

No. 26-5711
CAPITAL CASE

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 OKLAHOMA-BASED
ORGANIZATIONS, FAITH COMMUNITIES,
ADVOCATES, AND INDIVIDUAL ALLIES
AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONER**

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INTEREST OF THE AMICI CURIAE¹

Amicus curiae **Carceral Studies Consortium** is an interdisciplinary group of Oklahoma-based research and community affiliates committed to scholarship and community engagement on systems of punishment and incarceration. The Consortium has a strong interest in ensuring that criminal proceedings preserve defendants' due process rights and remain free from the taint of sex-role stereotypes and related harms.

Amicus curiae **The Oklahoma Appleseed Center for Law & Justice** is a nonprofit legal organization that fights for justice and opportunity for all Oklahomans. Since the enactment of the Oklahoma Survivors' Act in 2024, our criminal justice team has focused heavily on its implementation and accompanying issues, including the elimination of gender-based sentence disparities.

Amicus curiae **Oklahoma Coalition to Abolish the Death Penalty (OK-CADP)** is a statewide grassroots membership that promotes alternatives to capital punishment through public education, legislative advocacy, and research, and provides support both to people sentenced to death and their loved ones, and to victims of violent crime and their surviving loved ones.

¹ No counsel for a party authored this brief or any part of it, and no counsel for a party (nor a party itself) contributed monetarily to fund the preparation or submission of this brief. No person other than amici or their counsel made a monetary contribution to the brief's preparation or submission. Counsel timely notified the parties' counsel of record of the intent to file this brief.

Amicus curiae **Freedom Oklahoma** advocates and organizes across to create conditions where all 2SLGBTQ+ people have the safety, resources, and community to thrive everywhere we call home.

Amicus curiae **Brain Injury Therapy** provides therapeutic and support services to survivors of brain injury and their families. We are dedicated to the philosophy of liberation and rehabilitation, and though we disavow the death penalty, we also renounce known ways in which bias in our judicial system directly influences the makeup of death row.

Amicus curiae **Foundation for Liberating Minds** is an abolitionist organization focused on community organization and resource giving, but also on alternatives to prisons and policing.

Amicus curiae **Women in Action in All Norman** is an organization strongly opposed to the death penalty, particularly where gender bias plays a role in jury decisions and death penalty determinations, and in ensuring fair trials in Oklahoma.

Amicus curiae **New Covenant Christian Church (Disciples of Christ)** is a progressive, inclusive, justice-centered congregation in Oklahoma City committed to the inherent dignity and worth of every human being. We oppose the death penalty and believe every person deserves a fair trial, free from gender stereotypes and discrimination.

Amicus curiae **Oklahoma Objector Community** is an Interfaith religious humanistic community based in Oklahoma City, with a special focus on the concerns of peace and social justice.

Amicus curiae **First Unitarian Church of Oklahoma City** is a faith community that stands in

opposition of the death penalty. We reached that decision, in part, because of the clear race and gender biases that influence sentencing.

Amicus curiae **Center on Wrongful Convictions** of the Bluhm Legal Clinic, Northwestern Pritzker School of Law, is a nonprofit legal clinic dedicated to rectifying wrongful convictions and preserving fairness and due process in our criminal legal system.

Individual amici curiae are a multidisciplinary group of scholars, social service providers, faith leaders, community advocates, and allies concerned with how gender bias negatively affects the criminal legal system in Oklahoma and beyond. These individuals appear in their personal capacity and are listed in the Appendix.

Amici are deeply concerned with Oklahoma’s history of punishing women who, in the State’s eyes, fail to meet gender norms. Collectively, amici advocate for the fair application of Oklahoma’s criminal laws, particularly where, like in Ms. Andrew’s case, bias can result in a death sentence.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

It is a fundamental principle that “[i]rrelevant evidence is inadmissible for a reason – it necessarily invites the jury to render a decision based on factors other than what is provided for by law.” *Andrew v. Tinsley (Tinsley II)*, 186 F.4th 1256, 1262 (10th Cir. 2026) (mem.) (Federico, J. dissenting from denial of rehearing en banc) (internal citation omitted). During Ms. Andrew’s four-week murder trial, the prosecution introduced evidence concerning Ms. Andrew’s sex life, clothing choices, reading materials, fitness as a mother, and generally “unwomanly” behavior, none of

which proved she killed her husband. *See* Cert. Pet. 4-14 (describing evidence presented each week of Ms. Andrew’s trial). Ms. Andrew asserts, validly, that her trial was fundamentally unfair because the State presented this evidence to invoke sex-role stereotypes and to bias the jury against her for not meeting them.

