No. 19-1191

In the Supreme Court of the United States

STATE OF OHIO, PETITIONER

v.

SHAWN FORD.

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

BRIEF FOR THE STATES OF TEXAS, ARIZONA, ARKANSAS, IDAHO, INDIANA, KANSAS, KENTUCKY, LOUISIANA, MISSISSIPPI, MISSOURI, NEBRASKA, OKLAHOMA, SOUTH CAROLINA, AND UTAH AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

Amici curiae are the States of Texas, Arizona, Arkansas, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Nebraska, Oklahoma, South Carolina, and Utah.[1] All of the amici States have carried out capital punishment in the past, and many intend to do so in the future. All have a strong interest in the proper application of the Eighth Amendment's limits on the States' powers to implement criminal sentences.

Almost two decades ago, this Court declared that the Eighth Amendment forbids executing those with intellectual disability. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002). But the Court declined to define the test for intellectual disability. Amici ask the Court to do so now. State legislatures and courts need to know. They should no longer be forced to guess—and then rebuked. *See Moore v. Texas*, 137 S. Ct. 1039 (2017).

SUMMARY OF ARGUMENT

I. The Court announced in *Atkins v. Virginia* that the Eighth Amendment does not permit capital punishment of a criminal with an intellectual disability. 536 U.S. at 321. Having justified that conclusion partly on the consensus of state legislatures, *Atkins* declined to define intellectual disability, but instead purported to leave that definition to the States. *Id.* at 317.

However, with each decision since *Atkins*, it appears that the Court has removed that task from the States and reassigned it to mental-health academics. Those academics' views on intellectual disability have themselves contorted over the years. States can barely keep up. The

[1] On April 17, 2020, *see* S. Ct. R. 37.2(a), counsel of record for all parties received notice of amici's intention to file this brief.

Court should no longer tolerate the apparent outsourcing of this important doctrine of constitutional law.

II. Predictably, state legislatures and courts have found it difficult to implement the Court's instructions. Many legislatures no longer even try to define intellectual disability. Those that do have been vulnerable to invalidation in state and federal court, where the doctrine is no clearer.

The Court should grant review and explain what the Constitution requires in defining intellectual disability. The Court should no longer withhold these "discernible and manageable standards" from the States. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2502 (2019).

ARGUMENT

I. *Atkins* and Its Progeny Purport to Outsource the Eighth Amendment to Academics, Leaving States Confused.

Atkins left the definition of intellectual disability to the States. 536 U.S. at 317, 321. But the Court subsequently changed course and seemingly assigned that definitional task to mental-health academics. The result is a doctrinal area where judges consult not the Constitution or law, but rather an ever-evolving universe of academic casebooks and treatises.

A. *Atkins* declined to define intellectual disability, and *Hall* brought discord, not clarity.

Atkins declared that States may not execute the intellectually disabled. *Id.* at 321; *see also Hall v. Florida*, 572 U.S. 701, 705 (2014) (adopting the synonymous term "intellectual disability"). The Court based that holding in part on a supposed consensus of state legislation that

was "not identical, but generally conform[ed]" to the clinical definition of intellectual disability. 536 U.S. at 317 & n.22. The Court identified two sources of that clinical definition: the manual published by the American Association on Intellectual and Development Disabilities (AAIDD), and the Diagnostic and Statistical Manual of Mental Disorders (DSM) published by the American Psychiatric Association (APA). *Id.* at 308 n.3; *see Hall*, 572 U.S. at 727 n.1 (Alito, J., dissenting) (noting renaming of the American Association on Mental Retardation (AAMR) to the AAIDD). Drawing from those academic sources, *Atkins* observed the three-part, high-level definition of intellectual disability, adopted in some state laws and clinical manuals: (1) "subaverage intellectual functioning," corresponding to intelligence quotient (IQ) test scores under 70; (2) limits in "adaptive functioning," corresponding to limits in life skills; and (3) onset of the foregoing before age 18. 536 U.S. at 308 n.3, 309 n.5.

