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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JOHN R. MILLS
Counsel of Record
JESSICA SUTTON
MEREDITH HUANG
NATHALIE GREENFIELD
PHILLIPS BLACK, INC.
1721 Broadway, Suite 201
Oakland, CA 94612
(888) 532-0897
j.mills@phillipsblack.org

JOHN T. CARLSON
RIDLEY, MCGREEVY & WINOCUR
303 16th Street, Suite 200
Denver, CO 80202

JOSH TOLL
KING & SPALDING LLP
1700 PENNSYLVANIA AVE., NW
Suite 900
Washington, DC 20006

Counsel for Brenda Evers Andrew

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INTRODUCTION

Dissatisfied with having to defend the sex-based stereotypes that pervaded the trial, the Warden seeks to reframe the case into one about exhaustion and belittle the scope and impact of the gender bias that corrupted the prosecution of Ms. Andrew. First, the reframing around exhaustion is a red herring. The Circuit Court's decision expressly did not turn on exhaustion, and Ms. Andrew's claim is, in fact, exhausted and meritorious, even under the Warden's selectively formalistic approach to the scope of federal review.

Next, as for that bias, the Warden claims that it was but a "drop in the ocean" in Ms. Andrew's trial. Opp. 1. Nothing could be further from the truth. On *every single day* of the State's case, it offered evidence about Ms. Andrew's sex life, appearance, demeanor, and/or capabilities as a mother. *See, e.g.*, Tr. 137; 246; 498; 1109; 1181; 1492; 1801; 2030; 2349; 2561; 2858; 3165; 4396.

Indeed, the gender bias and sex-stereotyping were so embedded in the bedrock of the case that, even now, the Warden cannot extricate the gender bias from her narrative. While simultaneously dismissing as trivial the sex-stereotyping evidence, the Warden's own brief presents pages of sex-stereotyping evidence, including evidence related to Ms. Andrew's sexual history, demeanor, appearance, and role as a wife and mother. Opp. 12 (evidence included testimony of "affairs with two men other than Pavatt"; "making advances toward the two adult sons"; "her provocative dress at a dinner"; being called a "hoochie" at a restaurant; "changing the color of her

hair upon discovering that a different man liked women with that hair color"; witness testimony speculating that Ms. Andrew "lied to Pavatt when she told him that she had not slept with anyone other than her husband and Pavatt"; "the contents of her luggage, which included her thong underwear"; and testimony about whether she was a "good mother"); *id.* at 13 (evidence included testimony regarding Ms. Andrew's "tight clothing"; "her possession of a book related to sex"; "Robert's complaints about Andrew's lack of affection"; "repeated references to her affairs in closing argument"; "the prosecutor's reading from Robert's journal during closing argument"; and the prosecutor's statement that "she has had sex on him over and over and over"); *id.* at 14 (evidence included "evidence about the state of Andrew's house," "Andrew's demeanor after the murder," and "the prosecutor's reference to Andrew as 'an attractive woman'").

The language in the Warden's brief even characterizes the prosecution's narrative as revolving around Ms. Andrew's "ability to get men (including Pavatt) to do her bidding," and "blam[ing] the murder on Pavatt," who "readily took the blame." Opp. 1. Unsurprisingly, this gendered framing by the Warden here mirrors the language of the prosecution at trial and conveniently fails to address that the State relied on Mr. Pavatt's own confession letter and ballistics evidence to capitally prosecute him.[1]

[1] The State's evidence against Pavatt was compelling and pointed away from Ms. Andrew. Six days before Rob Andrew was killed, Pavatt alone purchased a .22 revolver. Tr. 2803–07; St. Exhs. 113–15. (2) Brenda was shot in the back of her left arm, and her wound was consistent with having been inflicted by .22 revolver. Tr. 1795–96, 3193. Both the State's and Defense's crime scene experts

