No. ___-____

In the Supreme Court of the United States

DANIEL E. GENSON, III,
Petitioner

v.

STATE OF KANSAS,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE KANSAS SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the absence of *mens rea* from a felony offense that criminalizes passive, otherwise innocent conduct without proof of notice while subjecting individuals to severe criminal punishment violates the Fourteenth Amendment?

PARTIES TO THE PROCEEDING

Petitioner is Daniel Earl Genson, III. Respondent is the State of Kansas. Neither party is a corporation. Rule 29.6.

RELATED PROCEEDINGS

Kansas Supreme Court:

State v. Daniel E. Genson, 316 Kan. 130 (Kan. 2022).

Kansas Court of Appeals:

State v. Daniel E. Genson, 481 P.3d 137 (Kan. App. 2020).

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PETITION FOR WRIT OF CERTIORARI

Petitioner Daniel E. Genson, III, ("Danny"), respectfully petitions for a writ of certiorari to review the judgment of the Kansas Supreme Court.

INTRODUCTION

This case presents an unsettled question of national importance: whether the absence of *mens rea* from a felony offense that criminalizes individuals engaged in passive, otherwise innocent conduct without proof of notice while subjecting them to severe criminal punishment violates the Fourteenth Amendment.

The question arises through the lens of Kansas' Offender Registration Act (KORA)—one of the most sweeping offender registries in the Nation, mandating offender registry compliance for more than 23,000 individuals—and through the lens of Danny's case, where mental illness, KORA's Byzantine registration requirements, and strict liability intersect. While in the throes of a psychotic break, Danny was noncompliant with KORA's registration requirements for little more than a day. But because Kansas defines KORA offenses as strict-liability crimes, the district court prevented the jury from receiving evidence and argument that Danny's severe mental illness caused his failure to register for the day in question. The jury convicted him.

Danny preserved a challenge to his conviction under the Fourteenth Amendment's Due Process Clause. He argued KORA offenses were unconstitutional because they combined strict liability with felony convictions for passive inaction, and mandated severe criminal punishment. But the Kansas Appellate Courts disagreed,

finding that no fundamental rights were impacted by KORA offenses and that strict-liability KORA prosecutions withstood a Fourteenth Amendment challenge under rational-basis review.

The Kansas Supreme Court's holding cannot be reconciled with decisions of this Court. Although the Court has not explicitly stated that the right to have scienter proven as an element of a felony offense is fundamental and implicit in our concept of ordered liberty, the Court has repeatedly emphasized—often through statutory construction—the deeply embedded and unparalleled importance of *mens rea* in our criminal jurisprudence. Moreover, felony offenses that eliminate *mens rea* necessarily implicate and impair other rights the Court has explicitly deemed fundamental. The convergence of these rights place significant doubt on the Kansas Supreme Court's determination that KORA's strict-liability provision needs only to survive rational-basis review to honor the Fourteenth Amendment.

While the Court's jurisprudence over the last century provides some guidance to lower courts, the Court has yet to delineate a precise line or establish comprehensive criteria for evaluating the constitutionality of strict-liability felonies. The lack of clear criteria on the matter has led to a schism in lower courts on to the degree to which due process limits strict-liability cries, if at all, and also, as demonstrated by Danny's case, to the routine deprivation of fundamental rights by unchecked legislatures seeking to ease the path to conviction. Because this case presents an ideal vehicle for the Court to establish clear guidelines for when a strict-

liability felony runs afoul of the Fourteenth Amendment, the Court should grant certiorari.

OPINIONS BELOW

The opinion of the Kansas Supreme Court is reported at 316 Kan. 130, Petition Appendix at 1a-31a ("App."), and the opinion of the Kansas Court of Appeals is reported at 481 P.3d 137, App. at 32a-94a.

JURISDICTION

The Kansas Supreme Court affirmed Danny's conviction on July 29, 2022. Danny moved for rehearing or modification of that decision, and the Kansas Supreme Court denied his motion on September 28, 2022. Danny received an extension from the Court until February 25, 2023, to file his Petition for Writ of Certiorari. The Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution and relevant Kansas statutes, Kan. Stat. Ann. § 22-4902 to Kan. Stat. Ann. § 22-4909 and Kan. Stat. Ann. § 21-5203, are reproduced in the appendix. App. at 97a-141a.

STATEMENT OF THE CASE

A. Kansas Law

KORA is among the most draconian registration schemes in the United States. It broadly mandates registration for individuals convicted of most sex

offenses, many violent offenses, certain drug offenses, for anyone "otherwise required to be registered" by another State or federal law, and for anyone otherwise ordered by a court to register. Kan. Stat. Ann. § 22-4902(a)(1)-(5) (2022). KORA registration is required for felony and misdemeanor convictions, and for juvenile offenders. Kan. Stat. Ann. § 22-4902(a)-(c) (2022). Registration obligations last for fifteen years to lifetime depending on the triggering event. Kan. Stat. Ann. § 22-4906 (2022).

In addition to mandating lengthy registration terms, KORA imposes vast registration obligations. A person must register in person within three days of entering any location or jurisdiction in which the individual resides, works, or attends school or intends to do those things. Kan. Stat. Ann. § 22-4905(a) (2022). A person must "report in person four times a year" to the appropriate jurisdictions during the month of the individual's birthday, then the third, sixth, and ninth month following it. Kan. Stat. Ann. § 22-4905(b) (2022). But if an individual is houseless, he must report in person at least every thirty days, and must provide a litany of information regarding past and potential future locations. Kan. Stat. Ann. § 22-4905(f) (2022); Kan. Stat. Ann. § 22-4907(a)(6) (2022). Registration in person is also required within three days of changing residences, employment, schools, names, or any time any other required information becomes stale. Kan. Stat. Ann. § 22-4905(h)-(i) (2022).

At each registration, a person must be photographed and pay $20 in every jurisdiction in which they reside, work, or attend school (unless otherwise exempted). Registrants are required to annually renew their driver's licenses or ID cards;

surrender out-of-state ID; and report in person *and* provide written notice twenty-one days in advance of international travel. Kan. Stat. Ann. § 22-4905(k)-(p) (2022). Registrants must further provide (and continuously update) extensive personal information ranging from occupational details to vehicle descriptions to email and social media accounts. Kan. Stat. Ann. § 22-4907(a)(1)-(21), (b) (2022). The overwhelming majority of a registrant's information is available to the public. Kan. Stat. Ann. § 22-4909 (2022). And there are no exit mechanisms for individuals registering for sexual or violent offenses. Kan. Stat. Ann. § 22-4908 (2022).

While KORA demands meticulous adherence to its provisions by registrants, the State's failure to comply with its obligations under KORA—including its obligation to provide notice to an individual of his or her duty to register—is not a defense to a KORA offense. *State v. Marinelli*, 415 P.3d 405, 419 (Kan. 2018); *State v. Anderson*, 188 P.3d 38, 39 (Kan. App. 2008). Likewise, an individual's substantial compliance with KORA's requirements is not a defense to a KORA offense. *State v. Stoll*, 480 P.3d 158, 164 (Kan. 2021).

