No. 18-6135

In the Supreme Court of the United States

JAMES KRAIG KAHLER, *Petitioner*,

v.

STATE OF KANSAS, *Respondent*.

On Writ of Certiorari to the Supreme Court of the State of Kansas

BRIEF OF *AMICI CURIAE* STATES OF UTAH, ALABAMA, ALASKA, ARKANSAS, FLORIDA, GEORGIA, IDAHO, INDIANA, LOUISIANA, MISSOURI, MONTANA, NEBRASKA, OHIO, OKLAHOMA, SOUTH CAROLINA, AND TEXAS SUPPORTING RESPONDENT

SEAN D. REYES
Utah Attorney General
TYLER R. GREEN*
Utah Solicitor General
THOMAS B. BRUNKER
Deputy Solicitor General
ANDREW F. PETERSON
Assistant Solicitor General
350 N. State Street, Suite 230
Salt Lake City, UT 84114-2320
Telephone: (801) 538-9600
Email: tylergreen@agutah.gov
**Counsel of Record*

Counsel for Amicus Curiae State of Utah

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*

"It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal government." *Patterson v. New York*, 432 U.S. 197, 201 (1977). Hence States prosecute the vast majority of crimes in the country. And States will bear the disproportionate weight of any constitutional strictures the Court places on the legislative prerogative to define moral and legal culpability. In short, this case threatens to impinge "the authority of States over the administration of their criminal justice systems," which "lies at the core of their sovereign status." *Oregon v. Ice*, 555 U.S. 160, 170 (2009).

In prior similar cases, the Court never has "lightly construe[d] the Constitution so as to intrude upon the administration of justice by the individual States." *Patterson*, 432 U.S. at 201. *Amici* urge the Court to stay that course. Today's increasingly pluralistic society demands that States retain flexibility to adapt their criminal laws to changing social, political, and scientific conditions that affect them in view of their unique democratic preferences and moral beliefs.

SUMMARY OF ARGUMENT

Neither the Due Process Clause nor the Eighth Amendment requires the States to provide any particular insanity defense to criminal liability.

I. The Constitution leaves almost exclusively to the States the sovereign prerogative to define and enforce the criminal law. The People do so through their elected representatives, who make moral judgments about blameworthiness by deciding which conduct merits criminal liability.

In the more than two centuries of democratic experimentation on those issues, no single theory of blameworthiness excluding the insane from criminal liability has gained such universal acceptance as to be considered a component of due process.

And legislative activity today confirms that moral culpability is not an essential prerequisite to imposing criminal liability. American legislatures uniformly impose strict or negligence criminal liability on huge swaths of conduct without regard to its inherent wrongfulness or the accused's subjective appreciation of its wrongfulness. Strict liability crimes like drunk driving or statutory rape, and negligent homicide based on a "reasonable person" standard, are familiar examples of these new crimes by which legislatures regulate and organize an increasingly complex political and social economy. Thus, even in jurisdictions that use some form of *M'Naghten*'s moral capacity test, a defendant's appreciation of right and wrong is not a necessary precondition to imposition of criminal liability.

A rule requiring a *M'Naghten*-like moral capacity defense for defendants claiming insanity would result in a quagmire of administrability problems. The jurisdictions with such a test do not agree themselves on its particulars, and adopting Petitioner's preferred rule without resolving those disputes would leave courts and legislatures floundering. The lack of apparent limiting legal principles for the defense also demands consideration, lest psychiatry's evolution extend the defense to excuse crimes resulting from conditions such as psychopathy.

II. The Eighth Amendment's bar against cruel and unusual punishments never has been interpreted to require an affirmative defense, and it should not be so interpreted here. While the Court has considered issues of moral culpability to be relevant to the punishments for certain classes of criminals, those moral culpability cases do not draw into doubt the legitimate, predicate power of the States to convict and impose *some* punishment on those who commit crimes *despite* their reduced moral capacity.

Neither has Petitioner shown a genuine national consensus that punishment depends on moral capacity in all circumstances. If the direction of change in the nation's laws is relevant, those changes break overwhelmingly in Kansas's direction. And the States punish an ever-expanding universe of crimes with no moral dimension at all for purposes of social and economic regulation.

ARGUMENT

I. The Due Process Clause Does Not Require States' Criminal Laws to Adopt a Particular Theory of Moral Culpability.

A. The States have always had broad sovereign power to define crimes, which entails normative judgments about what counts as culpable conduct.

Holding that the Due Process Clause requires States to provide a *M'Naghten*-like moral capacity defense would override the States' sovereign authority to decide what conduct is blameworthy.

"Our federal system recognizes the independent power of a State to articulate societal norms through criminal law." *McCleskey v. Zant*, 499 U.S. 467, 491 (1991). In fact, since the Founding, "[t]he States [have] possess[ed] primary authority for defining and enforcing the criminal law." *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993) (quotation marks and citation omitted). When State legislatures discharge that core sovereign function, they resolve complex and competing policy considerations about moral culpability, societal protection and regulation, and medical science. That process perpetually continues; legislatures must hone their criminal laws when society's judgments about those issues change.

States hone their criminal laws using well-worn tools: The "doctrines of actus reus, mens rea, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man." *Powell v. Texas*, 392 U.S. 514, 536 (1968) (plurality op.). The "choice of a test of legal sanity" in particular "involves not only scientific knowledge but questions of basic policy as to the extent to which that knowledge should determine criminal responsibility." *Leland v. Oregon*, 343 U.S. 790, 801 (1952).

