less probable than it would be without the evidence" because one of the women he referred to in the video could have been Ms. Carroll. Fed. R. Evid. 401. *See also, e.g.*, *United States v. Cordero*, 205 F.3d 1325 (2d Cir. 2000) (unpublished opinion) ("Proof of similar acts may be admitted so long as such evidence is offered 'for any purpose other than to show a defendant's criminal propensity.'") (citation omitted); *Woolfolk v. Baldofsky*, No. 19-CV-3815(WFK) (ST), 2022 WL 2600132, at *2 (E.D.N.Y. July 8, 2022) ("Evidence of prior crimes, wrongs, or acts, however, may be admissible if offered 'for any purpose other than to show a defendant's criminal propensity, as long as the evidence is relevant and satisfies the probative-prejudice balancing test of Rule 403.'") (citation omitted). Accordingly, the Court did not include the *Access Hollywood* tape in its instructions to the jury on the evidence of Mr. Trump's alleged sexual assaults of other women, and neither party objected to its exclusion from that portion of the charge.

anything. That's what you said; correct?"

A. Well, historically, that's true with stars.

Q. True with stars that they can grab women by the pussy?

A. Well, that's what -- if you look over the last million years, I guess that's been largely true. Not always, but largely true. Unfortunately or fortunately.

Q. And you consider yourself to be a star?

A. I think you can say that, yeah.

Q. And -- now, you said before, a couple of minutes ago, that this was just locker room talk?

A. It's locker room talk.

Q. And so does that mean that you didn't really mean it?

A No. It's locker room talk. I don't know. It's just the way people talk."[21]

Damages for Sexual Assault (Battery) Claim

The damages evidence at trial consisted primarily of Ms. Carroll's own testimony as well as the testimony of Dr. Leslie Lebowitz, a clinical psychologist with expertise in trauma and in sexual trauma who evaluated Ms. Carroll for this case. Dr. Lebowitz testified in detail on the psychological harm of the assault by Mr. Trump on Ms. Carroll. She explained that:

"There were three dominant ways that I felt that she [(Ms. Carroll)] had been harmed. She has suffered from painful, intrusive memories for many years; she endured a diminishment in how she thought and felt about herself; and, perhaps most

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21 Dkt 138-1 (Def. Dep. Designations) at 174:5-175:4 (emphasis added).

prominently, she manifests very notable avoidance symptoms which have curtailed her romantic and intimate life and caused profound loss."[21]

Dr. Lebowitz testified also that, although Ms. Carroll did not meet the full criteria to have been diagnosed with post-traumatic stress disorder ("PTSD"), Ms. Carroll exhibited symptoms in at least some of the four categories that are necessary for a diagnosis of PTSD, including "avoidance symptoms, . . . alterations in her thoughts and feelings about herself, and ... intrusions."[22] She explained that Ms. Carroll blamed herself for the assault and that the assault "made her feel like she was worth less than she had been before" and "[s]he felt degraded and diminished."[23] As an example of an intrusive memory, which Dr. Lebowitz defined as "when some part of the traumatic experience, either what it felt like or it felt like in your body or in your emotions, just pierces your consciousness and lands in the middle of your experience and essentially hijacks your attention," Dr. Lebowitz testified that at one point during her interview with Ms. Carroll, she "began to squirm in her seat because she was actually reexperiencing Mr. Trump's fingers inside of her, what she alleges to be Mr. Trump's fingers inside of her."[24] She explained also Ms. Carroll's comment that she felt she had died and somehow still was alive as a manifestation of "what it feels like psychologically" because "what rape does is it so violates that sense of humanity and independence and selfhood than people feel psychologically that they are being killed. They feel

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21 Dkt 193 (Trial Tr.) at 829:22-830:2.

22 Dkt 195 (Trial Tr.) at 853:13-15.

23 *Id.* at 876:2-4.

24 *Id.* at 861:8-19.

at risk. They feel like their personhood is being murdered . . . ."[25] Dr. Lebowitz summarized the psychological impact of Mr. Trump's assault on Ms. Carroll as follows:

> "Because she was frightened and rendered helpless in a way that had never happened to her before and because she blamed herself and because the meaning of that event and the feelings associated with it were simply too big for her to cope with in her usual ways, *it became a stuck point in her life*, something that she had to walk around in her day-to-day basis; and, in doing that, in working so hard to stay away from those feelings of helplessness and vulnerability, she gave up one of the great sources of joy and connection in her life, which was the opportunity to be intimate with a man, and that was a huge loss for her."[26]

Defamation

Liability

Most of the evidence of Mr. Trump's liability for the defamation claim based on his 2022 statement was coextensive with the evidence of his liability for the sexual assault. The crux of Mr. Trump's 2022 statement was that Ms. Carroll lied about him sexually assaulting her and that her entire accusation was a "Hoax" concocted to increase sales of her then-forthcoming book. To prove that Mr. Trump defamed her, Ms. Carroll needed to prove that his statement was false (i.e., not substantially true), that he knew the statement was false when he made it or acted in reckless

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25 *Id.* at 864:19-865:12.

26 *Id.* at 888:10-20 (emphasis added).

disregard of whether or not it was true (actual malice), and that the statement tended to disparage Ms. Carroll in the way of her profession or expose her to hatred or contempt in the minds of a substantial number of people in the community.

The evidence that Mr. Trump sexually assaulted Ms. Carroll proved also the falsity of his statement, which contended that Ms. Carroll's entire account – not any particular sexual act – was a fabrication. With respect to its defamatory import, in addition to showing the jury examples of Internet hate messages Ms. Carroll received from people she did not know, Ms. Carroll testified:

> "Q. How, if at all, do you believe this statement affected your reputation?
>
> A. I really thought I was gaining back a bit of ground. I thought, it's starting to go and I felt, you know, happy that, you know, I was back on my feet, had garnered some readers, and feeling pretty good, and then, boom, he knocks me back down again.
>
> . . .
>
> Q. What, if any, I'll call it sort of public response did you experience after Mr. Trump made his October 2022 statement?
>
> A. It was not very nice.
>
> Q. What do you recall?
>
> A. Just a wave of slime. It was very seedy comments, very denigrating. Almost an endless stream of people repeating what Donald Trump says, I was a liar and I was in it for the money, can't wait for the payoff, working for the democrats, over and over. But the main thing was way too ugly. It is very hard to get up in the morning and face the fact that you're receiving these messages you are just too ugly to go on

living, practically."[28]

Ms. Carroll further testified that in comparison to the "tweets or messages [she] received after Mr. Trump made his first remarks in June of 2019," the messages that came after October 2022 "were equally, equally disparaging and hurtful, but these particularly hurt because I thought I had made it through and here they are again."[29]

In excerpts of Mr. Trump's deposition that were played for the jury, Mr. Trump confirmed that he wrote the statement "all myself"[30] and testified that:

> "I still don't know this woman. I think she's a wack job. I have no idea. I don't know anything about this woman other than what I read in stories and what I hear. I know nothing about her."[31]

Damages for Defamation Claim

The damages evidence consisted primarily of Ms. Carroll's testimony as to the harm she suffered, which is described above, plus the testimony of Professor Ashlee Humphreys with respect to a "reputation repair program" to correct the harm to Ms. Carroll's reputation caused by Mr. Trump's statement.

" . . . [T]he nature of the work [(for Professor Humphreys)] was to look at a

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28 Dkt 189 (Trial Tr.) at 322:6-324:5.

29 *Id.* at 329:2-7.

30 Dkt 138-1 (Def. Dep. Designations) at 134:13.

31 *Id.* at 137:14-17.

> statement that was posted on social media and to understand the spread of that statement, how many people saw it, how broadly did it spread, then to look at the impact that statement might have had on Ms. Carroll's reputation, if any, and finally to estimate, well, how much would it cost to repair that reputation."[32]

Professor Humphreys testified about her process and various calculations. She used an "impression model" to determine approximately how many people saw Mr. Trump's 2022 statement. She determined that across various forms of media, including on the Internet, social media, print media, and television, "the final estimate . . . was between 13.7 million and 18 million impressions," which she explained likely "was an undercount."[33] She stated that "after June 2019 . . . of course there was a lot more volume of statements about her [(Ms. Carroll)] and they contained pretty negative associations including that she was a liar, the perpetrator of a scam, a hoax. Things like that."[34] With respect to Ms. Carroll's reputation before and after the 2022 statement, she testified:

> "So, what I noticed is that those meetings [*sic*] existed after June 2019, but the frequency of the posting with those associations had started to decline. However, after the statement on October 12th, the frequency of the negative associations, the volume of them again escalated."[35]

Professor Humphreys accordingly "concluded that there was a relationship" between Mr. Trump's

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32 Dkt 197 (Trial Tr.) at 1114:2-8.

