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 EIGHT LEGAL ORGANIZATIONS AND SEVEN LEGAL SCHOLARS WORKING ON GENDER JUSTICE IN THE LEGAL SYSTEM AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

ANDREA LEWIS HARTUNG
Counsel of Record
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
160 East Grand Avenue, 6th Fl.
Chicago, IL 60611
(312) 503-0913
alewishartung
@macarthurjustice.org

JAMES W. CRAIG
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
4400 S. Carrollton Ave.
New Orleans, LA 70119
(504) 620-2259
jim.craig@macarthurjustice.org

Counsel for Amici Curiae

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INTEREST OF AMICI CURIAE[1]

Amicus Curiae, **Battered Women's Justice Project (BWJP)**, is the premier national resource center on civil and criminal legal responses to gender-based violence. The National Defense Center for Criminalized Survivors (NDCCS), one of BWJP's seven national policy and practice centers, is the Nation's first and only national resource center devoted exclusively to assisting victims of gender-based violence prosecuted for crimes related to their abuse ("criminalized survivors"). NDCCS has worked to fight gender-based bias and prejudice since its inception. NDCCS was founded, in large part, to address what advocates witnessed in everyday work with criminalized survivors: a criminal justice system composed of prosecutors, defense lawyers, judges and others who often judged survivors based not on facts, but instead on gendered stereotypes, biases and misconceptions.

Amicus Curiae, **Gender Justice** envisions a world where everyone can thrive regardless of their gender, gender expression, or sexual orientation. We dismantle legal, structural, and cultural barriers that contribute to gender inequity. We work to ensure that people of all genders have a meaningful right to bodily autonomy, safety, health, and opportunity.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici or their counsel made a monetary contribution to its preparation or submission. Counsel timely notified the parties' counsel of record of the intent to file this brief.

Amicus curiae, **Legal Momentum, the Women's Legal Defense Fund (Legal Momentum)**, was established in 1970 and is the first and longest serving organization dedicated to advancing the rights of women and girls. Through its project, the **National Judicial Education Program to Promote Equality for Women and Men in the Courts (NJEP)**, established in 1980, Legal Momentum has been the national leader in identifying and eliminating gender bias in the courts.

Amicus curiae, **Lambda Legal Defense and Education Fund, Inc. (Lambda Legal)** is the Nation's oldest and largest nonprofit legal organization working for full recognition of the civil rights of lesbian, gay, bisexual, and transgender (LGBT) people and everyone living with HIV through impact litigation, education, and policy advocacy. Lambda Legal has appeared as counsel of record or amicus curiae in numerous cases in this and other federal courts involving the rights of LGBT people, as well as regarding the role of sex-based stereotypes in denying equal treatment under the law.

Amicus curiae, **National Center for Lesbian Rights (NCLR)**, is a national non-profit legal organization dedicated to protecting and advancing the civil rights of LGBTQ people and their families through litigation, public policy advocacy, and public education. Since its founding in 1977, NCLR has played a leading role in securing fair and equal treatment for LGBTQ people and their families in cases across the country involving constitutional and civil rights.

Amicus curiae, **Transgender Law Center (TLC)**, is the largest national trans-led legal organization advocating self-determination for all people. Grounded in legal expertise and committed to racial justice, TLC employs a variety of community-driven strategies to keep transgender and gender nonconforming people alive, thriving, and fighting for liberation.

Amicus curiae, **Transgender Legal Defense & Education Fund** is committed to ending discrimination based upon gender identity and expression and to achieving equality for transgender people through public education, test-case litigation, direct legal services, and public policy efforts.

Amicus curiae, **Women's Law Project (WLP)**, provides free legal representation, policy advocacy, and public education to advance the legal and economic status of women, girls, and LGBTQ people in Pennsylvania and surrounding regions. WLP challenges overt and implicit gender bias and discrimination in many forms and in many contexts, and it has direct experience representing litigants subjected to gender-biased court proceedings in which invidious sex-role stereotypes were unfairly and prejudicially invoked.

The individual *amici curiae* are legal academics appearing in their individual capacities. They include some of the Nation's leading experts teaching and writing in areas including feminist jurisprudence, feminist legal theory, and gender bias and sex stereotyping in the legal system. The list of individual *amici curiae* appears in the Appendix to this brief.