Not so, in Petitioner's view. Under his reading, *Powell* and *Leland* erred on that score because the Due Process Clause removes one tool from States' toolbox: *M'Naghten*'s moral capacity test, he claims, is a uniform standard that freezes "into a rigid constitutional mold" the balance the House of Lords struck on the insanity question more than 160 years ago. *Powell*, 392 U.S. at 537.

Petitioner's contention conflicts with half a century of this Court's precedent recognizing how legislatures rebalance their approaches to insanity based on new science. Psychiatry, and its bearing on notions of blameworthiness, is dynamic. *See Leland*, 343 U.S. at 800-01; *id*. at 803 (Frankfurter, J., dissenting); *Powell*, 392 U.S. at 536-37. Even now, scientific advances in psychiatry continue; "[t]he only certain thing that can be said about the present state of knowledge and therapy regarding mental disease is that science has not reached finality of judgment." *Jones v. United States*, 463 U.S. 354, 364 n.13 (1983). No final judgment on these questions is likely to arrive soon. After all, "[t]he pathological basis of almost all mental disorders remains as unknown today as it was in 1886—unsurprising, given that the brain turns out to be one of the most complex objects in the universe." Gary Greenberg, *Psychiatry's Incurable Hubris*, THE ATLANTIC, Apr. 2019, https://www.theatlantic.com/magazine/archive/2019/04/mind-fixers-anne-harrington/583228/. In short, "[i]t is simply [still] not yet the time to write the Constitutional formulas" for insanity "in terms whose meaning, let alone relevance, [still] is not yet clear either to doctors or to lawyers." *Powell*, 392 U.S. at 537.

In any event, Petitioner's contention is question-begging. He argues that moral culpability is a necessary precondition for criminal liability. But that assertion reveals little because it does not answer what counts as morally culpable. Popular sovereignty—the baseline of democratic republicanism—allows the People through their legislatures to decide for themselves what is blameworthy. That very "process of adjustment has always been thought to be the province of the States," *Powell*, 392 U.S. at 536—not of philosophers, professors, or lawyers. And as discussed below, Kansas's decision to adjust its conception of blameworthiness is a "distinctly small-bore" use of the States' historical sovereign control over their criminal laws. *Gundy v. United States*, 139 S. Ct. 2116, 2130 (2019) (plurality op.).

B. Moral capacity is not a constitutional prerequisite to imposing criminal liability.

Kansas has adopted the *mens rea* approach to the insanity question. Kan. Stat. Ann. § 22-3220 (2009). Under current precedent, that exercise of sovereign power does not violate due process unless it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Patterson*, 432 U.S. at 202 (internal quotation marks omitted), or is "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

Petitioner argues that § 22-3220 offends a "fundamental" principle because it provides no "mechanism to excuse criminal defendants whose mental states render them blameless," and "moral culpability" is "the essential prerequisite for criminal punishment." Pet'r Br. 12. That contention cannot be reconciled with the historical record or with uniform contemporary practice imposing criminal liability irrespective of moral capacity.

1. The historical record shows that moral capacity never has been a uniform part of the insanity defense.

M'Naghten's moral capacity standard has not achieved "the uniform and continuing acceptance we would expect for a rule that enjoys 'fundamental principle' status." *Montana v. Egelhoff*, 518 U.S. 37, 48 (1996) (plurality op.). Even "a cursory examination of the traditional Anglo–American approaches to insanity reveals significant differences among them, with four traditional strains variously combined to yield a diversity of American standards." *Clark v. Arizona*, 548 U.S. 735, 749 (2006). That "varied background," including "the cognitive incapacity, the moral incapacity, the volitional incapacity, and the product-of-mental-illness tests," already led this Court to conclude "that no particular formulation has evolved into a baseline for due process." *Id.* at 749-52.

That conclusion—though correct, and sufficient itself to resolve this case—politely understates the morass that was pre-Founding and nineteenth century insanity law.

a. America inherited from the English common law various insanity tests. Those included the "right and wrong" test eventually articulated in *M'Naghten*; the "wild beast" test, which requires a total deprivation of understanding and memory; and the "irresistible impulse" test, which excuses a defendant if his mental impairment made him unable to control his conduct. *See* Henry Weihofen, INSANITY AS A DEFENSE IN CRIMINAL LAW 20-24 (1933).

Many American jurisdictions eventually settled on the *M'Naghten* test. But nothing suggests that they did so because they thought *M'Naghten*'s moral-capacity standard represented any principled or widely accepted theory of human nature and its intersection with established jurisprudence. Rather, many of them seemed resigned to *M'Naghten* because it was comparatively easy to administer—it represented a "relatively simple set of standards" promulgated after "a series of acquittals . . . and the resulting furor over courts allowing juries to be 'lenient' toward criminals." HISTORIC U.S. COURT CASES: AN ENCYCLOPEDIA 54 (John W. Johnson ed., 2d ed. 2001).