33 *Id.* at 1127:24-25, 1128:16-19.

34 *Id.* at 1130:9-12.

35 *Id.* at 1130:18-22.

2022 statement and Ms. Carroll's reputation "given the timing and the fact that they [(posts with negative associations)] were in kind of direct response to his [(Mr. Trump's)] statement, as well as the particular language, words like 'liar' etc."[36] She looked at approximately how many people likely believed Mr. Trump's statement, and determined that "between 3.7 million and 5.6 million people saw Mr. Trump's statement and likely believed it."[37] Finally, she explained that to repair Ms. Carroll's reputation, there would need to be "a campaign to put out positive message" about her (a "reputational repair campaign" or "reputation repair program").[38] In total, Professor Humphreys calculated that the cost of such a campaign to repair Ms. Carroll's reputation on the low end would be $368,000 and on the high end would be $2.7 million.[39]

The Structure of the Verdict

Both parties submitted proposed "special verdict" forms to distribute to the jury. Pursuant to Federal Rule of Civil Procedure 49, which governs jury verdict forms and questions, "[t]he court may require a jury to return only a special verdict in the form of a special written finding on each issue of fact."[40] A special verdict stands in contrast to a general verdict form, which typically asks jurors to answer only the ultimate questions of liability and the damages amounts, if

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36 *Id.* at 1130:25-1131:3.

37 *Id.* at 1134:16-19.

38 *Id.* at 1136:10-13.

39 *Id.* at 1142:11-20.

40 Fed. R. Civ. P. 49(a)(1).

any.

The Court here used a special verdict form that was substantially similar to the parties' proposed forms, consisting of factual questions going to liability and damages, organized by the two claims. Neither party raised any objection to the Court's verdict form nor demanded that any specific questions other than those on the special verdict form be submitted to the jury. In accordance with Rule 49, the Court "g[a]ve the instructions and explanations necessary to enable the jury to make its findings on each submitted issue" contained in the verdict form.[41] Accordingly, the meaning of the jury's answers to each question on the verdict form depends upon the instructions given as to what it had to conclude in order to answer the questions.

Sexual Battery Instructions

The liability questions for Ms. Carroll's sexual battery claim were whether Ms. Carroll proved by a preponderance of the evidence that (1) "Mr. Trump raped Ms. Carroll?", (2) "Mr. Trump sexually abused Ms. Carroll?", (3) "Mr. Trump forcibly touched Ms. Carroll?".[42] These three theories of liability (rape, sexual abuse, and forcible touching) were the same three proposed by both parties. As the Court instructed the jury:

> "Ms. Carroll claims that Mr. Trump is liable to her for battery on three different and alternative bases, each of which corresponds to a criminal law definition of a different sex crime. Mr. Trump denies that he is liable to her for battery on any of these three different and alternative bases. . . . Accordingly, the first

41 Fed. R. Civ. P. 49(a)(2).

42 Dkt 174 (Verdict) at 1.

> set of questions in the verdict form has to do with whether or not Ms. Carroll has established that Mr. Trump's conduct, if any, came within any of those criminal law definitions."[43]

The Court then instructed the jury on the definitions of the three different sex crimes.

On the first question – whether Ms. Carroll proved that Mr. Trump "raped" her – the Court instructed the jury in accordance with the New York Penal Law's definition of rape:[44]

> "In order to establish that Mr. Trump raped her, Ms. Carroll must prove each of two elements by a preponderance of the evidence.
>
> The first element is that Mr. Trump engaged in *sexual intercourse* with her.
>
> The second element is that Mr. Trump did so without Ms. Carroll's consent by the use of forcible compulsion. . . .
>
> 'Sexual intercourse' means any penetration, however slight, *of the penis* into the vaginal opening. In other words, *any penetration of the penis* into the vaginal opening, regardless of the distance of penetration, constitutes an act of sexual intercourse. Sexual intercourse does not necessarily require erection *of the penis*, emission, or an orgasm.
>
> . . .
>
> I also used the phrase 'forcible compulsion,' and what that means is intentionally to compel by the use of physical force.

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43 Dkt 201 (Trial Tr.) at 1416:1-9.

44 It was necessary to obtain findings under the New York Penal Law definitions because the timeliness of the battery claim under the Adult Survivors Act depended on such findings. N.Y. CPLR § 214-j.

. . .

> If you find that Ms. Carroll has proved by a preponderance of the evidence both of those two elements, you will answer Question 1 'yes.' If you answer Question 1 'yes,' I instruct you that Mr. Trump thus committed battery against Ms. Carroll. There would be no need to consider whether he committed battery on either of the other two alternative bases. . . . If you find that Ms. Carroll has not proven either of the two elements of rape by a preponderance of the evidence, you must answer 'no' to Question 1 and go on to Question 2, which deals with the second of the three alternative bases for the battery claim."[45]

Thus, the instructions required the jury to answer Question 1 "No" unless it found that Ms. Carroll had proved that Mr. Trump penetrated her vagina *with his penis*. Penetration by any other body part did not suffice.

With respect to the second question, whether Ms. Carroll proved that Mr. Trump "sexually abused" her within the meaning of the New York Penal Law, the Court instructed the jury:

> "The second theory of battery corresponds to something called sexual abuse. Sexual abuse has two elements. In order to establish that Mr. Trump sexually abused her, Ms. Carroll must prove each of two elements by a preponderance of the evidence.
>
> The first element is that Mr. Trump subjected Ms. Carroll to sexual contact.
>
> The second element is that he did so without Ms. Carroll's consent by the use of forcible compulsion.

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[45] Dkt 201 (Trial Tr.) at 1416:18-1418:2 (emphasis added).

. . . Sexual contact for this purpose means *any touching of the sexual or other intimate parts* of a person for the purpose of gratifying the sexual desire of either person. It includes the touching of the actor by the victim, as well as the touching of the victim by the actor, and the touching may be either directly or through clothing.

. . . For this purpose, *a 'sexual part' is an organ of human reproduction*. So far as intimate part is concerned, the law does not specifically define which parts of the body are intimate. Intimacy, moreover, is a function of behavior and not just anatomy. Therefore, if any touching occurred, the manner and circumstances of the touching may inform your determination whether Mr. Trump touched any of Ms. Carroll's intimate parts. You should apply your common sense to determine whether, under general societal norms and considering all the circumstances, any area or areas that Mr. Trump touched, if he touched any, were sufficiently personal or private that it would not have been touched in the absence of a close relationship between the parties.

. . .

If you find that Ms. Carroll has proved by a preponderance of the evidence both of the two elements that I just referred to, the two elements of sexual abuse, then you will answer 'yes' to Question 2. If you answer yes to Question 2, I instruct you that Mr. Trump thus committed battery against Ms. Carroll. There would be no need to consider whether he committed battery on the third alternative test. . . . If you find that Ms. Kaplan [*sic*] has not proven either of the two elements of sexual abuse by a preponderance of the evidence, you must answer 'no' to Question 2 and proceed to Question 3, which deals with the third of the three alternative bases for the battery

claim."[46]

Thus, if the jury found that Mr. Trump penetrated Ms. Carroll's vagina with his fingers, it was obliged to answer Question 2 "Yes" assuming the other element was satisfied.

Questions 4 and 5 dealt with compensatory and punitive damages, respectively, for Ms. Carroll's battery claim. Question 4 asked whether Ms. Carroll proved that she was injured as a result of Mr. Trump's conduct, and if so, to insert a dollar amount that would fairly and adequately compensate her for that injury or those injuries. The Court instructed the jury:

> "My instructions to you on the law of damages should not be taken by you as a hint that you should find for the plaintiff. That is for you to decide by answering the questions I have put to you based on the evidence presented. But if you answer 'yes' to any of Question 1, Question 2, or Question 3, you will have determined that Ms. Carroll has prevailed on her claim of battery. In that event, it will be your task to determine from the evidence a dollar amount, if any, that would justly and adequately compensate Ms. Carroll for any physical injury, pain and suffering, and mental anguish, as well as emotional distress, fear, personal humiliation, and indignation that she has suffered, or will suffer in the future, as a result of Mr. Trump's alleged rape, sexual abuse, or forcible touching as the case may be.
>
> You may award damages only for those injuries that you find Ms. Carroll has proved by a preponderance of the evidence. Compensatory damages may not be based on speculation or sympathy. They must be based on the evidence presented at trial and only on that evidence.

