No. 18-6135

IN THE

Supreme Court of the United States

JAMES K. KAHLER,

Petitioner,

v.

KANSAS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

BRIEF OF *AMICI CURIAE* THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU FOUNDATION OF KANSAS IN SUPPORT OF PETITIONER

LAUREN BONDS
ACLU FOUNDATION OF KANSAS
6701 West 64th Street, Suite 210
Overland Park, KS 66202
(913) 490-4100

Attorney for Amicus Curiae the ACLU Foundation of Kansas

CAITLIN HALLIGAN
Counsel of Record
JESSICA E. UNDERWOOD
RYAN W. ALLISON
SELENDY & GAY PLLC
1290 Avenue of the Americas
New York, NY 10104
(212) 390-9000
challigan@selendygay.com

Attorneys for Amicus Curiae the American Civil Liberties Union

(For Continuation of Appearances See Inside Cover)

288637

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

David Cole
American Civil Liberties
Union Foundation
915 15th Street NW
Washington, DC 20005
(202) 457-0800

- and -

Cassandra Stubbs
American Civil Liberties
Union Foundation
Capital Punishment Project
201 West Main Street,
Suite 402
Durham, NC 27701
(919) 682-5659

Attorneys for Amicus Curiae the American Civil Liberties Union

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INTEREST OF *AMICI CURIAE*[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with almost two million members and supporters dedicated to the principles of liberty and equality embodied in the U.S. Constitution and our Nation's civil rights laws. Since its founding in 1920, the ACLU has appeared in numerous cases before this Court involving the scope and application of constitutional rights, including criminal justice cases, both as direct counsel and as *amicus curiae*. *See, e.g.*, *Timbs v. Indiana*, 139 S. Ct. 682 (2019); *Carpenter v. United States*, 138 S. Ct. 2206 (2018); *Halbert v. Michigan*, 545 U.S. 605 (2005); *Watts v. United States*, 394 U.S. 705 (1969) (per curiam). Through its Criminal Law Reform Project, the ACLU engages in nationwide litigation and advocacy to reform disproportionate sentencing, reverse the tide of over-incarceration, and protect constitutional rights. Its Capital Punishment Project seeks to enforce constitutional rights in capital cases. *Amicus* American Civil Liberties Union Foundation of Kansas ("ACLU-KS") is an affiliate of the national ACLU, with over 9,000 members across the state. ACLU-KS has a longstanding commitment to protecting the constitutional rights of Kansans with mental illness in the criminal justice system. Given *amici*'s longstanding commitment to protection of the Constitution and due process, the proper resolution of

1. The parties have filed letters offering blanket consent to the filing of *amicus* briefs in this case. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, or their counsel made a monetary contribution to its preparation or submission.

this case is a matter of substantial interest to the ACLU, and its affiliates, members, activists, and supporters.

SUMMARY OF ARGUMENT

It is a long-standing tenet of our democracy—and indeed of free societies generally—that criminal punishment should be levied only on those who are responsible for their crimes. The affirmative defense of insanity, often referred to as the *M'Naghten* Rule, is a key expression of this foundational principle of criminal justice. It recognizes that in instances where mental illness precludes an individual from understanding the nature and quality of his acts, or distinguishing right from wrong, the individual is not morally culpable and cannot be found guilty of a crime.

For most of our history, every state has recognized an insanity defense. Today, just five states—Kansas, Alaska, Idaho, Montana, and Utah—have departed from the norm and eliminated this defense. Kansas permits mental illness or disability to serve as a defense to a crime only where "the defendant . . . lacked the mental state required as an element of the offense charged." KAN. STAT. ANN. § 22-3220 (2009).[2] In other words, under Kansas law, serious mental illness is relevant only where it defeats *mens rea*. But even "a man who commits murder because he feels compelled by demons still possesses the mens rea required for murder." *United States v. Pohlot*, 827 F.2d 889, 900 (3d Cir. 1987). "Only in the rare case

2. Kansas modified the phrasing of this provision during a 2011 recodification, but the substance remains the same. *See* KAN. STAT. ANN § 21-5209 (2013). The 2009 version applies here.

. . . will even a legally insane defendant actually lack the requisite mens rea purely because of mental defect." *Id.*; *see also Delling v. Idaho*, 568 U.S. 1038, 1038 (2012) (Breyer, J., dissenting).

Depriving defendants who have severe mental illness and lack the capacity to appreciate the wrongfulness of their actions of a defense to criminal conviction "offends . . . principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Clark v. Arizona*, 548 U.S. 735, 748 (2006), and thus violates the Fourteenth Amendment's Due Process Clause. Both historical and contemporary norms deem punishment of such individuals unfair because they are not morally responsible for their actions. Reflecting our collective commitment to this enduring belief, some form of this affirmative defense of insanity is in use today in the overwhelming majority of states and the federal system.

Kansas's rule likewise contravenes principles of "fundamental human dignity," as reflected in "objective evidence of contemporary values," *Ford v. Wainwright*, 477 U.S. 399, 406 (1986), in violation of the Eighth Amendment's prohibition against cruel and unusual punishment. The Eighth Amendment prohibits penalties that serve no legitimate penological purpose, yet convicting persons whose mental disabilities prevent them from distinguishing right from wrong (and who can be civilly committed if dangerous) serves no penological purpose. Kansas's abolition of the insanity defense was, like those of the few other states to eliminate the defense, not a reasoned public-policy decision, but a response to public hysteria following sensational criminal cases, such as John Hinckley's successful invocation of the defense for

his attempted assassination of President Ronald Reagan. Moreover, the public criticisms of the defense rest entirely on demonstrably false misconceptions. While this does not in itself render Kansas's choice unconstitutional, it underscores the lack of any legitimate penological purpose.