More important, a rule cannot be a constitutionally necessary ingredient of due process unless it has achieved "uniform and continuing acceptance," *Egelhoff*, 518 U.S. at 48, and *M'Naghten*'s moral capacity rule flunks that test. Compare, for instance, the moral capacity rule to just one of its competitors—the irresistible impulse test. The latter "is at least as old as" *M'Naghten*, and it "often in the past competed" with *M'Naghten* "for acceptance." Abraham S. Goldstein, THE INSANITY DEFENSE, 67 (Yale Univ. Press 1967). In the 1920s in particular, the irresistible impulse test "enjoyed a considerable renaissance" after "psychoanalytic psychology turned to criminal law and found *M'Naghten* far too rationalistic." *Id.* The irresistible impulse test's "[e]mphasis on loss of control seemed much more sensible" since "it was more 'correct' psychologically" and "better comported with the other objectives of the insanity defense." *Id.*

Still different rules prevailed in other jurisdictions. New Hampshire has relied on the "product of insanity" formulation for 150 years. *State v. Pike*, 49 N.H. 399, 438 (1870). A similar rule gained currency for a time in *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1972). *Durham* echoed an insanity formulation first announced in *Hadfield's Case*, 27 State Trials 1281 (1800).

What is more, courts and jurists have criticized the *M'Naghten* rule since its inception. Shortly after the Civil War, the Alabama Supreme Court stated that the "'right and wrong test,' . . . it must be remembered, itself originated with the medical profession, in the mere dawn of the scientific knowledge of insanity, *has been condemned by the great current of modern medical authorities*, who believe it to be 'founded on an ignorant and imperfect view of the disease.'" *Parsons v. State,* 2 So. 854 (Ala. 1887) (citation omitted) (emphasis added). Nearly fifty years later, a Member of this Court said

M'Naghten "has little relation to the truths of mental life" and "palters with reality." Benjamin Cardozo, *What Medicine Can Do for Law,* in LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES 70, 106, 108 (1931).

More recently, the Third Circuit rejected *M'Naghten* as "unworkable" and a "sham" and abolished the defense until Congress reinstated it. *United States v. Currens*, 290 F.2d 751 (3d Cir. 1961). In rejecting *M'Naghten*, the court of appeals traced the moral capacity test's lineage to primitive and superstitious roots in "the ancient book, written by William Lambard of Lincolns Inn, Eirenarcha," which formulated the test as "knowledge of good or evil." *Id.* at 764. "The principles of law embodied in the volume were, of course, typical of the thinking of the times," including "imposing severe penalties for injuries or death caused by witchcraft." *Id.* at 764-65.

b. It wasn't just lawyers and judges who could not agree on—and heavily criticized—*M'Naghten*'s moral capacity rule. Disunity about legal insanity has long existed in the medical and scientific communities too.

Consider Benjamin Rush, a signer of the Declaration of Independence and the father of American psychiatry. As both medical man and legal reformer, he advocated a medicalized view of the human psyche that separated it into both rational and moral faculties, presaging *M'Naghten*'s moral capacity test. *See generally* Benjamin Rush, MEDICAL INQUIRIES AND OBSERVATIONS, UPON THE DISEASES OF THE MIND (1812). But Rush acknowledged that his moral capacity framework lacked administrable rules: "How far the person whose diseases have been mentioned, should be considered as responsible to human or divine laws for their actions, and where the line should be drawn that divides free agency from necessity, and vice from disease, I am unable to determine." *Id.* at 360.

Later, in the early nineteenth century, physicians began a vast project of classifying all human behavior under a psychiatric heading, creating categories such as "monomania" and "moral insanity." Susanna L. Blumenthal, LAW AND THE MODERN MIND: CONSCIOUSNESS AND RESPONSIBILITY IN AMERICAN LEGAL CULTURE 75 (Harvard Univ. Press 2016). Many patients with those conditions had "supposed symptoms . . . indistinguishable from crime; the first and only indicator that a patient was afflicted with *monomanie homicide* was often the act of murder itself." *Id.* Yet nothing about those conditions suggests that scientists viewed moral capacity as integral to each.

What followed in the antebellum decades, especially before *M'Naghten* itself, was a dizzying period of innovation among entrepreneurial doctors whose "psychological models were at odds with the 'philosophy of intellect' upon which Anglo-American jurisprudence was based." *Id.* at 87.

For example, in early editions of his monumental treatise on medical jurisprudence, Francis Wharton considered *M'Naghten*'s moral-capacity test to be an appropriate expansion of the law of insanity. But by his 1873 edition, Wharton admitted that "it would be folly to consider the question at rest." Francis Wharton, 1 WHARTON AND STILLÉ'S MEDICAL JURISPRUDENCE § 120

(3d ed., 1873). This hesitation was partly precedential—he surveyed over 800 appellate opinions stating irreconcilable rules—and partly doctrinal. On the latter, he considered the "right and wrong" test underinclusive to "cover all the cases of legitimate insane responsibility." *Id.* § 121. For but one example, Wharton explained that a *mens rea* approach to insanity could exclude from criminal responsibility some insane persons that the "right and wrong" test could not. *Id.* § 131.

Psychiatrists shared Wharton's skepticism of the moral capacity defense. In 1858, Dr. John P. Gray declared that the inability to appreciate right from wrong was "the usual condition of those, who, in plain speaking times, were called *bad men*." John P. Gray, *Moral Insanity*, in AM. J. OF INSANITY 14, 319-20 (Apr. 1858). Thus, one professor of medical jurisprudence, John Elwell, considered psychiatrists' various and competing diagnoses not to warrant acquittal unless, echoing the irresistible impulse test, the defendant was "absolutely without the power of self-restraint." John Elwell, A MEDICO-LEGAL TREATISE ON MALPRACTICE AND MEDICAL EVIDENCE: COMPRISING THE ELEMENTS OF MEDICAL JURISPRUDENCE 404 (1860).

