

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 *AMICUS CURIAE* FRED T.
KOREMATSU CENTER FOR LAW AND
EQUALITY IN SUPPORT OF PETITIONER**

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INTEREST OF AMICUS CURIAE¹

The Fred T. Korematsu Center for Law and Equality (“Korematsu Center”) is based at the University of California, Irvine School of Law and advances justice through research, advocacy, and education.² Inspired by Fred Korematsu, who challenged wartime incarceration of Japanese Americans and later championed civil rights and civil liberties, the Korematsu Center works to promote racial equality and social justice and has a particular interest in ensuring fairness in the courts. Its amicus work has repeatedly addressed the danger that courts and government institutions may become active participants in perpetuating discrimination. That work includes advocacy against the use of stereotypes in adjudication as well as advocacy on issues involving gender, sexuality, and family.

This case implicates the same fundamental concerns animating the Korematsu Center’s mission and work. Perpetuation of gender stereotypes in trials invokes pernicious implicit biases that threaten the fundamental fairness of our criminal justice system. Amicus submits this brief to assist the Court in evaluating how such stereotypes operate silently and unconsciously in jury deliberations, including at the sentencing phase, and

1. No party or counsel for any party authored this brief in whole or in part, and no one other than amicus and its counsel made a monetary contribution 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.

2. The Korematsu Center does not, in this brief or otherwise, represent the official views of the University of California, Irvine School of Law.

demonstrates why the unfettered priming of such stereotypes by prosecutors threatens the fairness and integrity of the judicial process.

INTRODUCTION AND SUMMARY OF ARGUMENT

The last time Petitioner Brenda Andrew’s case was before this Court, this Court recognized the profound risk that the irrelevant, sex-shaming testimony and arguments repeatedly invoked by the prosecutor against Ms. Andrew (and allowed by the trial court), were potentially so “‘unduly prejudicial’ as to render her trial ‘fundamentally unfair.’” *Andrew v. White*, 604 U.S. 86, 96 (2025). On remand, the Tenth Circuit panel—confronted again with a month’s worth of examples of the prosecutor labeling Ms. Andrew as purportedly being a “slut,” reenacting intimate scenes with Ms. Andrew, and waving, metaphorically and literally, Ms. Andrew’s “sexy outfits” and “thong underwear” in the jury’s face (*see* Petition for Writ of Certiorari (“Pet.”) at 1)—nevertheless concluded that a fair-minded jurist, reviewing this record, could believe that this drumbeat of stereotypes “hadn’t infected” Ms. Andrew’s trial with fundamental unfairness. *Andrew v. Tinsley*, 164 F.4th 789, 804 (10th Cir. 2026). In so ruling, the panel’s core assumption appeared to be that, unless these stereotypes tracked a “central” question, a fair-minded jurist could comfortably believe that Ms. Andrew’s jury, in convicting and then sentencing her to death, simply set aside the “irrelevant” testimony and evidence based on these pernicious stereotypes in favor of rationally assessing the “real” evidence being presented.

As Petitioner has already pointed out, the panel's core assumption, as a matter of basic common sense, flies in the face of how human beings actually think. *See, e.g.*, Pet. at 25 ("The month of degrading testimony and argument about Ms. Andrew's character as a woman meant that she arrived at the penalty phase at a deficit, with jurors already convinced of her lack of humanity[.]"). In this brief, amicus seeks to complement Petitioner's common-sense response with support from cognitive psychology and social science research showing that the prosecutor's repeated and relentless invocation of sex-shaming stereotypes—far from being easily set aside by the jurors—more likely resulted in the jurors disregarding mitigating or exculpatory evidence in order to punish Ms. Andrew as a "bad" woman, a "bad" mother, and a "bad" wife.

For decades, research has shown that the invocation of invidious stereotypes "primes," or triggers, implicit bias schemas that operate instantaneously, automatically, and unconsciously to disrupt and short-circuit rational decision-making processes. At least two such schemas, both well documented in academic literature, were invoked here by the prosecutor's stereotypes: "bad" women should be punished, and "bad" women are "not like us" and thus are undeserving of our empathy.

