No. 23-6573
(CAPITAL CASE)

IN THE

Supreme Court of the United States

BRENDA EVERS ANDREW,

Petitioner,

v.

TAMIKA WHITE, WARDEN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF OF AMICI CURIAE HABEAS SCHOLARS IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

Amici are law professors who teach and write about habeas corpus, capital punishment, and constitutional law. A list of amici is attached as Appendix A. Amici offer their diverse perspectives and deep knowledge to draw this Court's attention to a certiorari-worthy case and explain what conclusions the Tenth Circuit should have reached under the proper application of this Court's precedent. Amici sign this brief in their individual capacities and not on behalf of their institutions; institutional affiliations are provided solely for identification purposes.

INTRODUCTION AND SUMMARY OF ARGUMENT

Ms. Brenda Andrew was convicted and sentenced to death based on irrelevant evidence which served no purpose other than to sway the jury using sex-based stereotypes. Ms. Andrew appealed the admission and use of this evidence, arguing it violated the federal law articulated in *Payne v. Tennessee*, 501 U.S. 808, 825 (1991): Admission of unduly prejudicial evidence that renders the trial fundamentally unfair violates the Due Process Clause of the Fourteenth Amendment. But the Tenth Circuit denied the existence of this "clearly established federal law" based on a misinterpretation of this Court's precedent and a

[1] No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than amici and their counsel made a monetary contribution intended to fund the preparation or submission of the brief. Counsel of record for all parties received timely notice of the intention to file this brief.

misapplication of the required inquiry into whether the purported clearly established law existed. For these reasons, this Court should grant certiorari and course-correct the dangerous precedent set by the Tenth Circuit.

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), when a state court has "adjudicated" a claim "on the merits," habeas corpus relief is available if the petitioner establishes that the adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established [f]ederal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

In practice, the application of § 2254(d)(1) entails two steps: (1) a court must determine "what constitutes clearly established [f]ederal law"; and, if there is relevant "clearly established federal law," (2) a court must then determine whether the state court decision was "contrary to, or involved an unreasonable application of," that clearly established federal law. *Lockyer v. Andrade*, 538 U.S. 63, 70-71 (2003) (citation omitted). The phrase "clearly established federal law" "refers to the holdings" of the Supreme Court "as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000).

In *Payne*, this Court set out "clearly established federal law," namely, that the admission of "evidence … that is so unduly prejudicial that it renders the trial fundamentally unfair" violates the Due Process Clause of the Fourteenth Amendment. 501 U.S. at 825. Tasked with reviewing the admission of

"victim impact" evidence, this Court revisited the holding in *Booth v. Maryland*, 482 U.S. 496 (1987), which barred all victim impact statements in guilt-phase capital sentencing proceedings because they "do not in general reflect on the defendant's 'blameworthiness.'" *Payne*, 501 U.S. at 817-19. The *Payne* Court eliminated this *per se* bar, explaining that, in some circumstances, victim impact statements may serve "legitimate purposes" at the sentencing phase. *Id.* at 825. But the Court also made clear that just because evidence *may* serve a legitimate purpose, this does not mean it *always will* serve a legitimate purpose, and so the Court offered a broader guiding principle. *Id.* Where "evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." *Id.* (citing *Darden v. Wainwright*, 477 U.S. 168, 179-83 (1986) (reviewing whether comments made in the prosecution's closing argument "rendered the trial unfair")). In making this holding, the *Payne* Court articulated "clearly established federal law."

The Tenth Circuit, however, misapprehended this "clearly established federal law," instead concluding that *Payne* did not establish that the admission of unduly prejudicial evidence may violate the Due Process Clause. According to the Tenth Circuit, "*Payne*'s central holding [is] more limited," "merely establish[ing] that the Eighth Amendment did not erect a '*per se* bar' to the introduction of victim-impact statements in capital cases." Pet. App. 17a. To reach this conclusion, the Tenth Circuit erred in at least two ways: (1) it refused to consider subsequent Supreme Court precedent that reiterated the "clearly established federal

law" set out in *Payne* and compelled an opposite holding, and (2) it adopted an overly narrow view of what the inquiry for determining what constitutes "clearly established federal law" entails.

This Court should grant certiorari—or summarily vacate and remand—because the Tenth Circuit's decision not only conflicts with the "clearly established federal law" articulated in *Payne* but also is based on improper analysis and calls the "clearly established federal law" articulated in *Payne* into question. The court of appeals made these errors at the cost of Ms. Andrew's constitutional rights and, ultimately, her life.

