

No. 26-5711

IN THE
Supreme Court of the United States

BRENDA EVERS ANDREW,
Petitioner,

v.

KELSEY FISHER, WARDEN,
Respondent.

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

**BRIEF OF FAIR AND JUST PROSECUTION
AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONER**

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INTEREST OF *AMICUS CURIAE*¹

Fair and Just Prosecution (“FJP”), a project of the Tides Center, brings together elected prosecutors from around the nation to promote a justice system grounded in fairness, accountability, and public safety. FJP supports prosecutors who exercise their discretion responsibly, protect individual rights, and fulfill their duty to seek justice.

This case directly implicates those principles. The considerable power entrusted to prosecutors carries with it a corresponding responsibility to ensure that a defendant is judged on the evidence and the law, rather than on inflammatory and prejudicial gender stereotypes about how women should look, act, and comport themselves. Such conduct is inconsistent with a prosecutor’s duty to seek justice and risks undermining public confidence in the fairness of the criminal legal system.

FJP submits this brief to explain why reliance on gender stereotypes in a criminal prosecution is incompatible with that obligation and to offer the perspective of prosecutors committed to the fair

¹ Under Supreme Court Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part. For purposes of full disclosure, Nkemdirim Obodo, counsel for *amicus*, previously worked on Ms. Andrew’s case while a law student in Cornell Law School’s International Human Rights Clinic. Ms. Andrew’s informed consent to counsel’s participation in this brief has been obtained. No counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for the parties received timely notice of *amicus*’s intent to file this brief.

administration of justice and upholding the rights and dignity of all parties.

SUMMARY OF THE ARGUMENT

State governments entrust their prosecutors with extraordinary authority that carries a corresponding duty to seek justice. In Brenda Andrew's capital trial, prosecutors abused that authority by placing before the jury evidence that was irrelevant and highly prejudicial. They made Ms. Andrew's conformity to conventional expectations of womanhood a key feature of the case for her conviction and punishment by death. Evidence bearing no relation to criminal culpability became the basis for portraying her as morally unworthy, and therefore more readily condemned.

The prosecutors' reliance on sexist tropes was not an incidental feature of the trial. They elicited, organized, and repeatedly invoked the gendered narrative they wanted the jury to adopt. It was not just a narrative of inhumanity generally, but of unwomanliness specifically. From the opening statement through sentencing, the State repeatedly emphasized matters that had little to nothing to do with the charged offense. To give a few examples, it began its case by calling two pastors who neither witnessed the shooting nor offered testimony about how the crime occurred, but instead testified about Ms. Andrew's alleged adultery, "inappropriate behavior," and conduct purportedly contrary to "God's word." Tr. 125–27. It elicited testimony that Ms. Andrew wore "short skirt[s], low-cut tops" and "sexy outfits," and that her clothing was not "normal" for

“other mothers.” Tr. 247, 320–24, 343, 349, 357. And in closing, it argued that Ms. Andrew “can’t be a woman of God” because she had slept with a married man and branded her a “slut puppy.” Tr. 4120, 4125.

Sexist appeals such as these were intended to encourage jurors to evaluate Ms. Andrew against gendered expectations of sexuality, motherhood, and religious virtue, rather than confine their consideration to evidence bearing on guilt and punishment. As Judge Federico explained in his dissent from the Tenth Circuit’s denial of rehearing and rehearing en banc, gendered stereotypes formed part of a “trial strategy to draw the jury’s attention to Andrew’s concededly irrelevant but . . . unwomanly and unmotherly behavior.” App. 6a. The prosecutors deployed this strategy throughout the guilt phase and then directed jurors to carry “everything” they had heard into sentencing, urging them to regard Ms. Andrew as “different,” “not like you and me,” and among the “people exactly like her” for whom death was reserved. Tr. 4493–94. Gender prejudice thus became central to the State’s proof and its argument for the death penalty. Tr. 4493–94. And the jury listened. It convicted Ms. Andrew and sentenced her to death.

In pursuing this strategy, the prosecutors violated their legal and ethical obligation to seek justice and compromised the heightened reliability required before the State may impose death. *See Berger v. United States*, 295 U.S. 78, 88 (1935); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). A just conviction should rest on relevant evidence, not appeals to prejudice, and no fair-minded prosecutor would stand behind a conviction obtained

through such tactics. When prosecutors strike such foul blows, they compromise the fairness of the proceeding, weaken public confidence in the integrity of the judicial process, and cast doubt on whether guilt and punishment were determined solely on lawful grounds. *Amicus* urges this Court to grant Ms. Andrew’s petition for a writ of certiorari and reaffirm that a conviction and death sentence cannot rest on gender-based moral condemnation masquerading as proof, and that such prosecutorial tactics should be eradicated from American courtrooms.