So finely woven is gender bias into the fabric of Ms. Andrew's case that even the Oklahoma Court of Criminal Appeals' (OCCA) opinion could not disentangle it—in the five-page block quote of the OCCA opinion that serves as the Warden's "Statement of the Case," the OCCA inadvertently makes plain that sex-stereotyping was the heart of the State's case at trial and the defense argument on direct appeal, summarizing the demeanor evidence as testimony that Ms. Andrew was "uncharacteristically calm for a *woman* whose *husband* had just been gunned down." Opp. 5 (quoting OCCA opinion) (emphasis added). In arguing that this type of demeanor evidence was relevant and gender neutral, Opp. 5, n.4, the Warden misunderstands the central principle of this case: Ms. Andrew is not arguing over generic evidentiary issues; to the contrary, Ms. Andrew is specifically challenging the sex-stereotyping evidence that encouraged and perpetuated gender bias at every stage of the case and rendered her conviction fundamentally unfair. Here, the State leveraged demeanor evidence, which is known to be unreliable[2] , to explicitly compare

concluded that Ms. Andrew's wound could not have been self-inflicted. Tr. 3268, 3635. Police recovered shell casings in the neighbor's house, including an expended 16-gauge shotgun shell and three live .22 rounds. Tr. 2914–15, 2918–20; St. Exhs. 134, 137, 145. Pavatt's daughter found an unspent .22 round in her car, which Pavatt had borrowed and then returned to her on the morning following the homicide. Tr. 2973–75; St. Exh. 171. The State's ballistics examiner determined the bullet from the car was the same type as the projectile taken from the scene where Rob Andrew and Ms. Andrew were shot. Tr. 3188–89; St. Exhs. 171, 173. Pavatt wrote a letter confessing that he and another man shot Ms. Andrew and Rob Andrew. Tr. 1537–39; St. Exh. 222; Def. Exh. 15. In both Pavatt's and Ms. Andrew's trials, the State presented expert testimony that the handwriting of the letter was consistent with Pavatt's. *See Pavatt v. State*, 159 P.3d 272, 278 (Okla. Ct. Crim. App. 2007); Tr. 1531–36.

[2] Scholars and courts recognize that demeanor evidence is particularly unreliable and "essentially useless in detecting deception, and decisions about lie detection are right no more than half the time." Max Minzner, *Detecting Lies Using Demeanor, Bias, and Context*, 29 Cardozo L. Rev. 2557 (2008). Yet demeanor evidence has a uniquely powerful impact on the jury. *See, e.g.*, Scott E. Sundby, *The Capital Jury and Absolution: The intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 Cornell L.

Ms. Andrew to a "normal" woman and wife, inviting jurors to make determinations of guilt and penalty based on Ms. Andrew's gender transgressions. It is this appeal to jurors' biases to obtain a conviction and condemn Ms. Andrew to death that corrupted the integrity of the entire factfinding process.

The State's manipulation of sex-based stereotypes and gendered tropes not only pervaded Ms. Andrew's trial on a day-to-day basis, but also had a heightened impact on the jury due to the prosecution's use of this evidence to bookend the trial.[3]

Rev. 1557, 1560–62 (1998) ("Above all else, [] the defendant's demeanor and behavior during the actual trial shaped the jurors' perceptions of the defendant's remorse," which the Capital Jury Project revealed to be one of the most significant influences on the sentencing decision, with 69% of death jurors identifying lack of remorse as the reason for voting for the death penalty). Importantly, demeanor evidence impacts jurors' determinations of credibility, which is central to "ensuring that evidence admitted against an accused is reliable" and constitutes a source of "appellate deference to lower court factfinding." 29 Cardozo L. Rev. at 2559. However, "biases about witness credibility" obfuscates credibility determinations. *Id.* Therefore, the prosecution's strategy to elicit testimony concerning Ms. Andrew's demeanor as compared to a "normal" woman and wife invites the decision-maker to rely on gender bias to make determinations of credibility, guilt, and remorse. Additionally, symptoms such as flat affect, dissociation, and numbing are frequently related to experiences of trauma. *See* Deborah Epstein & Lisa A. Goodman, *Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences*, 167 Univ. Pa. L. Rev. 399, 421, (2019); Bethany L. Brand et al., *Assessing Trauma-Related Dissociation in Forensic Contexts: Addressing Trauma-Related Dissociation as a Forensic Psychologist, Part II*, 10 Psychological Injury & L. 298, 300, 303 (2017); Sandra Babcock & Nathalie Greenfield, *Gender, Violence & the Death Penalty*, 53 Cal. West. Int. L. J. 327, 374 (2023) ("The symptoms of trauma—notably emotional numbing. . . —can also affect a woman's demeanor in the courtroom or before law enforcement."); *see also United States v. Pickering*, 794 F.3d 802, 805 (7th Cir. 2015) ("demeanor evidence, such as tone of voice, or gestures or posture, can be an unreliable clue to truthfulness or untruthfulness.").