Furthermore, these implicit bias schemas, once primed by the prosecutor, have been found to displace rational analysis, decision-making, and recall processes. Such primed schemas promote confirmation bias—causing jurors to overweight supporting evidence and underweight, or even go out of their way to challenge, countervailing or mitigating evidence. And such primed

schemas not only disrupt attention and recall of relevant evidence but have even been found to cause the brain to displace accurate memories with *false* ones that match the stereotype.

This Court has acknowledged Ms. Andrew deserves, under the Due Process Clause, a fundamentally fair trial. *Andrew*, 604 U.S. at 96. Amicus’s brief shows how the prosecutor’s relentless barrage of pernicious stereotypes not only deprived her of one, but put her at “unacceptable risk” that her sentence of death was “meted out arbitrarily or capriciously or through whim or mistake.” *Turner v. Murray*, 476 U.S. 28, 34 (1986) (cleaned up). Amicus joins Ms. Andrew in respectfully requesting that the Court grant her petition for certiorari.

ARGUMENT

I. The Power of Implicit Bias Schemas, Especially When Primed, Has Long Been Understood to Distort Rational Human Decision-Making Processes.

Cognitive psychologists have long understood that “much of human mental life,” including “attention, perception, encoding, storage, and retrieval of information to and from memory,” operates “implicitly and automatically—outside of conscious awareness and control.” Jack Glaser, *Implicit Bias, Science, and the Racial Justice Act*, 29 Berkeley J. Crim. L. 17, 18 (2024). Because “humans are constantly bombarded with information,” our brains, by necessity, rely on “schemas” to “constantly simplify and process the information.” Yvonne Elosiebo, *Implicit Bias and Equal Protection*:

A Paradigm Shift, 42 N.Y.U. Rev. L. & Soc. Change 451, 475 (2018) (cleaned up). A schema is a “cognitive structure that represents knowledge about a concept or type of stimulus, including its attributes and the relations among those attributes”; in other words, it is a mental model or blueprint for how we expect something to be or behave. Jerry Kang, *Trojan Horses of Race*, 118 Harv. L. Rev. 1489, 1498 (2005) (citation omitted).

Schemas are used as mental shortcuts to fill gaps in “conditions of uncertainty, or the unavailability or indeterminacy of important information.” Dale Larson, *A Fair and Implicitly Impartial Jury: An Argument for Administering the Implicit Association Test During Voir Dire*, 3 DePaul J. Soc. Just. 139, 148 (2010). They play an invisible, yet omnipresent, role in everyday decision-making, from the essential to the mundane. In going out to dinner, for instance, we rely on schemas when we cross the street when the light turns green (schema: “green light means go”),³ when we instinctively make room while passing the large dog on the sidewalk (schema: that “large German shepherd is likely to be vicious”),⁴ and when we wait to be seated at a restaurant (schema: “in restaurants, the host seats you”).⁵ Such schema-based thinking occurs

3. Linda L. Berger, *Metaphor and Analogy: The Sun and Moon of Legal Persuasion*, 22 J.L. & Pol’y 147, 161 (2013).

4. Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 Cal. L. Rev. 969, 974 (2006).

5. Ronald Chen & Jon Hanson, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S. Cal. L. Rev. 1103, 1138 (2004); *see also* Yanine D. Hess & Cynthia L. Pickett, *Social cognition and attitudes*, Noba Project, <https://nobaproject.com/modules/social-cognition-and-attitudes>.

“nearly instantaneously,” Elosiebo, *supra*, at 475, and operates “automatic[ally]” rather than using “cognitive effort.” Ronald Chen & Jon Hanson, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S. Cal. L. Rev. 1103, 1143 (2004). No deliberation or logic is required.