This Court has long held that the Fourteenth Amendment’s Due Process Clause bars the admission of evidence “so unduly prejudicial that it renders the trial fundamentally unfair.” *Andrew v. White*, 604 U.S. 86, 92-93, 96 (2025) (quoting *Payne v. Tennessee*, 501 U.S. 808, 825 (1991)). Oklahoma conceded that at Ms. Andrew’s trial, “much of the challenged evidence [was] irrelevant to guilt or innocence.” *Andrew v. Tinsley (Tinsley I)*, 164 F.4th 789, 798 (10th Cir. 2026). But gender bias is so firmly entrenched in Oklahoma’s criminal legal system, and so much stereotype evidence was admitted, that an unbiased jury verdict was all but impossible.

First, Oklahoma has incarcerated women at higher rates than nearly any other state for years, which cannot be explained by a change in criminal behavior or any increased risk to the community. Mass incarceration of women in Oklahoma stems from punitive state policies. Oklahoma penalizes nonviolent drug offenses—which women are more likely to commit—as harshly as some felonies, under-utilizes proven alternatives to incarceration, and rebuffs efforts to reduce the need to incarcerate.

Second, Oklahoma prosecutes women whom it deems to have violated stereotypes surrounding motherhood and womanhood using statutes that are gender-neutral on their face. And for women accused of homicide, prosecutors unabashedly introduce sex-stereotype evidence just to argue that their deviation

from gender norms proves their guilt. This tactic has elicited death sentences for four women, including Ms. Andrew, calling into Doubt their juries' impartiality and the fundamental fairness of their trials.

The admission of irrelevant sex-role stereotype evidence that is intended to sway a jury cannot be harmless error. Studies reflect that jurors harbor biases which become more salient when reinforced at trial, and they convict people whom they perceive negatively. Yet in Oklahoma, when irrelevant sex-role stereotype is introduced, courts misclassify the evidence as general cultural reference, and thus overlook its prejudicial nature.

Ms. Andrew's jury was tasked with judging her womanhood, not the facts of her case. Thus, her trial was fundamentally unfair. Amici respectfully ask this Court to grant Ms. Andrew a writ of certiorari.

ARGUMENT

I. THE FOURTEENTH AMENDMENT PROHIBITS PROCEEDINGS LIKE MS. ANDREW'S THAT ARE INFECTED BY GENDER BIAS.

This Court holds that the Fourteenth Amendment protects against evidence in criminal proceedings that is "so unduly prejudicial that it renders the trial fundamentally unfair." *White*, 604 U.S. at 92-93, 96 (quoting *Payne*, 501 U.S. at 825). Thus, the Court has rejected, on Due Process grounds, the use of stereotype evidence that bears no relevance to the outcome of proceedings except to prejudice the jury. *See, e.g., Batson v. Kentucky*, 476 U.S. 79, 91 (1986) (holding that the Fourteenth Amendment protects against juror

strikes stemming from race-based generalizations); *Ham v. South Carolina*, 409 U.S. 524, 526-27 (1973) (holding that Due Process forbids racially discriminatory juries in capital proceedings).

Similarly, this Court rejected using peremptory challenges that invoked “the very [sex-role] stereotype the law condemns,” citing the risk of fundamentally unfair proceedings. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 139-140 (1994). Just as the *J.E.B.* court understood “the risk that the prejudice that motivated the discriminatory selection of the jury [would] infect the entire proceedings,” *id.* at 140, the State’s introduction of copious discriminatory sex stereotype evidence throughout Ms. Andrew’s trial infected her capital trial.

The State relied on immaterial sex-stereotype evidence from the beginning of trial, when it told the jury Ms. Andrew always “had a boyfriend on the side.” *State v. Andrew*, Trial Record 13 [hereafter Tr. R.]. Then the State called several men to testify they had past affairs with Ms. Andrew, asking questions like, “Brenda Andrew was really hospitable to you, wasn’t she, Mr. Nunley? . . . And she was hospitable to Mr. James Higgins as well, wasn’t she?” *Id.* at 420. Witnesses testified that Ms. Andrew “dressed sexy” when running errands,” and who labeled Ms. Andrew a “hoochie” who wore “very tight, very short” clothing “with a lot of cleavage.” *Id.* at 323–24. Other questions from the State addressed Ms. Andrew’s parenting, about which it argued, “Does a good mother run off to Mexico with her children while their father is lying in a coffin?” . . . “Does a good mother invite her boyfriends over to the house with the children in the home when they’re still married to their father?” *Id.* at 419–20. The

State then closed the trial by holding up a pair of Ms. Andrew's previously-admitted "thong underwear"—asking whether a "grieving widow" would wear it in a hotel room with her children and boyfriend, and asserting, "*You got all the evidence. That's enough. Can't twist the facts, folks. Can't twist the evidence. Use your common sense.*" *Id.* at 4101, 4103 (emphasis added). It defies reason to think the jury was not unduly prejudiced given the State characterized Ms. Andrew's mothering, sex life, and demeanor as "the evidence." *See id.*

