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 FOR LYNN DENTON, ARIZONA VOICE FOR CRIME VICTIMS, INC., AND UTAH CRIME VICTIMS LEGAL CLINIC AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE*

Lynn Denton is the sister of Karen Kahler, the granddaughter of Dorothy Wight, and the aunt of Emily and Lauren Kahler—all of whom Kraig Kahler murdered in 2009. She has an interest in seeing justice carried out and attaining closure for herself and her family.

Arizona Voice for Crime Victims, Inc. (AVCV) is an Arizona nonprofit corporation that works to promote and protect crime victims' interests throughout the criminal justice process. To achieve these goals, AVCV empowers victims of crime through legal advocacy and social services. AVCV also provides continuing legal education to the judiciary, lawyers, and law enforcement.

A key part of AVCV's mission is giving the judiciary information and policy insights that may be helpful in the difficult task of balancing an accused's constitutional rights with crime victims' rights, while also protecting the wider community's need for deterrence.

Utah Crime Victims Legal Clinic (UCVLC) provides free legal representation to Utah crime victims when their rights are at stake. The Legal Clinic is available to serve victims of all types of crime and has a statewide focus. It provides free legal services to crime victims in criminal district, justice, juvenile

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* Pursuant to Supreme Court Rule 37.6, *amici* represents that this brief was not authored in whole or in part by any party or counsel for any party. No person or party other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. The parties have filed blanket consents to the filing of *amicus curiae* briefs in accord with Supreme Court Rule 37.3.

and appellate courts, and also recruits and trains a roster of pro bono attorneys and law students to provide legal services to victims. UCVLC has a particular interest in this case, because the provisions of Utah law allowing defendants to raise issues concerning mental disease or defect are very similar to those contained in the Kansas statute at issue in this case. Accordingly, the ruling in this case will affect the interests of Utah crime victims, whom UCVLC represents.

STATEMENT

With calculated precision, Kraig Kahler murdered his wife Karen, her grandmother Dorothy Wight, and his own daughters, Emily and Lauren, in Mrs. Wight's home the weekend after Thanksgiving 2009. They did not die painlessly. When the first law enforcement officer arrived on the scene, he found Karen mortally wounded but still alive on the kitchen floor. After hearing a voice crying for help from the second floor, the officer went upstairs to find 16-year-old Lauren writhing in pain. He asked who shot her, and she said her father had. "Don't let me die," Lauren pleaded with the officer. "I don't want to die."

The voices of victims like Lauren, Emily, Karen, and Dorothy may have been silenced. But they must never be forgotten. Victims and their families have a powerful interest in criminals being held accountable for their actions and punished for their crimes. Setting up constitutional roadblocks in the area of law that deals with mental illness would drastically limit "the States' freedom to determine whether, and to what extent, mental illness should excuse criminal behavior." *Foucha* v. *Louisiana*, 504 U.S. 71, 88 (1992)

(O'Connor, J., concurring). The judgment below should be affirmed.

1. In March 2009, Karen Kahler sought an order of protection against her husband Kraig, describing him as "controlling" and "capable of using force." J.A. 34. Karen had filed for divorce from Kraig about two months earlier—explaining to him that she had been "unhappy for many years, feeling he would not listen to her or honor her needs." J.A. 60.

In the protection-order request, Karen recounted that she and Kraig had been at home discussing her decision to file for divorce when he blocked her from leaving the room, cornered her, and grabbed her in a "bear hug," resulting in scrapes and bruises. J.A. 33. The court issued the protection order, and Kraig was arrested later that same day on a misdemeanor assault charge. J.A. 33–34.

2. As the divorce proceedings went forward, Kraig "continued to try and advance tactics * * * to bring Karen back to him[,] to bring her to understanding that she really wanted to be with him." J.A. 42. "If that wasn't going to get her back," the psychologist who testified on Kraig's behalf explained at trial, "then he would humiliate her publicly to bring her back." J.A. 43. "He was offering to sort of psychologically bludgeon her back into the relationship." J.A. 43.

One "intervention" suggested by Kraig and Karen's marriage counselor was for Kraig "to stop pressuring Karen for daily sex or badger her if he didn't get the daily sex." J.A. 60. Kraig denied having sex outside of the marriage until he and Karen separated.

J.A. 68. During their separation, he met other women online. J.A. 68.