Through their wide-ranging work in gender and the law, *amici* are deeply familiar with the history and effects of gender bias throughout the legal system. This case represents the most severe consequence of the gender prejudice and bias that, despite the work of *amici* and others, continues to permeate the criminal justice system. When the potential penalty is death, it is of paramount importance to the interests of justice that court proceedings are free of the taint of gender bias. Together, *amici* have strong interests in ensuring that unchecked discrimination and sex stereotyping in the courts do not deprive defendants of their constitutional rights.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The evidence and argument the State presented to secure Brenda Andrew's capital murder conviction resembled the script of a tabloid talk show: the predominant themes were sex and adultery. In a case involving mostly circumstantial evidence and a defendant with no prior criminal history, the state leaned into age-old tropes of immoral women and uncaring mothers, referring to Ms. Andrew as a "slut puppy" and a "hoochie." (Cert. Pet. at 11, 14). Based on that "evidence," Ms. Andrew was convicted and condemned to die.

This Court has long held that discrimination that relies on underlying stereotypes about a protected category of people is prohibited by law. More pointedly, this Court's precedent has repeatedly rejected discriminatory state action that serves little purpose but to perpetuate identity-based stereotypes, including those based on sex. The Court has identified

parallels between sex stereotyping and racial stereotyping in the law, and held that the historically subordinate treatment of both women and racial minorities gives rise to heightened scrutiny when claims arise from discriminatory action.

Absent any reliable, non-circumstantial evidence of Ms. Andrew's guilt, the State resorted to putting her identity as a woman on trial by painting her as a "black widow".[2] The State tainted the proceedings with evidence of Ms. Andrew's clothing, her demeanor, and her sex life before, during, and after her marriage. It painted her as an inadequate mother. None of this information related to the elements of the crime, yet all of it capitalized on the bias women in the criminal justice system suffer when they are perceived to violate sex-role norms. With Ms. Andrew reduced to mere stereotype and her humanity eviscerated, the jury voted to condemn Ms. Andrew—who had no prior criminal record—to die.

These overt, gratuitous attacks on Ms. Andrew's identity and expression as a woman during her capital trial were the very brand of State-fueled stereotyping that binding federal law has prohibited for decades, in cases where litigants were *not* facing death. And this Court has decisively held that the Constitution protects capital defendants against proceedings that are tainted by irrelevant evidence and argument that

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[2] *See* Sandra Babcock & Nathalie Greenfield, *Gender, Violence, and the Death Penalty*, 53 Cal. W. Int'l L.J. 327, 328 (2023) (citing Mary Welek Atwell, WRETCHED SISTERS: EXAMINING GENDER AND CAPITAL PUNISHMENT 110 (2d. ed. 2014) (noting the "black widow" stigma long has attached to women facing capital punishment).

induce juror bias. Yet in the most serious of cases, the court below failed to consider this precedent in evaluating the prejudicial effect of the prosecution's conduct upon the jury.

The admission of copious immaterial, prejudicial evidence and argument that were meant to sway the jury rendered Ms. Andrew's trial fundamentally unfair. The questions raised in Ms. Andrew's petition for certiorari are of dire importance to criminal proceedings, including those of women who face the weaponization of sex stereotypes by state actors seeking guilty verdicts. This Court should grant Ms. Andrew's petition.

ARGUMENT

I. The Constitution Protects Against State Action That Largely Perpetuates Identity-Based Stereotypes.

This Court has repeatedly condemned conduct on the part of state actors that propagates stereotypes against protected groups. In doing so, it has pointedly discussed the parallels between race and gender discrimination and has held that in the criminal context, the Constitution prohibits the injection of bias based on both. Nonetheless, gender bias[3] has

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[3] *Amicus* Legal Momentum's project, The National Judicial Education Program to Promote Equality for Women and Men in the Courts, defines gender bias as encompassing "(1) stereotypical thinking about the nature and roles of women and men, (2) how society values women and men, and (3) myths and misconceptions about the social and economic reality of women's and men's lives." Lynn Hecht Schafran, *Will Inquiry Produce Action? Studying the Effects of Gender in the Federal Courts*, 32 U. Rich. L. Rev. 615, 618 (1998). This brief adopts that definition.

persisted in the legal system, with "grave consequences." *Id.* at 620 (citation omitted). In cases like the one at bar, the risk is acute that any form of unchecked gender bias will result in proceedings that this Court has deemed fundamentally unfair to litigants.