II. WOMEN IN CONFLICT WITH OKLAHOMA'S LAWS HAVE LONG FACED GENDER BIAS.

Criminal punishment should be proportionate to an individual's actions, especially when state-imposed death is on the line. *Harmelin v. Michigan*, 501 U.S. 957, 994 (1991) (opinion of Scalia, J.) (citing U.S. Const. amend. VIII). But negative gender bias has tainted Oklahoma's legal system for decades, with women's identities reduced to gender stereotypes and moral culpability substituted for legal responsibility. This phenomenon is apparent in Oklahoma's overincarceration of women for minor offenses, and in how it applies sex role stereotypes to women who do not meet the ideal of a good mother, a good wife, or a good woman. Thus, for women enmeshed in Oklahoma's legal system, the concepts of personal responsibility and fair punishment do not apply.

A. Punitive state policies disproportionately impact women, driving their mass incarceration.

Oklahoma is a punitive state, “lock[ing] up a higher percentage of its people than any independent democratic country on earth.” *Oklahoma Profile*, Prison Pol’y Initiative (2026).² A key driver of this is a steadily increasing proportion of incarcerated women over several decades.

Oklahoma consistently incarcerates women at higher rates than most other states, and indeed, most other countries. *See, e.g.*, David Wright, *Female Crime & Incarceration in Oklahoma*, Okla. Politics 61, 67-68 (2005) (reporting Oklahoma’s incarceration rate between 1993 and 2002); Sara Wynn, *Mean Women & Misplaced Priorities: Incarcerated Women in Oklahoma*, 27 Wisc. J. L. Gender & Soc’y 281, 282 (2012); (In 2011 Oklahoma ranked first in the country). Today, Oklahoma’s women’s incarceration rate remains two times higher than the national average, Widra & Kajstura, *supra*. This data is alarming given that in our country, women “have become the fastest-growing segment of the incarcerated population” since the 1970s.” Wendy Sawyer, *The Gender Divide*:

² <https://www.prisonpolicy.org/profiles/OK.html>. By 2024, Oklahoma had the fourth highest incarceration rate in the United States, with 905 per 100,000 people confined there. Emily Widra & Aleks Kajstura, *States of Women’s Incarceration: The Global Context 2025*, Appx. 2, Prison Pol’y Initiative (Sept. 2025), <https://www.prisonpolicy.org/global/women/2025.html>.

Tracking Women's State Prison Growth, Prison Pol'y Initiative (Jan. 9, 2018).³

The rise in women's incarceration in Oklahoma cannot be explained by increased criminality. Indeed, women's overall incarceration rates have continued to climb even as crime rates in the state have fallen. *Crime Trends in Oklahoma*, Crime & Just. Inst. (Oct. 16, 2026); Ziva Branstetter et al., *Let Down and Locked Up: Why Oklahoma's Female Incarceration is so High*, Reveal News (Sept. 20, 2017). The federal prison population, too, remained stable as Oklahoma's women's prison population grew. Sawyer, *supra*. It is state-level policy that drives the mass incarceration of women, *id.*, and Oklahoma adopts policies that further entrench gender bias. For instance, Oklahoma "incarcerates people for things that other states would not," including for minor, first-time drug and other nonviolent offenses. Wynn, *supra* at 286, 292. This practice has a negative and disparate impact on women, serving time in Oklahoma, a large proportion of whom were convicted of nonviolent drug offenses. Sawyer, *supra*; Wright, *supra* at 64. *See also* Wynn, *supra* at 295 (noting that men are more likely to be convicted of violent crimes). Consistent with observations that "[t]he war on drugs is really a war on women," Wynn, *supra* at 290, Oklahoma punishes these offenses harshly. Susan F. Sharp, *Mean Lives, Mean Laws: Oklahoma's Women Prisoners* 30 (2014). In fact, sentencing ranges for some nonviolent

³ <https://www.sentencingproject.org/fact-sheet/incarcerated-women-and-girls/>. Nationwide, state prisons' female populations increased by 834% during this period. *Id.*

drug offenses meet or exceed punishment for violent offenses like sexual assault. Wynn, *supra* at 295.

Meanwhile, Oklahoma underutilizes less punitive alternatives to incarceration, like diversion programs, which would reduce the need to punish with prison. *Id.* at 296-97. Similarly, Oklahoma courts use probation as an alternative to prison time less frequently than other states do. Sharp, *supra* at 36. Many women who do receive probation still end up incarcerated anyway, often for technical violations like failing a urinalysis. *Id.* at 36. *See also* Wright, *supra* at 78 (noting that a third of Oklahoma women placed on probation are re-arrested).