Finally, an insanity defense that accounts for the moral capacity of criminal defendants is not only workable—as evidenced by its long history and ongoing use in the vast majority of states—but necessary. Social science studies and data demonstrate overwhelmingly that prisons are ill-equipped to treat people with mental illness, and that incarcerating such individuals not only serves no valid penological or medical purpose but actually increases the likelihood that these persons will recidivate. And neither permitting a *mens rea* defense, nor allowing evidence of mental illness as mitigation evidence at sentencing in capital cases, suffices to protect the rights of mentally ill individuals. The insanity defense remains fundamental to our system of justice. Without it, individuals who lack the ability to appreciate the wrongfulness of their behavior are nonetheless convicted, punished, and remitted to an incarceration system that provides little opportunity for treatment or rehabilitation. This Court should make clear that the Eighth and Fourteenth Amendments guarantee the right to assert an insanity defense.

ARGUMENT

I. The Eighth and Fourteenth Amendments require states to provide an insanity defense in criminal prosecutions.

This Nation's criminal justice system has long manifested an aversion to punishing offenders for crimes for which they are not morally responsible. *See* Stephen J. Morse & Richard J. Bonnie, *Abolition of the Insanity Defense Violates Due Process*, 41 J. Am. Acad. Psychiatry & L. 488, 489–90 (2013). This concern is particularly salient where, as here, capital punishment is at issue. *See* U.S. Const. amend. VIII; *Ford*, 477 U.S. at 406–10. Kansas's abolition of the insanity defense violates both the Fourteenth Amendment's Due Process Clause and the Eighth Amendment's prohibition against cruel and unusual punishment.

A. The insanity defense is a fundamental element of justice deeply rooted in our Nation's history and is therefore required by the Due Process Clause.

The Due Process Clause provides heightened protection against government interference with certain fundamental rights, proclaiming that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The Court has defined "fundamental rights" as those "which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702,

720–21 (1997) (citations omitted). The insanity defense meets this test: it is so deeply rooted in our Nation's history that Kansas's repeal violates the Fourteenth Amendment's Due Process Clause.

American and English law have embraced this defense for centuries. *See United States v. Denny-Shaffer*, 2 F.3d 999, 1012 (10th Cir. 1993); *see also Ford*, 477 U.S. at 406–10. A core tenet of criminal law is that those who cannot tell right from wrong should not be criminally punished. *See Penry v. Lynaugh*, 492 U.S. 302, 331–32 (1984); *Morissette v. United States*, 342 U.S. 246, 250–52 (1952); *Davis v. United States*, 160 U.S. 469, 484–85 (1895); 4 William Blackstone, Commentaries *24–25 (1769). This tradition predates even English common law: Ancient Muslim, Hebraic, and Roman law all recognized that mental illness can diminish or preclude culpability. Brian E. Elkins, *Idaho's repeal of the insanity defense: What are we trying to prove?*, 31 Idaho L. Rev. 151, 161 (1994); Andrew P. March, *Insanity in Alaska*, 98 Geo. L. J. 1481, 1493 (2010). In twelfth-century England, people with severe mental disabilities could receive royal pardons. *See* Francis B. Sayre, *Mens Rea*, 45 Harv. L. Rev. 974, 1004–05 (1932). The English common law also recognized that "idiots and lunatics are not chargeable for their own acts, if committed when under these incapacities: no, not even for treason itself." *Ford*, 477 U.S. at 406–07; *see also* 4 William Blackstone, Commentaries *24 ("[M]adness alone punishes a madman.").

This legal tradition was universally adopted in the United States. Indeed, every state recognized the insanity defense until the early twentieth century, Morse & Bonnie, 41 J. Am. Acad. Psychiatry & L. at 489, and early

attempts to abolish the defense were held to violate state constitutional provisions, *see State v. Lange*, 123 So. 639, 641 (La. 1929) (rejecting as unconstitutional a Louisiana statute that "withdr[ew] the right of those accused of [a] crime to urge before the courts the defense of insanity"); *Sinclair v. State*, 132 So. 581, 582 (Miss. 1931) (en banc) (holding that Mississippi act "which attempts to abolish the defense of insanity" violated the state constitution); *State v. Strasburg*, 110 P. 1020, 1023–24 (Wash. 1910) (holding unconstitutional Washington statute that "so circumscribe[d] inquiry touching the question of the guilt of the accused as to exclude all consideration by the jury of his insanity at the time of committing the act").[3] These rulings recognized the fundamental right of an accused to present evidence that "he could not comprehend the nature and quality" of his actions at the guilt-innocence phase of trial. *Strasburg*, 110 P. at 1024.

As early as 1895, this Court recognized the long tradition in this Nation of declining to hold people with serious mental illnesses or significant mental disabilities criminally responsible:

> One who takes human life cannot be said to be actuated by malice aforethought, or to have deliberately intended to take life . . . unless at the time he had sufficient mind to comprehend the criminality or the right and wrong of such

3. Though Kansas stresses that these decisions rely on state constitutional law, Br. of State of Kans. in Opp. to Certiorari ("Opp.") at 11–12, that merely reflects the fact that until *Robinson v. California*, 370 U.S. 660 (1962), the Eighth Amendment had not yet been applied to the states through incorporation. *See McDonald v. City of Chicago*, 561 U.S. 742, 764 n.12 (2010); *Ford*, 477 U.S. at 405.

> an act. . . . [I]n order to constitute a crime, a person must have intelligence and capacity enough to have a criminal intent and purpose; and if his reason and mental powers are either so deficient that he has no will, no conscience, or controlling mental power, or if, through the overwhelming violence of mental disease, his intellectual power is for the time obliterated, he is not a responsible moral agent, and is not punishable for criminal acts. *Neither in the adjudged cases nor in the elemental treatises upon criminal law is there to be found any dissent from these general propositions.*

Davis, 160 U.S. at 485 (emphasis added) (internal quotation marks omitted) (citations omitted).