A. States may not rely on generalized stereotypes to engender bias against protected groups.

This Court has squarely held that the U.S. Constitution prohibits states from discriminating against individuals by perpetuating immaterial tropes about a group's identity or expression. Take, for instance, standing jurisprudence in cases challenging certain practices under the Fourteenth Amendment of the U.S. Constitution.

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Adhering to this mandate, in *Batson v. Kentucky* this Court held that the Equal Protection Clause prohibited the preemptive strike of Black potential jurors because of their race. 476 U.S. 79, 91 (1986). The State's basis for these strikes was rooted in a racialized generalization: that Black people were incapable of making unbiased decisions in a criminal case where the defendant is Black. *Id.* at 97. The Court rejected this notion, finding that an individual's status as a Black person is "wholly unrelated" to the outcome of trial. *Id.* at 91.

Unsurprisingly, this Court also has enforced criminal defendants' constitutional protection from stereotype-driven bias in the context of capital proceedings. The Fourteenth Amendment's Due Process Clause is meant to "prevent fundamental unfairness in the use of evidence" at trial. *Lisenba v. California*, 314 U.S. 219, 236 (1941). This Court has held that improper bias violates this provision by holding, for instance, that the due process protection demands capital proceedings that are free from racial bias on the part of jurors. *Ham v. South Carolina*, 409 U.S. 524, 526-27 (1973). After all, the discretion afforded a jury in capital trial provides "a unique opportunity for racial prejudice to operate but remain undetected," and for prejudice to infect juror decisions on numerous questions in the case. *Turner v. Murray*, 476 U.S. 28, 35 (1986). This Court acknowledged that the risk of such bias is "especially serious" in capital sentencing proceedings given the "complete finality of the death sentence." *Id.* For that reason, it also held that a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the victim's race and questioned to ascertain racial bias. *Id.*

More recently, in *Buck v. Davis*, this Court found a Black man's defense counsel ineffective for introducing in his capital trial the generalization from an expert witness that Black defendants allegedly were more prone to future dangerousness. 580 U.S. 100, 119, 128 (2017). After hearing this information from an expert witness, the jury sentenced Mr. Buck to death. *Id.* at 108. This Court found that the expert "appealed to a powerful racial stereotype" of Black men as "violence prone," which conveyed, "in effect,

that the color of Buck's skin made him more deserving of execution." *Id.* at 119, 121. Notably, when discussing prejudice, this Court remarked, "[i]*t would be patently unconstitutional*" for a State to make a similarly racially charged comment. *Id.* at 121 (emphasis added). Other federal case law directly adheres to this proposition. *See,* e.g., *Bennett v. Stirling*, 842 F. 3d 319 (4th Cir. 2016) (holding that the State's introduction of racially-charged evidence and argument in a capital trial violated due process).

B. State action that discriminates based on anachronistic sex stereotypes, too, is unconstitutional.

As with racial bias, this Court has held that State action driven by gendered stereotypes violates the Fourteenth Amendment's Equal Protection Clause. *United States v. Virginia*, 518 U.S. 515, 555 (1996); *see also Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 84 (2000) (cleaned up) ("[w]hen a State discriminates on the basis of race or gender, we require a tighter fit between the discriminatory means and the legitimate ends they serve."). Thus, this Court has repeatedly rejected "sex-based state action that reinforces traditional concepts of men's and women's roles." *See also* Cary Franklin, *The Anti-Stereotyping Principle*, 85 N.Y.U. L. Rev. 83, 90 (2010); *see also,* e.g., *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (noting "a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be *as demeaning and disconcerting as the harshest of racial epithets*.") (emphasis added) (internal citations omitted)). In other words, States cannot impose on women "*natural* and *proper* timidity and delicacy," or

the idea that "[t]he paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother." *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 132-34 (1994) (quoting *Bradwell v. State*, 16 Wall. 130, 141 (1873) (denying a woman a license to practice law)).

Moreover, this Court has made plain that gender bias in criminal cases runs afoul of the Constitution, for the very same reasons that racial bias does. In *J.E.B.*, this Court extended its ruling in *Batson* to hold that the Equal Protection Clause prohibited preemptory challenges based on the prospective juror's gender. *Id.* at 128, 130-31. In doing so, the Court addressed the longstanding history of sex stereotyping against women that deprived them of the right to participate in full citizenship in this country. *Id.* at 132-36. It squarely rejected the State's position that gender bias was less pervasive than racial bias. *Id.* at 137-39.