ARGUMENT

I. Prosecutors May Not Rely on Gender Stereotypes in Capital Cases

A. Prosecutors Have a Duty to Ensure that Convictions and Death Sentences Rest on Evidence

This Court has long recognized that a prosecutor’s “special role” in the adversarial system is to seek justice. *Banks v. Dretke*, 540 U.S. 668, 696 (2004). As representatives of the State, prosecutors bear different responsibilities from those of partisan advocates. *See United States v. Weatherspoon*, 410 F.3d 1142, 1148 (9th Cir. 2005) (“[W]e stress that the ethical bar is set higher for the prosecutor than for the criminal defense lawyer—a proposition that has been clear for at least seven decades”). As ministers of justice and servants of the law, prosecutors are “the representative[s] . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.”

Berger, 295 U.S. at 88; accord *United States v. Agurs*, 427 U.S. 97, 110–11 (1976). A prosecutor can and should forcefully advocate for conviction “with earnestness and vigor . . . [b]ut, while he may strike hard blows, he is not at liberty to strike foul ones.” *Berger*, 295 U.S. at 88. This means avoiding improper suggestions, insinuations, and inflammatory appeals so that guilt is decided solely on relevant, material evidence—not on prejudice, stereotype, or moral disapproval. See *Berger*, 295 U.S. at 88; see also *United States v. Johnson*, 231 F.3d 43, 47 (D.C. Cir. 2000) (recognizing prosecutor’s duty to refrain from improper methods calculated to produce a wrongful conviction); Jacob A. Stein, *Closing Arguments* § 1:16.

Professional standards are built upon the same premise. The American Bar Association Model Rules recognize that, as “minister[s] of justice,” prosecutors have a responsibility not merely to advocate for conviction, but to “see that the defendant is accorded procedural justice.” Model Rules of Prof’l Conduct r. 3.8 cmt. 1 (Am. Bar Ass’n 2023). Consistent with that principle, the ABA Criminal Justice Standards provide that “[t]he primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict.” ABA Criminal Justice Standards for the Prosecution Function 3-1.2(b) (4th ed. 2017). Oklahoma’s professional rules are in accord. Okla. Rules of Prof’l Conduct r. 3.8 cmt. 1. While these standards do not supply an independent constitutional rule, they do reflect the settled understanding that a prosecutor must proceed with fairness, impartiality, and restraint, and must not seek conviction through prejudice, stereotype, or

other appeals that divert jurors from deciding the case on the evidence alone.

These prosecutorial obligations are at their highest in a capital case. The Eighth and Fourteenth Amendments require heightened reliability before the State may impose death. *Woodson*, 428 U.S. at 305; *Zant v. Stephens*, 462 U.S. 862, 884–85 (1983). The Constitution thus forbids capital sentencing procedures that permit the imposition of death on arbitrary or capricious grounds. *Furman v. Georgia*, 408 U.S. 238 (1972); *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (joint opinion). Moreover, prosecutors are precluded from “encourag[ing] the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence.” *United States v. Moreno*, 947 F.2d 7, 8 (1st Cir. 1991) (quoting *Ivy v. Sec. Barge Lines, Inc.*, 585 F.2d 732, 741 (5th Cir. 1978)). When the prosecution invites jurors to depart from neutrality and rely on bias rather than evidence, it undermines both commitments. It makes conviction and punishment turn on social judgment, caprice, or emotion rather than legal proof, and it threatens both the appearance and the reality of reasoned capital decision-making that this Court’s cases require. *Gardner v. Florida*, 430 U.S. 349, 357–58 (1977). A prosecutor may advocate forcefully, but may not “summon that thirteenth juror, prejudice.” *Calhoun v. United States*, 133 S. Ct. 1136, 1137 (2013) (statement of Sotomayor, J.) (quoting *United States v. Antonelli Fireworks Co.*, 155 F.2d 631, 659 (2d Cir. 1946) (Frank, J., dissenting)).