ARGUMENT

I. The Tenth Circuit Misapprehended The "Clearly Established Federal Law" Set Out In *Payne.*

This Court in *Payne* explicitly set out that "[i]n the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." 501 U.S. at 825. This was not dicta, but rather a holding central to the Court's ultimate conclusion in *Payne*. *See Williams*, 529 U.S. at 412. The *Payne* Court's express statement set out "clearly established federal law," which included a prohibition on the admission of irrelevant evidence that "is so unduly prejudicial that it renders the trial fundamentally unfair." *Payne*, 501 U.S. at 825.

The *Payne* Court expressed this law while reviewing the admission of a specific type of evidence, but this does not negate that the broader principle expressed by the Court is equally foundational to and part of its holding. In the criminal proceedings underlying *Payne*, the State presented testimony from the victims' family member, who spoke about how the murders of his mother and sister affected the surviving infant son. *Id.* at 814-15. This "victim impact" evidence was relied on in the prosecution's call for capital punishment. *Id.* The defendant appealed the admission and use of this testimony, arguing that it violated the Eighth Amendment because it was "technically irrelevant" and "create[d] a constitutionally unacceptable risk of an arbitrary imposition of the death penalty." *Id.* at 816-17 (citation omitted) (quoting the state court's characterization of the evidence). In part, the defendant relied on *Booth* and its *per se* bar on victim impact statements at the sentencing phase of a capital trial. *Payne*, 502 U.S. at 817-18. This bar was based on a premise that such statements "do not in general reflect on the defendant's 'blameworthiness.'" *Id.* Revisiting *Booth*, the *Payne* Court noted that states are "free, in capital cases, … to devise new procedures and new remedies to meet felt needs." *Id.* at 824-25. "Victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime." *Id.* at 825. In doing away with the complete bar on admitting victim impact statements, however, the Court established a broader principle informing the admission of evidence.

The *Payne* Court explained: "In the event that evidence is introduced that is so unduly prejudicial that

it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." *Id.* (citing *Darden*, 477 U.S. at 179-83). Although the specific victim impact testimony in *Payne* "serve[d] entirely legitimate purposes" and was not unduly prejudicial (and therefore, its admission was not erroneous), the guiding principle was clear: Admission of unduly prejudicial evidence that renders the trial fundamentally unfair violates the Due Process Clause of the Fourteenth Amendment. *Id.*

The Tenth Circuit, however, held otherwise, concluding that *Payne* did not clearly establish that the admission of irrelevant evidence that renders the trial fundamentally unfair (a form of unduly prejudicial evidence) may violate the Due Process Clause. Pet. App. 17a. The Tenth Circuit acknowledged this same language in *Payne* but considered it to be a "broad statement" that applies only in scenarios involving victim impact statements that are "so unfairly prejudicial … that their introduction will violate the Constitution." *Id.* (citation omitted). This decision is erroneous for at least two reasons. First, it contradicts Supreme Court precedent affirming that *Payne* established that the admission of unduly prejudicial evidence may violate the Due Process Clause. *See Kansas v. Carr*, 577 U.S. 108 (2016). Second, the Tenth Circuit applied an overly narrow test for determining what constitutes "clearly established federal law."

These errors alone justify review. This case further warrants certiorari because of the high individual stakes at risk (namely, Ms. Andrew's life) and because this case is markedly different from other

§ 2254(d)(1) cases. Other § 2254(d)(1) cases do not doubt the existence of "clearly established federal law" itself, but rather, turn on whether the guarantee applies to the specific case at issue. In this case, however, the Tenth Circuit has called into question the "clearly established federal law" itself, creating risk that its error will spread to other cases.

A. The Tenth Circuit declined to consider this Court's precedent confirming that *Payne* set out the "clearly established federal law" at issue here.

The Due Process Clause forbids imposing punishment based on unduly prejudicial evidence resulting in fundamental unfairness. This principle is "clearly established" not only in *Payne* itself but also in other decisions. Indeed, this Court has relied on the very same holding from *Payne* in subsequent decisions.

