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 TWO ORGANIZATIONS AND TWELVE SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

KATHERINE M. MARQUART
Counsel of Record
GIBSON, DUNN & CRUTCHER LLP
333 SOUTH GRAND AVENUE
LOS ANGELES, CA 90071
(213) 229-7475
kmarquart@gibsondunn.com

ERIN MARIE CHOI
GIBSON, DUNN & CRUTCHER LLP
2001 Ross Avenue
Suite 2100
Dallas, TX 75201

MARK J. CHERRY
GIBSON, DUNN & CRUTCHER LLP
200 PARK AVENUE
NEW YORK, NY 10166

MONICA LIMENG WOOLLEY
TATE ROSENBLATT
GIBSON, DUNN & CRUTCHER LLP
1700 M STREET, N.W.
WASHINGTON, DC 20036

Counsel for Amici Curiae

TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. The Courts Below Recognized that the Prosecution Introduced Irrelevant Evidence About Ms. Andrew's Appearance, Sexuality, and Fitness as a Mother. 5

II. Scholarship Establishes the Sex-Stereotyping Evidence in Ms. Andrew's Trial Was Unduly Prejudicial and Tainted Her Sentence. 8

III. The Prosecution's Gender-Biased Evidence Infected the Central Questions of Ms. Andrew's Trial and Violated Due Process. 12

CONCLUSION 15

TABLE OF AUTHORITIES

Page(s)

Cases

Andrew v. State,
164 P.3d 176 (Okla. Crim. App. 2007) 3, 5

Andrew v. Tinsley,
164 F.4th 789 (10th Cir. 2026) 3, 5, 6, 14

Andrew v. White,
604 U.S. 86 (2025) 2, 3, 12

Buck v. Davis,
580 U.S. 100 (2017) 3, 4, 5, 13, 15

Ham v. South Carolina,
409 U.S. 524 (1973) 12

Moore v. Texas,
586 U.S. 133 (2019) 4

Payne v. Tennessee,
501 U.S. 808 (1991) 4, 12

Romano v. Oklahoma,
512 U.S. 1 (1994) 2

Woodson v. North Carolina,
428 U.S. 280 (1976) 4

Statutes

Tex. Code Crim. Proc. Ann. art. 37.071, § 2(b)(1) 13

Other Authorities

Amanda Potts & Siobhan Weare, *Mother, Monster, Mrs, I: A Critical Evaluation of Gendered Naming Strategies in English Sentencing Remarks of Women Who Kill*, 31 Int'l J. Semiotics L. 21 (2017) 9

Andrea L. Lewis & Sara L. Sommervold, *Death, But Is It Murder? The Role of Stereotypes and Cultural Perceptions in the Wrongful Convictions of Women*, 78 Alb. L. Rev. 1035 (2015) 10

Andrea Roth, *Defying DNA: Rethinking the Role of the Jury in an Age of Scientific Proof of Innocence*, 93 B.U. L. Rev. 1643 (2013) 11

Elizabeth Marie Reza, *Gender Bias in North Carolina's Death Penalty*, 12 Duke J. Gender L. & Pol'y 179 (2005) 8

Elizabeth Rapaport, *Some Questions About Gender and the Death Penalty*, 20 Golden Gate U.L. Rev. 501 (1990) 10

Jessica S. Henry, *Smoke But No Fire: When Innocent People Are Wrongly Convicted of Crimes That Never Happened*, 55 Am. Crim. L. Rev. 665 (2018) 12

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 (2005) 9

Joseph A. Colquitt, *Evidence and Ethics: Litigating in the Shadows of the Rules*, 76 Fordham L. Rev. 1641 (2007) 10

Julia Simon-Kerr, *Unchaste and Incredible: The Use of Gendered Conceptions of Honor in Impeachment*, 117 Yale L.J. 1854 (2008) 8

Melinda E. O'Neil, *The Gender Gap Argument: Exploring the Disparity of Sentencing Women to Death*, 25 New Eng. J. on Crim. & Civ. Confinement 213 (1999) 9