State supreme courts have consistently recognized that the insanity defense is so deeply rooted in the American system of justice as to be required by the Fourteenth Amendment. *See, e.g.*, *Finger v. State*, 27 P.3d 66, 84 (Nev. 2001) ("[L]egal insanity is a well-established and fundamental principal of the law of the United States."); *People v. Skinner*, 704 P.2d 752, 757–59 (Cal. 1985) ("[T]he insanity defense reflects a fundamental legal principle common to the jurisprudence of this country and to the common law of England."); *State v. Hoffman*, 328 N.W.2d 709, 716 (Minn. 1982) ("[T]he presentation of evidence of mental illness is a right of constitutional dimension."); *State ex rel. Causey*, 363 So.2d 472, 474–75 (La. 1978) ("The insanity defense, and the underlying notion that an accused must understand the nature of his acts in order to be criminally responsible . . . are deeply rooted in our legal tradition and philosophy.");

Ingles v. People, 22 P.2d 1109, 1111 (Colo. 1933) ("A statute providing that insanity shall be no defense to a criminal charge would be unconstitutional."); *Sinclair*, 132 So. at 581–82 (McGowen, J., specially concurring) ("So closely has the idea of insanity been woven into the criminal jurisprudence of English speaking countries that it has become a part of the fundamental laws thereof."); *Strasburg*, 110 P. at 1024 ("Whatever the power may be in the Legislature to eliminate the element of intent from criminal liability, we are of the opinion that such power cannot be exercised to the extent of preventing one accused of crime from invoking the defense of his insanity at the time of committing the act charged, and offering evidence thereof before the jury.").

Today, a national consensus of forty-five states and the federal government recognize this defense. Elizabeth Bennion, *Death is Different No Longer: Abolishing the Insanity Defense is Cruel and Unusual Under* Graham v. Florida, 61 DePaul L. Rev. 1, 42 (2011); *see Clark*, 548 U.S. at 750–51 (discussing various tests for insanity).[4] Thus, the defense aligns not only with our historical traditions but with our contemporary values as well. *See Ford*, 477 U.S. at 408–09; Stephan M. LeBlanc, *Cruelty to the Mentally*

4. Such a consensus is more than sufficient to mark the outliers as unconstitutional. By way of comparison, this Court deemed state practices far less widespread to be evidence of a national consensus on contemporary values in *Atkins*, *Roper*, and *Graham*. *See Atkins v. Virginia*, 536 U.S. 304, 313–15 (2002) (thirty states prohibited execution of "mentally retarded" offenders); *Roper v. Simmons*, 543 U.S. 551, 564 (2004) (thirty states prohibited the death penalty for juveniles); *Graham v. Florida*, 560 U.S. 48, 62 (2010) (finding national consensus even though only thirteen states barred sentences of life imprisonment without parole for juvenile nonhomicide offenders).

Ill: An Eighth Amendment Challenge to the Abolition of the Insanity Defense, 56 Am. U. L. Rev. 1281, 1311 (2007). This overwhelming national consensus demonstrates that the right to a defense due to serious mental illness or disability is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Glucksberg*, 521 U.S. at 721; *see also Atkins*, 536 U.S. at 312 ("[T]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." (internal quotation marks omitted)).

B. Abolishing the insanity defense serves no legitimate penological purpose and violates the Eighth Amendment.

This Court has held that "[a] sentence lacking any legitimate penological justification is by its nature disproportionate to the offense," in violation of the Eighth Amendment. *Graham v. Florida*, 560 U.S. 48, 71 (2010). The Nation's collective wisdom that an insanity defense is implicit in our sense of liberty and justice is grounded in the recognition that punishing people with severe mental illness or disability does not "measurably contribute[]" to any legitimate penological purpose, including retribution, deterrence, rehabilitation, or incapacitation—particularly given the ability, through civil commitment, to detain those whose mental illness poses a danger to themselves or others. *Atkins*, 536 U.S. at 319–20; *see also Ewing v. California*, 538 U.S. 11, 25 (2003). The criminal acts of defendants found to be legally insane arise from a lack of understanding produced by severe mental disability, and thus do not reflect culpability in any meaningful sense. To convict such people offends our sense of justice.

First, no retributive purpose is served, because one who cannot distinguish between right and wrong cannot be morally culpable. *See Tison v. Arizona*, 481 U.S. 137, 149 (1987) ("[A] criminal sentence must be directly related to the personal culpability of the criminal offender."). Retribution as a penological goal "reflects society's and the victim's interests in seeing that the offender is repaid for the hurt he caused." *Kennedy v. Louisiana*, 554 U.S. 407, 442 (2008). While retribution is a legitimate reason to punish, it serves no legitimate purpose when unmoored from culpability. *See Graham*, 560 U.S. at 71–72. The Supreme Court has recognized that the case for retribution is less compelling for defendants who have "diminished moral responsibility." *Id.* at 72 (explaining that retribution is an insufficient rationale for imposing life imprisonment on juveniles, who lack "maturity and [have] an underdeveloped sense of responsibility"); *see Hall v. Florida*, 572 U.S. 701, 709 (2014) (noting that when "moral culpability" is diminished, "the retributive value of the punishment" diminishes as well). So too, retribution is an insufficient justification for the punishment of individuals who by reason of serious mental illness or mental disability lack the moral capacity necessary to be held responsible for their actions. *See State v. Herrera*, 895 P.2d 359, 378 (Utah 1995) (Stewart, J., dissenting); Am. Psychiatric Ass'n, *Position Statement on the Insanity Defense* (Nov. 2014), https://www.psychiatry.org/File%20Library/About-APA/Organization-Documents-Policies/Policies/Position-2014-Insanity-Defense.pdf.