Instead, a KORA offense is "the failure by an [individual]" to "comply with *any and all provisions*" of KORA. Kan. Stat. Ann. § 22-4903(a) (2022) (emphasis added). All KORA offenses impose strict liability; *i.e.*, an individual is liable even when a failure to comply with all of the Act's provisions is inadvertent or unknowing. Kan. Stat. Ann. § 21-5203(e) (2022); App. at 15a. Every 30 days of noncompliance constitutes a separate KORA offense, and every 180 days of noncompliance

constitutes an aggravated KORA offense. Kan. Stat. Ann. § 22-4903(a) (2022).

Except for failing to pay the $20 registration fee, all other KORA offenses are felonies. Kan. Stat. Ann. § 22-4903(c)(1)-(2) (2022). By special rule, all KORA offenses carry a presumption of prison, even for those offenders whose combined criminal history and offense scores would normally presume a probation sentence. Kan. Stat. Ann. § 21-6804(m) (2022). Accordingly, one who fails to comply with any of the above-defined requirements faces a prison sentence of 17 to 247 months depending on the length of noncompliance. Kan. Stat. Ann. § 21-6804(a) (2022).

B. Factual Background and Trial Court Proceedings

On August 29, 2017, following a conviction for a violent offense, Danny was ordered to register—in accordance with KORA—in person every May, August, November, and February, and on certain other occasions. App. at 3a, 35a-36a. He properly reported in person in September and October to change his phone number and address. *Id.* But Danny did not appear in person again by November 30, 2017. *Id.*

On December 2, 2017, the State involuntarily committed Danny to a State mental-health facility "in the throes of a psychotic break" caused by his schizoaffective disorder. App. at 6a, 37a, 68a. Danny was experiencing auditory and visual hallucinations, and believed his living fiancée had been raped and murdered by someone from the internet. App. at 5a, 36a-37a, 68a; (R. II, 67.) Following his intake, the burden of registering Danny shifted to the hospital. *See* Kan. Stat. Ann. §

22-4904(c) (2022). Once released, Danny immediately updated his registration as required. App. at 5a, 36a. But because Danny did not appear in person by November 30 and his registration "lapsed" for one day (December 1), the State charged him with violating KORA. *See* Kan. Stat. Ann. § 22-4903(a) (2022).

Before trial, Danny notified the district court of his intent to present a defense of mental disease or defect, explaining that his mental illness was the reason he had failed to comply with his registration obligations by November 30. App. at 3a-7a. But the district court held that KORA offenses impose strict liability; thus, it prevented him from employing a mental-disease-or-defect defense. App. at 4a. The district court also disallowed Danny from referencing his mental health and involuntary commitment at trial over his objections that doing so infringed on his right to present a defense and made KORA an unconstitutional strict-liability offense. App. at 4a-5a. The jury convicted Danny. App. at 6a.

Danny moved to dismiss his conviction, arguing it violated due process. App. at 6a. The district court denied the motion and sentenced Danny to 24 months' felony probation, with an underlying 24-month prison sentence. App. at 7a, 37a.

C. Appellate Proceedings

On appeal, Danny argued that the district court erred by excluding all evidence of his mental state. He also argued that strict-liability KORA offenses violate the Fourteenth Amendment's due-process guarantees by permitting significant felony convictions in the absence of a culpable mental state for inaction

carrying no inherent risk.

The Court of Appeals held that the legislature designated KORA offenses as strict-liability crimes, and therefore the district court did not err in excluding evidence of Danny's mental state. App. at 33a, Syl.¶ 1. It held that while no strict criteria for evaluating the due-process implications of strict-liability offenses existed, it would apply the factors examined by this Court in *Staples v. United States*, 511 U.S. 600, 605 (1994)—whether the statute serves a public welfare purpose, carries a slight penalty, and besmirches the offender's reputation. App. at 54a-55a. The Court of Appeals concluded that KORA offenses protect the public welfare, analogizing KORA offenses to misdemeanor offenses such as Dairy Practices Act violations. App. at 56a. It then concluded that Danny failed to show that the felony KORA conviction harmed his reputation, and that even if the potential penalty was harsh, he received a downward departure at sentencing to probation. App. at 61a-64a. Moreover, the Court of Appeals held that the penalty factor was meant only as a statutory interpretation tool, not a due process limitation. App. at 64a. It further held that KORA crimes did not impact any fundamental rights, and upheld the constitutionality of the offense using rational-basis review. App. at 60a-65a.

Judge Atcheson dissented, explaining that convicting a violent or drug registrant for failing to comply with KORA violates every traditional limitation on strict-liability offenses: the offense imposes severe punishment typically reserved for *malum in se* offenses that require mental culpability; it criminalizes the pure failure

to act, which by itself imposes no risk or harm; and it does not require notice as a prerequisite to criminal liability. App. at 67a-94a.

The Kansas Supreme Court granted review of the issue, affirming the Court of Appeals in a split *per curiam* opinion. App. at 2a-20a. The *per curiam* opinion acknowledged strict liability may implicate due process, but, given the lack of clear standards on when it does so, the Court upheld the offense as rationally related to public welfare. App. at 19a-20a. A three-justice concurrence warned that the *per curiam* opinion narrowly avoided numerous constitutional concerns with Danny's conviction. App. at 20a-23a. Justice Rosen, joined by Justice Standridge, dissented. They opined that KORA offenses are not public-welfare offenses and argued that the *per curium* opinion's treatment of strict-liability offenses violated the deeply rooted presumption of *mens rea*. App. 22a-30a. Finally, the dissent concluded that strict-liability KORA offenses bear no rational relationship to legitimate government interests. App. at 23a-31a.

REASONS FOR GRANTING THE PETITION

I. Kansas' strict-liability criminalization of registration offenses violates the Fourteenth Amendment.

History sheds extensive light on the venerable nature of the general rule, deeply embedded in Anglo-American criminal jurisprudence, that *mens rea* is a required element of every crime. Indeed, to eliminate the essential element of a culpable mental state from a felony offense not only impairs immunities of the

individual but also implicates and violates rights that the Court has deemed core to our Nation's history and tradition and implicit in our concept of ordered liberty.

Despite the foundational rule that wrongdoing must be conscious to be criminal, the Court has upheld the constitutionality of certain exceptions to it. But, as the Court recognized over half a century ago, "the law on the subject is neither settled nor static." *Morissette v. United States*, 342 U.S. 246, 260 (1952). And this remains true today. The Court has repeatedly declined to set forth comprehensive criteria for establishing when a strict-liability offense violates the Fourteenth Amendment.

Nevertheless, the Court's jurisprudence provides guideposts by which to measure the constitutionality of Kansas' registration scheme. And regardless of which measuring stick the Court applies, Kansas' draconian registration-violation scheme, which imposes 17 to 247 months' imprisonment for wholly passive, otherwise innocent conduct while relieving the State of its burden to prove notice or *mens rea* as an element of the offense, cannot pass constitutional muster.

a. That wrongdoing must be conscious to be criminal is a foundational principle of Anglo-American jurisprudence.

The principle that "wrongdoing must be conscious to be criminal" is one that "took deep and early root in American soil." *Morissette*, 342 U.S. at 251-52 n.9. As recognized by the Court, "[t]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *Staples*, 511

at 605 (quoting *United States v. Gypsum Co.,* 438 U.S. 422, 436-37 (1978)).