[3] Although the Warden advantageously reduces the bulk of this impermissible argument and evidence to "bad mother" evidence, the Warden is incorrect in arguing that Ms. Andrew opened the door to this evidence. Rather, the State seized on a two-word question—"Good mother?"—to open the door to its barrage of questions and evidence presenting Ms. Andrew in a light inconsistent with traditional notions of motherhood. *See* Tr. 2344–45 (prosecutor arguing that the defense "put her . . . being a good mother at issue" because "the Defense ask[ed] Rick Nunley whether or Brenda Andrew was a good mother"); 414 (defense asking Rick Nunley "Good mother?" during questions about Mr. Nunley's testimony at Ms. Andrew's preliminary divorce hearing); 2345 (prosecutor arguing book reports from Ms. Andrew's children were "clearly indicative that she is not a good mother" because "this good mother was giving her child murder mysteries to read . . . ."); *see also* Br. Fed. J. et al. 19 (explaining that "women are stereotyped as nurturers and natural caregivers" and that "women who are perceived to have violated that role" are demonized (citations omitted)). The sole purpose of this evidence was to

Among the State's first witnesses were Ms. Andrew's former intimate partners, who testified at length about Ms. Andrew's sex life and included—in response to the prosecutor's questions—prurient details such as where Ms. Andrew had sex, the whereabouts of her children while these relationships occurred, and the number of times she had sex in a car. Tr. 246–61; 361–67; 419–420. The State then concluded its case at guilt by asking a neighbor about Ms. Andrew's skinny-dipping habits in her private hot tub and using its closing argument to brand her a "slut" and display her underwear to the jury. Tr. 2857–58. And just before the jury left to make its sentencing determination, the State unabashedly invited jurors to condemn Ms. Andrew to die because of her gender transgressions, arguing "[S]he's different. She's not like you and me."[4] Tr. 4493.

Finally, even if the entirety of the sex-stereotyping evidence that was introduced over the course of the month-long trial had been but a drop in the ocean, "[s]ome toxins can be deadly in small doses." *Buck v. Davis*, 580 U.S. 100, 122 (2017).

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strip Ms. Andrew of her humanity and identity as a woman beyond her value as a mother. And that question—her perceived maternal worth—in turn had nothing to do with whether Ms. Andrew committed the crime in this case.

[4] It is thus no surprise that a member of the Tenth Circuit panel concluded the State's case was a "broadside" on Ms. Andrew's sexuality that played to sex-based stereotypes. Pet. App. 98a. The State's case began and ended with a "broadside" on her sexual mores, thereby ensuring it was top of mind when the jurors were asked to convict Ms. Andrew. *See* Pet. App. 119a–120a (quoting *United States v. Starks*, 34 F.4th 1142, 1165 n.7 (10th Cir. 2022) ("closing arguments—including, as here, improper comments . . . —are likely to have an outsized effect due to their temporal proximity to jury deliberations.")); *Clark v. A&L Homecare and Training Center, LLC*, 68 F.4th 1003, 1008 (6th Cir. 2023) (describing "anchoring bias" as the "tendency of persons to rely heavily on the first piece of information they receive when making decisions."); *see also* Vernon A. Stone, *A Primacy Effect in Decision-Making by Jurors*, 19 J. of Comm. 239, 240–43, 247 (1969) (explaining that information presented early to decisionmakers has "greater effectiveness" and that "first impressions tend to have a disproportionate effect on final impressions" in juries).