B. Appealing to Gender Stereotypes Is Inconsistent with These Obligations

A prosecution grounded in stereotypes is incompatible with the prosecutor's duty to seek justice based solely on proper evidence. Employing stereotypes does not establish motive, opportunity, intent, causation, aggravation, or any other legitimate issue. Instead, it risks shifting the jury's attention from evidence to emotion. When the stereotypes concern gender in a criminal trial, they can produce aggravating effects. Yu Du, *The Effect of Defendant Gender on Jurors' Decision-Making*, 52 U. Balt. L. Rev. 1, 4 (2022). Where, as here, a woman is portrayed as violating conventional expectations, the stereotype invites jurors to infer that perceived sexual or moral impropriety reveals bad character and, from that character, a greater likelihood of guilt or lesser entitlement to mercy. *Id.*; see also Joseph A. Colquitt, *Evidence and Ethics: Litigating in the Shadows of the Rules*, 76 Fordham L. Rev. 1641, 1651 (2007) (explaining how evidence of a wife's infidelity may be used to suggest immorality and, from that supposed character defect, a greater likelihood of homicide). The Mississippi Supreme Court recognized this principle in *Lesley v. State*, 606 So. 2d 1084 (Miss. 1992), concluding that evidence of a woman's extramarital affairs had been introduced to show that the defendant was an "immoral woman" and therefore more likely to have committed the charged offense. *Id.* at 1090. Yet "[h]er alleged prior adultery did not make it more likely than not that she committed conspiracy to commit murder, and it did inflame any

listener.” *Id.* The prosecution’s theory here relied on the same impermissible logic.

This Court’s equal-protection cases underscore why sex-based assumptions are constitutionally suspect. The Government may not act on “overbroad generalizations about the different talents, capacities, or preferences of males and females.” *United States v. Virginia*, 518 U.S. 515, 533 (1996). Nor may it rely on “archaic and overbroad” assumptions about women’s proper roles. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 135 (1994). Reinforcing such “assumption[s]” creates “a self-fulfilling prophecy.” *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 730 (1982). And in a criminal prosecution, that self-fulfilling dynamic can be especially pernicious. When prosecutors ask a jury to view a female defendant through gendered stereotypes, the danger is not simply that such appeals are unfair. It is that they ask jurors to substitute her nonconformity for evidence of criminal wrongdoing.

That risk is present even without an express appeal to discriminate. Stereotypes can be conveyed through the details the prosecutor chooses to emphasize. *See* Hillel J. Bavli, *Character Evidence as a Conduit for Implicit Bias*, 56 U.C. Davis L. Rev. 1019, 1048–57 (2023) (explaining how character evidence can transmit implicit stereotypes). A woman’s affairs may be presented as sexual deviance; her clothing as immodesty; her parenting as selfishness; her demeanor as coldness; her failure to grieve in a particular way as proof that she is unnatural or unworthy of mercy. These themes may be framed as background or character evidence, but their force depends on gendered expectations. *Id.*

They invite jurors to decide not what the female defendant *did*, but what kind of woman she *is*.

Courts have accordingly condemned prosecutorial arguments that invite conviction or punishment on such improper grounds, and the rule is not limited to any single form of prejudice. Racially biased prosecutorial arguments are constitutionally prohibited because they shift the jury's focus from evidence to an impermissible appeal. The same is true when a prosecutor invites conviction based on a defendant's national origin, *see, e.g., United States v. Doe*, 903 F.2d 16, 24–25 (D.C. Cir. 1990) (reversing where the prosecutor invoked the defendants' Jamaican nationality to associate them with drug trafficking), or sexual orientation, *see, e.g., United States v. Birrell*, 421 F.2d 665, 666 (9th Cir. 1970) (reversing where the prosecutor's comments "invited conviction irrespective of innocence of the crime charged, upon the ground that appellant was a homosexual"); *United States v. Gillespie*, 852 F.2d 475, 479 (9th Cir. 1988) ("pointed questions about [a same-sex couple's] sleeping arrangements" were "extremely prejudicial"). The same goes for personal appearance. *See United States v. Portillo-Quezada*, 469 F.3d 1345, 1351 (10th Cir. 2006) ("improper" for prosecutors to "reference[] a physical characteristic [tattoos] and . . . link this characteristic to drug dealers in general").