The principle itself has ancient roots that can be traced back to at least the early 400s, when St. Augustine famously preached, "[t]he only thing that makes a guilty tongue is a guilty mind." Eric Luna, *Mezzanine Law: The Case of a Mens Rea Presumption*, 53 ARIZ. S.L.J. 565, 577-85 (2021) (citing Albert Levitt, *The Origin of the Doctrine of Mens Rea*, 17 ILL. L. REV. 117 (1922); Paul H. Robinson*, A Brief History of Distinctions in Criminal Culpability*, 31 HASTINGS L.J. 815, 825-37 (1980); Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 982-89 (1932)); *see also* Stephen P. Garvey, *Authority, Ignorance, and the Guilty Mind*, 67 S.M.U. L. REV. 545, 545 n. 1 (2014) (quoting Saint Augustine, Sermon 180, *in* 5 The Works of Saint Augustine: A Translation for the 21st Century, Pt. III- Sermons 314-15 (John E. Rotelle ed., Edmund Hill trans., 1992)).

By the eleventh and twelfth centuries, "differences between mental states [could] be seen in the laws of medieval England." Luna, 53 ARIZ. S.L.J. at 577-85; Sayre, 45 HARV. L. REV. at 981; A.E. Funk, Jr., *Note*, *Mens Rea in the Early Law of Homicide*, 33 KEN. L.J. 312-15 (1945); Sayre, 45 HARV. L. REV. at 978 (noting "*mens rea*" was first used as a phrase in *Leges Henrici*, a legal compilation assembled during the reign of Henry II, in 1118). And, by the eighteenth century, English common law, as memorialized by Blackstone, required a "vicious will" to "constitute *any* crime." *Morissette*, 342 U.S. at 251-52, n.9 (emphasis added) (noting Holmes's "pithy observation" from The Common Law that, "[e]ven a dog distinguishes between being

stumbled over and being kicked."); *see also Staples*, 511 U.S. at 605 (recognizing that "some *mens rea* for a crime" is a "firmly embedded" "background rule[] of the common law"); *United States v. Balint*, 258 U.S. 250, 251-52 (1922) ("[T]he general rule at common law was that the scienter was a necessary element in the indictment and proof of every crime."). Given its history, the Court has recognized that the principle that a criminal act must be accompanied by a mental element "is no provincial or transient notion[,]" but is as "universal and persistent in mature systems of [criminal] law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Morissette*, 342 U.S. at 250.

In fact, the State's burden to prove *mens rea* was so ubiquitous in early America that even when statutes failed to mention a mental state, courts found one implied by the common law. *Id.* at 252. Due to the fundamental nature of the *mens rea* requirement, reading scienter into offenses silent as to mental state remains the rule today. In short, the requirement that a crime contain a *mens rea* is "the rule of . . . Anglo American criminal-jurisprudence." *Staples*, 511 U.S. at 605.

Thus, while strict liability is not unknown in criminal law, its use is limited and such laws "generally are disfavored," *id.* at 605-06 (citing *Liparota v. United States*, 471 U.S. 419, 426 (1985)), as they implicate due process. *Lambert v. California*, 355 U.S. 225, 228 (1957) (noting Due Process Clause limits legislature's ability to enact crimes); *Morissette*, 342 U.S. at 260.

The Court has also acknowledged that convictions in the absence of *mens rea*

impact foundational pillars of criminal law beyond the due process presumption of scienter. In *Morissette*, the Court described the government's request to read an offense as imposing strict liability as asking the Court to "radically change the weights and balances of the scales of justice." 342 U.S. at 263. The Court noted that the "purpose and obvious effect" of strict-liability offenses is "to ease the prosecution's path to conviction, to strip the defendant of such benefit as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries." *Id.* And although in *Morissette* the Court declined to establish specific criteria for evaluating the constitutionality of strict-liability offenses, it acknowledged that such offenses "manifest[ly] impair[ ] the immunities of the individual." *Id.*

So, while the Court has not explicitly stated it, there can be little doubt that the right to a *mens rea* element in a felony offense is a fundamental right, central to our Nation's history and implicit in our concept of ordered liberty.

b. Relieving the State of its burden to prove *mens rea* as an element implicates numerous fundamental rights.

Regardless of whether the Court deems the right to a *mens rea* element in a felony offense fundamental, eliminating the State's burden to prove it implicates numerous other rights the Court has explicitly declared fundamental.

For instance, the Court has repeatedly recognized the fundamental nature of the rights to a fair trial and to present a complete defense to a jury. *See, e.g., Crane v. Kentucky*, 476 U.S. 683, 687-90 (1986) (holding that defendants have the

"fundamental constitutional right to a fair opportunity to present a defense"); *Duncan v. Louisiana*, 391 U.S. 145, 158 (1968) (declaring the jury trial a "fundamental right").

The Court has likewise emphasized the fundamental nature of one's liberty interest in freedom from punishment unless and until the Government proves guilt beyond a reasonable doubt. *Chapman v. United States*, 500 U.S. 453, 464-65 (1991) ("Every person has a fundamental right to liberty in the sense that the Government may not punish him unless and until it proves his guilt beyond a reasonable doubt at a criminal trial conducted in accordance with the relevant constitutional guarantees.") (citing *Bell v. Wolfish*, 441 U.S. 520, 535, 536, n.16 (1979)).

Each of these rights is implicated and potentially infringed upon in the case of a strict-liability felony conviction. In such circumstances, the legislature has relieved the State of its conventional burden to prove the accused's culpable mental state. Accordingly, evidence that may support a finding that the accused acted (or failed to act) without *mens rea* is rendered irrelevant and inadmissible for that purpose, stripping the accused of the opportunity to present evidence and argue to the jury that his lack of evil intent mitigates or negates his culpability.

Moreover, once convicted and punished, it is axiomatic that the felon loses fundamental liberty interests while serving any term of imprisonment, and that fundamental rights may also be diminished during any term of supervision. *Meachum v. Fano*, 427 U.S. 215, 224 (1976) (acknowledging upon valid conviction, a defendant may be "constitutionally deprived of his liberty to the extent that the State

may confine him and subject him to the [lawful] rules of its prison system"); *Samson v. California*, 547 U.S. 843, 852 (2006) (parolees have "severely diminished expectations of privacy" under the Fourth Amendment); *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987) (recognizing a "special need" exception to the Fourth Amendment for supervision of probationers who "do not enjoy 'the absolute liberty to which every citizen is entitled . . . .'") (quoting *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972)).

And the potential infringement on fundamental rights does not necessarily end upon the conclusion of the term of imprisonment or supervision, given that a felon may indefinitely lose additional fundamental rights that attend the conviction. *See, e.g., McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010) (noting longstanding prohibitions on the possession of firearms by felons); *Richardson v. Ramirez*, 418 U.S. 24, 56 (1974) (upholding California statute disenfranchising convicted felons' right to vote). In sum, felony punishment for an offense with no *mens rea* element also implicates individual liberty.

Removing the State's burden to prove a defendant's culpable mental state as an element of every felony offense therefore implicates and undermines numerous additional fundamental principles of liberty and justice.

c. Despite the spate of fundamental rights implicated, the Court has yet to clarify the standard lower courts must use to judge the constitutionality of strict-liability felonies. But the Court's jurisprudence does set forth flexible criteria and firm outer limits.