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[46] *Id.* at 1418:3-1420:8 (emphasis added).

> Now, if you answer 'yes' to Question 4 . . . she [(Ms. Carroll)] would be entitled to a dollar amount to compensate her adequately and fairly for any physical injury, pain and suffering, mental anguish, emotional distress, and the other things I just mentioned a moment ago, that she suffered by virtue of Mr. Trump's alleged battery, in other words, his alleged rape, sexual abuse, or forcible touching, as the case may be. Damages may be awarded based on a plaintiff's subjective testimony of pain, but the plaintiff's proof must satisfactorily establish that the injury is more than minimal."[47]

Defamation Instructions

The factual questions for the defamation liability issue were (1) whether Ms. Carroll proved by a preponderance of the evidence that Mr. Trump's statement was defamatory and (2) whether Ms. Carroll proved by clear and convincing evidence his statement was (a) false and (b) made with actual malice. As relevant to Mr. Trump's arguments in this motion, the Court instructed the jury that:

> "Question 7, as you see on the verdict form, asks whether Ms. Carroll has proved by something called clear and convincing evidence that Mr. Trump's

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47 *Id.* at 1422:17-1423:25.

Question 5 on punitive damages asked whether Ms. Carroll proved by a preponderance of the evidence that Mr. Trump's conduct was willfully or wantonly negligent, reckless, or done with a conscious disregard of the rights of Ms. Carroll, or was so reckless as to amount to such disregard. If so, it asked how much Mr. Trump should pay to Ms. Carroll in punitive damages. Given that Mr. Trump does not dispute the jury's $20,000 award in punitive damages for Ms. Carroll's battery claim, the Court's instructions on this question need not be reproduced here.

statement was false. . . . A statement is false if it is not substantially true. You will determine from the evidence presented what the truth was and then compare that with Mr. Trump's October 12 statement, taking that statement according to its ordinary meaning, the ordinary meaning of its words.

As you probably already have guessed, *whether Mr. Trump's statement is false or true depends largely or entirely on whether you find that Mr. Trump raped or sexually abused or forcibly touched or otherwise sexually attacked Ms. Carroll*. . . .

Question 8, in substance, asks you to determine whether Ms. Carroll has proved by clear and convincing evidence that Mr. Trump made the statement with what the law calls actual malice. Actual malice for this purpose . . . means that Mr. Trump made the statement knowing that it was false or acted in reckless disregard of whether or not it was true. Reckless disregard means that when he made the October 12 statement, he had serious doubts as to the truth of the statement or made the statement with a high degree of awareness that it was probably false. So Question 8 asks you to decide whether Ms. Carroll proved by clear and convincing evidence that Mr. Trump, when he made his October 12 statement, knew that it was false, had serious doubts as to its truth, or had a high degree of awareness that the statement probably was false."[48]

The question on compensatory damages was broken down into several parts. First, it asked whether Ms. Carroll proved by a preponderance of the evidence that Ms. Carroll was injured

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[48] *Id.* at 1430:17-1432:3 (emphasis added).

as a result of Mr. Trump's publication of the October 12, 2022 statement. If so, it asked that the jury (1) insert a dollar amount for any damages other than the reputation repair program, and (2) insert a dollar amount for any damages for the reputation repair program only. The Court instructed the jury that:

> "In the event Mr. Trump is liable for defamation, you will award an amount that, in the exercise of your good judgment and common sense, you decide is fair and just compensation for the injury to the plaintiff's reputation and the humiliation and mental anguish in her public and private life which you decide was caused by the defendant's statement. In fixing that amount, if you fix one, you should consider the plaintiff's standing in the community, the nature of Mr. Trump's statement made about Ms. Carroll, the extent to which the statement was circulated, the tendency of the statement to injure a person such as Ms. Carroll, and all of the other facts and circumstances in the case. These damages can't be proved with mathematical certainty. Fair compensation may vary, ranging from one dollar, if you decide that there was no injury, to a substantial sum if you decide that there was substantial injury.
>
> Now, in this case, Question 9, I have divided the damages determination into two parts . . . . The first part of Question 9, right at the top, the yes/no question asks you to decide whether Ms. Carroll has proved by a preponderance of the evidence that she was injured in any of the respects I just described. . . . If the answer is 'yes,' you first will fill in the amount you award for all defamation damages, excluding the reputation repair program. You will leave that out if you put in a figure in the first blank. That was of course the testimony of Professor Humphreys. Second, you will

fill in the amount, if any, that you award for the reputation repair program only."[49]

The last question on the form, on punitive damages for the defamation claim, asked whether in making the 2022 statement, Mr. Trump acted maliciously, out of hatred, ill will, spite or wanton, reckless, or willful disregard of the rights of another. If so, it asked how much, if any, Mr. Trump should pay to Ms. Carroll in punitive damages. The Court instructed the jury:

> "In addition to the claim for punitive damages for the defamation, Ms. Carroll asks also that you award punitive damages for the defamation. Similar to my earlier instructions to you regarding punitive damages on the battery claim, punitive damages in relation to a libel claim – the defamation claim – may be awarded to punish a defendant who has acted maliciously and to discourage others from doing the same. Now, this is where that difference between 'actual malice,' which I already talked about, and 'malice' or 'maliciously' comes into play. . . . A statement is made with malice or it's made maliciously for the purpose of Question 10 if it's made with deliberate intent to injure or made out of hatred or ill will or spite or made with willful or wanton or reckless disregard of another's rights.
>
> If you answer 'yes' to the first part of Question 10 – in other words, if you find that Mr. Trump acted with malice, as I have just defined that term for you, in making the October 12 statement about Ms. Carroll – you will write down an amount, if any, that you find Mr. Trump should pay to Ms. Carroll in punitive damages for the defamation. If you answer 'no' to that first part of Question 10 – that is, you find that Mr. Trump's statement was not made maliciously – you may not

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[49] *Id.* at 1432:25-1434:7.

award punitive damages. . . .

In arriving at your decision as to the amount of punitive damages, you should consider here with respect to the defamation punitive damage claim:

The nature and reprehensibility of what Mr. Trump did if he defamed her; that would include the character of the wrongdoing and Mr. Trump's awareness of what harm the conduct caused or was likely to cause. In considering the amount of punitive damages to award, you should weigh that factor heavily;

You should consider the actual and potential harm created by Mr. Trump's conduct; and

You should consider Mr. Trump's financial condition and the impact of your award of punitive damages, if any, on Mr. Trump."[50]

This concluded the Court's substantive instructions on the law, as relevant to Mr. Trump's motion.

The Jury's Decision

In accordance with the Court's instructions, which the jury is presumed to have followed,[51] the jury made the following explicit findings based on its answers to the verdict form. On the sexual battery claim, the jury found that:

- Mr. Trump *sexually abused* Ms. Carroll.
- Mr. Trump *injured her* in doing so.
- "Mr. Trump's conduct was *willfully or wantonly negligent, reckless, or done*

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50 *Id.* at 1434:17-1436:10.

51 *E.g.*, *United States v. Salameh*, 152 F.3d 88, 116 (2d Cir. 1998).

with a conscious disregard of the rights of Ms. Carroll, or was so reckless as to amount to such disregard".[50]

- Ms. Carroll was entitled to compensatory and punitive damages on the sexual battery claim of *$2.02 million* ($2 million in compensatory damages and $20,000 in punitive damages).

On the defamation claim, it found that:

- Mr. Trump's October 12, 2022 statement was *defamatory* and *false* (*i.e.*, "not substantially true").
- Mr. Trump made that statement "with actual malice" – that is, that when he made the statement, Mr. Trump *"knew that it was false", "had serious doubts as to its truth",* or *"had a high degree of awareness that the statement probably was false."*[51]
- "Ms. Carroll was *injured* as a result of Mr. Trump's publication of the October 12, 2022 statement."[52]
- "Mr. Trump *acted maliciously, out of hatred, ill will, spite or wanton, reckless, or willful disregard* of the rights of another."[53]
- Ms. Carroll was entitled to *$2.98 million* in compensatory and punitive

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50 Dkt 174 (Verdict) at 2 (emphasis added).