It follows, then, that a prosecution cannot substitute a female defendant's perceived sexual promiscuity as proof of the charged offense. In *Cerda*, the New York Court of Appeals condemned a prosecutor's effort to portray a woman as "promiscuous" and therefore lacking in credibility as

“a tactical attack based on now-rejected views of female sexuality.” *People v. Cerda*, 223 N.E.3d 308, 315 (N.Y. 2023). Nor may prosecutors “prod[] the jury to convict not on the evidence, but on the jurors’ assessment of [a defendant’s] mothering skills.” *State v. Carpenter*, 688 N.E.2d 1090, 1096–97 (Ohio Ct. App. 1996) (reversing conviction). Both dynamics were present here, where the prosecution repeatedly returned to Ms. Andrew’s affairs, appearance, and sexual conduct to encourage jurors to view her as morally suspect. Such tactics transform a criminal trial into a referendum on the female defendant’s conformity to conventional expectations of womanhood. See Wayne R. LaFave et al., *Criminal Procedure* § 24.7(e) (4th ed. 2015).

C. Appeals to Stereotypes Create an Unacceptable Risk that Jurors Will Base Punishment Decisions on Impermissible Considerations

The risk that appeals to stereotypes concerning constitutionally protected classes will distort a jury’s decision is neither abstract nor speculative; it is documented. Social science research has consistently found that stereotypes shape perception, memory, credibility assessments, and moral judgment even when decisionmakers believe they are applying neutral rules. *United States v. Young*, 6 F.4th 804, 810 (8th Cir. 2021) (Kelly, J., concurring).² Studies of

² See also Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124, 1135–46 (2012) (discussing the operation and legal consequences of implicit bias); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 Duke L.J. 345,

female defendants and “gender-crime congruency” indicate that jurors respond more harshly when a woman accused of serious violence is perceived as violating traditional gender roles.³ Evelyn M. Maeder et al., *A Test of Gender–Crime Congruency on Mock Juror Decision-Making*, 5 *Cogent Psychology* 1, 8–12 (2018) (discussing the effect of gender stereotypes on juror perceptions of defendants); Melissa Thompson, *Race, Gender, and the Social Construction of Mental Illness in the Criminal Justice System*, 53 *Soc. Persps.* 99 (2010) (same); Tanya Strub & Blake M. McKimmie, *Sugar and Spice and All Things Nice: The Role of Gender Stereotypes in Jurors’ Perceptions of Criminal Defendants*, 23 *Psychiatry, Psych. & L.* 487 (2016) (same). Scholarship on character evidence

354–64 (2007) (examining the effect of implicit bias on memory and judgment); Hillel J. Bavli, *Character Evidence as a Conduit for Implicit Bias*, 56 *U.C. Davis L. Rev.* 1019, 1048–57 (2023).

³ See Sandra Babcock, *Gendered Capital Punishment*, 31 *Wm. & Mary J. Race, Gender & Soc. Just.* 1 (2024). *Gendered Capital Punishment* provides a comprehensive examination of the influence of gender on decisionmakers in capital cases involving women. Babcock identifies three recurring prosecutorial tropes: the sexually transgressive woman, the deficient mother, and the manipulative schemer. She identifies Ms. Andrew’s prosecution as a striking example of first, explaining that such stereotypes “reflect social beliefs that are highly resistant to counterevidence” and can “undercut women’s credibility, highlight their immorality, and increase juries’ perceptions of their blameworthiness.” *Id.* at 15. And as Chesney-Lind has observed, the “harsh punishment of a few ‘fallen girls’ and women as witches and whores has always been integral to enforcement of the boundaries of ‘good girls’ and women’s place in society.” Meda Chesney-Lind & Lisa Pasko, *The Female Offender: Girls, Women, and Crime* (2d ed. 2004).

likewise explains how ostensibly neutral evidence can transmit stereotypes and permit social meaning to substitute for legal relevance. *See* Bavli, *Character Evidence as a Conduit for Implicit Bias*, *supra* at 1048–57.

The law recognizes the same risk. Appeals to racial prejudice can “distort the search for truth and drastically affect a juror’s impartiality,” *Doe*, 903 F.2d at 25, and this Court has warned that even brief stereotype-laden evidence may matter where it speaks directly to the question the jury must answer. In *Buck v. Davis*, the Court held that testimony linking race to future dangerousness was constitutionally intolerable because it appealed to a powerful stereotype at the precise point where jurors were deciding death eligibility. *Buck v. Davis*, 580 U.S. 100, 119–23 (2017).