Indeed, this Court observed that "the similarities between the experiences of racial minorities and women, in some contexts, 'overpower'" any differences between the two. *Id.* at 135-36 (quoting *Beyond* Batson*: Eliminating Gender-Based Peremptory Challenges*, 105 Harv. L. Rev. 1920, 1921 (1992)); *see also Frontiero v. Richardson,* 411 U.S. 677, 686 (1973) (noting, "women still face pervasive, although at times more subtle, discrimination" than racial minorities.). The *J.E.B.* Court found that exercising peremptory challenges based on notions about gender served to reinforce sex stereotypes, just as those based on race improperly perpetuated racial stereotypes. *Id.* at 140-41. In short, "gender, like race, is an unconstitutional proxy for juror competence and impartiality." *Id.* at

129. And gender bias, like racial bias, prevented fair criminal proceedings. *Id.* at 141.

The *J.E.B.* decision aligns with others from this Court invalidating biased State action that played on "overbroad generalizations about the different talents, capacities, or preferences of males and females." *United States v. Virginia*, 518 U.S. 515, 533 (1996). For instance, the Court acknowledged that Congress enacted Title VII to broadly "strike at the entire spectrum of disparate treatment of men and women *resulting from sex stereotypes*." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (plurality opinion) (1989) (emphasis added). It also observed that "[r]ather than resting on meaningful considerations, statutes distributing benefits and burdens between the sexes in different ways very likely reflect outmoded notions of the relative capabilities of men and women," which usually belies any reasonable justification for differential treatment. *City of Cleburne*, 473 U.S. at 440-41.

Furthermore, federal courts have struck down employers' reliance on sex stereotyping to discriminate against individuals in cases involving gender identity and sexual orientation. *See*, e.g., *Glenn v. Brumby,* 724 F. Supp. 2d 1284, 1305 (N.D. Ga. 2010), *aff'd,* 663 F.3d 1312 (11th Cir. 2011) (holding that rejection of a transgender person for not conforming to stereotypical norms is sex discrimination); *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 112 (2d Cir. 2018), aff'd *sub nom*. *Bostock v. Clayton Cnty.*, *Georgia*, 140 S. Ct. 1731 (2020) (interpretation of Title VII to prohibit discrimination based on sexual orientation "is reinforced by

considering the question from the perspective of sex stereotyping").[4]

Thus, intentional discrimination by state actors based on sex that merely "ratif[ies] and perpetuate[s] invidious, archaic, and overbroad stereotypes" about women, is unlawful. *See J.E.B.,* 511 U.S. at 130. For cases like Ms. Andrew's, "active discrimination by litigants on the basis of gender . . . 'invites cynicism respecting the jury's neutrality and its obligation to adhere to the law.'" *Id*. at 140 (quoting *Powers v. Ohio*, 499 U.S. 400, 412 (1991)). Yet the Tenth Circuit, like the courts below it, failed to consider this well-established body of law when deciding Ms. Andrew's trial was fair and denying habeas relief.

II. This Court Should Grant Certiorari To Address a Vital Issue of Federal Law That Affects the Fundamental Fairness of Criminal Proceedings.

This case presents an important opportunity for this Court to address overt bias in the prosecution of criminal defendants who are women. The State's use at Ms. Andrew's trial of irrelevant information and opinion on her behavior as a woman was "patently

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[4] Incongruously, considering its opinion in this case, the Tenth Circuit has also interpreted the Constitution to prohibit discrimination based on stereotypes about gender and sex roles. It affirmed a preliminary injunction that prohibited a city from adopting an ordinance prohibiting women, but not men, from knowingly exposing their breasts in public. *Free the Nipple-Fort Collins v. City of Fort Collins*, 916 F.3d 792 (10th Cir. 2019). Relying in large part on this Court's decision in *Virginia*, the court found that the City's claim that such an ordinance was necessary to promote public safety was based on mere stereotype about the sexual nature of female breasts. *Id.*

unconstitutional," as its only purpose was to convince the jury that Ms. Andrew's departure from traditional gender norms made her "more deserving of execution." *See Buck*, 580 U.S. at 119, 121. This Court should hear Ms. Andrew's claims, and hold that its admonishments on constitutional grounds of (1) bias against criminal defendants based on inherently racial stereotypes, and (2) reliance on sex stereotypes to deprive women of employment opportunities or jury service, necessarily extends to invoking outmoded ideas of womanhood to prejudice a jury against a woman facing capital punishment.