Disturbingly, state actors heavily opposed policy changes aimed at addressing this incarceration problem. In 2018, Oklahoma voters approved State Question 780 (SQ 780) which reclassified some low-level drug and theft offenses from felonies to misdemeanors. Stephen Galoob et al., *Oklahoma's State Question 780: Criminal Justice Reform and Resistance*, 1 Fed. Sent'g Rep. 182, 182 (2019). State prosecutors objected vigorously, with some circumventing the new measure by charging nonviolent drug offenses as felonies under different, more punitive statutes. *Id.* The year after SQ 780 took effect, Oklahoma saw a 7% *increase* in the number of women who were prosecuted for these nonviolent offenses. *Id.*

B. Women face criminal punishment for breaking with established sex stereotypes.

Social norms “expect women to be attentive and caring mothers, wives, and homemakers.” Nathalie Greenfield & Sandra Babcock, *Sex on Trial*, 46 Colum. J. Gender & L. 219, 274 (2026) (citing C. Nathan

DeWall *et al.*, *Understanding the Structure of Stereotypes of Women: Virtue and Agency as Dimensions Distinguishing Female Subgroups*, 29 *Psych. Women Q.* 396 (2005)). These beliefs permeate courts when women are accused of serious crimes, and reduced to gender tropes such as the bad mother, the promiscuous woman, and the manipulator. *See* Sandra Babcock, *Gendered Capital Punishment*, 31 *Wm. & Mary J. Race, Gender, & Soc. Just.* 1, 10-15 (2024) (describing the use of these tropes in the capital trial context).

For instance societal stereotypes persist in Oklahoma idealizing women as nurturing caregivers for whom individualism is unnecessary. *See*, e.g., Eva-Maria Schmidt *et al.*, *What makes a good mother? Two decades of research reflecting social norms of motherhood*, 15 *J. Fam. Theory & Rev.* 57, 62-63 (2023) (listing literature showing mothers as caregivers for children is a lasting social norm.). Conversely, there is a bias against “bad mothers,” either because they failed to protect their children from men’s behavior, or because their interactions with men are unbecoming of “good mothers.” Kristin Gorman & Barbara Fritsche, *The Good-Mother Stereotype: Stay at Home (or Wish That You Did!)*, 32 *J. Applied Soc. Psych.* 2190, 2190 (2002) (internal citations omitted); Greenfield & Babcock, *supra* at 274.

In Oklahoma, women are held to this standard from the time of pregnancy. Oklahoma ranks second in the nation for states who arrest and incarcerate people for pregnancy-related offenses. *Paths to Recovery: A Mixed-Methods Report on Pregnancy & Substance Use in Oklahoma*, Metriarch.⁴ In June of 2023, nearly a

⁴ <https://www.metriarchok.org/paths-to-recovery-clearing-the-path/>. (last visited Oct. 27, 2026).

third of pregnancy-related charges in the country were brought in Oklahoma, most of which alleged felony child neglect based on alleged substance use during pregnancy. Pregnancy Justice, *Oklahoma: The State of Pregnancy Criminalization in the First Year after Dobbs*, 1-2 (Sept. 2024).⁵ However, criminalizing substance use during pregnancy erroneously isolates blame for negative fetal health outcomes to the mother, without accounting for environmental and policy factors that research show are more impactful. Corney Lollar, *Criminalizing Pregnancy*, 92 Ind. L.J. 947, 951 (2017). *See also* Pregnancy Justice, *supra* at 2 (attributing Oklahoma’s high infant mortality rate to a “statewide crisis in women’s health and reproductive care” (citing *Child Abuse and Neglect Statistics State Fiscal Year 2023*, Okla. Dep’t Hum. Services, 1, 20 (Dec. 31, 2023))).

After a child is born, Oklahoma assigns women the role of primary caretaker by default and holds them presumptively responsible for protecting the child from harm. Oklahoma’s child abuse and neglect statutes makes it a felony offense to fail to protect a child from abuse. *See* Okla. Stat. tit. 21 § 843.5 (B) (enabling child abuse), (G) (enabling child sexual abuse). Facially, this law binds any “parent or other person” *Id.* Yet Oklahoma uses it almost exclusively against women. In 2020, the ACLU of Oklahoma reported that 93% of the defendants convicted under its failure to protect statute were women. Megan Lambert, *Oklahoma’s Failure to Protect Law and the Criminalization of Motherhood*, Report, ACLU

⁵ <https://www.pregnancyjusticeus.org/wp-content/uploads/2025/04/Oklahoma-Post-Dobbs.pdf>.

Oklahoma (Nov. 29, 2020).⁶ Conversely, the ACLU found not one case where a woman was the alleged perpetrator of child abuse, and her male partner was convicted under the failure to protect law. *Id.* In other words, Oklahoma punishes women both for their perceived failure as caretakers and, implicitly, for the underlying abuse committed by men.