Gender stereotypes pose the same kind of decisional danger. *See State v. Harris*, 786 N.W.2d 409, 417 (Wis. 2010) (recognizing a due process right not to be sentenced on the basis of gender and that imposing a sentence on this basis constitutes “an erroneous exercise of discretion.”); *United States v. Reed*, 599 F. App’x 827, 832 (10th Cir. 2014) (recognizing that reliance on racial or gender stereotypes in sentencing is impermissible).

The concern is at its apex at sentencing. Capital sentencing requires an individualized moral judgment about whether death is warranted. *Woodson*, 428 U.S. at 305; *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). If the prosecution has spent the trial framing the defendant as sexually improper, immodest, unfeminine, insufficiently maternal, or

insufficiently grief-stricken, that framing may affect how jurors evaluate aggravation, mitigation, remorse, and mercy. *See Buck*, 580 U.S. at 119–23; Brian R. Means, *Post Conviction Remedies* § 46:4 (2026 ed.).⁴ What appears to be an assessment of culpability instead becomes an assessment of conformity to gender stereotypes.

The Eighth Amendment’s reliability requirement guards against precisely that distortion. Capital sentencing cannot be driven by passion, prejudice, or moral condemnation. *Woodson*, 428 U.S. at 305; *Gregg*, 428 U.S. at 189; *Gardner*, 430 U.S. at 357–58. That constraint is especially important at capital sentencing, where the sentencer is guided by statutory factors meant to guard against the arbitrary imposition of the death penalty. *See Hance v. Zant*, 696 F.2d 940, 952 (11th Cir. 1983); *Tucker v. Zant*, 724 F.2d 882, 886 (11th Cir. 1984); *Coleman v. Brown*, 802 F.2d 1227, 1239 (10th Cir. 1986). When the prosecution builds its case around gender stereotypes, it compromises the fairness of the guilt phase and the reliability of the sentencing judgment. *See Andrew v. White*, 604 U.S. 86, 91 (2025); *Buck*, 580 U.S. at 119–23.

Independent of their gendered content, appeals of this kind are impermissible at capital sentencing when they direct the jury’s passions toward considerations untethered to the circumstances of the

⁴ *See also* Strub & McKimmie, *supra*, at 494–98; Babcock, *supra*, at 9–14; *see also* Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 46.4 (8th ed. 2023) (discussing the constitutional implications of prosecutorial appeals that introduce arbitrary or prejudicial considerations into capital sentencing).

offense. A “dramatic appeal to gut emotion has no place in the courtroom, especially in a case involving the penalty of death,” and the Constitution does not permit argument on matters extrinsic to the crime aimed at inflaming the jury. *Hance*, 696 F.2d at 952; *see also Tucker*, 724 F.2d at 886. The Tenth Circuit likewise has cautioned that prosecutorial appeals to passion subvert the process designed to prevent the arbitrary imposition of death. *Coleman*, 802 F.2d at 1241. References to a defendant’s clothing, sexual history, conformity to religious expectations, or performance of grief do not illuminate the circumstances of the offense; they encourage punishment based on moral condemnation rather than a reasoned judgment about culpability and the legally relevant sentencing factors.

D. The Prosecution in Ms. Andrew’s Case Failed Its Duty to Seek Justice

The prosecutors’ actions during Ms. Andrew’s trial were antithetical to their legal and ethical duties as public ministers of justice and illustrated the exact danger of appealing to impermissible biases in a criminal case. As Judge Federico explained in his dissent from the denial of rehearing en banc, “[t]o recite the facts [of this case] is to state the fundamental unfairness of the trial that sent Andrew to death row.” Pet. App. 4a (Federico, J., dissenting from denial of rehearing en banc).

In 2004, Ms. Andrew was tried, convicted, and sentenced to death for the murder of her husband, Robert Andrew. From the outset, however, the

prosecution departed from its duty to present a fair, impartial case grounded in evidence relevant to the charged offense. Rather than begin with evidence relevant to the shooting itself, the prosecution opened by defining the case through Ms. Andrew’s perceived moral and sexual transgressions, telling the jury that “the evidence would show that this case is about a controlling wife” who “liked to cheat.” Tr. 12–13.⁵ It then called two pastors as its first two witnesses. Neither had witnessed the shooting nor could offer any evidence about how the crime unfolded. Instead, the prosecution elicited testimony that framed Ms. Andrew’s alleged adultery, profanity, and perceived failures within her marriage as matters of moral condemnation. Tr. 125–27, 211–13.