For example, in *Carr*, this Court evaluated the constitutionality of a joint capital-sentencing proceeding and determined whether the admission of "one defendant's mitigating evidence," which may have been inadmissible in severed proceedings, "put a thumb on death's scale for the other," in violation of the Eighth Amendment. 577 U.S. at 122. In rejecting this premise, the Court reiterated: "[I]t is the Due Process Clause that wards off the introduction of 'unduly prejudicial' evidence that would 'rende[r] the trial fundamentally unfair.'" *Id.* at 123 (alteration in original) (quoting *Payne*, 501 U.S. at 825). In this way, *Carr* shows that this Court, interpreting its own precedent, understood *Payne* to set out the exact "clearly established federal law" that Ms. Andrew contended it did

before the Tenth Circuit. *Carr* did not originate the "clearly established federal law" relevant here, but instead, buttressed the fact that *Payne* had established Due Process Clause limitations on admitting unduly prejudicial evidence that would render the trial fundamentally unfair.

This is not unlike the situation in *Stringer v. Black*, 503 U.S. 222 (1992), where this Court held that a "new rule," as defined in *Teague v. Lane*, 489 U.S. 288, 301 (1989), is not announced when a "clear principle emerges not from any single case, … but from [a] long line of authority." *Stringer*, 503 U.S. at 232; *see also Williams*, 529 U.S. at 412 ("[W]hatever would qualify as an old rule under our *Teague* jurisprudence will constitute 'clearly established [f]ederal law, as determined by the Supreme Court of the United States' under § 2254(d)(1)." (citing *Stringer*, 503 U.S. at 228)). Just as subsequent cases "underscore[d]" the "applicability" of new rules announced in prior decisions in *Stringer*, 503 U.S. at 232, here, *Carr* underscores the applicability of the "clearly established federal law" set out in *Payne*. *See also Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 903-04 (3d Cir. 1999) (Stapleton, J., concurring) (citing *Stringer* for this very proposition in the AEDPA context) ("[T]he application of this *line of cases* to [defendant's] claim would not … result in a new rule under *Teague*." (emphasis added)).

The Tenth Circuit, however, declined to consider *Carr* in any meaningful way because it "post-dates the … appeal opinion by nearly a decade." Pet. App. 19a n.13. It did so based on *Greene v. Fisher*, which held that for "clearly established federal law" to

apply, it must be in place at the time of the state court decision alleged to have gone awry from it in violation of § 2254(d)(1), 565 U.S. 34, 38 (2011). Pet. App. 19a n.13. But the timing requirement of *Greene* restricts what case can be relied upon for originally setting out "clearly established federal law"—not what case can be relied upon for validating that "clearly established federal law" was indeed set out in another, *earlier* decision. *See Greene*, 565 U.S. at 38. After applying *Greene* to dispose of Ms. Andrew's reliance on *Carr*, the Tenth Circuit only summarily addressed the heart of Ms. Andrew's *Carr* argument in a catch-all statement: "Further, *Carr* does not persuade us that, contrary to our precedent, *Payne* serves as clearly established law entitling her to proceed with her due-process claim." Pet. App. 19a n.13.

The Tenth Circuit provided no substantive basis for its conclusion that *Carr* did not recognize the law that was clearly established in *Payne*, which undeniably predates the state-court decision at issue here. Nor could it. *Payne* set out a "clearly established federal law," and *Carr* acknowledged that law by relying on it. The inquiry into whether a "clearly established federal law" exists should have ended here, with *Carr* as determinative proof that *Payne* set out the claimed "clearly established federal law."

Other courts considering similar arguments from defendants appealing pre-*Carr* state-court decisions have viewed *Carr* as solidifying the "clearly established federal law" set out in *Payne*—not as establishing the law in the first instance. For example, in *Rivera v. Ryan*, the District Court for the District of Arizona reviewed whether the admission of

"testimony show[ing] that [the defendant] had a negative attitude … and that he had been involved in multiple confrontations regarding his work" violated the defendant's constitutional rights because its only purported purpose was "to establish guilt by showing prior bad acts, or a propensity for violence." No. CV-15-0586, 2016 WL 1622412, at *8, 17-18 (D. Ariz. Mar. 2, 2016) (citation omitted). The defendant was convicted and sentenced to death in 2007, and the denial of his § 2254(d)(1) petition was affirmed in 2011. *Id.* at *1-5. That means that *Payne* predated and *Carr* postdated the totality of the defendant's criminal proceedings. The district court began by reiterating the clearly established law: "Unfairly prejudicial evidence can amount to a denial of due process." *Id.* at *17. It then quoted this Court's articulation of this principle in *Payne*, followed by a citation to *Carr*, which the district court parenthetically described as "citing *Payne* for the proposition that the Due Process Clause prohibits the introduction of unduly prejudicial evidence that would render the trial fundamentally unfair." *Id.* Other courts have treated *Carr* in the same fashion. *See, e.g.*, *Perkins v. Dunn*, No. 14-CV-1814, 2019 WL 4538737, at *7, 35-36 (N.D. Ala. Sept. 19, 2019) (appealing 1994 conviction/sentence affirmed in 2001) ("'Rather, it is the Due Process Clause that wards off the introduction of "unduly prejudicial" evidence that would render the trial fundamentally unfair.' [*Carr*, 577 U.S. at 123] (quoting [*Payne*, 501 U.S. at 825])" (footnote omitted)); *Baker v. Steele*, No. 15 CV 1262, 2018 WL 4300203, at *8 (E.D. Mo. Sept. 10, 2018) (appealing 2010 conviction/sentence affirmed in 2014) ("A state violates the Fourteenth Amendment's Due Process Clause when it admits evidence that is 'so