Second, criminal sanctions cannot deter people with serious mental illness or mental disabilities because the "rules of law and morality cannot adequately guide them." Morse & Bonnie, 41 J. Am. Acad. Psychiatry &

L. at 489; *see also* Timothy S. Hall, *Legal Fictions and Moral Reasoning: Capital Punishment and the Mentally Retarded Defendant After* Penry v. Johnson, 35 Akron L. Rev. 327, 331 (2002). Indeed, mentally ill people are more likely to have multiple previous incarcerations than their counterparts without metal illness. *See* Doris J. James & Lauren E. Glaze, U.S. Dep't of Justice, Mental Health Problems of Prison and Jail Inmates 1 (2006), https://www.bjs.gov/content/pub/pdf/mhppji.pdf. People without serious mental illness are not likely to be deterred because they are unlikely to identify with mentally ill people. Julie E. Grachek, Note, *The Insanity Defense in the Twenty-First Century: How Recent Supreme Court Case Law Can Improve the System*, 81 Ind. L.J. 1479, 1482 (2006). Indeed, allowing our legal system to refuse to acknowledge the critical moral salience of understanding right from wrong would likely undermine deterrence.

Third, rehabilitation is not served by imposing criminal sanctions on individuals who lack the capacity to apprehend their own responsibility. Those whose mental illness poses a danger to others can be civilly committed and treated without recourse to criminal sanctions. There is no reason to believe that imposing a criminal penalty on an individual who is unable to appreciate the difference between right and wrong will serve any rehabilitative purpose. Any rehabilitative interest would be better served by providing the mental health services that the individual needs in an appropriate setting, not by placing them in prisons ill-equipped to treat such persons. As Senator Thomas Dodd explained in 1966, sending mentally ill individuals to prison, where they cannot be effectively treated, may result in such individuals "com[ing] back to haunt society after their release, more mentally disturbed,

more irresponsible, and more crime prone than ever before, because whatever the prison does to men it does not cure mental illness." *United States v. Freeman*, 357 F.2d 606, 626 n.61 (2d Cir. 1966) (quoting 112 Cong. Rec. 2853–56 (1966)); *see also* Bennion, 61 DePaul L. Rev. at 37–38; Jodie English, *The Light Between Twilight and Dusk: Federal Criminal Law and the Volitional Insanity Defense*, 40 Hastings L.J. 1, 25 (1988); Jessica Harrison, Comment, *Idaho's Abolition of the Insanity Defense—An Ineffective, Costly, and Unconstitutional Eradication*, 51 Idaho L. Rev. 575, 594–95 (2015).

Numerous studies have documented that incarcerating people with mental illness only stalls rehabilitation because prisons are "anti-therapeutic" environments where people with mental illness do not receive the treatment they need to be effectively rehabilitated. Grachek, 81 Ind. L.J. at 1489 (detailing how mentally ill people rarely receive rehabilitative treatment, are often targets of abuse, and often serve longer sentences than those without mental illness); Jennifer Bronson & Marcus Berzofsky, U.S. Dep't of Justice, Indicators of Mental Health Problems Reported by Prisoners and Jail Inmates 2011–12 (June 2017), https://www.bjs.gov/content/pub/pdf/imhprpji1112.pdf (survey finding that only half of prisoners who met the threshold for serious psychology distress had received mental health treatment since admission to their current jail or prison). People with mental health disabilities who are criminally punished and imprisoned are thus "unlikely to be rehabilitated and more likely to return to prison upon release." *See* Harrison, 51 Idaho L. Rev. at 595.

Fourth, punishing and imprisoning people with serious mental illness cannot further the state's interest

in incapacitation any more than can civil commitment. LeBlanc, 56 Am. U. L. Rev. at 1321. Moreover, incarceration can expose people with mental illness to harsh prison conditions that may exacerbate their condition, increasing the likelihood of recidivism. *Id.*; *see also* James & Glaze, Mental Health Problems of Prison and Jail Inmates 1. There is simply no reason to believe that civil commitment regimes are inadequate to protect public safety. *See Clark*, 548 U.S. at 798 (Kennedy, J., dissenting) ("Future dangerousness is not . . . a rational basis for convicting mentally ill individuals. . . . Civil commitment proceedings can ensure that individuals who present a danger to themselves or others receive proper treatment without unfairly treating them as criminals."); *Jones v. United States*, 463 U.S. 354, 370 (1983); Morse & Bonnie, 41 J. Am. Acad. Psychiatry & L. at 492.

Accordingly, depriving people whose mental illness is so severe that they meet the definition of being "legally insane," and penalizing them in the same manner as those without severe mental illness, serves no legitimate penological purpose. As such, it is disproportionate and violative of the Eighth and Fourteenth Amendments. *See Graham*, 560 U.S at 71.

II. The outlier statutes that abolished the insanity defense were largely a reaction to John Hinckley's use of the defense and lacked any legitimate penological justification.

As explained above, the insanity defense is a long-standing principle at the core of our Nation's criminal law. Efforts to repeal it are rare and relatively recent, especially when considered against the backdrop of its long

history in the Anglo-American system of justice. Every state and the federal government recognized some form of this defense until the late twentieth century. *See* Morse & Bonnie, 41 J. Am. Acad. Psychiatry & L. at 489. There were a few unsuccessful efforts to roll back the defense in the early twentieth century in Louisiana, Mississippi, and Washington, but those efforts were rejected as unconstitutional, precisely because the notion that one cannot be held culpable if one lacks the capacity to make such judgments is fundamental to the American system of justice. *See Sinclair*, 132 So. at 584–87 (Ethridge, J., concurring); *Lange*, 123 So. at 641–42; *Strasburg*, 110 P. at 1024.

During much of the twentieth century, legal scholars and mental health professionals advocated for *expansion*, not elimination, of the insanity defense. *See Finger*, 27 P.3d at 73. Many maintained that the traditional *M'Naghten* Rule was too limited and resulted in improper criminal convictions of defendants with severe mental illnesses. *Id.* Accordingly, courts began to develop new standards for legal insanity, such as the irresistible impulse test and the mental disease or defect test, to supplement or supplant the *M'Naghten* Rule. *See Durham v. United States*, 214 F.2d 862, 869, 875 (D.C. Cir. 1954); *Smith v. United States*, 36 F.2d 548, 550 (D.C. Cir. 1929). This "trend to expand the definition of legal insanity continued into the early 1980s." *Finger*, 27 P.3d at 74.