Schemas, however, can also operate to impair, rather than complement, rational deliberation. This tendency is particularly so with respect to what researchers call implicit bias, “an unconscious favoritism toward or prejudice against people of a certain race, gender, or group that influences one’s own actions or perceptions.” Nat’l Acads. of Scis., Eng’g & Med., *The Science of Implicit Bias: Implications for Law and Policy: Proceedings of a Workshop—in Brief* (2021), 1 <https://doi.org/10.17226/26191>. Like other schemas, implicit bias operates on the bases of immediate, unconscious associations between groups, on the one hand, and conclusions, on the other, that “shortcut” rational processes. *See id.* Such implicit bias schemas are “both pervasive and deep,” and they affect “perception, forming of impressions, processing of information, use of information, and retrieval of information.” Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 Conn. L. Rev. 827, 834 (2012) (cleaned up).

Critically, implicit bias impacts even “positions arrived at after careful consideration.” *Id.* This circumstance is particularly so when implicit biases are “primed,” meaning when information is presented “in ways that trigger associations with other ideas.” Mary Nicol Bowman, *Confronting Racist Prosecutorial Rhetoric at Trial*, 71

Case W. Res. L. Rev. 39, 57 (2020). “Our brains interpret new information by fitting it into existing categories, particularly categories that have been recently accessed, and [p]riming is a way of influencing the categories that are at the forefront of our brains.” *Id.*

Priming can operate quickly and unconsciously. Research has shown, for instance, that even flashing a Black face for 200 milliseconds—too fast for the conscious brain to recognize the content—could still activate racial stereotypes associated with African Americans.⁶ See Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. Va. L. Rev. 307, 327-28 (2010). And at least one study has shown that priming stereotypes “affected the way” participants “made judgments” as to a person’s “traits, culpability, and likelihood of reoffending.” *Id.* at 329-31.

6. This Court has similarly acknowledged, in cases like *Buck v. Davis*, 580 U.S. 100 (2017), that when it comes to the harmful impact of stereotypes, “[s]ome toxins can be deadly in small doses.” *Id.* at 122. Here, of course, the prosecutor used far more than a “small dose” of sex-shaming stereotypes, further magnifying the damage. See, e.g., Esra Hatice Oğuz Taşbaş & Christian Unkelbach, *Repeating Stereotypes: Increased Belief and Subsequent Discrimination*, 52 Eur. J. of Soc. Psych. 528, 535 (2022) (explaining the mere repetition of “stereotypes about groups increases belief in these stereotypes and influences decisions about members of the respective groups.”).

II. The State’s Drumbeat of Sex-Shaming Stereotypes Primed Ms. Andrew’s Jury to View Ms. Andrew as a “Bad Woman” Automatically Deserving of Punishment, Including Death.

Where, as in Ms. Andrew’s trial, prosecutors repeatedly present negative sex-shaming stereotypes—characterizing Ms. Andrew as a “bad” woman, “bad” wife, and “bad” mother—the jury is primed with schemas that, automatically and unconsciously, trigger beliefs and associations saying that such “bad” women deserve punishment and should be denied our empathy.

A. Schema Number 1: A “bad woman” deserves to be punished, in contravention of the premise that our justice system punishes people for what they do, not for who they are.

A fundamental premise of our criminal justice system is that “[o]ur law punishes people for what they do, not who they are.” *Buck v. Davis*, 580 U.S. 100, 123 (2017). This Court has observed that certain types of evidence—for instance, evidence of “bad character” offered for propensity purposes—are excluded precisely because they create the risk of the opposite result: “that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment.” *Old Chief v. United States*, 519 U.S. 172, 181 (1997) (cleaned up). Such a risk is intolerable; it “creates a prejudicial effect that outweighs ordinary relevance.” *Id.*

The prosecutor’s invocation of the “bad” woman, “bad” wife, and “bad” mother stereotypes directly undermined

this fundamental premise of fairness. The prosecutor unnecessarily invoked schemas that raised exactly the intolerable risk articulated in *Old Chief*: the risk that Ms. Andrew was convicted and sentenced to death not for committing the crime charged, but for being a “bad” woman.