51 Dkt 201 (Trial Tr.) at 1432:1-3 (emphasis added).

52 Dkt 174 (Verdict) at 3 (emphasis added).

53 *Id.* (emphasis added).

damages on the defamation claim relating to the October 12, 2022 statement ($1.7 million in compensatory damages for the "reputation repair program" only, $1 million in compensatory damages for damages other than the reputation repair program, and $280,000 in punitive damages).

Discussion

Mr. Trump's motion is addressed only to the jury's damages awards, specifically its compensatory damages award for Ms. Carroll's sexual battery claim, and its compensatory and punitive damages awards for the defamation claim. He does not challenge the Court's instructions or the jury's liability verdict. All of his arguments are unpersuasive.

The Legal Standard

A "trial judge enjoys 'discretion to grant a new trial if the verdict appears to [the judge] to be against the weight of the evidence,' and . . . '[t]his discretion includes overturning verdicts for excessiveness and ordering a new trial without qualification, or conditioned on the verdict winner's refusal to agree to a reduction (remittitur).'"[56] "In considering motions for a new trial and/or remittitur, '[t]he role of the district court is to determine whether the jury's verdict is within the confines set by state law, and to determine, by reference to federal standards developed under Rule 59, whether a new trial or remittitur should be ordered.'"[57]

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[56] *Lore v. City of Syracuse*, 670 F.3d 127, 176–77 (2d Cir. 2012) (alterations in original) (quoting *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 433 (1996)).

[57] *Stampf v. Long Island R. Co.*, 761 F.3d 192, 204 (2d Cir. 2014) (quoting *Gasperini*, 518 U.S. at 435).

"Ordinarily, a court should not grant a new trial 'unless it is convinced that the jury has reached a seriously erroneous result or . . . the verdict is a miscarriage of justice.' . . . Nevertheless, the standard for granting a new trial under Rule 59 is less stringent than the standard under Rule 50."[58] Specifically, unlike the standard on a Rule 50 motion, on a Rule 59 motion: "(1) a new trial . . . may be granted even if there is substantial evidence supporting the jury's verdict, and (2) a trial judge is free to weigh the evidence himself, and need not view it in the light most favorable to the verdict winner."[59] "A court considering a Rule 59 motion for a new trial must bear in mind, however, that the court should only grant such a motion when the jury's verdict is egregious. Accordingly, a court should rarely disturb a jury's evaluation of a witness's credibility."[60]

With respect to determining whether the jury's damages awards come within the confines of state law, "[u]nder New York law, a court 'shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation.'"[61] "To

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58 *Mono v. Peter Pan Bus Lines, Inc.*, 13 F. Supp. 2d 471, 475 (S.D.N.Y. 1998) (quoting *Smith v. Lightning Bolt Productions, Inc.*, 861 F.2d 363, 370 (2d Cir.1988)).

In *Mono*, the Court identified "an unresolved *Erie* issue – whether the state or federal standard of review applies in a motion for a new trial in a diversity action. New York law does not distinguish between a motion for a new trial and a motion for a judgment notwithstanding the verdict. . . . Thus, if state law applies to defendants' Rule 59 motion, the standard of review would be whether the jury could have reached its verdict on 'any fair interpretation of the evidence.'" *Id.* at 475, n.2 (citations omitted). However, as in *Mono,* "[b]ecause the evidence presented at trial [in *Carroll II*] satisfies both the federal and state standards, I need not determine which jurisdiction's law controls [Mr. Trump's] motion for a new trial." *Id.*

59 *Iverson v. Surber*, No. 13-CV-633 (RA), 2018 WL 6523176, at *1 (S.D.N.Y. Nov. 13, 2018), *aff'd*, 800 F. App'x 50 (2d Cir. 2020) (citation omitted).

60 *Id.* (quoting *DLC Mgmt. Corp. v. Town of Hyde Park*, 163 F.3d 124, 134 (2d Cir. 1998)).

61 *Stampf*, 761 F.3d at 204 (quoting N.Y. CPLR § 5501(c)).

determine whether a jury award is excessive within the meaning of [New York Civil Practice Law and Rules] § 5501(c), New York courts compare it with awards in similar cases."[62] The relevant standard "is not whether an award deviates *at all* from past awards – it is whether an award deviates *materially* from *reasonable compensation*."[63]

Compensatory Damages - Sexual Battery Claim

Mr. Trump Digitally and Forcibly Penetrated Ms. Carroll's *Vagina*

Mr. Trump argues that the Court should grant a new trial or remittitur with respect to the jury's award of compensatory damages for Ms. Carroll's sexual battery claim chiefly on the ground that "the [j]ury found that [Ms. Carroll] was not raped but was sexually abused by [Mr. Trump] during the 1995/96 Bergdorf Goodman incident."[64] According to Mr. Trump, "[s]uch abuse could have included groping of Plaintiff's breasts through clothing or similar conduct, which is a far cry from rape. Therefore, an award of $2 million for such conduct, which admittedly did not cause any diagnosed mental injury to Plaintiff, is grossly excessive under the applicable case law."[65] Mr. Trump's argument is incorrect at every step.

First, the definition of "rape" in the New York Penal Law – which the jury was obliged to apply in responding to Question 1 on the verdict form – requires forcible penetration of

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62 *Id.*

63 *Okraynets v. Metro. Transp. Auth.*, 555 F. Supp. 2d 420, 439 (S.D.N.Y. 2008) (emphasis in original).

64 Dkt 205 (Def. Mem.) at 1.

65 *Id.*

the victim's vagina *by the accused's penis*.[66] Accordingly, the jury's negative answer to Question 1 means *only* that the jury was unpersuaded that Mr. Trump's penis penetrated Ms. Carroll's vagina. It does not mean that he did not forcibly insert his fingers into her – that he "raped" her in the broader sense of that word which, as discussed above, includes any penetration by any part of an accused's body (including a finger or fingers) or any other object.[67]

Second, Mr. Trump's argument ignores the fact that the verdict in this case was a

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66 The New York Penal Law states that "[a] person is guilty of rape in the first degree when he or she engages in sexual intercourse with another person . . . 1. By forcible compulsion . . . ." N.Y. Penal Law § 130.35. It provides also that "'[s]exual intercourse' has its ordinary meaning and occurs upon any penetration, however slight." *Id.* § 130.00. New York courts have interpreted "sexual intercourse" as involving *penile* penetration. *E.g.*, *People v. Berardicurti*, 167 A.D.2d 840, 841 (4th Dept. 1990) ("The trial court properly instructed the jury that, to constitute sexual intercourse, penetration 'need not be deep' and that '[a]ny penetration of the penis into the vaginal opening, regardless of the distance or amount of penetration' constitutes sexual intercourse.") (citation omitted); *People v. Peet*, 101 A.D.2d 656, 656 (3d Dept. 1984), *aff'd*, 64 N.Y.2d 914 (1985) ("[T]he use of one's finger has already been sufficiently proscribed by section 130.65 of the Penal Law [(sexual abuse in the first degree)] . . . ."); *Williams v. McCoy*, 7 F. Supp. 2d 214, 220-21 (E.D.N.Y. 1998) (rejecting petitioner's argument that "the trial judge erred in instructing the jury on the elements of rape because he neglected to explain that rape requires penile – as opposed to digital – penetration" because "[a] jury of competent adults surely understood the 'ordinary meaning' of 'sexual intercourse' to require penile penetration"). This Court accordingly instructed the jury that sexual intercourse required penile penetration of the vagina, and neither party objected to that definition.