unduly prejudicial that it renders the trial fundamentally unfair.' [*Payne*, 501 U.S. at 825]; [*Carr*, 577 U.S. at 123]."); *Davis v. Royal*, No. CIV-12-1111, 2017 WL 4204031, at *14 (W.D. Okla. Sept. 20, 2017) (appealing 2007 conviction/sentence affirmed in 2012) (same); *Bowman v. Stirling*, No. 18-287, 2019 WL 8918815, at *44 (D.S.C. Dec. 10, 2019) (appealing 2001 conviction/sentence affirmed in 2012) (same). Courts considering similar line-of-cases reasoning regarding other "clearly established federal law" have also adopted a similar view. *See, e.g.*, *Fulcher v. Motley*, 444 F.3d 791, 803-04 (6th Cir. 2006) ("To summarize, at the time the Kentucky Supreme Court affirmed Fulcher's conviction (1996), [the purported 'clearly established law,' was established.] Though it was not made explicit until *Lilly* [*v. Virginia*, 527 U.S. 116] (1999), *Lee* [*v. Illinois*, 476 U.S. 530] (1986) had implied that" clearly established federal law.).

Consistent with how other courts have applied similar lines of cases to conclude that a preceding case originated "clearly established federal law," Ms. Andrew relied on *Carr* to show that *Payne* set out the purported "clearly established federal law." The Tenth Circuit should have given this argument its due weight. This Court should grant certiorari so that Ms. Andrew's argument—which, under proper consideration, compels an opposite holding—is given the consideration it requires.

B. The Tenth Circuit misunderstood the inquiry for determining what is "clearly established federal law."

Not only did the Tenth Circuit refuse to consider *Carr* and its validation of the "clearly established federal law" set out in *Payne*, but it also adopted an overly narrow inquiry for determining what constitutes "clearly established federal law," contrary to this Court's instructions.

In *Williams*, this Court explained what constitutes "clearly established [f]ederal law, as determined by the Supreme Court of the United States" for the purposes of § 2254(d)(1). 529 U.S. at 412 (citation omitted). "That statutory phrase refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." *Id.* But the term "holding" for the purposes of § 2254(d)(1) is not limited to the narrow, at-bottom conclusion that resolves a case. Rather, it is "the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Lockyer*, 538 U.S. at 71-72. On the one hand, "[i]f this Court has not broken sufficient legal ground to establish an asked-for constitutional principle, the lower federal courts cannot themselves establish such a principle with clarity sufficient to satisfy the AEDPA bar." *Williams*, 529 U.S. at 381. On the other, "rules of law may be sufficiently clear for habeas purposes even when they are expressed in terms of a generalized standard rather than as a bright-line rule." *Id.* at 382. There is a spectrum of abstraction in determining whether a particular legal principle was clearly established in a

specific Supreme Court decision. As Sixth Circuit Judge Merritt has explained:

> At one end of the spectrum lie legal principles with such a high level of generality, like the Eight[h] Amendment principle of reliability in sentencing, whose application does not necessarily lead to a "predictable development" in the relevant law and therefore [cannot] be considered clearly established. *See Sawyer v. Smith*, 497 U.S. 227, 236, 110 S. Ct. 2822, 111 L.Ed.2d 193 (1990). On the other end are narrowly drawn bright-line rules with little application beyond factually indistinguishable situations. In the middle of the spectrum lie those general principles of law crafted by the Supreme Court to constitute clearly established law in a wide range of factual situations.