Despite the spate of fundamental rights they implicate, strict-liability crimes

are not unconstitutional *per se*. Instead, while their use is disfavored, the Court has made patchwork exceptions—approving of their constitutionality when the offense is a public-welfare offense, or when it originated in the common law. Conversely, the Court has condemned strict-liability offenses that criminalize innocent conduct without warning to the accused, or which impose too severe a penalty to be fairly considered public-welfare crimes.

1. Public-Welfare Offense Exceptions to Scienter.

Not "without expressions of misgivings," the Court has declined to presume scienter when interpreting public welfare offenses. *Morissette*, 342 U.S. at 256. Public welfare offenses (or regulatory offenses) are a class of offenses primarily designed to redress societal dangers following industrialization: *e.g.*, the distribution of potentially tainted food or drink. *See id*. at 253-54. Generally, these offenses were not crimes under common law and do not punish "aggressions or invasions" but are "in the nature of neglect where the law requires care, or inaction where it imposes a duty." *Id*. at 255-56.

Public welfare offenses generally carry only "relatively small" or "minor" penalties. *Rehaif v. United States*, 139 S. Ct. 2191, 2196-97 (2019); *Morissette*, 342 U.S. at 256; *Staples*, 511 U.S. at 617 (noting the founding public welfare cases "almost uniformly involved statutes that provided for only light penalties such as fines or short jail sentences, not imprisonment in the state penitentiary"). The Court has clarified that the nature of the penalties imposed are a "significant consideration" in

determining whether a crime may be categorized as a public-welfare offense. *Staples*, 511 U.S. at 616-17. Accordingly, the Court has read scienter into statutes otherwise silent as to *mens rea* when, despite serving a regulatory purpose, the offense at issue carries too severe a penalty. *See Gypsum,* 438 U.S. at 442 (3 years' imprisonment and a fine of up to $100,000 too harsh to impose for a strict-liability offense, explaining "the severity of these sanctions provides further support for our conclusion that the [Act] should not be construed as creating strict-liability crimes."); *Staples*, 511 U.S. at 616 (construing the otherwise silent statute to include *mens rea* in part because of "its 'harsh' penalty of up to ten years' imprisonment"); *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994) (same).

The Court has also clarified that public welfare offenses must pose "no grave danger to the offender's reputation." *Staples*, 511 U.S. at 617-18. The Court has recognized that a "felon . . . is as bad a word as you can give to man or thing[,]" *Morissette*, 342 U.S. at 260, and further recognized that, in strict adherence to precedent, punishing an offense as a felony is alone incompatible with the public welfare doctrine. *Staples*, 511 U.S. at 617-18 (noting *Balint* as contrary to the general prohibition on felony public-welfare offenses). Indeed, depending upon the jurisdiction, a felon may lose the right to possess a firearm, vote, sit on a jury, serve in public office, or obtain a professional license or student loan assistance. *See, e.g., Shelton v. Sec'y, Dept. of Corrections*, 802 F. Supp. 2d 1289, 1302 (M.D. Fla., 2011), *overruled on other grounds by* 691 F.3d 1348 (11th Cir. 2012).

And while the Court has declined to read scienter into all felony offenses, in the limited circumstances that it has not, the statutes at issue have sought to control the possession or use of inherently dangerous items that place the defendant on notice. In such cases—where the conduct regulated is like the selling of dangerous drugs or the possession of hand grenades—the Court has reasoned that "as long as a defendant knows that he is dealing with a dangerous device of a character that places him in responsible relation to a public danger, he . . . is placed on notice that he must determine at his peril whether his conduct comes within the statute's inhibition." *Staples*, 511 U.S. at 600-01 (citing *Balint*, 258 U.S. at 250; *United States v. Freed*, 401 U.S. 601 (1971)).

The public-welfare doctrine thus implies that an offense may constitute a constitutional exception to the general *mens rea* requirement where the offense is: (1) regulatory; (2) imposes a minor penalty; (3) causes little damage to the accused's reputation; or (4) if it *does* carry a significant penalty or harm the accused's reputation, it regulates something inherently dangerous so as to justify imputing knowledge to the accused.

2. Common-Law Exceptions to Scienter.

The Court has also signaled that strict-liability offenses rooted in common law may constitute another constitutionally permissible exception to the *mens rea* requirement. The Court in *Morissette* acknowledged that while "[c]ommon-law commentators of the Nineteenth Century early pronounced" that "to constitute any

crime there must first be a 'vicious will[,]'" there were nonetheless "few exceptions" that existed under common law, such as rape, "in which the victim's actual age was determinative despite defendant's reasonable belief that the girl had reached age of consent." 342 U.S. at 251, n.8; *see also X-Citement Video,* 513 U.S. at 71 n.2; *United States v. Moreira-Bravo*, 56 F.4th 568, 572 (4th Cir. 2022) (citing *Regina v. Prince,* (1875) 13 Cox C.C. 138 (Eng.); Oliver Wendell Holmes, Jr., *The Common Law* 58-59 (1881)). Thus, a common-law pedigree for a crime that requires no *mens rea* may also withstand constitutional scrutiny because the *mens rea* requirement for the offense was never part of our Nation's history and traditions.

3. Scienter Required to Punish Unwarned, Innocent Conduct.

Conversely, the Court has clarified that the Fourteenth Amendment's Due Process Clause prohibits a state from imposing criminal liability upon an unwarned, unknowing citizen who is otherwise engaged in innocent, passive conduct.

In *Lambert*, the Court considered a municipal code that made it a crime for a felon "to be or remain in Los Angeles for a period of more than five days without registering[.]" 355 U.S. at 226. The Court noted that "[r]egistration laws are common and their range is wide[,]" but noted here that the accused "had no actual knowledge of the requirement[;]" there was no showing of "the probability of such knowledge[;]" a violation of the law was "unaccompanied by any activity whatever[;]"and "circumstances which might move one to inquire as to the necessity of registration [were] completely lacking." *Id*. at 227-29. Thus, "unlike the commission of acts, or the

failure to act under circumstances that should alert the doer to the consequences of his deed," *Lambert*'s conduct of remaining in Los Angeles as a felon without registering was "not per se blameworthy." *Freed*, 401 U.S. at 608 (quoting *Lambert*, 355 U.S. at 228). The Court concluded that to criminalize "wholly passive[,]" "entirely innocent" conduct (*i.e.*, "the mere failure to register") without any proof of "actual knowledge of the duty to register or proof of the probability of such knowledge" deprived the defendant of her liberty without due process. 355 U.S. at 229-30.

In line with the due-process notice requirements recognized in *Lambert*, and intertwined with the deeply embedded principle that "wrongdoing must be conscious to be criminal," the Court has repeatedly presumed, through statutory construction, that absent some indicia otherwise, Congress would not intend to dispense with a *mens rea* element when the regulation covers a broad range of apparently lawful conduct. *Morissette*, 342 U.S. at 246-52, 263; *Liparota*, 471 U.S. at 426; *see also Rehaif*, 139 S. Ct. at 2196 ("The cases in which we have emphasized scienter's importance in separating wrongful from innocent acts are legion.").