67 It is not entirely surprising that the jury did not find penile penetration but, as discussed below, implicitly found digital penetration. Ms. Carroll testified about the specific physical memory and excruciating pain of the digital penetration at great length and in greater detail than the penile penetration. She acknowledged that she could not see exactly what Mr. Trump inserted but testified on the basis of what she felt. Dkt 187 (Trial Tr.) at 181:20-23 ("I couldn't see anything. I couldn't see anything that was happening. But I could certainly feel it. *I could certainly feel that pain in the finger jamming up.*") (emphasis added). Moreover, the jury might have been influenced by defense counsel's ardent summation in which he virtually begged the jury not to answer the "rape" question against Mr. Trump. Dkt 199 (Trial Tr.) at 1370:5-10 ("To condemn someone as a rapist is a decision you would have to live with for the rest of your lives. Don't let her throw that burden on you. Don't let her throw her burden on you to have to carry forever. You know this didn't happen, that Donald Trump raped E. Jean Carroll in a Bergdorf Goodman changing room. You know it didn't happen.").

special verdict governed by Rule 49 of the Federal Rules of Civil Procedure. The form of the verdict, including the fact that it did not ask the jury to decide exactly what conduct Mr. Trump committed in the event it found for Ms. Carroll as to sexual abuse – was approved by Mr. Trump as well as by Ms. Carroll.[68] In these circumstances,

> "A party waives the right to a jury trial on any issue of fact raised by the pleadings or evidence but not submitted to the jury unless, before the jury retires, the party demands its submission to the jury. *If the party does not demand submission, the court may make a finding on the issue. If the court makes no finding, it is considered to have made a finding consistent with its judgment on the special verdict.*"[69]

Neither party made any such demand here. So the jury (or the Court) is deemed to have made a finding in accord with the judgment on the special verdict unless the Court makes a contrary finding.[70] In other words, the jury is deemed to have found that the specific conduct in which Mr.

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68 Dkt 199 (Trial Tr.) at 1208:12-21 (Both Ms. Carroll's counsel and Mr. Trump's counsel stating that they have no objection to the verdict form).

69 Fed. R. Civ. P. 49(a)(3).

70 *Roberts v. Karimi,* 251 F.3d 404, 407 (2d Cir. 2001) ("When a jury is specially instructed, and 'an issue [is] omitted' without objection, it 'shall be deemed' that a finding was made 'in accord with the judgment on the special verdict,' *unless* the court makes a finding to the contrary.") (alterations and emphasis in original) (citation omitted); *Marbellite Co. v. Naitonal Sign & Signal Co.,* 2 Fed. App'x 118, 120 (2d Cir. 2001) ("If the court fails to make a finding on the issue, it will be deemed to have made a finding that is harmonious with the judgment entered on the special verdict."); *Getty Petroleum Corp. v. Island Transpp. Corp.,* 878 F.2d 650, 655-56 (2d Cir. 1989) (in special verdict case, affirming on basis of implicit jury finding or, in the alternative, on basis of implicit finding in statement of the trial court).

As the jury's response to Question 2 was an implicit finding that Mr. Trump forcibly digitally penetrated Ms. Carroll's vagina, no explicit independent finding by the Court is

Trump actually engaged was such that the damages award was justified provided the evidence permitted such a finding.[71] And for reasons discussed in greater detail below, the evidence of the attack generally coupled with forcible digital penetration of Ms. Carroll justified the damages awarded regardless of the jury's finding adverse to Ms. Carroll on the New York Penal Law rape question.

Ms. Carroll testified that the sexual assault – the "rape" – of which she accused Mr. Trump involved especially painful, forced digital penetration, which as recounted above she described graphically and emphatically to the jury. The testimony of the outcry witnesses, Mss. Birnbach and Martin, corroborated the essence of Ms. Carroll's account of a violent, traumatic sexual assault. Ms. Leeds's testimony that Mr. Trump attacked her, culminating in putting his hand on her leg and up her skirt, suggests that Mr. Trump has a propensity for attempting forcibly to get his hands on and into women's sexual organs. Mr. Trump's own words from the *Access Hollywood* tape and from his deposition – that (a) stars "[u]nfortunately or fortunately" "c[ould] do anything" they wished to do to women, including "grab[bing] them by the pussy" and (b) he considers himself

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necessary. Nevertheless, the Court alternatively finds that he did so.

[71] As the Second Circuit has put it:

> "A district court has a duty to reconcile the jury's answers on a special verdict form with any reasonable theory consistent with the evidence, and to attempt to harmonize the answers if possible under a fair reading of those answers. . . . The court must search for a reasonable way to read the verdicts as expressing a coherent view of the case, . . . and if there is any way to view a case that makes the jury's answers to the special verdict form consistent with one another, the court must resolve the answers that way even if the interpretation is strained. . . . The district court should refer to the entire case and not just the answers themselves." *McGuire v. Russell Miller, Inc.,* 1 F.3d 1306, 1311 (2d Ci. 1993) (citations omitted).

Thus, the Court is obliged to construe the jury's answer to Question 2 with reference to the entire case and in a manner that renders it consistent with the $2 million award for sexual assault.

to be a "star" – could have been regarded by the jury as a sort of personal confession as to his behavior. Thus, there was ample, arguably overwhelming evidence, that Mr. Trump forcibly digitally penetrated Ms. Carroll, thus fully supporting the jury's sexual abuse finding.

Mr. Trump's attempt to minimize the sexual abuse finding as perhaps resting on nothing more than groping of Ms. Carroll's breasts through her clothing is frivolous. There was no evidence whatever that Mr. Trump groped Ms. Carroll's breasts, through her clothing or otherwise. The only evidence of bodily contact between Mr. Trump and Ms. Carroll other than the digital and alleged penile penetration was Ms. Carroll's testimony that Mr. Trump (a) "shoved" and "thrust" her against the wall, (b) "put his shoulder against [her] and h[eld] [her] against the wall," (c) "his whole weight came against [her] chest and held [her] up there," (d) he "pulled down [her] tights," (e) her "arm was pinned down" while she pushed him back, and (f) "he put his mouth against [hers]." The jury was instructed that one of the essential elements of sexual abuse under the New York Penal Law is "sexual contact," defined as "touching of the sexual or intimate parts." None of these actions, other than putting his mouth against hers and perhaps pulling down her tights, was sexual contact.[72] The jury's finding of sexual abuse therefore necessarily implies that it found that

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[72] Mr. Trump does not argue that the jury's sexual abuse finding was based on Ms. Carroll's testimony that he put his mouth against hers (or any of the other actions listed above). Even assuming this non-consensual kiss was "touching of [a] sexual or intimate part[]," there is no basis to assume that the jury found Mr. Trump sexually abused her based on that contact but not on digital penetration. Ms. Carroll testified that "it was a shocking thing for him to suddenly put his mouth against [hers]," Dkt 187 (Trial Tr.) at 179:22-23, and that she thinks she "laughed pretty consistently after the kiss to absolutely throw cold water on anything he thought was about to happen," Dkt 189 (Trial Tr.) at 405:22-24. She did not testify as to any physical pain and lasting trauma of the non-consensual kiss, or of any other bodily contact between her and Mr. Trump, as she did repeatedly of the digital penetration. A determination that this jury found Mr. Trump sexually abused Ms. Carroll solely on the basis of a non-consensual kiss would require ignoring all this testimony and accepting a far less malign, albeit still wrongful, version of events that is contradicted by the overwhelming weight of the evidence.

Mr. Trump forcibly penetrated her vagina. And since the jury's answer to Question 1 demonstrates that it was unconvinced that there was penile penetration, the only remaining conclusion is that it found that Mr. Trump forcibly penetrated her 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. And this conclusion is fully supported by Ms. Carroll's repeated and clear testimony on the digital penetration (more than the penile penetration), Dr. Lebowitz specifically mentioning Ms. Carroll squirming in response to an intrusive memory of Mr. Trump's fingers in her vagina, and the evidence at trial taken as a whole. It also is bolstered by the amount of the jury's verdict.

The Jury's $2 Million Damages Award Is Not Excessive

The trial evidence of the harm to Ms. Carroll as a result of being assaulted and digitally raped supports the jury's $2 million award as reasonable compensation for her pain and suffering. Ms. Carroll testified in detail with respect to the physical, emotional, and psychological injury she suffered after the incident with Mr. Trump. She expressed that in "the seconds, the minutes following [the assault] . . . my overwhelming thought was I had died and was somehow still alive."[73] She testified that when she called Ms. Birnbach immediately after the assault, "I had not processed it. I had not processed what was going on. I felt the hand jammed, and I felt the back of my head hurting."[74] The night of the assault, she testified "[m]y head hurt, my vagina felt pain ... ."[75] In relation to the specific act of being digitally raped, Ms. Carroll testified that it was

[73] Dkt 191 (Trial Tr.) at 635:23-636:1.