As amici put it, the "purpose of such testimony was to show Ms. Andrew was a bad woman, promiscuous, selfish, and aggressive, so as to invoke jurors' fears of a society out of control, one where women's sexuality ran amok." Br. Fed. J. et al. 16 (cleaned up). That "sort of improper evidentiary attack is especially prejudicial when levelled against a married woman on trial for murder." *Id.* The State's attack was so dehumanizing that the Warden at this Court does not even contend that the irrelevant evidence and argument had no effect on Ms. Andrew's death sentence.[5] It certainly did.

[5] Instead of addressing the impact on Ms. Andrew's death sentence, the Warden presents a logical fallacy: that because Ms. Andrew is the only woman currently sentenced to death, all of the Oklahoma judicial system must not be biased against women. Opp. 11, n.7. Setting aside this false cause fallacy, it bears noting that research going back to the 1980s has examined the impact of a defendant's gender on outcomes in the criminal justice system. These studies have found that women who violate gender role expectations or commit traditionally "masculine" crimes are treated more harshly than men and are punished for transgressing gender norms. *See, e.g.*, Joey L. Mogul, *The Dykier, the Butcher, the Better: The State's Use of Homophobia and Sexism to Execute Women in the United States*, 8 N.Y. City L. Rev. 473, 482 (2005) ("the women on death row are the ones who are easily portrayed as unfeminine, aggressive, possessed of poor mothering skills, or sexually promiscuous . . . They are dehumanized by being defeminized."); Ilene H. Nagel & Barry L. Johnson, *The Role of Gender in a Structured Sentencing System: Equal Treatment, Policy Choices, and the Sentencing of Female Offenders under the United States Sentencing Guidelines*, 85 J. Crim. L. & Criminology 181, 189 (1994) ("women whose criminal behavior violates sex-stereotypical assumptions about the proper role of women are treated *more* harshly than their male counterparts."); Jenny E. Carroll, *Images of Women and Capital Sentencing Among Female Offenders: Exploring the Outer Limits of the Eight Amendment and Articulated Theories of Justice,* 75 Tex. L. Rev. 1413, 1422 (1996) ("women who act so violently or in such gender-defying or forbidden ways are denied the sanctuary of their sex.").

ARGUMENT

I. CLEARLY ESTABLISHED FEDERAL LAW PROHIBITS STATE-RELIANCE ON PREJUDICIAL AND IRRELEVANT SEXUAL HISTORY FOR CULPABILITY AND CAPITAL SENTENCING

The seminal issue at the Tenth Circuit and before this Court is whether clearly established federal law prohibits the prosecution's reliance on irrelevant sex-stereotyping evidence of a woman's sexual history, demeanor, appearance, and role as a mother and wife to obtain a conviction and death sentence. It does. As set forth before the Tenth Circuit, *Payne v. Tennessee*, 501 U.S. 808 (1991) provides the controlling rule: admission of unduly prejudicial evidence that renders the trial fundamentally unfair violates the Due Process Clause of the Fourteenth Amendment. If there was any doubt on that score, *Kansas v. Carr*, 577 U.S. 108 (2016) settled the matter, clarifying that this rule from *Payne* provided clearly established federal law. *Id.* at 123 (explaining "it is the Due Process Clause that wards off the introduction of 'unduly prejudicial' evidence that would 'rende[r] the trial fundamentally unfair.'" quoting *Payne*, 501 U.S. at 825). *Payne* provides clearly established federal law.

The Warden has relegated the discussion of *Carr* to a single footnote. Opp. 22 n.13. But even that short discussion is long on mistakes. Instead of acknowledging that *Carr* settles that *Payne* is clearly established federal law, the Warden repeats the errors of the Tenth Circuit, arguing that because *Carr* post-dated the OCCA's decision on direct appeal, it has nothing to say about the significance of *Payne*. Opp. 22 n.13. As the habeas scholars' amicus brief explains, the timing issue "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." Br. Habeas Scholars 9 (quoting *Greene v. Fisher*, 565 U.S. 34, 38 (2011)). After *Carr*, other courts, but not the Tenth Circuit, have recognized that *Carr* "solidif[ied] the 'clearly established federal law' set out in *Payne*—not as establishing the law in the first instance." Br. Habeas Scholars 9–11 (collecting cases).