Davis v. Straub, 430 F.3d 281, 292 (6th Cir. 2005) (Merritt, J., dissenting). In *Payne*, this Court set out a "rule[] of law … sufficiently clear for habeas purposes," *Williams*, 529 U.S. at 382: "In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief," *Payne*, 501 U.S. at 825. At worst, a court may think that this holding is a "generalized standard rather than … a bright-line rule." *See Williams*, 529 U.S. at 382. Even so, that is all that *Williams* and this Court's subsequent decisions require.

The Tenth Circuit, however, did not approach the clearly-established-federal-law inquiry in a manner consistent with *Williams*. Instead, it limited the holding in *Payne* to what was necessary to resolve the exact factual dispute before the Court, requiring that the Court's "holdings 'must be construed narrowly' and 'on-point,'" Pet. App. 10a (quoting *Fairchild v. Trammell*, 784 F.3d 702, 721 (10th Cir. 2015))—these harsh restrictions are inconsistent with the broader meaning of "holding" under § 2254(d)(1) as the "governing legal principle" of the decision, *Williams*, 529 U.S. at 412-13.

Specifically, the Tenth Circuit reasoned that the district court erred in determining that the first part of the § 2254(d)(1) inquiry—the clearly-established-law requirement—was met. Pet. App. 16a. Interpreting its own precedent, the Tenth Circuit explained that, in *Holland v. Allbaugh*, 824 F.3d 1222 (10th Cir. 2016), it "viewed *Payne*'s central holding as more limited … merely establish[ing] that the Eighth Amendment did not erect a '*per se* bar' to the introduction of victim-impact statements in capital cases." Pet. App. 17a (quoting *Holland*, 824 F.3d at 1228). According to the Tenth Circuit, because "*Payne* is not 'clearly established law' that establishe[d] a due-process violation arising from ordinary evidentiary rulings at trial," Ms. Andrew's claim challenging the state court's evidentiary rulings fails. Pet. App. 18a.

The Tenth Circuit's approach applies an unduly narrow view of what constitutes "clearly established federal law." The court required identical facts—"victim-impact statements in a capital case," Pet. App. 17a—rather than considering the broader principle

that is established in law. As the Tenth Circuit interpreted its task, Ms. Andrew needed to point to "clearly established law governing … evidentiary-rulings-based claim[s]" to surpass the first step of the § 2254(d)(1) inquiry. Pet. App. 17a-18a. Absent a specific holding establishing that "a due-process violation aris[es] from ordinary evidentiary rulings at trial," the Tenth Circuit determined that there was no "clearly established federal law" on point. Pet. App. 18a; *see also* Pet. App. 17a (requiring that "holdings" under § 2254(d)(1) be "construed narrowly" and "on-point" (citation omitted)).

But the Tenth Circuit has missed the forest among the trees and incorrectly applied an overly narrow version of the § 2254(d)(1) inquiry. Applying the correct level of generality, the principle that is well-established is that the admission of irrelevant evidence that is so unduly prejudicial may violate Due Process.

The error in the Tenth Circuit's reasoning is even more clear when considered in view of the background principle underlying Ms. Andrew's appeal—that her conviction and sentence were unduly prejudiced by the introduction of irrelevant evidence that served "no purpose other than to hammer home that [she] is a bad wife, a bad mother, and a bad woman." *Andrew v. State*, 164 P.3d 176, 206 (Okla. Crim. App. 2007) (Johnson, J., concurring in part and dissenting in part).

It is well established that punishment cannot be imposed based on sex. *See Buck v. Davis*, 580 U.S. 100, 103, 123 (2017) ("[A] reasonable probability that

[a defendant] was sentenced to death in part because of [an immutable characteristic] … is a disturbing departure from the basic premise that our criminal law punishes people for what they do, not who they are …. Dispensing punishment on the basis of an immutable characteristic flatly contravenes this guiding principle."); *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) ("[S]ex … is an immutable characteristic …."). While "odious in all aspects," "[d]iscrimination on the basis of [an immutable characteristic] is especially pernicious in the administration of justice." *Rose v. Mitchell*, 443 U.S. 545, 555 (1979).