That bevy of newfound, unsettled, and competing psychiatric theories fatally undermines any claim that moral capacity always has been uniformly indispensable to the defense of legal insanity. Instead, the science's broad variability allowed psychiatrists "to underwrite capacity contests of every imaginable variety" and "tended to occlude rather than illuminate" "the distinction between insanity and mere depravity."

Blumenthal at 86. The discord became so stark that "[b]y the 1870's, mental unsoundness had become an 'embarrassing' problem in American courtrooms, producing obvious tensions between and among medical experts and legal authorities that rose to the notice of the general public." *Id.* at 90.

The upshot of that unsettled science, and the resulting legion approaches to legal insanity? "[N]o general charge" should be "brought against the courts *for want of well-settled rules on this subject*." Elwell at 369 (emphasis added). Better instead if the Country waited "until those learned men who have spent so much time in the investigation of the disease, shall have agreed upon something themselves, and demonstrated its truth to the world; *a result they admit, as yet unattained*." *Id.* (emphasis added).

Further dooming Petitioner's claim, we're still waiting for that result. Even today, "if anything can be agreed upon about criminal insanity, it is that insanity is a matter of some uncertainty." Insanity Defense Work Group, *American Psychiatric Association Statement on the Insanity Defense*, 140 AM. J. PSYCHIATRY 681, 685 (1983). In fact, the nation's leading medical associations continue to reverse course on which rules should govern legal insanity. For example, in the early 1980s, the American Medical Association advocated for "the abolition of the special defense of insanity in criminal trials, and its replacement by statutes providing for acquittal when the defendant, as a result of mental disease or defect, lacked the state of mind (*mens rea*) required as an element of the crime charged." Committee Report, *Insanity Defense in Criminal Trials and Limitation of Psychiatric Testimony*, 251 J. AM. MED. ASS'N 2967, 2967 (1984). Twenty years later, the AMA reversed course. *See AAPL Practice Guideline for Forensic Psychiatric Evaluation of Defendants Raising the Insanity Defense*, 42 J. AM. ACAD. PSYCHIATRY & L. at S6 (2014 Supp.) (citing AMA, *Reports of Council on Long Range Planning and Dev.* 202 (June 2005)).

It's not unreasonable to expect the country's medical organizations or their members to reverse course again in the next 20 years. The scientific method is *designed* to drive change: scientists get paid to conceive and test new theories, falsifying old ones in the process. Given those realities, Petitioner's request to constitutionalize today's in vogue theory of insanity is shortsighted.

c. The disharmony among courts and scientists discussed above should be fatal to Petitioner's contention that moral capacity always has been indispensable to the American conception of the insanity defense. That alone suffices to reject Petitioner's due process claim. Even so, *amici* briefly show how the *mens rea* approach to legal insanity developed alongside the moral-capacity approach—more evidence confirming that moral capacity has never been the uniform, sole approach to legal insanity.

The *mens rea* approach dates to at least 1724, when Justice Tracy instructed the jury on "guilty mind" as a requisite element of murder in the trial of Edward Arnold. Justice Tracy directly tied malice to lack of sanity—and both to the defendant's capacity to *reason*. "[G]uilt arises from the mind, and the wicked will and intention of the man. If a man be deprived of his reason, and consequently of his intention, he cannot be guilty; and if that be the case, though he had actually killed . . . he is exempted from punishment . . . ." *Arnold's Case*, 16 How. St. Tr. 596, 764 (1724). And "it is not every kind of frantic humour" that makes him "such a madman as is to be exempted from punishment: it must be a man that is totally deprived of his *understanding and memory*, and doth not know what he is doing, no more than an infant, than a brute, or a wild beast." *Id*. at 764-65.

Academic research shows just how widespread the *mens rea* approach's following became. "Until the nineteenth century, criminal-law doctrines of *mens rea* (criminal intent) handled the entire problem. Evidence of mental illness was admitted on the question of intent." Norval Morris, MADNESS AND THE CRIMINAL LAW 54 (1982). Confirming the point, early American jurists "tended to recite long-standing definitions and rules drawn from such old English authorities as Edward Coke, Matthew Hale, and Blackstone, most of whom reserved the designation of insanity for those suffering from 'a total deprivation of *reason*.'" Blumenthal at 57 (emphasis added).

2. States today routinely impose criminal liability irrespective of an accused's moral capacity.

Contemporary practice also contradicts Petitioner's claim that moral culpability is the *sine qua non* of criminal liability. All jurisdictions—including those with a moral capacity defense—impose strict liability and criminal negligence liability for a vast and growing body of regulatory crimes. By definition, those criminal prohibitions apply irrespective of the defendant's moral culpability.