Taking the Court at its word, States set out to define intellectual disability. But because this Court "provided states with virtually no meaningful guidance on how to define" intellectual disability, the States "adopted widely varying definitions" in response to *Atkins*. David DeMatteo et al., *A National Survey of State Legislation Defining Mental Retardation: Implications for Policy and Practice after* Atkins, 25 Behav. Sci. Law 781, 783, 789 (2007). Indeed, a "large majority of states" that set out to implement *Atkins* via legislation "either failed to mention all three *Atkins* elements" or "failed to operationally define some or all of the elements in a meaningful manner." *Id.* at 789.

Recognizing the confusion *Atkins* wrought, this Court next took up the issue of intellectual disability a decade after *Atkins* in *Hall v. Florida*. *Hall* announced

that States do not have "unfettered discretion" in defining intellectual disability for constitutional purposes. 572 U.S. at 719. Instead, they must "consult the medical community's opinions." *Id.* at 710. Florida's statutory definition failed because it excluded offenders with an IQ score over 70, without accounting for the standard error of measurement (SEM) as a clinical diagnosis would. This meant that even when state law *adopted* the *Atkins* framework, it still might fall short of the constitutional minimum if it failed to consider sufficient clinical parameters. *See id.* at 719.

In dissent, Justice Alito predicted practical problems from defining constitutional law using professional standards, which are unstable, inconsistent, and not designed for legal use. *Id.* at 731-33. (Alito, J., dissenting). As set out below, those predictions came true.

B. The guidance from this Court sets forth a judicial role that is both too narrow and too broad.

Hall set the stage for doctrinal confusion by muddling the roles of judges and scientists.

1. The current doctrine makes the judicial role too narrow by essentially enshrining a mental-health diagnosis as a legal conclusion. After all, post-*Hall*, a psychiatrist's word on the subject of mental disability may, to all intents and purposes, conclusively bind a court.

That makes *Atkins* and *Hall* judicial outliers. *Atkins* stands alone as "the only Supreme Court decision" creating a categorical exemption from capital punishment "based on a specific psychiatric diagnosis." David DeMatteo et al., *Forensic Mental Health Assessments in Death Penalty Cases* 166 (2011). This phenomenon "is analogous to a Court decision that exempts everyone

below age twenty-five from the death penalty because the APA has declared that, given new neuroscientific discoveries, that age is now the threshold for adulthood." Christopher Slobogin, *Scientizing Culpability: The Implications of* Hall v. Florida *and the Possibility of A "Scientific Stare Decisis"*, 23 Wm. & Mary Bill Rts. J. 415, 423 (2014) (footnote omitted).

Worse still, enshrining psychiatric evaluations as constitutional rules empowers special-interest groups and academics by elevating their judgments above those of the States. *See* Leigh D. Hagan & Thomas J. Guilmette, *The Death Penalty and Intellectual Disability: Not So Simple*, 32 Criminal Justice 21, 22 (Fall 2017); Charlie Eastaugh, *Taking Medical Judgment Seriously: Professional Consensus as a Trojan Horse for Constitutional Evolution*, 53 Willamette L. Rev. 403, 422 (2017) (observing a rise in political activism and litigation by health-science interest groups). Nowhere else does a psychiatric manual seem to supersede both this Court's jurisprudence and the original public meaning of the Constitution. Indeed, just six months before *Atkins* was decided, the Court emphasized the necessity of separating psychiatry from constitutional rules: "[T]he science of psychiatry . . . informs but does not control ultimate legal determinations." *Kansas v. Crane*, 534 U.S. 407, 413 (2002) (reversing a state supreme court's overly strict interpretation of Eighth Amendment limits on the State's ability to punish dangerous offenders). The way to fix this *Atkins* misadventure is to re-empower the judiciary to interpret the Constitution for itself.

2. At the same time, *Atkins* and *Hall* make the judicial role too broad by requiring judges to engage in a clinical diagnosis. Death-penalty cases involving *Atkins* claims now require state courts to "deal with definitions

of scientific knowledge, scientific method, scientific validity, and peer review—in short, matters far afield from the expertise of judges." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 599 (1993) (Rehnquist, C.J., concurring). Courts are painfully aware of the mismatch; indeed, they could hardly avoid the manuals' express caution against use by those not trained in mental-health sciences. *E.g.*, *Wright v. State*, 256 So. 3d 766, 776 n.9 (Fla. 2018) (per curiam), *cert. denied sub nom. Wright v. Florida*, 139 S. Ct. 2671 (2019).