3. Kraig continued to deny any responsibility for the demise of the marriage, which he insisted had been "perfect." J.A. 61. Kraig blamed Karen and her extramarital relationship with a woman (Sunny Reese), even though he had approved and initially encouraged the affair—including asking if he could watch his wife and Sunny having sex. J.A. 61. As a psychologist testified at trial, Kraig "might have been titillated by the idea of a bisexual or homosexual interaction as long as it didn't go out of control[,] because control is very important to him in a rigid way." J.A. 42. At one point after the affair "got out of hand," as Kraig put it, he approached an acquaintance about having Sunny killed. J.A. 60, 63.

4. Kraig's "obsess[ion]" with getting Karen back—following her online, tracking her in person, intercepting her emails and text messages—became so all-consuming that he "lost focus in work" and "ended up being fired" from his job as a city controller in September 2009. J.A. 45–46, 61–62. Even though he had been counselled against it, Kraig persisted in trying to get information about Karen and her whereabouts from their daughters. J.A. 46. He hired a private investigator to surveil his wife and her girlfriend. J.A. 70. "He couldn't let go." J.A. 46.

5. After losing his job, Kraig moved in with his parents on their Kansas farm. J.A. 29–32, 114–15. To keep Karen from getting more money in the divorce, he chose to remain unemployed. J.A. 133. He had been setting aside cash for months—including his last

paycheck, which he took in cash—to prevent Karen from getting any of it. J.A. 73.

Kraig and Karen's only son, 10-year-old Sean—whom Kraig openly preferred to their daughters—spent Thanksgiving with Kraig at the farm. J.A. 45, 135, 214. Karen was scheduled to pick Sean up that Saturday and bring him to her 89-year-old grandmother Dorothy's home about an hour away. J.A. 135, 214. That morning, Sean—who had been enjoying spending time at the farm with his father—called Karen to ask if he could stay longer. J.A. 135, 214. Karen said no, and while Kraig was out running errands, Kraig's mother took Sean to Topeka, where they met up with Karen. J.A. 135, 214.

6. That evening, Sean and Karen were standing at the kitchen sink in her grandmother's home, cleaning some old coins they had found. J.A. 215; Wayne White, *Son Testifies Against Father*, Osage Cty. Herald-Chron. (Dec. 23, 2010), http://www.och-c.com/topstories/2010/1223/122310kahler.html. As Sean later testified, his father "came through the door and shot my mom," and Sean "heard her collapse on the floor from the shot." White, *Son Testifies*. Kraig allowed Sean to escape unharmed. J.A. 215.

Sean ran out the back door, but then circled around to the front of the house—"trying to find a way to get back in" to "get a phone" and call for help. White, *Son Testifies;* J.A. 215. He "started opening the door" but "saw my dad go by again, and then I closed it." White, *Son Testifies*. Sean heard one or two more shots and then ran to a neighbor's house, but no one was home. *Ibid.* He went to another nearby house and frantically "told them to call 911 because there

had been a shooting across the street at Dorothy Wight's house." *Ibid.* When he was calmer, he "told them my dad had shot my mom, sisters and great grandma." *Ibid.*

7. The first law enforcement officer to arrive at the scene was Osage County Sheriff's Deputy Nathan Purling. *Ibid.* Grabbing a rifle and taking a position behind a tree in the front yard, Deputy Purling then went to the front porch and looked in a window. *Ibid.* He saw Sean's great-grandmother, Dorothy, sitting in a chair and covered with blood. J.A. 215; White, *Son Testifies*. Purling later testified that after forcing his way inside, he "stopped and looked at her injuries, and told dispatch we needed as much medical attention as we could get." White, *Son Testifies*.

As Deputy Purling began searching the house to make sure it was safe, he found Karen still alive in the kitchen and noticed empty .223 caliber shell casings on the floor. *Ibid.*; J.A. 228. Drawn upstairs by Lauren's calls for help, he found her suffering from gunshot wounds and "comforted her as best as I could," he testified. J.A. 215; White, *Son Testifies*. Deputy Purling went back downstairs to the living room, where he found Emily dead on the living room floor. J.A. 215; White, *Son Testifies*.

As Dorothy was transported by medical personnel to the hospital emergency room, she told the paramedics that Kraig "came in and just started shooting." White, *Son Testifies*; J.A. 215.

Karen and Lauren died from their wounds later that evening. Dorothy survived a few days but ultimately succumbed to her wounds. J.A. 215; White, *Son Testifies*.