[74] Dkt 187 (Trial Tr.) at 185:15-17.

[75] *Id.* at 188:18.

"extremely painful," "a horrible feeling," "unforgettable," and that the day after the assault she "felt [her] vagina still hurt from his fingers."[76] She testified also about not being able to maintain a romantic relationship or have sex for the past two decades since the "very violent" incident with Mr. Trump and about experiencing "visions" or "sudden intrusions" which she has "had . . . ever since the attack" and that "would absolutely take over [her] brain."[77] These visions included her "feel[ing] Donald Trump again on top of [her] . . . [she] thought for a minute [she] was going to die because [she] couldn't breathe" and while going about her day "in would slide just a picture of him going like this into the dressing room or hitting [her] head or feeling his fingers jammed up inside of [her]."[78] Ms. Carroll's testimony and Dr. Lebowitz's testimony, which is summarized above, of the long-lasting emotional and psychological trauma that Ms. Carroll experienced as a result of the incident with Mr. Trump demonstrate that the jury's $2 million award was motivated not by sympathy, but by competent evidence of harm to Ms. Carroll.

In view of the jury's implicit finding that Mr. Trump digitally raped Ms. Carroll, Mr. Trump's argument and references to examples of damages awards "in the 'low six-figure range'" where a plaintiff's "intimate parts were groped by a defendant" plainly are irrelevant.[79] Many of the

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76 *Id.* at 180:24-25; Dkt 189 (Trial Tr.) at 406:10, 432:7-8.

77 Dkt 187 (Trial Tr.) at 225:3, 225:19-226:7.

78 *Id.* at 226:14-21.

79 Dkt 205 (Def. Mem.) at 14-16.

Mr. Trump's argument that Ms. Carroll's "alleged damages are identical to plaintiffs in other cases asserting . . . a [loss of consortium claim], namely that Plaintiff argued to the Jury that she should be compensated for living a life since early 1996 without companionship," also is unavailing. Dkt 211 (Def. Reply Mem.) at 1; *see also* Dkt 205 (Def. Mem.) at 13. His theory ignores all of the other types of harm to Ms. Carroll that were discussed in her and

cases Mr. Trump cites are distinguishable also for the reasons identified by Ms. Carroll.[80] To be sure, there are New York cases in which plaintiffs who were sexually assaulted and/or raped were awarded lower damages than was Ms. Carroll.[81] There also, however, are cases with facts and injuries comparable to those here in which plaintiffs were awarded similar or higher compensatory damages.[82] "Although a review of comparable cases is appropriate," the Court "need not average

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Dr. Lebowitz's testimony, and in any case mistakenly conflates the loss of companionship in the context of a loss of consortium claim with the inability to form a romantic connection and have sex as a result of trauma arising from sexual assault.

80 Dkt 207 (Pl. Opp. Mem.) at 15-16 ("In some [of Mr. Trump's 'comparator'] cases, the plaintiff was awarded the exact amount of compensatory damages that the plaintiff herself had requested, often as part of a damages inquest conducted by a magistrate judge during default judgment proceedings. . . . As a result, those cases obviously have little to nothing to say about the damages that a jury might have awarded on a full evidentiary record developed at trial, as occurred here. Other cases cited by Trump involved evidentiary issues not present in this case. . . . And not one of the cases Trump cites involved evidence of injury covering a 25-year-plus period. That distinguishes Carroll's case from all of the cases on which Trump relies, and it was entirely reasonable for the jury to account for the harm that Carroll has experienced ever since the assault in 1996 in determining compensatory damages.") (citations omitted).

81 *See* Dkt 205 (Def. Mem.) at 15-16 (citing cases).

82 *E.g.*, *Ortiz v. New York City Hous. Auth.*, 22 F. Supp. 2d 15, 39 (E.D.N.Y. 1998), *aff'd*, 198 F.3d 234 (2d Cir. 1999) (jury's $3 million compensatory damages award for plaintiff who was raped at gunpoint, diagnosed with PTSD, and suffered "dramatic[] change[s]" to the quality of her life did not deviate materially from reasonable compensation) (citing cases).

Ms. Carroll cites to three cases, one of which is *Ortiz*, in which the plaintiffs were awarded more than Ms. Carroll was. *Breest v. Haggis*, No. 161137/2017, 2023 WL 374404 (N.Y. Sup. Ct., N.Y. Cty. Jan. 24, 2023) ($7.5 million); *Egan v. Gordon*, No. 904231-20 (N.Y. Sup. Ct., Albany Cty., Nov. 10, 2022) ($13.8 million). Mr. Trump correctly observes certain differences between those cases and this one, including in the details of the rapes and in the fact that the plaintiffs in those cases were diagnosed with PTSD whereas Ms. Carroll was not. Those differences, however, do not render these cases of no value in determining the appropriate range of reasonable compensation. Indeed, the greater severity of the harm in those cases might explain why the awards were greater than the amount awarded to Ms. Carroll, while still demonstrating that $2 million is not outside the bounds in circumstances such as these.

the high and low awards; [it may] focus instead on whether the verdict lies within the reasonable range."[83] It accordingly suffices for present purposes that the jury's award of $2 million falls within a reasonable range of the amounts awarded to plaintiffs in comparable sexual assault and rape cases.

In these circumstances, and based on all of the evidence presented at trial, the jury's compensatory damages award to Ms. Carroll for her sexual battery claim did not deviate materially from reasonable compensation so as to make it excessive under New York law.

Compensatory Damages - Defamation Claim

Mr. Trump argues that "the general compensatory damages for the defamation claim should be no more than $100,000, and no more than $368,000 (the low estimate provided by Professor Humphreys) for the reputation repair campaign."[84] He contends that the jury's awards should be reduced to these amounts because "the jury awards in this case for these categories of damages were speculative and based upon alleged harms caused by the June 2019 statements."[85] He makes eleven specific arguments, at least seven of which are based on challenges to the testimony of Professor Humphreys, Ms. Carroll's defamation damages expert. None ultimately is persuasive.

Professor Humphreys's Testimony

Mr. Trump makes the following challenges to Professor Humphreys's testimony:

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83 *Restivo v. Hessemann*, 846 F.3d 547, 587 (2d Cir. 2017).

84 Dkt 205 (Def. Mem.) at 18.

85 *Id.*

1. "Professor Humphreys testified about the purported harm arising from the June 2019 Statements and even compared Plaintiff's reputation before the June 2019 Statements and after the October 12, 2022 Statement, but did not do a comparison between her reputational harm before and after the October 12, 2022 Statement. . . . Therefore, Professor Humphreys must have included the alleged harm from the June 2019 Statements as part of her damages analysis."

2. "Professor Humphreys testified that she could not narrow her estimate as to how many times the October 12, 2022 Statement was viewed on Truth Social [(Mr. Trump's social media platform)] and Twitter to anything more specific than somewhere 'between 1.5 million and 5.7 million times,' which is an error rate of 74%. . . . Such an analysis is thus pure speculation."

3. "Professor Humphreys testified that the people who read and believed the October 12, 2022 Statement were 'republicans [who] typically believe Mr. Trump.' . . . Consequently, Professor Humphreys did not take into consideration the fact that Trump's supporters likely would never have supported or believed Plaintiff regardless of the October 12, 2022 Statement, and that Plaintiff's reputation with such supporters would not have changed due to such statement."

4. "Professor Humphreys testified that in order to repair Plaintiff's reputation with such Trump supporters, Plaintiff would have to pay for the cost of a reputation repair campaign, which is 'a campaign to put out positive messages about' Plaintiff. . . . However, Professor Humphreys did not

explain how existing Trump supporters would have changed their minds about Plaintiff from merely seeing positive messages about Plaintiff. Professor Humphreys also testified that she has never done a reputation repair campaign before, and thus, her opinion on this issue should be given little weight."