Signs of a backlash first came in 1979, when Montana became the first state to repeal the insanity defense, replacing it with the rule that evidence of insanity is only "admissible to prove that the defendant did or did not have a state of mind that is an element of the offense"—

essentially the same rule that Kansas has adopted. Mont. Code Ann. § 46-14-102 (2015); *see also* Jean K. Gilles Phillips & Rebecca E. Woodman, *The Insanity of the Mens Rea Model: Due Process and the Abolition of the Insanity Defense*, 28 Pace L. Rev. 455, 460 (2008) (likening Montana's statute to Kansas's). State legislators sought to remove medical professionals, who were thought to make "arbitrary and God-like" judgments about defendants, from the criminal justice system. Jeanne Matthews Bender, *After Abolition: The Present State of the Insanity Defense in Montana*, 45 Mont. L. Rev. 133, 137 & n.30 (1984). The Montana legislator who introduced the bill was reportedly influenced by the work of Thomas Szasz, a psychiatrist who propounded the extreme view that "there is and can be no such thing as mental illness or psychiatric treatment." *Id.* at 137 n.30 (quoting Thomas Szasz, The Myth of Mental Illness xii (1974)).

In the early 1980s, a number of other states moved to restrict the insanity defense after John W. Hinckley, Jr. attempted to assassinate President Ronald Reagan, apparently to impress actress Jodie Foster, with whom Hinckley was obsessed. *See* March, 98 Geo L.J. at 1495. In 1982, after a widely publicized trial, a jury found Hinckley not guilty by reason of insanity (after which Hinckley was civilly committed for decades). *See* Phillip E. Johnson, *Madness and the Criminal Law (Book Review)*, 50 U. Chi. L. Rev. 1534, 1536 (1983); Vincent J. Fuller, *United States v. John W. Hinckley Jr. (1982)*, 33 Loy. L.A. L. Rev. 699, 700 (2000). Hinckley's acquittal set off efforts to eliminate the insanity defense. *See* Elkins, 31 Idaho L. Rev. at 154–55; Joe Palazzolo, *John Hinckley Case Led to Vast Narrowing of Insanity Defense*, Wall St. J. (July 27, 2016), https://www.wsj.com/articles/john-hinckley-case-led-to-vast-narrowing-of-insanity-defense-1469663770.

In 1982, less than a year following the Hinckley verdict, Alaska "reacted" to the verdict by "narrowing" the insanity defense. *See* Leslie A. Leatherwood, Note, *Sanity in Alaska: A Constitutional Assessment of the Insanity Defense Statute*, 10 ALASKA L. REV. 65, 66 (1993).[5] Idaho also abolished the insanity defense in 1982, "responding to the . . . political climate" after the Hinckley verdict. Elkins, 31 IDAHO L. REV. at 154–55; *see* Marc W. Pearce & Lori J. Butts, *Insanity in the State of Idaho*, 44 MONITOR ON PSYCHOL. 28, 28 (2013), http://www.apamonitor-digital.org/apamonitor/201302?pg=30#pg30. Utah "abolished the traditional insanity defense" in 1983, again as a result of "public outrage" over the Hinckley verdict. *Herrera*, 895 P.2d at 361; *see State v. Young*, 853 P.2d 327, 383 (Utah 1993).

In the mid-1990s, Nevada and Kansas also passed laws barring defendants from asserting that they should not be held criminally responsible because of a severe mental illness. *See Finger*, 27 P.3d at 75–76; Marc Rosen, *Insanity Denied: Abolition of the Insanity Defense in Kansas*, 8 KAN. J.L. & PUB. POL'Y 253, 256–57 (1999). The Nevada Supreme Court overturned the legislature's attempt to abolish the insanity defense, concluding that the defense "is a fundamental principle under the Due Process Clause." *Finger,* 27 P.3d at 80.

Today, Kansas, Alaska, Utah, Idaho, and Montana are the only states in the Nation to preclude criminal

5. Alaska's response was also partially informed by the case of Charles Meach, who murdered four teenagers while on release from the Alaska Psychiatric Institute. *See* Leatherwood, 10 ALASKA L. REV. at 66. The revised defense in Alaska eliminates the possibility of "exoneration based on the defendant's ability to distinguish between right and wrong." *Id.* at 68.

defendants from asserting a traditional insanity defense. *See* R. Michael Shoptaw, Comment, M'Naghten *Is a Fundamental Right: Why Abolishing the Traditional Insanity Defense Violates Due Process*, 84 Miss. L.J. 1101, 1107 (2015). A defendant in these five states may introduce evidence of a mental illness or disability only to the extent that it would disprove that the defendant had the requisite *mens rea* to commit the offense charged. *Herrera*, 895 P.2d at 361–62; *State v. Doney*, 636 P.2d 1377, 1382 (Mont. 1981); March, 98 Geo. L.J. at 1509; Pearce & Butts, 44 Monitor on Psychol. at 28; Rosen, 8 Kan. J.L. & Pub. Pol'y at 257. As this history illustrates, the development was driven not by legitimate state interests or penological principles but largely by popular anger about the Hinckley verdict. While this does not by itself render elimination of the defense unconstitutional, it underscores the absence of any legitimate penological purpose for punishing those who lack the capacity to distinguish right from wrong.

III. Objections to the insanity defense rest on misconceptions about its use and impact.

Criticism of the insanity defense tends to rest on one or more of four misconceptions about the defense: (1) that it is overused; (2) that severe mental illness is easily faked; (3) that verdicts of not guilty by reason of insanity result in dangerous individuals being released into society to commit further crimes; and (4) that a constitutionally mandated insanity defense is somehow unworkable. Each of these views is contradicted by the evidence of how the defense is used and its impact on public safety.