Pursuing a woman for child abuse committed by someone *else* is mere pretext for gender discrimination. Oklahoma legislators publicly reasoned that the failure to protect law was meant to incentivize domestic violence survivors to leave their abusers. Lambert, *supra*; Allison Herrera, *How an Oklahoma Law Meant to Protect Children Fails Mothers*, Pulitzer Ctr. (Feb. 21, 2020)⁷. Domestic violence is, in fact, highly prevalent in Oklahoma; the state currently ranks number one in the nation for it. *Oklahoma Ranks No. 1 in Nation for Domestic Violence Prevalence*, Okla. City J. Rec. (July 7, 2026).⁸ Moreover, at least half of women convicted of failure to protect and incarcerated in Oklahoma were abused by the same men who had hurt their children. Lambert, *supra*. But given that women are the accused in almost every failure to protect case, the State essentially holds women responsible not only for men's actions towards her children, but also for her own abuse. *See*

⁶ <https://www.acluok.org/publications/oklahomas-failure-protect-law-and-criminalization-motherhood/>.

⁷ <https://pulitzercenter.org/stories/how-oklahoma-law-meant-protect-children-fails-mothers>.

⁸ <https://journalrecord.com/2026/07/07/oklahoma-ranks-first-domestic-violence-prevalence-study/>.

Babcock, *supra* at 56 (discussing the negative stigma attached to gender-based violence survivors in court.).

These women are left with no workable defense if the State alleges they enabled child abuse, because the premise on which the failure to protect law rests is flawed. Society judges women harshly for not leaving their abusers, but it is well documented the greatest risk of arises homicide when women separate from their abusers either because they fled or because the abuser is facing criminal charges. Deborah Epstein & Lisa Goodman, *Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences*, 167 U. Pa. L. Rev. 399, 439 (2019) (citing Douglas A. Brownridge, *Violence Against Women Post-Separation*, 11 Aggression & Violent Behavior 514, 519 (2006)). Nonetheless, a mother who remains with her abuser is considered a failure. See Christine Adams, *Mothers Who Fail to Protect Their Children from Sexual Abuse: Addressing the Problem of Denial*, 12 Yale L. & Pol'y Rev. 519, 529 (1994) (explaining the framework of state child abuse statutes that impose liability for exposure to a risk of child abuse).

As such, if a woman's abusive male partner harms her child—especially if he hurt her too—her actual knowledge is irrelevant. Lambert, *supra*. Prosecutors use the mere “fact that she survived violence as evidence that she knowingly permitted child abuse,” stating she should have *assumed* her partner might harm her child. *Id.* But if a woman says she did not know her child was abused, prosecutors allege she should be punished because a good caregiver should “notice immediately if anything is wrong.” *Id.*

At bottom, women accused of failure to protect in Oklahoma face a dangerous Catch-22 that forces a

woman to either act as the “good” mother who risks her own life to intervene in her abuser’s actions, or the “bad” mother who risks death in prison for surviving. *Cf. State v. Walden*, 293 S.E. 2d 780, 786 (1982) (rejecting rule of criminal liability that “would require every parent to exhibit courage and heroism which, although commendable in the extreme, cannot realistically be expected or required of all people.”). Both options hold women responsible for men’s conduct, and both potentially leave children exposed to the same abusers.⁹

Worse, “[o]ne in four women convicted of failure to protect will receive a longer sentence than the person responsible for abuse.” Lambert, *supra*. Considering the maximum penalty for failure to protect in Oklahoma is life in prison, *see* 21 Okla. Stat. § 843.5 (B), (G), a woman who committed no violent act also could receive a longer sentence people convicted of violent crimes like discharging firearms (maximum 20 years) and child stealing (maximum 10 years). Lambert, *supra*. This pattern alone suggests gender bias factors heavily into whether and how Oklahoma punishes women.

Oklahoma implemented a policy change that purportedly offered relief from over-punishment, but to little avail. The Survivors’ Act, passed in 2024, added domestic abuse as a mitigating factor at sentencing. 22 Okla. Stat. Ann. § 1090.1; *et seq.* The

⁹ The case of Kerry Lalehparvaran presents a clear example of this Catch-22. Lalehparvaran’s abusive boyfriend physically attacked her and her daughter, terrorizing them for hours before they were rescued. The man pleaded guilty to child abuse and received an 18-year prison sentence. Lambert, *supra*. Lalehparvaran received a 30-year sentence for failure to protect—12 years more than the man who victimized her. *Id.* See also Brief of Appellant at 47–49, *Lalehparvaran v. State*, No. F-2016-1169 (Okla. Crim. App. Aug. 4, 2017).