8. After an all-night search of the area, law enforcement officers found Kraig walking in a ditch about half a mile from his car, carrying a hunting knife and a .38 special. J.A. 52, 72, 215; White, *Son Testifies*. "I'm the guy you're looking for," Kraig told the first officer who approached him. J.A. 52; White, *Son Testifies*. A magazine for a .223 caliber rifle was found in the ditch, and a carrying case for the rifle was found in Kraig's car. J.A. 228–29; White, *Son Testifies*. Kraig later bragged that he could have "taken out at least a handful" of sheriff's deputies, and they were "lucky I decided not to go against them." J.A. 73.

9. Kraig denies remembering anything that happened between leaving his parents' home to run errands and his arrest. J.A. 72–73, 173. Yet Kraig's own expert, Dr. Peterson, wrote in his notes:

> Often, [Kraig] wanted to know "how I would like him to answer" mitigation questions so he could tailor answers to what I need or want he thinks strategic. He presented the defense process not as truth seeking process but almost pure manipulation of the court system to his ends.

J.A. 80–81, 117.

Consistent with his notes, Dr. Peterson testified that Kraig's decision to commit the ultimate act of domestic violence—murdering his ex-wife, his two daughters, and their great-grandmother—"looks like an isolated event." ROA Vol. 38, 56.[1] "There isn't anything else from the psychiatric assessment including

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[1] As the *Washington Post* recently reported, "36 percent of the 280 men implicated in a domestic killing" in five major U.S. cities

the psychological test that indicated he has ongoing antisocial or violent tendencies." ROA Vol. 38, 56.

10. After a two-week trial, a jury convicted Kraig of capital murder and aggravated burglary. J.A. 211. During the penalty phase, no limitation was placed on the mitigating circumstances and evidence he could present to the jury—and every mitigating circumstance Kraig believed existed was placed in the jury instructions. J.A. 150–52, 194–96.

Before Kraig was sentenced to death, Karen's sister, *amicus* Lynn Denton, gave a victim impact statement. "There are no words of how deeply I hurt because of these tremendous losses," she said. Steve Fry, *Sarcastic Kahler Draws Death Penalty*, Topeka Capital–J. (Oct. 11, 2011), https://www.cjonline.com/article/20111011/news/310119788. "I loved Grandma Wight, Karen, Emily, and Lauren very much and will miss them until the end of my days." *Ibid*.

While Lynn spoke, Kraig muttered sarcastic remarks under his breath. *Ibid*. As she described one of the last times she spent with her niece Lauren—a trip to the River Walk in downtown Wichita—Kraig

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"had a previous restraining order against them or had been convicted of domestic abuse or a violent crime." Katie Zezima et al., *Domestic Slayings: Brutal and Foreseeable*, Wash. Post (Dec. 9, 2018) ("A Washington Post analysis of 4,484 killings of women in 47 major U.S. cities during the past decade found that nearly half of the women who were killed—46 percent—died at the hands of an intimate partner."), https://www.washingtonpost.com/graphics/2018/investigations/domestic-violence-murders. And "more than one-third of all men who killed a current or former intimate partner were publicly known to be a potential threat to their loved one ahead of the attack." *Ibid.*

muttered "and with Sunny, too," referring to Karen's girlfriend. *Ibid.*

Karen's mother, Patricia Hetrick, was too distraught to deliver her victim impact statement in person, so it was read into the record. "I lost three generations of loved ones in one fell swoop, and to this day, I still replay that frightening night over and over in my mind just like watching an old movie reel," she wrote. *Ibid.* She described having to clean up the house after the murders, recounting that her childhood home now held only "hell and horror for me." *Ibid*.

As Kraig walked out of the courtroom after being sentenced to death, he told his parents to "[t]ake care of Sean so he's not raised by a bunch of freaks," referring to Karen's sister Lynn and her other relatives. *Ibid*.

ARGUMENT

THE CONSTITUTION AFFORDS LEGISLATURES FLEXIBILITY TO BALANCE COMPETING CONCERNS AND TAKE VICTIMS INTO ACCOUNT.