Even if no specific case has yet explicitly stated the point, it is clearly true that the imposition of capital punishment based on sex—or even, that there is a "reasonable probability that [a defendant is] sentenced to death in part because of" sex, *Buck*, 580 U.S. at 103—violates a general constitutional rule. In *Taylor v. Riojas*, there was no "new rule" where "no reasonable correctional officer could have concluded that … it was constitutionally permissible to house" the inmate "for six full days … in a pair of shockingly unsanitary cells"—the first being "covered, nearly floor to ceiling," in fecal matter, and the second being "frigidly cold" and "equipped with only a clogged drain in the floor to dispose of bodily wastes." 592 U.S. 7, 8-9 (2020). The Tenth Circuit's analysis runs afoul of this general principle, requiring "on-point" holdings that are "construed narrowly" to constitute "clearly established federal law." Pet. App. 10a (citation omitted). In Ms. Andrew's case, no reasonable person, much less a reasonable judge, could conclude that it was proper to impose criminal punishment—let alone capital punishment—based on sex and sexual

stereotypes. *See, e.g.*, Trial Tr., Volume 17, 4125 (prosecution referring to Ms. Andrew as a "slut puppy" in guilt-phase closing argument); Trial Tr., Volume 2, 323 (prosecution eliciting testimony that Ms. Andrew was a "hoochie" because she had "lot[s] of cleavage … exposed").

Any trial, therefore, where any aspect of the conviction or imposition of punishment rests on sex is "unduly prejudicial" because it would "render[] the trial fundamentally unfair." *Payne*, 501 U.S. at 825. In other words, a trial cannot both be fundamentally fair and simultaneously result in a conviction or sentence based, in any part, on sex. This rule of law is a "general constitutional rule already identified in the decisional law … with obvious clarity." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) ("[A] general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful.'" (alteration in original)); *United States v. Lanier*, 520 U.S. 259, 271 (1997) (same); *see Buck*, 580 U.S. at 103.

Combining this background principle—that criminal punishment cannot be imposed based on sex—with the "clearly established federal law" in *Payne*—that the admission of unduly prejudicial evidence may violate the Due Process Clause—it is indisputable that admitting irrelevant evidence that serves only the purpose of invoking sex as a basis for conviction and punishment is "unduly prejudicial" and violates the Due Process Clause. Yet the Tenth Circuit reached the opposite conclusion. This Court's intervention is necessary not only to correct the life-and-

death outcome in Ms. Andrew's case, but also to prevent the Tenth Circuit's overly narrow inquiry from infecting other cases.

C. The Tenth Circuit's decision is unlike other cases applying § 2254(d)(1) because it casts doubt on the "clearly established federal law" itself.

The discussion above by itself demonstrates that this Court should grant certiorari. The need for review, however, is made even more pressing when, as here, the challenged decision is mechanically very different from other cases applying the same statute. The Tenth Circuit resolved Ms. Andrew's § 2254(d)(1) challenge on the basis of whether the "clearly established federal law" that Ms. Andrew identified actually exists. In doing so, the Tenth Circuit called into question the very substance of the identified rule of law itself. In other words, it casts doubt on what has previously been well recognized (including by this Court) as the law established by *Payne*.

In contrast, other cases addressing § 2254(d)(1) arguments generally do not doubt the existence or breadth of the identified "clearly established federal law" itself. Instead, the analysis is typically devoted to whether the established guarantee applies to the case at issue. *See, e.g.*, *Turner v. Quarterman*, 481 F.3d 292, 298-99 (5th Cir. 2007) ("It is undisputed that the due process right … recognized in *Simmons* does not apply …."); *Hooks v. Workman*, 689 F.3d 1148, 1175 (10th Cir. 2012) (denying relief where the asserted "clearly established federal law" "[did] not apply" to the case at issue).

This case is unlike other § 2254(d)(1) cases because it calls into question what "clearly established federal law" was set out in *Payne*. This difference weighs heavily in favor of granting certiorari given the widespread consequences of such a challenge to the "clearly established federal law" set out in *Payne*. There is a significant difference in holding that a clearly established law does not apply to a specific factual scenario—that is, to a specific defendant's case based on the particular facts of that case—and holding as a more general matter that the asserted clearly established law does not exist. The latter fundamentally changes the breadth of law available to future defendants in seeking review across any number of factual scenarios. For example, as understood by the Tenth Circuit, *Payne* articulated only that the admission of victim impact statements that are unduly prejudicial violates the Due Process Clause—the consequences of its decision could be that *any* defendant seeking review with respect to *any* other type of unduly prejudicial evidence is now without recourse.

CONCLUSION

For the foregoing reasons, this Court should grant Ms. Andrew's petition for certiorari.

Respectfully submitted,

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Appendix A, List of Amici 1a

APPENDIX A

Amici are law professors who teach and write about habeas corpus, capital punishment, and constitutional law. Their titles and institutional affiliations are provided for identification purposes only.

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