Melinda Tasca et al., *The Role of Parental Status and Involvement in Sentence Length Decisions: A Comparison of Men and Women Sentenced to Prison*, 65 Crime & Delinquency 1899 (2019) 11

Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 Rev. Gen. Psych. 175 (1998) 11

Ryan Elias Newby, *Evil Women and Innocent Victims: The Effect of Gender on California Sentences for Domestic Homicide*, 22 Hastings J. Gender & L. 113 (2011) 9

Sandra Babcock, *Gendered Capital Punishment*, 31 Wm. & Mary J. Race, Gender & Soc. Just. 1 (2024) 8

Valena E. Beety, *Reproductive Wrongful Convictions: The Making of "Unfit" Mothers*, 73 UCLA L. Rev. 592 (2026) 9

Victor L. Streib, *Death Penalty for Female Offenders*, 58 U. Cin. L. Rev. 845 (1990) 10

William J. Bowers & Wanda D. Foglia, *Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing*, 39 Crim. L. Bull. 51 (2003) 11

Yu Du, *The Effect of Defendant Gender on Jurors' Decision-Making*, 52 U. Balt. L. Rev. 1 (2022) 8

INTEREST OF *AMICI CURIAE*[1]

Amicus curiae, Legal Momentum, the Women's Legal Defense and Education Fund ("Legal Momentum"), was established in 1970 and is the nation's first and longest serving organization dedicated to advancing the rights of women and girls, including by identifying and eliminating gender bias in the courts.

Amicus curiae, Women's Law Project ("WLP") challenges overt and implicit gender bias and discrimination in many forms and in many contexts, and it has direct experience representing litigants subjected to gender-biased court proceedings in which invidious sex-role stereotypes were unfairly and prejudicially invoked.

The individual *amici curiae*, appearing in their individual capacity and listed in the Appendix to this brief, are researchers, advocates, and scholars from a variety of fields who are experts on gender bias and sex stereotyping, particularly in the criminal justice system. The individual *amici curiae* are: Jamie Abrams, American University Washington College of Law; Mary Atwell, Radford University; Valena Beety, Indiana University Bloomington Maurer School of Law; Sally Goldfarb, Rutgers Law School; Leigh Goodmark, University of Maryland Francis King Carey School of Law; Aya Gruber, University of Southern

---

[1] Pursuant to this Court's Rule 37.2, all parties have received timely notice of *amici*'s intent to file this brief. Pursuant to this Court's Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the brief's preparation or submission. No person other than *amici*, their members, or their counsel made a monetary contribution to the brief's preparation or submission.

California Gould School of Law; Mallika Kaur, University of California, Berkeley School of Law; Nancy Lemon, University of California, Berkeley School of Law; Cortney Lollar, Georgia State University College of Law; Mindy Mechanic, California State University, Fullerton; Amanda Potts, Cardiff University; and Susan Sharp, University of Oklahoma.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court is already familiar with the irrelevant, sexualized evidence that pervaded Ms. Andrew's prosecution and sentencing. Less than two years ago, it took the rare step of summarily vacating the Tenth Circuit's judgment in this very case. The Court recognized that "[t]he State spent significant time at trial introducing evidence about [Ms.] Andrew's sex life and about her failings as a mother and wife, much of which it later conceded was irrelevant." *Andrew v. White*, 604 U.S. 86, 87 (2025) (per curiam). It held that "clearly established law provided that the Due Process Clause forbids the introduction of evidence so unduly prejudicial as to render a criminal trial fundamentally unfair." *Id.* at 96. The Court then remanded with a specific charge. The Tenth Circuit was to decide, "separately for the guilt and sentencing phases," whether a fairminded jurist could disagree that the irrelevant evidence "so infected the trial with unfairness" as to render the resulting conviction or sentence "a denial of due process." *Id.* (quoting *Romano v. Oklahoma*, 512 U.S. 1, 13 (1994)).