It's easiest to see the irreconcilable conflict between Petitioner's proposed rule and today's practice by first returning briefly to *M'Naghten*'s origins. *M'Naghten* was born when the few existing criminal prohibitions targeted conduct viewed as *malum in se*—inherently immoral. At common law, felonies were limited to offenses viewed then as inarguably immoral, including "murder, manslaughter, arson, burglary, robbery, rape, sodomy, mayhem and larceny." *Jerome v. United States*, 318 U.S. 101, 108 n.6 (1943) (citing Wharton, CRIMINAL LAW § 26 (12th ed.)). The jurisdictions that allowed an accused to invoke the defense of lack of moral capacity were at least internally consistent—both the crime and the defense were defined primarily by moral and religious concerns. Such an approach would not have been surprising in, for example, parts of colonial America, where "religious, biological, and moral explanations were woven into a unified model of madness in which God, devil, and human actors all played various roles." Mary Ann Jimenez, CHANGING FACES OF MADNESS: EARLY AMERICAN ATTITUDES AND TREATMENT OF THE INSANE 5-22 (1987).

Things have changed. Vast new swaths of contemporary criminal laws target behaviors for reasons other than notions of sin and morality. States now regulate complex economic, social, and political dynamics without regard to moral culpability. Those new *malum prohibitum* regulatory crimes "'enjoin only positive duties, and forbid only such things as are not mala in se . . . *without any intermixture of moral guilt*.'" *Jordan v. De George*, 341 U.S. 223, 237 n.10 (1951) (quoting COOLEY'S BLACKSTONE Vol. I at 54, 58 (4th ed.)) (emphasis added). They allow States to respond to immense post-industrial regulatory challenges: "Traffic of velocities, volumes and varieties unheard of came to subject the wayfarer to intolerable casualty risks," and "[c]ongestion of cities and crowding of quarters called for health and welfare regulations undreamed of in simpler times." *Morissette v. United States,* 342 U.S. 246, 254 (1952). "The industrial revolution multiplied the number of workmen exposed to injury from increasingly powerful and complex mechanisms, driven by freshly discovered sources of energy, requiring higher precautions by employers." *Id.* at 253-54.

All American jurisdictions now impose strict liability for a variety of crimes. Examples include vehicular homicide, Colo. Rev. Stat. § 18-3-106; possession of hand grenades, *United States v. Freed*, 401 U.S. 601 (1971); statutory rape, *State v. Yanez*, 716 A.2d 759 (R.I. 1998); drunk driving, *State v. Glass*, 620 N.W.2d 146 (N.D. 2000); selling unregistered securities, *Hentzner v. State*, 613 P.2d 821 (Ala. 1980); environmental crimes, such as permitting leakage from hazardous waste containers, *People v. Matthews*, 7 Cal. App. 4th 1052 (1992); and introducing adulterated drugs into commerce, 21 U.S.C. § 333(a)(1), to name but a few.

Still other statutes criminalize negligence. Those statutes impose criminal liability upon an accused who fails to live up to a duty of care that a "reasonable person" would exercise—irrespective of his own actual mental culpability. Examples include negligent assault, *People v. Conway,* 849 N.E.2d 954 (N.Y. Ct. App. 2006); involuntary manslaughter, *Moore v. State*, 574 S.W.2d 122 (Tex. Crim. App. 1978); and child abuse, *Santillanes v. State*, 849 P.2d 358 (N.M. 1993).

Adopting Petitioner's proposed rule would portend serious consequences for this universal regime of strict liability and negligence crimes. Taken to its logical end, Petitioner's rule could mean that all strict liability and negligence crimes are unconstitutional: None accounts for moral capacity, and (under Petitioner's rule) that's a constitutional minimum for due process. This Court, however, has already held that strict liability crimes pass constitutional muster. *Lambert v. California*, 355 U.S. 225, 228 (1957) ("We do not go with Blackstone in saying that 'a vicious will' is necessary to constitute a crime, 4 Bl. Comm. *21, for conduct alone without regard to the intent of the doer is often sufficient."). Petitioner's rule may call *Lambert*'s continuing validity into question.

Alternatively, Petitioner's rule would make lack of moral culpability a defense for strict or negligence criminal liability. This outcome is inherently inconsistent with those already-Court-approved theories of crime—and it knows no logical stopping point. After all, "it is hard to see why a special rule . . . should be made for the mentally ill if it is not available to other 'innocents' convicted of crimes of negligence or strict liability." Morris at 71.

* * * * *

The reality of States' expansive criminal regulation outside any moral dimensions disproves Petitioner's contention that moral capacity is a bedrock principle deeply rooted in our nation's history and traditions. Imposing a constitutional moral capacity defense could seriously undermine—or even invalidate—vast zones of modern societal regulation whose constitutional validity was settled long ago.

C. Constitutionalizing a moral capacity defense would commit the Court to substantial policymaking and produce troubling consequences.

Making Petitioner's moral capacity rule a due process baseline would leave this Court and the country to grapple with at least three significant follow-on problems.

1. Among jurisdictions with a moral capacity test, fundamental questions about the way that test operates remain controversial—and unresolved. Foremost among these: Must the accused subjectively believe the prohibited conduct to be inherently wrong? *See, e.g.*, 11 Del. Code § 401. Or must he merely understand that the conduct is illegal? *See, e.g.*, 720 Ill. Comp. Stat. 5/6-2 (excusing substantial incapacity "to appreciate the criminality of his conduct"); Model Penal Code § 4.01 (excusing where accused "lacks substantial capacity . . . to appreciate the criminality [wrongfulness] of his conduct") (brackets in original). Or both? *See, e.g.*, *People v. Lyttle*, 408 N.Y.S.2d 578 (Co. Ct. 1976). These are mutually exclusive theories of blameworthiness, so the Court must resolve this

disagreement before States can properly implement moral capacity as a constitutional baseline.