As the Court recently acknowledged in *Kahler v. Kansas*, "[d]efining the precise relationship between criminal culpability and mental illness" demands "hard choices among values, in a context replete with uncertainty," choices "that should be open to revision over time, as new medical knowledge emerges and as legal and moral norms evolve." 140 S. Ct. 1021, 1037 (2020); *accord Moore*, 137 S. Ct. at 1058 (Roberts, C.J., dissenting). Those features, the Court concluded, made that "project" (as they make this one) poorly suited to "constitutional law." *Kahler*, 140 S. Ct. at 1037.

C. *Moore v. Texas* exemplifies the confusion this Court's jurisprudence has created.

As Justice Alito predicted, *Hall* produced doctrinal confusion that only grows worse among the States. Nothing better illustrates this confusion than the two rounds of *Moore v. Texas*. *See Ex Parte Moore*, 470 S.W.3d 481, 528 (Tex. Crim. App. 2015), *vacated sub nom. Moore v. Texas*, 137 S. Ct. 1039 (2017) (hereinafter *Moore I*); *Ex parte Moore*, 548 S.W.3d 552, 573 (Tex. Crim. App. 2018), *vacated sub nom. Moore v. Texas*, 139 S. Ct. 666 (2019) (per curiam) (hereinafter *Moore II*).

In *Moore I*, the Texas Court of Criminal Appeals upheld Bobby Moore's death sentence and rejected his claim of intellectual disability. The court relied largely on its previous decision in *Ex parte Briseno*, 135 S.W.3d 1, 6 (Tex. Crim. App. 2004), which in turn had set out "to implement *Atkins*'s mandate" by "adopt[ing] the definition of intellectual disability stated in the ninth edition of the AAMR manual, published in 1992, and the similar definition of intellectual disability contained in section 591.003(13) of the Texas Health and Safety Code." *Moore I*, 470 S.W.3d at 486.

Under the AAMR framework, which *Moore I* applied, a prisoner is intellectually disabled and ineligible for execution if he shows by a preponderance of the evidence that:

> (1) he suffers from significantly sub-average general intellectual functioning, generally shown by an intelligence quotient (IQ) of 70 or less; (2) his significantly sub-average general intellectual functioning is accompanied by related and significant limitations in adaptive functioning; and (3) the onset of the above two characteristics occurred before the age of eighteen."

Id.

Those factors, of course, match the three *Atkins* factors beat for beat. *Atkins*, 536 U.S. at 308 n.3, 309 n.5. So, in keeping with *Atkins*'s promise of latitude to States to define intellectual disability, the Texas Court of Criminal Appeals' *Atkins*-compliant standard, copied from the clinical manual published by the AAMR, should have been affirmed easily.

Yet this Court granted certiorari and reversed. It criticized the Texas Court of Criminal Appeals for three

diagnostic errors relevant here. *Moore I*, 137 S. Ct. at 1053. First, the court "deviated from prevailing clinical standards" from current editions of clinical manuals. *Id.* Second, the court relied too heavily on the offender's adaptive strengths, not deficits, and his conduct in prison, contrary to clinical consensus. *Id.* at 1050. Third, the court improperly found no subaverage intellectual function, despite an SEM range of 69-79, relying on evidence of "other sources of imprecision" in the test administration to "*narrow*" the SEM range. *Id.* at 1049.

The Chief Justice, writing in dissent, observed three ways the Court's decision muddled the Eighth Amendment's requirements. First, the Court had articulated a contentless, immeasurable standard: States retain "some flexibility" and need not "adhere[]" to clinical guides, but States cannot "disregard" or "diminish the force" of clinical consensus—which the Texas court apparently did by "overemphasizing" the offender's adaptive strengths and "stressing" his conduct in prison. *Id.* at 1058-59 (Roberts, C.J., dissenting) (alterations omitted). Second, the Court found clinical consensus where none existed; experts disagree on how to evaluate adaptive strengths and prison conduct. *Id.* at 1059-60; *see also* Hagan & Guilmette, *Not So Simple*, *supra*, at 25-26. Third, the Court had not "insist[ed] on absolute conformity to medical standards"; therefore, courts may consider reliability evidence to evaluate multiple IQ scores. *Moore I*, 137 S. Ct. at 1060-61 & n.1 (Roberts, C.J., dissenting).