Amici bring decades of legal and social-science scholarship to bear on that question. This research shows that evidence that portrays a female defendant as violating society's expectations of wives and mothers leads jurors to see her as immoral and especially

deserving of severe punishment. Women perceived to defy gender norms receive harsher sentences, up to and including death. The State's evidence here was designed to produce exactly that effect. As one judge of the Oklahoma Court of Criminal Appeals recognized, the State's "egregious . . . pattern" of evidence served only "to hammer home that Brenda Andrew is a bad wife, a bad mother, and a bad woman," and it "trivialize[d] the value of her life in the minds of the jurors." *Andrew*, 604 U.S. at 90 (quoting *Andrew v. State*, 164 P.3d 176, 206–07 (Okla. Crim. App. 2007) (Johnson, J., concurring in result in part and dissenting in part)).

The State spent a month casting Ms. Andrew as a hypersexual seductress and an unfit mother. Yet the Tenth Circuit panel did not ask whether that campaign rendered her sentencing fundamentally unfair. It asked instead whether the challenged evidence "coincided *precisely* with the central question[s] at sentencing," and it treated those questions as limited to whether the State had proven the statutory aggravating circumstances. *Andrew v. Tinsley*, 164 F.4th 789, 804 (10th Cir. 2026) (emphasis added) (quoting *Buck v. Davis*, 580 U.S. 100, 121 (2017)). Because the inflammatory sexual evidence was irrelevant to the prosecution's case, *see, e.g.*, *id.* at 799; *Andrew*, 164 P.3d at 192, the Tenth Circuit panel concluded that "a fair-minded jurist could reasonably conclude that the challenged evidence hadn't infected the sentencing proceedings." *Tinsley*, 164 F.4th at 804. But the fact that the sex-stereotyping evidence was presented to the jury despite its admitted irrelevance is precisely the problem; if the State had only introduced relevant,

non-prejudicial evidence, the instant petition would not be before this Court.

The panel's test is the result of a misreading of this Court's decision in *Buck v. Davis* and produces a perverse result. The more irrelevant and inflammatory the evidence, the less likely it is to "coincide" with any statutory question, and thus, under the Tenth Circuit's test, the less likely it is to be legally prejudicial. Under that framework, the due process protection recognized in *Payne v. Tennessee*, 501 U.S. 808 (1991), would rarely, if ever, apply where it is needed most.

The panel's reasoning also ignores what a capital sentencing jury actually decides. A capital jury does not stop at finding aggravators. It must make an individualized moral judgment about whether the person before it deserves to live. *See Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion). Evidence of Ms. Andrew's sexual history, her allegedly provocative clothing, and her motherhood goes to the heart of that sentencing decision.

If even the extreme gender-based stereotyping in this record cannot render a sentencing fundamentally unfair unless it maps directly onto an element or aggravating factor, the consequences reach well beyond Ms. Andrew. Prosecutors would be free to invite juries to sentence women to death for "who they are" rather than for "what they do." *Buck*, 580 U.S. at 123.

This Court has not hesitated to intervene a second time when a lower court on remand fails to give effect to its decision in a capital case. *See Moore v. Texas*, 586 U.S. 133 (2019) (per curiam). It should do so again here. The Court should grant the petition for two reasons. First, granting would ensure that the

protection this Court recognized in *Andrew v. White* is applied as the Court directed. Second, it would allow the Court to make clear that unduly prejudicial evidence grounded in sex-based stereotypes—as with evidence grounded in racial stereotypes, *Buck*, 580 U.S. at 123—must be assessed for its effect on the jury's ultimate decision: whether the defendant should live or die.

ARGUMENT

I. The Courts Below Recognized that the Prosecution Introduced Irrelevant Evidence About Ms. Andrew's Appearance, Sexuality, and Fitness as a Mother.

The prosecution elicited and encouraged testimony from multiple witnesses labeling Ms. Andrew as a temptress, an adulteress, an uncaring wife, and an unfit mother. The prosecution itself conceded that "most of this evidence was irrelevant to any issue in [Ms. Andrew's] case," *Andrew*, 164 P.3d at 192, and the Tenth Circuit has also recognized that much of this testimony was irrelevant to guilt or innocence. *Tinsley*, 164 F.4th at 799 ("We agree with the state court's assessment of this evidence as irrelevant.").