Beyond that, the answers to those questions themselves raise more questions: Just how much "appreciation" of wrongness must an accused have? Must he have *no* appreciation that the conduct is wrong *in any sense*; or does he qualify if he doesn't appreciate *just how wrong* the conduct is? *See* Paul Robinson, 2 CRIM. L. DEF. § 173(d)(3) (1984) ("The term 'appreciate' in the A.L.I. formulation may have been intended…to provide the excuse where the actor knows the conduct is wrong or criminal, but may not know that it is as wrong or as criminal as it is."). If the latter, how much appreciation is too much to be insane? Thirty percent? Fifty?

No constitutional principle settles those questions. Instead, those questions call for policy-based answers. And adopting Petitioner's proposed rule would require substituting this Court's policy judgment for a legislature's on each of them.

2. Petitioner's rule makes the vagaries of psychiatry the limiting principle for a constitutional defense to criminal liability. Stated differently, if Petitioner is right, the insanity defense must be available to defendants with *any* mental disorder that psychiatrists claim deprives them of moral capacity. Consider what that would mean for just one disorder: psychopathy.

"Virtually all philosophers who have addressed the issue argue that psychopaths are not morally responsible." Stephen J. Morse & Morris B. Hoffman, *The Uneasy Entente Between Legal Insanity and Mens*

Rea: Beyond Clark v. Arizona, 97 J. CRIM. L. & CRIMINOLOGY 1071, 1126 (2007). It requires no imagination to see the usefulness of the moral capacity test for persons who, like psychopaths, cannot feel guilt. Henry Richards, *Evil Intent: Violence and Disorders of the Will*, in PSYCHOPATHY: ANTISOCIAL, CRIMINAL, AND VIOLENT BEHAVIOR, 69 (T. Millon, E. Simonsen, M. Birket-Smith, & R. D. Davis eds., 1998). In fact, some courts have already permitted psychopaths to use the defense. *United States v. Gay*, 522 F.2d 429 (6th Cir. 1975); *Wade v. United States*, 426 F.2d 64 (9th Cir. 1970).

The Model Penal Code drafters acknowledged this problem and tried to manage it by making the defense unavailable to defendants with a psychopathic "abnormality manifested only by repeated criminal or otherwise antisocial conduct." Model Penal Code § 4.01. But that exclusion fails to account for high-functioning psychopaths who escape detection. Indeed, some psychopaths "manage to ply their trade with few formal contacts with the criminal justice system" and are well-represented in politics, law, medicine, and business, especially "where rules and their enforcement are lax and where accountability is difficult to determine." Robert D. Hare, *Psychopaths and Their Nature: Implications for the Mental Health and Criminal Justice System*, in Millon et al. at 195-96. Nor does the Model Penal Code exclusion adequately account for the fact that psychopaths often suffer from a constellation of neurological symptoms unrelated to criminality, such as bipolar disorder, schizophrenia, somatization disorder, various anxiety disorders, and ADHD, with a possible genetic basis. In other words, few psychopaths will present a mental "abnormality manifested only by repeated criminal or otherwise anti-social conduct" because psychopaths often have numerous additional symptoms. Overholser, *Criminal Responsibility: A Psychiatrist's Viewpoint*, 48 A.B.A. J. 527, 529-30 (1962).

The more psychiatry says psychopathy resembles other disorders in etiology and broad neurological impairment, rather than simple predisposition to criminality, the more courts will say it qualifies for any constitutional moral capacity defense. And exempting psychopaths—malignant, personality-disordered offenders—from criminal liability will hobble the States' and Congress's ability to punish the worst crimes. *See, e.g.*, Federal Bureau of Investigation, *Killed in the Line of Duty: A Study of Selected Felonious Killings of Law Enforcement Officers* (1992) (concluding that half of officers killed in line of duty were killed by people closely matching psychopath profile); *United States v. Antone*, 742 F.3d 151 (4th Cir. 2014) (citing studies showing up to 70 percent of prisoners suffer from antisocial personality disorder).

3. Finally, a brief response to Petitioner's assurance that under his proposed rule, States will "retain ample leeway to experiment with the formulation of the insanity defense that works best for their citizens." Pet'r Br. 36. His promises—that even under his regime States still can "add or subtract a volitional component," *id.* at 37, or "adjust different components of the defense's basic formula," *id.*, or "allocate burdens as they see fit," *id.* at 38—resemble similar assurances to the States in prior cases.

Consider *Atkins v. Virginia*, which "le[ft] to the States the task of developing" standards to determine who qualified for an intellectual-disability exclusion from capital punishment. 536 U.S. 304, 317 (2002) (internal quotation marks and brackets omitted). That approach lasted twelve years—until the Court declared a State's chosen standard unconstitutional because, in the Court's view, it "create[d] an unacceptable risk that persons with intellectual disability will be executed." *Hall v. Florida*, 572 U.S. 701, 704 (2014).

If past is prelude, the question is not whether a follow-on case will aim to break Petitioner's promise that any State "approach[]" to insanity is "permissible" as long as it recognizes moral capacity. Pet'r Br. 39. The only real question—how long until that case is filed?