criteria for relief under the law are so narrow they exclude many survivors, “*even if a court agrees that the abuse was real.*” Anne Uhlman, *What Oklahoma Loses When Survivors Are Denied Justice*, Okla. Appleseed Ctr. For L. & Just. (Dec. 18, 2025).¹⁰ To date, only one woman has received sentence relief under this law. Pamela Colloff, *The Victims Who Fought Back*, ProPublica (Feb. 22, 2026).¹¹

C. Sex-role stereotypes are invoked gratuitously when women face trial for killing.

When women in Oklahoma are accused of murder, personal culpability is overshadowed by perceived transgressions against gender norms. Prosecutors tend to brazenly reference sex-role stereotypes during women’s murder trials with impunity, like in Ms. Andrew’s case. *See* Greenfield & Babcock, *supra* at 226 (describing how lawyers invoke sex stereotypes at trial). The focal point at trial becomes the ways in which the defendant deviated from societal expectations of women to be good mothers, good wives, or both. *See generally* Siobhan Weare, “*The Mad*”, “*The Bad*”, “*The Victim*”: *Gendered Constructions of Women Who Kill within the Criminal Justice System*, 2 *Laws* 337 (2013); Greenfield & Babcock, *supra* at 226-32. Prosecutors argue that these deviations show the defendant is “evil.” Under the evil woman framework, only bad women commit “masculine-type crimes,” like murder, and because they failed to adhere to more “feminine” gender roles these women deserve to give their lives as punishment. Jill Messing & John Heeren, *Gendered*

¹⁰ <https://www.okappleseed.org/blog/what-oklahoma-loses-when-survivors-are-denied-justice>.

¹¹ <https://www.propublica.org/article/oklahoma-survivors-act-do-mestic-violence>.

Justice: Domestic Homicide & The Death Penalty, 4 Feminist Criminology 170, 170-88 (2009); Elizabeth Reza, *Gender Bias in North Carolina's Death Penalty*, 12 Duke J. Gender L. & Pol'y 179, 208-10 (2005).

This storyline routinely appears in cases where prosecutors seek death sentences in a country where this punishment is now uncommon and for women, is even more rare. See Victor L. Streib, *Gendering the Death Penalty: Countering Sex Bias in a Masculine Sanctuary*, 63 Ohio St. L.J. 433, 434 (2002). Gender tropes were present in the cases of each of the three women Oklahoma has executed in the modern era.

Wanda Jean Allen was sentenced to death for the murder of her romantic partner Gloria Leathers. Rachel King & Judy Bellin, *The Forgotten Population: A Look at Death Row in the United States Through the Experiences of Women*, 28 ACLU 9 (Dec. 2004) (citation omitted).¹² Allen said Leathers was abusive and Allen had killed her in self-defense. Heat of passion killings do not typically result in death sentences. *Id.* But prosecutors, ignoring Allen's report that she was a survivor, encouraged gender bias by arguing that Allen was the "man" and "wore the pants" in the relationship, Allen was found guilty and sentenced to death. *Id.* Although her sentence was upheld, on appeal, one judge stressed that evidence concerning Allen's role as the "man" in the relationship had little or no legitimate probative value and instead served only to make her less sympathetic to the jury. *Id.*

Lois Nadean Smith received the death penalty for murdering her son's former girlfriend. Associated Press, *State Executes Oklahoma Woman*, L.A. Times

¹² <https://assets.aclu.org/live/uploads/publications/womenondeathrow.pdf>.

(Dec. 5, 2001).¹³ Smith shot and stabbed the victim, thus committing the kind of crime that conjures the trope of an evil woman. *See* Messing & Heeren, *supra* at 171 (explaining women who commit “masculine-type crimes” receive the harshest penalties). Smith involved her son in the attack, evoking tropes of the bad mother and the manipulative schemer. *See* Babcock, *supra* at 14-15 (noting the manipulative schemer stereotype paints women as “grasping” and “system-gaming”).

Marilyn Plantz was sentenced to death for the first-degree murder of her husband in an alleged murder-for-hire. *Bryson v. Ward*, 187 F.3d 1193, 1198 (10th Cir. 1999); Mary Atwell, *Gender Matters*, in *Slow Death of the Death Penalty: Toward a Postmortem 98-99* (Todd Peppers *et al.* eds., 2025). The court admitted sex-stereotype evidence that portrayed Plantz as “an insatiable money-grubber[],” a terrible mother, and an unfaithful wife. Atkins, *supra* at 99. The State’s evidence included testimony about Plantz’s sexual affair with her co-defendant and how she “entertained him and his friends at her home while her husband worked at night.” *Bryson*, 187 F.3d at 1198. Meanwhile, evidence introduced at trial that Plantz’ husband abused her was called into doubt. *Id.* at 1206.

Ms. Andrew’s case, when viewed alongside the cases of other women placed on Oklahoma’s death row, shows signs that the same gender bias brought about the same outcome for her. The State asked the jury to convict Ms. Andrew after calling her a “slut puppy” with “no twinge of conscience, who had sex on her husband over and over,” (Tr. R. 273), and the jury did.