The Chief Justice was correct: *Moore I* only added confusion to an already muddled area. Indeed, on remand, the Texas Court of Criminal Appeals tried in good faith to implement *Moore I*'s holding. The court adopted the current manuals. *Moore II*, 548 S.W.3d at 560. The court credited the State's expert, who stated she lacked

adequate evidence of adaptive deficits to support an intellectual disability diagnosis. *Id.* at 562-64. The court evaluated the claimed adaptive deficits by comparing the evidence of deficits and corresponding strengths in each adaptive area. *Id.* at 563-73. The court relied on standardized tests of adaptive function, not just the offender's conduct in prison. *Id.* at 569.

But that was not enough. In *Moore II*, the Court again reversed, finding many of the same errors identified in *Moore I*. The Court again faulted the Texas Court of Criminal Appeals for overemphasizing adaptive strengths and stressing prison conduct. *Moore II*, 139 S. Ct. at 670-71.

Justice Alito, writing in dissent, demonstrated that each error the Court found in the Texas court's analysis could be traced to the Court's own failure to provide clear guidance. *Id.* at 673 (Alito, J., dissenting); *see also id.* at 672 (Roberts, C.J., concurring) (reiterating lack of clear standards).

Texas's experience in *Moore I* and *Moore II* illustrates two considerations. First, the Court's Eighth Amendment jurisprudence is hopelessly muddled. States' highest courts do not—and cannot—understand what exactly they are supposed to analyze. Second, the problem *Atkins* created is getting worse, not better. Two decades after *Atkins* first forbade the execution of the intellectually disabled, state lawmakers and judges remain confused, while this Court at every turn seems to reassign more and more authority to academics and interest groups. There is no basis to continue this untenable regime.

II. The States Desperately Need Clear Guidance.

The Court should grant review in this case because state legislatures and courts have no way to know whether state-law definitions of intellectual disability comply with the Eighth Amendment. Some legislatures do not even try to define intellectual disability because state courts, chastened by the *Moore* experience, are too eager to strike down definitions that *might* be wrong. The undue abundance of caution persists in federal habeas court, where the guesswork multiplies and exacerbates an already severe intrusion on state sovereignty. The Court owes a heightened duty to provide clarity when States feel constrained to interpret their own laws narrowly to avoid conflict with federal law. *Cf. Michigan v. Long*, 463 U.S. 1032, 1044 (1983) (exercising jurisdiction as "the state court 'felt compelled by what it understood to be federal constitutional considerations to construe its own law in the manner it did'") (alteration omitted). Now is the time.

A. State legislatures and courts do not know what to do.

Following *Atkins*, *Hall*, and *Moore*, state legislatures do not know what to make of their role. *See Moore I*, 137 S. Ct. at 1058 (Roberts, C.J., dissenting) (critiquing the absence of discussion of the state legislative consensus that was "essential" in *Atkins* and *Hall*). The patchwork quilt of muddled decisions raises several questions this Court should answer.

1. Some state legislatures have met the challenge head on. For example, in 2015, the North Carolina legislature amended its statute, overtly noting its attempt to comply with *Hall*. *See* H.B. 173, 151st Gen. Assemb., Reg. Sess. (N.C. 2015) (codified at N.C. Gen. Stat. § 15A-

2005). In contrast, the South Dakota legislature entirely sidestepped the definition of intellectual disability in a recent amendment. H.B. 1077, 93d Leg., Reg. Sess. (S.D. 2018) (codified at S.D. Codified Laws § 23A-27A-26). Similarly, the Texas legislature "has not enacted legislation to implement *Atkins*'s mandate," despite the "repeated[]" pleas of the Texas Court of Criminal Appeals. *Moore I*, 470 S.W.3d at 486, 487.

State legislatures have good reason to hesitate. State courts have struck down legislative definitions of intellectual disability for remarkably thin reasons. One example arises from Kentucky, where the state supreme court struck down the Commonwealth's intellectual-disability statute based on the "tone" of U.S. Supreme Court and Ninth Circuit decisions. *Woodall v. Commonwealth*, 563 S.W.3d 1, 6 (Ky. 2018). The court further concluded that the statute was "simply outdated" and "d[id] not go far enough" to accommodate ever-changing "prevailing medical standards," which "should always take precedence in a court's determination." *Id.* at 6-7. This Court, in other words, has put state courts to the task of asking not what the Constitution requires, but what clinical guides say now and might say in the future.