A. The insanity defense is not overused.

Despite widespread public perception that it is overused, the insanity defense is rarely asserted. Judge Rubin of the U.S. Court of Appeals for the Fifth Circuit observed in 1984 that empirical studies of the insanity defense "provide little or no support for [the public's] fearsome perceptions and in many respects directly refute them." *United States v. Lyons*, 739 F.2d 994, 995 (5th Cir. 1984) (Rubin, J., dissenting). Indeed, the public vastly overestimates the number of insanity pleas, often by orders of magnitude. *See* John Q. La Fond & Mary L. Durham, *Cognitive Dissonance: Have Insanity Defense and Civil Commitment Reforms Made a Difference?*, 39 Vill. L. Rev. 71, 93 n.104 (1994) (summarizing studies). For example, one study showed the public expected the defense to be invoked in "20% to 50% of all criminal cases," even though the study found the defense is in fact invoked in just 1% of felony cases. Rosen, 8 Kan. J.L. & Pub. Pol'y at 258; *see also* Beatrice R. Maidman, Note, *The Legal Insanity Defense: Transforming the Legal Theory into a Medical Standard*, 96 B.U. L. Rev. 1831, 1846 (2016). State legislators share this misconception. Joseph H. Rodriguez, et al., *The Insanity Defense Under Siege: Legislative Assaults and Legal Rejoinders*, 14 Rutgers L.J. 397, 401 n.23 (1983) (state legislators estimated 4,400 pleas of insanity, when only 102 such pleas were actually entered); *see also* Lisa A. Callahan, et al., *The Volume and Characteristics of Insanity Defense Pleas: An Eight-State Study*, 19 Bull. Am. Acad. Psychiatry L. 331, 334 (1991) (finding that insanity plea was raised in 0.93% of all felony cases); Jeffrey S. Janofsky, et al., *Defendants Pleading Insanity: An Analysis of Outcome*, 17 Bull. Am. Acad. Psychiatry L. 203, 205–06 (1989) (only 1.2% of criminal defendants in one-year study invoked insanity plea).

B. Defendants do not fake insanity.

The misplaced concern that the insanity defense is overused is closely linked to another common misperception—that severe mental illness is easy to fake. Rosen, 8 KAN. J.L. & PUB. POL'Y at 259. In fact, insanity is rarely even a contested issue in the few cases where the plea is raised. "[M]ore than ninety percent" of insanity cases "result in agreement by psychiatrists for both sides as to the defendant's sanity." Ira Mickenberg, *A Pleasant Surprise: The Guilty but Mentally Ill Verdict Has Both Succeeded in Its Own Right and Successfully Preserved the Traditional Role of the Insanity Defense*, 55 U. CIN. L. REV. 943, 969 (1987). And any attempt to "fake" insanity comes at a high cost. Defendants who unsuccessfully assert the insanity defense at trial often receive longer sentences than those who do not. *See* Jeraldine Braff, et al., *Detention Patterns of Successful and Unsuccessful Insanity Defendants*, 21 CRIMINOLOGY 439, 445 (1983) (defendants who invoked insanity defense unsuccessfully served 22% more time in detention than those who did not plead insanity); Rodriguez, 14 RUTGERS L.J. at 401–02 & n.23 (mean maximum sentences "practically double[d]" after unsuccessful insanity pleas). Thus, there is no reason to believe that there is any meaningful risk that defendants will "fake" insanity.

C. The insanity defense does not result in the release of dangerous criminals into society.

The result of a verdict of not guilty by reason of insanity is widely misunderstood. Many believe the insanity defense allows dangerous individuals to go free. Rosen, 8 KAN. J.L. & PUB. POL'Y at 258–59. This common

misconception took hold after the Hinckley verdict, with the New York Times describing a "widespread suspicion" that the defense meant "people cannot be held responsible for even the most bizarre and heinous crimes." Stuart Taylor, Jr., *The Hinckley Riddle*, N.Y. Times (June 24, 1982) at D21. Individuals at the highest levels of government echoed these claims; for example, then-Attorney General William French Smith II asserted that the insanity defense "allows so many persons to commit crimes of violence . . . and then have the door opened for them to return to the society they victimized." Rosen, 8 Kan. J.L. & Pub. Pol'y at 256.

But as this Court has held, the Constitution permits states to hold individuals found criminally insane in involuntary hospitalization "until such time as [they have] regained . . . sanity" or no longer present a danger to themselves or society. *Jones*, 463 U.S. at 370. Individuals found not guilty by reason of insanity often spend as much or more time in custody as their peers who were found guilty without an insanity defense. (Indeed, this may help explain why the defense is so rarely invoked.) *See* Fond & Durham, 39 Vill. L. Rev. at 95–96; Maidman, 96 B.U. L. Rev. at 1846–47; Mickenberg, 55 U. Cin. L. Rev. at 967, 972–84; Rodriguez, 14 Rutgers L.J. at 402–04; Rosen, 8 Kan. J.L. & Pub Pol'y at 259. For example, although some speculated after the Hinckley verdict that he might be released "within months," *Hinckley Verdict Tested More Than the Jury*, N.Y. Times (June 27, 1982), https://www.nytimes.com/1982/06/27/weekinreview/hinkley-verdict-tested-more-than-the-jury.html, in fact he was held in involuntary commitment for thirty-five years, Gardiner Harris, *John Hinckley, Who Tried to Kill Reagan, Will Be Released*, N.Y. Times (July 27, 2016), https://www.nytimes.

com/2016/07/28/us/hinckley-who-tried-to-kill-reagan-to-be-released.html. When Hinckley was eventually released, it was with a set of strict monitoring requirements, similar to traditional supervised release. *See United States v. Hinckley*, 200 F. Supp. 3d 1, 63–70 (D.D.C. 2016); 18 U.S.C. § 3583. To this day, Hinckley must carry a GPS-enabled phone traceable by the government and must strictly limit his interactions with the public. *See* Spencer S. Hsu, *U.S. Judge Eases Release Conditions for Would-Be Reagan Assassin John W. Hinckley Jr.*, Wash. Post (Nov. 16, 2018), https://www.washingtonpost.com/local/public-safety/john-hinckley-jr-release-conditions-eased-by-us-judge-35-years-after-reagan-assassination-attempt/2018/11/16/c00aa472-e9c7-11e8-b8dc-66cca409c180_story.html?utm_term=.23bca16085de.