A. Sex Stereotyping is Pervasive in the Prosecution of Women, Particularly in Capital Cases.

Sex stereotyping is a prominent source of harm in the legal system; studies have found that people frequently pass judgment based on their personal views of the roles of men and women. Charles Elliott, *Juries, Sex, and Emotional Affect*, 35 L. & Psychol. Rev. 37, 38 (2011) (citing research). Furthermore, "[i]t takes little evidence to confirm one's stereotypes," because individuals focus more on information that confirms their pre-existing stereotypes of others than on contrary evidence *Id*. at 38-39; *see also* Marla Sandys & Ronald C. Dillehay, *First-Ballot Votes, Predeliberation Dispositions, and Final Verdicts in Jury Trials*, 19 Law & Hum. Behav. 175, 188 (1995) (discussing juror confirmation bias).

Notably, it also has been found that jurors are more likely to find a defendant guilty if they perceive the person—rather than the evidence—negatively. *See*, e.g., Neil A Rector et al., *The Effect of Prejudice*

and Judicial Ambiguity on Defendant Guilt Ratings, 133 J. Soc. Psychol. 651, 657-58 (2010). This reality weighs heavily on women charged with homicide, who frequently confront negative gendered labels. Women facing prosecution often are portrayed as "inherently bad," because "their lifestyle and behavior either does or does not accord with appropriate feminine behavior as dictated by gender discourse." Siobhan Weare, *"The Mad", "The Bad", "The Victim": Gendered Constructions of Women Who Kill Within the Criminal Justice System*, 2 *Laws* 337, 346 (2013). Women whose behavior misaligns with society's views of femininity and sex are labeled as "sexually deviant." *Id.* at 346-47. Sexually deviant women face punishment for "offend[ing] against appropriate female sexuality," *id.* at 347, when this conduct has no relation to the crime. The prosecution in Ms. Andrew's case seeded these stereotypes openly. In doing so it "left an imprint on the jurors, who generally give great weight to information they learn early in a trial." Pet. App. 119a (Bacharach, J. dissenting) (citing Lawrence S. Wrightsman, *The Place of Primacy in Persuading Jurors: Timing of Judges' Instructions and Impact of Opening Statements*, 8 U. Bridgeport L. Rev. 431, 432–36 (1987)).

When people in positions of authority in a courtroom—here, prosecuting attorneys—measure a woman's conduct against gender norms, those individuals' statements are likely to remain salient with the factfinders. As noted in *Berger v. United States*, "improper suggestions, insinuations and, especially assertions of personal knowledge [by prosecutors] are apt to carry much weight against the accused when they should properly carry none." 295

U.S. 78, 88 (1935); *see also Buck,* 580 U.S. at 121 (the prejudicial effect of testimony advancing racial stereotype "was heightened due to the source of the testimony. . . a medical expert bearing the court's imprimatur.").

Jurors are especially susceptible to such influence when, as here, the bias in question corresponds with pertinent issues at trial. E.g., *Buck*, 580 U.S. at 121 (recognizing that the expert's opinion on the danger posed by Black defendants "coincided precisely with a particularly noxious strain of racial prejudice, which itself coincided precisely with the central question at sentencing."). For Ms. Andrew, the prosecution's explicit evocation of sex stereotypes "coincided precisely with," *id.*, key questions at both phases of her trial. The State implored the jury, based on Ms. Andrew's sex life and how she presented as a woman, to decide that she had a motive to kill her estranged husband. It then touted her apparent "failures" as a woman to convince the jury that she deserved to die.

Death sentences have become increasingly rare. Brandon L. Garrett et al, *The American Death Penalty Decline*, 107 J. Crim. L. & Criminology 561, 563 (2017); *see also* Elizabeth Rapaport, *Some Questions About Gender and the Death Penalty*, 20 Golden Gate U. L. Rev. 501, 514 (1990) (discussing the low statistics of those who receive death sentences versus life in prison); Elizabeth Rapaport, *The Death Penalty and Gender Discrimination*, 25 L. & Soc. Rev. 367, 374 (1991) (same). They are rarer still for women, who are less likely to commit the kind of crime for which the death penalty may be authorized. Victor L. Streib, *Gendering the Death Penalty: Countering Sex Bias in*

a Masculine Sanctuary, 63 Ohio St. L.J. 433, 434 (2002).