It is well and persuasively documented that women in the United States are expected, by men and women alike, to fulfill the role of “wife and mother,” to act as “natural caregivers,” and to be “passive, cooperative, and nonthreatening.” 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, 1039–40 (2015); see also Melissa L. Breger, *The (In)visibility of Motherhood in Family Court Proceedings*, 36 N.Y.U. Rev. L. & Soc. Change 555, 563 (2012) (“many people subscribe to gendered stereotypes that suggest that all women inherently possess particular traits (*e.g.*, passive, gentle, nurturing), while all men possess other inherent traits (*e.g.*, assertive, strong, competent)”).

“Good” women (*i.e.* women who act in conformance with these gender stereotypes), “are looked upon favorably”; “bad” women, or women who so fail to conform, “are considered abnormal.” Pauline K. Brennan & Abby L. Vandenberg, *Depictions of Female Offenders in Front-Page Newspaper Stories: The Importance of Race/Ethnicity*, 2 Int’l J. Soc. Inquiry 141, 144 (2009); see also Lewis & Sommervold, *supra*, at 1040 (“People look favorably upon women who behave consistently with these stereotypes, and shun those who do not.”). Predictably, gender stereotypes have also negatively affected women in the criminal justice system. Women

“who are viewed to have stepped outside of cultural expectations of femininity” are treated more harshly in the criminal justice system than women who “embody traditional feminine ideals.” Kelsey M. Collins, *Too Feminine for Execution?: Gender Stereotypes and the Media’s Portrayal of Women Sentenced to Death* 8 (2022) (Ph.D. dissertation, Univ. of S.C.), <https://scholarcommons.sc.edu/etd/7080>; see also Lewis & Sommervold, *supra*, at 1045 (“when women are seen as unfeminine they are treated more harshly than women who stay within the bounds of ‘womanhood’”).

Two non-exclusive categories of women are seen as especially “bad” and deserving of punishment: sexually promiscuous women and bad mothers. Sexually promiscuous women are perceived as especially “immoral, and blameworthy,” in part because they are often cast as ruthless and manipulative. Sandra Babcock, *Gendered Capital Punishment*, 31 Wm. & Mary J. Race, Gender & Soc. Just. 1, 11 (2024). Because “women’s honor and credibility” have historically been tied to “virginity, chastity, [and] fidelity to a husband[,]” women who fail to conform to gendered sexual norms are perceived as especially dishonorable and untruthful. Julia Simon-Kerr, *Unchaste and Incredible: The Use of Gendered Conceptions of Honor in Impeachment*, 117 Yale L.J. 1854, 1857, 1860-64 (2008). Such women are seen as “deviant.” See Siobhan Weare, “*The Mad*”, “*The Bad*”, “*The Victim*”: *Gendered Constructions of Women Who Kill Within the Criminal Justice System*, 2 Laws 337, 346-47 (2013). Their sexual conduct is viewed to “prove[] a character fault—such as promiscuity or immorality,” that “potentially could be used by the jury to find that the defendant is an immoral or evil person.” Joseph A.

Colquitt, *Evidence and Ethics: Litigating in the Shadows of the Rules*, 76 Fordham L. Rev. 1641, 1651 (2007). And from there, the jury could conclude that “as a bad person she is more likely to commit criminal acts such as murder than is a person of good character.” *Id.*

Further, “[s]ociety considers women who fail to meet the ideal of motherhood deviant or criminal.” Weare, *supra*, at 349. “Much of society still believes that women should be wives and mothers”; “good mothers” are expected to be “nurturing, emotional, and non-aggressive” and “good wives” are expected to be “passive, cooperative, chaste, and dependent on their husbands.” Brennan & Vandenberg, *supra*, at 144. Women who defy these expectations and are therefore perceived as “bad mothers” and are seen as especially “nonfeminine”, “cold,” “callous” and therefore also “bad women” who are worthy of punishment. Lewis & Sommervold, *supra*, at 1040-42, 1049-50.