This theme continued throughout trial. Over the course of the prosecution’s case, witnesses were asked to describe Ms. Andrew’s affair, clothing, appearance, profanity, motherhood, demeanor, and lack of grief. Jurors heard that she wore “short skirt[s], low-cut tops,” “sexy outfits,” and overall “provocative”

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The purpose of an opening statement is to provide background on objective facts while avoiding prejudicial references, and hence the prosecutor’s opening statement should be an objective summary of the evidence reasonably expected to be produced, and the prosecutor should not use the opening statement as an opportunity to poison the jury’s mind against the defendant or to recite items of highly questionable evidence.

United States v. Moore, 651 F.3d 30, 51 (D.C. Cir. 2011) (quoting *United States v. Thomas*, 114 F.3d 228, 247 (D.C. Cir. 1997) (alterations and quotation marks omitted)).

clothing that was not “normal” for “other mothers.” Tr. 247, 320–24, 343, 349, 357. They heard testimony about intimate relationships even though the defense had already stipulated to the affairs. Tr. 249–54. None of that evidence advanced the jury’s understanding of the homicide. Instead, it invited jurors to judge Ms. Andrew against gendered expectations of sexuality, modesty, motherhood, marital fidelity, and grief.

The prosecution made this invitation explicit in its closing. It told jurors not to be deceived by the woman they had seen in the courtroom, explaining that although Ms. Andrew had sat through the trial “all meek and quiet and pretty,” she was “no meek, mild woman.” Tr. 3903, 3908. It re-emphasized her appearance, her sexual relationship with another man, and her supposed lack of grief. Tr. 3803–08, 4073, 4111, 4121. In a particularly shocking, prejudicial moment, the prosecutor displayed Ms. Andrew’s thong underwear before the jury and asked whether a properly “grieving widow” would have packed and worn it. Tr. 4101–03. The prosecutor also argued that Ms. Andrew “can’t be a woman of God because she [was] sleeping with a married man”⁶ and

⁶ Appealing to the religious inclinations of the jury is separately problematic. See *United States v. Goldman*, 563 F.2d 501, 504–05 (1st Cir. 1977) (describing as “grave misconduct” a prosecutor’s invitation to consider a defendant’s religion, which had “no bearing whatsoever on any legitimate issue in the case”); *United States v. Cartagena-Carrasquillo*, 70 F.3d 706, 713 (1st Cir. 1995) (condemning prosecutorial efforts to align the jury with a majority religion and distinguish the defendant through religious references as “flatly wrong and contrary to what the public has a right to expect of government prosecutors”);

branded her a “slut puppy.” Tr. 4125. The prosecutor even read aloud Mr. Andrew’s list of hopes for their marriage—including that Ms. Andrew “[l]ove God and desire to please him” and to “[m]ake [him] feel as though [he’s] the most important man in [her] life.” Tr. 3909–11.⁷ In doing so, the prosecution all but expressly urged jurors to conclude that Ms. Andrew’s character and conduct failed even the most basic expectations of a Christian woman and she therefore deserved both conviction and death.⁸

These were not isolated prosecutorial missteps or stray comments made in the heat of trial. As the Oklahoma Court of Criminal Appeals acknowledged, they were pronounced and persistent features of the

Cunningham v. Zant, 928 F.2d 1006, 1020 (11th Cir. 1991) (“drawing an analogy to Judas Iscariot” at the penalty phase was “outrageous”); *see also* Monica K. Miller & Brian H. Bornstein, *Religious Appeals in Closing Arguments: Impermissible Input or Benign Banter?*, 29 *Law & Psychol. Rev.* 29, 35 (2005).

⁷ *See Drayden v. White*, 232 F.3d 704, 712–13 (9th Cir. 2000) (finding misconduct when a prosecutor delivered a soliloquy in persona of a deceased victim because it inflamed the jury’s sympathy for the dead man and suggested the role of the jury was to vindicate the victim rather than punish for the crime).