In *Liparota*, for example, the Court interpreted a statute making it a crime to knowingly possess or use food stamps in an unauthorized manner. 471 U.S. at 410. The Government asserted that a conviction could be upheld if the accused knowingly possessed or used food stamps, and where the possession or use was in fact unauthorized. *Id.* at 423. The Court rejected that assertion. *Id.* at 425-26. Instead, the Court construed the statute to require knowledge of the prohibited act, finding

such construction "particularly appropriate where, as here, to interpret the statute otherwise would be to criminalize a broad range of apparently innocent conduct" by sweeping in individuals who had no knowledge of the facts that made their conduct blameworthy. *Id.*

In *Staples*, the Court again presumed Congress did not intend to dispense with *mens rea* when doing so would expose "entirely innocent" individuals to "severe penalty" where it could not be assumed that they were aware of the facts that made their conduct illegal. 511 U.S. at 614-15, 619. *Staples* analyzed the National Firearm Act, which made it unlawful for any person to possess a machinegun that was not properly registered with the Federal Government. *Id.* at 602. Because lawful gun ownership by private individuals enjoys a long tradition and is so widespread, the Court found that mere possession of a firearm would not put owners on notice of the potential criminal nature of that conduct. *Id.* at 610-11. This conduct, the Court recognized, was distinguishable from other regulated conduct in which the Court, declining to read a *mens rea* element into the statute, could assume based on the mere possession of an item alone that the defendant knew of the potential criminal liability of his conduct. *Id.* at 608-11 (discussing *Freed*, 401 U.S. 601 (hand grenades); *Balint*, 258 U.S. 250 (narcotics)). Because no such assumption could be made for the possession of a firearm, to dispense with a *mens rea* element in *Staples* "potentially would impose criminal sanctions on a class of persons whose mental state—ignorance of the characteristics of weapons in their possession—makes their actions entirely

innocent." *Id*. at 614.

Lambert thus clarifies that due process prohibits a state from imposing criminal liability upon an unwarned, unknowing citizen who is otherwise engaged in innocent, passive conduct. *Staples* and *Liparota* further emphasize a potential bright line regarding strict-liability offenses: states may not eliminate a *mens rea* requirement when doing so criminalizes a wide range of traditionally lawful conduct.

4. Substantive-Due-Process Protections.

Finally, the numerous fundamental rights implicated by strict-liability-felony-offenses beg protection under the Court's Fourteenth Amendment substantive-due-process framework.[1] The Court engages in a two-part inquiry to determine if a statute violates substantive due process. First, the Court looks to our Nation's history, legal traditions, and practices to assess whether the statute infringes on a

[1] An alternative but similar test, also rooted in the Fourteenth Amendment, may be located in the Privileges and Immunities Clause, which guarantees that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. Const. Amend. XIV. As Justice Thomas has discussed, when the Fourteenth Amendment was ratified, "the terms 'privileges' and 'immunities' had an established meaning as synonyms for 'rights.'" *Timbs v. Indiana*, 139 S. Ct. 682, 692 (2019) (Thomas, J., concurring) (quoting *McDonald*, 561 U.S. at 813. (Thomas, J., concurring) (citing Blackstone who described the "rights and liberties" of Englishmen as "private immunities" and "civil privileges"). Those rights—or privileges and immunities—were the long recognized, "inalienable rights" for which state and Federal Governments existed to preserve. *See McDonald*, 742 U.S. at 813 (J. Thomas, concurring). The inquiry under the Privileges and Immunities Clause, then, is whether requiring the State to prove scienter as an element of a criminal offense that subjects one to severe punishment for passive otherwise innocent inaction is a long-recognized and protected "inalienable right." Though the Court has never decided whether the Privileges and Immunities Clause protects unenumerated rights, the ancient pedigree that wrongdoing must be conscious to be criminal, coupled with the fact that the absence of *mens rea* in a criminal statute implicates numerous other fundamental rights, demonstrate that proof of *mens rea* to convict an individual of a felony offense that carries severe punishment may well have been an inalienable right to the ratifying public. *See supra*, §§1a, 1b; *see also Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2302 (2022) (Thomas, J., concurring).

"fundamental right or liberty" "so deeply rooted in this Nation's history and tradition" such that "neither liberty nor justice would exist if [the right] were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (internal quotations and citations omitted). The Court also requires a "careful description" of the asserted fundamental liberty interest. *Id*. at 721. If the statute infringes on a fundamental liberty interest, it may be upheld only where the state can demonstrate that the statute is narrowly tailored to achieve a compelling interest. *Id*.

The Court has yet to apply a pure substantive-due-process analysis to a strict-liability challenge, potentially because the issue can often be avoided through tools of statutory construction. But not so here. And, importantly, the Court's strict-liability jurisprudence is not antithetical to a straight substantive-due-process test. Indeed, the limited exceptions to the general rule of *mens rea* thus far upheld by the Court would likely survive strict scrutiny (as in the case of limited public-welfare offenses), or else not trigger it at all (as in the case of common law strict-liability crimes).

d. The Kansas Supreme Court's decision upholding Danny's conviction cannot be reconciled with decisions of this Court and the Fourteenth Amendment.

Kansas' crime of failing to comply in "any way" with its draconian registration scheme—a strict-liability felony offense that carries a presumptive sentence of 17 to 247 months' prison and undermines numerous fundamental rights—cannot be reconciled with the Court's jurisprudence. Though the Court's criteria is not comprehensive, it establishes boundaries for permissible strict-liability offenses.

KORA exists outside of those bounds. Regardless of the criteria the Court ultimately adopts for evaluating the constitutionality of strict-liability statutes that cannot be saved by presuming scienter, KORA's strict-liability felonies should be struck as unconstitutional.

1. Failing to comply with KORA cannot be classified as a public-welfare offense.

While a KORA offense may be regulatory—it was not a crime at common law, and the behavior criminalized is "inaction where [the law] imposes a duty[,]" *Morissette*, 342 U.S. at 255—it does not carry a slight penalty. Public welfare offenses are generally regulatory *and* carry only minor penalties that do not include imprisonment in a State penitentiary. *Morissette*, 342 U.S. at 256; *Staples*, 511 U.S. at 616. The Court has previously and repeatedly suggested a punishment of 10 years would be too harsh for a crime intended to be a public-welfare offense. *Id.*; *see also X-Citement Video*, 513 U.S. at 72. KORA offenses far exceed the "light penalties" associated with public-welfare offenses, carrying presumptive sentences of 17 to 247 months (i.e., more than 1 and up to 20 years' imprisonment) in the State penitentiary. Kan. Stat. Ann. § 21-6804(a) (2022); Kan. Stat. Ann. § 22-4903(c)(1)-(2) (2022).