In view of this scarcity, the characterization of a capital defendant as an "evil woman," based on stereotypes of gender-appropriate roles, behavior, and appearance, may explain the imposition of the death penalty on that woman. E.g., Elizabeth M. Reza, *Gender Bias in North Carolina's Death Penalty*, 12 Duke J. Gender L. & Pol'y 179, 208-09 (2005); *see also* Tara N. Richards et al., *An Examination of Defendant Sex Disparity in Capital Sentencing: A Propensity Score Matching Approach*, 39 Am. J. Crim. Just. 681, 694 (2014). For instance, a study of the case characteristics of women on death row in North Carolina revealed that juries had returned death sentences not just because of the nature of the women's crimes, "but because [those women] rejected the stereotype of the 'gentler sex.'" Reza, *supra* p. 209. The study's author reasoned that these women were viewed as needing harsher punishment because they "stepped outside the bounds of normative femininity and no longer conformed to society's gender stereotypes." *Id.* at 210 (citations and internal quotations omitted); *see also* Andrea Shapiro, *Unequal before the Law: Men, Women, and the Death Penalty*, 8 Am. U. J. Gender, Soc. Pol'y, & L. 427, 458-59 (2000) (explaining the "evil woman" theory and how it functions).

Ms. Andrew's verdict and death sentence in the wake of her portrayal as just such an "evil", sexually deviant woman was consistent with these other cases of women who received the death penalty after being vilified as violating gendered norms of acceptable

behavior. It also explains why Ms. Andrew, who had no prior criminal record, was condemned to die. *Brenda Andrew: Sex Shamed to Death in Oklahoma*, Cornell Center on Death Penalty Worldwide.[5] Women, not men, have disproportionately received the death penalty for a first offense. *See* Elizabeth A. Tomsich et. al, *A Review of Sex Disparities in the "Key Players" of the Capital Punishment Process: From Defendants to Jurors*, 39 Am. J. Crim. Just. 732, 737 (2014) (citing studies).

In summary:

> What makes the women on death row different is that they committed shockingly "unladylike" behavior, which allows the sentencing judges and juries to put aside any image of them as "the gentler sex" and to treat them as "crazed monsters" deserving of nothing more than extermination. This process of picturing the defendant as less than human must occur for a death sentence to be returned.

Melinda E. O'Neil, *The Gender Gap Argument: Exploring the Disparity of Sentencing Women to Death*, 25 New Eng. J. on Crim. & Civ. Confinement 213, 221 (1999) (cleaned up).

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[5] https://deathpenaltyworldwide.org/advocacy/brenda-andrew-sex-shamed-to-death-in-oklahoma

B. The State's gratuitous use of sex stereotyping in Ms. Andrew's case parallels dehumanizing tactics found to have violated the Fourteenth Amendment in other capital trials.

"[G]ender, like race, is an unconstitutional proxy" for measuring issues of importance in a criminal trial. *See J.E.B.*, 511 U.S. at 129. If prosecutors could freely present information that is designed to sex-shame in place of reliable evidence that the defendant committed the crime charged, the due process guarantee inherent in the criminal process "would be meaningless." *See id.* at 146; *see also Batson*, 476 U.S. at 97-98 ("[t]he core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race, would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which are solely from the jurors' race.").

Furthermore, context matters when reviewing the prejudicial effect of stereotype evidence and argument in a criminal trial. After all, every trial error will not lead to reversal of the decision in the trial court. *Zant v. Stephens*, 462 U.S. 862, 885 (1983). But "there is a qualitative difference between death and any other permissible form of punishment," and "a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Id.* at 884-85 (citing *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)) (internal quotation marks omitted).