5. "Professor Humphreys testified that (a) the June 2019 Statements already existed as of the October 12, 2022 Statement, and that readers of the June 2019 Statements likely would not have changed their minds about the rape allegation after reading the October 12, 2022 Statement . . . and (b) she does not know if the people who believed the October 12, 2022 Statement had already made up their minds about Plaintiffs rape allegation from reading the June 2019 Statements. . . . Therefore, Professor Humphreys's testimony about changing the minds of Trump supporters (the target of the reputation repair campaign) is pure speculation. Additionally, her testimony only supports the argument that the October 2022 Statement did not cause Plaintiff any harm in addition to any harm that was caused by the June 2019 Statements, because people already had made up their minds as to the veracity of Plaintiffs accusations as of the June 2019 Statements."

6. "Professor Humphreys's cost estimate for such a campaign was equally based upon pure conjecture in that she estimated that it would cost anywhere from $368,000 to $2.7 million . . . , which is an error rate of 86 percent. This is especially troublesome since Professor Humphreys testified that she has never done a reputation repair campaign before."

7. "Professor Humphreys also testified that she did not analyze any of Plaintiffs numerous media appearances where Plaintiff enhanced her reputation with regard to her allegations against Defendant. . . . In fact, Plaintiff conceded that she received a vast amount of positive support from the public after making her accusation against Defendant. . . . Even though Professor Humphreys admitted that Plaintiff received positive support from the public after the rape allegation, she did not factor such support into her analysis of the harm allegedly caused by the October 12, 2022 Statement. . . . Accordingly, her analysis of reputational harm is pure speculation."[86]

Ms. Carroll points out that Mr. Trump's arguments concerning Professor Humphreys "get at the core of Professor Humphreys's reliability as an expert, something Trump could have challenged under Federal Rule of Evidence 702 [(which governs the admissibility of expert testimony)] or raised on cross-examination."[87] His failure to do so, she contends, waived his present complaints. Mr. Trump counters, however, that his challenges are timely because they go to the weight, not the admissibility, of Professor Humphreys's testimony and because he preserved the issues by raising them on cross examination at trial.[88] Thus, there is a threshold question with

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86 Dkt 205 (Def. Reply Mem.) at 19-21.

87 Dkt 207 (Pl. Opp. Mem.) at 19.

88 Dkt 205 (Def. Reply Mem.) at 3. *See Disability Advocs., Inc. v. Paterson*, No. 03-CV-3209 (NGG) (MDG), 2009 WL 1312112, at *7 (E.D.N.Y. May 8, 2009) ("Thus, while Defendants are free to conduct vigorous cross-examine of Plaintiff's experts at trial and may argue in their post-trial briefing that the court should accord the opinions of those experts little or no weight, they may not renew their challenge to the admissibility of those opinions."); *Celebrity Cruises Inc. v. Essef Corp.*, 478 F. Supp. 2d 440, 446 (S.D.N.Y. 2007) ("[E]ven where a post-trial challenge to the admissibility of expert evidence is barred, a trial court

respect to whether Mr. Trump waived those arguments in relation to Professor Humphreys's testimony by failing to raise them previously, as a Rule 59 motion generally is not a proper vehicle to raise new arguments or legal theories.[89]

On reflection, the Court concludes that Mr. Trump's arguments listed above go primarily to the weight, rather than the admissibility, of Professor Humphreys's testimony. "Generally, arguments that the assumptions relied on by an expert are unfounded go to the weight rather than the admissibility of the evidence."[90] Most of Mr. Trump's arguments concern certain assumptions Professor Humphreys made or did not make in forming her expert opinion (*e.g.*, whether she included the alleged harm from the 2019 statements in her analysis, whether and how she considered Mr. Trump's supporters who viewed his 2022 statement, and whether she took into account Ms. Carroll's media appearances). The Court therefore considers Mr. Trump's challenges

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remains free to grant a new trial if it weighs the prevailing party's scientific proof and finds it wanting.").

89 *MJAC Consulting, Inc. v. Barrett*, No. 04-cv-6078 (WHP), 2006 WL 2051129, at *3 (S.D.N.Y. July 24, 2006) (citing cases).

90 *Silivanch v. Celebrity Cruises, Inc.*, 171 F. Supp. 2d 241, 270 (S.D.N.Y. 2001). *See also AU New Haven, LLC v. YKK Corp.*, No. 15-CV-3411 (GHW) (SN), 2019 WL 1254763, at *3 (S.D.N.Y. Mar. 19, 2019), *objections overruled*, No. 1:15-CV-3411(GHW), 2019 WL 2992016 (S.D.N.Y. July 8, 2019) ("Any contentions that the expert's 'assumptions are unfounded go to the weight, not the admissibility, of the testimony.'") (citation omitted); *In re: Gen. Motors LLC Ignition Switch Litig.*, No. 14-MD-2543 (JMF), 2015 WL 9480448, at *1 (S.D.N.Y. Dec. 29, 2015) ("'Although expert testimony should be excluded if it is speculative or conjectural, or if it is based on assumptions that are so unrealistic and contradictory as to suggest bad faith, or to be in essence an apples and oranges comparison, other contentions that the assumptions are unfounded go to the weight, not the admissibility, of the testimony.'") (citation omitted); *Colombo v. CMI Corp.*, 26 F. Supp. 2d 574, 576 (W.D.N.Y. 1998) ("Although a district court 'may ... inquire into the reliability and foundation of any expert opinion to determine admissibility,' *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 422 (5th Cir.1987), '[a]s a general rule, questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility and should be left for the jury's consideration.' *Id.*") (ellipsis and alteration in original).

to Professor Humphreys's testimony as having been timely raised.[91] Nevertheless, Mr. Trump's arguments are unavailing on the merits.

His contention that Professor Humphreys "did not do a comparison between [Ms. Carroll's] reputational harm before and after the October 12, 2022 Statement" and she therefore "must have included the alleged harm from the June 2019 Statements as part of her damages analysis" is contradicted by the record. Professor Humphreys testified that in her analysis, although she "noticed . . . that those meetings [(public statements of negative associations with Ms. Carroll)] existed after June 2019, . . . the frequency of the posting with those associations had started to decline. However, after the statement on October 12th, the frequency of the negative associations, the volume of them again escalated."[92] She testified also that she "only looked at the reputational harm from the October 12[, 2022] statement" and that the cost she estimated to repair Ms. Carroll's reputation following Mr. Trump's 2019 statements – the subject of *Carroll I* – was "higher" than

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91 Mr. Trump's two "error" rate arguments arguably go more to the admissibility of Professor Humphreys's testimony and therefore would be waived. *E.g.*, *AU New Haven, LLC*, 2019 WL 1254763, at *23 (stating that a high error rate "would be a valid basis to exclude an expert with scientific knowledge under *Daubert*"). But there is a vast difference between an error rate, on the one hand, and an expert opining that a quantity falls within a certain range, on the other. For example, an appraiser who values a piece of real state as falling in the range of $12 million to $14 million has not made an "error"; the expert is merely giving an opinion that a willing buyer and a willing seller would conclude a sale within that range. In any event, Mr. Trump's arguments that there were high error rates in Professor Humphreys's calculations fail to demonstrate that the jury's compensatory damages award was erroneous or against the weight of the evidence. Indeed, it is plausible that the jury took the so-called error rates, along with any other purported weaknesses in Professor Humphreys's testimony, into account in awarding damages well below the high end of Professor Humphreys's estimated range. Dkt 197 (Trial Tr.) at 1142:14-16 ("[O]n the low, low end it would be [$368,000], and on the high end it would be 2.7 million.").

92 Dkt 197 (Trial Tr.) at 1130:18-22.

the cost she estimated to repair Ms. Carroll's reputation following the 2022 statement.[93] Moreover, to remove any doubt, the Court specifically instructed the jury that "the question of whether there was any adverse effect by virtue of the 2019 statements and, if there was, how much adverse effect is not at issue in this case. It is not for you to determine."[94] There accordingly is no basis to assume that the jury award for the 2022 statement improperly included damages for the 2019 statements.

Mr. Trump's remaining challenges to Professor Humphreys's testimony similarly fail to support his argument for a new trial on or a reduction in the damages. Professor Humphreys's testimony was not "pure speculation" because she "did not analyze any of Plaintiffs numerous media appearances where Plaintiff enhanced her reputation with regard to her allegations against Defendant." Professor Humphreys testified that "in terms of reputation," the "positive responses or comments [do not] offset negative responses."[95] She explained: "if you imagine, like, at the place where you work, if 20 percent of your colleagues think that you stole money where you work, let's say you have a hundred colleagues and 20 of them think that you stole money, that still has an impact on your work life and your day-to-day reputation, and so I think that 20 percent is still important."[96]

Nor are his arguments that Professor Humphreys "did not take into consideration the fact that Trump's supporters [who read and believed the 2022 statement] likely would never have

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93 *Id.* at 1158:12-23.