The question presented asks whether Kansas may "abolish" the insanity "defense." But that is a misnomer. While Kansas (and several other States[2]) have repealed what is commonly called the "insanity defense," a defendant may still present evidence of a mental disease or defect to disprove the prosecution's

[2] See *State* v. *Searcy*, 798 P.2d 914 (Idaho 1990) (upholding Idaho's *mens rea* approach consistent with due process); *State* v. *Korell*, 690 P.2d 992 (Mont. 1984) (same for Montana); *State* v. *Herrera*, 895 P.2d 359 (Utah 1995) (same for Utah).

argument that he possessed the required *mens rea*, or mental state. See Kan. Stat. § 22-3221 (2009) (outlining procedures applicable "[i]n any case in which the defense has offered substantial evidence of a mental disease or defect excluding the mental state required as an element of the offense charged, and the jury returns a verdict of 'not guilty' ").[3]

Kansas, "like a number of other[ ] [States] that recognize an affirmative insanity defense, allow[s] consideration of evidence of mental illness directly on the element of *mens rea* defining the offense." *Clark* v. *Arizona*, 548 U.S. 735, 752 & nn.20, 22 (2006).

The Constitution does not deny States the flexibility to channel mental issues into the *mens rea* requirement of a crime, as Kansas has done. Resp. Br. 18–55. See *Clark*, 548 U.S. at 752 n.20 ("We have never held that the Constitution mandates an insanity defense."). As Justice O'Connor explained in her *Foucha* concurrence, the majority "places no new restriction on the States' freedom to determine whether, and to what extent, mental illness should excuse criminal behavior. The Court does not indicate that States must make the insanity defense available." 504 U.S. at 88–89 (O'Connor., J., concurring). Similarly, Justice Kennedy emphasized that "the States are free to recognize and define the insanity defense as they see fit." *Id*. at 91, 96 (Kennedy, J., joined by Rehnquist, C.J., dissenting) ("Mental illness may bear upon criminal responsibility * * * in *either of two ways*: First, it may preclude the formation of *mens rea* * * *; second, it may

[3] This statute was enacted contemporaneously with Kansas Statute § 22-3220, which Kahler contends "abolish[ed] the insanity defense." Pet. Br. i, 2.

support an affirmative plea of legal insanity") (first emphasis added).

As Justice Black observed over 50 years ago, "even the attempt to define these terms and thus to impose constitutional and doctrinal rigidity seems absurd in an area where our understanding is even today so incomplete." *Powell* v. *Texas*, 392 U.S. 514, 546 (1968) (Black, J., joined by Harlan, J., concurring). That observation is just as true today: "There being such fodder for reasonable debate about what the cognate legal and medical tests should be, due process imposes no single canonical formulation of legal insanity." *Clark*, 548 U.S. at 752–53 (explaining that "the insanity rule, like the conceptualization of criminal offenses, is substantially open to state choice," and that "the legitimacy of such choice is the more obvious when one considers the interplay of legal concepts of mental illness or deficiency required for an insanity defense, with the medical concepts of mental abnormality that influence the expert opinion testimony by psychologists and psychiatrists commonly introduced to support or contest insanity claims").

Flexibility is particularly important so that the interests and concerns of victims can be taken into account. Broadly speaking, victims have an interest in holding perpetrators accountable for their crimes. If a defendant is found not guilty by reason of insanity, subsequent proceedings to determine whether to release him from a treatment facility will take place outside the criminal justice system—reducing transparency and the opportunity for victim involvement (e.g., victim impact statements that can be provided to sentencing judges and parole boards). See generally Paul G. Cassell, *In Defense of Victim Impact Statements*, 6

Ohio St. J. Crim. L. 611, 615 (2009) (noting widespread adoption of victim impact statements in criminal sentencings).

This is not to say that States that have made a different policy choice are wrong. It is simply to say that the Constitution did not require them to make that choice. See *Clark*, 548 U.S. at 752 n.20 ("We have never held that the Constitution mandates an insanity defense."); *Foucha*, 504 U.S. at 88–89 (O'Connor, J., concurring) ("The Court does not indicate that States must make the insanity defense available.").

When the Kansas Legislature was considering the bill that became Kansas Statute § 22-3220, it heard the testimony of two crime victims—JoAn Turnbull, whose 18-year-old son Michael was murdered, and Allen Cox, himself a shooting victim. They spoke about feeling re-victimized each year under Kansas's prior "not guilty by reason of insanity" regime, which provided for a yearly competency hearing to determine whether their perpetrators would be freed.

Michael Turnbull's "murderer was acquitted in a 'ten minute' trial by the insanity defense." J.A. 292. As Representative Wells, the chair of the hearing, explained, "to this day, the mother of that boy *cannot put his death behind her*," because "*[e]very year* she has to testify to keep his killer in a secur[e] institution." J.A. 292–93 (emphases added).