The Warden's other response is to suggest that *Payne*'s Due Process pronouncement only applies to the context of victim impact statements, the position the Tenth Circuit adopted. Opp. 22; Pet. App. 17a. In requiring that the Court's "holdings 'must be construed narrowly' and 'on point,'" the Circuit parted course from this Court's jurisprudence on what constitutes clearly established federal law. Pet. App. 10a (quoting *Fairchild v. Trammell*, 784 F.3d 702, 710 (10th Cir. 2015)). This Court instructs courts to apply "the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Lockyer v. Andrade*, 538 U.S. 63, 71–72 (2003). At a minimum, *Payne* provides "a generalized standard" that was applicable at the time the OCCA entered its decision in this case. *Williams v. Taylor*, 529 U.S. 362, 382 (2000). That is, contrary to the Tenth Circuit's holding, all AEDPA requires. *Id.*

A. Exhaustion Is a Red Herring

The parties agree that the Tenth Circuit resolved this case on the question of whether clearly established federal law prevented the state's presentation of sex-based stereotyping evidence. Having (erroneously) concluded there was no clearly established federal law, the Circuit Court denied relief without resolving any questions concerning exhaustion—a point on which the parties also agree. Pet. App. 15a n.11; *see also* 28 U.S.C. § 2254(b)(2). Yet the Warden's first and primary argument is about exhaustion. Opp. 12–18.

The thrust of the Warden's complaint is that Ms. Andrew failed to cite most of the material for the state court in making her case there. But that is just not the case. *See Vasquez v. Hillery*, 474 U.S. 254, 260 (1986) (holding addition to federal record "sophisticated computer techniques" concerning the "mathematical probability that chance or accident could have accounted for the exclusion of blacks from the Kings County grand jury over the years at issue" did not fundamentally alter the claim). Many of the facts from the Warden's lengthy recitation of supposedly unpresented material were, in fact, briefed at the OCCA when it adjudicated these issues. Opp. 13–14. For example, the Warden claims Ms. Andrew did not note at the OCCA that the prosecution brandished her underwear and bras during closing argument. Opp. 13. But her brief at that court clearly highlighted the issue, "In closing argument the prosecutor picked up some of her underwear in the suitcases while he argued to the jury that these items of clothing showed that she had intended to frolic on the beach,

not grieve for her husband." Reply App. 90a. Similarly, Ms. Andrew presented the OCCA with the evidence about Robert Andrew's complaints over her lack of affection and the prosecution's reliance on her alleged demeanor after the murder. *Compare* Opp. 13–14 *with* Reply App. 53a, 65a, 97a n.35. Indeed, the Warden's assertion that Ms. Andrew's sex-stereotyping claim "bears little resemblance to that which she raised before the OCCA on direct appeal" is belied by the Warden's own summary of the facts presented to the state court, which included evidence of Ms. Andrew's sexual history, demeanor, appearance, and role as a mother, as argued here. Opp. 12.

To the extent that the Warden complains Ms. Andrew now relies on "additional" testimony within those categories of sex-stereotyping evidence, Opp. 13–14, the Warden fails to acknowledge the implicit concession that the evidence was fairly presented via at least some testimony, which suffices for exhausting it. *See Moore v. Stirling*, 952 F.3d 174, 183 (4th Cir. 2020) ("Without a change to the nature of the claim, the type or quantum of [the new evidence] did not fundamentally alter the claim."); *Dowthitt v. Johnson*, 230 F.3d 733, 746 (5th Cir. 2000) (presentation of additional confirming evidence in federal court of claim presented in state court did not render claim unexhausted). Ms. Andrew presented the OCCA with more than a fair opportunity to address the evidence and constitutional basis for the substantive claim at issue here.