As to her appearance, the prosecution called witnesses to testify that Ms. Andrew wore: "very tight, very short [clothes] with a lot of cleavage"[2]; "short skirt[s], low-cut tops, [and] sexy outfits [that were] provocative"[3]; revealing clothing to a restaurant,

---

2 Trial Transcript at 323 (Guilt Phase).

3 *Id.* at 247 (Guilt Phase).

where she was called a "hoochie"[4]; and other irrelevant misogynistic details. The Tenth Circuit agreed that testimony the prosecution elicited to establish Ms. Andrew's "provocative appearance and flirtatious behavior" was irrelevant. *See Tinsley*, 164 F.4th at 799.

As to her sexual history,[5] the prosecution called Ms. Andrew's former sexual partners and other witnesses to testify that she, in the prosecution's words, had "no twinge of conscience" after she "had sex [with] [Mr. Andrew] over and over and over and . . . [kept] a boyfriend on the side."[6] The prosecution elicited testimony about Ms. Andrew's past affairs,[7] of alleged sexual overtures to her neighbor's adult sons,[8] that her husband would find lingerie he had never seen her wear,[9] that she repeatedly had sex in her car with other men,[10] that she would "rub up against" and

---

4 *Id.* at 323 (Guilt Phase).

5 The Tenth Circuit panel stated that certain parts of the record should not be considered because Ms. Andrew did not properly present or address them. *See Tinsley*, 164 F.4th at 797–98. Petitioner challenges that limitation, *see* Pet. i, 24–31. Because *amici*'s argument does not depend on how that question is resolved, *amici* do not rely on that evidence here. But that additional evidence only further demonstrates the extent to which the prosecution caused gender bias to permeate Ms. Andrew's trial. *See* Pet. 4–14.

6 Trial Transcript at 4124–25 (Guilt Phase).

7 *Id.* at 361–67 (Guilt Phase).

8 *Id.* at 278 (Guilt Phase).

9 *Id.* at 1101–02 (Guilt Phase).

10 *Id.* at 251 (Guilt Phase).

"touch" men,[11] and that she often paid for motel rooms where she would spend hours with a sexual partner who was not her husband.[12]

As to her motherhood, the prosecution repeatedly sought to elicit testimony that Ms. Andrew was not fit to raise her children by asking witnesses: "Does a good mother invite her boyfriends over while the children are in the home?"[13] "Where were the children when she was doing this rubbing against you and flirting with you?"[14] "Do you believe a good mother would run off with her boyfriend five days after her husband is killed?"[15] The message to the jury was clear: Ms. Andrew was a deviant woman and a bad mother, and by sentencing her harshly, the jury could free her children from her "spell."[16]

During closing arguments, the prosecutor dangled in front of the jury the thong Ms. Andrew wore on vacation after her husband had been killed, proclaiming: "The grieving widow packs *this* to go sleep in a hotel

---

11 *Id.* at 247 (Guilt Phase).

12 *Id.* at 249–51 (Guilt Phase). The prosecution reinforced this testimony by seeking to introduce into evidence, over Ms. Andrew's objection, a book found in her possession titled *203 Ways to Drive a Man Wild in Bed*. *Id.* at 2318 (Guilt Phase). The prosecution further referred to her as a "slut puppy" and not "a woman of God" in their closing arguments. *Id.* at 4124–25 (Guilt Phase).

13 *Id*. at 420 (Guilt Phase).

14 *Id.* at 248 (Guilt Phase). The witness answered: "I believe … the son was there when that was going on." *Id.* (Guilt Phase).

15 *Id.* at 4346 (Sentencing Phase).

16 *Id.* at 4411 (Sentencing Phase).

room with her children and her boyfriend."[17] The prosecutor pointed the jury to a suitcase packed by Ms. Andrew, and to a piece of underwear therein, allegedly for a beach vacation with her boyfriend, and said that the jury had "all the evidence" it needed to convict Ms. Andrew, repeating, "That's enough. That's enough."

II. Scholarship Establishes the Sex-Stereotyping Evidence in Ms. Andrew's Trial Was Unduly Prejudicial and Tainted Her Sentence.