Another example comes from Kansas. In *State v. Thurber*, the Kansas Supreme Court struck down a statutory definition that required a finding that the offender could not understand the criminality of his conduct or conform it to the law. 420 P.3d 389, 450 (Kan. 2018). That court reasoned that since clinicians do not consider a criminal's ability to understand or conform to the law when diagnosing intellectual disability, courts cannot do so either. *Id.*

To be sure, not every state court errs on the side of striking down legislation. The Oklahoma Court of

Criminal Appeals, for example, upheld a statutory definition of intellectual disability that "in no event" includes offenders who have "received an [IQ score] of seventy-six (76) or above." Okla. Stat. tit. 21, § 701.10b(C); *see Fuston v. State*, No. D-2017-773, 2020 WL 1074845, at *7 (Okla. Crim. App., Mar. 5, 2020). The offender had received an IQ score of 81, among other lower scores, and argued that *Moore* required the court to consider the totality of the circumstances. *Fuston*, 2020 WL 1074845, at *7. But the court found no requirement in *Hall* or *Moore* that "a person with an IQ score of 81 . . . whose SEM yields a range of 76 to 86" is entitled to *Atkins* protection. *Id.* That was correct: *Hall* "reached no holding" as to "multiple scores," and *Moore I* provided no basis to "question the approach of States that would not treat a single IQ score as dispositive evidence where the prisoner presented additional higher scores." *Moore I*, 137 S. Ct. at 1060 n.1 (Roberts, C.J., dissenting).

But even state courts that manage to avoid clashing with the legislative branch often find conflict and confusion amongst themselves. For example, a concurring Oklahoma judge warned lower courts to "use great caution" and encouraged them to shift the burden of proof to the State and apply *two* layers of SEM ranges. *Fuston*, 2020 WL 1074845, at *26 n.4 (Lewis, J., concurring).

A similarly wary judge on the Missouri Supreme Court thought the court would have been safer to assess intellectual disability and vacate the sentence, whether or not that issue had been properly raised, considering this Court's "almost unprecedented step of reversing the Texas courts a second time in *Moore II*." *Johnson v. State*, 580 S.W.3d 895, 915 (Mo. 2019) (en banc) (Stith, J., dissenting), *cert. petition pending*, No. 19-7153 (Jan. 3, 2020).

Likewise, a concurring judge of the Florida Supreme Court wrote separately to discourage lower courts from assessing prison conduct at all. *Wright*, 256 So. 3d at 780-81 (Pariente, J., concurring).

2. The above cases confirm that it is time for the Court to answer at least three questions. First, can courts consider adaptive strengths and prison conduct? Conservatively interpreting *Moore*, perhaps not. *See supra* pp. 8-9. The Eighth Circuit apparently takes that approach. *Jackson v. Norris*, No. 5:03-CV-00405 SWW, 2020 WL 1482144, at *5 n.4, *16 (E.D. Ark. Mar. 23, 2020) (applying *Jackson v. Kelley*, 898 F.3d 859, 869 (8th Cir. 2018)); *see also infra* p. 15. The judges of the Florida Supreme Court reached different conclusions. *Wright*, 256 So. 3d at 776 & n.8. So did the judges of the South Carolina Supreme Court. *State v. Blackwell*, 801 S.E.2d 713, 721 & n.11 (S.C. 2017). The Alabama Supreme Court found consideration of adaptive strengths and prison conduct to be proper in resolving conflicting expert testimony. *Ex parte Carroll*, No. 1170575, 2019 WL 1499322, at *10-12 (Ala. Apr. 5, 2019), *cert. petition pending*, No. 19-7456 (Jan. 28, 2020).

Second, can courts ever find that the offender has failed to prove subaverage intellectual functioning if the record contains any IQ score with a range below 70? Florida says yes. *Wright*, 256 So. 3d at 772. Nevada says no. *Bean v. State*, 448 P.3d 575, at *2 (Nev. 2019) (unpublished). Mississippi says it doesn't matter; the only necessary finding is whether the scores fell within the SEM. *Carr v. State*, 283 So. 3d 18, 26 (Miss. 2019), *cert. petition pending*, No. 19-7699 (Feb. 19, 2020).