Michael's mother, JoAn Turnbull, testified in support of the bill that became Kansas Statute § 22-3220:

> My son Michael was murdered February 26, 1997 in a Wichita, Kansas Nautilus Fitness Center.

> Gary Cox entered the Nautilus Center reached into his duff[e]l bag pulled out a gun and commenced firing. He fired several shots then he yelled now I am going to put it on automatic. But instead he put his gun back into his bag and ran out the door.
>
> Besides Michael's death, three others were wounded one still required medical treatment. As far as anyone knows Cox knew no-one in the Nautilus Center.

J.A. 304 (capitalization altered).[4]

Michael's killer pleaded not guilty by reason of insanity. J.A. 304. Mrs. Turnbull "was informed by the district attorney that they would accept the defendant[']s] plea * * * before it was ever presented to the judge." J.A. 304. The entire hearing took "about ten minutes"—"[i]t seemed to me that that Gary Cox was treated about the same as someone who had committed a traffic violation." J.A. 305.

Mrs. Turnbull explained to the legislators that the district attorney was not to blame for Cox's seemingly cursory treatment: "Under [then-]current law[,] the doctor's diagnosis carries so much weight that the prosecution had no choice but to send Gary Cox to Larned [State Hospital]." J.A. 305. "The present insanity defense weakens trust in the judicial system," Mrs. Turnbull testified—"[my] impression is that

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[4] The transcript of Mrs. Turnbull's testimony in the Joint Appendix is in uppercase. To enhance readability, the capitalization has been altered to sentence-style capitalization without further notation. See *The Chicago Manual of Style* § 8.158 (17th ed. 2017).

Gary Cox got away with murder; that a psychiatrist not a judge was in control of the process." J.A. 306.

Cox's "ten minute trial" was just the beginning of Mrs. Turnbull's ordeal under Kansas's "not guilty by reason of insanity" regime: "Under [then-]current law, Gary Cox has the right to a hearing every year to be released, which he has exercised," Mrs. Turnbull testified. J.A. 305. And it is a not a judge, but a "psychiatrist [who] is still in control of Gary Cox's future." J.A. 306.

The possibility that the man who murdered her 18-year-old son in cold blood "will be on the street soon" weakened Mrs. Turnbull's "trust in the judicial system." J.A. 306. "Society shouldn't be victimized by laws that don't protect the public," Mrs. Turnbull implored the legislators—"I just hope and pray he will not kill someone else." J.A. 306.[5]

Allen Cox also appeared before the Legislature as a proponent of the bill. While Mr. Cox was driving to work in Wichita, Vincent Crenshaw pulled up next to him and shot him in the face. J.A. 309–10. Mr. Cox was not the only person in Crenshaw's line of fire that March morning. Crenshaw shot William Brown in the back of the head as he stocked a coin-operated newspa-

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[5] In 2014, "[m]ore than 2 1/2 decades after he was found not guilty by reason of insanity in a deadly shooting rampage at a Wichita fitness center," Cox was conditionally released. Hurst Laviana, *Man Deemed Insane in 1987 Fitness Center Shootings May Move from Hospital to Care Home*, Wichita Eagle (Apr. 17, 2014) (Cox previously "was granted a conditional release" in July 2011, "but was returned to [the State Hospital] several months later after suffering from medical problems"), https://www.kansas.com/news/local/crime/article1140491.html.

per box outside a diner. Michael Bates, *Wichita Shooting Victim Dies*, Hutchinson News (Mar. 10, 1990), https://newspaperarchive.com/hutchinson-news-mar-10-1990-p-43. Brown was transported to Wesley Medical Center, where he ultimately succumbed to his injuries. J.A. 311.

Mr. Cox survived, but was grievously injured by Crenshaw:

> As a result of the injuries I received I have had 5 surgeries on my face and numerous trips to the dentist to have dental work done. It is still going to require additional dental work to be done. The day I was shot I was in surgery approximately 7 hours. To this day I still carry a fragment of the bullet in my chin.

J.A. 311. But the physical pain was just the beginning.

Crenshaw was declared not guilty by reason of insanity—and his "entire trial did not last any longer than 5 minutes." J.A. 311. Every year, Crenshaw requested a "competency hearing to see if he is able to be released from Larned [State Hospital]"—and he and his lawyers even tried to prevent victims like Mr. Cox from attending (or participating in) those hearings. Mr. Cox explained:

> At the second competency hearing [Crenshaw] and his attorney attempted to have it as a closed door hearing so the victims and news media could not be in the court room. Even though we are not able to make any comments.
>
> Since then he has even tried to get the competency hearings transferred to Pawnee County

> to make it a little more difficult for the victims and news media to attend the hearing.