Thus, there is no basis to the popular misconception that the insanity defense sets dangerous individuals free to prey on others.

D. A constitutionally mandated insanity defense is plainly administrable, as evidenced by its lengthy history.

Some critics of the insanity defense have suggested that a constitutional right to the defense would be unworkable. *See* Stephen J. Morse, *Excusing the Crazy: The Insanity Defense Reconsidered*, 58 S. Cal. L. Rev. 777, 800 (1985). But that claim is contradicted by the defense's long history in this country and elsewhere, as well as by its recognition in the overwhelming majority of the states.

As explained, the modern insanity defense traces its roots to English common law, *see Ford*, 477 U.S. at 406–07,

and forty-five of the fifty states presently use either the *M'Naghten* or Model Penal code test for insanity—both of which recognize moral incapacity as a defense. *See* LeBlanc, 56 Am. U. L. Rev. at 1312–13 n.190. Moreover, as noted above, *see* Sec. I.A., several states not only permit the insanity defense as a matter of policy, but explicitly recognize a constitutional right to such a defense.

To the extent Kansas suggests that outlining the contours of such a right would be unworkable, *see* Opp. at 14–17, the experiences of these states demonstrate otherwise. Moreover, this Court has often established constitutional minimum requirements, while leaving the details of implementing such requirements to the states. *See, e.g.*, *Atkins*, 536 U.S. at 317 ("[W]e leave to the States the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." (quoting *Ford*, 477 U.S. at 416)). That individual states adopt different insanity tests does not weaken the case that provision of an insanity defense is a constitutional right. *See* Dora W. Klein, *Memoir as Witness to Mental Illness*, 43 L. & Psychol. Rev. 133, 141–142 (2019) ("Although the precise, technical differences among the various tests of insanity can be philosophically interesting, it is unclear whether these differences have a meaningful effect on a defendant's likelihood of being found not guilty by reason of insanity. Some research suggests that jurors regard any insanity test as essentially a test of fitness for moral (and legal) responsibility."). And while lawyers and medical professionals have sometimes disagreed about how to articulate the legal standard so that it is understandable to a jury, this concern can be and is addressed by states through standard jury instructions. *See State v. Johnson*, 399 A.2d 469, 476 (R.I.

1979) (adopting ALI "substantial" capacity test because "the test employs vocabulary sufficiently in the common ken that its use at trial will permit a reasonable three-way dialogue between the law-trained judges and lawyers, the medical-trained experts, and the jury").

Moreover, the insanity defenses used in forty-five states are no more difficult to administer than is a *mens rea* defense. *See* Rita D. Buitendorp, Note, *A Statutory Lesson from "Big Sky Country" on Abolishing the Insanity Defense*, 30 VAL. U. L. REV. 965, 980 & n.95 (1996) (arguing *mens rea* test "reveals little about when defendants have sufficient evidence that they are not responsible for their conduct" and noting that, when Montana abolished the insanity defense, its attorney general "initially opposed the mens rea bill for the very reason that . . . no guidelines or workable set of rules existed for the new type of law"). The very same challenges present in delineating the contours of sanity are present with respect to any *mens rea* requirement: "both *mens rea* and legal insanity refer to past mental states that must be inferred from the defendant's actions, including utterances." Morse, 58 S. CAL. L. REV. at 800.

Given the scarcity of insanity pleas in practice, the long-standing history of the defense, and its continuing existence in all but five states, there is no indication that this Court's recognition of a constitutional right will overwhelm the criminal justice system. Callahan, 19 BULL. AM. ACAD. PSYCHIATRY LAW at 331 (finding that the insanity defense is used in fewer than 1% of all cases, and only about a quarter of those cases are successful). This Court's recognition of a constitutionally mandated insanity defense would simply require Kansas, and the remaining

four states lacking such a defense, to conform their laws to those which have governed everywhere else across this Nation since the founding.

IV. Neither mens rea nor the ability to present mental-state evidence at the penalty phase of a capital case is an adequate substitute for an insanity defense.

That Kansas permits the consideration of psychiatric evidence as it relates to *mens rea*, and, in capital cases, during the sentencing phase of the trial, is no substitute for an insanity defense.

As explained above, the *mens rea* approach adopted by Kansas and four other states permits the punishment of individuals who lack capacity to understand the wrongfulness of their actions. A man who kills his daughter believing she is possessed by the devil, *see* Rosen, 8 KAN. J. L. & PUB. POL'Y at 261–62, cannot be described as having a normal capacity to "choose between good and evil," *Morissette*, 342 U.S. at 250. Yet so long as that man acted with intent to kill, he had sufficient *mens rea*. These exact concerns led Congress to decide against eliminating the federal insanity defense in the 1980s, recognizing that doing so "would alter that fundamental basis of Anglo-American criminal law: the existence of moral culpability as a prerequisite for punishment." *Pohlot*, 827 F.2d at 900 (quoting H.R. Rep. No. 98–577, at 7–8 (1983)).