⁸ *See United States v. Taylor*, 54 F.3d 967, 976–77 (1st Cir. 1995) (“A prosecutor is permitted vigorous advocacy, so long as he does not stray into forbidden terrain.’ Thus, prosecutors need not pull their punches; they may—indeed, they should—present their cases to criminal juries zealously. Forcefulness in the pursuit of justice is to be admired rather than condemned. Yet, while a prosecutor ‘may strike hard blows, he is not at liberty to strike foul ones.’ This maxim is particularly relevant to closing arguments, for such arguments come at an especially delicate point in the trial process and represent the parties’ last, best chance to marshal the evidence and persuade the jurors of its import.”)

prosecution’s “trial strategy to draw the jury’s attention to Andrew’s concededly irrelevant but . . . unwomanly and unmotherly behavior.” *Andrew v. State*, 164 P.3d 176, 192 (Okla. Crim. App. 2007).⁹ From start to finish, the prosecution “portrayed Ms. Andrew as a scarlet woman, a modern Jezebel, sparking distrust based on her loose morals . . . plucking away any realistic chance that the jury would seriously consider her version of events.” *Andrew v. White*, 62 F.4th 1299, 1366 (10th Cir. 2023) (Federico, J., dissenting). The prosecution then juxtaposed Ms. Andrew with Mr. Andrew, whom it maintained had been a man “committed to God.” Tr. 4124.

These prejudicial and misleading appeals carried directly into sentencing. In a penalty phase that lasted less than a day and relied almost entirely on evidence introduced during the guilt phase, the prosecution invited jurors to deny Ms. Andrew mercy because she was sexually immoral, unfeminine, unmotherly, and insufficiently grief-stricken. The prosecution likewise characterized Ms. Andrew as “different,” “not like you and me,” devoid of “[e]motion,” “remorse,” or “grief,” and deserving of the punishment “reserved for people exactly like her.”¹⁰

⁹ Scholarship likewise identifies prosecutors’ strategic emphasis on a woman’s departure from feminine ideals as a means of turning jurors against female defendants. See Katherine Lewis & Andrea Sommervold, *Death, but Is It Murder? The Role of Stereotypes and Cultural Perceptions in the Wrongful Convictions of Women*, 78 Alb. L. Rev. 1035, 1048 (2015).

¹⁰ See *People v. Johnson*, 229 N.E.3d 438, 452 (Ill. App. Ct. 5th Dist. 2023) (Prosecutors may not “utilize closing argument to forge an ‘us-versus-them’ mentality that is inconsistent

Tr. 4493–94. It set up a stereotyped expectation of a grieving widow and told the jury Ms. Andrew was blameworthy for deviating from that standard. The resulting sentencing argument thus asked jurors to evaluate not the crime and the legally relevant evidence, but whether a woman who does not conform to gendered stereotypes deserved to live. *See Le v. Mullin*, 311 F.3d 1002, 1015 (10th Cir. 2002) (“It is a hallmark of a fair and civilized justice system that verdicts be based on reason, not emotion, revenge, or even sympathy.”).

The prosecutor’s role as a minister of justice permits vigorous advocacy, but not an invitation to substitute disapproval of a defendant’s sexuality, appearance, motherhood, marriage, or grief for proof of murder or for a reasoned sentencing judgment. *See Taylor v. United States*, 413 F.2d 1095, 1096 (D.C. Cir. 1969). Yet that is precisely what the prosecution did. Tr. 12–13, 247, 320–24, 343, 349, 357, 3903–08, 4101–03, 4120, 4125, 4493–94. It repeatedly directed jurors away from evidence and law and toward the exact prejudice that prosecutors are legally and ethically obligated to resist—substituting stereotypes for evidence that is crucial to the penalty decision. Tr. 4412, 4493–94. As this Court has made clear, “[o]ur law punishes people for what they do, not who they are.” *Buck*, 580 U.S. at 123; *see also Le*, 311 F.3d at 1021 (“Personal attacks by a prosecutor are improper.”). Dispensing punishment based on who they are “flatly contravenes this guiding principle.” *Buck*, 580 U.S. at 123. Ms. Andrew was entitled to be

with the criminal trial principle that a jury fulfills a nonpartisan role, under the presumption that a defendant is innocent until proven guilty.”).

tried for the offense charged, not for failing to conform to the prosecution's conception of a proper woman, wife, mother, or widow. *See Berger*, 295 U.S. at 88; Pet. App. 265a. Having pursued a trial and sentencing tragedy centered around gendered stereotypes, “[t]he Government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds.” *Bruton v. United States*, 391 U.S. 123, 129 (1968) (internal quotation marks and citation omitted). A conviction and sentence such as Ms. Andrew’s, based on a deeply flawed and fundamentally unfair process, cannot stand.