Prosecutors regularly prime these schemas against female defendants in death row cases, with predictable results. One study, for example, found that prosecutors “introduced sexualizing evidence in 71% of” the trials of women sentenced to death between 1990 and 2022, ranging from evidence “regarding women’s sexual experiences to judgments of their appearance.” Nathalie Greenfield & Sandra L. Babcock, *Sex on Trial*, 46 Colum. J. Gender & L. 219, 221 (2026) (study); *see also* Babcock, *supra*, at 11, 13 (study demonstrating that in criminal trials of female defendants, prosecutors “repeatedly invoked women’s sexual expression—including their choice of undergarments, the number of sexual partners they’ve had, and their adulterous relationships” and “elicit[ed]

anecdotes that illustrate women's negligence and poor parenting.""). This phenomenon is consistent with the long history of prosecutors "'othering' defendants 'as someone outside of the moral community' to 'induce a negative emotional response towards the defendant.'" Bowman, *supra*, at 61 (citations omitted).

These are exactly the sorts of schemas that the State here invoked when the prosecutor repeatedly slapped labels like "slut" and "hoochie," among other sex-shaming stereotypes, on Ms. Andrew. These irrelevant labels served a purpose: they primed the jury, both at the guilt phase and the sentencing phase, to view Ms. Andrew not as a defendant potentially worthy of mercy, but as a "bad" woman, a "bad" wife, and a "bad" mother who is automatically "deviant," "immoral," "blameworthy," and "criminal," and thus someone who should be punished accordingly.

B. Schema Number 2: A "bad woman" is not worthy of empathy and jurors need not feel as responsible if they were to sentence her to death.

A second schema arises from priming the jury to believe the defendant is a "bad" woman: "bad" women are outsiders and not worthy of empathy. Where female defendants are perceived as unfeminine, it invites "the sentencing judges and juries to put aside any image of them as 'the gentler sex' and to treat them as 'crazed monsters' deserving of nothing more than extermination." Victor L. Streib, *Death Penalty for Female Offenders*, 58 U. Cin. L. Rev. 845, 878 (1990). This schema of "othering" becomes particularly salient when, as in this case, it

impacts the substantial discretion granted to jurors in carrying out the “awesome responsibility” of exercising the “power to determine the appropriateness of death.” *Caldwell v. Mississippi*, 472 U.S. 320, 330 (1985).

This Court has recognized, time and again, that levying a sentence of death is qualitatively different in “both its severity and its finality” than any other punishment. *Gardner v. Florida*, 430 U.S. 349, 357 (1977) (collecting cases). This process of asking a jury to render judgment that another member of their community “deserves the sentence of death,” *Turner*, 476 U.S. at 34, calls on the jury “to make a very difficult and uncomfortable choice.” *Caldwell*, 472 U.S. at 333. It places jurors in a “very unfamiliar situation” in which “[t]hey are confronted with evidence and argument on the issue of whether another should die,” asks them “to decide that issue on behalf of the community,” and gives them “only partial guidance as to how their judgment should be exercised, leaving them with substantial discretion.” *Id.* Because no decision carries graver consequences, juror discretion is viewed as an essential safeguard in capital sentencing. “Belief in the truth of the assumption that sentencers treat their power to determine the appropriateness of death as an ‘awesome responsibility’ has allowed this Court to view sentencer discretion as consistent with—and indeed as indispensable to—the Eighth Amendment’s ‘need for reliability in the determination that death is the appropriate punishment in a specific case.’” *Id.* at 330.

The corollary of this grant of discretion, however, is a demand—as a condition of “vital importance” to a fundamentally fair trial—that the jury’s decision to sentence another to death not only “be,” but also “appear

to be,” carried out “based on reason rather than caprice or emotion.” *Gardner*, 430 U.S. at 358. “Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity” for evidence of prejudice “to operate but remain undetected.” *Turner*, 476 U.S. at 35. This Court has overturned sentences of death, for instance, where the prosecutor lightened the load on jurors for feeling the “awesome responsibility” of their power to sentence another to death by assuring the jurors that an appellate court, rather than the jury, would bear the ultimate responsibility for the decision. *Caldwell*, 472 U.S. at 330-333, 341. Likewise, courts have “struck down capital sentences” when the circumstances under which death was imposed created an “unacceptable risk” that death was “meted out arbitrarily or capriciously or through whim or mistake.” *Turner*, 476 U.S. at 35-36 (cleaned up).