Third, can a court discredit unreliable test scores based on evidence that the test was not properly taken or administered without impermissibly "*narrow*[*ing*] the

test-specific standard-error range"? *Moore I*, 137 S. Ct. at 1049. Mississippi says yes. *Carr*, 283 So. 3d at 27. Nevada says yes. *Bean*, 448 P.3d at *3. Alabama says probably. *Ex parte Carroll*, 2019 WL 1499322, at *14. Some Texas judges doubt it. *Ex parte Wood*, 568 S.W.3d 678, 685 (Tex. Crim. App. 2018) (Newell, J., concurring), *cert. denied sub nom. Wood v. Texas*, 140 S. Ct. 213 (2019). Pennsylvania says no. *Commonwealth v. Cox*, 204 A.3d 371, 384-88 (Pa. 2019).

This Court should not put off weighing in any longer.

B. Federal habeas review of this Court's unclear doctrine unjustly impinges on state sovereignty.

Already, federal habeas review of state convictions "intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). The intrusion is "unnecessar[y]" when federal habeas courts grant relief based on rules the Court has not clearly announced. *Virginia v. LeBlanc*, 137 S. Ct. 1726, 1729 (2017) (per curiam) (reversing the Fourth Circuit for deducing an Eighth Amendment rule that was "[p]erhaps the logical next step" from what the Court said, but "perhaps not," considering other courts' contrary conclusions).

The Court's unclear standard on intellectual disability has rendered federal habeas review more intrusive and less justified than it otherwise would be. For instance, the Tenth Circuit granted habeas relief based on this Court's "admonitions" and "disfavor[]" of evidence the State had offered to rebut the offender's evidence of adaptive deficits. *Smith v. Sharp*, 935 F.3d 1064, 1086 (10th Cir. 2019).

More disconcerting, the Eighth Circuit holds courts to a standard that introduces statistical inaccuracy, lacks logical coherence, and relaxes the "petitioner's burden of proof." *Jackson*, 2020 WL 1482144, at *5 n.4, *16 (citing *Jackson*, 898 F.3d at 869). The Eighth Circuit instructs courts to apply a five-point SEM to any IQ score, whatever a clinician would apply. *Id.* at *14-16. And, perplexingly, courts must analyze whether an offender's "adaptive functioning deficits . . . indicate that he is *not* intellectually disabled." *Jackson*, 898 F.3d at 869 (emphasis added). This leaves no choice but to grant habeas relief, because, "[a]s one would expect, [a] record of adaptive deficits (*i.e.*, academic and behavioral problems experienced in childhood) provide no indication that [the offender] is *not* intellectually disabled." *Jackson*, 2020 WL 1482144, at *16.

Short of granting habeas relief, federal habeas courts compound the confusion by articulating different standards. For example, States in the Ninth Circuit are "required to adhere closely to the" "prevailing clinical definitions," *Pizzuto v. Yordy*, 947 F.3d 510, 526-27 (9th Cir. 2019) (per curiam), whereas States in the Eleventh Circuit may not "disregard current clinical and medical standards," *Smith v. Comm'r, Ala. Dep't of Corr.*, 924 F.3d 1330, 1338 (11th Cir. 2019); *see also* Clinton M. Barker, *Substantial Guidance Without Substantive Guides: Resolving the Requirements of* Moore v. Texas *and* Hall v. Florida, 70 Vand. L. Rev. 1027, 1048-52 (2017) (observing divergent federal appellate court definitions).

Such a severe intrusion on state sovereignty deserves a better foundation.

* * *

Just last year, in *Rucho*, this Court declined to adopt a proposed rule of constitutional law because it lacked

"legal standards discernible in the Constitution" and thus was not subject to "clear, manageable" judicial administration. 139 S. Ct. at 2500. That is, the Constitution does not require rules that lack "discernible and manageable standards for deciding whether there has been a violation." *Id.* at 2501. Surely, when this Court decided *Atkins* and its progeny, it believed that such "discernible and manageable standards" exist to determine intellectual disability. Now is the time to announce them.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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