Extensive scholarship shows that, when prosecutors "rely on gendered stereotypes" in a capital trial—portraying women as "hypersexual, immoral, and blameworthy" or turning "penalty phase proceedings" into "a referendum on [the defendant]'s mothering skills"—those stereotypes "inspire condemnation" against the defendant and make the death penalty more likely. Sandra Babcock, *Gendered Capital Punishment*, 31 Wm. & Mary J. Race, Gender & Soc. Just. 1, 11–16 (2024); *see* Elizabeth Marie Reza, *Gender Bias in North Carolina's Death Penalty*, 12 Duke J. Gender L. & Pol'y 179, 183–84 (2005).

Women face close scrutiny from jurors regarding how they conform to traditional gender roles, which dictate they should be "kind and loving," Yu Du, *The Effect of Defendant Gender on Jurors' Decision-Making*, 52 U. Balt. L. Rev. 1, 16–27 (2022), raise children, "remain chaste," and "remain true to [their] husband[s]," Julia Simon-Kerr, *Unchaste and Incredible: The Use of Gendered Conceptions of Honor in Impeachment*, 117 Yale L.J. 1854, 1862 (2008). And

---

[17] *Id.* at 4101–03 (emphasis added) (Guilt Phase).

women defendants are consistently "treated more severely than men for failing gendered expectations." Valena E. Beety, *Reproductive Wrongful Convictions: The Making of "Unfit" Mothers*, 73 UCLA L. Rev. 592, 657 (2026); *see also* Amanda Potts & Siobhan Weare, *Mother, Monster, Mrs, I: A Critical Evaluation of Gendered Naming Strategies in English Sentencing Remarks of Women Who Kill*, 31 Int'l J. Semiotics L. 21, 23 (2017) ("[F]emale defendants are processed within the criminal justice system in accordance with the crimes which they committed and the extent to which the commission of the act and its nature deviates from appropriate feminine behavior.").

As a result, when defendants like Ms. Andrew are depicted as "evil women" who committed "shockingly unladylike behavior," it encourages juries to punish them as "a way for society to set the outer limits which define gender roles." Ryan Elias Newby, *Evil Women and Innocent Victims: The Effect of Gender on California Sentences for Domestic Homicide*, 22 Hastings J. Gender & L. 113, 119–20 (2011) (cleaned up) (quoting Melinda E. O'Neil, *The Gender Gap Argument: Exploring the Disparity of Sentencing Women to Death*, 25 New Eng. J. on Crim. & Civ. Confinement 213, 221 (1999)). The prosecution improperly supplied evidence about Ms. Andrew's supposed noncompliance with gender norms in order "to dehumanize" her, "understanding that such prejudices may further motivate jurors to impose a death sentence." 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, 483 (2005). This evidence—designed to paint Ms. Andrew as a bad mother and sexual object worthy of punishment—is precisely the sort of evidence that heightens the risk

of biased death sentences, and thus went to the central question at issue in Ms. Andrew's capital trial. *See, e.g.*, O'Neil, *supra*, at 221.

For example, by soliciting testimony on Ms. Andrew's outfits, flirtatious behavior and adultery, and sexual appetite, the prosecution centered the sentencing phase of Ms. Andrew's trial not around aggravating and mitigating factors that would show whether the death penalty was the appropriate punishment, but on a perceived "character fault[,] such as promiscuity or immorality," that the jury could rely on "to find that the wife is a person of evil nature." Joseph A. Colquitt, *Evidence and Ethics: Litigating in the Shadows of the Rules*, 76 Fordham L. Rev. 1641, 1651 (2007). And once "convicted of capital murder," Ms. Andrew was "more likely to land on death row" if the jury felt she did not properly adhere to feminine stereotypes. Reza, *supra*, at 183 (quoting Elizabeth Rapaport, *Some Questions About Gender and the Death Penalty*, 20 Golden Gate U.L. Rev. 501, 506–07 (1990)); *see also* Andrea L. Lewis & Sara L. 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) ("Studies show that women who are perceived as gender inappropriate in court receive harsher sentences than women who appear more feminine."). The prosecution's drumbeat of evidence about Ms. Andrew's "unladylike behavior" sent the clear message to the jury that she was a "crazed monster[] deserving of nothing more than extermination." Victor L. Streib,