For this reason, the Fourth Circuit vacated a death sentence in a case in which the prosecutor had

repeatedly invoked racial stereotypes during closing arguments in a Black man's capital trial. *Bennett*, 842 F. 3d 319. The prosecutor's derogatory remarks about the defendant—comparing him to "a primitive, subhuman species and a wild, vicious animal"— were "impossible to divorce . . . from their odious historical context" and thus violated due process. *Id.* at 324-25. Looking at the entire record, the court observed that the prosecutor's comments were far from isolated. *Id.* at 326. The prosecutor had used racial imagery throughout the trial, both in argument and through irrelevant witness testimony on topics such as the defendant's sexual relations with a female prison guard who was white. *Id.* The circuit court found that the prosecution could only have made these racially charged comments to "encourag[e] the jury to fear Bennett or regard him as less human on account of his race." *Id.* at 324-25. Thus, the resulting sentence was fundamentally unfair. *Id.* at 327.

This case is no different. It is equally important that the evidence and argument in a capital case be "free of fixed notions concerning the roles and abilities of males and females." *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982). In Ms. Andrew's case, the prosecution was just as brazen as the prosecution in *Bennett*. Moreover, just like the prosecutor in *Bennett* reduced the defendant to a racial caricature over the course of his trial, the prosecution reduced Ms. Andrew to a gendered caricature during hers. The State constructed this image for the jury from beginning to end, relying on evidence that had no bearing on the murder. It successfully prosecuted Ms. Andrew for being "a bad wife, a bad mother, and a bad woman." Pet. App. 318a

(Johnson, J. concurring in result in part and dissenting in part).

Lurid examples abound, not least of which were:

1. Testimony from numerous men about Ms. Andrew's extramarital sex life and her alleged attempts to seduce other men. *See* Pet. App. 14a; Brief of a Former Federal Judge, Fair and Just Prosecution, 17 Law Professors, and 4 Domestic Violence Researchers and Advocates as *Amici Curiae* In Support of Petitioner, *Andrew v. White,* S.Ct. No. 23-6573 (2024) ("Amicus Brief in Support of Petitioner"), § II.B.

2. Testimony about Ms. Andrew's physical appearance, much of which described her clothing using terms like "tight", short", "provocative", "improper", and "sexy." Cert pet. at 9-10; Amicus Brief in Support of Petitioner, *supra* § II.A.

3. Testimony concerning Ms. Andrew's alleged unfitness as a mother. *See*, e.g., Pet. App. 272a (addressing impermissible hearsay testimony that Ms. Andrew refused to let Mr. Andrew see their children); Pet. App. 14a (noting testimony asserting that Ms. Andrew "trained her children to be discreet about her affairs"); Cert pet. at 8, 11-12 (recounting testimony concerning Ms. Andrew's parenting habits); Amicus Brief in Support, *supra* §§ II.C, III.B (same).

4. Testimony concerning Ms. Andrew's alleged demeanor after her husband's death, including that Ms. Andrew "didn't *seem* to be grieving," Pet. App. 32a (emphasis added), and that her demeanor was "bizarre", *Id.* at 280a.

5. The admission into evidence of thong underwear Ms. Andrew wore on vacation after her husband's death. Pet. App. 14a; Amicus Brief in Support, *supra* p. 12.

The State's continuing focus on sex stereotypes in closing argument forecloses any doubt about its pernicious effect on the jury. The prosecutor held up the previously-admitted thong underwear and "asked whether a 'grieving widow'" would wear it. Cert. pet. at 11 (citation omitted). And having opened the trial by telling the jury that Ms. Andrew always "had a boyfriend on the side", Pet. App. 118a, the State closed its case by reading years-old entries from Mr. Andrew's journal about a sexual relationship Ms. Andrew had with another man *before she married Mr. Andrew*. *Id.* at 118a-119a.

The Court of Criminal Appeals understandably "struggle[ed] to find any relevance" for much of the challenged evidence, and the State could offer none. *Id.* at 172a-173a. And unlike the state court majority, Judge Johnson concluded that "[t]he second stage of Brenda Andrew's trial was fundamentally unfair. I find it impossible to say with confidence that the death penalty here was not imposed as a consequence of improper evidence and argument." *Id.* at 321a. (A. Johnson, J., concurring and dissenting). As Judge Johnson further observed, "Whatever the purpose [of this irrelevant evidence], I believe one effect was to trivialize the value of her life in the minds of the jurors." *Id.* at 320a-321a. Admission of this evidence was error.

C. This Court should grant certiorari because a State actor expressing overt bias against a defendant based on sex stereotypes raises grave due process concerns.

The combination of evidence that Ms. Andrew was a "bad woman" and argument that emphasized to the jury that Ms. Andrew had transgressed cultural norms deprived Ms. Andrew of "any realistic chance that the jury would seriously consider her version of events." Pet. App. 120a (Bacharach, J., dissenting). The prosecutor's conduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (citation omitted).