Likewise, a conviction for a KORA offense endangers an offender's reputation given that nearly all KORA offenses are felonies. Kan. Stat. Ann. § 22-4903(c)(1)-(2) (2022); *Morissette*, 342 U.S. at 256. Felons are stigmatized when they are forbidden from, for example, serving on a jury, voting, owning a firearm, serving in public office,

obtaining certain professional licenses, or obtaining federal student loan assistance. *See, e.g.*, *Shelton*, 802 F. Supp. 2d at 1302. Moreover, a KORA offense can be a registrant's first felony. Kan. Stat. Ann. § 22-4902(a)(5),(b)(4)(A)-(E),(5),(7),(9),(e)(H) (2022) (enumerating misdemeanor offenses requiring registration); *see also State v. Escalante*, No. 107,967, 2013 WL 3455790 (Kan. App. 2013) (unpublished opinion) (defendant convicted of first felony for KORA offense after ordered to register for a misdemeanor). Additionally, even for individuals previously convicted of a felony requiring registration, a subsequent felony KORA conviction still may besmirch an individual's reputation, particularly when the two incidents are far apart in time and the KORA offense curtails anew the registrant's civil liberties.

Finally, KORA offenses do not regulate inherently dangerous materials. Though *Balint* and *Freed* both approved of strict-liability felonies—in contrast with common law, which limited the concept of public-welfare offenses to misdemeanors—in both instances, the regulations dealt with the possession or use of inherently dangerous materials that, in and of themselves, placed individuals on notice of the material's potential regulation. *Balint*, 258 U.S. at 252-53 (narcotics); *Freed*, 401 U.S. at 607-09 (grenades). In contrast, the inaction criminalized by a KORA offense is not inherently dangerous. Rather, as the Court has recognized, "the mere failure to register" constitutes "wholly passive[,]" "entirely innocent" conduct. *Lambert*, 355 U.S. at 229. No harm flows from an individual's passive failure to comply with each and every registration requirement. Thus, classifying KORA offenses as strict-

liability felonies cannot be excused under *Freed* and *Balint*.

Accordingly, KORA offenses do not fit within the narrow class of public welfare offenses for which this court has excused the presence of a *mens rea* requirement.

2. Failing to comply with KORA does not warrant a common-law exception from the general rule of *mens rea*.

The crime of failing to register did not exist at common law. Thus, the Kansas Legislature's elimination of *mens rea* from its definition cannot be exempted from constitutional scrutiny on the basis that the offense has a common-law pedigree.

3. Kansas' registration offenses regulate otherwise innocent conduct and do not require the State to prove the accused had notice.

KORA offenses further violate the Constitution in much the same way as the offense at issue in *Lambert* in that they impose criminal liability upon unwarned, unknowing citizens who are engaged in otherwise innocent, passive conduct.

First, there is no notice requirement for criminal liability under KORA: an individual required to register need not have actual notice of the duty to register to be convicted of failing to comply with the registration requirements. App. at 87a. (Atcheson, J., dissenting) (citing *Marinelli*, 415 P.3d at 419, and *Anderson*, 188 P.3d at 39). Specifically, "[n]o provision in KORA creates a consequence for the failure to inform [an individual of their duty to register] at the appropriate time." *Marinelli*, 415 P.3d at 419; *State v. Juarez*, 470 P.3d 1271, 1273-74 (Kan. 2020).

While the Kansas Supreme Court has hinted there may be "prejudice" to the

accused in the event KORA itself was the only notice provided, it has declined to "address the effect of such failure" in the absence of proof of prejudice by the accused. *Marinelli*, 415 P.3d at 419; *Juarez*, 470 P.3d at 1273-74. The Catch-22 is evident. There is no mechanism under Kansas law that permits an accused to put a lack-of-notice defense before the jury given that proof of notice is *not* an element of the crime. *See* Pattern Instructions Kansas, Criminal 63.140 (4th ed.). Here, had the State been required to prove that Danny had actual notice of his obligations—an element that would create a concomitant criminal intent—evidence that Danny was not cognizant at the time of the offense may have negated that element. App. at 83a-84a ("[T]he inevitable byproduct of [*Lambert's*] requirement for actual notice is a form of criminal intent to convict."). But because a KORA offense imposes strict liability, evidence that Danny was not cognizant at the time of his offense is deemed irrelevant and inadmissible under Kansas law. Thus, like the registration scheme at issue in *Lambert*, KORA does not require the State to prove that alleged offenders had adequate notice of their duties before they may be criminalized for their innocent failure to comply with each of those duties.

Second, KORA implicates the same inaction—failure to comply with a registration requirement—at issue in *Lambert*. App. at 16a-17a. Yet, KORA goes even further than the registration requirement at issue in *Lambert*, which encompassed any felon who remained in Los Angeles for more than five days. *Lambert*, 355 U.S. at 226. Under KORA, for example, an individual is liable for

merely existing without re-registering, even if no information has changed.

Third, like the offenses at issue in *Lambert*, *Staples*, and *Liparota*, KORA criminalizes otherwise traditionally innocent conduct: existing without repeatedly registering one's required information with the government. Arguably, this inaction is even *more* innocent then the possession of food stamps or a gun as it requires no *actus reus*. An individual subject to registration is criminalized for doing nothing. Thus, similar to the offenses struck down in *Lambert*, and construed to require *mens rea* in *Staples* and *Liparota*, KORA offenses criminalize individuals for engaging in traditionally innocent conduct without proof of notice.

4. Eliminating *mens rea* from KORA offenses impairs fundamental rights and is not narrowly tailored to serve a compelling interest.

KORA's strict-liability-violation scheme likewise fails under a substantive-due-process analysis. A careful description of the fundamental rights at issue here include the right to be free from felony conviction and severe criminal punishment for passive, otherwise innocent, inaction in the absence of scienter or proof of notice and those rights inexorably infringed upon by the strict-liability prosecution and its corresponding punishment. *See* §1b, *supra*; *Glucksberg*, 521 U.S. at 721.

The fundamental nature of these rights triggers the State's obligation to establish that eliminating *mens rea* from the definition of the felony offense is narrowly tailored to achieve a compelling government interest. *Id*. The State did not argue below that KORA's strict-liability-violation-scheme survives strict scrutiny but

merely that the Legislature had the authority to craft strict-liability crimes. (Br. of Appellee 20.) The State did, however, argue that the purpose of KORA "is to protect the public from designated offenders the Legislature has concluded are likely to reoffend." (Br. of Appellee 20) (citing *State v. Fredrick*, 251 P.3d 48 (2011)).

While this may constitute a compelling government interest, there is insufficient evidence to support a finding that KORA achieves it. Instead, as recognized by the Kansas Sentencing Commission, there is no indication that the registry improves public safety *at all*, let alone as applied to violent offenders given that the "Commission has not discovered any data that would support the contention that the offender registry serves as a deterrent to crime or decreases recidivism."[2] If KORA as a whole does not improve public safety, then it is an untenable assertion that the elimination of *mens rea* from KORA offenses advances public safety.