Death Penalty for Female Offenders, 58 U. Cin. L. Rev. 845, 878 (1990).[18]

Similarly, multiple studies have shown that individuals seen as "bad parents"—particularly bad mothers—tend to be sentenced more severely, with courts tending to impose more severe sentences against mothers than fathers. Melinda Tasca et al., *The Role of Parental Status and Involvement in Sentence Length Decisions: A Comparison of Men and Women Sentenced to Prison*, 65 Crime & Delinquency 1899, 1900 (2019). Prosecutors exploited this gender bias to paint Ms. Andrew as an uncaring mother who prioritized her sexuality over her children, and they invited the jury to judge Ms. Andrew's character, and whether she deserved the death penalty, through the lens of allegedly deficient motherhood. The trial included instances where the prosecution elicited testimony that

---

[18] Research suggests the jurors in Ms. Andrew's trial carried prejudicial evidence from the guilt phase into their sentencing decision. Of 1,201 interviewed capital jurors from 354 trials, "approximately half the jurors indicated that they decided what the punishment should be before the sentencing phase had even begun" and were either "absolutely convinced" or "pretty sure" about their initial decision to vote for death. William J. Bowers & Wanda D. Foglia, *Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing*, 39 Crim. L. Bull. 51, 55–57 (2003). Jurors—like all humans—are susceptible to reasoning through a "confirmation bias" that leads them to interpret evidence "in ways that are partial to existing beliefs, expectations, or a hypothesis in hand." Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 Rev. Gen. Psych. 175, 175 (1998). Confirmation bias can be so strong that it can lead jurors to reject objective, scientific exculpatory evidence in favor of story-confirming character evidence. Andrea Roth, *Defying DNA: Rethinking the Role of the Jury in an Age of Scientific Proof of Innocence*, 93 B.U. L. Rev. 1643, 1645–46 (2013).

Ms. Andrew allegedly left her children with workers at the house,[19] that she was not sufficiently attentive to them after the death of her husband,[20] and that she was heard yelling at her children.[21] "If women are stereotyped as nurturers and natural caregivers, then women who are perceived to have violated that role are re-cast as a 'flawed mother' . . . or even a 'monster.'" Jessica S. Henry, *Smoke But No Fire: When Innocent People Are Wrongly Convicted of Crimes That Never Happened*, 55 Am. Crim. L. Rev. 665, 693–94 (2018).

III. The Prosecution's Gender-Biased Evidence Infected the Central Questions of Ms. Andrew's Trial and Violated Due Process.

The prosecution's relentless focus on Ms. Andrew's appearance, sexuality, and motherhood was not simply irrelevant—it fundamentally distorted the jury's core task at both the guilt *and* sentencing phases of her trial, unduly prejudicing the jury against Ms. Andrew and violating her right to due process. This Court has "clearly established" that the "Due Process Clause forbids the introduction of evidence so unduly prejudicial as to render a criminal trial fundamentally unfair." *Andrew*, 604 U.S. at 96; *see also Payne*, 501 U.S. at 825. And this Court has long recognized that bias in a trial can create undue prejudice in violation of the Due Process Clause. *Ham v. South Carolina*, 409 U.S. 524, 526–27 (1973) (racial bias). As the scholarship detailed above makes plain, gender-biased evidence like that introduced in Ms.

---

19 Trial Transcript at 325–26 (Guilt Phase).

20 *Id*. at 419–20 (Guilt Phase).

21 *Id.* at 995 (Guilt Phase).

Andrew's case is more than capable of creating undue prejudice: such evidence has a direct, quantifiable impact on a jury's assessment of a female defendant's culpability and whether she deserves to be punished. *See supra* Part II.