¹³ <https://www.latimes.com/archives/la-xpm-2001-dec-05-mn-11847-story.html>.

Tr. R. 273. *See also supra* Part I (describing other stereotype evidence) admitted against Ms. Andrew.

III. SEX-ROLE STEREOTYPE EVIDENCE USED TO PROVOKE NEGATIVE GENDER BIASES IS NEVER HARMLESS.

Where, as here, courts in a state with a history of gender-based bias admit evidence tending to reinforce that bias, it undermines confidence that a trial was fair. This is because “when that irrelevant evidence touches upon an issue of passion or prejudice, it can do much worse than procure a decision on merely other-than-permissible grounds; rather, it can induce decision-making on affirmatively prohibited grounds.” *Tinsley*, 186 F.4th at 1262 (Federico, J., dissenting). The use of such evidence is particularly concerning in capital cases, where the penalty is so severe it warrants “special considerations.” *Furman v. Georgia*, 408 U.S. 238, 286 (1972) (Brennan, J., concurring). In these circumstances, the risk of arbitrariness is too great to assume anything other than undue prejudice.

A. Stereotype evidence invites juror bias.

Oklahoma’s assertion that erroneously admitted, sex-based character evidence was harmless contradicts finding on how biases affect jury decisions. Research shows, “[j]urors apply many facets of sex-role stereotypes in the courtroom, including perceptions of competence, influence, and capability made solely on the basis of sex.” Charles Elliott, *Juries, Sex, and Emotional Affect*, 35 L. & Psych. Rev. 37, 39 (2011). Jurors also to find defendants guilty whom they perceive negatively. Neil Rector et al., *The Effect of Prejudice and Judicial Ambiguity on Defendant Guilt Ratings*, 133 J. Soc. Psych. 651, 657-58 (1993). Because

“[i]t takes little evidence to confirm one’s stereotypes of an outgroup,” Elliott, *supra* at 38, stereotype evidence in a capital case is particularly dangerous.

Substantial evidence was presented against Ms. Andrew that would reaffirm stereotypes about women and permissible behaviors. Neither Oklahoma nor the Tenth Circuit appreciate that the issue is not the admission of a stray comment or two in a case with airtight evidence. Rather, Ms. Andrew’s jury heard information intended to make them question Ms. Andrew’s womanhood over the course of *weeks*. It is hard to imagine that evidence did not worsen jurors’ perception of her as a woman or influence the verdict.

B. Oklahoma courts do not acknowledge gender bias and are blind to resulting prejudice.

Twice now, the Tenth Circuit has failed to apply established federal law to determine whether Ms. Andrew received due process. Evidence introduced at Ms. Andrew’s trial concerning her sex life, hair and clothing choices, and fitness as a wife and mother, was irrelevant to the murder charge and thus inadmissible. E.g., *Andrew v. State*, 164 P.3d 176, 192 (Okla. Crim. App. 2007). Yet, courts deemed the admission of this evidence the State used to attack Ms. Andrew’s character at every stage of her trial harmless. *Id.*

The Tenth Circuit reduced the State’s sex stereotyping evidence and commentary during a month-long trial to just “ten testimonial passages” and one passage from the State’s closing argument. *Tinsley*, 164 F.4th at 797. Having isolated these few statements from the many, it decided that the concededly irrelevant statements were not unduly

prejudicial because they “did not coincide precisely with the central question before the jury.” *Id.* at 792 (internal citations and quotations omitted). In other words, the irrelevant evidence could not render Ms. Andrew’s trial unfair, because the evidence was irrelevant. This circular—and untrue—reasoning both misconstrued how courts evaluate due process claims, and implicitly condoned the gratuitous use of sex stereotype evidence to prejudice the jury against Ms. Andrew. *See supra* Part II. This Court has expressed particular concern about arbitrariness in the capital context. *See, e.g., Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam) (invalidating Georgia’s capital punishment scheme because it lacked safeguards against arbitrariness); *Gregg v. Georgia*, 428 U.S. 153 (1976) (upholding Georgia’s new capital punishment scheme on the grounds that it cured arbitrariness concerns stated in *Furman*).

The risk of arbitrary outcomes is not hypothetical. The Oklahoma Court of Criminal Appeals decided Ms. Andrew’s direct appeal one year before it ruled the opposite way in a similar case. Laura Dunkle was convicted and sentenced to life in prison for the first-degree murder of her fiancé. Like the trial court did at Ms. Andrew’s case, the court admitted irrelevant sex-stereotype evidence against Ms. Dunkle at trial. The State used that evidence to label Ms. Dunkle “a bad person, a bad mother, an unloyal fiancée, a self-absorbed manipulator, and . . . quite literally, a witch.” *Dunkle v. State*, 139 P.3d 228, 237 (Okla. Crim. App. 2006).