Priming the jury, repeatedly, with a ceaseless stream of irrelevant accusations of a defendant as a “bad” woman—as the prosecutor did here—raises precisely the specter of juror decision-making based upon “caprice” or “emotion,” rather than upon reason, that this Court has unequivocally held to be unacceptable. *Gardner*, 430 U.S. at 358; *see also Buck*, 580 U.S. at 121 (finding unacceptable the risk of a jury sentencing a defendant to death based on a “noxious” and “powerful racial stereotype—that of black men as ‘violence prone’”).

Studies have shown that if implicit bias leads a juror to perceive the defendant as different and as an “other,” that juror will perceive the defendant more negatively, be less inclined to trust her, and be less able to empathize with her. *See Sheri Lynn Johnson et al., When Empathy Bites*

Back: Cautionary Tales from Neuroscience for Capital Sentencing, 85 Fordham L. Rev. 573, 574 (2016). Priming a jury to view a defendant—like Ms. Andrew here—as a “bad” woman who failed to conform to traditional gender norms “others” her by highlighting her failure to conform to gendered expectations. Academic studies analyzing the women on death row show they “are not necessarily the women who have committed the worst murders. Instead, they are women who do not conform to sexist notions society has proscribed [sic] for women.” Joey L. Mogul, *The Dykier, the Butcher, the Better: The State’s Use of Homophobia and Sexism to Execute Women in the United States*, 8 N.Y. City L. Rev. 473, 482 (2005). These women tend to be portrayed as “unfeminine, aggressive, [possessing] poor mothering skills, or [being] sexually promiscuous.” *Id.* The criminal justice system thus is used to reinforce gender norms by “reserving the harshest sentence, capital punishment, for those that violate these prescribed characteristics.” Collins, *supra*, at 8; see also Babcock, *supra*, at 9 (“harsh public punishment of a few ‘fallen’ girls and women as witches and whores has always been integral to enforcement of the boundaries of the ‘good’ girls’ and women’s place in patriarchal society.”) (quoting Meda Chesney-Lind & Lisa Pasko, *The Female Offender* 2, 2-3 (2004)).

By priming the jury to see Ms. Andrew as a “bad woman,” the prosecutors invoked long-standing stereotyped norms likely to lessen the weight jurors feel in imposing the death penalty.

III. The State's Non-stop Parade of Sex-Shaming Stereotypes Also Disrupted and Short-Circuited the Jury's Evaluation of Evidence and the Rational Decision-Making Processes that Jurors Are Expected to Follow as Decisionmakers in Fundamentally Fair Trials.

Research has further shown that priming jurors with sex-shaming stereotypes distorts how jurors gather, weigh, remember, and even generate the evidence on which they base their decisions, including verdict, conviction, and through the sentencing phase. These distortions in Ms. Andrew's case—especially given the prosecutor's repeated invocations of such stereotypes from the beginning to the end of the trial and the sentencing process—undermined the rational decision-making processes that were essential to her receiving a fundamentally fair trial and sentencing.

A. Priming implicit bias schemas promotes the corrosive effects of confirmation bias in the jury's assessment and weighing of evidence.

First, priming the schemas of implicit bias exacerbates the well-known psychological phenomenon known as “confirmation bias”—a process whereby the brain unconsciously selects and interprets evidence to support a previously held belief. *See* Barbara O'Brien, *Prime Suspect: An Examination of Factors That Aggravate and Counteract Confirmation Bias in Criminal Investigations*, 15 Psych. Pub. Pol'y & L. 315, 316-17 (2009).