This Court has held that the injection of arbitrary facts by a prosecutor to secure a death sentence infects the jury's decision with constitutional error. *See*, e.g., *Caldwell v. Mississippi*, 472 U.S. 320, 328–29 (1985) ("Accordingly, many of the limits that this Court has placed on the imposition of capital punishment are rooted in a concern that the sentencing process should facilitate the responsible and reliable exercise of sentencing discretion") (citing *Eddings v. Oklahoma*, 455 U.S. 104, (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion); *Gardner v. Florida*, 430 U.S. 349 (1977) (plurality opinion); *Woodson v. North Carolina*, 428 U.S. 280 (1976)). The Tenth Circuit ignored this mandate, despite ample signs that the State's actions influenced the verdict.

The State's motive assuredly was to convince the jury to "regard [her] as less human" because she did not fit her "proper" role as a woman. *Cf. Bennett*, 842

F. 3d at 324-25. That "the State [did not] try to defend the admissibility of any of this evidence." Pet. App. 98a alone is strong evidence of the state's discriminatory intent.

Contrast the State's conduct in this case with that of the prosecution in *Darden v. Wainwright*, where this Court held that racially derogatory comments the prosecution made during closing argument in a capital case did not deprive the defendant of a fair trial. 477 U.S. at 181. There, much of the prosecutor's argument, though reprehensible, responded to preceding remarks about the defendant by his counsel. *Id.* at 182. This Court rejected a due process argument because the prosecutor's comments did not "manipulate or misstate the evidence, nor did it implicate other specific rights of the accused such as the right to counsel or the right to remain silent." *Id.* at 181-82.

Here, it was *the prosecution* that elicited irrelevant, derogatory testimony about Ms. Andrew's sex life. And here, the prosecution *did* manipulate the evidence, playing on the "black widow" archetype and falsely suggesting that her offenses against her gender warranted death. These actions *did* deprive Ms. Andrew of fair proceedings. *Cf. Darden*, 477 U.S. at 181-82.

This Court should grant cert to correct the Tenth Circuit's error, and hold that playing to sex stereotypes to obtain a conviction, as happened here, violates the constitutional Due Process guarantee. This case is essential to ensuring the integrity of capital prosecutions, for "[i]t is of vital importance to the defendant and to the community that any decision

to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Gardner*, 430 U.S. at 358.

* * * *

In this Court's words: "From beginning to end, judicial proceedings conducted for the purpose of deciding whether a defendant shall be put to death must be conducted with dignity and respect." *Wellons v. Hall*, 558 U.S. 220, 225 (2010). When they are not, the decision below must be reversed. *Id.* Ms. Andrew's capital trial lacked both dignity and respect. Under circumstances like those present here, a capital conviction and death sentence cannot stand.

CONCLUSION

For these reasons, this Court should grant Ms. Andrew's petition for a writ of certiorari.

Respectfully submitted,

ANDREA LEWIS HARTUNG
Counsel of Record
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
160 East Grand Avenue, 6th Fl.
Chicago, IL 60611
(312) 503-0913
alewishartung@macarthurjustice.org

JAMES W. CRAIG
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
4400 S. Carrollton Ave.

New Orleans LA 70119
504-620-2259
jim.craig@macarthurjustice.org

Counsel for Amici Curiae

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APPENDIX

APPENDIX – INDIVIDUAL *AMICI CURIAE* ††

Mary Atwell
Professor Emeritus of Criminal Justice
Radford University

Cynthia Grant Bowman
Dorothea S. Clarke Professor of Law Emerita
Cornell Law School

Patricia A. Cain
Professor of Law
Santa Clara University
Aliber Family Chair in Law Emerita
University of Iowa

Martha Albertson Fineman
Robert W Woodruff Professor of Law
Founding Director of the Feminism and Legal Theory Project
Emory University

Sally F. Goldfarb
Professor of Law
Rutgers Law School

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†† This brief is signed on behalf of the individual *amici* and not any organization or entity. Academic affiliations are solely for identification purposes.

Julie Goldscheid
Professor of Law Emeritus
CUNY Law School

Adam Omar Hosein
Associate Professor of Philosophy
Director of PPE
Affiliate Professor of Law
Northeastern University