94 *Id.* at 1158:3-6.

95 *Id.* at 1135:9-11.

96 *Id.* at 1135:11-17.

supported or believed Plaintiff regardless of the [2022 statement]" and "did not explain how existing Trump supporters [or people who had made up their minds already based on the 2019 statements] would have changed their minds about Plaintiff" through her proposed reputation repair program grounds to minimize the weight of her testimony. Mr. Trump's counsel cross examined Professor Humphreys on these points. Professor Humphreys explained that in her view, it is "very likely that [the 2022 statement] was seen by some new people."[97]

The jury considered all of Professor Humphreys's testimony, including the purported flaws Mr. Trump's counsel attempted to draw out on cross examination and in summation, and determined that her testimony still was worthy of sufficient weight to reach the $1.7 million it awarded for the reputation repair program. None of Mr. Trump's challenges to that testimony, considered separately or collectively, supports a determination that the jury's compensatory damages award was seriously erroneous, egregious, or against the weight of the evidence.

Mr. Trump's Other Arguments and Awards in Comparable Defamation Cases

Mr. Trump's other objections to the jury's compensatory damages award for Ms. Carroll's defamation claim are without merit. He contends that the jury's award was excessive because:

> "[T]he overall essence of Plaintiff's defamation claim was that Defendant allegedly defamed Plaintiff when he denied her rape allegation. . . . [T]he Jury found that Defendant did not rape Plaintiff, and thus, the portions of the defamation claim based upon an alleged rape failed. Accordingly, all that was left of Plaintiff's

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97 *Id.* at 1135:10-11.

> defamation claim was that Defendant defamed Plaintiff by stating that 'he has no idea who Carroll was[,]' . . . which is far less damaging to Plaintiff's reputation than accusing Plaintiff of lying about the alleged rape."[98]

His argument is grounded entirely on false premises.

The crux of Ms. Carroll's defamation claim was that Mr. Trump defamed her by stating that she lied about him sexually assaulting her in order to increase sales of her new book or for other inappropriate purposes. Her claim, as noted above, never was limited to the specific definition of "rape" in the New York Penal Law, which requires penile penetration. Nor was any specific "portion[] of the defamation claim based upon an alleged rape." Mr. Trump did not deny specifically "raping" Ms. Carroll or specifically penetrating her with his penis as opposed to with another body part in his 2022 statement. He instead accused her of lying about the incident as a whole, of "completely ma[king] up a story" that was a "Hoax and a lie."[99] There is thus no factual or legal support for Mr. Trump's made-up version of Ms. Carroll's defamation claim.[100]

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98 Dkt 205 (Def. Mem.) at 18-19.

99 Dkt 1 (Compl.) at 18, ¶ 92.

100 Mr. Trump's remaining arguments similarly lack merit. His contention that the jury "clearly must have [awarded compensatory damages for the June 2019 statements]" because Ms. Carroll "did not even attempt the separate the harm caused by the June 2019 Statements and the October 12, 2022 Statement" in her testimony fails for the same reasons discussed above with respect to his "double recovery" argument based on Professor Humphreys's testimony. Dkt 205 (Def. Mem.) at 19. It also is inaccurate because, as noted above, Ms. Carroll in fact did compare the post-2022 messages she received to the post-2019 messages and stated that the post-2022 messages were "equally disparaging and hurtful, but these particularly hurt because [she] thought [she] had made it through and there they are again." Dkt 189 (Trial Tr.) at 329:5-7. Moreover, even if Ms. Carroll had not clearly separated the harm from the 2019 statements from the 2022 statement, it would not demonstrate that the jury's award was against the weight of the evidence. The same is true for Mr. Trump's argument that in summation, Ms. Carroll's counsel stated "public statements" as opposed to the singular 2022 "statement." Dkt 205 (Def. Mem.) at 19. As noted above, the Court's instruction to the jury

Mr. Trump argues also that the jury's damages award deviates materially from the compensatory damages awards in other defamation cases in New York. Similar to the review of damages awards in sexual assault and rape cases, there certainly are cases – including those cited by Mr. Trump – in which plaintiffs in defamation cases in New York received compensatory damages awards considerably lower than the amount awarded to Ms. Carroll.[101] The facts of those cases, however, were materially different from the facts and evidence in this case. In many of those cases, the defamatory statements were published in far less public forums (*e.g.*, a "local newspaper"),[102] and none involved the scale of attention and influence commanded when the defendant in this case chooses to speak publicly. The cases Mr. Trump cites "do not compare in the slightest to being defamed by one of the loudest voices in the world, in a statement read by millions and millions of people, which described you as a liar, labeled your account of a forcible sexual assault a 'hoax,' and accused you of making up a horrific accusation to sell a 'really crummy book.'"[103] And, as Ms. Carroll cites, there are cases in New York in which defamation plaintiffs have been awarded compensatory damages higher than the amount awarded to Ms. Carroll, demonstrating that the jury's award here is not excessive and falls within the range of reasonable compensation.[104]

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to ignore any harm arising from the 2019 statements overrides Mr. Trump's concern in this respect. Finally, his argument that Ms. Carroll testified she made more money after leaving *Elle* magazine and therefore suffered no financial harm from the 2022 statement is irrelevant. Ms. Carroll did not argue that she was owed compensatory damages for financial harm resulting from the 2022 statement.

101 Dkt 205 (Def. Mem.) at 16-17.

102 *Strader v. Ashley*, 61 A.D.3d 1244, 1247 (N.Y. App. Div. 3d Dep't 2009).

103 Dkt 207 (Pl. Opp. Mem.) at 24.

104 *Id.* at 23-25.

Mr. Trump accordingly has failed to meet his burden of demonstrating that a new trial or remittitur is warranted on the jury's compensatory damages award for Ms. Carroll's defamation claim.

Punitive Damages - Defamation Claim

Lastly, Mr. Trump argues that the jury's $280,000 punitive damages award for Ms. Carroll's defamation claim violated due process principles. He principally argues that the punitive damages award for Ms. Carroll's defamation claim should be no more than $5,000 because his conduct with regard to the 2022 statement is "barely reprehensible, if at all, because he was defending himself against a false accusation of rape."[105] "The Supreme Court [has] outlined three 'guideposts' to facilitate its review of state court punitive damage awards: (1) the degree of reprehensibility of the defendant's conduct, (2) the ratio of punitive damages to the actual harm inflicted, and (3) 'the difference between this remedy and the civil penalties authorized or imposed in comparable cases.'"[106] Mr. Trump's argument plainly is foreclosed by the analysis set forth above and by the Court's determination that the jury implicitly found Mr. Trump did in fact digitally rape Ms. Carroll.

Moreover, the evidence presented at trial and the jury's findings that Mr. Trump made the 2022 statement knowing that it was false (or with reckless disregard of its truth or falsity) and with deliberate intent to injure or out of hatred, ill will, or spite or with willful, wanton or reckless disregard of another's rights firmly establish the high reprehensibility of Mr. Trump's

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105 Dkt 205 (Def. Mem.) at 23.

106 *Stampf*, 761 F.3d at 209 (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996)).

defamatory statement. In these circumstances, the jury's $280,000 punitive damages award was not excessive and did not violate due process.

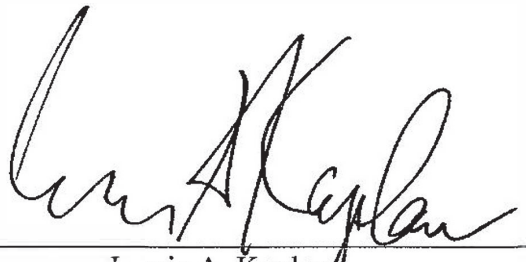
I have considered Mr. Trump's other arguments and found them all unpersuasive.

Conclusion

The jury in this case did not reach "a seriously erroneous result." Its verdict is not "a miscarriage of justice." Mr. Trump's motion for a new trial on damages or a remittitur (Dkt 204) is denied.

SO ORDERED.

Dated: July 19, 2023



Lewis A. Kaplan
United States District Judge