Moreover, when it expanded KORA to require registration for violent offenders and drug offenders, the Legislature did not consider any data indicating that individuals convicted of violent or drug offenses were more likely to reoffend than individuals convicted of other types of crimes. *See* App. at 67a (noting that "[u]nlike convicted sex offenders—the class originally targeted in KORA—[violent offenders] were added to the statutory scheme without any demonstrably comparable public

[2] Scott Schultz, Exec. Dir. of the Kansas Sentencing Comm'n, Neutral Testimony – SB 407, S. Judiciary Comm. (Feb. 15, 2018), http://kslegislature.org/li_2018/b2017_18/committees/ctte_s_jud_1/documents/testimony/20180215_06.pdf.

welfare purpose[.]"). *See also* App. at 30a (Rosen, J., dissenting) (observing the Legislature "has made no suggestion or connection that [individuals convicted of violent offenses] are likely to reoffend."); *Fredrick*, 251 P.3d at 51 (noting the legislative purpose of KORA is "to protect the public from sex offenders as a class of criminals who are likely to reoffend."). And, as Judge Atcheson explained in his dissent, "the stated legislative purpose and legal justification for KORA" rest on the allegedly high rate at which sex offenders reoffend, which "can't simply be superimposed on violent offenders" to justify their inclusion in KORA, let alone to justify making their failure to register criminal even in the absence of scienter. App. at 80a. Thus, even if a strict-liability KORA offense *might* be justified as applied to certain sex offenders, there is no support that prosecuting violent offenders for strict-liability KORA offenses serves a compelling government interest.

Additionally, making KORA crimes strict-liability felonies is not narrowly tailored. The Legislature could require the State to prove actual notice or a lesser *mens rea*—such as recklessness or negligence—as an element of KORA. These limitations would prevent forgetful offenders from being excused of their obligations while affording protections to a registrant like Danny, whose mental state resulted in a lack of capacity to understand his registration obligations at the critical time. Alternatively, Kansas could punish the failure to comply with KORA as a misdemeanor, and retain the strict-liability character of the offense.

In fact, KORA offenses used to be misdemeanors that required some proof of scienter. App. at 80a; *see also State v. Bailey*, No. 108,551, 2013 WL 3970198 (Kan. App., 2013) (noting that KORA used to require a culpable mental state, as evidenced in *In re C.P.W.*, 213 P.3d 413 (2009), but was amended to specifically dispense with a *mens rea* requirement) (citing L. 2010, ch. 136, sec. 14). There is no evidence that KORA's current structure better protects the public than any previous iteration of KORA. App. at 80a (noting the Legislature did not provide a legal justification when it amended KORA to impose strict-liability felonies as opposed to intent-based misdemeanors).

II. Lower court decisions reveal a schism on when due process protects citizens from strict-liability crimes. The Court's intervention is necessary to end the stalemate and ensure uniform application of constitutional principles.

Lower-court decisions dissecting the intersection of strict-liability and the Fourteenth Amendment fall at all points along a polarized spectrum. Courts at one end of the spectrum recognize that due process provides firm limits on the enactment of strict-liability offenses that carry severe penalties. Courts on the spectrum's opposite end hold that due process principles inform statutory construction but rarely curtail a legislature's authority to adopt otherwise permissible laws, or have found, such as the case here, that strict-liability offenses do not implicate fundamental rights.

In *Holdridge v. United States*, 282 F.2d 302 (8th Cir. 1960), for example, then-Judge Blackmun applied *Morissette* to articulate firm factors necessary for a criminal statute to impose strict liability without violating due process:

> "[The law must: 1] involve what is basically a matter of policy, [2] where the standard imposed is, under the circumstances, reasonable and adherence thereto properly expected of a person, [3] where the penalty is relatively small, [4] where conviction does not gravely besmirch, [5] where the statutory crime is not one taken over from the common law, and [6] where congressional purpose is supporting, the statute can be construed as one not requiring criminal intent." *Holdridge*, 282 F.2d at 310.

And since *Holdridge*, a number of courts have recognized iterations of Blackmun's factors to determine whether a strict liability crime violates due process. *See Tart v. Com. of Mass.*, 949 F.2d 490, 502 (1st Cir. 1991) (applying *Holdridge* to conclude strict-liability offense did not violate due process); *United States v. Foley*, 598 F.2d 1323, 1335 (4th Cir. 1979) (identifying *Lambert* and *Holdridge* as examples of due-process limitations on strict-liability offenses); *United States v. Wulff*, 758 F.2d 1121, 1125 (6th Cir. 1985) (finding *Holdridge* providing "proper guidance for resolution" of due process issue raised by felony offense that does not require proof of scienter); *United States v. Unser*, 165 F.3d 755, 763 (10th Cir. 1999) (applying full *Holdridge* test); *see also Speidel v. State*, 460 P.2d 77, 80 (Alaska 1969) (holding that, outside of public welfare offenses, felony conviction without proving criminal intent violates due process); *State v. Gedrose*, 961 N.W.2d 288, 292-93 (N.D. 2021) (applying *Staples*' factors to determine that omission of *mens rea* from felony crime of issuing bad check was constitutional); *Shelton*, 802 F. Supp. 2d at 1300-06 (finding Florida's strict-

liability drug statute "runs afoul of due process limits" under *Staples*' factors). A Florida court has even held that, under *Staples'* factors, its strict-liability offender-registration scheme violated due process because it did not require proof of the accused's knowledge of his duty to register as an element of the crime. *State v. Giorgetti*, 868 So.2d 512, 519-20 (Fla. 2004).

Similarly, at least one court has recognized that strict-liability offenses violate fundamental rights and must survive strict scrutiny to be upheld. *See State v. Moser*, 884 N.W. 2d 890, 900 (Minn. App. 2016) (finding strict-liability nature of child-solicitation statute infringed upon fundamental rights; striking statute as unconstitutional under strict-scrutiny review).

On the opposite end of the spectrum, courts have held that due process principles merely inform statutory construction, but rarely curtail a legislature's authority to adopt otherwise permissible laws. For instance, the Nebraska Supreme Court has held that "*Morissette* provides no basis for striking down a statute—just for construing it." *State v. Perina*, 804 N.W.2d 164, 170 (Neb. 2011). Similarly, in *United States v. Figueroa*, 165 F.3d 111, 116-17 (2d Cir. 1998), the United States Court of Appeals for the Second Circuit characterized a *mens rea* requirement as a "presumption" and "principle of construction" and the public-welfare doctrine as supplying "interpretative" principles, but not constitutional ones. *See also United States v. Nguyen*, 73 F.3d 887, 890 (9th Cir. 1995) (finding criminal offenses with no *mens rea* disfavored, but only in context of statutory construction).

In the same vein, some courts acknowledge a due process analysis applies to strict-liability offenses but conclude such offenses do not implicate fundamental rights. Like the Kansas Supreme Court in this case, these courts uphold strict-liability offenses over due process challenges so long as the offense is rationally related to a legitimate government interest, or, alternatively, so long as it is not "arbitrary" or "capricious." *See* App. at 19a, 60a; *State v. Martinez*, 52 P.3d 1276, 1280-82 (Utah 2002) (adopting rational-basis test to uphold due-process challenge to strict-liability sex offense on the grounds no protected constitutional rights were implicated by strict-liability crimes); *Commonwealth v. Wilbur W.*, 95 N.E.3d 259, 267-68 (Mass. 2018) (applying rational-basis review to uphold strict-liability juvenile sex crime over due process objection, although it noted that the accused did not argue any fundamental rights were implicated).