When a juror has been primed, for instance, with the schema that “bad” women are to be punished and

are not worthy of empathy or mercy, the risk exists that confirmation bias will push the juror to process “evidence. . . in a manner that bolsters their initial assumptions.” Schuyler Leffler, Note, *All Is Fair If We Pretend It Is: How the Cognitive Limitations of the Brain Undermine Our Judicial System*, 87 U. Pitt. L. Rev. 219, 229 (2025) (citation omitted); see also Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 Wis. L. Rev. 291, 312 (2006) (explaining how, with confirmation bias, “people also tend to give greater weight to information that supports existing beliefs than to information that runs counter to them.”); Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 Rev. Gen. Psych. 175, 178 (1998) (“Closely related to the restriction of attention to a favored hypothesis is the tendency to give greater weight to information that is supportive of existing beliefs or opinions than to information that runs counter to them.”).

Confirmation bias can cause jurors to construe ambiguous facts to be consistent with their primed implicit bias schema. In one study, participants read a one-paragraph description of an armed robbery and then evaluated twenty pieces of evidence, some of which were ambiguous (*e.g.*, the person was seen shopping in the store two days before the robbery). Levinson & Young, *supra*, at 332-34. Some of the participants were primed with pictures of a suspected perpetrator with a dark skin tone; others were primed with pictures of the same person with a lighter skin tone. *Id.* at 333. The researchers found that the participants primed with pictures of the darker-skinned perpetrator tended to judge ambiguous evidence as “significantly more indicative of guilt” (*id.* at 337) (*e.g.*,

being seen at the store was evidence of “casing the joint” rather than “simply shopping”). *Id.* at 334.

In addition to causing people to ***overweight*** evidence that supports existing beliefs, confirmation bias simultaneously causes people to ***underweight***, or even go out of their way to challenge, evidence that contradicts these same existing beliefs. “[P]eople do not respond to information at variance with their beliefs by simply ignoring it, but rather by working hard to examine it critically so as to undermine it.” Findley & Scott, *supra*, at 313. For instance, “people tend to use different criteria when they evaluate data or conclusions that they desire” as compared to “conclusions they disfavor.” *Id.* For “preferred conclusions,” people tend to “ask only that the evidence not force us to believe otherwise,” *i.e.*, “can I believe this?,” but for “disfavored conclusions,” people move the goalposts to “ask whether the evidence *compels* such a distasteful conclusion,” *i.e.*, “*must* I believe this?” *Id.* at 313-14.

Indeed, the force of confirmation bias is so powerful that it can lead factfinders to reject even scientific evidence that “wholly undermines their initial hypotheses.” *Id.* at 314. This pattern is due to a psychological mechanism called “belief persistence,” which renders coherent narratives of guilt difficult to abandon even if compelling evidence surfaces to contradict the narrative. *See id.* at 314-16. Numerous studies have shown that “these cognitive biases help explain what went wrong in many wrongful conviction cases.” *Id.* at 316. For example, Professor Andrea Roth has documented cases in which juries returned guilty verdicts “notwithstanding exculpatory DNA test results,” crediting “testimonial

evidence, however weak,” even when “contradicted by highly compelling evidence of innocence.” See Andrea Roth, *Defying DNA: Rethinking the Role of the Jury in an Age of Scientific Proof of Innocence*, 93 B.U. L. Rev. 1643, 1643 (2013).

Where confirmation bias has been shown to prevail over even DNA evidence, there is every reason to conclude that the same phenomenon here—anchored by primed implicit bias schemas associating Ms. Andrew with being deserving of punishment and undeserving of empathy because of her failure to conform with gender norms—would have disrupted and short-circuited the jury’s fair consideration of the evidence that Ms. Andrew presented in her defense.

B. Primed implicit bias schemas disrupt, displace, and even potentially replace memories of evidence and testimony.

Primed implicit bias schemas also distort what jurors notice and what they remember (including “remembering” things that simply did not occur). Where a jury has been primed to view the defendant as a “bad woman” who should thus be punished and denied empathy, social science research shows that jury will recall (potentially falsely) evidence that confirms these predetermined schema-based outcomes and they will likely forget or disregard evidence that contradicts those outcomes, including mitigating evidence that could support the jury granting mercy to the defendant.