The *mens rea* standard thus excludes a high proportion of defendants who might otherwise meet the legal definition of insanity. *See id.* ("Only in the rare case, however, will even a legally insane defendant actually lack

the requisite mens rea purely because of mental defect."). The colorful examples courts often use to illustrate the *mens rea* approach obscure the fact that this approach simply does not capture the defense that legal insanity does, and therefore *mens rea* is virtually never defeated based on insanity. *See* Daniel J. Nusbaum, Note, *The Craziest Reform of Them All: A Critical Analysis of the Constitutional Implications of "Abolishing" the Insanity Defense*, 87 CORNELL L. REV. 1509, 1522 n.45 (2002) (noting 1% acquittal rate among individuals raising *mens rea* defense based on insanity in Montana); Harv. L. Rev. Ass'n, *Idaho Supreme Court Upholds Abolition of Insanity Defense Against State and Federal Constitutional Challenges*, 104 HARV. L. REV. 1132, 1135 (1991) ("[E]xamples of total cognitive disability . . . appear more often as academic hypotheticals than as real-world cases.").[6]

Kansas suggests that the *mens rea* approach is an unremarkable replacement for the insanity defense, since it simply "channels" evidence of insanity to the mental state requirement. *See* Opp. 8–9. But this argument elides the well-recognized distinction between *mens rea* and the affirmative defense of insanity. *See Mullaney v. Wilbur*, 421 U.S. 684, 706 (1975) (Rehnquist, J., concurring) (noting that "the existence or nonexistence of legal insanity bears no necessary relationship to the existence or nonexistence of the required mental elements of the

6. Courts have suggested, for example, that the *mens rea* defense would vindicate the strangler who thinks he is only squeezing a lemon, *Finger*, 27 P.3d at 75; or a grapefruit, *Herrera*, 895 P.2d at 362; the shooter who thinks he is hunting a wolf, *Delling*, 568 U.S. at 1038 (Breyer, J., dissenting); or the man who kills a blond man, thinking "all blond people are robots," *Clark*, 548 U.S. at 767–68.

crime"); *Insanity Defense in Federal Courts*, *Hearings Before the Subcomm. on Criminal Justice, H. Judiciary Comm.*, 97th Cong. (statement of Bruce Ennis, former national legal director of the ACLU) (describing *mens rea* and the affirmative defense as "two quite different ways . . . in which a defendant's mental condition could be relevant").

Nor is it sufficient to consider mental illness at the sentencing stage of a capital trial.[7] Kansas permits this, as it must given this Court's direction, that defendants must be able to submit any evidence relevant to mitigation at sentencing. *See Payne v. Tennessee,* 501 U.S. 808, 822 (1991) ("[V]irtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce . . . ."); *McKoy v. North Carolina*, 494 U.S. 433, 442 (1990) ("The Constitution *requires* states to allow consideration of mitigating evidence in capital cases."). But by then it is too late. To convict a person for murder who does not even have the capacity to know that he committed a culpable act is unconstitutional, whether the penalty is life, death, or a term of years. That fundamental wrong cannot be remedied at the back end through sentencing considerations.

In addition, "reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury." *Atkins*, 536 U.S. at 321. Consideration solely at the sentencing

7. Four of the five states that have fully abolished the insanity defense—Kansas, Utah, Montana, and Idaho—still impose the death penalty. *See Clark*, 548 U.S. at 750–51.

phase fails to acknowledge that mental illness can negate culpability itself. Indeed, jurors often view evidence of mental illness in sentencing proceedings as *aggravating*—not mitigating. Ellen Fels Berkman, Note, *Mental Illness as an Aggravating Circumstance in Capital Sentencing*, 89 Colum. L. Rev. 291, 291 (1999). Thus, mentally ill persons in fact often serve *longer* sentences than others convicted of the same crime. *See* Erika Eichelberger, *Alaska may abandon criminal verdict behind longer sentences for mentally ill*, The Guardian (Apr. 4, 2016), https://www.theguardian.com/us-news/2016/apr/04/alaska-guilty-verdict-mentally-ill.

Even if evidence about mental illness is admissible for sentencing purposes, it is well documented that jurors in capital cases often make up their minds about punishment during the guilt phase of trial. *See State v. Kahler*, 410 P.3d 105, 136 (Kan. 2018) (Johnson, J., dissenting) (raising concerns that abolishing insanity defense undermines "the reliability of the jury's determination to impose the death penalty"). A 1998 study, based on interviews of 916 capital jurors in eleven states, found that "many jurors reached a personal decision concerning punishment before the sentencing stage of the trial, before hearing the evidence or arguments concerning the appropriate punishment, and before the judge's instructions for making the sentencing decision." William J. Bowers, Marla Sandys & Benjamin Steiner, *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision-Making*, 83 Cornell L. Rev. 1476, 1477 (1998). It is thus crucial that criminal defendants have an opportunity to present evidence of insanity *before* the sentencing phase.

Use of this evidence during sentencing is also subject to judicial discretion—its admission is not guaranteed. Morse & Bonnie, 41 J. Am. Acad. Psychiatry & L. at 493. Without the guarantee of an insanity defense, people with mental illness and mental disabilities will be penalized even where their illness precludes culpability, and sentences will not be "tailored to . . . personal responsibility and moral guilt." *Enmund v. Florida*, 458 U.S. 782, 801 (1982); *see also Weems v. United States*, 217 U.S. 349, 367 (1910) ("[P]unishment for crime should be graduated and proportioned to offense."). When people with severe mental illness face criminal punishment, especially the death penalty, states must recognize the right to an insanity defense under the Eighth and Fourteenth Amendments.

CONCLUSION

The judgment of the Supreme Court of Kansas should be reversed.

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Respectfully submitted,

Lauren Bonds
ACLU Foundation of Kansas
6701 West 64th Street, Suite 210
Overland Park, KS 66202
(913) 490-4100

Attorney for Amicus Curiae the ACLU Foundation of Kansas

Caitlin Halligan
Counsel of Record
Jessica E. Underwood
Ryan W. Allison
Selendy & Gay PLLC
1290 Avenue of the Americas
New York, NY 10104
(212) 390-9000
challigan@selendygay.com
- and -
David Cole
American Civil Liberties Union Foundation
915 15th Street NW
Washington, DC 20005
(202) 457-0800
- and -
Cassandra Stubbs
American Civil Liberties Union Foundation
Capital Punishment Project
201 West Main Street,
Suite 402
Durham, NC 27701
(919) 682-5659

Attorneys for Amicus Curiae the American Civil Liberties Union