Unlike Ms. Andrew’s case, the Court of Criminal Appeals reversed Dunkle’s conviction, finding that

irrelevant evidence admitted at Dunkle’s trial was unduly prejudicial, in violation of the Due Process Clause. *Id.* at 246. The court rejected evidence connecting Dunkle to the practice of witchcraft because “our culture associates witchcraft with Satanic worship and other evil practices.” *Id.* at 241. The court refrained from mentioning that the cultural reference to “witches” has applied universally to women since the 1400s. Babcock, *supra* at 2. The court also found the admission of phone calls and letter contents from Dunkle to her paramour, which the State used to cast Dunkle as a manipulator, bad wife, and bad mother, generally “irrelevant and unduly prejudicial,” without acknowledging that these tropes are women-specific. *Dunkle*, 139 P.3d at 242, n. 69.

The stereotype evidence in Ms. Andrew’s case, too, was irrelevant to any issue. *White*, 604 U.S. at 90. But the Oklahoma court that vacated Dunkle’s conviction decided that evidence against Ms. Andrew’s case, which evoked similar gender tropes, was harmless.

The alleged acts of the defendants do not explain the court’s conflicting decisions. Dunkle, unlike Ms. Andrew, was accused of shooting the gun that killed her fiancé. A more plausible explanation for these case outcomes—and for the admission of sex-stereotype evidence to argue that a woman was inclined to kill—is that gender bias is so entrenched that Oklahoma courts cannot see it.¹⁴ And without

¹⁴ Oklahoma courts similarly hesitated to acknowledge a longstanding “unwritten law” that jurors were biased *in favor* of acquitting men who killed on suspicion that the victim engaged in adultery with those men’s wives. See Jeremy Weinstein, *Adultery, Law, and the State: A History*, 38 UC L.G. 195, 236-37 n. 296 (1986) (listing cases where Oklahoma courts expressed

acknowledging the true source of constitutional error, court rulings appear inconsistent and arbitrary.

IV. THIS COURT SHOULD GRANT CERTIORARI, AND ORDER MS. ANDREW A NEW TRIAL.

This court directed the lower court below to evaluate *the record*—not portions of the record—to consider whether the state court’s erroneous admission of irrelevant evidence rendered Ms. Andrew’s trial fundamentally unfair. *White*, 604 U.S. at 95-96. The Tenth Circuit was duty-bound to apply *Payne* to Ms. Andrew’s case and determine whether she received a fair trial. Whether unwilling or unable, the Tenth Circuit failed to complete that task.

When a court is charged with deciding whether evidence had an unduly prejudicial effect on the jury, it defies reason not to consider the whole record. The lower court’s decision to limit its review to ten passages addressed on appeal, only to then compare those ten passages to the rest of the record, compounds the unfairness of Ms. Andrew’s legal proceedings and mirrors Oklahoma’s disregard for of gender bias in the legal system. *See Tinsley*, 186 F.4th at 1260–61 (Federico, J., dissenting). Most federal circuits have recognized that a fundamental fairness determination requires a review of the whole record. *See Jeffries v. Morgan*, 522 F.3d 640, 644 (6th Cir. 2008); *Ruff v. Kincheloe*, 843 F.2d 1240, 1242 (9th Cir. 1988); *Derden v. McNeel*, 978 F.2d 1453, 1458 (5th Cir. 1992); *Henderson v. Norris*, 118 F.3d 1283, 1286 (8th Cir. 1997).

sympathy for men who killed in revenge, while denying a similar sentiment influenced jury verdicts).

Damningly, even the Oklahoma Court of Criminal Appeals recognizes that genuine due process review involves consideration of the entire record. In *Dunkle*, having noted evidence that the defendant practiced witchcraft was irrelevant and erroneously admitted, the Court of Criminal Appeals continued:

[T]he witchcraft references were part of a larger State pattern of attacking Dunkle's character, by portraying her as a frightening and unlikable person. Hence *we evaluate the potential prejudice from this evidence by considering it in combination with the other character evidence that is challenged on appeal.*"

Dunkle, 139 P.3d at 242 (emphasis added). Notably, some of the evidence the court addressed was even raised under a claim the defendant had waived. *Id.* Oklahoma's opposite position in this case makes little sense.

Ms. Andrew petitions this Court a second time, to address evidence that it acknowledged must be reviewed for undue prejudice. The Tenth Circuit's non-compliance erroneously denied her due process. Thus, amici urge this Court to review Ms. Andrew's case, vacate her conviction, and remand to the Oklahoma courts for a fair trial.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that the Court grant Brenda Andrew a writ of certiorari.

Respectfully submitted,

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