The Warden's complaint concerning exhaustion is also novel, which may explain the resort to "principles" instead of a particular holding or doctrine. Opp. 15.

Every single case the Warden relies upon regarding new evidence rendering a claim unexhausted involves evidence that was *not* part of the state record. Opp. 14–15. Here, as the Tenth Circuit noted, "all the challenged evidence was in the record." Pet. App. 15a n.11. As a result, § 2254(d)'s limitation to the "record before the state court" is simply not at issue. *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011). And even presenting evidence outside the state record does not inextricably lead to the conclusion that a claim is fundamentally altered. *See, e.g.*, *Morris v. Dretke*, 413 F.3d 484, 490–94 (5th Cir. 2005) (presentation of new IQ evidence did not fundamentally alter claim based on *Atkins v. Virginia*, 536 U.S. 304 (2002)). The facts supporting Ms. Andrew's claim before this Court do not render the claim fundamentally altered.

Moreover, "[t]he heart of the claim [has] remain[ed] the same." *Gray v. Zook*, 806 F.3d 783, 799 (4th Cir. 2015). That is, in state court, Ms. Andrew argued that the sex-based stereotyping, both in evidence and in the State's arguments, violated federal law. Reply App. 57a–72a, 86a–93a. Ms. Andrew's reliance on federal law in state court makes her case fundamentally different than *Picard v. Connor*, 404 U.S. 270 (1971) upon which the Warden relies. Opp. 15. There, the habeas petitioner cited only state law in state court and then sought to bring a federal claim based on the same issue. *See Picard*, 404 U.S. at 276–77. Understandably, this Court concluded that the petitioner in *Picard* had failed to provide the state courts with "fair opportunity" to apply federal law. *Id.* at 276. But that situation is nothing like this

case, where Ms. Andrew provided the OCCA with an opportunity to correct course on the same grounds currently before the Court.

To accept the Warden's position—prohibiting the grouping of claims and requiring citation of every part of the state court record in support of a claim in order for a claim to be exhausted—would be the "triumph [of form] over substance" and allow the State of Oklahoma to hide behind inapposite procedural defenses instead of facing the sexist evidence and arguments that have no place in our system of laws. *Vasquez*, 474 U.S. at 260.

B. The Court Below Erred

The Warden next complains Ms. Andrew did not invoke "every fairminded jurist" when discussing the unreasonableness of the OCCA's decision. Opp. 18. It is true that the Petition, like the text of the federal habeas statute, does not include that phrase. *See* 28 U.S.C. § 2254(d). It is also the case that the Tenth Circuit, having concluded there was no clearly established federal law, did not have cause or occasion to address whether the OCCA's decision was an unreasonable application of this Court's precedents. Pet. App. 21a.

The State's case for guilt and penalty revolved around attacking Ms. Andrew's identity as a woman through the introduction of sex-stereotyping evidence. *See, e.g.*, Tr. 246–61 (eliciting testimony about Ms. Andrew's "shock[ing]" behavior, including that she "started kinda flirting," "dressing sexy," wearing "short skirt, low-cut tops, just sexy outfits, provocative," and "pa[ying] for the motel" where she had sex with a

partner); 323 (asking if there was anything "surprising" or "[un]expected" about Ms. Andrew's appearance, eliciting the response that she was a "hoochie" and "her dress was very tight, very short with a lot of cleavage she exposed."); 343 (asking if there was anything "unusual" about Ms. Andrew, eliciting testimony that "she wasn't wearing attire that I would consider appropriate . . . ."); 420 (asking whether "a good mother invite[s] her boyfriends over while the children are in the home"); 1801 (asking if Ms. Andrew's "calm" demeanor after the shooting was "strik[ing]," eliciting testimony that "most of them are very hysterical at this time"); 2345 (arguing that "this good mother was giving her child murder mysteries to read . . . . That is clearly indicative that she is not a good mother."); 4125 (arguing that "[Ms. Andrew] can't be a woman of God because she's sleeping with a married man and even if you're single that's adultery, what a slut puppy she must be . . . ."); *see also* Br. Fed. J. et al. 8–15 (presenting the "most troubling examples" of the "prosecution's invocation of gender bias," including evidence about Ms. Andrew's appearance, sexual history, and fitness as a mother.) Respectfully, no fairminded jurist could conclude that this noxious evidence did not render her trial and sentencing proceedings fundamentally unfair.