II. THE EIGHTH AMENDMENT DOES NOT REQUIRE A MORAL CAPACITY DEFENSE.

A. Petitioner did not press, and the Kansas Supreme Court did not pass upon, his new Eighth Amendment claim.

As an initial matter, Petitioner's litigation choices preclude the Court from considering his claim that the Eighth Amendment requires States to recognize an insanity defense. "With 'very rare exceptions,'" this Court has "adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that [it] will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision" under review. *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (quoting *Yee v.*

Escondido, 503 U.S. 519, 533 (1992)). Petitioner's new Eighth Amendment claim fails both parts of that test.

First, the Kansas Supreme Court did not address, much less decide, whether Kansas Statute § 22-3220 violates the Eighth Amendment. J.A. 242-45. Petitioner concedes as much: "the decision below does not separately analyze Kansas's *mens rea* approach under the Eighth Amendment." Cert. Reply Br. 9.

Second, when—as here—"the highest state court is silent on a federal question," this Court "assume[s] that the issue was not properly presented, and the aggrieved party bears the burden of defeating this assumption by demonstrating that the state court had a fair opportunity to address the federal question that is sought to be presented here." *Adams*, 520 U.S. at 86-87 (internal quotation marks and citations omitted). Petitioner fails to carry that burden.

Petitioner has tried to rebut that assumption only in his cert-stage reply brief. There, he contended that he raised this claim in the Kansas Supreme Court—but only "in a post-argument submission." Cert. Reply Br. 9 (citing Cert. Reply Br. Add. 19). That contention does not withstand scrutiny.

That post-argument submission arose from counsel's "belie[f]" that some members of the Kansas Supreme Court "were, essentially, combining parts of Issue IV (unconstitutional to abrogate the insanity defense) and Issue VIII (death penalty is categorically disproportionate for defendants with a severe mental illness)." Cert. Reply Add. 18. Counsel thus worried "that Issue VIII was not sufficiently clear," *id.*, and urged the Kansas Supreme Court *not* to import Petitioner's due process challenge to § 22-3220 into his separate Eighth Amendment categorical challenge to the death penalty: "to the extent this [Kansas Supreme] Court would consider applying the historical insanity defense as outlined in Issue IV to the imposition of a death sentence, counsel believes that issue has been substantially raised and briefed in Issue VIII." Cert Reply Add. 19.

The conflict between what that submission *actually* says and what he now claims it said could not be starker. His post-argument submission expressly tried to protect, and keep his categorical Eighth Amendment claim separate from, his due process claim. He urged the court not to "combin[e]" them because his categorical Eighth Amendment claim stood alone and was "substantially raised and briefed." That contradicts his current reading—that the submission somehow made his due process attack on § 22-3220 the *basis of* his categorical Eighth Amendment challenge.

Petitioner's failure to rebut the assumption that he did not press his Eighth Amendment challenge to § 22-3220 in the Kansas Supreme Court deprives this Court of jurisdiction to hear this claim. *Yee*, 503 U.S. at 533; *Illinois v. Gates*, 462 U.S. 213, 218-20 (1983). At a minimum, prudential considerations should preclude the Court from considering this question. Petitioner's failure makes the record on this claim inadequate. *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969). And "'due regard'" for this Court's "'appropriate relationship'" with state courts "demands that" the Kansas Supreme Court "be given an opportunity to consider" this claim before this Court does. *Gates*, 462 U.S. at 221 (quoting *McGoldrick v. Compagnie Generale*, 309 U.S. 430, 435-36 (1940)).

B. Nothing in this Court's Eighth Amendment precedent requires States to provide an insanity defense.

Petitioner's claim fails on the merits in any event. Petitioner does not cite, and *amici* are unaware of, any opinion of this Court holding that the Eighth Amendment (or any other constitutional provision) requires States' substantive criminal law to provide any affirmative defense. On the contrary, the Court has rejected at least four requests to create constitutionally based affirmative defenses: States need not recognize the affirmative defenses of cognitive incapacity, *see Clark*, 548 U.S. at 779; or voluntary intoxication, *see Egelhoff*, 518 U.S. at 56; or extreme emotional disturbance, *see Patterson*, 432 U.S. at 201; or irresistible impulse, *see Leland*, 343 U.S. at 800-01.

Making a fifth run at that goal, Petitioner invokes statements from some of the Court's cases touching on moral culpability to try to create a constitutional command for a moral capacity defense. But Petitioner fundamentally misreads those cases. They concerned which punishments the Constitution permits States to impose on criminals with reduced moral culpability. None undermined the States' separate, and predicate, legitimate power to punish those persons in the first place *despite* their reduced moral capacity.

Consider, for example, the death penalty for persons with intellectual disabilities. Thirty years ago, the

Court held that the Eighth Amendment did not forbid that punishment for that group of murderers, even while recognizing the "principle that punishment should be directly related to the personal culpability of the criminal defendant." *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (citing *Lockett v. Ohio*, 438 U.S. 586 (1978) and *Eddings v. Oklahoma*, 455 U.S. 104 (1982)). That principle animated the Court's prior holdings that capital defendants have an Eighth Amendment right to individualized sentencing, including presentation of favorable mitigation evidence during the penalty phase. *Lockett*, 438 U.S. at 605; *Eddings*, 455 U.S. at 113-14.

Penry is of course no longer good law. *Atkins v. Virginia*, 536 U.S. 304 (2002). In overruling *Penry*, *Atkins* reasoned in part that persons with intellectual disabilities "do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." *Id.* at 306.