A number of courts fall between those two extremes, recognizing due process is implicated by strict-liability crimes, but only insofar as the offense regulates unwarned, otherwise innocent conduct, such as in *Lambert*. *See United States v. Engler*, 806 F.2d 425, 435 (3d Cir. 1986) (overruling district court's application of *Morissette* factors and concluding salient question regarding constitutionality of strict-liability offense was whether the conduct regulated put the doer on notice of regulation by its nature, or whether it regulated innocent conduct); *Stepniewski v. Gagnon*, 732 F.2d 567, 569-71 (7th Cir. 1984) (noting that the district court's use of the *Morissette* factors as constitutional limitations on the legislature's ability to enact

strict-liability offenses was "incorrect" because the Court "discusses the factors as general policy concerns" and not "as principles of constitutional law" but recognizing *Lambert* places some due process limitations on the enactment of criminal offenses); *State v. Blake*, 481 P.3d 521, 528 (Wash. 2021) (finding strict-liability drug-possession statute violated due process because it criminalized potentially unintentional, unknowing possession of substance while imposing "harsh felony consequences"); *Lawrence v. State*, 257 A.2d 588, 609-10 (Md. 2021) (upholding strict-liability prohibition on wearing or transporting a handgun, concluding regulation did not punish entirely innocent or passive conduct); *State v. Brown*, 389 So.2d 48 (La. 1980) (striking down felony drug possession statute because it criminalized wholly innocent and passive nonconduct on a strict-liability basis).

In sum, whether one may be convicted of a felony offense carrying severe punishment for passive, otherwise innocent conduct depends on where the accused "commits" the alleged offense. While Danny's strict-liability KORA conviction was upheld under rational-basis review by Kansas appellate courts, the opposite would have been true had a different court been asked to evaluate his offense. The strength of fundamental rights cannot depend on one's location. But deep and significant divisions on how to determine the constitutionality of a strict-liability offense in the face of a Fourteenth Amendment challenged have percolated in the years since the Court first declined to delineate criteria for evaluating such offenses. The schism has fully developed in the last half-century of lower-court decisions addressing the issue,

and no signs indicate that the split will resolve itself absent the Court's intervention.

III. Danny's case presents an ideal vehicle for the Court to clarify how the Fourteenth Amendment limits strict-liability felonies.

This case presents an excellent vehicle for the Court to provide clear guidance on when the Fourteenth Amendment requires a felony offense to contain a *mens rea* element. The record in this case is straightforward and there are no relevant factual disputes. The parties agree, and the courts at each stage of the litigation found that prior to trial, Danny notified the court of his intention to present a mental-disease-or-defect defense; that Danny's proffered evidence could establish an inference that Danny was not cognizant at the time of the offense; and that the district court denied Danny the opportunity to present that evidence to the jury after finding that a violation of KORA is a strict-liability offense. Danny challenged the constitutionality of Kansas' strict-liability registration scheme under the Due Process Clause of the Fourteenth Amendment at each stage of the litigation. On appeal, the State identified no procedural shortcomings and addressed Danny's argument on the merits, and both courts addressed and rejected his claim under a rational-basis review.

Danny's case is also an ideal vehicle because the rights at issue cannot be salvaged through alternative protective means. For example, the courts cannot protect the rights at issue through rules of statutory construction by reading scienter into the statute; each Kansas court acknowledged that the Kansas legislature expressly dispensed with a *mens rea* element requirement in defining the criminal

offense of failing to comply with its registration scheme. Nor does Kansas law currently preserve an alternative avenue for a defendant charged with a strict-liability offense to raise a defense of mental illness. "[A] 'mental disease or defect' defense is available *only* if it could establish that a defendant 'lacked the culpable mental state required as an element of the crime charged.'" App. at 21a (Wilson, J., concurring) (emphasis in original) (quoting *Kahler v. Kansas*, 140 S.Ct. 1021, 1026 (2020) ("In other words, Kansas does not recognize any additional way that mental illness can produce an acquittal.").[3]

Likewise, Danny's case is an ideal vehicle because it illustrates the gravity of the Court's repeated refusal to answer the Fourteenth Amendment questions left open for decades. KORA permits severe criminal punishment when one, through inaction, fails to comply in full with its Byzantine, purportedly civil regulatory scheme. While lower courts are deeply fractured over when or how strict-liability offenses violate due process, Danny's conviction is difficult to reconcile with the decisions of this Court. The jury convicted Danny of a notorious, felony offense based on passive inaction (and otherwise traditionally innocent conduct) that, because of his mental illness, was beyond his control. Under Kansas law, evidence relating to

[3] While Kansas law does authorize a limited defense of physical incapacity, Kan. Stat. Ann. § 21-5201(a) (2022), it is questionable at best whether such a defense would be available as a defense to strict-liability crimes when physical incapacity arises as a byproduct of mental illness. App. at 21a (Wilson, J., concurring) (emphasis in original) (recognizing that a physical-incapacity defense based on a defendant's mental illness "may not currently create a statutory corridor permitting the consideration of mental health evidence in strict liability crimes."); *see also* App. at 31a (Rosen, J., dissenting) (recognizing that "when a statute eliminates a mental culpability requirement, mental disease or defect is wholly irrelevant to innocence or guilt").

his mental illness and hospitalization, or how his mental illness may have negated notice, was rendered irrelevant to the question of Danny's guilt or innocence and thus inadmissible for the jury to consider. He received severe criminal punishment and indelible collateral consequences attached to his conviction.

While a *mens rea* requirement is deeply embedded in Anglo-American criminal jurisprudence, and while the elimination of scienter unquestionably impairs numerous other rights deemed fundamental, the number of individuals subject to KORA's strict-liability-offense-registration-scheme is alone untenable. Presently, more than 23,700 individuals are actively registered in Kansas; the youngest registrant is 13, the oldest, 97.[4]

Moreover, in the years since *Morissette*, strict-liability offenses have proliferated nationwide. App. at 74a (citing Larkin, Paul J., Jr., *Strict Liability Offenses, Incarceration, and The Cruel and Unusual Punishments Clause*, 37 HARV. J.L. & PUB. POL'Y 1065, 1121 (2014)); *see also* Andrew Ashworth & Lucia Zedner, *Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure, and Sanctions,* 2 CRIM. L. & PHIL. 21, 31-33 (2008) (noting an increase in strict-liability crimes). As Stanford Law School Professor, Lawrence Friedman said, nearly 30 years ago, "[w]holesale extinction may be going on in the

[4] Robert Jacobs, Exec. Off., Kansas Bureau of Investigation, Testimony before the Joint Comm. on Corrs. and Juvenile Justice Oversight, 3-4 (November 29, 2022), http://kslegislature.org/li_2022/b2021_22/committees/ctte_jt_cjjo_1/documents/testimony/20221128_38.pdf

animal kingdom, but it does not seem to be much of a problem among regulatory laws. These now exist in staggering numbers, at all levels. They are as grains of sand on the beach." Lawrence M. Friedman, *Crime and Punishment in American History* 282-83 (1993); *see also* Jennifer A. Richie, Note, *State v. Wingate*: *Fishing the Murky Waters of Louisiana's Strict Liability Crimes*, 57 LA. L. REV. 1415, 1416 (1997) (noting that as of 1997, Louisiana alone had more than seventy strict-liability crimes). Intervention by this Court is necessary to prevent the exceptions to scienter from swallowing the rule.

Given the fractured decisions in lower courts over the constitutional contours of this important and recurring exercise of police power, Danny's case presents an ideal vehicle for the Court's imperative and immediate intervention.

CONCLUSION

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

Respectfully submitted.

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