II. Gender-Based Prosecutions Undermine Confidence in the Justice System

Prosecutors hold a position of public trust and must pursue convictions without compromising the fair administration of justice. *Silva v. Brown*, 416 F.3d 980, 991 (9th Cir. 2005) (“In our justice system, the prosecuting attorney occupies a special position of public trust.”). “Courts, citizens, and even criminal defendants must rely on these public servants to be honorable advocates both for the community on whose behalf they litigate and for the justice system of which they are an integral part.” *Id.* When prosecutors weaponize stereotypes and prejudice, they betray that trust; they compromise the fairness of the proceeding and weaken confidence that judgments rest on evidence rather than bias. The Court should not permit the justice system to bear that institutional cost.

“Justice must satisfy the appearance of justice.” *Offutt v. United States*, 348 U.S. 11, 14 (1954). That requirement is not ornamental. The legal system hinges on the public’s willingness to respect and follow its decisions. *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 445–46 (2015). Discrimination in the administration of justice “casts doubt on the integrity of the judicial process” and “impairs the confidence of the public.” *Rose v. Mitchell*, 443 U.S. 545, 555–56 (1979). When prosecutors impermissibly rely on group stereotypes, the injury is not inflicted on the defendant alone, but on the law as an institution and the community at large. *Buck*, 580 U.S. at 124.

That institutional harm has practical consequences. People who regard legal authorities as fair and legitimate are more willing to report crimes, cooperate with police, serve as witnesses, and accept judgments. See Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 Ohio St. J. Crim. L. 231, 263–67 (2008). When trust erodes, cooperation erodes with it. Victims depend on investigators and prosecutors who can rightfully earn witnesses’ confidence. Law enforcement depends on communities willing to share information and cooperate with investigations. And prosecutors and courts depend on judgments the public can recognize as the product of fair procedures. Every one of those interests is weakened when the prosecution appears willing to use prejudice as a tool for obtaining a conviction.

Capital proceedings should leave no room for that danger. Death is qualitatively different from every

other punishment, and it requires a profound need for reliability. *Woodson*, 428 U.S. at 304–05; *California v. Ramos*, 463 U.S. 992, 998–99 (1983). That requirement protects both the defendant and the public. A death sentence is uniquely severe and irrevocable, and the State’s execution of one of its citizens differs from every other exercise of governmental authority. The decision to impose death must therefore be, and appear to be, grounded in reason such that capital procedures retain the public’s confidence in their fairness. *See Mickens v. Taylor*, 535 U.S. 162, 189 (2002) (Stevens, J., dissenting). When prosecutorial misconduct “so infect[s] the trial with unfairness as to make the resulting conviction a denial of due process,” the integrity of the process itself has been compromised. *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (citation omitted); *see also Buck*, 580 U.S. at 122 (rejecting the contention that limited race-based testimony was harmless because “[s]ome toxins can be deadly in small doses”).

Capital sentencing must treat the defendant as a uniquely individual human being, not as a gendered archetype. *Woodson*, 428 U.S. at 304–05. Yet gender stereotype-based advocacy does precisely the opposite: it collapses the individual into the hypersexual woman, the failed mother, the manipulative seductress, or the unnatural widow. The central question is whether a person should live or die. It is not whether jurors approve of a woman’s sexual conduct, clothing choices, parenting decisions, marital fidelity, religiosity, or performance of grief. Congress has similarly acted to ensure that this anti-bias principle is explicit in federal capital cases by

requiring jurors to certify that sex did not affect the sentencing decision. 18 U.S.C. § 3593(f). This provision reflects the elementary proposition that sex can play no part in the choice between life and death.¹¹

This Court's review has implications beyond this case. Treating a prosecution saturated with concededly irrelevant, prejudicial evidence and gender-based moral judgment as constitutionally tolerable would place this Court's imprimatur on a tactic fundamentally incompatible with the prosecutor's duty to seek justice. It would also invite prosecutors to repeat this misconduct in future capital cases, which will only erode confidence that death sentences rest on evidence and law rather than stereotype and moral disapproval.

¹¹ This proposition is especially salient since case studies of executed women suggest that gender stereotypes have shaped how female defendants were portrayed by prosecutors. See, e.g., Mary Welek Atwell, *Wretched Sisters: Examining Gender and Capital Punishment* 197, 296 (2d ed. 2014); 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 CUNY L. Rev. 473, 483–90 (2005).

CONCLUSION

For the foregoing reasons, *Amicus* urges the Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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