J.A. 311–12.

Balancing the burdens borne by crime victims with the needs of mentally ill defendants is a challenging task—and it is precisely why "States' freedom to determine whether, and to what extent, mental illness should excuse criminal behavior" is so important. *Foucha*, 504 U.S. at 88 (O'Connor, J., concurring). See *Clark*, 548 U.S. at 752 (emphasizing "that the insanity rule, like the conceptualization of criminal offenses, is substantially open to state choice" and that "the legitimacy of such choice is the more obvious when one considers * * * [that] medical definitions devised to justify treatment, like legal ones devised to excuse from conventional criminal responsibility, are subject to flux and disagreement").[6]

Constitutionalizing a single approach to mental illness would not only restrict States' ability to adjust their approaches based on scientific and medical progress in understanding mental illness, but also prevent States from responding to the concerns of crime victims as those concerns, too, become better understood over time. See *Powell*, 392 U.S. at 537 (Black, J., joined by Harlan, J., concurring) ("erect[ing] a constitutional barrier * * * would significantly limit the States in their efforts to deal with a widespread and important social problem"). These concerns are especially pressing in the domestic-violence context, where

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[6] See also *Foucha*, 504 U.S. at 96 (Kennedy, J., joined by Rehnquist, C.J., dissenting) ("the States are free to recognize and define the insanity defense as they see fit").

States need the flexibility to assess, punish, and incapacitate defendants who allege their heinous crimes were the result of temporary "insanity" rather than acknowledge their culpability.[7]

As Justice Marshall put it 50 years ago, "[n]othing could be less fruitful than for this Court to be impelled into defining some sort of insanity test in constitutional terms." *Powell*, 392 U.S. at 536 (plurality). "[F]ormulating a constitutional rule would reduce, if not eliminate, that fruitful experimentation, and freeze the developing productive dialogue between law and psychiatry into a rigid constitutional mold." *Id*. at 536–37. See *id*. at 537 (Black, J., joined by Harlan, J., concurring) (it "would also tightly restrict state power to deal with a wide variety of other harmful conduct").

States need this flexibility to develop nuanced responses to difficult challenges—and to strike delicate balances between the concerns of crime victims and the needs of the mentally ill. As *Clark* explains,

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[7] An analysis of 4,500 domestic violence killings revealed that 20 percent of those killed were "corollary victims"—that is, persons other than the intimate partner. Sharon G. Smith et al., *Intimate Partner Homicide and Corollary Victims in 16 States: National Violent Death Reporting System 2003–2009*, 104 Am. J. Pub. Health 461, 463 (2014), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3953789/pdf/AJPH.2013.301582.pdf. Family members—"children, parents, siblings, [and] other family members"—comprised half of all corollary victims. *Id*. at 464. "Nearly half of corollary victims who were family members of the suspect were minors, and more than one third were elementary school aged or younger." *Id.* at 463–64 ("More than one third (38%) of family member homicide victims were aged 11 years or younger, and 48.3% were aged 17 years or younger.").

"[e]ven 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." 548 U.S. at 749–52 & nn.7–22 (emphasizing that the "distillation of the Anglo-American insanity standards into combinations of four building blocks should not be read to signify that no other components contribute to these insanity standards or that there are no material distinctions between jurisdictions testing insanity with the same building blocks").

Indeed, as noted scholar Norval Morris explained, "[u]ntil the nineteenth century, criminal law doctrines of *mens rea* handled the entire problem of the insanity defense." Norval Morris, *The Criminal Responsibility of the Mentally Ill*, 33 Syracuse L. Rev. 477, 500 (1982). Over time, an insanity defense was recognized in various jurisdictions. This Court, of course, need not endorse the *mens rea* approach now taken by Kansas (along with Idaho, Montana, and Utah) to reject the contention that the Constitution forbids it.

In sum, the Constitution does not require the States to adopt a single approach when it comes to mentally ill defendants. See *Clark*, 548 U.S. at 753 ("due process imposes no single canonical formulation of legal insanity"). Shaping the contours of an insanity defense involves competing concerns—including the need to protect crime victims and acknowledge their concerns. The Court should not limit the flexibility of States to adjust and refine their approaches to these difficult and evolving problems.

CONCLUSION

For the foregoing reasons, the judgment of the Kansas Supreme Court should be affirmed.

Respectfully submitted,

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