Empirical research demonstrates “that people not only seek confirming information, they also tend to recall

information in a biased manner.” Findley & Scott, *supra*, at 312. In one study, researchers found that “participants in mock jury trials were more likely to remember statements consistent with their chosen verdict as having been presented as trial evidence than statements that were inconsistent with this verdict. This was true both of statements that had been presented (hits) and ***of those that had not.***” Nickerson, *supra*, at 194 (emphasis added).

Because trial evidence concerns human behavior, which is “fundamentally ambiguous,” jurors rely on mental shortcuts, through schemas, “that enable them to make inferences and predictions from what scanty and unreliable data are available.” Larson, *supra*, at 149 (citations omitted). When this mental shortcutting is activated, the decision maker is more likely “to make broad overgeneralizations about individuals” and to make “assumptions about them implicitly based off of cultural and social cues that we have learned through various interactions with the world.” Anona Su, *A Proposal to Properly Address Implicit Bias in the Jury*, 31 Hastings Women’s L.J. 79, 81–82 (2020).

In one study compiled by the National Center for State Courts, mock jurors in whom negative stereotypes about a defendant had been activated “provided higher estimates of the defendant’s guilt, more severe punishment, and better memory for incriminating evidence than participants with positive activated stereotypes.” Pamela M. Casey et al., *Helping Courts Address Implicit Bias: Resources for Education*, Nat’l Ctr. for State Cts., app. G, at G-20 (2012). Another study found that when a transgression matched a cultural stereotype, participants judged it “as more likely to recur and as deserving of more severe

punishment,” and “tended to recall less crime-relevant information about the person’s life circumstances.” *Id.* at G-17. In short, even where jurors do not outright discount evidence because it is inconsistent with the implicit bias schemas that have been primed by the prosecutor, they simply recall stereotype-consistent information more easily and consistently.

Primed implicit bias schemas can even lead jurors to decide a case on something other than the evidence presented at trial, including false memories of what was said or shown. See Mikah K. Thompson, *Bias on Trial: Toward an Open Discussion of Racial Stereotypes in the Courtroom*, 2018 Mich. St. L. Rev. 1243, 1272 (2018). People “are more likely to generate false memories when the contents of these memories are consistent with stereotypes they have about the subject, actor, and situation of the memory.” *Id.* (citation omitted). In one study, participants not only recalled stereotype-consistent facts more readily, but “were more likely to recall false memories” of stereotype-consistent conduct “even though the story did not include these facts.” *Id.* at 1273.

So, in the criminal context, “where holes exist in the prosecution’s case, jurors tend to fill in the gaps or ‘complete the story’ by turning to . . . stereotypes” as shortcuts. Thompson, *supra*, at 1267. This risk is magnified in long and complex proceedings. Research shows that “distracted people are more likely to create false memories or fill in memory gaps, and . . . this type of confabulation is more often shaped by or constructed in accordance with stereotypes.” Justin D. Levinson & Rachel G. Schaefer, *Flawed Framework, Fatal Discretion: Unraveling Implicit Bias in Capital Punishment Decisions*, 75 Case

W. Res. L. Rev. 821, 884 (2025). Such biases “are more likely to alter decision-making in particularly protracted and/or complex cases” because “jurors are more likely to have divided or decreased attention in such proceedings.” *Id.* at 883.

Ms. Andrew’s month-long capital trial encapsulated exactly the conditions under which these cognitive distortions flourish. A jury primed for a month to see Ms. Andrew as a hypersexual, unfeeling, and unmaternal “bad woman” was primed to recall every detail that confirmed that portrait, and to overlook, challenge, or even forget the countervailing evidence that should have weighed in favor of her life. No “fairminded jurist,” *Andrew*, 604 U.S. at 96, should be able to review this record, with the litany of stereotypes invoked, and conclude that Ms. Andrew in fact received a fundamentally fair trial and sentencing.

CONCLUSION

For the foregoing reasons, amicus respectfully submits that this Court should grant Petitioner Brenda Andrew's petition for writ of certiorari.

Respectfully submitted,

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