C. The Error Implicates an Important Question

Granting certiorari will provide this Court with an opportunity to continue its "unceasing efforts" to eliminate the use of sex-based stereotyping in the administration of justice and in a case with the highest stakes. *See Batson v. Kentucky*, 476 U.S. 79, 85 (1986). This alone is enough to warrant review.

The question at issue is also important because it implicates a split of authority. Notwithstanding the Warden's protestations, the Circuit Courts are divided on whether there is clearly established federal law prohibiting the admission of unduly prejudicial evidence that renders a trial fundamentally unfair.

The Warden maintains the First Circuit aligned itself with the Tenth Circuit in concluding there is no clearly established federal law. To the contrary, after noting a lack of precedent specifically addressing autopsy photos, the First Circuit reasoned that the "broader fair-trial principle is the beacon by which we must steer," and then relied on the rule provided in *Payne* and elsewhere. *Lyons v. Brady*, 666 F.3d 51, 55–56 (1st Cir. 2012); *see also Jaynes v. Mitchell*, 824 F.3d 187, 195 (1st Cir. 2016). Likewise, post-AEDPA cases in the Fifth Circuit, applying AEDPA deference, have not hesitated to find clearly established federal law concerning the admission of unduly prejudicial evidence. *See, e.g.*, *Bigby v. Dretke*, 402 F.3d 551, 563–64 (5th Cir. 2005); *Butler v. Vannoy*, 2020 WL 708146 (E.D. La. Feb. 12, 2020).

This case presents important questions, both because of what it says about the fairness of our legal system and because the federal appellate courts are split on the legal issue at the heart of the case.

II. THE CUMULATIVE ERRORS WARRANT SUMMARY REVERSAL

The Warden is right: Ms. Andrew requests this Court correct the profound errors that have rendered her conviction and sentence of death fundamentally unfair. The errors in her capital case constitute flagrant violations of this Court's precedents

and warrant summary reversal. The State's reliance on gender bias to obtain a conviction and sentence of death is worthy of summary reversal. But that's only the beginning. The Warden, like the Tenth Circuit, continues to rely on an objective observer's ability to see the future. Opp. 26; Pet. App. 53a. Specifically, Ms. Andrew's interrogation was supposedly not custodial because she was allowed to leave *after it was over*. Opp. 26; Pet. App. 53a. How a reasonable person would know that while in a hospital gown at the police station after being told she could not leave, the Warden does not explain. *See J.D.B. v. North Carolina*, 564 U.S. 261, 271 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 667 (2004)). Similarly, the Warden makes no effort to explain why Ms. Andrew should not have been permitted to present witnesses to her profound concern over her husband's wellbeing as rebuttal to the State's evidence about her demeanor or the other sex-stereotyping evidence at the heart of this case. *See Holmes v. South Carolina*, 547 U.S. 319, 324–25 (2006). Individually and collectively, the errors in this case demand reversal. In light of the stakes, even error correction is an appropriate use of this Court's authority.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN R. MILLS
Counsel of Record
JESSICA SUTTON
MEREDITH HUANG
NATHALIE GREENFIELD
PHILLIPS BLACK, INC.
1721 Broadway, Suite 201
Oakland, CA 94612
(888) 532-0897
j.mills@phillipsblack.org

JOHN T. CARLSON
RIDLEY, MCGREEVY & WINOCUR
303 16th Street, Suite 200
Denver, CO 80202

JOSH TOLL
KING & SPALDING LLP
1700 PENNSYLVANIA AVE., NW
Suite 900
Washington, DC 20006

COUNSEL FOR PETITIONER

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