But even then, the Court reiterated that diminished moral culpability did not preclude the intellectually disabled from "meet[ing] the law's requirements for criminal responsibility." *Id.* And when they meet those requirements, they "should be tried and punished when they commit crimes." *Id.*

Likewise, the Court has exempted juveniles from capital punishment, *Roper v. Simmons,* 543 U.S. 551 (2005); from life without parole for non-homicide crimes, *Graham v. Florida*, 560 U.S. 48 (2010); and from mandatory life without parole in any case, *Miller v. Alabama,* 567 U.S. 460 (2012). In each of those cases the Court relied on juveniles' "diminished culpability."

Roper, 543 U.S. at 571. But in none of them did the Court set aside a juvenile's conviction—a seemingly necessary consequence if youth were an affirmative defense. On the contrary, the Court reaffirmed that, despite his diminished moral culpability, a "juvenile *is not absolved of responsibility for his actions*." *Graham,* 560 U.S. at 68 (emphasis added).

In short, these cases show concern about the severity of punishments for defendants with lessened culpability, but no hesitation about whether they can be convicted under the substantive criminal law and receive *some* punishment. Those cases cannot reasonably be read to support the conclusion Petitioner draws from them—that an accused's reduced culpability precludes "criminally punishing the insane." Pet'r Br. 32.

C. There is no genuine national consensus that moral capacity is a necessary predicate to criminal liability.

Under the Court's current Eighth Amendment jurisprudence, the Amendment "draw[s] its meaning" in part "from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958) (plurality). Those "evolving standards should be informed by objective factors to the maximum possible extent." *Harmelin v. Michigan*, 501 U.S. 957, 1000 (1991) (quotations and citation omitted). "[T]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Penry*, 492 U.S. at 331.

Taking that jurisprudence at face value, it too precludes adopting Petitioner's proposed rule for two reasons. First, though a majority of States makes some species of the *M'Naghten* test available as a defense in some circumstances, "[i]t is not so much the number of the States" taking a given approach "that is significant, but the consistency of the direction of change." *Atkins*, 536 U.S. at 315. The direction of legislative change leads to Kansas: Since the late 1970s, five States besides Kansas have moved *away* from *M'Naghten* and toward the *mens rea* test. *See* Idaho Code Ann. § 18-207 (1986); Mont. Code Ann. § 46-14-102 (1979); Alaska Stat. § 12.47.010(a) (1982); Utah Code Ann. § 76-2-305(1) (1983); Nev. Rev. Stat. § 193.220 (1995), *held unconstitutional by Finger v. Nevada*, 27 P.3d 66 (Nev. 2001). Even considering Congress's adoption of *M'Naghten* in the early 1980s, 18 U.S.C. § 17, on balance the weight of legislative momentum favors Kansas's approach.

Second, as discussed, *see supra* Section I.B.2, all jurisdictions today impose strict or negligence criminal liability—uniform American movement over the last half century to an agreement that criminal liability can arise irrespective of moral capacity. That ends the Eighth Amendment inquiry.

* * * * *

Petitioner's Eighth Amendment argument, like his due process argument, amounts to a plea for mercy for the mentally ill. "Mercy toward the guilty can be a form of decency, and a maturing society may abandon harsh punishments that it comes to view as unnecessary or unjust." *Miller*, 567 U.S. at 495 (Roberts, C.J., dissenting). "But decency is not the same as leniency." *Id.* "A decent society protects the innocent from violence. A mature society may determine that this requires removing those guilty of the most heinous murders from its midst, both as protection for its other members and as a concrete expression of its standards of decency." *Id.* The Eighth Amendment is not a one-way ratchet that "can move only in the direction of easing sanctions on the guilty." *Id.*

CONCLUSION

The Court should affirm the Kansas Supreme Court's judgment.

Respectfully submitted.

SEAN D. REYES
Utah Attorney General
TYLER R. GREEN*
Utah Solicitor General
THOMAS B. BRUNKER
Deputy Solicitor General
ANDREW F. PETERSON
Assistant Solicitor General
350 N. State Street, Suite 230
Salt Lake City, UT 84114-2320
Telephone: (801) 538-9600
Email: tylergreen@agutah.gov
**Counsel of Record*

Counsel for Amicus Curiae
State of Utah

ADDITIONAL COUNSEL

STEVE MARSHALL
Attorney General
STATE OF ALABAMA

KEVIN G. CLARKSON
Attorney General
STATE OF ALASKA

LESLIE RUTLEDGE
Attorney General
STATE OF ARKANSAS

ASHLEY MOODY
Attorney General
STATE OF FLORIDA

CHRISTOPHER M. CARR
Attorney General
STATE OF GEORGIA

LAWRENCE G. WASDEN
Attorney General
STATE OF IDAHO

CURTIS T. HILL, JR.
Attorney General
STATE OF INDIANA

JEFF LANDRY
Attorney General
STATE OF LOUISIANA

ERIC SCHMITT
Attorney General
STATE OF MISSOURI

TIMOTHY C. FOX
Attorney General
STATE OF MONTANA

DOUG PETERSON
Attorney General
STATE OF NEBRASKA

DAVE YOST
Attorney General
STATE OF OHIO

MIKE HUNTER
Attorney General
STATE OF OKLAHOMA

ALAN WILSON
Attorney General
STATE OF SOUTH CAROLINA

KEN PAXTON
Attorney General
STATE OF TEXAS