The Tenth Circuit concluded otherwise by fundamentally misreading this Court's decision in *Buck v. Davis*. In *Buck*, the applicable state law permitted a jury to "impose the death penalty only if it found" (1) "a probability that the defendant would … constitute a continuing threat to society" and (2) that mitigating circumstances did not warrant a sentence of life imprisonment. 580 U.S. at 105–06 (quoting Tex. Code Crim. Proc. Ann. art. 37.071, § 2(b)(1)). Both parties in *Buck* had "focused principally on the first question," and thus this Court observed that whether Buck was likely to commit future violence had been "the central question at sentencing" in that case. *Id.* at 121. But *Buck* did not suggest that inflammatory evidence that related to something other than likelihood of future violence or an aggravating factor could not violate the Due Process Clause. By rejecting Ms. Andrew's claim on the grounds that none of the gender-biased evidence was relevant to specific aggravating factors identified by the prosecution, the Tenth Circuit appears to have confused what was a sufficient condition in *Buck* for a necessary one. The consequence of this erroneous holding is that even the most irrelevant, discriminatory, pernicious gender- or race-based evidence will be permitted *unless* it corresponds with a particular aggravating circumstance.

Ms. Andrew's case is a clear illustration of how wrong the Tenth Circuit's holding is, and this Court should correct it. While the gender-biased evidence at Ms. Andrew's trial may not have "coincided precisely"

with the aggravating factors alleged by the prosecution, *Tinsley*, 164 F.4th at 804, scholarship shows that it has a direct impact on the central question in the capital trial of any female defendant: how deserving of punishment is this woman, and should she be permitted to live?[22] *See supra* Part II. Each time evidence of Ms. Andrew's sexuality and allegedly poor motherly behavior was introduced, the prosecution effectively invited the jury to judge Ms. Andrew for her supposed failure to comply with expectations of what a woman should be—judgment that legal and sociological researchers have confirmed directly impacts a jury's decision of whether the death penalty is warranted. *Id.*

If left uncorrected, a narrow reading of the "central question[s]" in Ms. Andrew's trial creates the risk that future women defendants will be punished for improper, biased reasons with no recourse. *Tinsley*, 164 F.4th at 804. If even the most extreme gender bias will not be found prejudicial enough to disturb a sentence if it does not go directly to the elements of a crime or aggravating factors used in capital cases, that will create a dangerous precedent. Biased and irrelevant evidence could be used to taint a jury's mind—as research shows it inexorably does—with no opportunity for a reviewing court to correct the prejudice. And paradoxically, the more irrelevant evidence is, the further it will be from any "central question,"

---

[22] The risk of bias is so great—as the scholarship above shows—that the improper evidence may also have infected the jurors' analysis of subsidiary questions, such as whether Ms. Andrew acted in ways that were "especially heinous, atrocious, or cruel" or her motivations. *See Tinsley*, 164 F.4th at 804.

and the more likely it will be that women are sentenced for improper reasons without judicial relief.

As this Court has noted, even the possibility that a defendant "may have been sentenced to death in part because of his race" "is a disturbing departure from a basic premise of our criminal justice system: Our law punishes people for what they do, not who they are." *Buck*, 580 U.S. at 123. The same is true for gender bias. Because the overwhelming weight of scholarship confirms that the prosecution's evidence infected Ms. Andrew's trial with gender bias that tainted the jury's ability to assess the central questions at issue fairly, the Tenth Circuit's contrary conclusion warrants this Court's review.

CONCLUSION

For these reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted.

KATHERINE M. MARQUART
Counsel of Record
GIBSON, DUNN & CRUTCHER LLP
333 SOUTH GRAND AVENUE
LOS ANGELES, CA
(213) 229-7475
kmarquart@gibsondunn.com

ERIN MARIE CHOI
GIBSON, DUNN & CRUTCHER LLP
2001 Ross Avenue
Suite 2100
Dallas, TX 75201

MARK J. CHERRY
GIBSON, DUNN & CRUTCHER LLP
200 PARK AVENUE
NEW YORK, NY 10166

MONICA LIMENG WOOLLEY
TATE ROSENBLATT
GIBSON, DUNN & CRUTCHER LLP
1700 M STREET, N.W.
WASHINGTON, DC 20036

Counsel for Amici Curiae

October 29, 2026